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## Appeal Decision

Site visit made on 8 September 2022

by **Grahame Gould BA MPhil MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 9 December 2022

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**APP/V2255/W/22/3297650**

**The Shipyard Upper Brents Industrial Estate, Upper Brents, Faversham  
ME13 7DZ**

- 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 Mr J Shave against the decision of Swale Borough Council
  - The application Ref 21/504909/FULL, dated 6 September 2022, was refused by notice dated 3 December 2021.
  - The development proposed is described as "Mixed-use development comprising: (1) the erection of 3 No. terraced units in Class C3 (dwellinghouse) use with optional Class E(g)(i) (office) use at the ground floor, excluding sleeping accommodation at the ground floor and including access, parking and turning via Waterside Close, together with associated landscaping; (2) the erection of 4 No. commercial units in Class (g)(iii) (light industrial), B2 (general industrial) or B8 (storage and distribution) uses, with associated access, turning and parking via a separate road, plus acoustic fencing.
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### Decision

1. The appeal is dismissed.

### Preliminary Matters

2. In response to the Council's second reason for refusing planning permission, the appellant on 13 September 2022 paid a contribution of £827.64 to the Council to mitigate effects of the development on the Swale Special Protection Area for birds (the SPA). That contribution was paid pursuant to section 111 of the Local Government Act 1972, sections 12 and 93 of the Local Government Act 2003 and section 1 of the Localism Act 2011<sup>1</sup>. This contribution having been paid as an alternative to the appellant entering into a planning obligation under section 106 of the Town and Country Planning Act 1990 (TCPA1990).
3. The Council has confirmed<sup>2</sup> that the receipt of the SPA contribution has addressed its second reason for refusal. The development's effect on the SPA is no longer a contested matter.

### Main Issues

4. The main issues are whether the development would:
  - provide acceptable living conditions for its occupiers, having particular regard to noise in the area;

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<sup>1</sup> As explained in a "SAMMS Mitigation Contribution Agreement" completed by the appellant on 13 September 2022

<sup>2</sup> Through the submission of emails to the Planning Inspectorate on 13 and 15 September

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- effect the supply of industrial/commercial land in the area; and
  - effect the integrity of the SPA.

### Reasons

#### *Living conditions for the occupiers of the development*

5. The site is situated to the east of unit 4 (No 4) Upper Brents Industrial Estate. Nos 1 to 4 being four industrial units, of which Nos 1 and 2 are occupied, while Nos 3 and 4 were vacant at the time of my site visit. The site was in part occupied by four other industrial units (Nos 5 to 8), which were destroyed by a fire in 2001. All that remains of Nos 5 to 8 is the base on which they stood to the east of No 4. To the south and east of Nos 1 to 4 there is a comparatively recent development comprising 26, three storey, "business units with associated residential accommodation"<sup>3</sup>, which are essentially dwellings, in Waterside Close. In Waterside Close there is a terrace of five very recently constructed properties, Nos 25 to 29, which adjoin the appeal site.
6. The site is bounded immediately to the north by engineering/foundry premises. Those premises comprise some comparatively large buildings and an extensive yard. The foundry premises have brick walls, while their roofs are clad with corrugated sheeting. Some extraction fans have been installed in the roofs of those premises. The foundry has the ability to operate 24 hours a day and it has an increased production rate between June and September<sup>4</sup>.
7. The development would involve the construction of a terrace of three dwellings, including optional ground floor office space (the dwellings), and four commercial units for occupation by light industrial, general industrial or storage and distribution users. The commercial units would have a floor area of 528 square metres and it is anticipated they would provide employment for 15 people. The commercial units would be sited in a row immediately to the east of No 4, where Nos 5 to 8 were previously located.
8. The dwellings would be sited so as to infill the gap between No 29 and part of the foundry's southern boundary, occupying land shown as a parking and vehicle manoeuvring area on the original plans for Waterside Close<sup>5</sup>.
9. Table 1 in the appellant's acoustic report summaries the results of a noise survey undertaken in June 2016. During that survey the on-site daytime (0700 to 2300 hours) noise levels ranged between 51 and 56 dB L<sub>Aeq</sub>, while the night-time (2300 to 0700 hours) level was between 50 and 51 dB L<sub>Aeq</sub>. The maximum night-time level ranging between 54 and 60 dB L<sub>Amax</sub>. Throughout my site visit noise emanating from the foundry was clearly audible.
10. The surveyed daytime and night-time noise levels indicate that without attenuation the internal noise levels within the dwellings would exceed the interior guideline levels referred to in British Standard BS 8233:2014<sup>6</sup> (BS8233) and the World Health Organisation's 'Guidelines for Community

