



Department for
Communities and
Local Government

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Our Ref: APP/P4605/A/12/2182952/NWF
Your ref:

10 December 2012

Dear Sir

**TOWN AND COUNTRY PLANNING ACT 1990 (SECTION 78)
APPEAL BY EBN BEHAVIOUR AND ATTENDANCE LIMITED
TESCO YARDLEY OFFICES, COVENTRY ROAD, BIRMINGHAM B26 1AD
APPLICATION REF: 2012/02873/PA**

1. I am directed by the Secretary of State to say that consideration has been given to the report of the Inspector, J Woolcock BNatRes(Hons) MURP DipLaw MPIA MRTPI, who held a hearing on 6 November into your client's appeal under Section 78 of the Town and Country Planning Act 1990 against the decision of Birmingham City Council to refuse planning permission for the change of use of vacant office (Class B1) to a Free School (Class D1); incorporating the first time internal fit-out and new school logo on windows, dated 2 August 2012.

2. The appeal was recovered for the Secretary of State's determination on 26 September 2012, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act 1990, because it involves proposals for development of major importance having more than local significance.

Inspector's recommendation

3. The Inspector, whose report is enclosed with this letter, recommended that the appeal be allowed and planning permission granted. For the reasons given in this letter, the Secretary of State agrees with the Inspector's recommendation. A copy of the Inspector's report (IR) is enclosed. All paragraph numbers, unless otherwise stated, refer to the Inspector's report (IR).

Procedural matters

4. The original description of the development is as set out at paragraph 1 above. However the Inspector notes that the parties agreed at the hearing that the description of the development should be amended to "*Use of existing building for the provision of education.*" The Secretary of State agrees with the Inspector that the description of

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the development should be changed to reflect this agreed revised description (IR3), and he is satisfied that no interests would thereby be prejudiced.

Policy Considerations

5. In deciding this appeal, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004, which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise. In this case, the development plan comprises the Regional Spatial Strategy for the West Midlands (2008) and the Birmingham Unitary Development Plan (2005). The Secretary of State agrees with the Inspector that the development plan policies relevant to the appeal are those set out at IR9-10 and he notes that the parties do not consider RSS policies relevant.

6. Other material considerations which the Secretary of State has taken into account include the National Planning Policy Framework (the Framework – March 2012); the Ministerial Policy Statement - planning for schools development (August 2011); Circular 11/1995: *Use of Conditions in Planning Permission*; and the Birmingham City Council *Shopping and Local Centre Supplementary Planning Document* (2012).

Main issues

7. The Secretary of State agrees with the Inspector that the main considerations are those set out at IR34.

Outdoor play facilities

8. For the reasons given at IR35, the Secretary of State agrees with the Inspector that there is no basis for finding against the proposal by reason of inadequate access to recreation facilities.

Vitality and viability of the Swan Centre

9. The Secretary of State agrees with the Inspector that, for the reasons given at IR36, the use of this vacant building would add activity to this part of the Swan Centre which would be beneficial in terms of its overall vitality and viability. He therefore also agrees with the Inspector that the proposal would not conflict with the Council's SPD in that respect.

Highway safety

10. The Secretary of State agrees with the Inspector that, for the reasons given at IR37-39, a safe area for picking-up and dropping-off could be made within the existing car park; measures could be taken to prevent drop-off/pick-up on the roads directly adjacent to the appeal site; and cycle storage could be provided closer to the appeal site than currently exists within the Swan Centre. He therefore also agrees that, subject to the imposition of conditions to address these issues, the School would not have an unacceptable adverse effect on highway safety.

Noise and disturbance

11. The Secretary of State agrees with the Inspector (IR40) that, due largely to the setting down and picking up arrangements described in paragraph 10 above, the proposed development would not have an unacceptable adverse effect on the living conditions of nearby residents or the amenities of the occupiers of nearby premises by reason of noise and disturbance.

National and development plan policy

12. The Secretary of State agrees with the Inspector that the evidence indicates that the appeal scheme would accord with the provisions of the development plan (IR42) and national policy (IR43).

Conditions

13. The Secretary of State agrees with the Inspector's reasoning and conclusions on conditions, as set out in IR44-47. The Secretary of State is also satisfied that the conditions recommended by the Inspector and set out in the Annex to the IR are reasonable and necessary and meet the tests of Circular 11/95.

Overall conclusions

14. The Secretary of State is satisfied that the appeal proposal accords with the development plan and national policy and, despite considerable local opposition to it, that there are no material considerations of sufficient weight to justify going against that. He is also satisfied that the appeal proposal would not be an inappropriate use for this vacant building by reason of accessibility of outdoor play space and recreation facilities, nor would it harm the vitality and viability of the Swan Centre. Furthermore, subject to the imposition of conditions concerning car parking, cycle storage and the control of setting down and picking up arrangements, the Secretary of State is satisfied that the proposed development would not have an unacceptable adverse effect on highway safety, the living conditions of neighbouring residents, or on the occupiers of nearby premises.

Formal Decision

15. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby allows your client's appeal and grants planning permission for *use of existing building for the provision of education*, in accordance with planning application ref: 2012/02873/PA (amended description), dated 18 April 2012, subject to the conditions listed at Annex A of this letter.

16. An applicant for any consent, agreement or approval required by a condition of this permission for agreement of reserved matters has a statutory right of appeal to the Secretary of State if consent, agreement or approval is refused or granted conditionally or if the Local Planning Authority fail to give notice of their decision within the prescribed period.

17. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than section 57 of the Town and Country Planning Act 1990.

Right to challenge the decision

18. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged by making an application to the High Court within six weeks from the date of this letter.

19. A copy of this letter has been sent to Birmingham City Council.

Yours faithfully

Jean Nowak

Authorised by the Secretary of State to sign in that behalf

CONDITIONS

Annex A

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development shall not be carried out otherwise than in complete accordance with the approved plans being Drawing Nos. A100, A101, A102, A103, A-200 rev A, A-201 rev A and 6416/P801.
- 3) No development shall take place until a scheme detailing the provisions to be made for people with mobility and sensory difficulties to gain access to the building has been submitted to and approved in writing by the local planning authority. The building shall not be occupied until the scheme has been implemented in accordance with the approved details, and the provisions for people with mobility and sensory difficulties to gain access to the building shall thereafter be retained.
- 4) The use hereby permitted shall only operate between the hours of 0600 and 2200 hours Mondays to Fridays, 0700 and 1800 hours Saturdays and 0800 and 1500 hours Sundays and Bank Holidays.
- 5) No development shall take place until a Travel Plan has been submitted to and approved in writing by the local planning authority. The development shall thereafter be undertaken in accordance with the approved Travel Plan, which shall be periodically reviewed. A review of the approved Travel Plan shall be submitted to the local planning authority for approval in writing no later than three months after the first occupation of the building, and thereafter every six months.
- 6) The premises shall be used for the provision of education and for no other purpose (including any other purpose in Class D1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification).
- 7) The number of students in the building at any one time shall not exceed 90.
- 8) No development shall take place until an access and parking scheme has been submitted to and approved in writing by the local planning authority. The scheme shall make provision for 6 car parking spaces and cycle storage for the development, along with provisions to facilitate and control setting down and picking up associated with the development. The use hereby permitted shall not commence and the building shall not be occupied until the scheme has been implemented in accordance with the approved details, and the parking spaces, cycle storage and provisions for setting down and picking up shall thereafter be retained.

End



Report to the Secretary of State for Communities and Local Government

by John Woolcock BNatRes(Hons) MURP DipLaw MPIA MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Date 16 November 2012

Town and Country Planning Act 1990

Birmingham City Council

appeal by

EBN Behaviour and Attendance Ltd

Hearing held on 6 November 2012

Tesco Yardley Offices, Coventry Road, Birmingham B26 1AD

Report APP/P4605/A/12/2182952

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File Ref: APP/P4605/A/12/2182952

Tesco Yardley Offices, Coventry Road, Birmingham B26 1AD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by EBN Behaviour and Attendance Ltd against the decision of Birmingham City Council.
- The application No:2012/02873/PA, dated 18 April 2012, was refused by notice dated 2 August 2012.
- "The development proposed is to consist of a change of use, incorporating the first time fit-out of an existing, newly built office (Tesco Yardley), to provide facilities required for a new Free School. Works include: New School Logo on windows. Internal Fit-Out."

Summary of Recommendations:

The appeal be allowed, and planning permission granted subject to conditions.

Procedural matters

1. The appellant made an application for a full award of costs at the Hearing. This is the subject of a separate Report.
2. The appeal was recovered for determination by the Secretary of State by letter, dated 26 September 2012, because the appeal involves proposals for development of major importance having more than local significance.
3. The Council described the proposal as a change of use of vacant office (use class B1) to a Free School (use class D1), and refused the application, against officer recommendation, for the following reasons.
 - "1. The site is inappropriate for a school due to the lack of outdoor play facilities and is contrary to paragraphs 2.7, 3.8 and 3.10 of the Birmingham Unitary Development Plan (2005) and guidance contained within the National Planning Policy Framework.
 - 2. The proposal for a non retail use would undermine the vitality/viability of this centre. As such it would be contrary to Paragraphs 3.8, 3.10, 3.14C and 7.25 of the Birmingham UDP 2005, guidance in Shopping and Local Centres adopted as a Supplementary Planning Document and the National Planning Policy Framework.
 - 3. The car parking and drop off/pick up facilities proposed are inadequate and would lead to parking and waiting in nearby roads, to the detriment of highway safety. As such it would be contrary to Paragraphs 3.8, 3.10 and 6.39 of the Birmingham UDP 2005 and the National Planning Policy Framework.
 - 4. The proposed development would adversely affect the amenities of occupiers of dwellings/premises in the vicinity by reason of noise and general disturbance. As such the proposal would be contrary to Paragraphs 3.8 and 3.10 of the Birmingham UDP 2005 and the National Planning Policy Framework."

The Council's Appeal Statement notes that Reason for Refusal 2 incorrectly refers to UDP Paragraph 3.14C, and that Reason for Refusal 3 should have also referred

to Paragraph 6.38.¹ The description of the proposal was discussed at the Hearing given that the permitted office use of the premises has never commenced, and that the parties had agreed that in the event that planning permission was granted a condition would be necessary to restrict the use to a school. In these circumstances, the proposed development could more accurately be described as "Use of the existing building for the provision of education", which was suggested at the Hearing, and which would accord with the terms used in Class D1 of the Use Classes Order.

4. I made an accompanied site visit to the area as part of the Hearing, but also visited the locality unaccompanied on the afternoon of Monday 5 November 2012 around the time that children were leaving Yardley School.

