



## Appeal Decision

Hearing Held on 28 August 2019

Site visit made on 28 August 2019

**by John Dowsett MA DipURP DipUD MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 11<sup>th</sup> November 2019

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**Appeal Ref: APP/P4605/W/18/3217413**

**18-20 Albion Court, Frederick Street, Birmingham B1 3HE**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Part 3, Class O of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
  - The appeal is made by Seven Capital (Albion) Limited against the decision of Birmingham City Council.
  - The application Ref: 2018/03393/PA, dated 25 April 2018, was refused by notice dated 14 June 2018.
  - The development proposed is a change of use of a building from office use (Class B1(a)) to a 21no. residential apartments (Class C3).
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### Decision

1. The appeal is dismissed.

### Application for costs

2. Prior to the hearing an application for costs was made by Seven Capital (Albion) Limited against Birmingham City Council. At the hearing, a third party, Albion Court Action Group, made applications for costs against both Seven Capital (Albion) Limited and Birmingham City Council. These applications are the subject of a separate Decision.

### Procedural matters

3. As originally submitted, the appeal proposal sought Prior Approval for the creation of 23 flats within the appeal building. Before the hearing, the appellant submitted an amended drawing that removed two proposed flats within the basement level of the appeal building from the scheme. The Council and third parties were made aware of this amendment and did not raise any objections to it. It was subsequently agreed at the hearing that the description of the proposal should be amended to read 21no. residential apartments.

### Main Issue

4. Class O of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), hereinafter the GPDO, grants planning permission for the change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the

Schedule to the Use Classes Order<sup>1</sup>, to a use falling within Class C3 (dwellinghouses). It is not in dispute that the building was in a use falling within use Class B1(a) on 29th May 2013, and that the appeal site is not within a safety hazard area or military explosives area, nor is the building a listed building or scheduled monument. The Council accept that the change of use would constitute permitted development.

5. Planning permission granted by Part 3, Class of the GPDO is subject to a condition that, before beginning the development, an application is made to the local planning authority for a determination as to whether the prior approval of the authority will be required in respect of the transport and highways impacts of the development; contamination risks on the site; flooding risks on the site; and the impacts of noise from commercial premises on the intended occupiers of the development. The Council resolved that its prior approval was required, and this was subsequently refused. It is common ground between the main parties that the proposed development would not have any adverse effects in terms of transport and highways and that there are no risks to the development from contamination or flooding. The sole matter in dispute is the efficacy of the noise mitigation measures proposed by the appellant and the effect that noise from nearby premises in commercial use may have on the future residents of the proposed flats.
6. Therefore, the main issue in this appeal is the effect of noise from nearby commercial premises on the future occupiers of the proposed development.

### **Reasons**

7. The appeal building is a two storey structure with a semi-basement level. At the time of the hearing site visit, a further floor had been inserted into the roof space of the building as part of works commenced, and later suspended, under a previous prior approval. It is located within the city's Jewellery Quarter, which is predominantly commercial in nature with some small enclaves of residential uses. In the vicinity of the appeal building are several licenced premises that hold licences for live and recorded music, in particular the 1000 Trades public house which immediately adjoins the appeal building and Acapella on the junction of Albion Street and Frederick Street, opposite the appeal site. The Council state, and it is not contested by the appellant, that the licencing conditions of these premises allow recorded or live music until 03:00 on certain days.
8. Both parties recognise that these premises will be a source of noise that would affect the appeal building. Paragraph 182 of the National Planning Policy Framework (the Framework) seeks to ensure that new development can be effectively integrated with existing businesses and community facilities, which includes music venues, and that such businesses should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Paragraph 182 further states that where the operation of an existing business would have a significant effect on new development nearby, the applicant/appellant should be required to provide suitable mitigation as part of the development.
9. In order to mitigate the potential for noise nuisance, it is proposed to install secondary glazing behind the existing windows in the appeal building and to

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<sup>1</sup> The Town and Country Planning (Use Classes) Order 1987 (as amended)

provide sound insulation on the party wall between the appeal building and the adjoining 1000 Trades public house. During the course of the appeal the specification of these mitigation measures were changed from that originally proposed, however, all the relevant parties have had the opportunity to comment on the revised specification. Mechanical ventilation would be provided throughout the building to provide the air changes required by the Building Regulations.

