

Appeal Decision

Hearing held on 7 September 2016

Site visit made on 7 September 2016

by M Seaton BSc (Hons) DipTP MRTPI

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

Decision date: 28 October 2016

Appeal Ref: APP/P4605/W/16/3143604

Land at the corner of Aston Lane/Wellhead Lane and to the rear of Aston Lane, Perry Barr, Birmingham, B42 2SY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Westleigh Partnerships Limited against the decision of Birmingham City Council.
 - The application Ref 2015/01779/PA, dated 6 March 2015, was refused by notice dated 3 September 2015.
 - The development proposed is a residential development with access.
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Procedural Matters

1. The application has been submitted in outline with all matters reserved at this stage other than access. I have dealt with the appeal on this basis and treated the submitted layout plan as indicative in respect of the reserved matters.
2. A Unilateral Undertaking (UU) dated 6 September 2016 addressing matters related to affordable housing and the provision of a contribution towards public open space was submitted by the appellant at the Hearing. Furthermore, a copy of a brief Statement of Common Ground (SoCG) was also submitted at the event. Since the Hearing a further revised UU dated 21 September 2016 has been submitted, which again provides coverage of the same matters as the earlier iteration. My decision has therefore also taken these additional documents into account, and I will return to these later on within this Decision Letter.

Decision

3. The appeal is dismissed.

Application for costs

4. An application for costs was made prior to the Hearing by the Council against the appellant. However, a further application was made at the Hearing by the appellant against the Council. These applications will be the subject of separate Decisions.

Main Issues

5. The completed SoCG indicates that the appellant and the Council have reached an accord in respect of matters related to the identification of the Development Plan and the constituent parts of relevance to this appeal. It is also indicated
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that the proposals are acceptable in highway terms, and that the principle of the provision of 35% affordable housing and a public open space contribution has now been agreed. Furthermore, I have had regard to the Committee Report which highlighted the Council to also have no concerns in respect of the impact of the redevelopment of the appeal site on archaeology, ecology and trees, flood risk and sustainable urban drainage, and ground contamination.

6. Nevertheless, the SoCG highlights areas of disagreement in that the Council does not accept that the site has been appropriately marketed for employment use to the industrial sector for the requisite period of time, and does not consider that the noise mitigation measures proposed would be acceptable.
7. As a consequence, I consider the main issues to be;
 - whether it has been satisfactorily demonstrated through the marketing of the site that there is not a continued demand for use of the existing site for industrial or employment purposes; and,
 - whether the living conditions of the future occupiers of the proposed development would be harmed, having regard to noise and disturbance, and whether the proposals would as a consequence place unreasonable restrictions on the nearby employment uses.

Reasons

8. The appeal site occupies 1.72 hectares, and comprises previously developed commercial/industrial land, which is broadly level and open having been cleared of all buildings and structures in 2006, but which I observed to currently be substantially overgrown. The land is bounded to the north by a railway line linking Birmingham and Walsall, with a mix of education and commercial land beyond, including the Birmingham Wholesale Markets site. To the east is the rear of existing residential properties on North Road, whilst along the southern boundary are a collection of commercial units including a petrol filling station, a commercial car wash, a job centre, and a classic car business, with Aston Lane beyond. Wellhead Lane is located adjacent to the western boundary, with an engineering business (Tufnol Ltd) on land beyond. The boundaries of the site are defined by a mixture of fencing and brick walls, with access points to Aston Lane towards the south-east corner of the site, and Wellhead Lane to the west.

Loss of industrial land

9. The appeal site is a vacant industrial plot of land, which further to acquisition in 2010 by Euro Foods Ltd, was ultimately not taken forward for commercial development as a consequence of a preferable site becoming available in Walsall. The site is not allocated for development in the saved Birmingham Unitary Development Plan 2005 (the UDP), but applying the means of classification for industrial land as set out at paragraph 4.20, it is agreed that it would be regarded as 'Good Urban'.
10. The Council has highlighted that saved paragraph 4.31 of the UDP identifies that opportunities for industrial development within the built up area are diminishing, and that the loss of industrial sites to retail or other *non-conforming* uses would be resisted. Paragraph 4.21 of the UDP highlights the need to maintain a minimum reservoir of 30 hectares of 'Good Urban' sites, with the latest Industrial Land Supply figures from April 2016 indicating that

the current reservoir stands at about 19.66 hectares, albeit that this would not include the appeal site. In this context, the Council has identified the site as remaining of value as part of the 'Good Urban' reservoir of sites.