The site and surroundings

5. The appeal site comprises a vacant office building of three storeys. It is of a contemporary design, with a front entrance onto Coventry Road, and has a standard office specification with a central core of toilets, lifts and stairwell. The building is located within the Swan Centre at Yardley. The Swan Centre is centrally located within East Birmingham and is sited near to the grade-separated junction of the A45, the main eastern radial route, and the A4040, which is the outer ring road. The appeal site lies at the junction of Coventry Road and Lily Road. A large Tesco Store lies to the immediate west. Beyond the car park attached to the Swan Centre, lies a large recreation area called Oaklands playing fields. This is a grassed area, which includes several football pitches.
6. To the north of the appeal site is a service road leading to the rear of the Tesco Store and its basement staff parking and service area. There are residential dwellings further to the north along Lily Road. To the north of the service road Lily Road operates one way from north to south. To the east of the appeal site there is a mix of retail, commercial and food and drink uses fronting Coventry Road.²
7. In the wider area the principal land uses are residential, employment, offices, recreation and education. Yardley Junior and Infants School is located near to the junction of Lily Road and Harvey Road to the north of the appeal site.

The proposal development

8. The proposed development is for a change of use to accommodate a Free School, with no physical changes to the external appearance of the building, except for a new school logo on the windows. The ground floor would comprise an entrance lobby, reception area, interview room, offices, secure store, staff room, along with a treatment room and hair and beauty class room. The first floor would have four teaching spaces, dining and study area and interview room. The second floor would have three teaching spaces, a science laboratory and preparation room, along with work room and timeout area. The building would have a single entrance, via a secure lobby, facing onto Coventry Road. The school would accommodate up to 90 pupils aged between 13 and 16 years, with

¹ HS1 paragraph 4.3.

² The location is shown on HS2.1 Appendix 2, with the layout of the Swan Centre at Appendix 3. The appeal site is shown in the context of properties on Lily Road at Appendix 4. Photographs in the vicinity of Lily Road are included at Fig.2.2 and Fig.2.3 of HS2.2.

17 full time and 3 part time staff. At the time the Council determined the application the scheme provided for 4 car parking spaces in the Tesco Store underground car park. However, a lease, which remained unsigned at the time of the Hearing, would provide for 6 car parking spaces in the underground car park, with access via the service road to the rear of the appeal premises.³

Planning policy

9. The development plan for the area includes the Spatial Strategy for the West Midlands 2008 (RSS), and The Birmingham Unitary Development Plan 2005 (UDP).⁴ The parties do not consider that any RSS policies are relevant to this appeal.
10. UDP paragraph 2.7 states that knowledge and skills will be essential if social exclusion and discrimination are to be reduced, social and community life strengthened, and citizenship and civic involvement promoted. Paragraph 3.8 provides that the environment strategy is based on the principles of the need to protect and enhance what is good in the city's environment, and to improve what is less good, and recognises the key relationship between environmental quality and levels of economic growth. Paragraph 3.10 states that proposals which would have an adverse effect on the quality of the built environment would not normally be allowed. Matters such as environmental impact, safety, access control, pedestrian and cyclist needs and the function of the road are key factors in determining planning applications, as specified in Paragraph 6.39. The A45 is part of the Strategic Highway Network, where Paragraph 6.38 aims to protect capacity whilst ensuring a primacy for environmental improvement and road safety.⁵ Paragraph 7.25 provides for restrictions where there is evidence that the future growth of service uses is likely to be at the expense of the primary retail function of a shopping centre.
11. The site lies within a designated Primary Shopping Area of a District Centre, where the Council's *Shopping and Local Centre Supplementary Planning Document 2012* (SPD) aims to support the primary retail function, whilst ensuring an appropriate balance of retail and non-retail uses. The SPD notes that the presence of a diverse range of non retail uses in centres, including community facilities, can complement the retail function of centres.
12. The *Planning statement – planning for school development*, published by the Department for Communities and Local Government in 2011, sets out principles for the planning system when dealing with proposals for schools. These include the following; there should be a presumption in favour of the development of state-funded schools, and the Secretary of State will attach significant weight to the need to establish schools; local authorities should foster a collaborative approach to applications, where necessary using planning obligations to mitigate adverse impacts; clear and cogent evidence would be necessary for refusal or imposition of conditions.
13. The more recent *National Planning Policy Framework* (hereinafter cited as the *Framework*) provides that the Government attaches great importance to ensuring that a sufficient choice of school places is available to meet the needs of existing

³ HD5 Appendices 1 and 5.

⁴ HS2.1 Appendix 8.

⁵ HD4.

and new communities, and that great weight should be given to the need to create, expand or alter schools.

