



Appeal Decision

Site visit made on 13 November 2023

by A Berry MTCP (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 April 2024

Appeal Ref: APP/D1590/W/23/3318088

1305 London Road, Leigh-on-Sea, Southend-on-Sea SS9 2AD

- 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 Mr R Hopkins of Foxstone Estates Limited against the decision of Southend-on-Sea Borough Council.
- The application Ref 22/02152/AMDT, dated 2 November 2022, was refused by notice dated 29 December 2022.
- The application sought planning permission to erect a two-storey rear extension and install dormers to sides to form additional self-contained flats and alter front elevation without complying with a condition attached to planning permission Ref: 22/01477/AMDT, dated 23 September 2022.
- The condition in dispute is No 7 which states:

Prior to first occupation of the residential units hereby approved noise from plant and equipment including extract ventilation when operating at its maximum speed and output shall be limited to 10 dB(A) below the background noise level which is expressed as a LA90,15minutes at the boundary of the nearest residential property. The rated noise levels from plant and equipment shall include any penalties for noise characteristics such as tone, intermittency, which are liable to cause the noise to be a nuisance etc.

Background noise levels shall be established for the following periods:

- o Daytime 0700 to 1900*
- o Evening 1900 to 2300*
- o Night 2300 to 0700*

In order to establish background noise level a representative survey shall be undertaken in accordance with BS 4142:2014+A1:2019 and/or the most suitable method to fully represent any noise source and impact at the boundary of the nearest residential properties so that noise will not cause a statutory nuisance. This shall be undertaken by a suitably competent person. Details of how noise and vibration will be attenuated together with a maintenance schedule for the future operation of that equipment must be submitted to and approved in writing by the local planning authority prior to first occupation of the residential units hereby approved. Heating and ventilation shall be in accordance with current guidance from DEFRA and the Heating and Ventilating Contractors' Association (HVCA) For Kitchen Ventilation Systems. The use hereby permitted shall not take place other than in accordance with these approved details.

Prior to operation of the equipment a post completion noise survey must be undertaken by a suitably qualified acoustic consultant, and a report submitted to and approved in writing by the Local Planning Authority. Where the local authority's noise criteria have not been met further noise mitigation shall be implemented in accordance with details that shall have been previously submitted to and agree with the Local Planning Authority.

The final agreed noise mitigation scheme shall be operated prior to first occupation of the dwellings hereby approved and permanently maintained thereafter.

- The reason given for the condition is: *To protect the environment of people in neighbouring properties and general environmental quality in accordance with Core Strategy (2007) Policies KP2 and CP4, Development Management Document (2015) Policies DM1 and DM3 and Design and Townscape Guide (2009).*
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Decision

1. The appeal is dismissed.

Procedural Matter

2. Since the appeal was lodged, a revised National Planning Policy Framework ('the Framework') has been published. This has not raised any new matters which are determinative to the outcome of this appeal. However, I have referred to the revised paragraph numbers where necessary.

Background and Main Issue

3. Planning permission¹ was granted in 2018 ('the 2018 permission') to erect a two-storey rear extension, install dormers to the sides to form additional self-contained flats, and to alter the front elevation of the building at the appeal site. From the information before me, I am satisfied that this constitutes the original act of development. In the banner heading above, I have therefore used this description.
4. The appeal site comprises a commercial unit to the ground floor (used as a hot food takeaway) and residential flats above. The 2018 permission included three conditions that required the submission and approval of details in respect of the means of ventilation for the extraction and dispersal of cooking smells/fumes prior to the commencement of development (Condition 8); the submission and approval of a management and maintenance scheme for the duct, extraction plant and associated equipment (Condition 9); and for the noise rating level for all plant to not exceed certain levels (Condition 10).
5. Following the grant of planning permission, the Council established that the development had commenced without the submission of an application for the approval of details pursuant to Conditions 8 and 9 detailed above. Consequently, a planning application² was submitted to vary Condition 8 of the 2018 permission to take account of the extract system that had been installed. The appellant proposed an amended condition however, the wording was not accepted by the Council. Instead, the Council approved the planning application subject to a revised Condition 7 of their own wording, as contained within the banner heading above.
6. This appeal seeks to vary Condition 7 of planning approval 22/01477/AMDT by replacing it with the following wording:

Prior to first occupation, an assessment undertaken by a suitably competent person demonstrating the rating sound level for all plant (including but not exclusively ventilation, refrigeration and air conditioning equipment, operating at typical levels) shall not exceed the representative background sound level at 1m from the nearest habitable room window or the boundary of the nearest residential premises whichever is closer shall be submitted to and approved by the local planning authority. The assessment shall include

¹ Planning Ref: 18/01811/FUL

² Planning Ref: 22/01477/AMDT

details of the operating capacity of the relevant plant and equipment at the time of testing. The rating level and background sound level that form the basis of the assessment shall be determined by the procedures in British Standard 4142:2014+A1:2019.

Where the above sound level criteria has not been met, details of how sound will be attenuated shall be submitted to and approved in writing by the local planning authority together with a maintenance schedule for the future operation of that equipment prior to first occupation of the residential units.

Following the assessment all relevant plant and equipment included in the assessment shall be restricted so that the operational running capacity will not exceed that used during the testing and details of a restricting device shall also be submitted to and approved by the local planning authority in advance of first occupation.

