



Appeal Decision

Site visit made on 20 April 2021

by John Dowsett MA DipURP DipUD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19th July 2021

Appeal Ref: APP/M4510/W/21/3267023

107 Northumberland Street, Newcastle-upon-Tyne NE1 7AG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Article 3(1) and Part 3, Class O of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
 - The appeal is made by Maymask (121) Limited against the decision of Newcastle-upon-Tyne City Council.
 - The application Ref: 2020/1094/01/NRE, dated 28 July 2020, was refused by notice dated 30 September 2020.
 - The development proposed is described as: Change of use of first and second floors from office accommodation to four apartments.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Maymask (121) Limited against Newcastle-upon-Tyne City Council. This application is the subject of a separate Decision.

Procedural matters

3. The application form describes the appeal proposal as: 'Change of use of first and second floors from office accommodation to four apartments'. Whilst the decision notice issued by the Council uses the description 'Change of use of offices (Class B1a) to three residential dwellings (Class C3)', it is clear from the submissions and the drawings submitted with the application that the proposal relates to the creation of four flats within the upper floors of the appeal building. I have therefore considered the appeal on that basis.
4. The appellants submitted amended drawings with their appeal submission showing communal refuse storage within the building. Although these drawings were not before the Council at the time the application was determined, the Council has commented on these as part of their appeal submissions and, consequently, I do not consider that the interests of any parties would be prejudiced by accepting these.

Main Issues

5. The main issues in this appeal are:

- The effect of noise from nearby commercial premises on the future occupiers of the proposed development; and
- Whether the proposed development makes suitable provision for refuse storage.

Reasons

6. Class O of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), hereinafter the GPDO, grants planning permission in certain circumstances for the change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwelling houses). It is common ground that the appeal site is not within a safety hazard area or military explosives area, nor is the building a listed building or scheduled monument, which are instances where the development would not be permitted by the GPDO.
7. Class O also sets out that development is not permitted where the building was not used, or has been last used, for a use falling within Class B1(a) on 29th May 2013.
8. In the application for prior approval the appellant states that the first and second floors of the building have historically been occupied as a Class B1(a) use before falling vacant approximately 5 years before the application was made. This notwithstanding, the supporting statement to the application sets out that when the appellant acquired the building the upper floors were let to a recruitment agency.
9. In its Statement of Case, the Council sets out what it considers to be the relevant planning history of the appeal building, stating that in 1994 planning permission was granted for a change of use of the first and second floor of the building to Use Class A2 as an employment agency office and notes that this permission was implemented with reference to the prior notification application supporting information which, as noted above, confirms that when the appellant acquired the premises in 2007 the upper floors were leased to a recruitment agency. The Council also sets out that there has been no subsequent application or permission to change the use of the premises to Use Class B1(a).
10. The Planning Officer's report makes no mention of the current lawful use of the building in its assessment of the proposal and the Council does not argue in its appeal submissions that the proposal falls outside the scope of the permitted development rights set out in Part 3, Class O of Schedule 2 of the GPDO.
11. In order to benefit from permitted development rights a proposal must meet all of the requirements of the relevant provisions of the GPDO. Class O does not permit a change of use from Use Class A2 to Use Class C3. An application for prior approval cannot authorise development that does not otherwise meet the qualifying criteria and a developer seeking prior approval ought to have come to their own conclusion that the proposed development would be permitted by the GPDO subject to compliance with all relevant limitations and conditions.