The case for Birmingham City Council

The main points are as follows.⁶

14. The Reasons for Refusal are related and cumulatively represent the Council's practical judgements about the everyday implementation and operational consequences of the proposed school. This is the wrong location for a school due to the lack of outdoor play facilities and the adverse impacts on the vitality and viability of the Swan Centre, highway safety and residential amenity.
15. Planning policy does not require schools to provide outdoor play facilities within the curtilage of the site. However, the absence of daily access to outdoor play facilities would fail to facilitate social interaction and the creation of healthy, inclusive communities, contrary to local and national policy. Planning permission has been granted for two other Free Schools at Tame House and Tenby Building, which both include provision for play facilities.⁷ There is insufficient information about how pupils would access playing facilities and without this detail it is not possible to find that the proposal would not have an adverse effect on local residents. There are no changing facilities at Oaklands playing fields, and the availability of this facility will be affected by a planned major refurbishment, including construction of tennis courts and 6 re-surfaced pitches. A school with no on-site play facilities would not accord with the aims of paragraph 69 of the *Framework* concerning healthy communities and social inclusion.
16. Offices are considered to be a main town centre use, which would be complementary to the shopping function of a centre. However, a school is not considered an appropriate town centre use that would compliment the main retail function of the Swan Centre. The proposal would, therefore, adversely affect the vitality and viability of the Centre. The appeal scheme would not affect the amount of retail floorspace in the Centre, but would affect its retail function because it would not complement shopping, and is opposed by local retailers. The use of the building by up to 90 teenagers would be an over intensive use. It would change perceptions of the area and affect the willingness of customers to use the Centre.
17. Given the large geographical catchment area of the proposed school, the appellant has underestimated the number of parents likely to drop off and pick up children by car, compared to similar sized secondary schools. Parents are likely to park/wait as close as possible to the entrance to the school, which would be near to the junction of Coventry Road and Lily Road. This would adversely affect the free flow of traffic on these roads and would be detrimental to highway safety. The Free Schools permitted at Tame House and Tenby Building both include provision for large car parks with drop off and pick up facilities within the site. Information about access arrangements has evolved since the Council determined the application. There is evidence that only 1 of the 45 students at the temporary school, located at Saltley, arrives by car. But there is nothing to indicate that a similar proportion would do so if the school was sited in the Swan Centre. A cautious approach should be adopted to likely modal split.

⁶ Based on HS1 and submissions at the Hearing.

⁷ HS1 Appendices 1 and 2.

18. Since the Council's decision more information has now been provided about the number of car parking spaces proposed and provision for cycle parking. The Council's standards would require a maximum of 10 staff car parking spaces, but the 6 spaces now proposed would be adequate in association with a Travel Plan. Cycle parking and dropping off/picking up is not covered in the lease, which in any event is unsigned. Some physical works, such as bollards may be necessary to prevent vehicles mounting the pavement to set down/pick up near the junction of Coventry and Lily Roads. Safety issues are very important given that the use proposed is a school. The Council did not have the information before it that would have enabled it to determine that the school would operate safely.
19. The nearest residential properties are located 11 m to the north of the appeal site in Lily Road. Noise and disturbance associated with drop offs and pick ups in the vicinity of Lily Road at the start and end of the school day would adversely affect the amenities of nearby residents. The comings and goings of pupils, revving of car engines and slamming of car doors would be intrusive. Traffic movements from the proposed school would be different from those associated with a Class B1 office use, which would be more likely to be phased throughout the day and less likely to disturb nearby residential occupiers compared to peak arrival and departure times for a school. Teenagers congregate in groups and this would impact on the residential amenity of the area. Local residents fear that the proposed school would result in noise and disturbance. The use is too intensive, especially given the proximity of the school at Harvey Road. There are already queues for buses at times.
20. The proposal is for a behaviour unit for disengaged students who already have a school place, and so the scheme would not provide new places. Policies which support proposals that would provide new school places do not therefore apply.
21. The Council does not consider that the UDP is silent about education, but acknowledges that it does not go into great depth, and so it is appropriate to rely on the national policies set out in the *Framework*.

The case for the appellant

The main points are as follows.⁸

22. A Free School is an all-ability state funded school set up in response to an identified gap and need within a local area in order to improve secondary education for children in their community. The EBN Alternative Provision Free School would provide an educational setting for young people who are not coping with mainstream school or who have come into the city mid way through the school cycle. The Local Education Authority considers that the proposal is of significant value to the area network of local secondary schools in providing alternative pathways to young people who are at risk of becoming disengaged from education.⁹
23. There is no requirement for schools to provide any outdoor play area. Other schools have been permitted which do not have outdoor play facilities within the

⁸ Based on HS2.1 and submissions at the Hearing.

⁹ Further information about the proposed Free School is included with HS2.1 Appendix 1. Letters in support are at WR2.6.

