



Appeal Decision

Site visit made on 5 June 2025

by **M Cryan BA(Hons) DipTP MSc MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 13 January 2026

Appeal Ref: **APP/C5690/W/24/3355539**

122 New Cross Road, London SE14 5BA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Mr Raj Patel against the decision of the Council of the London Borough of Lewisham.
- The application reference is DC/23/131998.
- The development proposed is a new building with nine flats to the rear of an existing building facing the street, below which the flats will gain access; the lower part of the existing building will be altered to house ancillary functions (refuse storage) etc.

Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mr Raj Patel against the Council of the London Borough of Lewisham. This application is the subject of a separate Decision.

Preliminary and Procedural Matters

Local and national planning policy

3. On 16 July 2025, while the appeal was being determined, the Council adopted the new Lewisham Local Plan ("the LLP"). This replaced the 2011 Lewisham Core Strategy and the 2014 Lewisham Development Management Local Plan, the policies of which had been referred to in the Council's decision notice and other appeal evidence submitted up to that point. I therefore sought comments from the main parties on the new LLP, which I have taken into account in reaching my decision.
4. In December 2024 the Government published a revised National Planning Policy Framework ("the Framework"), replacing the December 2023 version extant at the time the planning application had been determined. Both main parties' final appeal submissions were made in the light of the provisions of the December 2024 Framework, so it was not necessary for me to seek further comments on those changes.
5. In December 2025 the Government launched a consultation on proposed revisions to the Framework. Although the extent of changes would be considerable, given the draft status of the consultation document there is considerable doubt over the wording and implications of the revisions which will ultimately be made to the Framework. The consultation version of the proposed changes carries limited weight at present, and I have not therefore sought comments on them from the

parties. Where I have referred in this decision to specific paragraphs of the Framework, the numbering used is that of the December 2024 version.

Planning history

6. The appeal site itself has a considerable planning history. Among other things:

- In December 2010 planning permission was granted for a development described as “the construction of single to three storey building incorporating terraces, on land to the rear of 122 New Cross Road SE14, comprising 3 commercial units (Use Class B1) on the ground floor and 5 two bedroom self-contained maisonettes above, together with associated landscaping and alterations to the front and rear of 122 New Cross Road with the provision of refuse/recycle and bicycle stores at ground floor level” ¹.
- In September 2016, the Council refused planning permission for an alternative scheme, described as “the construction of a new building with 9 self-contained flats and associated alterations to the existing building”. It was the subject of an appeal, which was dismissed in November 2017 ².
- In January 2019, the Council refused planning permission for another alternative scheme, described as the “construction of a three storey building incorporating balconies, on land to the rear of No 122 New Cross Road, SE14, to provide 3 one bedroom, 5 two bedroom and 1 three bedroom self-contained flats, together with associated landscaping and alterations to the front and rear of the existing building fronting New Cross Road, with the provision of refuse/ recycle and bicycle stores at ground floor level” ³. No appeal was made against this refusal.
- In 2018 an application was made for a lawful development certificate relating to the December 2010 permission⁴, which was refused by the Council. This was again the subject of an appeal. Two decisions – one allowing the appeal, one dismissing it – were quashed following challenges under section 288 of the Act. A third decision – allowing the appeal and granting the LDC – was issued in May 2022 ⁵.

7. This is by no means the complete history of the site, though these cases are particularly relevant to this appeal. I refer to them below as “the 2010 planning permission”, “the 2017 appeal”, “the 2019 refusal”, and “the 2022 LDC appeal” respectively.

8. Reference was also made to the grant of planning permission on 22 January 2022 for an area of land bounded by Besson Street, Briant Street and New Cross Road east of, and adjacent to, the appeal site⁶. I refer below to that development, described as “the comprehensive redevelopment of Land at the corner of Briant and Besson Street, SE14, including demolition of existing structures to deliver a mixed use development comprising 324 residential units (Use Class C3), flexible retail and commercial floorspace (Use Class A1/A3/B1), a Pharmacy (Use Class

¹ LPA Ref: DC/10/073432.

² LPA Ref: DC/14/087433; PINS Ref: APP/C5690/W/16/3162045 (the description of the proposed development I have used here is taken from the appeal decision).

³ LPA Ref: DC/17/103612

⁴ LPA Ref: DC/18/105530.

⁵ PINS Ref: APP/C5690/X/18/3204924

⁶ LPA Ref: DC/19/114805

A1), a GP surgery (Use Class D1) and community space (Use Class D2) in buildings ranging from 3 to 12 storeys, provision of disabled car parking, cycle parking and servicing facilities, landscaping and other associated works”, as “the Besson Street permission” or “the Besson Street scheme”.

