



Appeal Decision

Hearing Held on 19 July 2017

Site visit made on 19 July 2017

by Paul Singleton BSc (Hons) MA MRTPI

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

Decision date: 22 August 2017

Appeal Ref: APP/U5360/W/16/3165861 9-15 Helmsley Place, London E8 3SB

- 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 Mexpro Trading Ltd against the decision of the Council of the London Borough of Hackney.
 - The application Ref 2016/1885, dated 19 May 2016, was refused by notice dated 21 September 2016.
 - The development proposed is erection of part 1, part 2, part 3 storey roof extension to existing 2 storey warehouse building in order to provide 8 No. residential units (5x3 bed and 3x2 bed) together with change of use of the ground and first floor from B8 (storage and distribution) to B1 (office) plus single storey side extension to the north elevation, two storey side extension to the south elevation and basement excavation in order to provide additional commercial floorspace.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. A Statement of Common Ground has been agreed between the main parties and I have had regard to this in reaching my decision. A signed Unilateral Undertaking (UU) prepared under S106 of the Town and Country Planning Act 1990 (1990 Act) has been submitted by the appellant. This document is considered under the 'Other Matters' heading within this decision.

Main Issues

3. The main issues are:
 - (a) The effect on the living conditions of the future occupiers of the proposed residential units having regard to noise, disturbance, odour and dust; and
 - (b) The effect of the residential component of the proposed development on the current and future operation of the adjacent Locally Significant Industrial Site (LSIS).

Reasons

Living conditions

4. The appellant's Dust and Odour Assessment concludes that the effects of odour and dust from nearby industrial/commercial users on the future occupiers of the flats would be negligible. The Noise Ingress Assessment concludes that, with existing background noise levels, acceptable noise limits could be achieved in all of the proposed flats in accordance with BS 8233. The recommended standards would be exceeded in the flats facing Helmsley Place when windows are open. However, the installation of appropriate alternative ventilation would provide residents with the choice of keeping their windows closed if and when disturbed by noise. The assessment concludes that noise levels within the proposed external amenity spaces, at around $L_{Aeq,16hr}$ 61 dB on a weekday, would not be unusually high for an inner London location.
5. The Council accepts that the noise conditions with windows open and at the external amenity areas would be similar to those at other nearby residential developments and that the necessary noise insulation could be achieved by means of a planning condition. It also accepts the findings of the Odour and Dust Assessment and that no mitigation is required in respect of these matters. Whilst it agrees that no unacceptable effects would arise from the existing use and operation of units within the Mare Street LSIS the Council contends that future changes of use within those units could give rise to such effects. It is this concern that underpins the second reason for refusal.
6. The draft North London Waste Local Plan (NLWLP) designates part of the LSIS for waste use but expressly excludes a range of waste operations that would be most likely to give rise to significant emissions to air. The draft designation provides for processing and recycling of waste but any such operation would most likely be regulated by a waste management licence or Environmental Permit. In my experience, adequate measures to prevent or strictly control odour and dust would need to be demonstrated before such a licence or permit is issued. Other, non-waste related industrial users would need to ensure appropriate measures to protect workers and prevent the release of dust and odour to the air if the processes and equipment involved were likely to give rise to such emissions.
7. Also of relevance is Policy DM18 of the London Borough of Hackney Development Management Local Plan (2015) (DMLP). The supporting text to that policy notes that railway arches provide good sites for some of the 'heavier' type industries, such as B2 and B8 uses. The policy provides positive support for the use of railway arches for B1, B2, B8 and similar sui generis uses but states that proposals "*must not cause adverse environmental, highway or amenity impacts to other uses within the surrounding area*".
8. That this requirement is set out in such clear terms is an acknowledgement that such uses can give rise to amenity concerns. The proper application of this policy would require that planning permission for a change of use should be granted only where the applicant can demonstrate that the proposed use would not have unacceptable effects on the living conditions of occupiers of nearby residential properties. This policy requirement would also protect the future residents of the appeal scheme from any adverse effects of dust, odour,