- curtilage.¹⁰ The proposed school would have access to a range of community facilities. These would include Oaklands playing fields, along with tennis courts, an ice rink, swimming pool and other sports facilities in the wider area.¹¹ Ofsted has carried out a pre-opening inspection and recommended that the school could open subject to submission of evidence about an appropriate fire risk assessment, and as to how students' access to a safe outdoor play area would be provided on a regular basis.¹² The former would be undertaken as part of the Buildings Regulations procedure. A formal risk assessment for outdoor space has been submitted to Ofsted, which raised no objection to the school using Oaklands recreation ground.¹³ Oaklands recreation area is to be improved and it is within walking distance of the appeal site via a signalled crossing on the A4040.
24. The appeal premises currently has planning permission for office (Use Class B1) use and so there would be no loss of retail floor space. The proposal would bring into use a vacant unit and so would positively impact upon the vitality and viability of the Centre. There is no shortage of vacant retail and office premises in the Centre, with 9 retail units currently being marketed, along with 110,000 sq ft of vacant office space in the Equipoint building on the opposite side of the A4040. Other schools have been permitted within the prime retail core of the City Centre.¹⁴
25. The centrality of the Swan Centre to East Birmingham and to 12 secondary schools, along with the public transport links, are key drivers in choosing this location. The A4040 is the route of the No.11 Birmingham Outer Circle Bus. The Swan Centre is highly accessible by public transport. Other principal bus services include Nos.17, 58, 59, 59a, 60, 73, 99, 900 and 957, with bus stops within 400 m of the appeal site, some of which are accessible by underpasses.¹⁵ All pupils enrolled at the school would receive a free bus pass, and a Travel Plan is proposed.¹⁶ Secondary school students can safely travel by public transport and other sustainable modes, such as walking and cycling. Research by Birmingham City Council indicates that almost 80% of secondary school students in the city either walk, cycle or travel by bus. Only 20% use cars, including taxis and car share. However, the current school at Saltley in temporary accommodation has only 1 out of 45 students that arrive by car.
26. The highway network in the vicinity of the appeal site is tightly controlled by double red lines, double yellow lines, bus stops and restricted parking. This, along with rail guards protecting the pedestrian underpasses and the one way systems would discourage setting down and picking up at the corner of Coventry and Lily Roads.¹⁷ The Tesco Store has a large car park, which is some 250 m from the appeal site and accessible via the covered walkway that bisects the Centre, or around the front of the store and other retail development. The minority of pupils who use drop off/pick up would do so from within this car park.

¹⁰ HD1 Enclosure 1.

¹¹ HS2.1 paragraph 6.5.

¹² WR2.1 and WR2.2.

¹³ WR2.3 and WR2.4.

¹⁴ HD1.

¹⁵ HS2.2 Fig.2.4 indicates the location of bus stops. Details about bus routes are included in Fig.2.5 and Fig.2.6

¹⁶ WR2.7 Appendix 8.

¹⁷ These features are shown on photographs at Fig.2.1 and Fig.2.2 of HD1 Enclosure 2.

The need for measures to prevent drop off/pick up on the roads immediately adjacent to the appeal site was discussed at the Hearing, and the possibility of bollards near to the corner of Coventry and Lily Roads was raised in this regard.¹⁸ Staff parking would be provided within the Tesco car park. Tesco Stores Ltd by letter dated 24 October 2012 has confirmed its support for the proposal and advised that it has no plans to restrict the drop off and pick up of students in the main customer car park, or to restrict the use of cycle storage facilities at the centre, and would be supportive of any other arrangements for the storage of cycles.¹⁹ In this regard the possibility of using one of the 6 proposed basement car parking places for cycle stands was discussed at the Hearing.²⁰ Car and cycle parking, along with drop off/pick up facilities would be adequate and would not result in parking or waiting on nearby roads.

27. Given the likely access arrangements, noise and disturbance from students arriving and leaving the premises would not significantly affect neighbouring residents or businesses, especially as background noise levels in the area are influenced by buses and other vehicles using the A45. In terms of vehicle movement throughout the day a Class B1 development would generate more movements than would a Class D1 development.²¹ There is no reason to believe that the proposed use would have any more obvious implications or consequences than the permitted use of the building as a office in terms of likely noise and disturbance.

Written representations

Application stage

28. The Council received 16 letters of objection to the application. These included an objection from John Hemming MP. The representations raised issues about lack of consultation, anti-social behaviour, the proximity of Yardley School, lack of information about the proposal, highway safety, litter and the lack of recreation space.
29. Petitions with 162 signatures were submitted objecting to the proposal. Those signing disagreed with the location on the grounds of impact on the local community, intensity of building, and the duty of care for the local population.

Appeal stage

30. Written representations were received from 10 individuals in response to the appeal.²² These generally raised similar concerns to those expressed at the application stage and by the Council. In addition, reference is made to the original consultation involving residents and stakeholders that resulted in a planning permission partly predicated on the provision of the office space to encourage employment. Local businesses expressed concern about the use by

¹⁸ HS2.2 paragraph 3.9 includes a commitment to implement any necessary Traffic Regulation Orders, railings, bollards, signage etc in the immediate vicinity of the school to ensure that no parking, drop-off/pick up or waiting would take place.

¹⁹ HD1 Enclosure 3.

²⁰ The Inspector also enquired at the site visit about the ownership of a landscaped area between the appeal building and Lily Road, and was advised that this is part of the Tesco site.

²¹ HD1 Enclosure 2 Fig.2.4.

²² Red folder.

the school of the limited parking in front of local shops along Coventry Road. There is also concern about exacerbating traffic congestion, which is already a problem because of local employment uses and Yardley School, which has 680 pupils and is planning to add a further 120 pupils.²³

Conditions and obligations

31. There was a measure of agreement between the Council and the appellant concerning suggested conditions in the event that the appeal were to succeed and planning permission to be granted.²⁴ In addition, the parties agreed at the Hearing that a condition would be necessary to limit the number of students in the building at any one time to 90. The wording of some conditions was discussed, and I asked whether a negative or Grampian condition would be necessary to deal with off-site parking and access arrangements (this is included as Condition 8 in the Schedule of Conditions attached to this report). These discussions had regard to Circular 11/95 *The Use of Conditions in Planning Permissions*. Possible conditions are dealt with in more detail in the Conclusions to this report.
32. No obligation pursuant to section 106 of the 1990 Act has been submitted. Neither at the Hearing, nor at any other time during the processing of the application and appeal, were submissions made that a planning obligation would be necessary in this case.