Additional submission

9. During the appeal, a submission was made on behalf of Music Room London (“MRL”), a neighbouring business, relating to one of the conditions which the Council had suggested should be imposed in the event of my allowing the appeal. This came outside the standard timescale for such representations, which does not normally provide for interested parties to make further comments after the Council has submitted an appeal statement.
10. While it would have been possible for MRL to submit its own suggested conditions as part of its earlier response to the appeal consultation, the submission addressed matters central to my consideration of the second main issue in this appeal. Notwithstanding the appellant’s observation about the time taken to prepare the MRL submission, I consider it could not reasonably have been submitted significantly earlier in the proceedings (that is, within the standard timetable), and I therefore accepted it as late evidence. In the interests of fairness, I also gave both main parties the opportunity to comment on it. I have taken the MRL submission, and the comments made by the appellant in response⁷, into account in my determination of the appeal. In view of the approach I have set out here I am satisfied that all parties have had “a fair crack of the whip”, and none of their interests have been prejudiced or otherwise harmed by my having followed this course.

Main Issues

11. The main issues are:

- Whether the proposed development would comply with national and local planning policy which seeks to steer new development away from areas at the highest risk of flooding;
- Whether the proposed development would compromise the continued operation of adjacent noise-generating businesses, having particular regard to the “agent of change” principle; and
- Whether the proposed development would provide acceptable living conditions for future occupiers, with particular regard to daylight and sunlight.

Reasons

Flood risk

12. The appeal relates to No 122 New Cross Road and the area of land at its rear. No 122 is part of a longer 19th Century block called Minerva Terrace. The ground floor of No 122 was once a commercial unit with a single-storey front projection to a shopfront on New Cross Road, though the shopfront and other original features have been lost and the ground floor is now little more than a derelict shell. The

⁷ The Council did not submit further comments on the additional MRL submission.

- upper floors are divided into three flats. The irregularly-shaped land at the rear widens to run behind Nos 120 and 124.
13. Other buildings in Minerva Terrace follow a similar pattern to No 122, albeit that it appeared to me that most of the ground floor units were in some form of active, if not commercial, use. To the north-west, separated by No 124 New Cross Road (the last building of Minerva Terrace) and its rear garden, is the former New Cross Library, now home to MRL; to the south of the site is a small group of industrial premises, accessed from Fishers Court of Besson Street. To the west is the site of the proposed Besson Street scheme described above.
 14. The proposed development is the erection of a three-storey block of flats. The new block would be set at the rear of the site, in a wide-angled L-shape. The flats would be accessed from New Cross Road through the former shop unit at the front of the site, which would also accommodate refuse and cycle storage for the development. The submitted drawings show that the shop front would be replaced with glass and timber panels in a timber frame, and that the existing uPVC first- and second-floor frontage windows would be replaced with painted timber sash windows in a traditional style. The area between the frontage building and the new building would be landscaped to provide a communal garden.
 15. The Environment Agency Flood Map for Planning shows that the appeal site lies within Flood Zone 2 and so is at medium risk (1 in 100 to 1 in 1,000 years) of river or sea flooding (in this case, from the tidal River Thames). Paragraph 170 of the Framework indicates that “inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future)”, while the Planning Practice Guidance (“the PPG”) clarifies that for areas at risk of river and sea flooding, this is principally land within Flood Zones 2 and 3, or where a Strategic Flood Risk Assessment shows it will be at risk of flooding in the future⁸.
 16. Policy SD7 of the LLP says that development proposals must apply a sequential approach to the location of new development to avoid flood risk to the population and property whilst taking account of the long-term impact of climate change. It goes on to say that a site-specific Flood Risk Assessment (“FRA”) will be required for all development proposals within Flood Zones 2, 3a and 3b, and that this should provide sufficient information that it can be assessed whether the requirements of the sequential and exception tests have been satisfied. The development plan therefore applies the sequential approach to development set out in national planning policy and guidance.
 17. The assessment of flood risk which formed part of the planning application noted that the site is “just outside the area of very low risk”, that “it also benefits from London’s flood defences”, and that “a fuller assessment or response is not therefore required”⁹. More detailed information submitted during the appeal¹⁰ addressed the significance of the Thames Barrier and other flood defences protecting London, the intention under the *Thames Estuary 2100* project to raise and adapt defences to deal with increasing maximum likely water levels, and the residual risk of flooding in the event of a failure of defences; this concluded that the

⁸ Paragraph: 001 Reference ID: 7-001-20220825, Revision date: 25 08 2022

⁹ *Supporting Statements Rev. July 2023*, Peter Hutchinson Architects, paras. 8.1 and 8.2

¹⁰ *Flood Risk Letter for 122 New Cross Road*, 13 November 2024, Herrington Consulting

long-term risk of flooding to the site would remain low, even after allowing for climate change.

