



Appeal Decisions

Site visit made on 16 August 2023

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 December 2023

Appeal Refs: APP/M1520/C/22/3292851 & APP/M1520/C/22/3292852 Land at 176 Furtherwick Road, Canvey Island, Essex SS8 7BL

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Rabbi Joseph Paneth and Mrs Hindy Paneth against an enforcement notice issued by Castle Point Borough Council.
 - The enforcement notice was issued on 11 January 2022.
 - The breach of planning control as alleged in the notice is: Without planning permission, a material change of use from residential to a mixed use for residential purposes, theological study and as a place of worship.
 - The requirements of the notice are to:
 - 1) Permanently cease using the building as a place of worship and theological study other than for purposes incidental to the enjoyment of the dwellinghouse. For the avoidance of doubt this includes, but is not limited to, the use being undertaken by occupiers, relatives and friends of the occupiers but does not include members of the public or the wider religious community of which the occupiers are members.
 - The period for compliance with the requirement is one (1) month after this notice takes effect.
 - The lead appeal is proceeding on the ground set out in section 174(2) (a), (b) and (c) of the Town and Country Planning Act 1990 as amended, the other appeal relating only to grounds (b) and (c). 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 enforcement notice be corrected by the deletion of its second sentence under section 5(1). The requirement is therefore limited to the following:

“Permanently cease using the building as a place of worship and theological study other than for purposes incidental to the enjoyment of the dwellinghouse.”

2. Subject to this correction 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.

Preliminary matters

3. At the Hearing, the Council witness, when faced with the appellant’s evidence that persons visiting the appeal dwelling for prayer meetings arrive on foot as it is strictly forbidden on the Sabbath and Jewish Festivals, conceded that the development did not result in private motor vehicles parking along local

streets, and no empirical evidence exists as to resultant undue noise and traffic disturbance.

4. Accordingly, as no evidence was produced indicating otherwise, the second reason for issuing the enforcement notice, which cites this impact as a consequence of the alleged mixed use, falls away.
5. In the circumstances I agree with the Council's approach.
6. The emerging Castle Point replacement Local Plan, although recommended for adoption by the examining Inspector, was withdrawn by the Council in June 2022. Accordingly, policies therefrom referred to in the enforcement notice are no longer of relevance. The Castle Point Borough Council Local Plan, adopted in 1998, therefore remains the development plan for the Castle Point area.

Matters concerning the Enforcement Notice

7. The second sentence in section 5(1) of the notice is confusing. It seeks to clarify the limitations on the use considered necessary but, instead, it is open to interpretation and only serves to complicate the issue.
8. Admittedly, the appellant has attempted to show that a material change of use has not occurred by claiming that the religious element is incidental to the enjoyment of the dwellinghouse.
9. It would, though, be a nonsense if the enforcement notice sought to preclude friends and neighbours from calling at the appeal property. Instead, its issue was a response to the numbers of persons visiting and the frequency involved, and it serves a purpose as an attempt to regulate the use of the land.
10. In the circumstances I am satisfied that the test of what is or what is not '*incidental*' is a matter of fact and degree related to the various factors involved, and this should be interpreted, accordingly.

Background

11. No 176 Furtherwick Road is primarily a dwellinghouse, with a generous curtilage, situated off the junction of Furtherwick Road and Parkway. Access is gained from the latter.
12. Rabbi Paneth, an orthodox Jew, and his wife, Hindy have six children, all of whom live at the appeal property. They moved to the property in 2019.
13. In February 2020 the Council first received complaints that the dwelling was being used as a place of worship, and Council officials visited the property and monitored the situation throughout that year, issuing a Planning Contravention Notice (PCN) in November 2020, alleging that the property was being used as a place of worship.
14. In order to gauge the planning position the PCN asked a series of questions, one of which asked whether the property is being used to hold religious services/meetings by individuals/groups not living at the dwellinghouse. The response was short, and somewhat evasive, merely saying that the property is "*used entirely as a private dwelling.*"
15. Although not directly related to the current appeal an application was submitted to the Council in March 2021 proposing the sub-division of the

curtilage of no 176 and the development of a synagogue on the southern section. Planning permission was refused in October 2021.

16. In view of the Council's findings and its interpretation of the activity, by January 2022 the Council saw it expedient to issue an enforcement notice requiring for the cessation of what it considered to be the dwelling's mixed use.