My conclusions begin on page 10 of this report.

²³ HD3.

²⁴ HS1 and HS2.1.

Conclusions

Preliminary matters

33. The following conclusions are based on the evidence given at the Hearing, the written representations and my inspection of the site and its surroundings. In this section the figures in parenthesis [] at the end of paragraphs indicate source paragraphs from this report.

Planning and policy considerations

34. In the absence of any matters set out, about which the Secretary of State particularly wishes to be informed for the purposes of considering this appeal, the evidence indicates that the main considerations are:

- (1) Whether the site is inappropriate for a school by reason of outdoor play facilities.
- (2) The effects of the proposed development on the vitality and viability of the Swan Centre.
- (3) The effects of the proposed development on highway safety.
- (4) The effects of the proposed development on the living conditions of nearby residents and the amenities of the occupiers of nearby premises, by reason of noise and disturbance.
- (5) The extent to which the proposed development would be in accordance with the development plan for the area.
- (6) The extent to which the proposed development would be in accordance with the *National Planning Policy Framework*.
- (7) Whether any permission should be subject to any conditions or obligations and, if so, the form that these should take.
- (8) Overall conclusions.

The remainder of this report addresses these matters and my recommendations are based on these findings.

(1) Outdoor play facilities

35. The school would have access to a large recreation area at Oaklands playing fields, which is within a reasonable walking distance of the proposed school for teenage students. The route would follow paved pedestrian paths through or around the Swan Centre, and would cross the A4040 at a signalled crossing. There is no evidence of changing facilities being available at Oaklands playing fields, but these might not be necessary given its proximity to the school. The recreational value of Oaklands playing fields is planned to be improved. This might result in some disruption during construction work, but it would offer a more useful recreational venue for the school in the longer term. There is no policy requirement for the proposed school to include on-site play facilities, and students would have access to a range of community facilities in the wider area. There is no basis for finding against the proposal by reason of inadequate access to recreation facilities. [5, 10, 15, 23, 28]

(2) Vitality and viability of the Swan Centre

36. The vitality and viability of the Swan Centre is an important consideration given that this is a new shopping centre with some floorspace still to be let. However, the proposed school would not reduce the retail floorspace in the Centre. Furthermore, no substantive case has been made that the school, and activities associated with it, would deter shoppers or other customers from visiting the Centre. Given the proposed access arrangements, it is unlikely that any use associated with the school of the limited parking spaces outside the local shops along Coventry Road would significantly affect these businesses. There is no compelling evidence that students passing through and around the Centre would impair the Centre's retail function. On the contrary, the use of a vacant building by up to 20 staff and 90 students would add activity to this part of the Centre, which would be beneficial in terms of its overall vitality and viability. The proposal would not conflict with the Council's SPD. [5, 10, 11, 16, 24, 30]

(3) Highway safety

37. Notwithstanding incentives to use public transport, the extensive bus network in the vicinity of the appeal site, and the proposed Travel Plan, it is likely that some students at the school would be set down and picked up by car. It was evident from my site visit that any on-street setting down and picking up in the vicinity of the appeal site would pose a serious risk to the safety of those using the highway. Measures would, therefore, be necessary to facilitate and control set down and pick up. However, the letter submitted at the Hearing from Tesco Stores Ltd indicates that provision could be made within the existing car park. This would provide a safe area for students to be dropped off and collected, which would be within 250 m walking distance of the appeal site. Measures could be taken if necessary, such as the introduction of bollards, to prevent drop off/pick up on the roads immediately adjacent to the appeal site. These are considerations which could be addressed by the imposition of an appropriate planning condition. So too could the provision of 6 car parking spaces for staff, which would be a reasonable provision given the nearby bus routes. [5, 7, 10, 17, 25, 26, 30]
38. The school would have access to the cycle stands within the Swan Centre. However, these are located at the north-western and western entrance to the Centre and the Hearing discussed provision for cycle storage closer to the appeal site. Use of one of the proposed underground car parking spaces for 6 cycle stands would be unacceptable on safety grounds. There is no footway along the service road to rear of the appeal premises, and a mix of cyclists/pedestrians and service vehicles in this area would give rise to serious conflict. However, it was evident at my site visit that there might be other areas close to the appeal building that could incorporate some cycle stands, either within the highway or within a landscaped area adjacent to the building. Cycle storage is, therefore, also a matter that could reasonable be addressed here by means of a planning condition. [5, 10, 18, 26]
39. Subject to the imposition of an appropriate planning condition concerning car parking and cycle storage, and to facilitate and control setting down and picking up, the proposed development would not have an unacceptable adverse effect on highway safety. The letter from Tesco Stores Ltd dated 24 October 2012 indicates that there is a reasonable prospect of satisfactory access arrangements

being achieved for the proposed school by means of the imposition of a negatively worded or Grampian condition. [26, 28]

(4) Noise and disturbance

40. This concern relates primarily to activity associated with setting down and picking up. Given the findings above, it is not considered likely that any such activity in the vicinity of the junction of Coventry and Lily Roads which give rise to undue noise and disturbance, especially given noise levels from the busy A45. With no cycle spaces in the basement car park, and no provision for access to the rear of the building, there would be no reason for students to congregate near to residential dwellings in Lily Road. Some activity would be associated with the use, but there is nothing to indicate that likely noise and disturbance attributable to those coming and going to the school would have an unacceptable impact on this busy District Centre, or to the residents who live near to it. The proposed development would not have an unacceptable adverse effect on the living conditions of nearby residents or the amenities of the occupiers of nearby premises by reason of noise and disturbance. [6, 19, 27, 29]

