



Appeal Decision

Site visit made on 21 June 2021

by David Cross BA(Hons) PgDip(Dist) TechIOA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 July 2021

Appeal Ref: APP/P2935/W/21/3270917

Land at Former Bates Colliery, Cowpen Road, Blyth, Northumberland.

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Matt Smith of Gleeson Regeneration Ltd against the decision of Northumberland County Council.
 - The application Ref 18/03435/VARYCO, dated 25 September 2018, was refused by notice dated 2 October 2020.
 - The application sought planning permission for detailed planning application for erection of 142no. two-storey 2, 3 and 4 bedroom semi and detached dwellings with associated works without complying with a condition attached to planning permission Ref 16/04622/FUL, dated 6 October 2017.
 - The condition in dispute is No 27 which states that: Prior to commencement of the development the applicant shall submit for approval a detailed scheme for an attenuation barrier to plots 11, 17-30, 31-36, 37-74, 75-113. The scheme should include a barrier of brick wall construction and should include its exact height, location and specification, design and acoustic performance. Thereafter the attenuation barrier shall be constructed prior to occupation of these plots and retained for the lifetime of the development.
 - The reason given for the condition is: In the interests of protecting the amenity of future occupants from noise disturbance and loss of privacy.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appellants' name and details vary between the planning application and appeal forms. As the right of appeal rests with the original applicant, I have used the details as given on the application form.
3. I have taken the location of the development from the planning application form as this accurately reflects the proposal.
4. The appellants state that the appeal has been submitted in accordance with S73 of the Act. However, the condition in question is a pre-commencement condition, and the evidence indicates that the development commenced prior to the submission of the application which has led to this appeal. The appeal therefore relates to a proposal where the terms of the condition of the planning permission have been breached by works or development already carried out, which is more appropriately addressed under S73A of the Act. I have

proceeded to determine this appeal on that basis. I consider that no party has been prejudiced by the approach I have taken, as the details in respect of the commencement of development are clearly set out on the planning application form.

Background and Main Issue

5. Planning permission for the development of this housing estate was granted subject to condition No 27, which requires the submission of a scheme for an attenuation barrier. The reason given for the condition refers to the amenity of future occupants in respect of noise disturbance and privacy.
6. However, comments raised locally as well as summaries of the Council's consideration of the proposal refer to the effects of potential complaints from residents on the operation of nearby commercial uses, particularly the Port of Blyth and an associated access road adjacent to the appeal site.
7. On that basis, I consider that the main issue is whether the condition is reasonable or necessary in respect of the living conditions of residents of the proposal with regards to noise and privacy, and the operation of nearby business uses.

Reasons

8. The appeal site is adjacent to an area designated as Port Development Land in the Development Plan. This adjacent land is associated with the Port of Blyth, and is subject to a Local Development Order which grants planning permission for a range of business uses to promote investment in the area. Comments from the Port emphasise that this is an active port terminal which operates 24 hours a day. As well as the Port, there are also a number of other businesses in the vicinity of the site. There is an access road immediately to the north of the appeal site which is within the boundary of the Port, as well as a road to the west which serves the Port and other properties. There are a number of noise generating activities associated with these businesses, including heavy goods vehicle movements to and from the Port.
9. The extant condition refers to a scheme for an attenuation barrier, including a barrier of a brick wall construction. As well as acting as an acoustic screen, this barrier should be of a height which mitigates intervisibility between drivers of vehicles and occupants of dwellings. The appellants propose to vary this condition to refer to the construction of an attenuation fence, rather than a brick wall.
10. It is common ground between the main parties that a fence of a suitable design could provide the same noise attenuation and privacy benefits as a brick wall. Based on the evidence before me, I have no reason to disagree.
11. However, the Council has requested that if the condition is varied then a maintenance agreement for the lifetime of the fence should also be required by condition. A wall would be significantly more robust than a fence, and the Council's Environmental Health consultee states that even a small amount of damage can render the protection provided by an acoustic barrier worthless. Compared to a brick wall, a fence would be much more susceptible to damage as well as potential alterations from residents. A fence would also be much more susceptible to weathering, requiring significantly more commitment to maintenance than a brick wall.