The appeal on ground (b)

17. 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 of this residential dwelling to that of a mixed use involving the dwelling being also used for theological study and as a place of worship has not taken place.
18. The onus of proof on such matters of fact is on the appellant, and is on the balance of probabilities.
19. Section 55(1) of the 1990 Act defines development as, in addition to operational development, 'the making of any material change in the use of any buildings or other land'.
20. The concept of a material change of use is not defined in statute, but the basic approach is that, for this to have occurred, there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.
21. For principles I refer now to case law relating to what might be considered as an incidental use. The case of *Emin v SSE and Mid Sussex DC [1989]* deals with this question. The Court held that it is necessary to consider whether the use of the building, in the context of the planning unit, will remain ancillary or subordinate to the main use of the property as a dwellinghouse. An incidental use is one which is functionally related to the primary use. It may to an extent differ in character but is carried out as a function of the enjoyment of the dwellinghouse.
22. In *Sage v SSHCLG & Bromley LBC [2021] EWHC 2885 (Admin)* it was held that incidental or ancillary uses are part of the single main use, and for these purposes are not a separate use at all. The judgement upheld the established principle that a planning unit may have a single primary use, and not be in mixed use, even if uses incidental to the primary use are carried out.
23. In this particular instance the appellants say that the primary use of the property is as a residential dwelling. They consider that the holding of prayer meetings is incidental to the residential use. In fact they say in the written evidence that this "*enhances the residential use*". It is said that the incidental use is "*purely to allow Rabbi Paneth to pray with a quorum at home*". This involves a minimum number of ten males, which constitutes a community of Israel for liturgical purposes.
24. The prayers take place in the dwelling's dining room for which, it is said, the family have yet to purchase domestic furniture. Private prayers take place within, and family friends and neighbours are invited to attend. A second, smaller room, off the hall, is the appellant's private study, for which tables are laid out to enable up to five ladies to pray. There is also an element of

- theological study. In addition, within the rear garden is a mikvah where Rabbi Paneth invites prayer-goers for a ritual bath.
25. Regular prayer meetings take place on Friday evenings and Saturday mornings. On Fridays, from approximately one hour before sunset, sabbath prayers will take place, lasting for some 1.5 hours. However, on Saturdays and Festival days – of the latter there are 22 such days throughout the year – approximately six hours will be taken up with prayer.
 26. During the Hearing the appellants' agent made an analogy between the use of the property and, hypothetically, a dwelling with an outside swimming pool or jacuzzi where outside parties are often held. The appellant was attempting to illustrate his point that the prayer meetings and religious instruction taking place is incidental to the residential use of the dwelling. However, I disagree with such an analogy in that domestic pool parties are most unlikely to be held every Friday evening and Saturday morning throughout the year. It is further unlikely that such garden parties would consistently involve the numbers of people attending the property for prayers.
 27. Apart from the police being contacted on the 19 September 2020 as to a gathering at the appeal premises, potentially breaching the then COVID Regulations, Council officials carried out comprehensive monitoring as to the comings and goings to and from the property, particularly on two specific occasions; the evening of Friday 29 October 2021, and the morning of Saturday 26 February 2022.
 28. The Council's records say that on 29 October 2021, between the hours of 17:15 and 18:24, 47 men/boys arrived in religious dress/accoutrement and entered the dwelling's side door, without knocking to announce themselves. On 26 February 2022, between the hours of 07:34 and 11:22, 33 people arrived at the property, letting themselves in through the secondary front door, again without knocking first.
 29. The appellants accepted in evidence that there have been occasions where over 40 persons have attended, although he says that the average mean is some 13-14 attendees. Nonetheless, over 40 persons is substantial and particularly significant, irrespective of whether it involves only a few actual families.
 30. Whether a use should be regarded as incidental will be a matter of fact and degree, but the 'incidental' link or relationship must be maintained. The scale of the use may be relevant but is not necessarily determinative. However, in this particular case I consider that the volume of people visiting the property for prayers and the regularity of such strongly suggests an assembly use which cannot reasonably be considered as incidental to the dwelling's residential use. Instead, it represents a use unconnected with the sole lawful use rights and I am satisfied it is not subordinate thereto.
 31. The appellants make the point that one person is the main complainant. However, she lives next door and is best placed to witness the activity of persons arriving and leaving the property. Other objections have also been received. At the Hearing it was more than apparent that there is bad feeling between the main complainant and some attendees. This may be the case but it does not alter the fact that, even if the Council had not received any complaints regarding the use of the premises, but the case had somehow come to the local planning authority's attention, it would have been quite entitled to

- make an assessment as to whether the consequent activity had altered the residential character of the dwelling, to the extent that it had brought about a material change of use.
32. Such an assessment would have involved taking into account all the relevant factors arising from the property's current use, such as frequency and duration, and then making a judgement, accordingly. The Council will have also borne in mind the appellant's responses to the PCN in deciding to issue the enforcement notice.
 33. Having had regard to all the evidence adduced, including the photographic evidence provided, I find that the property's current use goes beyond what might be considered as incidental to its residential and householder purpose.
 34. The frequent comings and goings, on a weekly basis, has changed the dwelling's residential character by introducing a marked and significant assembly use. Whether or not the use of the property attracts large numbers of people only at particular times of the day doesn't alter my conclusion.
 35. From the various evidence put forward, I find that the allegation in the enforcement notice is correct and that the planning position has changed materially, constituting development, since the prayer meetings first commenced.
 36. Accordingly, the appeal on ground (b) does not succeed.