11. In support of the UDP policies, the Council has published a Supplementary Planning Document, *Loss of industrial land to alternative uses 2006* (the SPD). Within the SPD, it is identified that brownfield sites are important to future supply as the City's future industrial land will be largely dependent on the recycling of brownfield sites already in industrial use. However, the SPD highlights there to be 3 separate criteria to be met in the consideration of the loss of industrial land to alternative uses. In this respect, there is agreement between the parties that the existing use would not be considered to be non-conforming (i.e. subject to complaints related to the lawful use). Furthermore, no case has been advanced in respect of viability related to an industrial redevelopment of the appeal site. The final criteria relates to active marketing where it is argued there is a lack of demand for a particular site, with the marketing expected to have been undertaken for a reasonable period, indicated as normally being a minimum of two years.
12. In this instance, whilst the appellant has submitted details of the extent of the marketing of the site over an extended period of time, the Council has expressed a number of reservations over the validity of the appellant's submissions in the context of the requirements of the SPD. In particular, the Council has highlighted concerns over whether the marketing undertaken could be regarded as 'active', the duration of the marketing of the site, and whether the site has been appropriately marketed for industrial/commercial use only.
13. The appellant has indicated that over a period dating back to June 2012 that the site has been marketed by various means without success. During this period the appellant has indicated that marketing boards and brochures, advertising, electronic mailers, and portal advertising on Costar have all been utilised as a means of marketing the site. Furthermore, 'soft' advertising in the form of a confidential mailshot to targeted recipients was indicated as having been undertaken.
14. I have had regard to the criticism of the appellant's marketing methods by the Council, and in particular the concerns related to 'soft' marketing. However, I am satisfied that the wide variety of approaches and methodologies employed as a means of promoting and raising awareness of the availability of the site demonstrates that the site has been marketed on an active basis and with a certain degree of creativity in responding to various media and platforms available. Furthermore, I do not consider the definition of 'soft' marketing as described by the appellant in respect of the confidential mailshot, to be inconsistent with the requirement for active marketing.
15. I have noted the Council's assertion that the period of marketing of the site amounted to a maximum of 18 months between November 2013 and April 2015, which would not be in accordance with the SPD. The end date is when it is alleged the site was withdrawn from Costar, and although this is disputed by the appellant, I am not persuaded by the evidence of either party in this respect. Nevertheless, there does not seem to be any dispute that the marketing boards remained on the site beyond this date, and indeed were still in situ at the time of my site visit. Furthermore, I am not persuaded that an indication on the marketing boards that the site was 'under offer' would have

been an active deterrent to further enquiry, a conclusion which would appear to be borne out by the details of continued enquiries during the latter part of 2015 and into 2016. In addition, the submitted evidence indicates that a revised marketing brochure was published in August 2015, with another update in March 2016, as well as listings on various commercial property websites.

