



Appeal Decision

Hearing held on 17 October 2023

Site visit made on 17 October 2023

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 January 2024

Appeal Ref: APP/U5360/C/22/3305987

Unit 10 Fairweather Wharf, 10 Timberwharf Road, London N16 6DB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Yeshiva Lepeitim against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The enforcement notice was issued on 26 July 2022.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change in the use of the property from an office on the first floor and storage and distribution on the ground floor (sui generis use) to a Class F1(f) for, or in connection with, public worship or religious instruction.
 - The requirements of the notice are to:
 - 1) Cease the use of the property as a Class F1(f) for, or in connection with, public worship or religious instruction;
 - 2) Remove all fixtures and fittings and equipment facilitating the use of the property as a Class F1(f) for, or in connection with, public worship or religious instruction; and
 - 3) Make good all damage to the property resulting from the removal of the unauthorised works as listed above; and
 - 4) Upon completion of the above steps, remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises.
 - The period for compliance with the requirements is 3 months after this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Formal Decision

1. It is directed that the alleged breach of planning control, as set out in the enforcement notice, is deleted and reworded as follows:

‘Without planning permission, the material change in the use of the property to a Class F1(f) use for, or in connection with, public worship or religious instruction’.

2. It is also directed that the enforcement notice be varied by extending the compliance period from 3 to 6 months from the date of this decision.
3. Subject to this correction and variation the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act, as amended.

Application for costs

4. An application for an award of costs was made by the Council of the London Borough of Hackney against Yeshiva Lepeitim. This application is the subject of a separate decision.

Preliminary matters

5. Towards the end of the Hearing the appellant decided to withdraw the ground (b) appeal which had been discussed in full earlier in the proceedings. However, to illustrate the argument on this legal ground as it relates to the Council's application for an award of costs, I have summarised my reasoning on this matter later in this decision letter.
6. The appellant also decided to withdraw the ground (f) appeal, but this was before the point in this regard had been discussed.
7. At the close of the Hearing, therefore, only the ground (a) and ground (g) appeals remained for consideration.

Matters concerning the Enforcement Notice

8. The wording of the alleged breach of planning control alleged is deleted and reworded as follows:

'Without planning permission, the material change in the use of the property to a Class F1(f) use for, or in connection with, public worship or religious instruction',
9. Given that the ground (f) appeal is not being furthered it follows that the appellant is not disputing the Council's stated requirements in order to comply with the enforcement notice.

Background

10. The Yeshiva, which occupies a redundant warehouse and distribution centre, has occupied the premises since April 2021. The appellant says that it offers a secure location for children who are all home educated. The children, who are home educated, attend the Yeshiva to supplement their home education, known as flexi-schooling.
11. The appellant has said that the premises were vacated by the previous occupiers, S & J Sales in 2017/18 because the access to the unit was seriously confined due to the restricted access to the entry road to the site, and this impeded commercial deliveries.
12. I noted that the area is of mixed character; commercial/industrial and residential, and the immediate roads are quite busy due to vehicular traffic including lorries frequently passing along Timberwharf Road. Beyond the north boundary of the site is Maple Close, a heavily parked, narrow road which serves a series of small residential units, including a four-storey block of flats. Immediately to the south are blocks of recently built flats, Ash and Elder Court. The sole vehicular access to the unit is gained off Timberwharf Road, close to its junction with Maple Close.
13. The site is currently a school although, from my site visit observations, the spacious internal layout is spartan with little conversion works seemingly

undertaken. There is open ground on the east side of the site that is used as a playground for pupils. The school is for 90 boys in the age range of 12 to 13. The playground immediately to the rear of the building measures some 480 sqm.

