



Appeal Decision

Site visit made on 13 May 2022

by J Woolcock BNatRes MURP DipLaw MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 May 2022

Appeal Ref: APP/K3605/W/21/3276292

Apps Court Farm, Hurst Road, Walton-on-Thames KT12 2EG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for consent, agreement or approval to details required by a condition of a planning permission.
 - The appeal is made by Apps Court Farm against Elmbridge Borough Council (EBC).
 - The application Ref:2021/1127, dated 29 March 2021, sought approval of details pursuant to Condition No.6 of planning permission Ref:2019/3142 granted on 7 May 2020.
 - The development proposed is 2 wind turbines.
 - The details for which approval is sought are: "A Desktop Site Specific Noise Assessment".
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Decision

1. The appeal is dismissed, and the Desktop Site Specific Noise Assessment details submitted with the application Ref:2021/1127, dated 29 March 2021, are not approved. Condition No.6 of planning permission Ref:2019/3142 is not discharged.

Application for costs

2. An application for costs was made by Apps Court Farm against EBC. This application is the subject of a separate Decision.

Preliminary matters

3. On 2 March 2020 EBC's North-Area Planning Sub Committee Members resolved to overturn the officer recommendation for refusal and to grant permission for two wind turbines, subject to a report being submitted back to the Sub-Committee setting out the full policy explicit reasons for permitting the application and to consider a list of appropriate conditions. Members considered that proposals for renewable energy have significant public benefit and should be supported where they do not cause significant harm to the locality.
4. Members also considered the proposal to be compliant with relevant development plan policies, including Elmbridge Local Plan Development Management Plan 2015 Policy DM2. This provides that all new development should achieve high quality design, which demonstrates environmental awareness and contributes to climate change mitigation and adaptation, taking into account the protection of amenity. They also considered that the proposal

would comply with Policy DM17 (Green Belt) and the National Planning Policy Framework (NPPF).

5. Planning permission Ref:2019/3142 was subsequently granted on 7 May 2020 for "2 wind turbines" subject to eight planning conditions. Condition 1 requires the development to be begun before the expiration of three years from the date of the permission. Condition 2 specifies that the development shall be carried out in strict accordance with the approved plans: P15-024 3207 and 0210-AD-00298. These plans indicate the siting for two Britwind H15 Class 4 turbines with a maximum blade tip height of 25 m. The wind turbines would each have a maximum generating capacity of 15 kilowatt (kW).

6. Condition 6 states:

"A Desktop Site Specific Noise Assessment shall be carried out prior to commencement of the development and must provide predicted noise levels at the curtilage of identified noise sensitive premises and, where appropriate, financially involved properties in the vicinity of the proposed location of the two turbines. Printouts from computer models used to make predictions or produce noise contour maps are insufficient by themselves and must be accompanied by a site specific assessment. Please refer to section 5 of the IOA Guidance for further information. Reason: To avoid adverse impacts on health and quality of life from noise in accordance with paragraph 123 of the National Planning Policy Framework and the Noise Policy Statement for England."

EBC advised that the NPPF paragraph cited is now paragraph 185 of the 2021 version.

7. The reference to "section 5 of the IOA Guidance" is to the Institute of Acoustics *A Good Practice Guide to the Application of ETSU-R-97 for the Assessment and Rating of Wind Turbine Noise*, dated May 2013 (IOA Guide). However, section 5 of the IOA Guide is titled 'Cumulative Issues', which does not appear to be applicable to the circumstances that apply in this appeal.

Main issue

8. The main issue in this appeal is the proper interpretation of Condition 6 and whether the submitted Desktop Site Specific Noise Assessment is adequate to discharge the condition, having regard to the residential amenity of nearby occupiers, and to relevant policy and guidance.

Reasons

9. Principles pertaining to the interpretation of conditions were considered by the Court in *UBB Waste Essex Ltd and Essex County Council*.¹ The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions on it and the express reasons for those conditions. In doing so the words used should be given their natural and ordinary meaning, viewed in their particular context and in the light of common sense. Mrs Justice Lieven stated that; "The reasons for the condition should be the starting point, the policies referred to and then the documents incorporated. This is not the

¹ *UBB Waste Essex Ltd and Essex County Council* [2019] EWHC 1924 (Admin).

