



Appeal Decision

Site visit made on 21 January 2021

by Cullum J A Parker BA(Hons) MA MRTPI IHBC

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

Decision date: 17 February 2021

Appeal Ref: APP/U2235/W/20/3255982

Hen and Duckhurst Farm, Marden Road, Staplehurst TN12 0PD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by BDW Trading (BDW Kent) against the decision of Maidstone Borough Council.
 - The application Ref 20/500800/FULL, dated 7 February 2020, was refused by notice dated 21 May 2021.
 - The application sought planning permission for *Outline application for the Erection of residential development for up to 250 dwellings with access and garaging with access considered at this stage and all other matters reserved for future consideration* without complying with a condition attached to planning permission Ref 14/502010/OUT, dated 3 February 2017.
 - The condition in dispute is No 20 which states that:
*During the construction period, no construction or deliveries to the site shall take place on Sundays or Bank Holidays or outside the following times:
0800 to 1800 on Mondays to Fridays; and 0900 to 1300 on Saturdays.*
 - The reason given for the condition is: *In the interests of amenities of the occupiers of surrounding properties.*
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Decision

1. The appeal is dismissed.

Background and Main Issue

2. During my unaccompanied site inspection on 21 January 2021, I saw that works have already started on the appeal site.
3. The detailed planning history is outlined in the respective cases, so I do not seek to replicate them here. Put simply, outline planning permission was granted in 2017 for up to 250 dwellings. Condition 20 of that permission sought to restrict construction and deliveries to specific times and days of the week.
4. This appeal seeks the removal of this planning condition so that construction or deliveries can take place at any time. The Appellant considers other regulatory regimes exist which mean that the condition is unnecessary, not relevant to planning nor reasonable in all other aspects.
5. The main issue is, therefore, whether such a condition as imposed meets the 'six tests' as set out in *National Planning Policy Framework* (the Framework) and the national *Planning Practice Guidance* (the PPG).

Reasons

6. Paragraph 55 of the Framework and the PPG set out that conditions should only be imposed where they meet the 'six tests' which are:
 - i) Necessary; ii) Relevant to planning; iii) Relevant to the development to be permitted; iv) Enforceable; v) Precise; and vi) Reasonable in all other respects.
7. I have considered the disputed condition in light of these 'tests'.

Necessary

8. In February 2019, an application (Ref 19/500705/FULL) for varying condition 20 to allow working on Saturday from 8am was submitted and subsequently refused by the Council in August 2019. The Appellant has drawn my attention to the officer report to committee which indicated the officer's view that the condition did not pass 'the relevant legal and policy test' and therefore should be removed on the grounds there is separate environmental protection legislation under 'statutory nuisance' mechanisms.
9. However, statutory nuisance is not intended to secure a high level of amenity per se, but instead it is a basic safeguarding standard intended to deal with excessive emissions. Nuisance does not equate to loss of amenity. Furthermore, significant loss of amenity can often occur at lower levels of emission than constitute statutory nuisance. In such a context it is therefore important to consider properly loss of amenity from emissions in the planning process in its wider context and not just from the narrow perspective of statutory nuisance.
10. In this case, both the planning and environmental health teams have a number of investigations into potential breaches of Condition 20. An Abatement Notice in respect of Statutory Nuisance, dated 16 December 2019, has also been served by the Council. A number of concerns have also been raised by interested parties through this planning application and subsequent appeal stages which further reinforce that there is some loss of amenity that has and would arise from noise and disturbance occurring on the appeal site.
11. Condition 20 seeks to focus activities such as construction and deliveries to 08:00 to 18:00 Monday to Friday and 09:00 to 13:00 on Saturdays. This provides both times and days when occupiers of nearby residential buildings can have some respite from the noise and disturbance arising from the appeal site.
12. Paragraph 127 of the Framework requires that planning decisions ensure that developments create places with a high standard of amenity for existing and future users and Paragraph 180 sets out that new development should be appropriate for its location taking into account the likely effects of pollution on health and living conditions. This is reflected at a local level in Policy DM1 of the *Maidstone Borough Local Plan Adopted October 2017*, which seeks to respect the amenities of occupiers of neighbouring properties and uses.
13. As such, I find that the Condition is necessary in order to protect the living conditions of neighbouring occupiers during the construction phase of the development.

