



Appeal Decision

Hearing Held on 1 September 2021 and 28 September 2021

Site visit made on 1 October 2021

by C Dillon BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16/11/2021

Appeal Ref: APP/W4515/W/21/3268413

Land at Eccleston Close, Station Road, Backworth, Newcastle-upon-Tyne NE27 0RX

- 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 The Northumberland Estates against the decision of North Tyneside Metropolitan Borough Council.
 - The application Ref 18/00881/FUL, dated 28 June 2018, was refused by notice dated 30 September 2020.
 - The development proposed is construction of 67 residential dwellings (C3) and 14 No B1, B2 and B8 commercial units totalling 650sqm, with associated road infrastructure, car parking spaces, open spaces, gardens and landscaping.
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Decision

1. The appeal is dismissed.

Application for costs

2. Prior to the resumption of the Hearing, applications for costs were made by Northumberland Estates against North Tyneside Council and also by Keenans Ltd against North Tyneside Council. These applications are the subject of separate Decisions.

Preliminary Matters

3. The description of development contained on the decision notice and heading above differs to that stated on the planning application form as it reflects changes made to the scheme during the determination period.
4. Further to the appeal being lodged, the Council reviewed its case and decided to reverse its stance in respect to the 3 reasons for refusal cited on the decision notice. Nonetheless, I am required to make my determination of this appeal on those reasons for refusal. I address the Council's first and second reasons for refusal together in my decision as they both concern matters relating to biodiversity.
5. Just prior to the opening of the hearing, further evidence was submitted by the Council to support the reasons for their revised position. I found that evidence was significant to understanding the Council's revised position. The appellant had no objection to the acceptance of that evidence. However, an interested party from a neighbouring business known as Keenans Limited expressed

concerns over his inability to comprehend that evidence at such short notice and be able to fully participate in the hearing. Consequently, during the opening session I determined that in the interests of fairness for all participants, it was necessary to defer that element of the hearing discussion until a later date to enable that new evidence to be fully considered and understood. Accordingly, parties were given the opportunity to provide written comments prior to the resumption of the hearing on 28 September 2021.

6. The appeal site falls within the zone of influence of a European designated site relating to the North East coast. I have a statutory duty as the competent authority to ensure that there are no adverse effects on the integrity of this area. The appellant has submitted a planning obligation to mitigate the effects on this designation. I will return to this matter later in my decision.
7. The National Planning Policy Framework ('the Framework') was revised subsequent to the appeal being lodged. The main parties have been given the opportunity to draw my attention to any material changes which would impact on their respective cases and the appeal has been determined on the basis of the revised Framework. Furthermore, recent changes to the Town and Country Planning (Use Classes) Order (1987) bring B1 uses into a new use class, namely Commercial, Business and Service (Class E). However, transitional arrangements mean that this appeal must be decided with reference to the current use classes.

Main Issues

8. The main issues are:
 - whether or not the appeal proposal would prejudice the undertaking of existing neighbouring business operations, with particular regard to the living conditions of occupants of the proposed dwellings in terms of noise levels; and
 - the effect of the appeal proposal on biodiversity interests, with particular regard to the existing Local Wildlife Site and protected species.

Reasons

Noise

9. The appeal site forms part of a mixed use land allocation under Policy S4.3 as shown on the proposals map of the North Tyneside Local Plan 2017 ('the Local Plan'). It comprises undeveloped land which forms part of a former colliery site located on the edge of the village of Backworth. In addition to existing surrounding residential properties, the appeal site is bounded by a range of existing business premises located between the appeal site and Station Road, including a food processing unit known as Keenans Ltd. The existing businesses and appeal scheme would share a common access off Station Road. The Council confirmed that their third reason for refusal relates to that particular business use which operates unrestricted and relies upon regular early morning activities. These include multiple deliveries by both refrigerated heavy goods vehicles and other large commercial vehicles and the use of forklift trucks to move products within the site, as well as the operation of the food processing machinery and associated activities within the building itself.