- private intentions of the parties, as would be the case in a contractual dispute, but the planning purpose which lies behind the condition.”
10. Condition 6 does not state that the Noise Assessment must be submitted to EBC for approval. Nevertheless, the parties to this appeal do not dispute that this can properly be implied in the circumstances that apply here. I have no reason to doubt that this was the clear intention. EBC argues that it is also necessary to ‘read in’ to the condition that the assessment must demonstrate that the development will avoid adverse impacts on health and quality of life from noise. However, this cannot be implied because the stated Reason for Condition 6 misconstrues national policy.
 11. The Noise Policy Statement for England (NPSE) and the NPPF both refer to avoiding noise giving rise to significant adverse effects on health and the quality of life. Whereas the reason given for imposing Condition 6 is to avoid adverse impacts on health and quality of life from noise. No justification is given for the Reason specifying ‘adverse effects’ rather than ‘significant adverse effects’.
 12. The Explanatory Note to the NPSE considers ‘significant adverse’ and ‘adverse’ to be key phrases. It defines the Lowest Observed Adverse Effect Level (LOAEL) as the level above which adverse effects can be detected, and the Significant Observed Adverse Effect Level (SOAEL) as the level above which significant adverse effects on health and quality of life occur. The first aim of the NPSE is to avoid significant adverse impacts on health and quality of life from environmental, neighbour and neighbourhood noise within the context of Government policy on sustainable development.² The second aim of the NPSE refers to the situation where the impact lies somewhere between LOAEL and SOAEL. It requires all reasonable steps be taken to mitigate and minimise adverse effects while also taking into account the guiding principles of sustainable development, adding that this does not mean that such adverse effects cannot occur. Avoiding adverse impacts on health and quality of life from noise is not, contrary to the Reason for Condition 6, in accordance with the NPPF and NPSE.
 13. Conditions and reasons need to be read together. Given the wording of the Reason for Condition 6, I find that there is some ambiguity in the wording of the conditional permission, which justifies consideration of extrinsic material to resolve the ambiguity. To do so I have had regard to; (1) EBC Officer’s Report, (2) EBC Members’ Decision, (3) *The Assessment & Rating of Noise from Wind Farms Final Report* September 1996 (ETSU-R-97) and (4) Section 1 of the IOA Guide.
 14. The section of the EBC Officer’s report concerning the impact on the amenity of neighbouring properties stated that the nearest neighbouring properties would be in the new development at Rivernook Farm (then under construction) at a significant distance to the site. It added that; “Environmental Health (Noise & pollution) have raised no objection to the proposals but do raise concern with the potential noise and vibration impact from the operation of the wind turbines on occupiers of residential properties in the vicinity including the future occupiers of the new development to the west of Apps Court Farm, which could

² The NPSE’s guiding principles of sustainable development include ensuring a strong healthy and just society, using sound science responsibly, living within environmental limits, achieving a sustainable economy and promoting good governance.

be significant, especially at night when background noise levels are normally lower than daytime levels. A condition could be recommended requiring a noise impact assessment of the operation of the wind turbines prior to commencement, to ensure the proposal would not result in an adverse impact on neighbouring residents through noise and disturbance issues.” Ensuring that the proposal would not result in an ‘adverse impact’ on neighbouring residents through noise and disturbance would be the same in this context as requiring ‘no adverse effect’, and so would not accord with national policy.

15. Notwithstanding the terminology cited in the Officer’s report Members considered that proposals for renewable energy have significant public benefit and should be supported where they do not cause significant harm to the locality. The reference to ‘significant harm’ has the same meaning here as ‘significant adverse effect’, and so is consistent with the aims of the NPSE. Members also considered the proposal to be compliant with Policy DM2 concerning amenity. An interpretation of Condition 6 that the Noise Assessment must demonstrate that the development would avoid adverse impacts would not accurately reflect the Members’ intention.
16. EBC’s appeal statement argues that a site-specific background noise assessment is considered necessary to assess potential noise impacts on both onsite and offsite noise sensitive receptors in context with the character of the area. The proposed turbines would be sited in a part of the Apps Court Farm leisure and recreation complex that contains storage containers, along with the storage of caravans/campervans. Apps Court Farm has planning permission for “ use of land for ‘events site’ “. This includes a range of outdoor activities. There are also mobile homes and a cottage within Apps Court Farm. In the wider area there is a house on the A3050 with other dwellings at Rivernook, Lock House and Thomas Street.
17. Relevant guidance does not support EBC’s view that the discharge of Condition 6 requires a site-specific background noise assessment. Section 1 of the IOA Guide at paragraph 1.2.1 states that the guide presents current good practice in the application of the ETSU-R-97 assessment methodology for all wind turbine developments above 50 kW. However, the proposal in this appeal is for two 15 kW turbines. Paragraph 1.2.2 of the guide is therefore relevant and provides that developments smaller than 50 kW warrant a simplified procedure, either based on ETSU-R-97 or other method agreed with the local planning authority, commensurate with the size and impact of the project. In this case it is apparent EBC determined the appropriate assessment method for two 15 kW turbines in this context to be a Desktop Site Specific Noise Assessment providing predicted noise levels at the curtilage of identified noise sensitive premises and financially involved properties in the vicinity. Given that EBC was applying the IOA guide it is reasonable in interpreting and applying Condition 6 to conclude that the required Desktop Site Specific Noise Assessment would apply a simplified procedure commensurate with the size and impact of the proposal.
18. A noise desktop procedure would not normally include taking measurements in the field of background sound levels and wind speed. The required assessment to discharge Condition 6 does not specify a need for the submission of a background noise survey. The absence of such a requirement would be consistent with the “simplified assessment method” in ETSU-R-97, which refers to levels of 35 dB $L_{A90,10 \text{ min}}$ (45 dB $L_{A90,10 \text{ min}}$ where the occupier has some

