



Appeal Decision

Site visit made on 16 November 2021

by Helen O'Connor LLB MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 November 2021

Appeal Ref: APP/Z5630/W/21/3268483

229-255 and 277-279 Kingston Road, New Malden KT3 3SW

- 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 Fairview New Homes (Willow Way) Ltd against the decision of the Council of the Royal Borough of Kingston-upon-Thames.
- The application Ref 20/02201/FUL, dated 4 September 2020, was refused by notice dated 17 December 2020.
- The application sought planning permission for redevelopment of the site to provide 297 residential units in buildings ranging from 4 to 7 storeys, with 207 sqm commercial space (A1, A2, A3, A4, B1 and D1) at ground floor, 123 car parking spaces (including car club and accessible provision); communal landscaped amenity areas, secure cycle parking, stopping up of Avenue Terrace and other associated development without complying with a condition attached to planning permission Ref 19/01228/FUL, dated 29 May 2020.
- The condition in dispute is No 48 which states that: *'No building shall be occupied until details of fixed windows/openings as shown on the following plans have been submitted to and approved by the Local Planning Authority:
D6701rev05SW - Elevation Sealed Window Locations
D6101rev04SW - First Floor Sealed Window Locations
D6102rev04SW - Second Floor Sealed Window Locations
D6103rev04SW - Third Floor Sealed Window Locations
D6104rev04SW - Fourth Floor Sealed Window Locations
D6105rev04SW - Fifth Floor Sealed Window Locations
D6106rev04SW - Sixth Floor Sealed Window Locations
The development shall be carried out in accordance with the approved details prior to the first occupation of the units affected and retained for the lifetime of the development, unless otherwise agreed in writing.'*
- The reason given for the condition is: *'to safeguard the amenity of future occupiers and to remove the risk of noise complaints against adjoining noise generating uses, in accordance with 'Agent of Change' principles.'*

Decision

1. The appeal is dismissed.

Background and Preliminary Matters

2. The Government published its revised National Planning Policy Framework (the Framework) on 20 July 2021. The main parties had the opportunity to refer to it as part of the appeal process. Paragraph 182 of the previous version of the Framework is referred to in refusal reason 2 on the Council's decision notice.

However, similar wording is contained in paragraph 187 of the revised Framework.

3. Since the Council made its decision, The London Plan 2021, March 2021 (LP) has superseded the London Plan, March 2016. Accordingly, policies 3.5 (Quality and design of housing developments) and 7.15 (in relation to reducing and managing noise) of the 2016 plan are no longer in force. The Council has not brought my attention to any corresponding policies in the LP in these regards. However, policy D13 – Agent of Change, of the then Intend to Publish London Plan was cited on the decision notice and is now part of the development plan. Both parties have commented on the policy as part of the appeal process and therefore, I am satisfied that no one would be prejudiced by my determining the appeal with reference to it.
4. Planning permission¹ was granted subject to 57 conditions for the redevelopment of the appeal site to a major mixed-use development including 297 residential units. To the north of the appeal site is the St John's Industrial Area which is recognised as a Locally Significant Industrial Site (LSIS) in the Royal Borough of Kingston Upon Thames, Local Development Framework, Core Strategy, April 2012 (CS). The CS generally seeks to protect land at the LSIS for industrial and business uses. Within the St John's LSIS, there is a builder's merchants, which directly adjoins the appeal site to the north.
5. The relationship between the existing builder's merchants and the proposed residential units in the northern part of the approved redevelopment was considered as part of the original planning application, and in particular issues relating to noise impacts. Condition 48 specifies that the windows identified on the 7 drawings listed as fixed must be provided prior to occupation in accordance with details previously agreed with the Council in writing. Thereafter, it requires the windows to be retained as fixed in accordance with the agreed details. The drawings relate to some of the windows in 56 of the flats.
6. Although the appellants do not dispute that some measures to counteract noise impact are necessary, they contend that the requirement for the windows to be sealed is disproportionate and therefore, unreasonable. They consider it goes further than is necessary to provide suitable living conditions for future occupants and that residents should have the option of opening the windows in question. They assert there would be a low likelihood of successful complaints being made that could restrict industrial activity on the adjacent site. Therefore, they seek to remove the condition.
7. My attention² is drawn to caselaw that establishes there are limits on the scope of an application made under section 73 of the Town and Country Planning Act 1990. Planning Practice Guidance (PPG) states that in deciding an appeal made against a refusal of an application made under section 73, only the condition in question will be considered and it is not a complete re-consideration of the application.
8. It is put to me that the drawings identifying the windows to be fixed form part and parcel of the development and there is some dispute between the parties as to whether, if successful, the proposal would achieve the appellants'