- noise or other disturbance resulting from any change of use of any of the railway arches that requires planning permission.
9. Syntegra's dispersion model shows that dust from operations within the yards to the railway arches would affect existing apartments on Mentmore Terrace equally as much as those proposed in the appeal scheme (Figure 4). All of the arches extend through to Mentmore Terrace and most have a roller door or other means of access from that street and there is some existing extraction equipment on that elevation. There are existing residential properties on Lamb Lane and immediately adjacent to the appeal site at No. 18 Helmsley Place. The rear gardens to Nos. 35-38 London Fields also extend through to Helmsley Place.
 10. Given the close proximity of these existing residential properties to the railway arches and their yard areas it seems highly unlikely that a licence or permit for a waste or industrial operation with the potential to generate emissions to air would be granted unless the relevant regulatory authority was satisfied that the amenity of those existing dwellings would not be harmed by adverse odour and dust effects. Any incoming operator that could satisfy those requirements would pose little risk of harm to the occupiers of the proposed flats through dust or odour emissions.
 11. The waste management licence for the metal recycling use within Arch 377 limits its hours of operation to 07.00 to 16.00 on Mondays to Fridays and 08.00 to 12.00 on Saturdays. These hours are compatible with a location close to residential dwellings and the parties agree that the restrictions were most likely imposed to protect the amenity of nearby residents. The use is not a significant source of dust or odour and it can be assumed that those granting the licence were mainly concerned with the potential effect of noise from operations within the arch and yard area and from the comings and goings of delivery vehicles. The operator adheres to the permitted hours and there is no record of complaints of noise or other disturbance from the premises.
 12. Since that use commenced, in around 1992, the residential properties on Lamb Lane and London Fields have been added to by the new dwelling at No. 18 Helmsley Place and a large number of apartments on Mentmore Terrace. The Council contends that these apartments would have less exposure to noise disturbance but there are entrances from Mentmore Terrace to nearly all of the arches which appear to be used for access and/or ventilation purposes. These accesses would represent a significant risk of noise break-out from machinery or operations that might otherwise be contained within the arch.
 13. For these reasons I consider that any industrial or waste user with the potential for causing such emissions would be required to demonstrate that the use would not have unacceptable noise effects on existing residential properties on both sides of the viaduct in order to secure the necessary planning permission and/or licence or permit. I also consider it likely that any permission or permit granted would be subject to restrictions on the hours of operation and servicing to protect the amenity of the existing residential properties. Such occupiers would not be likely to have a significant effect on noise levels in the evening and at night time when the railway would continue to be the predominant noise source. Any incoming use that meets those requirements would have very limited potential to cause unacceptable noise disturbance to the future occupiers of the proposed flats.

14. A noticeable increase in noise levels from the LSIS would only arise if there is a doubling of existing background levels as recorded in the noise survey. Given the requirements of DMLP Policy DM18 and the likelihood that most operations with the potential to create significant noise would be subject to other regulatory control there is a very limited prospect that such an increase would occur. However, even if such an increase was to be experienced it would affect only those apartments with windows facing onto Helmsley Place. The provision of double glazing as part of the initial construction works would future proof those flats in terms of providing additional protection should it be needed at a later date. Given that only 4 flats would require this treatment this would not be an unreasonable burden on the developer.
15. The flats facing east would be set back from the ground floor elevation of the building. The existing dwelling at No. 18 Helmsley Place is a similar distance from the face of the arches and many of the apartments on Mentmore Terrace are slightly closer. These 4 flats might potentially be affected by noise from the coming and going of delivery vehicles and any loading or servicing activities in the yard areas but I do not consider that they would be significantly more exposed to such disturbance than the existing dwelling at No. 18 or the houses on Lamb Lane. The installation of double glazing to these apartments would provide additional insurance in that respect.
16. Accordingly, I find that no significant harm to the living conditions of the future occupiers of the proposed flats would result from likely future changes of use within the LSIS. Adequate mitigation of the small risk of such harm could be secured by the measures already agreed and the installation of double glazing to the flats facing Helmsley Place. The proposal is, therefore, consistent with Policy DM2 of the DMLP, which seeks to ensure an acceptable level of amenity for occupiers of residential development, and with Policies 3.5, 7.14 and 7.15 of the London Plan (2016) with regard to the protection of residential occupiers from adverse noise and air pollution.