18. Even so, in my experience it is usual to ignore the presence of flood defences for the purposes of carrying out the sequential test. The appellant acknowledges that this is the approach set out in the PPG¹¹; other advice (such the need to take a “proportionate approach” to the application of the sequential test¹²) should be viewed in that context. The appeal site is, and the proposed building would be, in an area which both national and local policy consider to be at risk of flooding. The proposal would not be “minor development” in the terms set out in the Framework in respect of flood risk. Taking the preceding points together, a sequential test is therefore necessary. None has been submitted with the proposal, and accordingly it has not been demonstrated that there are no reasonably available alternative sites where the proposal could be developed.
19. The appellant has made further observations related to this matter, including that the Council has (both in pre-application advice and in granting the 2010 permission) accepted the principle of developing the site, and that although the development would have residential uses on the ground floor these would have raised floor levels, which would lessen the risk of any flood damage. I also acknowledge that the proposal would bring a brownfield site back into use, in a sustainable location with good access to a wide range of services and amenities. However, all of these points address matters that would be appraised *following* a sequential test (including, were one to be required, as part of the Exception Test which, Paragraph 178 of the Framework explains, takes into account whether there would be wider sustainability benefits to the community which outweigh the flood risk, and whether the development would be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere). As compliance with the sequential approach has not been demonstrated, I have not considered these points in detail here.
20. The appellant also drew my attention to, and provided me with an extract of the summary and conclusions from, the FRA for the Besson Street scheme. I was not provided with the full assessment, but there is no reference in the extract before me, or in the Council’s officer report for that development, to a sequential test having been carried out during the application (though as the Besson Street site had been allocated for development in the 2011 Lewisham Core Strategy, it is reasonable to assume that this had formed part of the plan-making stage). In any case, notwithstanding the proximity of the two sites, an FRA forming part of the Besson Street permission is self-evidently not a site-specific FRA for the appeal proposal, and it does not weigh significantly in its favour.
21. For the reasons I have set out above, I conclude that the proposed development would not comply with national planning policy which seeks to steer new development away from areas at the highest risk of flooding. It would therefore conflict with Policy SD7 of the LLP, the principal relevant provisions of which I have set out above. It would also conflict with Policy SI 12 of the London Plan 2021 which seeks to minimise and mitigate flood risk, as well as the requirements of the Framework in respect of flood risk.

¹¹ Paragraph: 024 Reference ID: 7-024-20220825, Revision date: 25 08 2022

¹² PPG Paragraph: 027 Reference ID: 7-027-20220825, Revision date: 17 09 2025

Noise and “agent of change”

22. The appeal site is close to two principal noise generating uses. The first is MRL, a live music, cinema and arts and venue with rehearsal studios and event space, which has operated from the former New Cross Library north of the appeal site since around 1993. MRL is not subject to planning conditions restricting its hours of operation, or in respect of noise levels. The second is the industrial premises on Fishers Court to the south of the appeal site, which I understand to include a stone restoration business.
23. The presence of existing noise generating uses could mean that occupiers of the proposed development could be adversely affected by noise. In turn, there is the potential for complaints about noise which could lead to established and lawful operations being restricted. This would conflict with the “agent of change” principle applied by Policy QD7 of the LLP, Policy D13 of the London Plan 2021, and Paragraph 200 of the Framework, which seeks to ensure that, where the operation of an existing business or community facility could have a significant adverse effect on new development in its vicinity, the new development (or “agent of change”) should be required to provide suitable mitigation.
24. A noise assessment (“NA”) was submitted as part of the planning application¹³. The planning application supporting statement had indicated that the NA was the same as that which had been submitted for the 2019 refusal¹⁴. In fact, it was more recent and included the results of noise level measurements taken on the appeal site from Thursday 9 to Wednesday 15 November 2023¹⁵. The NA was prepared with reference to guidance and standards in *ProPG: Planning & Noise* (“ProPG”)¹⁶ and BS 8233:2014 *Guidance on sound insulation and noise reduction for buildings*, which reflect World Health Organisation (“WHO”) guidelines. The Council also referred to BS 4142:2014 + A1:2019 *Methods for rating and assessing industrial and commercial sound*. While the development plan includes policies relating to amenity and noise, I have not been made aware of any specific standards relating to noise levels set out there or in associated development plan guidance.
25. When I visited the appeal site, at around lunchtime on a weekday, I did not notice any significant noise from the industrial units, though I acknowledge that I was there only for a short period. However, the NA also did not capture any significant noise on the appeal site from the industrial uses. I have therefore focused here on matters relating to MRL, in line with most of the evidence which was put to me.
26. I have not been provided with details of MRL’s *actual* current operating hours, though at the time of the 2017 appeal decision it opened between 10.00 and 23.00 on weekdays, and between 10.00 and 21.00 at weekends. I am told that the range of activities taking place at MRL has increased since 2017, and that it is used for performances “late into the evenings, including at weekends” which attract significant numbers of customers to the site. I also understand that the use of the external space at the rear of MRL as a beer garden and bar is a new feature since 2017. The two most likely sources of significant noise disturbance in respect of the appeal proposal are music noise, from the rehearsal rooms and performances in