10. The appellant's noise assessment has regard to the method described in "British Standard 8233: Guidance on sound insulation and noise reduction for buildings" ('BS 8233'). The appellant has advanced that their assessment is based upon a worst case scenario for prospective residents of the appeal proposal, taking into account other existing noise sources including the surrounding road and rail network, as well as the other existing and proposed business units. This noise assessment demonstrates that there is potential for future residents of the appeal scheme to encounter noise including that arising from the surrounding existing business uses. Measures are incorporated within the proposed design and layout of the scheme in a bid to mitigate against these.
11. Notwithstanding the arguments advanced by Keenans Ltd about the inappropriateness of the appellant's reliance on BS 8233, the results of a noise assessment based upon "British Standard 4142: Methods for rating and assessing industrial and commercial sound" are not before me. The High Court¹ has offered a reminder that British Standards and WHO Guidelines were not drafted with the same objectives as planning policy nor intended to have the same formal role and effect as development plan policies. In the context of national policy they do not set any specific standards and are clearly a matter of judgement for the decision maker, but they need to be understood sufficiently to enable them to be taken into account correctly.
12. The submitted noise assessment provides a scenario in terms of sounds which would originate from the existing business uses and other known sources. It also provides a contingency to cater for further future development of Keenans Ltd. Whilst the relevant recorded upper noise level documented in the appellant's assessment was a source of dispute between the appellant and interested party, both recorded levels advanced are consistent with the noise characteristics described by the parties at the hearing which include occurrences of sudden bangs and noise from vehicle movements, refrigeration units and reversing alarms. Both of these recorded levels provide an upper range of the noise that is omitted as a consequence of the regular operations of this food processing business.
13. The appellant has included a number of mitigation measures into their design, layout and landscaping. From a technical perspective and in combination, these proposed measures would reduce the noise that would be experienced to a level which would meet the standards relied upon by both the appellant and the Council.
14. Nonetheless, crucially the evidence also demonstrates that occupants of some of the proposed residential units would be subject to industrial noise above the standards advanced should their windows be opened. Bearing in mind the regularity, level and characteristics of the noise recorded as being associated with Keenan Ltd, the evidence before me demonstrates that the number of properties reliant upon having to keep their windows closed to achieve a reasonable level of tranquillity would be significant. It is evident that noise of levels similar to the recorded upper noise levels are more likely to occur during the early hours of the morning when the business operation is at greatest operational capacity. At those times some of those rooms would be in use. This would coincide when resident's expectations for tranquillity would be greatest. I

¹ *Stoke Poges Parish Council v SSCLG and Secretary of State for Education, South Buckinghamshire DC and Slough Sikh Education Trust Ltd* Date: 15 July 2016; Ref: [2016] EWHC 1772 (Admin)

conclude that in the event that windows to those dwellings were opened, significant adverse effect could be encountered.

15. Furthermore, it has not been adequately demonstrated that the proposed glazing and ventilation measures would secure a satisfactory standard of living conditions for the occupants of those units to encourage their deployment; occupants may wish to open their windows for fresh air or for other reasons, particularly during the warmer summer months. Neither the appellant nor the Council have adequately demonstrated that the operation of any ventilation system would not cause undue disturbance by way of noise, and no specification was put before me that would indicate otherwise. Moreover, the deployment of those particular mitigation measures falls beyond the control of either the appellant or the Council. Whilst the appellant has advanced that these measures give those residents a choice, either scenario would stand to compromise living conditions which any occupant should have a reasonable expectation to enjoy.
16. Therefore, overall, I do not find that the glazing and ventilation measures advanced would provide suitable mitigation in combination with other measures proposed for this particular scheme. Furthermore, given the technical nature of noise mitigation, it is not possible for me to impose a planning condition with sufficient certainty that this harm, which would be considerable, could be both sufficiently and appropriately managed.
17. My attention has been drawn to an earlier scheme within this site allocation where the Inspector² expressed concerns about the reliance on sealed windows as a means to mitigate noise for future residents. Although the site boundaries differ, the number of dwellings affected would be less and the scheme's details and mitigation measures are different, the consequences for both Keenans Ltd and future residents of the appeal scheme in terms of the reliance on windows remaining closed would be not be materially different to that earlier scheme. I attach moderate weight to that previous appeal decision in this regard and that weighs against the current appeal scheme before me.
18. Neither the evidence before me nor the related discussion at the hearing substantiated that it would be inconceivable that justified noise nuisance complaints would arise from residents of this particular scheme, particularly in relation to the operation of Keenans Ltd. Indeed, I find there is a real and reasonable prospect that such complaints would arise as a consequence of this scheme given the regularity, nature and times of the operation of that particular business.
19. Paragraph 185 of the Framework states that planning decisions should avoid noise giving rise to significant adverse impacts on health and the quality of life. In the context of paragraph 187 of the Framework the appellant being the 'agent of change' is required to provide suitable mitigation before the development is completed. However, I have found that this would not be the case here. It would be unreasonable for the existing business operation to be unduly fettered or expected to provide the additional measures. Therefore, the appeal proposal would conflict with the Framework in this regard.
20. For the reasons given, the appeal proposal would prejudice the undertaking of existing neighbouring business operations, with particular regard to the living