14. In October 2022 the Council's decision to refuse retrospective planning permission for the site's change of use to a Yeshiva, Class F1(f) was upheld on appeal. The Inspector considered that the main issues related to the effect of the development on employment floorspace within Hackney borough, whether the development makes appropriate provision for its users, with particular regard to outdoor space, daylight, access and safety, and the effect on the living conditions of neighbouring occupiers, with particular regard to outlook and privacy. She found harm on all these three main issues, and also that there were no material considerations which outweighed the said harm.
15. Prior to the Hearing the Council had seen it expedient to issue an enforcement notice against the unauthorised use for which an application for planning permission had been submitted in February 2022. The enforcement notice was served in July 2022 and an appeal was subsequently lodged. However, as the Hearing for the s78 appeal was to be held in September 2022 it did not prove possible to conjoin it with the s174 appeal. Nonetheless, the decision to dismiss the s78 appeal is a significant material consideration in the determination of the current appeal.

The appeal on ground (b)

16. An appeal made on this ground is that the breach or breaches alleged have not occurred as a matter of fact. In other words, the appellants are saying that the planning position is not as the Council alleges in the enforcement notice and the material change of use has not taken place.
17. The onus of proof on such matters of fact is on the appellant, and is on the balance of probabilities.
18. The revised Use Classes Order, which came into force in April 2001, defines a Class F1(f) use as '*for, or in connection with, public worship or religious instruction*'. The enforcement notice mentioned that the material change of use had involved the change from an office on the first floor and storage and distribution on the ground floor. The appellant in his initial grounds of appeal, countered the allegation, saying that the previous use of the building was by S & J Sales for warehousing and distribution purposes, rather than that of an office (although the firm's office had been located on the mezzanine floor within).
19. In an initial discussion during the Hearing both main parties accepted it has been established by the Courts – in particular, *Westminster CC v SSE & Aboro* [1983] JPL 602 – that it is unnecessary for an enforcement notice's allegation to state the previous land use. In the circumstances the appellant also accepted that the allegation's wording did not alter the fact that a material change of use had taken place. As such, in the interests of clarity, and as no injustice would be caused, I shall amend the allegation, accordingly.
20. Although, as mentioned, the appellant, during the Hearing, decided not to continue with the appeal on this ground, the above explains why the appeal would have failed.

The appeal on ground (a) and the deemed planning application (DPA)

Main Issues

21. The previous unsuccessful s78 appeal is clearly a significant material consideration to be taken into account. Although having regard to the previous Inspector's comments it is not necessary that I revisit all aspects of this case especially as, in the main, there has been no material change in circumstances. However, I shall examine whether her findings need to be updated or revised, and, to this end, I have identified the following main issues which require consideration:

- 1) In terms of the loss of employment floorspace whether there is sufficient information available to demonstrate that the premises have been adequately, but unsuccessfully, marketed.
- 2) whether the development would give rise to conditions of noise and disturbance detrimental to the living conditions of neighbouring occupiers; and;
- 3) whether changes made since the previous Inspector's decision amounts to appropriate provision for its users with regard to access and safety.

Reasons

Employment floorspace and marketing

22. The site does not fall within any locally designated 'Priority Industrial Area' or 'Locally Significant Industrial Sites.'
23. The previous Inspector, in her decision letter, found against the appellant's evidence. However, the appellant is of the view that the previous Inspector erred in insisting that a full marketing exercise is required, if at all. When asked at the Hearing why he believed this to be the case the response was that "*strict adherence here is not correct*". Although the response was vague and lacked proper explanation it seems to me from the points made that this is because the previous occupier used the floorspace for storage and ancillary office purposes or, alternatively, is borne out of former local industrial sites having been recently given over to housing.
24. Disagreement exists regarding the adequacy of the marketing evidence, including the timing and extent of marketing efforts, registration with commercial property agenda and the lack of internet marketing and newspaper publication. In the event I have looked again at the issue.
25. The Hackney Local Plan 2033 (HLP) was adopted in 2020. HLP policy LP28, is titled '*Protecting and Promoting Industrial Land and Floorspace in the Borough*', including the retention of such floorspace and I consider that this policy rather than LP27 is more appropriate in this particular instance, although LP27 is mentioned in the appeal papers. Policy LP27 is specifically concerned with protecting and promoting office floorspace (former use class B1) in the borough but robust marketing evidence would similarly be required in any proposal involving the loss of office space.
26. In policy LP28's point A, the wording refers to industrial floorspace as including B1c, B2, B8 and Sui Generis uses of an industrial nature. Point B makes similar reference and point D – the limb which is directly applicable here - says

