



Appeal Decision

Site visit made on 19 October 2021

by K A Taylor MSC URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 January 2022

Appeal Ref: APP/P1045/W/21/3274248

Four Lane Ends Farm, Gibfield Lane, Hulland Ward, Derbyshire DE6 3EJ

- 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 Richard Bowler against the decision of Derbyshire Dales District Council.
 - The application Ref 19/01213/VCOND, dated 24 October 2019, was refused by notice dated 22 April 2021.
 - The application sought planning permission for '*use of premises for commercial dog breeding and boarding purposes, replacement kennel and erection of new isolation unit*' without complying with a condition attached to planning permission Ref 16/00374/FUL, dated 10 May 2017.
 - The condition in dispute is No 3 which states that: *The sound insulation recommendations set out in the Noise Impact Assessment by Peak Acoustics dated 20th July 2016 in relation to the replacement kennel (to house boarding dogs) and isolation cubicle buildings set out in the 1:500 Scale Proposed Block Plan dated 5th October 2016 shall be carried out in full within 3 months of the date of this decision unless otherwise agreed in writing by the Local Planning Authority and thereafter in perpetuity. No boarding dogs shall be housed in these buildings until the sound insulation works have been carried out in full and independently verified through further sound recording by a competent person and the results submitted to and approved in writing by the Local Planning Authority.*
 - The reason given for the condition is: *For the avoidance of doubt and in the interests of safeguarding the amenities of the occupants of nearby residential properties in accordance with the aims of Policy SF4 of the Adopted Derbyshire Dales Local Plan (2005) and guidance contained within the National Planning Policy Framework (2012).*
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The Council, and the appellant replicates in their statement that the appeal has been submitted in accordance with section 73 of the Act (S73). However, the condition in question required details to be submitted within an agreed timeframe, and the evidence indicates that the development commenced prior to the submission of the application which has led to this appeal.
3. 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. As such, 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 within the planning application form.

4. The reason for the condition is stated as being in the interests of safeguarding the amenities of the occupants of nearby residential properties and to accord with Policy SF4 of the Local Plan 2005. Since that application was approved a new local plan has been adopted '*Derbyshire Dales Local Plan, December 2017*' (DDLDP), thus Policy SF4 has been superseded. The Council's reason for refusal does not include any policy references. However, in the evidence before me, my attention has been drawn to Policies PD1 and EC1 of the DDLDP. On this basis, I have considered the appeal accordingly, with the changes to the statutory development plan and relevant policies to the appeal.

Background & Main Issue

5. Planning permission was granted in 2017¹ for the use of the premises for commercial dog breeding and boarding purposes, with the erection of replacement kennel and new isolation unit. Planning history at the site sets out that an application² was made to discharge details reserved by condition, but also sought to vary Condition(s) 5 and 6 of the original consent to utilise the replacement kennel building to house boarding cats. Although, this was granted, conditions were not discharged, and the appellant has since housed breeding dogs.
6. The appellant now proposes to substitute the sound mitigation measures which are the subject of Condition 3 with a 17.5m long by 2m high acoustic fence, already constructed behind the replacement kennel building. The original noise impact assessment³ (NIA) recommended and included measures to install an improved façade and roof specification, such as an insulated steel panel or other panel with similar octave band noise reduction properties. Masonry would also provide required noise reductions and to minimise noise breakout, the kennels should be sealed and ventilation/windows.
7. The main issue, therefore, is whether the condition is reasonable or necessary in the interests of living conditions of nearby residential occupants.

Reasons

8. The original 'Peak' NIA was specifically carried out to assess the likelihood of complaints arising due to the 15-replacement kennels and 6 new build isolation kennels. It identified that the nearest sensitive receptor was the house on Brick-Kiln Lane and dog's barking was the primary noise source. Levels of noise were recorded over a 24-hour period and in line with standards, including BS8233:2014. The assessment was carried out within the kennel building. It concluded that the sound rating for dogs barking in the kennels with the current façade would exceed the day and night-time background levels having a 'significant adverse impact' above desirable levels, thus requiring further mitigation.
9. The 'Spire' NIA⁴ was undertaken on a grass verge at the entrance of the appeal site and at a representative location close to Brick Kiln Farm. It was also

¹ 16/00374/FUL

² 17/01185/VCOND

³ Noise Impact Assessment, Project Reference Number: PA55, Peak Acoustics, dated 20/07/2016

⁴ Spire Environmental Noise, Vibration and Air Quality Consultants, Noise Impact Assessment, R20.1493-1-AG, dated 26/10/2020.

carried out for a period of 24 hours. It concluded that during the periods of the assessment, noise criterion in the daytime and night-time was exceeded at both locations. However, it found there to be no correlation between existing activities at the dog kennels and existing measured noise levels, as the climate was dominated by road traffic noise at both receptors.