² Appeal Ref: APP/W4515/W/15/3137995

conditions of occupants of the proposed dwellings in terms of noise levels. Consequently, although the proposed uses accord with Policy S4.3 of the Local Plan, the particular appeal scheme is in conflict with Policies S1.4 and DM5.19 of that Plan which require that proposals are acceptable amongst other things in terms of their impact upon local amenity for new or existing residents and businesses, adjoining premises and land use; the use of mitigation measures to provide satisfactory living environment; and that development that may be sensitive will not be sited in proximity to polluting sources.

Biodiversity

21. The appeal site forms part of a Local Wildlife Site ('LWS') with species rich grassland. The presence of bats and the Dingy Skipper, a protected butterfly species has been recorded within the area. There is not an obvious separation between the appeal site and the wider LWS. The scale of development proposed is more concentrated over a smaller area than what the Local Plan proposed. However, the appeal proposal would result in the loss of a significant part of the site to built development. Since the Council made its decision the appellant has clarified matters relating to the immediate effects on habitat and fragmentation. That has led the Council to conclude that their previous concerns which led to reasons for refusal Nos 1 and 2 have been satisfactorily addressed, subject to a number of planning conditions.
22. The principle of development within the LWS has previously been established through the Local Plan process. Limited tree felling is proposed. Construction impacts on the local biodiversity interests could be dealt with through a planning condition requiring a management plan to control noise, lighting and disturbance. The LWS already permits informal recreational access and any further significant increase in recreational disturbance is not evident from the evidence before me. Although the scale of development proposed is greater than that set out in the Local Plan, the submitted evidence demonstrates that the proposed layout would provide a suitable habitat for local species, including the Dingy Skipper, bats and birds which would not lead to fragmentation of the existing wildlife corridor. The evidence before me indicates that the appeal proposal would not conflict with the provisions of the Wildlife and Countryside Act 1981. Suitable off-site mitigation to compensate for the proposed loss is proposed in the locality.
23. Furthermore, the appeal proposal will provide a biodiversity net-gain both within and off-site and this was not disputed by the Council through the course of the appeal. The proposed mitigation would be secured through planning conditions and a duly executed Section 106 Legal Agreement. I am satisfied the evidence of need has been satisfactorily demonstrated, in accordance with the provisions of Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended), and the tests for planning obligations set out in the Framework. This is a moderate benefit of the overall appeal scheme.
24. For these reasons, I find that the appeal scheme would not cause unacceptable harm to biodiversity interests, with particular regard to the existing LWS and protected species. Consequently, the appeal proposal would not conflict with Policies S5.4 and DM5.5 of the Local Plan which seek to protect biodiversity resources, including non-statutory sites; conserving, enhancing and managing local sites and wildlife corridors; and the effects on protected species and locally designated sites. Neither would the appeal proposal conflict with Policy

DM5.7 which seeks to ensure that all new developments take account of and incorporate existing wildlife links into their plans at the design stage. In the absence of harm, neither would there be conflict with paragraph 180 of the Framework which seeks to avoid, adequately mitigate, or as a last resort, compensate for significant harm to biodiversity.