Relevant to Planning

14. The Appellant considers that Policy DM1 is a design policy which applies only to the design and proposed use of the proposal and that this has planning permission. However, as explored in the previous section, Policy DM1 is in line with similar policy set out at a national level which seeks to mitigate or reduce the impact arising from noise and disturbance.
15. Moreover, planning condition 20 specifically relates to the construction phase of the development (including deliveries) which is needed to build the dwellings. In this respect, it seeks to mitigate the impact of the proposal on the living conditions of neighbouring occupiers during the construction phase by focussing construction and delivery hours.
16. As such I consider the condition is relevant to planning as it would relate to planning objectives to protect the living conditions of nearby occupiers and within the scope of the permission.

Relevant to the development to be permitted; Enforceable; and Precise

17. Not only does the condition directly relate to the development permitted, but it is justified by the nature and impact of the development on the living conditions of nearby and neighbouring occupiers. The condition is therefore fairly and reasonably directly related to the development permitted.
18. The local planning authority can detect a breach of the condition. Moreover such detection can be done relatively easily and permit the Council to take action as is open to them to pursue. In this respect it is enforceable.
19. In terms of precision, conditions should be worded so that they can be understood by the Appellant, the local planning authority and interested parties. Ostensibly, the condition must be clear as to what is required. In this case, it clearly permits that no construction takes place between specific times and days and therefore can be considered as precise.

Reasonable in all other respects

20. The condition restricts hours for construction and deliveries so that nearby residents are able to have respite from the noise and disturbance that arises from the development of a site for around 250 dwellings. There is very limited evidence that the limits imposed by the condition place an unjustified or disproportionate burden on the rate at which the proposal is being built out (see also Other Matters below).
21. The appellant draws my attention to the comments of the Environmental Protection Team that the condition is not one that they would ordinarily request as it restricts hours in a blanket way. However, as identified earlier in this decision, there is a distinction between 'nuisance' as considered through an Environmental Health lens, and loss of amenity through the noise and disturbance arising from activities implementing a planning permission.
22. I therefore find that the disputed condition is reasonable in all other respects.

Other Matters

23. Since the application was submitted, the Covid-19 pandemic has occurred. I have taken into account the *Written Ministerial Statement of 13 May 2020*

- (WMS), where the Secretary of State set out various provisions to support the construction and development industry during the pandemic.
24. Of specific relevance the WMS is the requirement of *'local planning authorities to take swift and positive approach to requests for greater flexibility around construction site working hours. This is to ensure that, where appropriate, planning conditions are not a barrier to allowing developers the flexibility necessary to facilitate the safe operation of construction sites during the response to the COVID-19 pandemic and to proceed at pace with work otherwise delayed as a result of COVID-19.'*
25. There is limited evidence before me that the planning condition is a barrier in this case. It is also unclear as to how the pandemic itself has affected the construction of buildings on the specific appeal site. For example, I have not been provided with any detailed schedule that explains the phasing of the site and how removal of the condition would provide the flexibility for work to proceed at pace.
26. Moreover, the WMS was clear that any such arrangements would be temporary; for example *'temporary extensions to working hours might be required on some sites to facilitate safe working and....longer hours may also be needed to facilitate social distancing in the wider community...it might be necessary to start work earlier in the day or work until later in the evenings'*.
27. The proposal in this case seeks the removal of the condition in its entirety. However, I have found that the condition meets the 'six tests' and serves to protect the living conditions of the local community. Whilst mindful of the WMS as a whole, it does not provide justification for the removal of the condition that is sought in this instance.

Conclusion

28. I find that the condition would meet the 'six tests' set out in national policy and guidance in order to mitigate the impact of the proposal on the living conditions of neighbouring occupiers with regard to noise and disturbance. As such its continued imposition is justified in this instance.
29. For the reasons given, above I conclude that the appeal should be dismissed.

Cullum J A Parker

INSPECTOR