(5) Development Plan

41. Pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004 this appeal should be decided having regard to the development plan, and the determination made in accordance with it, unless material considerations indicate otherwise. There is nothing to indicate that any policies of the RSS are relevant in this case. [9]
42. The Council considers that the proposal would conflict with UDP Paragraph 2.7 because of the lack of on-site play facilities, but as outlined above students would have access to other facilities in the wider area. The proposal would, therefore, gain some support from Paragraph 2.7 because it would increase knowledge and skills. Given my finding that the school would not adversely affect the vitality and viability of the Swan Centre, it would not conflict with Paragraph 3.8 concerning the relationship between environmental quality and levels of economic growth. The proposal would not have an adverse effect on the quality of the built environment and so would not contravene Paragraph 3.10. Subject to the imposition of appropriate planning conditions there is no reason to find against the proposal by reason of matters such as environmental impact, safety, access control, pedestrian and cyclist needs and the functions of the local road network, which are highlighted in Paragraph 6.39. Nor would the scheme be at odds with the aims of Paragraph 6.38 to protect capacity whilst ensuring road safety on the strategic highway network. There is no convincing evidence that the use of the building as a school would be at the expense of the primary retail function of the Swan Centre, and so the proposed development would not conflict with Paragraph 7.25. The evidence indicates that the appeal scheme would accord with the provisions of the development plan. [10]

(6) National Planning Policy Framework

43. The Council acknowledges that the UDP does not go into great depth about education, and that it is therefore appropriate to rely on the *Framework*. The proposal gains substantial support from the *Framework* because the school would help to ensure that a sufficient choice of school places is available to meet the needs of the community. The fact that the school might accommodate some students who already had places in other schools would not diminish the weight

to be given to this policy support because the *Framework* provides that great weight should be given to the need to create, expand or alter schools. The policy support does not apply only to schemes which would result in additional school places over and above the number that already exist. Having regard to the *Framework* as a whole, the proposed development would be sustainable development to which the presumption in favour set out in the *Framework* would apply. It would also benefit from the presumption in favour of the development of state-funded schools, and the significant weight given to the need to establish schools, set out in the *Planning statement – planning for school development*, published by the Department for Communities and Local Government in 2011. [12, 13, 20, 21, 22]

(7) Conditions and obligations

44. The need for conditions and their wording should properly be considered in the light of the advice contained in Circular 11/95 *The Use of Conditions in Planning Permissions*. The Condition numbers in this section refer to the Schedule of Conditions attached to this report. [31]
45. The standard three year commencement period was not disputed (Condition 1). Otherwise than as set out in any decision and conditions, it would be necessary that the development shall be carried out in accordance with the approved plans, for the avoidance of doubt and in the interests of proper planning (Condition 2). Measures to assist people with mobility and sensory difficulties to gain access to the building would be necessary (Condition 3). Restricted hours of operation for the use would be necessary to accord with the details of the application and in the interests of the amenity of the area (Condition 4). A Travel Plan would be necessary to minimise the need to travel to the facility by car, and this would need to be periodically reviewed to ensure that it was up to date (Condition 5). A restriction of the use to education would exceptionally be necessary given that the access arrangements might not be suitable for other Class D1 uses, such as a crèche, day nursery or day centre, which might have different requirements for setting down and picking up (Condition 6). It would be necessary to limit the number of students in the building at any one time to accord with the application and in the interests of the amenity of the area (Condition 7).
46. There was a disagreement at the Hearing about whether Condition 8 concerning off-site access arrangements would be necessary. It was agreed at the Hearing that a condition in a negative form would be necessary to ensure adequate provision for car parking and cycle storage on land that is outside the appeal site, but the appellant considers that provision for setting down and picking up could be adequately addressed in the Travel Plan. However, this would not provide sufficient certainty about an important issue, which would involve land that was not within the appellant's control. The Council's submission that a Grampian condition would be necessary should be preferred. Possible wording for such a condition was discussed at the Hearing. If the Secretary of State was minded to allow the appeal, but considers that such a condition would not comply with the relevant tests, then the parties could be given the opportunity to deal with these matters by means of an obligation pursuant to section 106 of the Act. [12, 32]
47. The conditions set out in the Schedule of Conditions attached to this report would be necessary to mitigate the impact of the proposed development. They would reasonably relate to the proposed development and would appropriately address some of the issues raised by third parties.

(8) Overall conclusions

48. There is considerable local opposition to the proposed development, which is evident from the written representations, petitions, and the submissions to the local planning authority and made at the Hearing. One of the aims of national planning policy is to strengthen local decision making.²⁵ However, it remains a general principle of the planning system that local opposition or support for a proposal is not in itself a ground for refusing or granting planning permission, unless it is founded upon valid planning reasons.²⁶ The proposal falls to be determined on its planning merits.
49. The proposed school gains substantial support from local and national policies concerning education. It would not be an inappropriate use for this vacant building by reason of the accessibility of outdoor play space and recreation facilities, nor would it harm the vitality and viability of the Swan Centre. Subject to the imposition of conditions concerning car parking, cycle storage, along with provision for, and control of, setting down and picking up, the proposed development would not have an unacceptable adverse effect on highway safety, the living conditions of neighbouring residents, or on the occupiers of nearby premises. The proposed development would comply with the provisions of the development plan, and would accord with the *Framework*.
50. All other matters raised in evidence have been taken into account, but there is nothing to outweigh the main considerations that lead to the conclusion that the appeal should be allowed.