that the loss of industrial land and floorspace outside of the Priority Industrial Areas and Locally Significant Industrial Sites will be permitted where a series of criteria are all met. In the circumstances I am satisfied that a Class B8 use is covered by policy LP28.

27. The criteria includes the submission of 'robust marketing evidence' to demonstrate that there has been no demand for the existing floorspace for its former commercial use, and the possibility of retaining, reusing or redeveloping it for similar or alternative smaller or flexible units for employment generating use, or other alternative employment generating use has been fully explored.
28. The requirement for the submission of marketing evidence to the Council is reiterated in paragraph 8.15 of the HLP. The appellant has indicated that the Yeshiva employs some 20 staff as against the 15 persons said to have been employed by the previous user.
29. Another criterion indicates that any new employment use should provide a range of higher quality, more flexible floorspace and preferably a higher density employment than that of the previous use. Nonetheless, whilst the number of staff employed is seemingly of a higher density than those employed in the previous storage and distribution use, the Council has made the case that the type of employment is fundamentally different.
30. The marketing information supplied was produced in the form of a letter from Nextgen Real Estate, dated 21 July 2022. The letter says that Nextgen marketed the commercial unit, measuring some 1,116sqm from May 2019. It is indicated that the marketing initiatives involved the preparation of in-house particulars with accompanying photographs, and these being circulated to top London Commercial agents, and a 'To Let' board erected at the site.
31. The letter goes on to say that several companies did register an interest in the premises but decided that the unit was not suitable for reasons such as location, lack of parking and access. Accordingly, the previous Inspector, in paragraph 23 of her decision letter states:

'Despite having met some criteria in Appendix 1 (of the Hackney Local Plan), the marketing information does not meet criteria 1, 3, 4, 6, 7, 8, 10 and 15. While the appellant suggests that the marketing requirements should not be rigidly applied, there are no specific circumstances before me that indicate that the unmet criteria should not be applied in full...'
32. It is not clear when attempts to market the premises stopped, and at the Hearing no update was given. However, the letter is light on detail and there is little from Nextgen to explain and demonstrate that the property has been subject to rigorous marketing to reflect the sizeable floorspace involved.
33. I must therefore agree with the previous Inspector's findings on this issue, that the proposal fails to meet the requirements of Part D of LP policy LP28 for floorspace outside of the designated Priority Industrial Areas and Locally Significant Industrial Sites.
34. The appellant has drawn my attention to previous decisions made which he believes indicates the LB Hackney "has accepted that this total site is no longer suitable for commercial employment land." This is a somewhat sweeping statement and is not substantiated with definite and telling empirical evidence.

