



Appeal Decision

Site visit made on 14 November 2023

by J Moore BA (Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 January 2024

Appeal Ref: APP/P4605/W/23/3322392

260 Windsor Street, Birmingham B7 4DX

- 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 Waddah Nasir of Midland Alliance Property against the decision of Birmingham City Council.
 - The application Ref 2023/00394/PA, dated 19 January 2023, was refused by notice dated 29 March 2023.
 - The development proposed is change of use of first floor commercial annex office and part of ground floor to 3-bed HMO (Use Class C4) and installation of rear balcony.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. Part E of the appeal form indicates that the description of development has not changed from that stated on the planning application form. Nevertheless, a different description has been entered, which I consider to be more precise, and therefore I have used it in my banner heading above.
3. The Council advises that the appeal property is the subject of an enforcement investigation regarding an unauthorised change of use. For the avoidance of doubt, it is not the role of an Inspector dealing with a section 78 appeal to determine the lawful use of the property. I have therefore determined the appeal on the basis of the application as submitted.
4. A Noise Impact Assessment (NIA) by Bloc Consulting was submitted with the application and another NIA by Sound Licensing was submitted to the appeal. Having regard to the 'Wheatcroft Principles' and the Holborn judgement¹, I consider that the additional information does not result in a substantial or fundamental change to result in a different application. I am satisfied that no party would be prejudiced by my accepting the further NIA, and therefore I have considered it in my determination of the appeal.
5. The National Planning Policy Framework (the Framework) was revised in December 2023. In the interest of natural justice and to ensure neither of the main parties were prejudiced by this matter, I consulted both parties on the changes to the Framework, and responses have informed my determination of the appeal.

¹ Bernard Wheatcroft Ltd v SSE [JPL 1982 P37]; Holborn Studios Ltd v The Council of the London Borough of Hackney [2017] EWHC 2823 (Admin)

Main Issue

6. The main issue is whether the proposed development would provide acceptable living conditions for future occupiers, with particular regard to levels of noise and disturbance, and the provision of private amenity space.

Reasons

Noise and disturbance

7. The appeal site adjoins commercial/industrial uses, and the wider area is bounded by Windsor Industrial Area to the north, and Aston Science Park to the east. Nearby uses include warehousing, storage, manufacturing, and motor vehicle repair. There is some student accommodation in the wider area. Therefore, while it is fair to say that the area comprises a mix of uses, I find the area to be predominantly commercial and industrial.
8. The front part of the appeal property is two-storey, and the ground floor extends deeply behind the frontage. The appeal scheme covers the first floor, and part of the ground floor below. At the first floor, the proposed HMO (house in multiple occupation) would include three bedrooms with front facing windows, a rear facing balcony and a shared living/kitchen area with a dual aspect. The ground floor would include an entrance lobby from the street and an area described as an amenity space/multi-purpose room. The area of the ground floor of the appeal building (outside of the application) includes hot food takeaway businesses with extensive areas for food preparation to the rear.
9. Consequently, the appeal scheme would introduce a noise sensitive use in proximity to existing uses that have the potential to affect the living conditions of future occupiers through noise, vibration and odour. The dispute centres on the NIAs, which are to be considered together.
10. The Bloc Consulting Report (BCR) fails to fully and accurately characterise the existing noise climate of the area. For example, it fails to take account of all adjacent commercial and industrial uses and report their correct opening hours and it does not take account of extraction/other equipment installed upon the roof of the appeal building or within it.
11. The Sound Licensing Report (SLR) identifies five commercial kitchens operating at the rear of the appeal building and a nearby restaurant, with extraction systems terminating through the ground floor roof of the appeal building. The operating hours of the commercial kitchens are 12:00-00:00 daily, and the restaurant opens daily 17:00-22:00. Consequently, the potential impacts of noise from these businesses would occur during a substantial proportion of each day and the week as a whole.
12. The SLR does not detail the nature of the existing noise climate at the nearby metal fabrication workshop, nor take account of any refrigeration or condensers within the commercial premises in the appeal building which are likely to be present in commercial kitchens. Consequently, I am not satisfied that the NIAs sufficiently detail the existing noise climate and the potential impacts upon future occupiers.