The appeal on ground (c)

37. An appeal under ground (c) is that those matters do not constitute a breach of planning control.
38. In other words the matters alleged will not constitute a breach if planning permission is not required. To draw a distinction with that of a ground (b) appeal it is that the matters allegedly constituting the breach have occurred/are occurring, but, as no planning permission is required, there is no contravention.
39. Given my findings on the ground (b) appeal, namely that a material change of use has taken place constituting development, planning permission is required under s57 of the 1990 Act, as amended, for the mixed use's lawful continuation.
40. No such permission has been granted, although I acknowledge that it is now sought by virtue of the deemed planning application brought about by the appeal lodged under ground (a), the matter of which I deal with in this decision letter.
41. As it stands, the appeal under ground (c) cannot succeed.

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

Main Issues

42. The main issues involved in this appeal are:
 - 1) the effect of the development on the character of the immediately surrounding area; and

2) the effect on the living conditions of neighbouring occupiers.

Reasons

Character

43. Policy CF6 of the adopted Local Plan (LP) says that the Council will, in principle, support the provision of worship within the borough. Any proposals for such should, though, be seen to accord with all other relevant policies in the LP.
44. From both the evidence produced and also my site visit observations it would appear to me that the regular comings and goings of a significant number of persons, rather than actual noise disturbance has changed the character of this residential dwelling. Certain representations objecting to the use, received from local residents, consider that a form of synagogue has been established. From my visit I don't necessarily subscribe to that view, but that appears to be the perception amongst some interested parties.
45. On the above point I here refer directly to an extract from the Council's appeal statement, and then the appellant's written response. In paragraph 5.3.40 the Council states, in part:
- "...The application must be considered as any place of worship, not specifically a synagogue."*
46. The appellant responds:
- "It is submitted that it is perfectly proper to grant consent for use as a synagogue. It is further submitted that the use could be further restricted to use as an orthodox Jewish Synagogue."*
47. This goes beyond the scope of the DPA in that the appellant is specifically referring to a synagogue as a single entity and makes no mention of the mixed use of the dwellinghouse itself, which is the point at issue in this appeal.
48. In my opinion the above is indicative of the discord between the appellant and the objectors, and this only contributes to the problem.
49. Further, I am not convinced how and why the dwelling's use for prayer meetings can be said to enhance the residential use, as has been claimed. This might be the case for the owner/appellant, but not for the wider residential area and its associated domestic characteristics.
50. The appellant has requested that I allow the appeal and grant planning permission subject to conditions restricting the use. I am not, though, convinced that a condition restricting the number of people visiting for prayer meetings would be realistically enforceable. It would be absurd if council officials were to stand at the property's gate advising people against entering once the threshold had been reached.
51. The numbers of people previously visiting is key and I am influenced here by the appellant's apparent intentions. Illustrating this, I make reference to paragraph 5.3.37 of the appellant's statement of response where he states:
- "The use of the property with a restricted maximum limit of say 50 would certainly overcome this objection."*

52. On this basis I am not satisfied that a much lesser number – one that might be consistent with what could be termed an incidental use – would meet the appellant’s requirements. It, therefore, follows that a personal permission would be inappropriate, as would a temporary permission, given that the use at issue has seemingly been taking place for nearly four years.
53. On this main issue I find that the development, although on the face of it supported by LP policy CF6, is contrary to the development plan as a whole, and has harmed the character of the immediately surrounding area.

Living conditions

54. Policy EC3 relates to significant adverse upon the residential amenity of the surrounding area. Although the policy’s wording makes specific reference to traffic and noise, it also refers to ‘other forms of disturbance’. Notwithstanding the traffic objection falling away, there is some crossover here with the character issue. It relates to neighbours’ perceptions arising from the number of visitors and I sympathise with their concerns.
55. Accordingly, I am similarly of the view that the use is harmful to the living conditions of neighbouring occupiers, and in conflict with the objectives of LP policy EC3.

Other considerations

Public Sector Equality Duty and Human Rights

56. In discharging my function as decision maker I have had regard to the public sector equality sector (PSED) under s149 of the Equalities Act, particularly with regard to fostering good relations between people who share a protected characteristic, as is the case here by way of religion.
57. The PSED is therefore a relevant factor in making this decision, but it 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.
58. 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.
59. 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 8 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 owner, and those persons regularly visiting the property for prayer meetings, would not be unduly infringed upon by way of my decision.

Other material

60. I have had regard to all the documents submitted by the appellant, in particular the previous appeal decisions highlighted. However, these relate to different properties and surroundings. As each case would involve its own individual factors and circumstances, direct parallels are not easily drawn, irrespective of whether or not the property lies within a residential area.

61. Accordingly, I afford these little weight in my determination of the current appeal.

Conclusion on the DPA

62. I have found harm on both 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.

Timothy C King

INSPECTOR