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<sup>3</sup> As described in planning permissions SW/97/0202 and SW/97/0203 and later permissions relating to Waterside Close

<sup>4</sup> Paragraph 2.5 of the noise impact assessment (acoustic report) submitted with the appealed planning application

<sup>5</sup> SW/97/202 and SW/97/203

<sup>6</sup> 'Guidance on sound insulation and noise reduction for buildings'

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Noise', as set out respectively in Table 2 and paragraph 4.3.1 of the acoustic report. In that regard BS8233's recommended internal design criteria for a living room during the daytime is 35 dB  $L_{Aeq}$ , while the recommended bedroom night-time level is 30 dB  $L_{Aeq}$ .

11. Given the level and the round the clock nature of the noise emanating from the foundry it is intended that the dwellings would have acoustic double glazing (without trickle vents) and mechanical ventilation. With those attenuation measures the dwelling's internal noise levels have been predicted not to exceed the guideline levels stated in BS8233. The windows would be openable, giving the dwellings' occupiers the choice to ventilate their properties either naturally or mechanically. Observance of BS8233's guideline levels would require the dwellings' windows and doors to be closed.
12. I recognise that the installation of the attenuation measures would be capable of providing an appropriate internal noise environment for the occupiers of the dwellings. The installation of those measures could be secured through the imposition of a planning condition. However, to avoid there being internal noise disturbance the occupiers of these dwellings would effectively need to reside in hermetically sealed homes, albeit that those occupiers could not be compelled to keep the doors and windows of their homes closed and/or use the mechanical ventilation. Those residents might wish to open doors and windows to receive fresh air. I am of the view that reliance on keeping doors and windows closed and using mechanical ventilation, potentially all the time because there are no restrictions on the foundry's operation, to ensure the residential occupiers avoided "... *being seriously annoyed by noise ...*", indicates that this development would offer its occupiers very poor living conditions.
13. The Council's Environmental Health officer (EHO) felt unable to advise planning permission be refused. However, the EHO's advice falls a long way short of providing a ringing endorsement for the siting of the dwellings, with heavy reliance being placed on the effectiveness of the attenuation measures. I am therefore of the view that the EHO's observations should not be looked upon as being a barrier to a finding that reliance on keeping doors and windows closed and using mechanical ventilation would provide very poor living conditions for this development's residents.
14. The rear gardens of the dwellings would be exposed to noise levels in the range of 51 to 56 dB  $L_{Aeq}$ <sup>8</sup>. BS8233 refers to a desirable noise level of up to 50 dB  $L_{Aeq}$  and an upper limit of 55 dB  $L_{Aeq}$ <sup>9</sup>. To avoid an exceedance of the upper limit it has been recommended that the rear gardens be enclosed with acoustic fencing or walling at a minimum of 3 metres in height. The rear gardens of the dwellings would have a depth of around 5 metres and would therefore have relatively small areas. I consider small gardens enclosed by fencing or walling of at least 3 metres in height would provide an uninviting external environment, further contributing to the dwellings providing their occupiers with poor living conditions.
15. I am mindful that the existing dwellings in Waterside Close have been built without the proposed attenuation measures. However, those existing

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<sup>7</sup> The Council's Environmental Protection Team comments of 26 October 2021

<sup>8</sup> Based on the survey results from June 2016

<sup>9</sup> Table 2 in the acoustic report

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dwellings are sited further from the foundry than would be the case for the now proposed dwellings and given that the former's exposure to the noise emanating from the foundry is not directly comparable.

