

Appeal Decision

Hearing (Virtual) held on 9 February 2022

Site visits made on 29 January and 11 February 2022

by Mr JP Sargent BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 September 2022

Appeal Ref: APP/P4605/W/20/3264336

16 Kent Street, Birmingham B5 6RD

- 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 planning permission
 - The appeal is made by Prosperity Developments on behalf of The Trustees of The Gooch Estate against Birmingham City Council.
 - The application Ref 2018/03004/PA, is dated 13 April 2018.
 - The development proposed is the demolition of existing buildings and redevelopment to provide 116 apartments with a ground floor of 2 commercial units (use classes A1-A4, B1(a) and medical services within use class D1).
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This decision is issued in accordance with section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes that issued on 25 March 2022.

Decision

1. The appeal is dismissed.

Main Issues

2. Having regard to the Council's putative reasons for refusal, I consider the main issues in this case are
 - a) whether or not the scheme would result in reasonable living conditions for future residents with regard to noise and
 - b) the effect of this residential use on the operation of The Nightingale.

Reasons

The effect on future residents

Background

3. The *Birmingham Development Plan* promotes a diversity of uses in the city centre including leisure uses, pubs and bars, cultural facilities and tourist related facilities, as well as residential uses '*on upper floors where it provides good quality, well-designed living environments*' (Policy TP24). Policy DM6 seeks to ensure development is designed, managed and operated to reduce exposure to noise and vibration. These policies consequently reflect advice in section 12 of the *National Planning Policy Framework*, which advocates high quality buildings that create places that promote health and well-being.

4. This appeal is to redevelop a commercial property on the corner of Kent Street and Lower Essex Street in the centre of the city. Until recently offices and business premises would have been prevalent in the area, but increasingly these are being redeveloped, in whole or in part, for residential purposes. In particular the building of a sizeable, flatted scheme known as the Unity House and The Armouries site (the U&A site) is underway immediately to the north straddling Lower Essex Street. I was also told the Council was minded to grant planning permission for a large residential proposal just to the south on the opposite side of Kent Street, and various apartment blocks have been constructed to the east and north on Hurst Street and Bromsgrove Street.
5. However, 12m or so from the appeal site, directly across Lower Essex Street, is a night club called The Nightingale (the night club). This has operated from here for many years and can accommodate up to 2,200 patrons. It tends to be open between 2100h in the evening and 0500h or 0600h the following morning, with Thursdays, Fridays and Saturdays being the busiest. This is just one of a number of night-time entertainment venues in the area, with other public houses and clubs nearby.
6. When I visited just after midnight on a dry and (for January) mild Saturday morning, along The Nightingale's Kent Street elevation was a lengthy queue of people waiting for admission, while others were gathered in groups on the pavements around smoking and chatting. The Nightingale also has 2 large external balconies, one on the Kent Street frontage and the other at the corner with Lower Essex Street, and these both appeared to be relatively full with people socialising. The boisterous conversation from these various gatherings gave rise to a significant level of noise. The music and the low frequency bass beat from inside the building were clearly and appreciably audible when outside, and indeed the building appeared to have relatively poor noise-retention abilities with numerous points from where noise break-out could occur. There was also traffic noise from patrons being delivered to or collected from this night club or other establishments in the area.
7. I acknowledge this visit was just a snapshot in time. However, what I saw broadly reflected what had been described in the submissions and, although there may be instances when there is more activity round the night club, based on all that was presented to me what I saw and heard seemed to be representative of its general operation.

The effect on residents if the windows were open

8. The proposed flats on the Lower Essex Street elevation facing The Nightingale would be primarily single aspect with their bedrooms and living rooms looking towards the night club, and they would have windows that could be opened.
9. Throughout the day the night club would be closed, and so during those hours the living conditions of the residents in the proposed apartments would be satisfactory, even if they chose to open their windows.
10. However, if the windows were open when the night club was operational during the evening or the night-time, I consider there would be unacceptable noise and disturbance arising from all of the various noise sources described above. To my mind that would lead to appreciable and unreasonable harm to living conditions at a time when residents could expect and require lower levels of noise to allow sleep. Indeed, noise could also be occurring from other sources,

such as rooftop plant and equipment, that I was unable to distinguish when outside the property but which also contribute to and further compound this unacceptable situation.