35. Nonetheless, he refers to a 2011 planning permission at the nearby Oak Wharf site where the Council approved the change of use of Class B1 floorspace to 15 dwellings. He then cites a Prior Notification case from 2016 where approval was given at the Ravensdale Industrial Estate, Timberwharf Road for the change of use of Class B8 floorspace.
36. The age of the Oak Wharf decision, which would have been subject to past local planning policies, presumably long since updated, pre-dated the original iteration of the National Planning Policy Framework, and it realistically means that this decision has no relevant bearing on the current appeal's DPA. Similarly, the Ravensdale decision is of little relevance given that this type of application is decided by way of the provisions of the appropriate class within Part 3 of the Town and Country Planning (General Permitted Development) (Order) 2015, as amended, rather than by reference to the development plan.
37. In such context the above decisions do not in any way confirm, nor indicate the far flung assertion in paragraph 7.3.5 of the appellant's statement where it is said:
- '...The appellant will submit that having extinguished the commercial floorspace surrounding the appeal site the LPA have acknowledged the potential loss of the appeal site.'*
38. Most apparent are the industrial buildings which lie south of the site and also Hatton House, a commercial building at the front of the site adjacent to the site's main access point off Timberwharf Road.
39. Another case referred to is one within the LB Barnet area where, in 2007, an enforcement notice issued against the change of use of a warehouse to a primary school. The notice was quashed on appeal and a temporary planning permission was granted. Again, though, this decision has no bearing on the current case, not only because of its age, nor that the development would have involved particular planning merits and impacts relating to the individual site, but also that LB Barnet would have had its own development plan and policies therein which would have been long superseded and, moreover, could not be transposed to the current appeal site within Hackney borough, even at the time of the decision, some seventeen years ago.

Noise

40. At the previous Hearing on 15 September 2022 a Noise Impact Assessment dated September 2022, previously not seen by the Council, was presented to the Inspector. However, she refused to accept the late evidence.
41. The Council makes the point that the aim of a noise assessment is to quantify the baseline noise environment at the particular site and, accordingly, it is critical that noise levels are controlled to an acceptable level both internally and externally. The two main parties disagree as to the weight which should be given as there was no internal assessment of noise emitted from the use.
42. The sole outdoor assessment was undertaken in the rear playground with noise recorded from 50 boys and microphones at a fixed point. It was carried out during two lunchtime periods with four sets of recordings taken on 8 September 2022 when the use was not at full capacity. Indeed, the letter says that the maximum number of boys in the playground could be up to 90 in number.

43. The consultant says that the noise levels at nearby properties during playtime is low with an indication that levels at Elder Court, immediately to the south of the playground, is "substantially" below the maximum level for urban areas. However, I am also mindful of the close physical relationship between the buildings; Elder Court, being a three-storey block whose upper floor windows directly look out over the playground, one of which is distanced some 4.5m from the closest window within the appeal building's facing elevation. The playground is accessed from the appeal building's upper floor by means of an external metal staircase.
44. The letter then goes on to say that there is no specific guidance published for the effects of noise from schools to nearby buildings. The letter also says that most people will consider the noise from children playing for short periods as not intrusive. This is not the case here with local residents attending the Hearing and, orally, raising objections to the use due to regular noise and disturbance they indicate is experienced.
45. One occupier said that he had previously complained to the Council's Environmental Health team regarding this but the matter had apparently not been investigated. Complaints from local residents relate to noise breakout from the pupils when in the playground, and monitoring details relating to three separate instances were distributed by local residential occupiers who attended the Hearing.
46. These can be summarised as follows:
- Sunday 5 March 2023 – between 10am and 6pm, loud music using microphones and speakers, loud banging and talking (self-measured @ 70 decibels).
- Tuesday 9 May 2023 – between 2 and 3pm, loud music and singing, with loudspeakers (outdoors). The authorities refer to the guidance of BS 8233 that is primarily intended for noise by industrial premises or roads. This guidance is used in this report but it is not strictly applicable to noise from children in schools.
- Tuesday 9 May 2023 – between 3 and 3.30pm, loud music with speakers, microphones and electric keyboards.
47. To allow both main parties to respond I invited for written comments to be subsequently forwarded to PINS. The appellant takes issue with certain findings and the times stated but does accept that music is played at times accompanied with singing, although stating that such events would start at 2pm, and finish by 4.30pm. This would take place inside the building.
48. In turn, the Council considers that the complaints demonstrate that the use is causing noise disturbance due to amplified sound.
49. LP policy LP2 says that all new development must be appropriate to its location and should be designed to ensure there are no significant adverse impacts on the amenity of occupiers and neighbours. Undue noise and disturbance is obviously discouraged and I am unconvinced as to the appellant's analogy of an open-air swimming pool.
50. Given the circumstances I am not satisfied that the noise assessment exercise undertaken was both sufficiently comprehensive and extensive in order to

make a full assessment as to the regularity of noise breakout and the expected levels of such. In the circumstances whether the appeal building's windows remain shut is only part of the equation.