16. Given the noise originating from the foundry, it appears that from Waterside Close's first inception the land forming the gap between No 29 and the foundry was purposefully earmarked for vehicle parking and manoeuvring as opposed to a location for dwellings.
17. For the reasons given above I conclude that the development would provide unacceptable living conditions for its occupiers, having particular regard to noise in the area. There would therefore be conflict with Policies CP4(1) and DM14(8) of the Swale Borough Local Plan of 2017 (the Local Plan). That is because the development would not be of a good design, with it failing to provide a comfortable place for its residential occupiers and it being harmful to the living conditions (amenity) of those occupiers.
18. In terms of the policy stated in the National Planning Policy Framework (the Framework), while this development would involve the use of previously developed land it would be inappropriately located and would not promote healthy living conditions for its occupiers. Given that I consider there would be conflict with paragraphs 119, 124(e) and 185 of the Framework, meaning that part of the proposed development would not amount to an effective use of land. Having regard to the policy stated in paragraph 187 of the Framework and given my concerns about the suitability of the intended mitigation, I am not persuaded the new dwellings could be integrated effectively with the business operating from the foundry.

*Effect on the supply of industrial/commercial land*

19. The appeal site is within an industrial/employment area and Policies ST7(1), CP1(1) and NP1 of the Local Plan and Policy BIE1 of the Faversham Creek Neighbourhood Plan made in 2017 (the NP) collectively seek to maintain industrial uses in this location. Policy BIE1 states that the "*Brents Industrial Estate shall be retained in industrial use for a mixture of class B1<sup>10</sup> and B2 uses to provide local employment and relatively low cost premises suitable for small businesses ...*". The appellant has questioned the consistency of the extent of the employment area subject to Policy BEI1 with the evidence base underpinning the adopted Local Plan. However, the NP is a made plan and the appropriate time to have queried its policies and the extent of any designations included in it was when it was being examined. I therefore consider it unnecessary for me to comment further on that aspect of the appellant's case.
20. While the proposed dwellings would occupy land forming part of an industrial/employment area that land has not been actively used for employment purposes for around twenty years. In that regard there is no evidence of the land on which the dwellings would be sited having been actively pursued as a location for commercial development, with the proximity of the dwellings at Nos 25 to 29 now being likely to preclude general industrial usage under class B2. Additionally, the plans approved in connection with the

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<sup>10</sup> Now forming part of Class E of the Use Classes Order, further to amendments made by The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020

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planning permissions for what has become Waterside Close clearly show the land beyond No 29 as a parking and manoeuvring area.

21. The land at the northern extremity of Waterside Close continues to remain capable of becoming a parking and vehicle manoeuvring area in line with the previous planning permissions. Based on the evidence before me I am not persuaded that permitting the proposed dwellings would, in practice, amount to a significant loss of employment land. The provision of the four commercial units would accord with the development plan's industrial/employment area designation.
22. I therefore conclude that the development would not have an unacceptable effect on the supply of industrial/commercial land in the area. The residential element of the development would result in some conflict with Policies ST7(1), CP1(1) and NP1 of the Local Plan and Policy BIE1 of the NP. However, given the amount of land in question and its planning history I consider that the conflict with those development plan policies would be minor and would not fundamentally undermine the implementation of the development plan's employment policies.

