



Appeal Decision

Inquiry held on 12 and 13 December 2006

Site visit made on 13 December 2006

by **Colin A Thompson** Dipl Arch DipTP Reg Arch
RIBA MRTPI IHBC
an Inspector appointed by the Secretary of State for
Communities and Local Government

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Date 19th January 2007

Appeal Ref: APP/N5090/C/05/2004650

Arbiter House, Wilberforce Road, London NW9 6AX

- The appeal is under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act).
- The appeal is by Beis Soroh Schneirer Girls Primary School (the school) against an enforcement notice issued by the Council of the London Borough of Barnet.
- The Council's reference is ENF/W00154AX/05.
- The enforcement notice (the notice) was issued on 12 October 2005.
- The breach of planning control as alleged in the notice is the change of use of an existing warehouse (Class B8) and offices (Class B1) to a primary school.
- The requirements of the notice are to discontinue the use of the property as a primary school.
- The period for compliance with the requirements is 6 months after the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: the appeal is allowed on ground (a) and temporary planning permission is granted.

General Matters

1. A Unilateral Undertaking (UU) under Section 106 of the Act was offered at the inquiry. Two final and signed versions have been received which would come into force on the grant of temporary, and /or permanent, planning permission. These are public documents.
2. Evidence submitted by the appellant, after the enforcement notice was served but before the inquiry, indicated that noise and air quality concerns were no longer an issue. The Council formally withdrew this part of its objection on 2 May 2006.

Ground (b) Appeal

3. This ground is that the alleged breach of planning control has not occurred (as a matter of fact).
4. I could not see the relevance of this ground because a school use has been implemented. As a matter of fact, therefore, the alleged breach has occurred so the substantive appeal under this ground must inevitably fail.
5. But the appellants explained that their point was a small one. Because it was now agreed that the lawful use of the site was *Class B8* of the Town and Country Planning (Use Classes) Order 1987 as amended (UCO): *use for storage or as a distribution centre, with ancillary office use*, not a *Class B8 and Class B1 mixed use*, the notice should be corrected to properly reflect this.

6. I have a duty to get the notice right if I can. The suggested change would not damage the interests of any of the parties; it would simply add clarity by more accurately describing the lawful use, so I will make suitable corrections if I uphold the notice. To this very limited extent the appeal under this ground succeeds.

Ground (a) Appeal

7. This ground is that planning permission ought to be granted.

Policy

8. The development plan includes the 2004 *London Plan* (LP) and the 2006 *Barnet Unitary Development Plan* (UDP). There is a general presumption in favour of the policies of the development plan unless material considerations indicate otherwise.
9. Government policy is also a material planning consideration.

Main Issues

10. Following what I heard and saw at the inquiry there is just one main issue in this case. This is whether the grant of planning permission for the school use on an employment site conforms to the policies of the development plan, and if it does not, whether there are any compelling other material considerations sufficient to allow planning permission to be granted.

My Reasoning

The Pivotal Development Plan Policies

Employment land protection

11. As noted above, the agreed lawful use of Arbiter House is Class B8, with ancillary offices. Because the site is not within any of the borough's primary industrial sites and business parks, listed in Table 10.2, UDP Policy EMP2 – *Employment Land – Protection* applies. Paragraph 10.3.6 of the UDP, states that such sites can provide important services and employment, at a sustainable local level, thereby reducing the need to travel or commute. Where there is a reasonable prospect of productive use, protection will be afforded to such sites against the loss to non-industrial and non-business uses. UDP Policy GEMP4 is the relevant *strategic* companion to EMP2.
12. UDP employment land protection policies cover Class B1, B2 and B8, uses and apply even to slightly less desirable sites that could, or do, provide affordable premises for small firms and growing business sectors. Such land and buildings may only be redeveloped, or re-used for non business purposes, if there is no interest expressed in employment uses after a period of at least 18 months of active marketing. The reason given for protecting this class of development is, what the Council consider to be, a key threat to Barnet's economic base; that is the loss of employment uses because of the high price of land in the borough which tends to favour retail and residential development. It follows, logically, that to have an appropriate effect any active marketing exercise should place the property on the open market, for employment uses, at a realistic price for such uses.