51. In the absence of such, and the very near proximity of Elder Court's windows, I must conclude that the use is giving rise to noise and disturbance harmful to the living conditions of neighbouring residential occupiers, and is in conflict with the aims and requirements of HLP policy LP2 and London Plan (LP) policy D14.

Transport and access

52. HLP policy LP8 relates to the provision of Social and Community Infrastructure and, with reference to the current use, it requires that such facilities are accessible by walking, cycling or public transport for its end users. This requirement is also reflected in London Plan policy S3.
53. The site has a poor public transport accessibility level (PTAL) rating of 1a and it is understood that, in the main, children will arrive at, and leave, the premises on foot. Accordingly, they will either have to walk along Timberwharf Road or, instead, use the River Lea towpath.
54. In December 2022, after the previous Hearing, a gate was installed in the site's side wall, thereby allowing pedestrian access from Maple Close into the site, close to the building. This is certainly preferable to children using the main access point off Timberwharf Road as walking into the site down to the building runs the risk of conflict with motor vehicles entering and leaving the site. However, it doesn't alter the fact that children will still need to walk along Timberwharf Road which, as mentioned, is heavily trafficked and accommodates heavy vehicles that serve other local industrial/commercial sites and buildings.
55. The towpath is unlit and is frequently used by cyclists and, most likely, e-scooter riders, and this also presents a risk given the proximity of the river.
56. In this context, therefore, although the gate is a welcome installation it still necessitates that before entering or after leaving Maple Close the children have to walk along Timberwharf Road.
57. The previous Inspector concluded that the development did not make appropriate provision for its users, with particular regard to access and safety and, despite the installation of the pedestrian gate, I must agree with her conclusions.
58. Accordingly, I find that the use is contrary to the objectives and requirements of HLP policy LP8 and LP policy S3.

Other considerations

Appellant's representations

59. The appellant is of the opinion that the Consultation draft Stamford Hill Area Action Plan (SHAAP) holds relevance, citing policy SHAAP policy 01 which relates to the wider Ravensdale Industrial Estate. The policy sets down the development objectives and opportunities for the area which, amongst other things, indicates the potential for a variety of commercial and community uses that positively contribute to the area's social infrastructure.

60. However, this goes no further than that of a general aspiration for the Ravensdale Industrial Estate as it does not alter the primacy of the development plan and its policies as the first port of call in determining whether a proposal for development is acceptable in planning terms.
61. The appellant also refers to a Court of Appeal judgement relating to the Tate Modern at Bankside and the viewing gallery from its recent extension towards a block of residential flats. However, I fail to see how this gives pertinent and convincing support to the current appeal and its own individual circumstances and physical arrangements. Indeed, the previous Inspector concluded that the Yeshiva use has a harmful effect on the living conditions of neighbouring occupiers due to matters of outlook and privacy.
62. In this connection it matters not that the appeal building pre-dates the new residential properties in Saw Mill Way. Development involving a material change of use has since taken place and is subject to the relevant local planning policies which I have highlighted.
63. Further, although the appellant considers that the Inspector erred in her findings that the appeal building receives inadequate daylight as the actual degree of natural light entry is compliant with Building Regulations I find this point, in the context of the main issues I have now identified, to be merely peripheral and has no bearing on the fundamental considerations regarding the material change of use.