¹ Planning reference 19/01228/FUL

² Specialist Counsel Opinion dated 19.7.21, Appendix 1, Council's Statement of Case

objective of permitting the windows to be opened. However, the drawings listed in condition 48 are not explicitly identified in the approved drawings listed in condition 2, to which the development must otherwise accord. Hence, whilst the windows in question were permitted as part of the original permission, but for the wording of condition 48 there would appear to be no other impediment to the windows specified from being opened. Central to the dispute is whether those approved windows may open or must be fixed shut. On this basis, I am satisfied that the application made under section 73 in this regard does not seek to fundamentally alter the original planning proposal for which permission has been granted.

Main Issue

9. The main issue is whether the condition is necessary and reasonable having regard to the likely impact from noise on the living conditions of future occupants and any consequences for the commercial use of the adjacent land having regard to the Agent of Change principle in local and national planning policies.

Reasons

10. A noise impact assessment³ was submitted with the original planning application. It details a noise survey undertaken in February 2019 which informed the noise modelling used to predict the likely impact from noise on the development. Section 7 refers to the builder's merchants' site adjacent and indicates⁴ that assuming a worst-case scenario the noise may cause a potential significant adverse impact upon future residents of the development.
11. The assessment information provided goes on to predict that, assuming windows are shut in the north facing residential units in Block D, daytime and night-time noise levels (L_{Aeq}), and maximum noise levels (L_{AFmax}) would meet with the recommended thresholds⁵ for internal target levels in the Professional Practice Guidance on Planning and Noise for new residential development, May 2017. These draw upon advice in World Health Organisation guidelines and BS:2833:2014. The predicted internal noise levels are reproduced in Table 5.1 of the supplementary noise reports⁶. It is also confirmed that the apartments would have façade insulation, a mechanical ventilation system and active cooling⁷.
12. The evidence indicates that with windows open and activity occurring at the adjacent builder's merchants, disturbance to the residents of the apartments concerned would occur. This would have the potential to disturb sleep during night-time hours (deemed to be between 2300-0700hrs)⁸. Nevertheless, the appellants assert that the worst-case scenario would be unlikely to arise in practice, that noisy activity would be infrequent and that night-time operation at the adjacent premises would be confined to 0600-0700 hrs in the period before the business opens. They further suggest, if residents had the option to

³ Prepared by Syntegra, dated April 2019, Appendix 6, Appellant's Appeal Statement

⁴ Table 7.1, BS 4142 Assessment – Builders Merchants Yard Noise

⁵ Table 2.1, ProPG Internal Noise Level Guidelines, Syntegra June 2020 document, Appendix 6, Appellant's Appeal Statement

⁶ Prepared by Syntegra, dated January 2020 & Syntegra Removal of Planning Condition 48 document, June 2020 Appendix 6, Appellant's Appeal Statement

⁷ Paragraphs 3.2-3.3, Appellants' Appeal Statement

⁸ Paragraph 5.13 & 5.14 Appellants' Appeal Statement

open the windows, disturbance would realistically only occur in summer months when there are higher temperatures.