16. On this basis, and even allowing for the Council's estimation that the first marketing brochures and boards were not available until early 2014, I am satisfied that the site has been marketed for a period in excess of 2 years. I accept that the headline description of the site in the marketing brochures from 2013 as a '*Mixed Use Land Opportunity*' could reasonably be described as comparatively misleading without reviewing the particulars. However, it is clear from the subsequent descriptions of the site from early 2014 as a '*Development Land Opportunity*', that when taken in combination with the detail of the site highlighted as employment land within the particulars, that it provided a realistic assessment of future potential land use for any prospective purchaser. Furthermore, with regards to the issue of the price of the land, whilst I have noted the Council's contention regarding a Costar listing of £2.5m, which I note is disputed by the appellant, I have not been provided with any conclusive evidence regarding the provenance of the listing or in respect of the setting of an unrealistic price, with the most recent marketing brochure indicating only an invitation for offers.
17. It was contended by the Council at the Hearing that as a consequence of the anticipated development of the High Speed Two (HS2) rail line, up to about 100 occupiers are likely to be looking at relocating, with a written and legally-binding assurance having been given by HS2 Ltd that when relocations are required that efforts will be undertaken to keep companies within Birmingham. However, whilst I am not persuaded on this basis of the certainty that such an assurance provides, I note that the appellant has indicated that despite the continued marketing of the site, there have been no apparent enquiries from businesses likely to be displaced by HS2. Furthermore, no definitive evidence has been provided of specific businesses who are either likely to relocate or who are in the process of doing so. In any event, it was drawn to my attention that the project has not yet received Royal Assent, and in the absence of any definitive information supporting the Council's contention, I do not consider this matter to carry any significant weight.
18. Similarly, the Council has indicated that the opening of the Birmingham Wholesale Markets in early 2017 would also be likely to result in further demand for land within the vicinity for businesses within the food production sector. However, whilst I appreciate that the information related to any emerging interest would be likely to be considered to be commercially sensitive, there is no conclusive or persuasive evidence presented that such an emerging demand is likely to come to fruition.
19. I have noted the appellant's contention that the highway characteristics of the surrounding road network, and the awkward shape of the site have proved to be critical factors in determining the desirability of the site for potential purchasers or occupiers. I have also had regard to matters related to the availability of other land in the vicinity, and in particular on the nearby IM Hub site. However, whilst in respect of the latter point there was no agreement between the parties regarding the precise amount of land available at the time of the Hearing, in light of my conclusion regarding the appropriateness of the

marketing, this and the other matters above are not issues which have proved to be decisive factors in my decision-making.

20. On the balance of the submitted evidence, I am satisfied that the appeal site has been actively and appropriately marketed for a period of in excess of two years as employment land, without success. As a consequence, I conclude that the appellant has provided an adequate demonstration that there is a lack of demand for the continued use of the appeal site for employment purposes. In this respect, I therefore find that the proposals would not conflict with paragraphs 4.13 – 4.32 of the UDP, or the content of the SPD, which seek to maintain and protect the supply of good quality industrial land, whilst allowing the release of redundant industrial sites for which there is no market demand for redevelopment.

Noise and disturbance

21. The principal concerns which have been expressed regarding sources of noise are in respect of the relationship between the proposed residential development and the adjacent railway line to the north, and the Birmingham Wholesale Markets development beyond the railway line, once it is operational. The concerns relate both to the impact of the existing noise sources on the living conditions of the future occupiers of any dwellings on the site, and the potential for restrictions to be placed on the operation of employment premises in the vicinity.
22. In seeking to establish the noise and vibration impacts, I note that appraisals and reports, prepared by Cundall dated March 2015 and April 2015, were submitted with the planning application, with further updated reports submitted during the course of the appeal in May and June 2016.
23. It is clear from the conclusions of the technical noise reports and the evidence of the main parties that there is a general agreement in respect of the methodology undertaken to assess the noise impacts. Furthermore, the Council has accepted the noise data to be representative of the existing noise levels generated by the railway line. There is also no dispute that the relationship between the appeal site and existing and future noise sources would require mitigation. In this respect the technical reports indicate that high specification acoustic glazing coupled with mechanical ventilation would provide a satisfactory internal environment for future occupiers.
24. In light of the Council's disagreement with the appropriateness of the proposed mitigation, I have carefully considered its impact and whether it would adequately safeguard the living conditions of future residents. Having regard to the evidence placed before me, I regard it as reasonable to conclude that the proposed measures would provide a technical basis to ensure that internal noise levels would be within acceptable parameters of 45 dB LAfmax for night-time noise, in accordance with World Health Organisation (WHO) guidelines. However, with regards to the concerns over external noise levels, whilst I have noted the indication that an acoustic fence would be placed along the site boundary with the railway line, I share the Council's concern that the noise levels experienced by residents would have the potential to exceed 55dB LAeq recommended for transport sources as a maximum in accordance with BS8233:2014, '*Guidance in sound insulation and noise reduction in buildings*'. Nevertheless, I accept that this concern must be qualified by the proposals

being in outline at this stage, with the layout and indeed the quantum of development being indicative only.