¹³ *Noise Assessment 122 New Cross Road London* Rev. 1.3 dated 21 February 2024, Lustre Consulting

¹⁴ *Supporting Statements* Rev. July 2023, Peter Hutchinson Architects, para. 10.1

¹⁵ Data for 25 hours from early Monday 13 to early Tuesday 14 were excluded because the noise readings had been affected by wind and rain

¹⁶ *Professional Practice Guidance on Planning & Noise*, 2017, Association of Noise Consultants, Institute of Acoustics and Chartered Institute of Environmental Health.

the bar space; and the talking or shouting of customers, either leaking from within the building or from the beer garden.

27. I visited MRL myself immediately after visiting the appeal site and was shown round its studios, bar area, and other facilities, as well as the rear garden. I have therefore been able to see (and hear) MRL's operations, although the timing of my visit meant that, while a couple of the rehearsal studios were being used, overall there were relatively few customers on the premises. Nevertheless, this visit improved my understanding of the relationship between MRL and the appeal site.
28. The submitted NA set out acoustic design criteria for the proposed development. BS 8233:2014 recommends that internal ambient noise levels do not exceed 35 dB $L_{Aeq,16hour}$ for living rooms and bedrooms during the day, and 30 dB $L_{Aeq,8hour}$ for bedrooms during the night. However, recognising that the noise from music or patrons at MRL would not be "anonymous", the NA proposed that a 5 dB penalty be applied to those BS 8233:2014 limits in respect of MRL (rather than "general") noise, and the assessment period reduced to one hour (rather than the 16-hour day or 8-hour night average). The scheme's design target for living rooms and bedrooms during the day is therefore 30 dB $L_{Aeq,1hour}$, and for bedrooms at night it is 25 dB $L_{Aeq,1hour}$. For bedrooms at night, in view of the possibility of exposure to low-frequency noise, an additional short-term "worst case" target of 15 dB NR $L_{eq,5min}$ was proposed, with a "sudden" noise target (for shouting and similar sounds) of 45 dB $L_{AF,max}$. The NA included details of specifications for the building envelope in respect of wall construction, glazing and ventilation, and concluded that with such measures the proposed dwellings would meet all the targets set out here.
29. The design criteria proposed in the NA are more stringent than those which the Council suggested should be applied by condition in the event of my allowing the appeal. MRL, supported by the Council's environmental health officer, considered that the habitable rooms in the development should comply with the NR20 noise rating curve, and with NR15 in the 62.5Hz and 125Hz frequency bands. There is nothing before me to indicate exactly what that requirement would mean in terms of internal sound levels in the proposed flats or the extent of any additional measures which would be necessary to comply, though I understand that it would be an even more stringent standard. However, while I acknowledge that such compliance has been required for other schemes in Lewisham, I was not provided with anything to explain how those other cases are comparable to this, nor with any technical evidence to demonstrate why it would be necessary for that even stricter standard to be met here.
30. The NA for the appeal scheme noted that, with open windows, "general" noise levels in the flats would be exceeded, even before taking into account music and patron noise from MRL. It was therefore proposed that additional means of ventilation would need to be provided to the dwellings. The Council considered that this would leave noise mitigation reliant on "the actions of a third party" which neither they nor the appellant could control. However, it would allow occupiers of the flats to leave windows shut during relatively noisy periods, if they wished, while still providing adequate ventilation. While the use of mechanical ventilation may not be ideal, in my view it is not an unacceptable additional measure in this instance, given the particular circumstances of the relatively small scheme proposed for a somewhat constrained site. As my colleague noted in the 2017 appeal decision (and notwithstanding the lack of planning restrictions on MRL's operating hours),

occupiers would still have the option of opening windows during quieter periods, including overnight.