13. However, these deductions are generally based on several assumptions. Firstly, that the present operating hours of the adjacent builder's merchants would remain broadly similar. These are stated to be 7am-4.45pm Monday to Friday and 8am-12.45pm on Saturday⁹. Nevertheless, it is not shown that there are restrictions on working hours and so these might be subject to change.
14. Successful commercial businesses must be receptive to changes in the economy which in turn may require dynamic working practices. It is possible that future uses could take place in the evenings and at weekends or overnight and therefore, at times when the impact from noise would be likely to cause significant disturbance to residents. It is foreseeable that the existing business could expand or adapt their practices and activities, or that the site may change hands in the future. This is especially so given that it lies in an area where the development plan encourages and protects industrial activity.
15. Whilst the proximity of other existing noise sensitive development to the builder's merchants is highlighted, it is not necessarily the case that this would stifle future night-time or other increases in activity at the LSIS. I observed that relative to the apartments that are the subject of this appeal, most are situated further away or are located on the other side of buildings which is likely to offer some protection against noise. By comparison, the appeal site is close to the open storage yard and delivery area, which in some respects, is a part of the commercial premises that offers a higher degree of operational flexibility to accommodate changes in the business.
16. In addition, the noise survey that fed into the modelling was undertaken over a 48 hour period in mid February. This would conventionally be a quieter time for the construction industry than warmer months, and levels of activity could fluctuate. As such, an assumption that night-time activity in the lighter, hotter months, where it is conceded that noise could cause sleep disturbance would be limited to an hour is not necessarily soundly drawn.
17. Moreover, limited importance has been attributed to the likely character of noise that would be experienced. Noise arising from the adjacent industrial use could include impulsive bursts of loud noise from engines, the operation of machinery, use of tools, vehicle reverse alarms and movement of heavy materials. The character of this noise is likely to prove particularly annoying for future residential occupiers and therefore, has greater potential to disturb such occupants. The predicted maximum night-time noise level for the north façade of Block D is 69dB¹⁰. Even allowing for attenuation of around 12dB¹¹ due to noise passing from outside to inside, with windows open this would be higher than the recommended 45dB L_{Amax} in the guidelines¹². For the reasons already outlined, the frequency of such individual noise events could increase.
18. Nevertheless, I accept that at present it appears that there would be some periods where, if the specified windows were openable, residents would be

⁹ Paragraph 18, Council's Officer report

¹⁰ Table 5.1 Syntegra June 2020 document, Appendix 6, Appellant's Appeal Statement

¹¹ Letter from E H Clarke dated 17.8.21, Appendix 2, Appellants' Appeal Final Comments

¹² Table 2.1 ProPG Internal Noise Level Guidelines, Syntegra June 2020 document, Appendix 6, Appellant's Appeal Statement

unlikely to be unacceptably disturbed by noise at the adjacent site. Moreover, the development would incorporate sufficient physical mitigation to address the impact from noise to future residents to comply with the design requirements of DM10(k) of the CS. Hence, I can understand why it appears attractive to give future residents greater agency to self-mitigate and if they so choose, to expose themselves to noise. However, the consequences of noise impacts are not confined to the future residents, they also have knock on effects for the adjacent industrial premises.

19. Paragraph 187 of the Framework requires planning decisions to ensure that new development can be integrated effectively with existing businesses and goes on to state that existing businesses should not have unreasonable restrictions placed on them as a result of development permitted after they were established. In circumstances where the existing business could have a significant adverse effect on new development in its vicinity, it is the new development (or agent of change) that should be required to provide suitable mitigation.
20. Policy D13 of the LP aligns with this agent of change principle. It stipulates that development should be designed to ensure that established noise and other nuisance-generating uses remain viable and can continue or grow without unreasonable restrictions being placed on them. It further requires development proposals to manage noise by ensuring good design mitigates and minimises existing and potential nuisances generated by existing uses and activities located in the area.
21. I am mindful that the wording of both local and national policy refers to 'ensuring' that such established uses can integrate effectively. To my mind this necessitates a high degree of certainty to secure effective mitigation measures. Moreover, policy D13 refers to existing and potential nuisance being minimised rather than simply reduced. Consequently, this would warrant a more prudent approach that would not support the flexibility advocated by the appellants in this case.
22. Additionally, PPG states that the agent of change will need to take into account not only the current activities that may cause a nuisance, but also those activities that businesses or other facilities are permitted to carry out, even if they are not occurring at the time of the application being made¹³. For the reasons already outlined, I have doubts that this has been fully considered and the flexible approach proposed would not take sufficient account of the likely consequences for the lifetime of the development.
23. No definition is given of 'unreasonable restrictions' in either the Framework or policy D13 of the LP. However, in my view the status of the adjacent land as a LSIS is a relevant consideration in this regard as it constitutes an identified component in the main supply of industrial and business land important to the local economy. Hence, the term should be responsive to the context of the case in question.
24. There is much discussion by the parties regarding the intricacies of environmental protection law, both statutory and the common law. However, if the windows in question were openable, and a noise complaint made, it is not clearly shown that a resident's ability to avoid disturbance by closing windows

¹³ Paragraph: 009 Reference ID: 30-009-20190722

would automatically prevent a successful complaint. Neither would it avoid the risk of conflict between neighbouring uses from arising in the first instance, nor the potential requirement for the business to spend time and energy on attending to such complaints or investigations irrespective of the ultimate outcome.