10. The Council have not challenged the technical findings of the appellant's noise assessments, although these are challenged by Albion Court Action Group who are third party objectors to the proposal and were represented at the hearing. The Council's primary concern is that the mitigation measures relied upon by the proposal would result in the future occupiers of the building having to keep the windows of the flats and the secondary glazing closed to prevent noise ingress, which would result in unsuitable living conditions.
11. Although it was argued by the appellant that Part 3, Class O makes no reference to living conditions and that there are no policy preclusions on sealed windows, in making a determination on a prior approval application, decision makers are required to have regard to the provisions of the Framework, so far as they are relevant to the proposal. Paragraph 127 of the Framework requires that new development should create places which promote health and well-being, with a high standard of amenity for existing and future users. The Planning Practice Guidance also identifies that if proposed noise mitigation relies on windows being kept closed this may have an effect on living conditions.
12. In addition, from the wording of Paragraph O2 (1)(d) of the GPDO, which deals with the conditions subject to which permission is granted, the effect of the proposal on living conditions is implicit in the consideration of the impacts of noise from commercial premises on the intended occupiers of the development. Within this context it is clear that the manner in which it is proposed to mitigate the noise is an integral and non-severable part of assessing the potential effect of noise on the future occupiers.
13. The appellant confirmed at the hearing that the secondary glazing to be installed at the appeal building would be openable and it was also confirmed that the proposed mitigation would only be effective if the windows and secondary glazing are closed.
14. There is no formal policy basis in the Framework that precludes the use of sealed windows, and the Council accepts that the use of mechanical ventilation would meet the requirements of the Building Regulations. Although there may be a psychological effect of living in an environment where it is not possible to open the windows, this is difficult to objectively quantify as it would affect different people in different ways. The Council do not generally support the use of sealed windows or fixed glazing, nevertheless, there is no persuasive evidence that would support the contention that fixed glazing would automatically result in poor living conditions.
15. Whilst the use of sealed windows would not necessarily result in unacceptable living conditions, the key test in this case that has to be met in order to meet the requirements of the GPDO is the effect of noise from commercial premises on the future occupiers and whether that noise can be suitably mitigated in

order to integrate the proposal with existing businesses. The appeal proposal specifically does not include sealed windows or fixed secondary glazing.

16. Although it is suggested by the appellant that people moving into city centre housing are prepared to make compromises in return for the convenience and lifestyle offered by city centre living, future occupiers would nevertheless have expectations regarding their quality of life and it cannot be assumed that any or all future occupiers of the development would necessarily be more tolerant of noise, nor can it be assumed that future occupiers would keep windows closed, even during events that resulted in noise. Whilst a planning condition could ensure that a noise mitigation scheme was put in place, it cannot thereafter ensure that it is used or operated as intended. Regardless of the provision of mechanical ventilation, future occupiers may wish to open the windows for access to fresh air or other reasons, and the actions of the future occupiers are not within the control of either the appellant or the Council.
17. The principal noise sources at this point in time result from evening uses and so windows in the appeal building could potentially be opened without detriment to the occupiers during the day. However, there is no evidence that the activities at the music venues is restricted or do not occur during the daytime. The surrounding area is commercial in nature and other nearby commercial users could at a future date introduce noisier uses or daytime activities that are not necessarily controllable, and the Framework is explicit that existing businesses should not be unreasonably restricted by development permitted after they were established. The ability to open the windows and secondary glazing would, therefore, fatally undermine the effectiveness of the proposed mitigation scheme.
18. In these circumstances, regardless of whether the enhanced glazing and sound insulation on the dividing wall would result in an acceptable internal noise climate and suitable living conditions for the future occupiers, the mitigation proposed is compromised by its reliance on the actions of a third party, namely the future occupiers, which is beyond the control of either the appellant or the Council, and, consequently, the proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development.
19. I have had regard to Inspector's decision on 50 Frederick Street opposite the site which allowed flats to be created above the premises now known as Acapella and the Inspector's conclusion that as a result of the mitigation measures proposed in that case, the impact of noise from commercial premises on the intended occupiers of the development would be acceptable. However, I note that this resulted in flats that had sealed, non-opening, windows and it was apparent from my site visit that the upper floor windows of this building are sealed units. This is materially different from the case in the present appeal, where the existing opening windows are being retained and openable secondary glazing is being installed. It is not proposed to replace the existing windows in the appeal building with fixed glazing. Nonetheless, I do not consider that this approval represents a precedent to allow the appeal proposal.
20. I have also had regard to the other cases cited by the appellant where the use of sealed windows has been permitted or openable windows have been found acceptable. I do not have the full details of these cases and so cannot be