12. The fence would be in place in the interests of the living conditions of residents, and it may therefore not be in the best interests of individual residents to damage the fence or let it fall into disrepair. However, a resident of one plot may undertake unacceptable alterations or fail to maintain the fence, with resultant harm to the living conditions of other residents. The proposed barrier would also be higher than a typical domestic fence, which would add to the difficulties for individual property owners to maintain their extent of the fence.
13. The appellants refer to the potential for a retention clause in a condition, where the fence should be retained for the lifetime of the development. They contend that this would give the Council the opportunity to enforce against a change in the barrier should it so wish. However, I am mindful that enforcement action is discretionary, and due to the relative vulnerability of a fence to damage and weathering I consider a more proactive approach should be taken to maintenance rather than relying on enforcement. The approach suggested by the appellants would not give a suitable degree of certainty to the Port of Blyth that its operations could continue without undue constraints being placed upon it as a result of upheld complaints from nearby residents. The appellants reference to the Port taking up the issue of repairs as a civil matter rather than a planning matter only adds to my concerns in respect of uncertainty and the effect on the operations of the Port.
14. Evidence¹ provided by the appellants indicates that even if Port activities were to double then the noise levels would still remain comfortably within guideline limits. However, this is with the barrier proposals in place, which emphasises the importance of an effective acoustic barrier on the future operations of the Port.
15. To ensure that the fence would retain its function as an effective noise barrier, I consider that a maintenance scheme is necessary and relevant to planning. That said, I have some concerns in respect of the other tests in paragraph 55 of the National Planning Policy Framework (the Framework). A maintenance scheme has only been referred to in general terms, and the Council has not indicated what measures this should include. Maintenance may also require access to land owned or controlled by third parties, including the Port of Blyth. The Port has referred to national security legislation which would prevent access to their side of the fence, which would mean that a condition in respect of maintenance would not be enforceable or reasonable in other respects. Therefore, whilst I consider that a condition requiring a maintenance scheme would be necessary, relevant to planning and to the development permitted; based on the evidence before me, it would not meet other tests in paragraph 55 of the Framework, including being precise and enforceable.
16. The appellants also consider that the fence can be replaced and repaired from the landowner's side without needing access to neighbouring land. However, it has not been demonstrated how this would be feasible or if it would enable ongoing maintenance to address weathering.
17. The extant condition does not refer to a maintenance scheme for the wall. However, due to the more robust construction of a wall and the minimal maintenance requirements, I consider that a maintenance scheme would not be required. The appellants refer to the costs of repairing a wall compared to a

¹ Planning Noise Assessment ref. RK2975/19063/Rev 2 - section 7

fence, but due to the robust nature of a wall such substantial repairs are likely to be very infrequent at worst.

18. The appellants refer to condition 1 of the planning permission, which requires that the development be carried out in complete accordance with a number of plans and documents, including a Noise Assessment which refers to an acoustic fence. However, it is not unusual for there to be a minor conflict between different detailed elements of a planning application. The requirement for a brick wall in condition 27 does not therefore render the condition unenforceable. Moreover, the provisions of condition 1 do not prevent the submission of a maintenance scheme in respect of a fence.
19. Condition 27 refers to the submission of a scheme for an attenuation barrier to a range of plot numbers, including some which are not on the edge of the estate. However, I consider that the list of plot numbers is not prescriptive, and the omission of a barrier where it is not required can be addressed as part of the approval of the scheme. The wording of the condition therefore meets the tests of paragraph 55 of the Framework, including in respect of being precise.
20. The evidence suggests that the Council has accepted the provision of a fence as a noise attenuation barrier without a maintenance scheme on other parts of the estate adjacent to commercial uses. However, it has not been demonstrated that these other adjacent uses are of a scale or nature similar to the Port of Blyth, or raise constraints such as security matters in respect of access.
21. The appellants refer to housing developments elsewhere which have used an acoustic fence adjacent to highways without the need for a maintenance scheme. However, the effect of upheld noise complaints would be unlikely to fetter the use of a public road or motorway, as opposed to an individual commercial operation such as the Port. The circumstances of those other developments are therefore materially different to the appeal before me.
22. Drawing the above together, I conclude that the condition is reasonable and necessary in the interests of the living conditions of residents of the proposal with regards to noise and privacy, and the operation of nearby business uses. Whilst a fence may achieve the same benefits, I have concluded that a maintenance scheme would be required and it has not been demonstrated that this can be achieved by a planning condition. The variation of the condition would therefore conflict with policies DC1 and DC27 of the Development Control Policies² and policy H21 of the Local Plan³ with regards to achieving a high standard of design which takes account of adjacent land uses and the amenity of residents. These policies are broadly consistent with the Framework in respect of building a strong economy and achieving a good standard of amenity for existing and future users.

Other Matters

23. The Council states that condition 27 should remain as approved, but has requested that it is amended to reflect the fact that works have commenced. However, it has not been clearly set out which of the other conditions on the permission have been discharged, including a number of other pre-commencement conditions. If I was to change the wording of condition 27,

² Blyth Valley Development Control Policies 2007

³ Blyth Valley District Local Plan 1999

there is insufficient evidence to enable me to consider whether other conditions continue to have effect, should be varied or removed. Given the uncertainty about other pre-commencement conditions, and in the knowledge that the subject condition has been breached, this raises issues about whether there has been a wider breach of conditions precedent and indeed whether any such potential breaches would go to the heart of the planning permission. In any event, there are other options open to the Council to address this issue, including enforcement, and on that basis it is not necessary for me to vary the condition and I have therefore not chosen to do so.

24. I have had regard to the sequence of events set out by the appellants which led to the reference to a brick wall in the condition. However, this does not lead me to a different conclusion in respect of the characteristics of an acoustic fence or the requirement for a maintenance scheme.

Conclusion

25. For the reasons given above, I conclude that the appeal should be dismissed.

David Cross

INSPECTOR