13. The threat of such losses has to set against forecasts indicating a future demand for employment land in Barnet during the period up to 2015. The resulting conflict makes it important that the borough's existing stock of employment land is retained.
14. A school comes under Class D1 of the UCO and covers any use, not including residential use, for the provision of education. Because a school does not fall within Classes B1, B2 or B8 the employment land protection policies set out in UDP Policies EMP2, and GEMP4, bite.
15. Although, from the evidence I have, Arbiter House may have been actively marketed for industrial and business uses, the period of time it was available, about 9 months, is only half that required by the development plan. Of additional concern is uncertainty that the price asked was a reasonable one for business /employment uses. Even setting aside the priority given in the UDP to re-use such sites for a mixture of small businesses and residential units, the present school use, and the way it came about, does not comply with the requirements of the development plan. Because the UDP is a relevant and up-to-date document the normal presumption in favour of its policies should apply and permanent planning permission should be withheld unless material considerations indicate otherwise.
16. In forming this opinion I have considered some of the other matters raised. UDP Policy EMP5 – *Warehousing*, which requires such development to be on suitable major transport routes, has little relevance in this instance. Paragraph 10.3.11 makes it clear that such requirements apply to *new* B8 uses. There was no dispute that the appeal proposals provide 47 full, and part-time, jobs. But not all these jobs are new, some being transferred, along with the school, from the previous site at Finchley Synagogue. In any event UDP Policy EMP2 is about the protection of *industrial land and buildings*, not the defence of jobs, (although the latter is probably an underlying concern of the policy).
17. I have also reflected upon the appellant's argument that the only reason it was not granted permanent planning permission, back in July 2005, was because the Council refused to defer consideration of the then application as requested. The appellant reasoned that because the concerns surrounding the Council's reasons for refusal, at that time, have now been satisfied permanent planning permission should be given. But the reason why UDP employment land protection policies were not a significant issue, when the July 2005 decision was made, was due principally to a senior planning officer misunderstanding the terms of the recently adopted UDP. That a permanent planning permission might well have been forthcoming, on such a misunderstanding, is not a good reason for me to set aside the normal presumption in favour of the policies of the development plan.
18. These matters do not alter my opinion that permanent planning permission should be withheld at this time.

Other Material Considerations

Other development plan policies

19. As with most such documents a range of different, but relevant, policies frequently exist; not all of which pull in the same direction. Examples in this case include UDP Policy GCS1 – *Community Facilities* (where the Council will seek to ensure that an adequate supply of land and buildings is available, amongst other matters, for religious and educational facilities to meet the needs of the residents of the borough) and UDP Policy

CS4 – *Educational Facilities* (where proposals for the development of educational facilities will be permitted in certain circumstances). However, these seem to me to be more generalised planning concerns which are not compelling enough to override the pivotal, land and building specific, prohibitions set out under UDP Policy EMP2. In spite of my giving these other UDP policies less weight they are still important statutory matters which assist in my determination of this appeal under this second limb of the main issue.