certain that the circumstances are similar to the case now before me. I note that the Council state in respect of the planning permissions that it has granted that there were other regeneration benefits that outweighed the disadvantages of sealed windows, and I also note that these schemes are markedly different in scale to the appeal proposal. In respect of the appeal decision at Perry Barr<sup>2</sup>, whilst I note that the Inspector concluded that openable windows were acceptable and that the proposal would provide a suitable residential environment, I do not have any details in respect of the nature or proximity of the noise sources, or of the prevailing noise climate in the area. I therefore cannot tell if this is comparable to the case before me, where there are multiple late night noise sources extremely close to the appeal building and, as a result, I can give little weight to this.

21. A number of conditions were discussed at the hearing relating to noise mitigation. Paragraph W of Schedule 2, Part 3 to the GPDO does allow for conditions that are reasonable related to the subject matter of the prior approval. However, the matter of noise mitigation is in itself a condition of the development permitted by the GPDO, is the principal matter in dispute between the parties, and goes to the heart of the main issue in this appeal. In these circumstances it would not be appropriate to require the submission of a further noise mitigation scheme as this would, in effect, reopen the prior approval process.
22. I conclude that the appeal proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development. It would conflict with the relevant requirements of the Framework which seeks to ensure that new development new development can be effectively integrated with existing businesses and community facilities; that where the operation of an existing business would have a significant effect on new development nearby, suitable noise mitigation is provided as part of the development; and that new development provides a high standard of amenity for future occupiers.

### **Other Matters**

23. It was argued on behalf of the third parties that allowing the proposal would have a detrimental effect on the operation of the 1000 Trades public house as a music venue. Whilst this pre-supposes that there may be complaints from the future residents in respect of noise, it is also difficult to objectively quantify the likely prospects of success of such complaints. In any event, as this application is for prior approval rather than an application for planning permission, the matter that is before me is ultimately whether the proposed development would provide suitable living conditions for the future occupiers of the proposed development taking into account the existing commercial noise sources in the area and the proposed mitigation measures. It is not for me to determine whether those existing noise sources constitute an actionable noise nuisance but rather whether the proposed noise mitigation is appropriate.
24. The third parties also raised concerns in respect of increased car parking in the area as a consequence of the development. The appeal site has good access to public transport within a short distance of and is within reasonable walking distance of large parts of the city centre. No substantive evidence was submitted in respect of current and future parking demand, or which would

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<sup>2</sup> Appeal reference: APP/P4605/W/18/3201108

demonstrate that the area suffers from parking stress. I also note that the Highways Authority have not raised any objections to the proposal. Based on the evidence, I have no reason to conclude differently.

**Conclusion**

25. For the above reasons, I conclude that the appeal should be dismissed.

*John Dowsett*

INSPECTOR

## **APPEARANCES**

### FOR THE APPELLANT:

Ms N Pindham	Barrister, No. 5 Chambers
Mr K Fenwick	Pegasus Group
Mr N Mann	White Young Green
Mr A Moore	Pegasus Group
Mr L Kelter	White Young Green

### FOR THE LOCAL PLANNING AUTHORITY:

Mr D Wells	Principal Planner, Birmingham City Council
Mr M Key	Regulatory Services, Birmingham City Council
Ms A Do	Planning Officer, Birmingham City Council

### INTERESTED PERSONS:

On behalf of Albion Court Action  
Group:

Ms S Clover	Barrister, Kings Chambers
Mr B Albon	Sandy Brown Associates
Mr J Stapleton	1000 Trades
Mr J Todd	1000 Trades
Mr P Rose	Birmingham Jazz
Mr D Mahoney	Jewellery Quarter Development Trust

### DOCUMENTS SUBMITTED AT THE HEARING

Updated drawings showing 21 flats (basement flats omitted)

Updated suggested conditions

Written submission from Jewellery Quarter Development Trust

Written submission from Birmingham Jazz