financial involvement with the turbines) offering sufficient protection of amenity and background noise surveys would be unnecessary. Reading Condition 6 in the light of relevant policy and guidance its discharge would not require a site-specific background noise assessment. I find that it would be reasonable in the circumstances that apply here for the Noise Assessment required by Condition 6 to be based on the ETSU-R-97 simplified assessment method and acceptable noise levels of up to 35 dB $L_{A90,10 \text{ min}}$ and 45 dB $L_{A90,10 \text{ min}}$ where the occupier has some financial involvement with the turbines.

19. EBC considers that it is likely that the 35 dB(A) rule has not been met by the desktop study, but that this should be confirmed. There is a dispute between EBC's and the appellant's noise experts about the predicted noise levels at the nearest residential units. EBC estimates that the noise level for the nearest static homes may range from 54 to 48 dB(A) L_{Aeq} so that even if the tenants were considered to be financially involved the noise levels experienced would be well above the 45 dB(A) relaxed limit. The written submissions for this appeal do not provide sufficient details about the modelling assumptions applied in the respective noise predictions for me to be able to resolve this dispute. Nevertheless, I consider that it is not necessary for me to do so in order to be able to determine this appeal.
20. Some residences in the vicinity of the proposed turbines within the Apps Court Farm complex would be subject to predicted noise levels exceeding 35 dB $L_{A90,10 \text{ min}}$ but below 45 dB $L_{A90,10 \text{ min}}$. The appellant intends to address this by re-letting these units on new leases that would include a clause providing the tenants with a share of the profit from the sale of the electricity generated by the turbines. But such an intention is not tied in any formal way to the construction and operation of the turbines. I am not satisfied that the submitted Noise Assessment provides for an effective and enforceable means to identify and secure, over the lifetime of the turbines, the financial interest of affected occupiers necessary for the assessment to rely upon the 45 dB $L_{A90,10 \text{ min}}$ noise limit for those having some financial involvement with the turbines.
21. The noise level from the proposed turbines at the house on the A3050 to the east of the appeal site is predicted by the appellant to be 35.2 dB $L_{A90,10 \text{ min}}$. It is not clear whether this property is in residential or office use. Nevertheless, if this prediction is correct and it was occupied as a dwelling then a 0.2 dB noise level above that advocated in the ETSU-R-97 simplified assessment method would be imperceptible. Any harm arising from this exceedance would be far outweighed by the benefits of the renewable energy generated by the turbines.
22. I find, having regard to noise policy and guidance, that the submitted Desktop Site Specific Noise Assessment is insufficient to discharge Condition 6 because it does not adequately identify and secure the necessary financial interest of relevant occupiers. This defect cannot be overcome by discharging Condition 6 subject to the imposition of further conditions regarding the financial involvement of affected residents. In the circumstances that apply here this is a matter about which there would need to be clarity and certainty before Condition 6 could be discharged.

Other Matters

23. A third party representation states that work has commenced to implement the permitted development. I saw at my site visit that there has been some

construction activity at the proposed locations for the turbines, but there is no convincing evidence before me to indicate that this implements the permitted scheme. Even if it did so that would be a matter for EBC in the first instance.

Conclusion

24. Interpreting Condition 6 in the light of its planning purpose and context, and giving its words their natural and ordinary meaning, having regard to relevant guidance, I find that it is not necessary to 'read in' a requirement that the assessment must demonstrate that the development would avoid adverse impacts on health and quality of life from noise. The condition, on its face, does not require a background noise survey. However, its reference to the IOA guide requires appropriate provision to secure some financial involvement with the turbines for relevant occupiers. In the absence of such provision, I conclude that the submitted Desktop Site Specific Noise Assessment cannot be approved and I dismiss the appeal.

J Woolcock

INSPECTOR