Highways concerns

20. Discussion between the appellant's and the Council's specialist highways advisors during, but outside, the inquiry resulted in a further simplification of the local planning authority's objections. A second reason for issuing the notice, concerns about the amount of traffic the school would generate and the resulting increase in on-street parking and congestion which could be harmful to the safe and convenient flow of traffic on the public highway, could be withdrawn in the light of an appropriate, and legally binding, UU.
21. As already noted there are now two completed UUs which would come into force on the grant of temporary, and /or permanent, planning permission. The full permission version requires that within 90 days of permission being granted; the owner must draft a Traffic Survey, School Travel Plan and Activities Management Plan (survey and travel /activity plans). The temporary permission version is similar except that there would be no requirement for a Traffic Survey. In both versions the appropriate documents must be submitted to, and approval by, the Council. Once approved the survey and travel /activity plans have to be implemented (and must remain in force for as long as the site shall be in any school use). All these requirements must be carried out within a set timetable. Under the terms of both UUs the owner would be obliged to make a financial contribution towards the cost of monitoring and the carrying out traffic management measures and waiting restrictions, within 1.5km of the site. To my mind these measures are sufficient to satisfy legitimate highways concerns regarding the school use of Arbiter House depending upon the actual terms of any resulting planning permission.
22. Despite this professional assessment local residents perceive that the school has worsened traffic problems in the surrounding area. However, the site's lawful Class B8 /office uses could include a wide range of business and distribution occupiers with a substantial number of employees. Traffic generation from such uses may be marginally less, in absolute numbers of vehicle movements, than that from a school but, despite what might have happened with the last occupier, the balance of probabilities indicates to me that any new Class B8 /office use is likely to involve large articulated heavy goods vehicles (HGVs) that need to gain access to Arbiter House on a regular basis.
23. I saw, at the accompanied site visit, that there was probably room within the open forecourt to turn such HGVs around so they could enter and leave in forward gear. But if there were other vehicles parked in the forecourt, as there probably would be, such turning movements would be likely to be restricted or prevented, so that HGVs or other large commercial vehicles would probably have to reverse into the site from Herbert Road and Wilberforce Road. To my mind such a manoeuvre, which would be counter to the predominant flows in these roads, would be very disruptive to the safe and convenient flow of traffic on the public highway. In reaching this conclusion I have taken into account Mr Henry's opinion that the appeal site could be redeveloped for smaller Class B8 /office units. Assuming that there is a market for such units it would not be reasonable, or practical, to try to control the type of

vehicles which would serve them using the public highway and such traffic could include HGVs. It follows that there would still be a probability that large vehicles would need to enter the site on a regular basis with the resulting significant damage to highways interests.

24. I have also considered the local residents point about excessive parking generation and the disruption which the school is alleged to have caused in the surrounding streets. But such disruption was probably most severe in the early days of the new use. Existing Traffic Regulation Orders and the voluntary measures already introduced by the school, which would be extended and formalised by the survey and travel /activity plans required by the UUs, seem to me to be working well. These measures include; the use of mini buses by pupils and staff, encouraging car sharing, stipulating morning drop-off points and allocating specific time slots for afternoon pick-ups from the school forecourt.
25. There is the potential to go much further with such preventative measures. The primary objective of the travel plan, as currently drafted, is to restrain private car use for pupil and staff journeys to and from the school by the transfer of a proportion of these journeys to more sustainable means of transport (including walking and use of the public transport network). The UUs are also significant in that they quite severely restrict normal school hours (0800-1800 Monday to Friday) and limit the number of out of normal school hours activities which can take place (to 12 times per calendar year). Bearing these points in mind it seems to me that a properly controlled school use on the appeal site would not have any significantly damaging impact on the safe and convenient use of the public highway. Indeed a net increase in road safety could be the result thereby benefiting the living conditions of nearby residents.

The school and its search for an alternative site

26. The school is an Ultra Orthodox Jewish one which caters for girls aged between 3 and 11. It was founded in 1997 and commenced operating out of premises at Finchley Synagogue. Since starting on the appeal site the school has grown to cater for a total of 215 pupils which I was told is a full complement.
27. Because the Finchley Synagogue premises were not suitable for the appellant's use in the long term the Governors commenced searching for suitable alternative accommodation in earnest during January 2000. This search was given heightened importance in July 2004 when the school's then landlord wrote to say that the Finchley Synagogue premises would no longer be available for its use after 31 August 2005.
28. Mr Zwiebel's evidence set out in detail the school's extensive efforts to find an alternative home. Some eight sites were investigated in detail over a period of 5 years or so but, apart from the acquisition of the appeal site, these efforts were unsuccessful. To my mind this indicates an obvious shortage of such sites in the borough and gives support to the appeal proposals under UDP Policies GCS1 and CS4.