LSIS

17. Policy 17 of the London Borough of Hackney Core Strategy (2010) (CS) identifies the Mare Street LSIS as one of 3 categories of area which are the preferred locations for waste management and recycling facilities, industrial, manufacturing, and specifically for general industry (B2) and storage and distribution (B8). Only 4 of the 10 units within the northern part of the LSIS are currently used for Class B2 or B8 uses or for other purposes that might be considered to fall within the list of preferred uses. The other existing uses comprise a range of leisure and service outlets that reflect the wider pattern of regeneration across this part of Hackney.
18. I have already found that the living conditions of the occupiers of the proposed flats would not be harmed by reason of noise, dust or odour effects resulting from the existing uses within this part of the LSIS. There is, therefore, no reason to conclude that the development and occupation of those flats would give rise to complaints or pressure on the Council or the Environment Agency to seek additional controls over operations within the LSIS. There would, accordingly, be no adverse effect on the existing operation and business function of the LSIS.
19. The shape and structure of the railway arches would prevent their being used by many larger businesses but they could be suitable for a range of smaller

industrial and business uses and might be perceived as providing cost effective accommodation for such uses. As these arches have external yards they may be more attractive than other railway arches in the Borough to businesses with a requirement for outdoor space for parking, deliveries or storage purposes. The arches do, therefore, have the potential to accommodate a range of industrial and waste related operations that would fit within the Council's list of preferred uses. That potential is not, however, open ended as it is constrained both by the location of the LSIS and its surroundings.

20. Access is physically constrained by the nature of the local road network and the need to pass under the railway viaduct. For these reasons the LSIS is not an easily accessible location for businesses that need regular servicing by large HGVs. Access from either end of Helmsley Place requires delivery vehicles to pass existing residential properties on Lamb Lane and/or Mentmore Terrace and the need to protect those properties may give rise to the requirement for servicing hours restrictions on new users.
21. The close proximity of existing residential properties would serve to restrict future occupiers to those that would not be unneighbourly in terms of noise and other emissions. Although the proposed apartments would face the LSIS the existing dwelling at No.18 Helmsley Place is a similar distance away and, the apartments on Mentmore Terrace would also be exposed to the dust, odour and noise effects generated by any incoming business.
22. The draft NLWLP designation recognises the limitations of the LSIS in this respect by ruling out uses with the greatest potential to lead to harmful emissions. The draft goes no further than to state that a Band C development might be possible but that significant planning issues would require mitigation. As it has not been submitted for examination the draft NLWLP can be given limited weight. However, even if this designation forms part of the final plan, the NLWLP would neither replace nor override DMLP Policy DM18. In addition to the likely need for planning permission any waste use would also be likely to be subject to other regulatory controls by means of a licence or permit.
23. Hence, although the LSIS may continue to have an important role in the economic make up and function of the wider area that contribution must be made within the physical and operational constraints that are already in place. I am not persuaded that the grant of planning permission for the appeal scheme would place any additional constraints on the use of the arches and their yards in terms of the environmental standards that future users would be required to meet.
24. The potential of this part of the LSIS to accommodate the heavier type B2, B8 and other industrial uses is also constrained by the existing non-industrial uses within the arches, some of which would be sensitive to odour and dust effects, if not to adverse noise. The Council states that some of these uses are unauthorised. However, the planning permissions granted by the Council for the dog grooming use and fitness centre, within Arches 375 and 379 respectively, involved a change from B2/B8 use and the loss of accommodation suitable for the Council's preferred uses.
25. These permissions were granted prior to the adoption of the Core Strategy and the area's designation as a LSIS. However, Policy E5 of the former Unitary Development Plan stated a clear presumption against the loss of existing sites and premises from employment use and does not appear to have been any