25. Moreover, if the residents became accustomed to opening their windows at certain times there would be an increased risk of their opposition to any future measures that might interfere with their ability to do so. It is reasonable to suppose that they may oppose the future growth or changes to the adjacent business on this basis. Therefore, even if formal proceedings could be averted, the anticipation or reality of such complaints would be likely to curtail the extent of economic activities at the site than might otherwise have been the case. In turn this could potentially curb the attractiveness of the LSIS. Overall, I am not assured that the existing business would not have unreasonable restrictions placed on it if the condition were to be removed.
26. The appellants suggest a substitute condition whereby a welcome pack detailing the noise attenuation measures are signalled to the occupants of the residential units. However, I am not assured this would surmount the risk of conflict I have identified as whilst it could be administered prior to the first occupation of the units, it is doubtful that this would continue to be the case for subsequent occupants for the lifetime of the development.
27. Even if it were, if the windows were openable, future residents would harbour an expectation that they could be so used. To an extent, this is reinforced by the general marketing comments¹⁴ provided indicating that prospective purchasers prefer to be able to open windows. Any perceived encroachment on their flexibility to do so due to changes in the business would be experienced as a diminution of their living conditions and therefore, more likely to trigger a complaint. Hence, in this case an increase in flexibility would be likely to move the onus away from the agent of change contrary to the approach set out in local and national policy.
28. The windows to be sealed are limited to those apartments likely to be most affected by the noise impact. Furthermore, it is stated that 17 of those flats would have other openable windows within the same room. Where this is not the case, the remaining 39 flats would have at least some openable windows as they are not single aspect¹⁵. Such an approach reflects a proportionate response. Whilst this may have consequences for the sale price and marketability of units, the evidence does not show that the units cannot be sold.
29. My attention is drawn to two appeal decisions¹⁶ where the Inspectors considered noise impact on the proposed residential development from nearby industrial uses. However, these cases relate to a prior approval and an outline planning application respectively. Neither concerns the removal of a condition requiring specific windows to be sealed, and therefore they are not directly comparable to the circumstances before me. Hence, they are of limited weight and I have determined the application on its own merits.

¹⁴ Letter from Foxtons

¹⁵ Paragraph 17, Council's Officer Report

¹⁶ Appeal references APP/Z0116/W/19/3220741 & APP/Z1510/W/20/3253661, Appendices 9 and 10, Appellants' Appeal Statement

30. The appellants also refer to other planning applications which they consider to be relevant. Three relate to the adjacent builder's merchants' site, but none have been implemented and so are of limited weight. However, they generally reinforce the likelihood that the site may seek to expand or change. The Council have confirmed that the proposal for development at Adams House & 5-8 Dickerage Lane¹⁷ has been refused, therefore it does not weigh in favour of the proposal.
31. It is put to me that condition 48 was primarily imposed to avoid a legal challenge being made to the original planning permission rather than to address planning concerns. However, for the reasons set out I am satisfied on the information before me that it meets the requirements for planning conditions in paragraph 56 of the Framework.
32. Therefore, I find that the condition is necessary to make the development acceptable in planning terms, and reasonably proportionate in the circumstances. It strikes a reasonable balance between safeguarding the living conditions of residents close to the adjacent commercial uses whilst protecting the continued use and future growth of industrial land in the LSIS. To do otherwise would be contrary to the agent of change principle set out in the Framework and policy D13 of the LP.

Conclusion

33. For the reasons given above I conclude that the appeal is dismissed, and the condition retained in its present form.

Helen O'Connor

Inspector

¹⁷ Reference 20/01966/FUL