The suitability of Arbiter House for school use

29. The appeal buildings retain their original appearance. Children playing and the sound of young voices laughing or singing replace the noises which were generated by the previous warehouse /business uses. It is relevant, in regard to environmental considerations, that the Council dropped its noise, and air quality, concerns about the school use before the start of the inquiry.

30. I saw that the school presently occupies only part of the buildings; principally the areas of the former offices which are on 2 floors. There remains a not-insubstantial, lofty and single storey, warehouse space only a relatively small part of which is presently utilised; that area which I saw partitioned-off close to the main entrance which I was told was an internal playground, when the weather was very wet, and was used as a gathering place where the children wait to be picked-up in the afternoons. But evidence was given that the warehouse would be converted to include school assembly, and gymnasium, activities should permanent planning permission be granted (presently these activities, along with the consumption of food at lunch time, take place in a multipurpose room on the first floor (labelled Assembly Room on Inquiry Plan A).
31. As such conversions could obviously involve substantial expense it seems to me to be entirely reasonable to defer such works whilst there is uncertainty surrounding the school's long term occupation of the site. In any final configuration of the building, with the relocation of the gymnasium and assembly rooms within the present warehouse (not an unreasonable assumption on the balance of probabilities) the buildings would not seem to me to be overly big or inconvenient for the school. In this regard it is pertinent that the appellant has a fire certificate, building regulations and full Ofsted registration, for the school use of the appeal site.
32. It follows that, taking all this into account, but setting aside the pivotal UDP employment land protection policies, the school use of Arbiter House would appear to me to be an appropriate one.

The impact of planning permission being refused

33. In such an eventuality the school will probably have to close. This is because from the evidence before me there are no alternative sites, within reasonable distance of the local Orthodox Jewish population, in the borough. Putting to one side the obviously damaging impact that the loss of their school would have on the well-being and education of the children, and the resulting conflict with UDP Policies GCS1 and CS4, closure of the school would be most damaging to the interests of this sizeable Barnet minority group.

Temporary planning permission as an alternative to upholding the notice

34. But Mr Henry, in his commendably even handed evidence, told the inquiry that the Council was not looking to close the school. Instead he was concerned with maintaining the proper planning process. He suggested that a temporary planning permission, for 2 years or so, might allow the school to continue to operate whilst the terms of UDP Policy EMP2 were properly implemented. If it were found that after active marketing for industrial /business re-use or redevelopment, for a period of at least 18 months and at a reasonable price, there was no realistic prospect of such re-use in the short, medium and long, term, as an industrial /business site, then alternative uses might legitimately be considered. Despite priority being given in the UDP for re-use as a mixture of small business units with residential development, Mr Henry conceded that a school may well be an appropriate use for the appeal site if the case for it was compelling enough.

Conclusion on the Ground (a) Appeal

35. Granting a permanent planning permission for the school would be contrary to UDP employment land protection policies and would not comply with the development plan.