more flexible than the current policy with regard to proposals that would result in the loss of industrial accommodation to other uses. At the time that permission was granted for the fitness centre, in June 2010, the Core Strategy was also at an advanced stage of preparation. These new uses are now well established and, given the wider pattern of regeneration in the surrounding area, are likely to remain as part of the context against which the acceptability of any incoming industrial or waste related uses would need to be assessed.

26. I conclude that the residential component of the appeal scheme would not unduly compromise the future operation and business function of the LSIS. I therefore find no conflict with CS Policy 17 or its underlying objectives or with London Plan Policies 4.1 and 4.4 which are concerned with ensuring an adequate supply of sites and premises to meet a range of employment needs and to support economic growth.
27. The appeal proposal would increase the amount of commercial floorspace within the building from 1,360 square metres to 2,231 square metres (gross internal). This substantial increase in quantum would be complemented by a significant enhancement in the quality of the commercial floorspace, compared to the basic accommodation that currently exists, that would render it suitable for a much wider range of users. As an employment-led mixed use scheme the proposal both complies and derives positive support from CS Policy 18 as it would contribute to improving the business function and attractiveness of the building. The proposal would, therefore, make a positive contribution to achieving the objectives of that policy.

Other Matters

28. The locally listed, former vicarage is separated from the appeal site by the rear gardens to Nos. 35-38 London Fields, the residential property at No. 18 Helmsley Place and by Lamb Lane itself. Due to this separation and the screening provided by the tall hedge to the front boundary of the former vicarage the proposal would have no effect on the setting of that building.
29. The warehouse building occupies land that was previously part of the gardens to Nos. 31 to 34 London Fields and its construction has significantly altered the original setting of these locally listed properties. As the additional floors to the warehouse would have a stepped profile and would be set back from the rear wall these proposed extensions would not have a harmful effect on the setting of those buildings. The additional floors would project above the ridge of the 2 storey terrace comprising Nos. 33 and 34 London Fields but would be seen against the background of taller buildings to the east of the railway viaduct and would not cause significant additional detriment to the setting of the terrace as experienced in views from London Fields.
30. The removal of the existing northern lights roof and its replacement, in the rear section of the building, with a flat roof would reduce the overall height of the west elevation facing the rear of the London Fields houses. Due to this reduction and the setting back of the extensions the proposed additions would not appear overbearing when viewed from the rear windows and gardens of the adjacent houses. The daylight and sunlight study demonstrates that there would be no significant detriment in terms of a loss of daylight and sunlight to the rear of the houses.