31. Taking all of this together, I am satisfied that it would be possible to provide acceptable conditions in terms of noise inside the proposed flats. I therefore turn to the question of the external areas – the private patios and balconies, and the communal garden – which would provide valuable amenity space for residents of the development.
32. When I was on the appeal site some bass sounds from MRL were audible over the background traffic and aircraft noise, though these were not (to my ears) so loud as to seem especially intrusive. While I was in the beer garden of MRL, however, a different (and seemingly much louder and more intrusive) range of music noise from the rear studios was clearly audible, though obviously by then I had no way of telling what that would have sounded like from the appeal site. In any case, my own impressions were formed over a very short period, when MRL was not busy (and, indeed, there were no customers using the beer garden). Future occupiers of the proposed development, living there for the longer-term, would be likely to have a very different perception of matters.
33. For external amenity areas, BS 8233:2014 advises that “it is desirable that the external noise level does not exceed 50 dB $L_{Aeq,T}$, with an upper guideline value of 55 dB $L_{Aeq,T}$ which would be acceptable in noisier environments”. The NA noted that the baseline survey found ambient external noise levels to be within the 50 to 56 dB L_{Aeq} range, which would exceed both what is considered “desirable” and, by a small amount, the “upper guideline value”. However, the NA also acknowledged that “noise egress from MRL would not be anonymous, especially when music is played at higher levels”. Future occupiers would be likely to be more sensitive to such noise, and I note that the noise in the external amenity areas at the “music worst case” level of 62 dB $L_{Aeq,5min}$ and the “sudden” shouting maximum level of 81 dB $L_{AF,max}$ would be likely to be perceived as significantly intrusive.
34. There is nothing before me to demonstrate that adequate noise mitigation could or would be put in place in respect of the external amenity areas. I address the question of, and any weight to be given to, the 2010 permission as a fallback position following the 2022 LDC appeal decision (which was relied on by the appellant on this matter, including in the NA) below. However, I find that noise from MRL which would be audible in external amenity areas would be likely to cause some unacceptable disturbance to residents of the proposed development.
35. I am aware that the section 106 agreement for Besson Street permission includes a requirement for a “deed of easement”, described by the Council as granting MRL “defined rights over the whole of the [Besson Street scheme] by allowing it to produce noise up to specified levels during its permitted hours of operation. The relevant hours and the related noise levels would be a matter of detail to be picked up in the deed of easement itself”. MRL suggested that such an easement should be required here, in the event of the appeal being allowed. I do not know what the terms of the Besson Street easement are, and therefore have no way of knowing whether a comparable agreement might be a useful “additional protection”, as the Council put it. The alternative view put forward by the appellant is that it could raise questions of legality and ethics by compromising future occupiers’ human right to sleep while simultaneously “allowing them no recourse” – though that remark goes further than my own view, in the light of my findings above in respect of internal

noise levels. In any event, there is no such easement or agreement before me here to take into consideration.

36. I agree with the appellant that the operations of MRL cannot be entirely unconstrained in terms of possible noise disturbance. Flats within the upper floors of Nos 120 and 122 New Cross Road were, to the best of my knowledge, occupied before MRL began operating. In respect of those flats, MRL is itself the agent of change, though there is no evidence before me of noise nuisance complaints having been made by occupiers of those dwellings. All the same, the agent of change principle requires that a strongly precautionary approach be taken as far as new development is concerned. Given the close relationship between MRL and the nine proposed flats, the potential adverse impacts I have described above and the consequent conflict with the agent of change principle, the presence of other dwellings nearby does not carry significant weight in favour of the appeal scheme.
37. In view of the relationship between the proposed external amenity spaces and MRL, I cannot be confident that the development would not compromise the continued operation of that noise-generating use, having regard to the agent of change principle. The proposal would therefore conflict with Policy QD7 of the LLP, Policy D13 of the London Plan, and Paragraph 200 of the Framework, which seek to ensure a good standard of amenity while protecting existing established noise-generating businesses by applying the agent of change principle, as I have already described above. There would also be conflict with Policy D6 of the London Plan 2021 which seeks to maximise the usability of outside amenity space in residential development, and Policy D14 of the London Plan 2021 which seeks to mitigate and minimise adverse impacts of noise in the vicinity of new development without placing unreasonable restrictions on existing noise-generating uses.