- This should not be countenanced at the present time. But granting a 2 year or so temporary planning permission would allow the marketing exercise, identified by Mr Henry in his evidence, to take place thereby protecting the pivotal UDP policies I have identified. If after such a marketing exercise there were still no takers for Arbiter House, for industrial /business purposes, it would be appropriate to consider alternative uses.
36. Regarding such possible alternatives, with suitable safeguards I have concluded that the school has the potential to be a good neighbour to the nearby residents. The type of traffic it would attract is likely to consist of smaller vehicles than for a Class B8 user, or indeed a mixed business /residential redevelopment scheme, so that unacceptable damage to the safe and free flow of traffic on the public highway would be unlikely. The school opening times, which would be controlled by a legally binding UU, are shorter than would be reasonable to be required just through the imposition of normal planning conditions thereby reducing the potential for disturbance to residential neighbours.
 37. Should there continue to be a lack of appropriate other sites available for a Jewish Orthodox Primary School in this part of the borough, the appeal use of Arbiter House would give proper weight to UDP Policies GCS1 and CS4. (In regard to the latter policy, I note that the site is easily accessible to a range of public transport alternatives, as well as, walking and cycling (whether or not advantage is taken of these facilities). For the reasons already given the school would not be likely to cause any demonstrable harm to the character of the surrounding area, or the amenities of nearby residents and other users, and can easily be converted to give full disabled persons access through the installation of a lift if, or when, the need arises. The school should therefore get full support from this policy.) Any requirement the appellant has for a single sex school on religious grounds is a matter which should be given full weight when, and /or if, the pivotal UDP policy objections are overcome and another application for permanent planning permission is made.
 38. Bearing all these things in mind Mr Henry's suggestion in regard to the grant of temporary planning permission appears to me to be the most appropriate way forward. This course would reinstitute a plan led development control approach towards any change of use of Arbiter House whilst at the same time giving due weight to the obvious, and compelling, other material considerations.
 39. In forming the opinion that the appeal under this ground should succeed, through the grant of temporary planning permission, I have considered the effect of the reduced requirements set out in the appropriate UU. In particular the payment of £5,000 instead of £20,000 towards the costs of implementing traffic management measures /monitoring as well as the absence of any specific necessity for a Traffic Survey. But the school, which is a registered charity and non-profit making organization, can't afford the full contribution for just a temporary permission and some traffic survey work has already been done as part of the appellant's inquiry evidence. Although the lesser requirements would mean that not all the highways mitigation measures anticipated would be carried out within the first 2 years significant improvements could still be made. When any temporary planning permission ceases either the school use would stop, could be enforced against, or permanent planning permission could be granted. The two former situations would remove the need for mitigation measures and the latter would bring the full UU requirements, associated with permanent planning permission, into play. Despite the Council's objections to the reduced contributions any resulting slowing down of the mitigation measures would not to my mind

have such a severe impact on highways concerns as to require temporary planning permission not to be granted.

40. I have taken into account the possible impact on the Cricklewood, Brent Cross and West Hendon Regeneration area. But I fail to see how the school use of a relatively small amount of existing industrial /business land, developed with modern buildings, on the edge of the regeneration area and close to existing housing, could have any material effect on the success or otherwise of such a large comprehensive regeneration scheme involving the creation of some 5,000 homes and a similar number of jobs. For the reasons already given: the new use would probably have a less damaging impact on the safe and convenient use of the public highway; the appearance of the buildings would not materially change, and; the amenities of existing and new residents would be protected. It follows that the scheme would have no material impact on UDP Policies C1, C2 and C3.
41. I have also reflected upon the opinions expressed that the appellant's action throws into question whether planning controls have any use or value. Local people feel that if the school *gets away* with what is considered to be a *gross violation of planning regulations* then this paves the way for a *development free for all* in West Hendon. But planning law does not make the school's action illegal. It is simply unlawful and exposes the appellant to the enforcement action which is currently being taken against it. An *offence* would not be committed until any enforcement notice takes effect and its requirements are not complied with, which is not the case at the moment. Neither of these matters is sufficient to alter my opinion that temporary planning permission should be granted.
42. The appeal under ground (a) should succeed.

Conditions and Undertakings

43. But any temporary planning permission should be a conditional one. It should be for a maximum period of about 2 years (until the end of December 2008) not 5 years as suggested by the appellant. Such a period would give ample opportunity for the site to be marketed under the terms of UDP Policy EMP2 and allow for further efforts to be made by the appellants to find a suitable alternative site. It would also link any possible discontinuance to normal school term times and /or give the opportunity for an application for a permanent planning permission to be made for the appellant to remain in Arbiter House, after the 18 month marketing /alternative site availability exercises have been completed, if appropriate. Such a temporary period would also allow the impact of the school use, on the safe and convenient use of the public highway and living conditions of residents, to be further monitored whilst not extending the period of uncertainty by too much.
44. The appropriate UU would automatically come into force with the grant of temporary planning permission. This is necessary to ensure that adverse highway problems are kept to a minimum or are eliminated.
45. Conditions are also required to cover vehicle parking and cycle storage (needed to further minimise the impact of the new use on the public highway). Similarly, conditions to secure suitable measures for refuse storage and collection (required to protect the appearance of the area) and the overall hours of operation (needed to safeguard the living conditions of nearby residents) should be imposed. It should be noted that the planning condition on hours of operation should be read in conjunction with the terms of the relevant UU. The planning

condition is a long stop which would prevent out of school hours activities from starting too early or going on too late.