25. Despite the conclusion on the technical submissions, I have a significant concern over the impact that the proposed mitigation of the noise would have on the overall living conditions of future occupiers. Whilst a reliance on the closed windows units and mechanical ventilation with only occasional purge ventilation would address the technical aspects of the issue, the inclusion of such would undoubtedly diminish the quality of the living conditions available to the affected properties. In this respect I would agree with the Council that it would not be unreasonable for future occupiers of all dwellings to expect to be able to open windows to naturally ventilate their properties for periods in excess of occasional purge ventilation rather than rely on mechanical assistance, in order to maintain a reasonable standard of living conditions. I have been particularly mindful in this regard of the national Planning Practice Guidance which advises that it is undesirable for material changes in behaviour to be caused by noise, such as the need for keeping windows closed for most of the time.
26. In respect of noise from the rail line, the Council has indicated within its statement that no overall objection to rail noise is offered, and I would agree that the character of noise from passing trains would be unlikely to result in significant adverse impacts. However, the particular commercial nature of the Wholesale Markets gives rise for concern in light of its 24-hour operation. These concerns relate particularly to the hours of operation with the commencement of trading at 0330 in the morning, and deliveries throughout the day and up to this time. In this respect, my attention has been drawn to the conclusions of the noise assessment undertaken in connection with the proposed development of the market site, which indicated that significant mitigation in the form of a 5-metre high acoustic noise barrier would be required along the southern boundary of the market site in order to protect the living conditions of existing dwellings. I have also had regard to the Council's acceptance that such measures would be sufficient to safeguard the amenity of existing residential properties.
27. Despite the provision of the approved acoustic mitigation for existing dwellings, I note that the noise barrier does not extend for the entire length of the boundary or seek to mitigate the impact of the market recycling centre within the south-west corner of the market site. This would appear to be due to the appeal site being regarded as commercial at the time of approval, and that there would not as a consequence be any requirement for mitigation along the remainder of the southern boundary.
28. At the Hearing, the possibility of the extension of the acoustic barrier was explored, further to a meeting convened between the main parties in June 2016 where the issue was discussed. However, whilst the Council has conceded that the extension of the noise barrier would provide an appropriate acoustic solution for future residential occupation of the appeal site, Birmingham City Council as the landowner was indicated at the Hearing as not being prepared to entertain an extension as being necessary, even allowing for the appellant's offer to meet the costs of the works. In this respect, it was also concluded between the parties that it would not be possible to secure the occupation or development of the site subject to conditions requiring the provision of such a

barrier, as this would have the potential to leave the development either unoccupied or undeliverable.