12. Neither party has submitted any substantive evidence that would clarify the lawful use of the premises. This notwithstanding, the Council determined the application and did not refuse prior approval on the grounds that the proposal would not be permitted development, nor has it argued this point as part of its appeal submissions. When it considered the application for prior approval, the Council appears to have accepted that it fell within the scope of Part 3, Class O. As I have dismissed the appeal for another reason, this matter is ultimately not determinative, nor would it lead me to a different overall conclusion. Consequently, I have not considered it further.
13. Planning permission granted by Part 3, Class O of the GPDO is subject to a condition that, before beginning the development, an application is made to the local planning authority for a determination as to whether the prior approval of the authority will be required in respect of the transport and highways impacts of the development; contamination risks on the site; flooding risks on the site; and the impacts of noise from commercial premises on the intended occupiers of the development. Changes to the GPDO which came into force on 1 August 2020¹ added an additional prior approval matter to Class O, namely the provision of adequate natural light in all habitable rooms of the dwelling houses, however, this is subject to transitional provisions and does not apply to applications made before the changes came into force. The appeal proposal was submitted prior to 1 August 2020.
14. The Council resolved that its prior approval was required, and that prior approval should be refused. Two reasons for refusal were given, relating to the impact of noise from nearby commercial premises on the future occupiers and in respect of the provision of suitable arrangements for refuse storage. It is common ground that there are no flood risk or land contamination issues in respect of the proposal. From what I have read and from what I observed during the site visit, I have no reason to find differently.

The effect of noise on the future occupiers

15. Paragraph 127 of the National Planning Policy Framework (the Framework) expects new development to provide a high standard of amenity for the future users. Paragraph 180 of the Framework expects development to mitigate and reduce to a minimum potential adverse impacts resulting from noise, whilst Paragraph 182 seeks to ensure that new development can be effectively integrated with existing businesses and community facilities, and that such businesses should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Paragraph 182 further states that where the operation of an existing business would have a significant effect on new development nearby, the applicant/appellant should be required to provide suitable mitigation as part of the development.
16. The appeal building is located on a main shopping street in central Newcastle. The ground floor of the building is occupied by a restaurant and takeaway. At the time of site visit, some restrictions were still in place due to the coronavirus pandemic, although non-essential shops were open. As a result, the level of pedestrian activity on Northumberland Street was lower than might usually be the case for a principal shopping street.

¹ SI 2020 No.632 The Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020.

17. To the rear of the building is a narrow shared service lane leading from a larger service yard area. On the rear elevation of the appeal building there are a number of air handling units associated with the ground floor restaurant use and a large flue for an extractor unit rises the full height of the building. Opposite the rear elevation of the appeal building, two large flues are present on the Marks and Spencer building and several other nearby buildings also have air handling units.
18. The application was supported by two Noise Impact Assessments. Both of these concluded that without mitigation, internal noise levels within the building would exceed the recommended levels. The Noise Impact Assessments identified the most significant noise sources were the extraction and air handling units to the rear of the appeal building, both those attached to the appeal building itself and those on nearby units. Activities on Northumberland Street were, however, also identified as a major noise source. When I visited the site, I noted that to the rear of the building the external noise levels were particularly high, primarily due to the extraction equipment on the Marks and Spencer building. I also noted that this noise was clearly audible within the appeal building. At the front of the building, some noise from passers-by and, in particular, amplified music from Northumberland Street was also clearly audible inside. Noise transmission from activities in the ground floor restaurant was not obvious, although as the site visit was relatively early in the day and some coronavirus restrictions were still in force, allowing for the sale of takeaway food only, the premises were not busy. There was, however, a notable vibration in a first floor rear room, adjacent to the extractor flue for the restaurant attached to the rear elevation, that caused fittings within the room to rattle.
19. Whilst both Noise Impact Assessments conclude that it is theoretically possible to provide adequate attenuation against noise, and this is not disputed by the Council, neither assessment includes a detailed design specification that could be implemented. In particular, whilst glazing specifications are suggested, there is no specification for the complete window design. Nor is there any indication of the treatment of the glazed fire escape door at the second floor rear of the building. Neither assessment contains a detailed specification for any mechanical ventilation which may be required, or an assessment of how this may affect internal noise levels. The submitted drawings do not show any of the proposed noise attenuation works.
20. Whilst the appellants Statement of Case asserts that the proposed windows would be, sealed, non-openable, units, this specification is not included in either of the submitted noise assessments, or shown on the submitted drawings. Both conditions suggested by the appellant in order to overcome the reason for refusal refer to the provision of non-openable windows which indicates that these were not contained within the specification.
21. Although the Council has raised concerns regarding the use of fixed windows in respect of the living conditions of the future occupiers more generally, there is no formal policy basis in the Framework that precludes the use of sealed windows and this approach is commonly used to mitigate noise. Whilst there may be psychological effects on some individuals from living in a sealed environment, there is little substantiated evidence that supports the contention that the use of non-openable windows automatically results in poor living conditions.