Overall Conclusions

46. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed on ground (a) and temporary planning permission will be granted. The appeal on ground (g) does not fall to be considered and, because the notice will be quashed, no action is required on the partial success noted for the ground (b) appeal.

Formal Decision

47. I allow the appeal, and direct that the enforcement notice be quashed. I grant temporary planning permission on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely the use of the land and buildings at Arbiter House, Wilberforce Road, London NW9 6AX, as shown on the plan attached to the notice, for a school under Class D1 of the UCO, subject to the following conditions:

- 1) the use hereby permitted shall be discontinued and the land restored to its former condition on or before 31 December 2008 in accordance with a scheme of work submitted to and approved in writing by the local planning authority;
- 2) The use shall not take place other than between the hours of:
0800-2200 Mondays-Fridays, and;
0930-2200 Saturdays, Sundays and Bank Holidays;
- 3) works for: the marking-out of vehicle parking and turning spaces; the provision of cycle storage facilities, and; the details of enclosures and screened facilities for the storage of recycling containers, wheeled refuse facilities and /or other refuse storage containers where applicable, together with a satisfactory point of collection; shall be prepared and carried out as specified below:
 - i. within 3 months of the date of this decision appropriate schemes for all the above shall have been submitted for the written approval of the local planning authority and the schemes shall include a timetable for their implementation;
 - ii. within 11 months of the date of this decision the schemes shall have been approved by the local planning authority or, if the local planning authority refuse to approve the schemes or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;
 - iii. if an appeal is made in pursuance of ii. above, that appeal shall have been finally determined and the submitted schemes shall have been approved by the Secretary of State, and;

- iv. the approved schemes shall have been carried out and completed in accordance with the approved timetable.

Colin A Thompson

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr A Dinkin QC	Instructed by Planning and Project Management Services
He called	
Mr B Zwiebel	School Governor witness
Mr A Ormonde	Planning and Project Management Services' witness

FOR THE LOCAL PLANNING AUTHORITY:

Mr E O'Bree
 He called
 Mr J Henry BA(Hons) Planning witness
 DipUrbPlanning

INTERESTED PERSONS:

Mrs J Shepherd	Joint Chair, West Hendon Community Forum, 270 The Broadway, West Hendon, London NW9 6AE
Mrs P Wallace	11 Wilberforce Road, West Hendon, London NW9 6BA
Mr B Perl	33 Brent Street, Hendon, London NW4 2EF
Mr Unsdorfer	Wilberforce House, Station Road, West Hendon, London NW4 4QE
Mr Shah	Wilberforce House, Station Road, West Hendon, London NW4 4QE

DOCUMENTS

Document 1	List of persons present at the inquiry on day 1
Document 2	Letter of notification of the inquiry (as earlier letter of notification)
Document 3	Statement of Common Ground
Document 4	Agreed Statement on Highway Matters
Document 4A	Barnet UDP 2006
Document 4B	Educational Needs Generated by New Housing Developments
Document 5	Draft Unilateral Undertaking
Document 6	Draft School Travel Plan and Management Statement
Document 7	Additional papers put in by the appellants

PLANS

Plan A	Plan of the school
Plan B	Plan of Class B8 /office use
Plan C	Catchment of the school (where the pupils come from)

PHOTOGRAPHS

Photos 1	Site photos put in by the appellants
Photo 2	Aerial photo of the site and its surroundings
Photos 3	Traffic photos put in by Mrs Wallace