31. The privacy of the adjacent gardens could be protected by means of appropriate screening to the balconies to the flats at the second and third floor levels. The risk of overlooking to the rear gardens of Nos 25-30 and 35-38 London Fields could be mitigated by the use of non-opening windows and obscured glazing to windows in the south and east elevations of the development. There would be some risk of noise disturbance to the occupiers of No. 30 when using their garden because of the close proximity of the enclosed yard area proposed at the south east corner of the site. As discussed at the hearing, that risk could significantly be reduced by means of a planning condition that limits the use of the rear door to the proposed side extension to use for maintenance and emergency exit purposes only.
32. These mitigations could all be secured by means of planning conditions. With these in place I am satisfied that the proposal would not cause unacceptable harm to the living conditions of the occupiers of any nearby residential property.
33. CS Policy 33 seeks to promote sustainable transport across the Borough and DMLP Policy DM 47 states that the Council will expect to see car free and car capped developments in most locations, particularly in those that have a high PTAL rating. With a rating of Level 4 the area in which the appeal site is located is such an area and the parties are agreed that a car free development is needed to comply with these policies. No on-site parking is to be provided but some additional means of discouraging the future occupiers of the development from owning and using private cars is needed to ensure compliance with Policy DM47.
34. The appellant has submitted a signed UU which seeks to achieve that outcome by means of restricting the ability of the future occupiers to apply for on-street parking permits. However, in accordance with recent case law¹ such a restriction would not be a valid obligation under the powers set out in S106 of the 1990 Act as it would not amount to a restriction on the development or use of the land comprised within the appeal site. In my judgement the UU also lacks sufficient detail in respect of how the restrictions could be enforced against subsequent owners and occupiers of the residential flats.
35. The Council and the appellant have subsequently agreed the wording of a Grampian type condition in respect of these matters but, as no draft condition had previously been circulated, the terms of this proposed condition were not discussed at the hearing. Although the draft condition refers to the submission of a 'scheme' for providing a car free development, the restrictions needed to secure this outcome could only be achieved by some formal legal agreement that could subsequently be enforced by the Council. I note that such a condition has been used by the Council in relation to another development proposal but regard must be had to the clear advice set out in the Planning Practice Guidance (PPG).
36. PPG advises that, in exceptional circumstances, a negatively worded planning condition requiring a planning obligation or other agreement to be entered into before certain development is commenced may be appropriate in the case of more complex and strategically important development where there is clear evidence that the delivery of the development would otherwise be at serious

¹ R (oao Khodari) v Kensington and Chelsea RBC [2015] EWHC 4084

risk². Such a condition would need to meet the six test set out in paragraph 206 of the National Planning Policy Framework. PPG also advises that, where consideration is given to the use of such conditions, the heads of terms of the necessary agreement need to be agreed prior to permission being granted to ensure that the test of necessity is met and in the interests of transparency.

37. The appeal proposal is neither a complex nor strategically important development. I have seen no evidence that serious consequences would result from any delay needed to negotiate and agree the terms of an agreement before planning permission is granted. In addition, given the late submission of the draft condition, there appears to have been no meaningful discussion between the parties as to the heads of terms of the agreement that would need to be entered into in order to secure the discharge of the condition. At the present time there is, therefore, no certainty that appropriate and enforceable terms that would meet the relevant tests are likely to be agreed.
38. PPG places strict limitations on the use of negatively worded conditions and the exceptional circumstances needed to justify such a condition have not been established in this case. Accordingly, I find that there is no satisfactory means available to me of ensuring that the proposal would meet the requirements of CS Policy 33 and DMLP Policy DM47. The proposal is, therefore, in conflict with these policies and for this reason the appeal should not be allowed.

Conclusions

39. I find that the Council's reasons for refusal are not substantiated by the evidence. However, I am not satisfied that adequate means are available to ensure the proposal's compliance with the development plan in relation to sustainable transport and the reduction in journeys by private car. For this reason I conclude that the appeal should fail.

Paul Singleton

INSPECTOR

² PPG – Paragraph 010 Reference ID: 21a-010-20140306

APPEARANCES

FOR THE APPELLANT

Greg Dowden	Indigo Planning
Mark Willingale	Willingale Associates
Jethro Redmere	Syntegra Consulting Ltd
Andrew Long	Sandy Brown Associates LLP

FOR THE COUNCIL

Toyin Omodara	Planning Officer
Katie Glasgow	Deputy Manager, Planning Policy

INTERESTED PARTIES

Fiona Roach Canning	Local Resident
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DOCUMENTS SUBMITTED AT THE HEARING

Signed Unilateral Undertaking

Copy of Mayor of London: Housing Supplementary Planning Guidance March 2016

DOCUMENTS SUBMITTED AFTER CLOSURE OF THE HEARING

Copies of relevant development plan policies not provided in advance of the hearing.

Additional draft conditions relating to car free development and the provision of managed workspace.