13. The BCR details acoustic measurements taken from a single measurement location at a first-floor opening window of the front elevation, and thus its findings are confined largely to an assessment of traffic related noise.
14. The SLR details measurements from a single monitoring position at the ground floor rear elevation of the appeal building. Measurements from a closer position were not undertaken due to an unstable roof, security concerns for the equipment and the sealed nature of the rear first floor windows of the proposal. The report states that the monitoring position is considered representative of noise levels for the proposal. Even so, it is a considerable distance from the rear of the proposal.
15. Furthermore, the SLR relies on the BCR for noise impacts to the front elevation of the appeal building. Given that the BCR acknowledges a need for additional measurements relating to commercial and industrial noise to the front of the building, the SLR is not clear how this matter has been resolved or addressed.
16. Both NIAs are undertaken in accordance with BS8233 which applies to external noise as it affects an internal acoustic environment from sources without a specific character. However, this approach does not accord with the Council's guidance as set out in its Planning Consultation Guidance Note: Noise and Vibration, 2020, which seeks accordance with BS4142 which addresses the specific character of commercial and industrial uses.
17. Having regard to all of the above, I am therefore not satisfied that the NIAs demonstrate a robust assessment of impacts from transportation, commercial and industrial noise sources, including those via transmission. In such circumstances, I cannot be certain that the proposed mitigation in the form of glazing specifications would be sufficient to ensure that the health and/or quality of life of future occupiers would not be adversely harmed.
18. The Council raises other concerns in regard to the NIAs. However further consideration of these matters would not change my overall finding on the NIAs.
19. I therefore conclude that the proposed development would not provide acceptable living conditions for future occupiers, with particular regard to noise and disturbance. It conflicts with Policy PG3 of the Birmingham Development Plan 2017 (BDP) and Policies DM2, DM6 and DM11 of the Development Management in Birmingham Development Plan Document 2021 (DPD).
20. Taken together, these policies seek to ensure high quality development that responds to site conditions and local area context; that noise sensitive development is assessed, and adverse impacts are reduced or mitigated; and that development does not result in unacceptable adverse impacts upon the amenity of occupiers.
21. The proposal conflicts with paragraph 135 of the Framework which sets out that planning decisions should ensure that developments create places that are safe, inclusive and accessible and which promote health and well-being, with a high standard of amenity for existing and future users. It also conflicts with paragraph 191 of the Framework, which sets out that planning decisions should avoid noise giving rise to significant adverse impacts on health and the quality of life.

Private Amenity Space

22. The only outdoor amenity space proposed is a balcony to the first-floor rear elevation which would be about 2m wide and 0.93m deep, with an overall size of about 1.86m². The Council's Supplementary Planning Document: Birmingham Design Guide 2022 (BDG)² requires the provision of a minimum of 10m² of outdoor amenity space per resident of a HMO. The proposal would fail to meet this requirement by a substantial degree. The proposed balcony would be significantly short of the minimum depth of 1.5m as required by the BDG.
23. The appellant suggests that taken together, the proposed indoor amenity area (about 20m²) and balcony would be sufficient to meet the needs of future occupiers. However, even if I were to agree, there would still be a significant quantitative shortfall of about 8.2m² against the BDG requirement. In qualitative terms there would still only be a very small outdoor space of a very limited depth for outdoor activity, to accommodate seating, enjoy outdoor sunlight and/or dry laundry.
24. The appellant suggests that the public open space at Nechells Community Sports Centre would be within six minutes walking distance and would compensate for the shortfall. The Council states that this is an indoor facility with an outdoor football pitch, and thus it is not a public recreational facility. I find no reason to consider otherwise. Consequently, it would not form a readily accessible space for future occupiers to enjoy outdoor activities such as sitting outside on an impromptu basis.
25. I therefore conclude that the proposed development would not provide acceptable living conditions for future occupiers with particular regard to private amenity space. It conflicts with Policies PG3 and TP27 of the BDP, and Policies DM2 and DM11 of the DPD, the BDG, and the Supplementary Planning Document: Houses in Multiple Occupation 2022. Taken together, these policies and guidance seek to ensure that development is of high quality and that new HMO developments contribute to sustainable neighbourhoods; that all residents have access to private outdoor amenity space in accordance with defined standards to meet day to day needs and promote healthy living. The proposal also conflicts with paragraph 135 of the Framework, whose objectives I have set out above.

Planning Balance and Conclusion

26. The Council's report which considered the application states that the Council cannot demonstrate a five-year supply of deliverable sites for housing. Neither of the main parties have provided any information on the scale of the shortfall. There are no areas or assets of particular importance that provide a clear reason to refuse the proposed development.
27. In such circumstances, the Framework indicates that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.
28. The policies with which the proposal conflicts are consistent with the Framework, which seeks to ensure that planning policies create places that are safe, inclusive and accessible and which promote health and well-being, with a

² Birmingham Design Guide: Healthy Living and Working Places City Manual, 2022: City Note LW-13.

high standard of amenity for existing and future users; and to avoid noise giving rise to significant adverse impacts on health and the quality of life. As such, I apportion significant weight to these identified policy conflicts and to the unacceptable harm that would be caused to the living conditions of future occupiers.

29. The proposal would support the government's objectives to make efficient use of land and to significantly boost the supply of homes, although it would be a small contribution. The proposal would assist in meeting wider housing needs and as a small site it could be delivered quickly. These benefits attract limited weight in favour of the proposal.
30. Further economic benefits would arise during the construction process, but these would be temporary. The proposal would deliver additional expenditure into the economy, but this would be of a limited scale. Such benefits would attract limited weight.
31. The appellant suggests the proposal would result in increased taxation, but it is unclear how any additional receipts would be used to benefit the general public. The appellant also suggests that the proposal would accommodate additional local workforce. However, there is no compelling evidence of such a need before me, nor can I be certain that future occupiers would be locally employed. Therefore, any advantages in these respects would be of very limited weight.
32. Even if the scale of the shortfall in the five-year housing supply was substantial, it is clear that the benefits of the proposal would not outweigh the unacceptable harm that I have found, when assessed against the policies in the Framework taken as a whole.
33. The proposal conflicts with the development plan when read as a whole, and there are no other material considerations, including the Framework, which would indicate a decision other than in accordance with it.
34. Therefore, for the reasons given above, the appeal is dismissed.

J Moore

INSPECTOR