Other Matters

25. The main parties have agreed that in the absence of this site, the housing land supply would fall below the 5 year requirement. The evidence before me indicates that the shortfall would be small. Nonetheless, the contribution it would make would be a moderate benefit of the appeal scheme.
26. The appeal scheme includes the provision of business units which could support local enterprise and employment. However, this is a speculative scheme with anecdotal demand in the area, but no known end users specified. The evidence does not demonstrate the likely timeframes for its delivery which at the hearing was confirmed as being dependent on grant funding. No shortfall in the area's employment land supply was demonstrated. The deliverability of the housing element was not demonstrated as being reliant upon that component of the scheme. Economic Benefits of scheme during both the pre-construction and post-construction phases of the proposed dwellings have been advanced. These benefits have not been quantified in any level of detail. Overall, these are moderate economic benefits of the appeal scheme.
27. Social benefits of the appeal scheme have been advanced by the appellant in respect to the provision of affordable housing and contribution to the housing mix. The affordable housing units to be provided within the site would be secured by a duly executed Section 106 Legal Agreement which was submitted with the appeal. I am satisfied the evidence of need has been satisfactorily demonstrated, in accordance with the provisions of Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended), and the tests for planning obligations set out in the Framework. These are moderate benefits of the appeal scheme.
28. The appeal site adjoins the Backworth Conservation Area along its road frontage and forms part of this designated heritage asset's setting. In the past this was defined by the presence of buildings and infrastructure related to the appeal site and wider former Backworth Colliery. This former colliery site now presents as a large green area enclosed by tree planting which is used for informal recreational purposes. This part of the Conservation Area is leafy in character with buildings of a single and 2 storey scale. Materials are a mix of red brick, stone and render.
29. With the exception of the open area around the site access, I am satisfied that the appeal scheme would be largely screened from views along Station Road by existing buildings. The materials of construction and proposed house types would not be jarring with the appeal site's heritage context. The proposed alterations to the entrance way to the appeal site would include the replacement of the existing timber fence which has a proliferation of advertisements relating to the surrounding businesses with appropriate brick walling. Views into the site would largely comprise a foreground of landscaped public open space and appropriately scaled dwellings beyond. The proposed landscaped bund and acoustic fence would not be unduly prominent once planting matured. Overall, the appeal scheme would not result in a

development which would be uncharacteristic to the context of the Conservation Area in terms of form. This would have a neutral impact on the significance, character and appearance of the Conservation Area and its setting. Similar to the Council's assessment, I am satisfied that the significance and setting of Grade II Listed Dairy Cottage would not be adversely affected by the appeal proposal due to the intervening distance and the physical separation of the appeal site.

Planning Balance

30. This appeal must be determined in accordance with the development plan unless material considerations indicate otherwise. I have found that the appeal scheme would provide benefits in respect to biodiversity, the economy and contribution to the 5-year housing land supply, affordable housing delivery and housing mix. Nonetheless, I have identified that the appeal scheme would cause significant adverse effects on living conditions which could harm the future operation of neighbouring business. This conflicts with Policies S1.4 and DM5.19 of the Local Plan and paragraphs 185 and 187 of the Framework.
31. Having regard to the submitted evidence, there are no matters which weigh in favour of the appeal proposal, including the contribution to the shortfall in the housing land supply, that outweigh the identified harm and subsequent conflict with the development plan when taken as a whole.

Habitat Regulations

32. Regulation 63(1) of the Conservation of Habitats and Species Regulations 2017 requires an Appropriate Assessment to be carried out where the competent authority is minded to give consent for the development. As the appeal proposal is unacceptable for other reasons, there is no need for me to carry out an Appropriate Assessment in this instance.

Conclusion

33. For the reasons given, the appeal should be dismissed.

C Dillon

INSPECTOR

Attendees

For the Council:

Mr F Genley- Capita

Ms M Ingram- North Tyneside Metropolitan Council

Mr Haynes- Regional Enterprise (resumed session only)

For the appellant:

Mr B Spall - The Northumberland Estates

Mr N Morton- Savills

Mr Walton – Wardell Armstrong

Mr Betts – BSG Ecology (opening session only)

Mr J Gillespie- BSG Ecology (resumed session only)

Other participants:

Mr Keenan – Keenans Ltd

Mr R Wood – R & K Wood on behalf of Keenans Ltd (resumed session only)

Mr R Hinton- Apex on behalf of Keenans Ltd (resumed session only).

Documents submitted and accepted during the hearing:

Plan of properties requiring glazing mitigation

Revised schedule of planning conditions

Note on implementation of the Council's Coastal Mitigation Strategy

Appellant's comments on the Council's report to committee on 16 March 2021

Keenans Ltd comments on the Council's report to committee on 16 March 2021