Living conditions

38. The development plan and the Framework both seek to ensure that new residential schemes are well-designed, with a high standard of amenity for occupiers (including by ensuring that they receive sufficient daylight and sunlight). Policies of the LLP and the London Plan 2021 also seek to minimise the provision of single-aspect dwellings, in view of the potential for improved daylight, outlook and natural ventilation which dual-aspect dwellings offer.
39. There would be three flats on each floor of the proposed block. Most – though not all – of the principal habitable rooms throughout the development would be served by windows on north or north-west facing elevations; these would open onto the communal garden, which would have three- and four-storey buildings on three sides¹⁷, as well as large mature trees in the garden of No 124 to the north. Some flats would have additional – mostly high-level or obscure-glazed – windows on the rear (south or south-east facing) elevations, and several would have rooflights.
40. The planning application included application included a copy of the daylight and sunlight report for the 2010 permission¹⁸, but this relates to a proposed building of different height and layout, and in any event only deals with potential overshadowing of habitable rooms and gardens in neighbouring properties. There is no substantive evidence before me which demonstrates that the habitable rooms

¹⁷ Although Minerva Terrace, including No 122 New Cross Road, is described as having three storeys, the rear elevation of the block is effectively four storeys high.

¹⁸ Dixon Payne, February 2010

of the nine flats proposed here would receive adequate natural daylight or sunlight and, given the constrained urban nature of the site as I have described above, I am therefore not satisfied that they would provide acceptable living conditions for occupiers.

41. I also note that the second bedrooms in two flats, E and H, would each have only an obscure-glazed window, This would not offer any form of outlook, and would also contribute to poor living conditions for the occupiers of those flats. This point does not appear to have been picked up by the Council in its assessment of the scheme but, as it does not materially alter my overall conclusion on this matter I have not sought further comments on it from the main parties.
42. The Council considers that five of the nine proposed dwellings (flats C, D, F, G and J) would be single-aspect, while the appellant argues that the presence of rooflights means that none would be (though they acknowledge that Flat C would be “only in terms of outlook”). Having regard to the definition of “dual aspect” in the Mayor of London’s 2023 *Housing Design Standards* guidance¹⁹, on my reading of the submitted plans it seems that two of the nine (flats C and G) would be single aspect. In fact, bearing in mind the site’s constraints including its shape, and the presence of existing buildings on three sides, the specific circumstances of the case suggest that some flexibility on this point may be appropriate. At the same time, even if I accept all of the appellant’s arguments and find that the development would be acceptable in terms of aspect, this would not overcome the other shortcomings in respect of living conditions.
43. The decision notice for the 2019 refusal did not refer to the provision of adequate daylight or sunlight. However, the development plan has changed significantly since then, with the adoption of new borough and London-wide plans. Furthermore, the BRE guidelines *Site Layout Planning for Daylight and Sunlight – A Guide to Good Practice* which do not set statutory standards (though they are referred to in Policy QD8 of the LLP) have also been updated since the 2019 refusal. In view of the changing policy and guidance background, it is not evidence of inconsistent decision making that this matter had not been a reason for refusal for earlier applications.
44. In respect of single-aspect dwellings, the appellant again drew my attention to the adjoining Besson Street scheme. I note from the Council’s committee report that 38% of the 324 units in that scheme would be single aspect, though it also states that only six units would be single-aspect *and* north facing. It is also evident that, for the Besson Street scheme, the Council took other matters into account, including the outlook from single-aspect units, and the slightly more generous size (compared to minimum floorspace standards) of north-facing units and, having done so, reached a balanced view in favour of that scheme. It was entitled to do so on the basis of the facts of that scheme, and that it did when granting the Besson Street permission does not carry significant weight in favour of this proposal, given the different scale and nature of the two schemes.
45. I therefore conclude that the proposed development would not provide acceptable living conditions for future occupiers, with particular regard to daylight and sunlight, and outlook. Because of this, it would conflict with Policy QD8 of the LLP, and with

¹⁹ Which, among other things, requires “opening windows on two external walls, which may be on opposite sides of a dwelling [...] or on adjacent sides of a dwelling”, and states that “dwellings that have opening windows on two adjacent sides can only be defined as dual aspect if the window opening/s are situated at least halfway down the depth of the dwelling”.

Policy D6 of the London Plan 2021. Among other things, these policies seek to ensure that housing is well-designed and provides a good standard of living for future occupiers, including by ensuring adequate provision of daylight and sunlight.