Recommendations

51. It is recommended that the appeal be allowed, and planning permission be granted for use of the existing building for the provision of education at Tesco Yardley Offices, Coventry Road, Birmingham B26 1AD, subject to the conditions set out in the attached Schedule of Conditions.

John Woolcock

Inspector

²⁵ *National Planning Policy Framework Annex 1: Implementation.*

²⁶ *The Planning System: General Principles, ODPM, 2005.*

SCHEDULE OF CONDITIONS 1-8

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development shall not be carried out otherwise than in complete accordance with the approved plans being Drawing Nos. A100, A101, A102, A103, A-200 rev A, A-201 rev A and 6416/P801.
- 3) No development shall take place until a scheme detailing the provisions to be made for people with mobility and sensory difficulties to gain access to the building has been submitted to and approved in writing by the local planning authority. The building shall not be occupied until the scheme has been implemented in accordance with the approved details, and the provisions for people with mobility and sensory difficulties to gain access to the building shall thereafter be retained.
- 4) The use hereby permitted shall only operate between the hours of 0600 and 2200 hours Mondays to Fridays, 0700 and 1800 hours Saturdays and 0800 and 1500 hours Sundays and Bank Holidays.
- 5) No development shall take place until a Travel Plan has been submitted to and approved in writing by the local planning authority. The development shall thereafter be undertaken in accordance with the approved Travel Plan, which shall be periodically reviewed. A review of the approved Travel Plan shall be submitted to the local planning authority for approval in writing no later than three months after the first occupation of the building, and thereafter every six months.
- 6) The premises shall be used for the provision of education and for no other purpose (including any other purpose in Class D1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification).
- 7) The number of students in the building at any one time shall not exceed 90.
- 8) No development shall take place until an access and parking scheme has been submitted to and approved in writing by the local planning authority. The scheme shall make provision for 6 car parking spaces and cycle storage for the development, along with provisions to facilitate and control setting down and picking up associated with the development. The use hereby permitted shall not commence and the building shall not be occupied until the scheme has been implemented in accordance with the approved details, and the parking spaces, cycle storage and provisions for setting down and picking up shall thereafter be retained.

APPEARANCES

FOR BIRMINGHAM CITY COUNCIL:

| | |
|---------------------------|--------------------------------|
| Tracy Humphreys | Area Planning Manager East. |
| Justin Howell | Senior Planning Officer. |
| Paul Cowen | Principal Development Control. |
| Cllr John Clancy | Birmingham City Council. |
| Cllr Peter Douglas Osborn | Birmingham City Council. |
| Cllr David Willis | Birmingham City Council. |
| Cllr Zafar Iqbal | Birmingham City Council. |

FOR APPELLANT:

| | |
|-------------------------------------|---|
| Peter Leaver MRICS | Director of Jones Lang LaSalle. |
| Marie Rooney | East Birmingham Network Strategic Manager. |
| Amer Waheed BEng(Hons) FIHT FAPM | Director of iPRT Group Transport Planners. |
| Tom Sampson | Project Manger of the Education Funding Agency. |

HEARING STATEMENTS (HS) AND WRITTEN REPRESENTATIONS (WR)

Birmingham Council

HS1 Appeal Statement including Appendices 1 and 2.

Appellant

HS2.1 Hearing Statement on Planning Issues including Appendices 1-8.
HS2.2 Statement on Transportation Issues.
WR2.1 Ofsted advice note.
WR2.2 Ofsted pre-registration regulatory check sheet for EBN Free School, inspection date 13 June 2012.
WR2.3 Risk Assessment for access to outdoor space at EBN Free School.
WR2.4 Evidence re access to safe outdoor play area.
WR2.5 Summary of East Birmingham Network Alternative Provision Free School.
WR2.6 Letters from Birmingham City Council Directorate of Children, Young People and Families dated 10 June 2011 and 14 October 2011.
WR2.7 Transport Statement with Appendices 1-8 and accident statistics.

Other representations

Written representations to the Council at the application stage attached to Questionnaire.

Third party written representations about appeal in Red folder.

DOCUMENTS SUBMITTED AT THE HEARING (HD)

HD1 Notes in respect of the Appeal Statement of BCC.
Enclosure 1 – Alternative providers already operating in Birmingham City with planning permission.
Enclosure 2 – Statement on Transport Issues – Addendum.
Enclosure 3 – Letter from Tesco Stores Ltd dated 24 October 2012.
HD2 Application for costs award.
HD3 Letter from local resident objecting to proposed development.
HD4 Paragraph 6.38 Birmingham Unitary Development Plan.
HD5 Report on Title August 2012 including unsigned lease.



Department for Communities and Local Government

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS;

The decision may be challenged by making an application to the High Court under Section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

Decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged under this section. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application under this section must be made within six weeks from the date of the decision.

SECTION 2: AWARDS OF COSTS

There is no statutory provision for challenging the decision on an application for an award of costs. The procedure is to make an application for Judicial Review.

SECTION 3: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the report of the Inspector's report of the inquiry or hearing within 6 weeks of the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.