22. This notwithstanding, the matter at issue in this case is whether the proposal would suitably mitigate noise from nearby commercial premises in order to address the requirements of the GPDO and the Framework.
23. Whilst both noise assessments state that the conclusions are drawn on the basis of windows being closed, neither explicitly specifies the use of sealed, non-openable windows, and both state that if the windows were opened for the purposes of purge ventilation, internal noise levels would exceed the recommended levels.
24. Taken as a whole, the details that were submitted with the prior approval application do not demonstrate that the proposed development would provide suitable living conditions for the future occupiers of the dwellings in terms of mitigation of noise from nearby commercial premises.
25. The appellant has suggested that a condition could be imposed requiring either the implementation of the recommendations in the second Noise Impact Assessment or requiring a noise mitigation strategy to be submitted for approval. Paragraph W of Schedule 2, Part 3 to the GPDO does allow for conditions that are reasonably related to the subject matter of the prior approval. Although this may allow for a condition that requires the implementation of a previously submitted detailed noise mitigation scheme, neither of the submitted Noise Impact Assessments set out a comprehensive mitigation scheme that would be capable of being implemented without further details being provided and assessed. The matter of noise mitigation is, in itself, a condition of the development permitted by the GPDO, which must be satisfied through the prior approval process and is one of the principal matters in dispute in this case. To impose a further condition requiring the submission of a noise mitigation and ventilation strategy would effectively re-open, or by-pass, the prior approval process. In these circumstances it would not be appropriate to impose such a condition.
26. My attention has been drawn to several appeal decisions relating to changes of use to residential accommodation. I do not have the full details of these cases before me. However, I note that in the case of the proposed development at 41 Groat Market² the accuracy of the submitted noise assessment was questioned by the Inspector. I also note that the Inspector who determined the appeal at 50 Clayton Street West³ reached a similar conclusion to my findings in the appeal at Frederick Street in Birmingham⁴, namely that an otherwise effective noise mitigation scheme was fatally compromised by the ability of the occupiers to open windows in the building. From the decision letter that has been provided, the case at the Wigmore Centre in Luton⁵ appears to differ from the case currently before me in that the potential noise sources were intermittent and not constant.
27. Each application and appeal has to be determined on its own merits and these other cases do not lead me to a different conclusion in respect of this case.
28. I therefore conclude that the appeal proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development. It would conflict with the relevant requirements of the

² Appeal reference: APP/M4510/W/19/3233989

³ Appeal reference: APP/M4510/W/20/3249882

⁴ Appeal reference: APP/P4605/W/18/3217413

⁵ Appeal reference: APP/B0230/W/20/3253139

Framework which seeks to ensure that new development can be effectively integrated with existing businesses and community facilities; that where the operation of an existing business would have a significant effect on new development nearby, suitable noise mitigation is provided as part of the development; and that new development provides a high standard of amenity for future occupiers.