The effect on residents if the windows were closed

11. To counter this concern, the appellant initially intended to undertake some works to the night club to restrict its noise emissions, but those are no longer proposed and so are not before me. Rather, the appeal scheme has been designed with a high level of soundproofing if the windows were closed. In such circumstances, artificial ventilation would be included to allow each property to be ventilated and achieve a suitable level of thermal efficiency. The appellant contended that the effect of such measures meant that when the night club was operational, if the windows were closed, the soundproofing proposed would be sufficient to create a reasonable noise environment with a Noise Rating of NR20 inside the rooms.
12. The NR20 level was accepted on appeal in 2007 by the Inspector (the 2007 Inspector) considering the residential development now being built on the adjacent U&A site. She came to the view that the bass beat from The Nightingale's music would not be inaudible in those units but rather would be 'a dull low thud' that would still allow residents to fall asleep.
13. The appellant concurred with the 2007 Inspector, thereby accepting the bass beat would not be inaudible in the units but at the same time it would be a consistent feature of the soundscape and would not be so problematic as to prevent sleep. In contrast, the Council and representatives for the night club considered the 2007 Inspector was incorrect in her assessment, contending the level of disturbance arising from the bass beat, even with the windows closed, would be sufficient to prevent sleep.
14. When one is awake and not considering sleep, the bass noise may well form part of the background soundscape and so not be disturbing. However, when trying to sleep the background soundscape is experienced in a very different manner. There would be a close and direct relationship between this development and The Nightingale, and the regular consistent bass beat from the music would be experienced for a greater part of the night over a number of consecutive days. Being mindful of these points in particular, on the evidence before me it has not been shown that, even at the reduced level achieved by the intended soundproofing when the windows are closed, the bass beat would not be sufficiently disruptive or intrusive to impair sleep.
15. In support of their respective positions, both sides referred me to other decisions across the city that had been made variously by the Council and the Planning Inspectorate. However, I have limited knowledge of those cases, their relationships to the noise sources, any soundproofing proposed, or the noise environment into which they were to be introduced. I cannot therefore afford them significant weight, but rather my findings rest on a judgement of the evidence presented and the merits of the case before me.
16. In particular, I acknowledge that my findings differ to those of the 2007 Inspector. The U&A site though, which was approved over 14 years ago, was identified, at least in part, as a housing opportunity in Supplementary Planning Guidance. Moreover, it is a different development that, while being close to the night club, does not have the same relationship to The Nightingale as the

appeal proposal. Although the 2007 Inspector said she listened to noise in a flat in the vicinity, I am unclear as to what she heard or the relationship between that property and the noise source. Therefore, whilst I have noted this decision, it does not offer a basis to change my view.

17. I recognise too that by acquiring a residential property in the city centre future occupiers will be accepting a certain amount of activity outside during the day and the night. A balance therefore has to be struck, but, under the terms of Policy TP24, a good quality living environment should still be sought. Indeed, often the background noise of the city takes the form of a low-level rumble of traffic or the occasional siren, and does not have the same potential effect on living conditions as the situation before me. It could be said that any prospective occupiers, when they visited the area beforehand, would see its character and be able to anticipate whether they could live in the consequent noise environment. It does not necessarily follow though that they would correctly judge the effects of consistent and on-going noise nuisance throughout consecutive nights. Moreover, because some may be willing to accept a certain noise environment that does not mean the living conditions are, of themselves, a good quality.
18. Finally, while I discuss below the possible effect on The Nightingale, I am mindful that if any action against the night club under the *Environmental Protection Act 1990* is unsuccessful and The Nightingale is required to undertake no mitigation, this could well be because the decision-maker has judged that, for whatever reason, actions against the night club are not justified. Such an outcome does not necessarily mean the residents of the proposal would not be experiencing disturbance or that they would not have poor living conditions in their apartment.

Conclusions on this issue

19. Accordingly, I conclude it has not been demonstrated that the scheme would provide reasonable living conditions for future residents with regard to noise, and so I cannot conclude it would accord with Policies TP24 and DM6 in the *Birmingham Development Plan*, or the Framework.

The effect on the operation of The Nightingale

20. In paragraph 187 the Framework says that new development should be integrated effectively with existing businesses (including music venues and pubs). It adds that existing businesses should not have unreasonable restrictions placed on them from development permitted after they were established. Where there could be significant adverse effect on new developments from the operation of an existing business, mitigation should be provided by the applicant for the new development (the agent of change) before the new development has been completed.
21. The Nightingale appears to be an important part of the city's night-time economy, for it is a sizeable night club serving the LGBTQ+ community in particular, which has been here many years and plays a key role in the entertainment and activities of Birmingham's gay village.
22. If the scheme is allowed and its residents then contended that noise from the night club had a severe adverse effect on their living conditions, it is likely that any action would be considered under statutory nuisance subject to the

Environmental Protection Act 1990. If it was found such nuisance existed, it could result in restrictions being placed on The Nightingale that could be potentially significant for the operation of those premises, adversely affecting the positive role it played in the city's night-time economy and the diversity of the area.