Other Matters

Fallback

46. In determining the 2017 appeal, my predecessor observed that it was not their position (in the context of a section 78 appeal) to resolve the disagreement between the appellant and the Council as to whether the 2010 planning permission had expired or remained extant. That matter was dealt with by the 2022 LDC appeal decision, which established that the 2010 planning permission had been lawfully commenced; there is no dispute that that permission remains extant today.
47. The concept of a fallback position as a material consideration is not novel, and has been considered in various court judgments. In assessing the 2010 planning permission as a possible fallback position, there are two key questions for me to address (neatly summarised in paragraphs 25 to 27 of *Gambone*²⁰). Firstly, is there a more than theoretical possibility that the fallback development might take place? And secondly, if so, what weight should be given to it, having regard to the facts of the case and consideration of the scale of any harm which would arise?
48. The development allowed by the 2010 planning permission would be a mixed-use scheme, with three commercial units on the ground floor, and five two-storey maisonettes above. It was put to me by both the Council and MRL that the presence of commercial units mean that it would not be a viable development. Indeed, part of the appellant's case when submitting an application for an all-residential development in 2016 (the subject of the 2017 appeal) was that the 2010 scheme "would not be a successful or indeed a viable development"²¹, though at the Hearing for that appeal the appellant stated that the 2010 scheme would nonetheless be a profitable development.
49. The Council is of the view that the increase in build costs since 2017 is likely to have rendered the 2010 mixed-use scheme even even less viable than before. The appellant responded that property values have also risen, that "a comparative financial appraisal might now find the mixed-use scheme more attractive", and that the mixed-use scheme would be less expensive to build, though there is no substantive evidence before me which addresses viability or costs either way. Nevertheless, the appellant's position now is that "the reality, in development terms, is that there is no alternative to the construction of either the extant scheme as consented, without material amendment, or if this appeal to be allowed the appealed proposal".
50. It was the appellant's stated position eight years ago that if the 2017 appeal was dismissed they would build out the extant permission²² – it was, and they have not. The appellant blames this lack of progress on "the planning process, essentially the resistance from MRL, by and large supported by [the Council]". The appellant's continuing pursuit of an all-residential scheme even after the 2017 appeal could also cast further doubt on the likelihood of the 2010 planning permission being built out, the interpretation preferred by the Council.

²⁰ Raffaele Gambone v Secretary of State for Communities and Local Government [2014] EWHC 952 (Admin)

²¹ Paragraph 15 of the 2017 appeal decision.

²² Paragraph 16 of the 2017 appeal decision.

51. In assessing this “first question”, I have given little weight to changes in planning policy since the 2010 planning permission was granted; while any outstanding details specified in conditions may need to be submitted to the Council for approval (although I do not know if any remain), this would not mean a reassessment of the entire scheme against current policies. The 2010 planning permission remains live, and the appellant has clearly stated their intention to build it out as an alternative to this appeal proposal. In fallback terms I consider that it must be treated as at least a possibility, rather than a merely theoretical prospect. I therefore turn to the “second question”, and the weight to be given to the fallback position. I will first consider it in terms of those aspects of the main issues above where I have found harm, before addressing other points raised.
52. Flood risk vulnerability classifications are set out in Annex 3 of the Framework; buildings used for dwelling houses fall into the “more vulnerable” category, while buildings used for a variety of commercial purposes (including shops, offices and general industry) are classified as “less vulnerable”. I again acknowledge that it is part of the appellant’s case that the actual flood risk at the site would be low though, as I have set out above, this has not been demonstrated in the manner required by national and local policies. The appeal proposal would introduce ground floor residential units onto a site in Flood Zone 2, while the extant 2010 permission would have commercial units on the ground floor. The more vulnerable ground floor uses proposed in this scheme would lead to considerably greater conflict with planning policy, and the potential for greater harm to occupiers in the event of flooding, than would the fallback scheme.
53. It is the appellant’s case that future occupiers of this appeal scheme “would be better protected against noise than those of the consented [fallback] scheme”. Condition 1 of the fallback permission includes reference to “soundproofing against airborne and impact sound” and was the subject of considerable discussion in the 2022 LDC appeal decision. In that case, my colleague noted that “the condition was imposed to mitigate any impact between the commercial use on the ground floor and the residential use above” rather than noise from outside sources such as MRL, and it does not set any specific sound level requirement in that respect.
54. For the reasons I have set out above, I consider that the appeal proposal would provide acceptable noise conditions *within* the proposed flats, and were the appeal to be allowed a condition could be imposed which would not only set those target sound levels, but which would require testing and a demonstration of compliance before the occupation of the development. In respect the impact of noise on residents’ living conditions within the proposed dwellings, I therefore consider that the appeal scheme would be less harmful than the fallback position.
55. There is no substantive evidence before me to indicate that sound levels in external amenity areas would differ significantly between the two schemes, in view of the proximity of those areas to MRL and the lack of mitigation in both cases. The appeal scheme would have nine dwellings rather than the five in the 2010 permission scheme, but the site layout would be broadly the same. As noise in private and shared amenity areas would be likely to adversely affect a greater number of residents here, in terms of external noise I consider that the appeal scheme would be slightly more harmful than the fallback position, though it would still be likely to perform better overall in terms of noise impacts on living conditions.