7. Taking the above into consideration, the main issue is therefore whether Condition 7 is reasonable and necessary to secure suitable living conditions for the occupiers of neighbouring properties, with particular reference to noise and disturbance, or whether the revised wording proposed by the appellant would achieve that aim.

Reasons

8. The appellant asserts that they cannot meet the requirements of Condition 7 because the boundary is effectively the façade of the building on which the flue is attached. Additionally, the appellant suggests that it may not be possible to achieve any attenuation and a rating of 10dB(A) below background noise levels as the flue has been positioned roughly 10cm from the wall. However, the appellant has not yet undertaken any background noise surveys or a survey of the existing equipment to demonstrate that it is unachievable or that, if necessary, attenuation would be unfeasible. In the absence of this information, I am not satisfied that the appellant has demonstrated that the requirements of the condition cannot be achieved.
9. The appellant raises concern that the Council has changed the speed and output of the extract system from 5dB(A) below the background noise level, as detailed within Condition 10 of the 2018 permission, to 10dB(A) without substantive evidence. While this may be more stringent than the previously imposed conditions, the situation at the appeal site has altered since the application was first approved with the development proceeding without discharging the noise related conditions. Consequently, I do not find it unreasonable for the Council to have reviewed the situation in the intervening period and imposed the current wording, especially given the proximity of the flue to residential properties.
10. Condition 7 requires the equipment to be "*operating at its maximum speed and output*". The appellant suggests that an extract system should not be run at 100% on the basis that driving systems at maximum capacity is not normal practice and the flow rate of the system can be fixed so that it is not freely adjustable. However, from the information before me, it has not been adequately demonstrated that the flow rate can be fixed, nor have I been provided with information regarding the system that has been installed. Consequently, in the absence of this information, I do not find it unreasonable for the system to be tested at maximum capacity as a precautionary means of

ensuring the living conditions of the occupiers of neighbouring properties would not be harmed.

11. The appellant states that they would be unable to access the flats to undertake the post completion surveys required by Condition 7. However, it is unclear why access would be problematic as the evidence before me suggests that the flats fall under the appellant's ownership.
12. The Council has conceded that the inclusion of the term "*statutory nuisance*" within the condition is not necessary and could be excluded for the avoidance of doubt. Notwithstanding this, I consider that the remaining elements of Condition 7 meet the tests for conditions as detailed within paragraph 56 of the Framework and the condition is reasonable and necessary in reference to the information before me.
13. Turning to the appellant's suggested revised wording for Condition 7. The condition requires the maintenance of any attenuation measures employed. However, it excludes the requirement to maintain the actual equipment. The maintenance of the extract system is necessary to ensure that it is retained in good working order to safeguard the living conditions of the occupiers of neighbouring properties throughout its lifetime. Therefore, the omission of the requirement to maintain the system would be unacceptable. Furthermore, the suggested revised wording does not deal with the potential effects of vibration, which was included within Condition 8 of the 2018 permission.
14. The extract system is attached to the external wall of the building, including the wall of the flats on the first and second floors. Therefore, the suggested measurement location of "*1m from the nearest habitable room window or the boundary of the nearest residential premises whichever is closer*" is not representative of existing circumstances as the current flue is closer to the windows than 1m.
15. At the time of my site visit it appeared that the flats within the appeal property were occupied. The appellant's revised wording requires the trigger points of the condition to be undertaken "*prior to first occupation...*". Therefore, even if I had found the appellant's revised wording to be acceptable, I could not impose it, as it would be unenforceable.
16. I have been directed to conditions imposed by the Council on other planning approvals to demonstrate that Condition 7 of the 2018 permission is inconsistent with other conditions the Council has imposed on similar developments. However, limited information has been provided regarding these permissions and therefore I am unable to determine whether they are directly comparable. In any event, I must determine each case on its own merits.
17. In conclusion, a suitably worded noise attenuation condition is reasonable and necessary to ensure the take-away operates in a manner that would safeguard the living conditions of the occupiers of neighbouring properties, with particular reference to noise and disturbance. Overall, Condition 7 would achieve those aims, even with the minor issue relating to its precise wording. For the reasons outlined above, I am not persuaded that the appellant's suggested revised wording for Condition 7 would safeguard the living conditions of the occupiers of neighbouring properties or would be enforceable.

18. Neither party has offered an alternative wording for my consideration, and while I have the power to impose a differently worded condition, to do so, I would require additional information that is not before me, including details of the existing extract system, background noise surveys, a survey of the existing equipment, details of how the flow rate can be fixed, to ensure that any revised wording was reasonable and could be complied with.
19. In reference to the main issue, the proposal would conflict with Policies KP2 and CP4 of the Southend on Sea Core Strategy Development Plan Document One, adopted 2007 and Policies DM1 and DM3 of the Southend on Sea Borough Council Development Management Document, adopted 2015 that seek, amongst other things, to protect the amenity of the site, immediate neighbours and surrounding area having regard to noise and disturbance. It would also conflict with the Southend on Sea Supplementary Planning Document 1 Design and Townscape Guide, adopted 2009 that seeks, amongst other things, to ensure that noise conflicts between different occupiers do not cause disturbance.

Conclusion

20. For the reasons given above, having regard to the development plan as a whole and all other matters raised, the appeal should be dismissed.

A Berry

INSPECTOR