Whether the development makes suitable provision for the storage of refuse

29. Paragraph O.2. of the Part 3 to Schedule 2 of GPDO requires that prior approval is sought for certain specified matters. The provision for the storage of refuse and refuse bins is not explicitly one of the matters that forms the subject of an application for prior approval.
30. Although the reason for refusal makes reference to the failure to provide adequate refuse storage facilities within the curtilage of the property, the Council has sought to relate this to the highways and transportation impacts of the development and by extension to the provisions of the Framework relating to new developments providing to safe and suitable access, improving the environment, and promoting safe and healthy living conditions. Paragraph W of Schedule 2, Part 3, of the GPDO sets out that in determining applications for prior approval, the decision maker must have regard to the Framework, so far as relevant to the subject matter of the prior approval, as if the application were a planning application. The Framework does not make direct reference to the storage and collection of refuse from domestic properties.
31. Although detailed arrangements for the collection of refuse from the proposed flats is not set out in the supporting documents for the application, in the appeal submissions the appellant sets out that it is proposed that refuse would be stored within the building and that it would be collected on a weekly basis by a private waste management company either from within the building, or from a communal commercial sized bin within the lane to the rear of the property.
32. The amendments to the proposal submitted with the appeal show storage for 720 litres of refuse in twelve, 60 litre, bins housed in two internal storage areas. I have been provided with a copy of an extract from the Newcastle City Council Developer Guidance Note on Provision of Waste and Recycling Collection and Storage Facilities which sets out that a total of three 240 litre bins are required for 4 flatted properties. The proposed internal refuse storage would provide equivalent capacity.
33. I accept that one of these internal stores is located beneath a proposed new stairway and it is not totally clear how either storage area would be ventilated to prevent odours. Nonetheless, there is no substantiated evidence before me that would demonstrate that this arrangement is either a fire hazard, or would be intrinsically unsafe, or that the bins could not be suitably accessed. There is also nothing that would suggest that refuse from the proposed flats would be left on Northumberland Street.
34. I have noted that the rear service road is not within the red line boundary of the application site but there is no other information before me regarding the status or ownership of the rear service road. It was, however, clear from my site visit that this is used for the collection of refuse from other properties adjacent to it, as there were a considerable number of large wheeled bins

present. I also observed that all the buildings that share the same section of service road as the appeal building are built up to the carriageway and do not have separate service yards. The bins present were marked with the identification of several private waste management companies who clearly make collections from these. Even in the event of a further waste management company being involved which does not currently service the area, the suggested arrangements would only amount to one additional vehicle movement per week.

35. Although the arrangements for servicing the existing bins sited in the rear lane is not included in either parties evidence, it is reasonable to conclude that this would either be from the service yard to the rear of Marks and Spencer, which is accessed adjacent to Haymarket Bus Station, or from Northumberland Street at those times when vehicles are permitted to access the pedestrianised area. There is nothing that would indicate that any arrangements made by the appellant would differ from this.
36. No objections were received from the Highway Authority in connection with the proposal. On this basis it would be very difficult to conclude that the one potential additional weekly vehicle movement arising from the proposal would result in an unacceptable impact on highway safety or result in severe cumulative impacts on the road network.
37. Whilst I have noted that Inspector who determined the previously referred to appeal at 50 Clayton Street West found that proposal would not make suitable provision for the storage of refuse and refuse bins, that appeal related to an application for full planning permission, in which case, such matters can be explicitly considered.
38. I recognise that the arrangements for domestic refuse collection were not fully set out in the application. However, the appellant has submitted details that indicate that suitable provision can be made for the storage of refuse within the building, and there is no substantive evidence which would indicate that suitable arrangements could not be made for its collection. The connections between arrangements for refuse storage and collection, the requirements of the Framework to promote health and well-being and safe and inclusive communities, and the assessment of the transport impacts of the proposed development which are required by the GPDO are, to my mind, too tenuous to amount to a reason to withhold prior approval in this case.
39. The provisions of the GPDO do allow for the imposition of conditions that are reasonably related to the subject matter of the prior approval. Although I have found that in this particular case noise mitigation measures could not be addressed through a condition, as this would effectively by-pass the requirements of the GPDO, the matter of refuse storage and collection is not the subject of prior approval. The proposal makes provision for the storage of refuse within the building and the practical details of the manner in which it would be collected, could in this case reasonably be the subject of a suitably worded condition.
40. I therefore conclude that the proposed development would make suitable provision for refuse storage and would comply with the relevant requirements of the Framework.

Conclusion

41. I have found that the proposed development would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development. As such, it would not comply all of with the conditions set out in Paragraph O.2 of Schedule 2, Part 3 of the GPDO and for this reason the appeal must fail.
42. For the above reasons, I conclude that the appeal should be dismissed.

John Dowsett

INSPECTOR