56. As the appeal scheme and the fallback scheme would be subject to adverse noise impacts, both could potentially lead to future occupiers seeking to restrict the future activities of MRL. While there would be the differences in precise impacts which I have described, and different numbers of flats or residents might be affected, both developments would conflict with the strongly-precautionary agent of change principle. I therefore do not separate their potential impacts in this respect – both schemes would potentially be significantly harmful, albeit that the probability of that “potentially” is difficult or impossible to attempt to quantify.
57. As far as living conditions in respect of daylight and sunlight are concerned, there is no substantive information before me in respect of the 2010 planning permission on this matter. My assumption is therefore that it complied with the relevant standards at the time that decision was made, though as I have noted in paragraph 43 above those standards have changed. Nevertheless, the approved drawings for that scheme show large windows (on a visual comparison of the plans, windows serving principal rooms on the inward-facing side of the development appear to be larger than their counterparts in the appeal scheme). The fallback scheme also does not include residential accommodation on the lowest floor of the development where, based on the site’s surroundings, in my experience daylight levels might sensibly be expected to be particularly low. In view of my findings on this main issue I consider that the appeal scheme would be more harmful than the fallback.
58. Turning to other factors, the appellant has suggested that the appeal proposal would include measures such as energy generation from more solar panels and heat pumps, which would make it potentially feasible to achieve a building that has is zero-carbon in usage, though the limited information on this (set out in the supporting statements during the application) is couched in very general terms rather than specific detail. The fallback scheme would also include rooftop solar panels, and would need to be built to energy efficiency and similar standards set out in the current building regulations. It was also put to me that the appeal scheme would make “more provision for planting and with that biodiversity” than the approved scheme, although a comparison of the submitted and approved drawings suggests that, other than perhaps some areas of green roof in the appeal scheme, the differences in this respect would be negligible. Broadly speaking, I consider the appeal scheme and fallback position to be approximately comparable in these respects.
59. The appellant also stated that the fallback scheme would not be subject to an affordable housing contribution and so, compared to the appeal scheme, would lead to money being lost to the public purse. However, I can find no reference in the Council’s evidence to an affordable housing contribution being required by the development plan policies. If such a contribution *is* required, there is no means before me by which one could be secured. This point does not weigh in favour of the appeal scheme over the fallback position.
60. I have carefully considered the arguments which have been put to me about fallback, as I have set out above. In terms of noise within dwellings, I find that the fallback permission would be more harmful than the appeal scheme. In terms of flood risk, and living conditions in respect of daylight, I find that the appeal scheme would be more harmful than the fallback position. They would be approximately comparable in terms of noise in external areas, the agent of change principle, and the other matters described. In the overall balance, I find that the fallback scheme

would be less harmful than the appeal proposal, and it does not therefore carry significant weight in favour of the appeal scheme.

Hatcham Conservation Area

61. The appeal site is within the Hatcham Conservation Area. The Council considered that the scale and materials of the proposed development would be appropriate, and that the replacement of the shopfront to New Cross Road would be an enhancement, albeit that further details would be required. At the same time, an interested party objected to the impact of the proposed development on the conservation area and noted that, in determining the 2017 appeal, my predecessor found that scheme would fail to preserve the character and appearance of the conservation area, causing less than substantial harm to its significance as a designated heritage asset. I have a statutory duty to pay special attention to the desirability of preserving or enhancing the character or appearance of the conservation area but, in view of my overall conclusion, I have not sought further comments from the main parties on this matter as they would not alter the outcome of the appeal.

Other issues not addressed above

62. The appellant raised further matters in respect of the Council's handling of the planning application, including its pre-application advice and the consistency of its decision making. Beyond those points which I have addressed in my reasons above they are not directly related to the planning merits of the proposal, but are dealt with instead in the separate costs decision.

Conclusion

63. The proposed development would provide nine additional dwellings, in a location which is close to a range of shops and services including public transport connections. These are benefits which carry considerable weight in its favour.
64. However, the development would not comply with the "agent of change" principle in respect of nearby noise-generating businesses, and it has not been demonstrated either that it would provide acceptable living conditions in respect of daylight, or that it would comply with national and local policies in respect of flood risk. These shortcomings carry considerable weight, and in my view outweigh the benefits of the scheme. As a result, the proposal would conflict with the development plan taken as a whole, and there are no other considerations, including the fallback position or the provisions of the Framework, that outweigh this conflict.
65. For the reasons set out above, I therefore conclude that the appeal should be dismissed.

M Cryan

Inspector