29. In the absence of the provision of an extension to the acoustic barrier, I consider that the activities associated with the delivery, unloading and loading of produce within the service yard, as well as the normal anticipated use of the recycling centre would undoubtedly have a great impact on the living conditions of residents were windows to be open during the night or early morning. In this respect, I would concur with the Council that it would be likely that there would be complaints regarding noise generation from the Wholesale Markets, and consequentially this could result in the need to consider restrictions on the business which would be at odds with its 24-hour operation. In this respect, I am mindful of paragraph 123 of the Framework which states that planning policies and decisions should aim to recognise that development will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established.
30. I acknowledge there to be other sources of noise which have been assessed within the vicinity such as that arising from the surrounding roads, the nearby car wash, and Tufnol Ltd. to the west. Furthermore, the Council has also undertaken its own assessment of the noise impact of the nearby classic car business (Leacy's Classics). However, whilst I have had regard to the submissions in respect of these sources, I do not consider these to have more than a low impact which I am satisfied could be adequately mitigated.
31. My attention has also been drawn to the relationship between the existing Wholesale Markets and surrounding residential development in the Digbeth area of Central Birmingham. However, whilst I noted the proximity of existing residential development to the current site, I do not consider the location adjacent to the city centre in respect of the existing noise environment to be directly comparable to that of the appeal site due to the differences in night-time activity. I also do not have any detailed comparative technical evidence before me in respect of the existing Wholesale Markets, or full details of the circumstances related to the decision-making for the residential development referred to in the vicinity.
32. I have also had regard to the references made to a previous appeal decision in Crewe, where the Inspector held the use of mechanical ventilation to be acceptable. However, whilst I have noted the conclusions reached in that instance, the Decision Letter pre-dated the more recent publication of the advice in the national Planning Practice Guidance regarding the undesirability of development resulting in material changes in behaviour in respect of noise, which I have already referred to above.
33. Turning to the issue of vibration from the adjoining rail line, I note that the submitted technical assessment has been prepared in accordance with the guidance within *BS6472:2008 'Guide to evaluation of human exposure to vibration in buildings – Part 1: Vibration sources other than blasting'*. The assessment has concluded that the daytime and night-time Vibration Dose Values, when compared to the British Standard, would not result in an adverse impact on future residents of the proposed scheme, and that no anti-vibration mitigation measures would be required. I note that the Council has agreed with this conclusion, and for which I also have no reason to dispute.

34. In reaching my conclusions, I have carefully considered whether the proposed mitigation would result in a satisfactory resolution of the outstanding issue. Whilst I am satisfied that matters related to vibration have been appropriately assessed and would not result in an adverse impact, I am not persuaded that the proposed incorporation of noise mitigation measures detailed above would result in an acceptable standard of living conditions for future occupiers. Furthermore, I consider that the proposed residential use of the appeal site would be likely to result in unreasonable restrictions being placed on the nature of the operations of the Birmingham Wholesale Markets. As a consequence, the proposal would therefore not accord with saved paragraphs 3.8, 3.10, 4.13 – 4.32, and 5.25C of the UDP, which seek to resist proposals which would have an adverse impact on the quality of the built environment, whilst requiring account to be taken of the suitability of brownfield land for new housing development. Furthermore, the proposed development would conflict with paragraph 123 of the Framework as the change in the land use would be likely to place unreasonable restrictions, in terms of noise and disturbance, on Birmingham Wholesale Markets.

Other material considerations

35. In addition to the main issues addressed above, interested parties have also raised representations regarding a number of other issues, including highway matters, the suitability of existing schools to cope with the proposed development, and the possibility of contaminated land on the appeal site.
36. In respect of highway matters, I noted there to be congestion on Aston Lane during the course of my site visit, but that the access would be taken on to Wellhead Lane. The appellant has provided a Transport Assessment (TA) based upon an indicative quantum of 95 dwellings, which I consider is likely to represent a worst-case scenario. In this respect, I note that the Council's Highways Team has not raised any objections to the conclusions of the TA, which include assumptions made regarding trip generation for the proposed development, and that any increase in existing levels of congestion would be modest. The TA also assesses that a junction on to Wellhead Lane would benefit from an appropriate level of visibility, taking into account the monitored speed of vehicles, and that it would be possible to maintain the safe operation of any junction through the use of appropriate mitigation measures on the highway itself. The TA concludes that the proposal would be acceptable in terms of highway safety and that it would be possible to achieve an appropriate level of parking on the appeal site. In the absence of any technical evidence to the contrary, I have no reason to dispute these conclusions.
37. Turning to the matters of the impact on existing infrastructure in respect of available capacity within local primary and secondary schools, no detailed evidence has been submitted in respect of this point and I am mindful that this was not an issue referred to by the Council in their reasons for refusal. In respect of the potential for ground contamination from the previous use of the site, I am satisfied that such matters could be adequately addressed by a suitable planning condition. I am not therefore persuaded on this basis that these are matters which would direct me to refuse the appeal.
38. I have noted the location of a sycamore within the south-west corner of the site adjacent to the Job Centre, which is identified as being protected by a Tree Preservation Order (TPO). However, whilst I have had regard to the current

indicative layout of the proposed development, I am mindful that the Council has not raised any objection to the loss of this category C tree, subject to appropriate tree planting within any approved development, which is a conclusion with which I would agree.