23. I was given conflicting views though as to the likelihood of such action being taken. Based on the evidence put to me, the decision-maker in such a situation would need to consider many factors, a number of which are cited in the *Planning Practice Guidance* and were discussed at the Hearing and in the submissions.
24. The noise source in this instance is long-established, but that could be said of many businesses affected in this way. Reference was also made to the character of the area into which the residents would be moving. By definition the 'agent of change' principle will tend to apply when new uses are brought to existing ones with which they would potentially conflict, and so to a certain extent a discordancy between the new use and at least some of the existing uses around is to be expected where the principle is an issue. Notwithstanding that point though, I concur with the Council that the character of this area is not clear cut. Whilst maybe it used to be commercial it appears to be becoming increasingly mixed in nature now as more residential development occurs in the vicinity.
25. The *Planning Practice Guidance* says that addressing the matter at the outset can 'help to mitigate the risk' of a statutory nuisance being found if the new development is used as designed. In this regard it expressly cites keeping windows closed and using alternative means of ventilation when noise effects are occurring. This describes well what is being proposed in this instance, and which it is accepted would keep out much of the noise. It could therefore be seen to be unnecessary for a resident to open their window at such a time of noise nuisance, and if they did that would be an example of the development not being used as designed. It could also be contended that the desire to open windows would not be common but would be confined to a few summer nights.
26. However, putting aside the fact I am not satisfied that keeping the windows closed would prevent unreasonable noise disturbance, I consider an open window allows ventilation of a different nature to that provided artificially. Therefore, I can foresee instances where those living in the apartments may wish to open their windows during the night or at times other than in the height of summer, despite the noise outside and even though other means of ventilation are possible.
27. Furthermore, while the *Planning Practice Guidance* says such measures 'help to mitigate the risk' that does not bring certainty to the situation, and does not mean that statutory nuisance would not be found. Rather, it implies the chance of such nuisance being found would be reduced, albeit by an unspecified amount. It would therefore be for the decision-maker, when considering if there was statutory nuisance, to assess among other things the reasonableness or otherwise of opening windows in the circumstances of the case.
28. These matters and no doubt further ones besides would be weighed in the balance if it was contended that a statutory nuisance occurred because of the effect of noise from the night club on the proposed flats. However, even taking into account the caselaw submitted, whether or not statutory nuisance would

then be found and the implications it would have for the operation of The Nightingale rest on subjective judgements on the merits of the situation and the relative weights given to these factors by the public, by the Council officers and by the Courts. Consequently, mindful of this subjectivity, although I cannot say a statutory nuisance would be found, I also have little comfort that unreasonable restrictions would not be placed on the operation of The Nightingale because of this scheme.

29. Accordingly, I conclude the development could result in unreasonable restrictions being imposed on the operation of The Nightingale, so conflicting with paragraph 187 of the Framework.

Other Matters

30. Section 38(6) of the *Planning and Compulsory Purchase act 2004* says development should be in accordance with the development plan unless material considerations indicate otherwise.
31. In this respect, it is accepted the Local Planning Authority can now only demonstrate a housing land supply of some 3.5 years, which falls well below the requirement for a supply of 5 years. Accordingly, the most relevant development plan policies relating to the supply of housing are out-of-date, and so Framework paragraph 11(d) is engaged. This states that where development plan policies are out-of-date because a 5-year supply of housing land cannot be achieved, planning permission should be granted unless one of 2 criteria apply. Of these, the one identified as relevant to this case is the second, namely if any adverse impacts would significantly and demonstrably outweigh the benefits when assessed against the development plan taken as a whole.
32. This scheme would make an appreciable contribution to addressing this shortfall in housing land supply. Moreover, it would provide a number of affordable units that would help reduce an under-delivery in that area of housing too. However, for the reasons given above I find it has not been shown that many of the units would offer a suitable standard of accommodation for future residents, and so would be a poor addition to the housing stock. As such, whilst I acknowledge the benefit of further open-market and affordable housing, I consider this benefit is significantly and demonstrably outweighed by the harm I have identified.

Conclusion

33. For the reasons stated I therefore conclude the appeal should be dismissed.

JP Sargent

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr J Jowitt	Planning Consultant
Mr A McCordick	Noise Consultant
Mr P Reilly-Smith	Barrister

FOR THE LOCAL PLANNING AUTHORITY:

Mr M Key	Environmental Protection Officer
Mr D Wells	Principal Planning Officer

FOR THE NIGHTINGALE:

Miss S Clover	Barrister
Mr P Rogers	Noise Consultant
Mr T Runcorn	Owner

DOCUMENTS SUBMITTED DURING & AFTER THE HEARING

1. *Procedure for the assessment of low frequency noise disturbance* by AT Moorhouse, DC Waddington & MD Adams, submitted by Mr Rogers
2. *Joint statement on ProPG and AVO Guide* by The Institute of Acoustics, The Chartered Institute of Environmental Health and the Association of Noise Consultants submitted by Mr Rogers
3. Section 106 Agreement submitted by Mr Jowitt

DOCUMENTS

PLANS

PHOTOGRAPHS