10. Nevertheless, I have some serious concerns with the latest 'Spire' NIA in comparison to the original 'Peak' NIA. The baseline levels for assessment (Dba) during both daytime and night-time hours have discrepancies, and the locations of the assessments were different. Particularly that this was not carried out in close proximity to the acoustic fence or within the kennel building. Neither does it go on to assess (other than an assumption) of comparisons of the fence to those suggested recommendations of building modifications, that were originally proposed, or indeed reductions in noise levels having been achieved since the first NIA.
11. Given that the locations were roadside, it would be expected that noise levels of traffic generation would be higher, of which did not form a baseline in the original NIA. The Council also confirm that since the determination of the application there have been a significant number of complaints relating to noise at the premises for dogs barking, I have no evidence to the contrary. Therefore, I am not satisfied on the basis of the evidence before me that the acoustic fence provides alternative suitable mitigation or reduces noise levels of dogs barking within the immediate and wider area of the site.
12. Condition 3 relates to both the replacement kennel and the isolation cubicle building. It goes further to restrict the replacement kennel to house boarding dogs. However, the 'Spire' NIA that was carried out was on the basis of the replacement kennel being used to house breeding dogs. I am not satisfied from the evidence, that the noise emanating would be the same. Such as boarding dogs would not necessarily be housed for continuous periods within the building and there would be changes in frequency with dogs coming and going when boarding was required. Unlike breeding dogs, which would likely be housed continuously during breeding times and has the potential to incorporate significantly more dogs 'puppies' being housed at the time of breeding.
13. Furthermore, Condition 3 also relates to mitigation measures being carried out for the 'isolation cubicle' building. I have not been provided with any substantive evidence that this has been carried out or that the replacement fencing provides suitable mitigation to justify the variation of the condition, in this regard. Moreover, the appellant's evidence is limited as to why any scheme of insulation would not be practical. There is no evidence to support that powered ventilation would be inconsistent with statutory animal welfare requirements, transmission of disease would occur or as to why the costs were prohibitive.
14. In deciding an application under S73, the local planning authority must only consider the disputed condition/s that are the subject of the application – it is not a complete re-consideration of the application⁵. Planning Practice Guidance⁶ states that in granting permission under S73, new conditions may be imposed provided that they do not materially alter the development that was subject to the original permission and are conditions that could have been imposed on

⁵ Paragraph: 031 Reference ID: 21a-031-20180615; Revision date: 15 06 2018

⁶ Paragraph: 040 Reference ID: 21a-040-20190723; Revision date: 23 07 2019

that original permission. However, it is not been clearly set out which of the other conditions on the permission have been discharged or complied with, including other time restricted detail conditions relating to ventilation and the noise management plan, given the conflict with noise mitigation measures.

15. Even, if I were to change the wording of Condition 3, there is insufficient evidence to enable me to consider whether the other conditions continue to have effect, should be varied or removed. Furthermore, the suggested condition by the Council of the number of mature dogs and that this should be modified so not to exceed 35 at any one time, excluding puppies would not meet the tests in the National Planning Policy Framework of being precise or reasonable. It would be difficult to establish as to what timeframe a puppy or even a young stock dog would mature to be a dog for the purposes of the condition. Which would be dependent on different ages, breeding condition and the breed type. It would also reduce those specified numbers of dogs in Condition 6 of the original consent, of which was not applied to be modified in this case.
16. Given the uncertainty about other 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 appellant and 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.
17. Overall, I conclude that Condition 3 is necessary and reasonable to protect the living conditions of nearby residents. Moreover, the variation of Condition 3 would conflict with Policies EC1 and PD1 of the DDLP, insofar they relate to protecting amenity of occupiers nearby, and that development does not cause unacceptable effects of noise.

Other Matters

18. The appellant's evidence heavily relies on the content of the 'Officers' report. However, a Council is not duty bound to follow the advice of its professional officer's and this alone would not amount to unreasonable behaviour. From the evidence before me, the Planning Committee came to this conclusion on the basis of the representations received and undertook an objective analysis from the applicant's evidence submitted with the application at that time.
19. I acknowledge that the appellant's have run a successful and highly regarded pedigree dog breeding business for some time, they are members of the Kennel Club, subject to RSPC inspections and have a track record of prioritising animal welfare. However, these matters are a neutral consideration in the appeal scheme, and do not outweigh the concerns and harm identified above.

Conclusion

20. For the reasons given above, taking account of all other matters, I conclude that the appeal should be dismissed.

KA Taylor

INSPECTOR