Planning Benefits

39. The Council has indicated that it is able to demonstrate a 5.6 year supply of deliverable housing sites, but I am mindful from the evidence that it must deliver a shortfall of 89,000 homes by 2031, which it is indicated would include the release of previously undeveloped and Green Belt land. In this respect, the proposed development would result in the contribution of up to 95 dwellings towards the delivery of housing in the City and towards the long-term housing requirement. This would accord with the underlying objective of Chapter 6 of the Framework, which is to seek and significantly boost the supply of housing, and ensure choice and competition in the market for land for housing. Whilst the appeal site has not been allocated for housing, it occupies an accessible location with regards to its access to services, facilities and a variety of modes of transport, and would therefore make a positive social contribution of additional housing within the area, which would clearly weigh in support of the proposed development.
40. I have noted that the initial expectation of the appellant is that the scheme would provide 100% affordable housing, but that a UU securing a minimum of 35% affordable housing as well as defining the proportion of affordable rented dwellings and intermediate affordable dwellings, has been submitted. I am satisfied that the need for the provision meets the requirements of the tests in Regulation 122 of the Community Infrastructure Levy Regulations 2010, being necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. Furthermore, even if only 35% of the final number of dwellings were to be provided as affordable units, this would clearly represent positive social weight in support of the proposals.
41. Further to the additions to the local housing market, the proposed development would also provide some limited economic benefit as a result of the opportunities for the creation of employment from the construction of the dwellings, as well as the potential for resultant training opportunities in the local area. I am also satisfied that the development would provide some support to existing local services.
42. The effective reuse of previously developed land would attract moderate weight in support of the proposed development from an environmental standpoint.
43. Whilst I have had regard to the contention that provision of a contribution towards public open space and children's play would also be a planning benefit, I am mindful that any contribution is indicated to be subject to viability, and would ultimately address the level of requirement generated by the quantum of the proposals. I do not therefore give this any weight as a planning benefit.

Planning Balance and Conclusion

44. I have concluded that the appeal site is situated within an accessible and sustainable location for new development, and represents an effective re-use of previously developed land, for which it has been adequately demonstrated

there is no longer a requirement for employment use. The proposed development would provide additional housing within the local market as well as economic benefits related to the construction and future occupation. Furthermore, the provision of affordable housing would, dependent on the level of provision, provide limited to moderate weight in support of the proposals.

45. However, I must attach substantial weight to the harm which would be caused to the living conditions of future occupiers having regard to noise and disturbance, and as a consequence the unreasonable restrictions that would be likely to be placed on the operation of the Birmingham Wholesale Markets, contrary to the Development Plan and the economic and environmental roles of sustainable development as set out within the Framework.
46. Overall, and having regard to all other matters raised and the economic, social and environmental dimensions of sustainable development set out in paragraph 7 of the Framework, I conclude that the scheme does not represent sustainable development. I therefore conclude that the harm likely to be caused by the proposal would outweigh the benefits of the proposed development, and that for the reasons given above, the appeal should be dismissed.

M Seaton

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Debbie Farrington	Cerda Planning
Keri Dobson	Dobson Grey
Mark Evans	Cundall
Olivia Jayne Hoare	Westleigh Partnerships
Tim Hart	Westleigh Partnerships

FOR THE LOCAL PLANNING AUTHORITY:

Stuart Morgans	Planning & Regeneration, Birmingham City Council
Jacob Bonehill	Planning & Regeneration, Birmingham City Council
Greg Jambor	Environmental Health, Birmingham City Council
Charles Spicer	Savills (on behalf of Birmingham City Council).

DOCUMENTS SUBMITTED AT AND FOLLOWING THE HEARING

Agreed Statement of Common Ground (submitted at the Hearing)

A Unilateral Undertaking dated 6 September 2016 (submitted at the Hearing)

A Unilateral Undertaking dated 21 September 2016 (submitted after the Hearing)