Public Sector Equality Duty (PSED) and Human Rights

64. The appellant considers that the Council has neglected the above duty under s149 of the Equalities Act, as the enforcement notice states in section 5:

'There are no other material considerations which could justify the granting of planning permission for the development in this form'

65. The appellant's justification here is apparently that the Council omitted to appreciate the changed status of the surrounding properties. From this, and his point that the previous use of the site is not appropriate to a residential area, I can only infer that he is implying that the surrounding area is now residential in character. This is not the case as there are other industrial/commercial units still operating in proximity to the appeal site. Further, in referring to the grounds of appeal, the appellant's assertion is a double-edged sword in that the current use itself has been shown to be potentially harmful to the living conditions of neighbouring occupiers.
66. Besides, the previous Inspector took both the PSED and Human Rights into account in reaching her decision. Whilst it is important to foster good relations between people who share a protected characteristic, as is the case here by way of religion, the PSED does not impose a duty to achieve the outcomes in s149 as this is only one factor that needs to be considered, and must be balanced against other relevant factors.
67. In the above regard I have concluded that the enforcement notice serves a particular and reasonable planning purpose and that my decision to uphold the enforcement notice does not have a disproportionately adverse impact on any protected characteristic.

68. The previous Inspector also remarked that it has not been satisfactorily demonstrated that the development represents the only possible or least harmful option for the children's education. I agree with this comment.
69. In addition, I have also taken account of any implications that may arise from the Human Rights Act 1998, in particular with reference to Articles 1 and 2 of the First Protocol. The Council is expected to regulate the use of land in the wider public interest and I have similarly concluded that the rights and freedoms of both the appellant and the children who attend the Yeshiva would not be unduly infringed upon by way of my decision.

Conclusions on the DPA

70. I have looked again at the adequacy of the marketing exercise undertaken, and have looked afresh at the issue of noise breakout and the extent and completeness of the assessment carried out in September 2022. I have also taken into account the new pedestrian access gate installed from Maple Close and the degree to which this feature has helped the access to and from the site. My findings are though, consistent with those of the previous Inspector in that the use is in clear conflict with local policies, and the development plan as a whole.
71. Further, there are no material considerations which would outweigh the identified harm.
72. The Yeshiva use has continued unabated since April 2021 and has given rise to local complaint due to resultant noise and disturbance. Notwithstanding my conclusions on the marketing aspect, local occupiers and the appellant strongly disagree as to the incidence of noise disturbance arising from the use. It follows, therefore, that the frequency and duration of such disturbance expressed by the objectors at the Hearing is not accepted by the appellant.
73. In view of the uncertainty as to degree of impact on Elder Court residents and my Notwithstanding the fact that the Yeshiva has already been operating for a lengthy period due to my view that the suggested conditions would in the main be ineffectual to guard against the potential for such, I consider that a temporary permission would not be appropriate in the circumstances.
74. I have found degrees of harm on all three main issues. For the reasons given above, and having had regard to all matters raised, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and refuse to grant planning permission on the deemed application.

The appeal on ground (g)

75. The appellant considers that the stipulated time period of three months for the Yeshiva use to cease is unreasonably short in the circumstances.
76. In light of the unsuccessful s78 appeal and the Inspector's comprehensive findings the appellant must have realised that the appeal against the enforcement notice, whilst not of forlorn hope, had little chance of succeeding. The requirement for robust marketing is clearly set out in the wording of HLP policy LP28.
77. That said, I am mindful that a limit of three months would likely mean disruption to the pupils' education. However, the compliance period initially

requested by the appellant - an extension to at least eighteen months – would amount to a temporary planning permission and, as mentioned, such would not be appropriate given the circumstances surrounding the case. At the Hearing the appellant revised this to nine months but, even so, I still consider this to be excessive.

78. In the event, and to keep some continuity, I shall extend the compliance period to six months from the date of this decision. The appeal succeeds to this extent.

Overall Conclusion

79. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with both a correction and a variation and refuse to grant planning permission on the deemed application.

Timothy C King

INSPECTOR