*Effect on the integrity of the SPA*

23. The development would involve increased residential occupation a little over 80 metres from the SPA. There is therefore potential for the occupiers of the development to use the SPA as an informal recreational destination. That activity, in combination with visits made by the occupiers of other new residential development within the 6km zone of influence for the SPA, could adversely affect the integrity of the SPA or cause disturbance to qualifying features (birds) frequenting the SPA. It is therefore likely that the development would have a significant effect on the SPA's qualifying features.
24. The SPA is afforded protection under the Conservation of Habitats and Species Regulations 2010 (the Habitats Regulations). To reduce the potential for recreational disturbance to arise within the SPA, as mitigation, the Council seeks developer contributions to fund the operation of an Access Management and Monitoring strategy (SAMM). Developer funding for the SAMM's operation being a form of mitigation that Natural England supports. The SAMM operates on the basis of contributions being paid in line with a fixed tariff for each new dwelling in the SPA's zone of influence. A SAMM contribution of £827.64 has been identified as the required sum in this instance.
25. In line with the guidance in the Planning Practice Guidance measures intended to inform decisions about the effects on the integrity of habitats, such as an SPA, need to be sufficiently secured and likely to work in practice<sup>11</sup>. It is usual for financial contributions intended to mitigate the effects of new development to be secured through the making of a planning obligation under section 106 of the TCPA1990. Although the SPA contribution that has been paid has not been secured through the operation of a planning obligation, I am content through the provisions of the SAMM Mitigation Contribution Agreement that the appellant has submitted to the Council that the SAMM contribution could only be used by the Council for the purposes of mitigating the development's effect on the SPA.

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<sup>11</sup> Paragraph 4 in section 65 of the Planning Practice Guidance, published by the Government on 22 July 2019

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26. Accordingly, I conclude that mitigation would be available so that the development would be unlikely to adversely affect the SPA's integrity. I therefore consider with the payment of the SPA contribution that the requirements of the Habitats Regulations have been fulfilled and that the development would accord with Policies ST1, DM14 and DM28 of the Local Plan and paragraph 180 of the Framework. That is because mitigation would be available to conserve the natural environment, most particularly the integrity of the SPA.

#### **Other Matters**

27. The appeal site straddles the boundary of the extensive, mixed use Faversham Conservation Area (the CA) and the dwellings and part of the commercial development would be within the CA. Special attention is to be paid to the desirability of preserving or enhancing the character or appearance of the CA. The site is vacant and I consider it is not contributing positively to the CA's character or appearance.
28. Given the siting, scale and external appearance of the proposed dwellings, I am of the view that they would appear as a natural extension to Waterside Close. I consider that aspect of the development would enhance the CA's appearance through removing a gap site. The commercial units would be of a utilitarian design, however, I consider those units would not look out of place, having regard to the various industrial buildings just outside the CA. I am therefore of the view that the presence of the commercial units would preserve the character and appearance of the CA. I am therefore of the view that the development in its totality would not harm the character or appearance of the CA.
29. The planning history for the area indicates that the Council has been accepting of Nos 5 to 8's replacement following the granting of planning permission for Waterside Close. Given that background and the intended siting of the proposed commercial units, I consider there would be sufficient separation between those units and the existing dwellings in Waterside Close for the living conditions of the occupiers of the latter not to be adversely affected. In that regard the planting in front of the perimeter fencing adjoining Nos 1 to 4 has become well established and that has softened the appearance of the southern perimeter fence. I see no reason why such planting could not be replicated as part of the development now proposed, which would similarly soften the appearance of the fencing opposite Nos 26 to 29.
30. The Council cannot currently demonstrate a five year supply of deliverable housing sites (5yrHLS). The Council places the 5yrHLS at around 4.6 years, equating to there being a need for an additional 370 dwellings per annum<sup>12</sup>. Providing three extra dwellings at Waterside Close would amount to around 0.8% of the annual deficit and I consider that contribution would be small and would not significantly boost the supply of housing in the Council's area. In terms of boosting the supply of housing the circumstances of the appeal before me are therefore very different to the allowed Wises Lane appeal<sup>13</sup>, which concerned a development for up to 675 dwellings. The Rides House appeal<sup>14</sup> involved a proposal for a net increase of one dwelling in a rural

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<sup>12</sup> Paragraph 8.15 in the Council's officer report

<sup>13</sup> APP/V2255/W/19/3233606, included as appendix 5 to the appellant's statement of case

<sup>14</sup> APP/V2255/W/20/3262303, included as appendix 4 to the appellant's statement of case

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location and that scheme is of a scale not too dissimilar to the proposal before me. However, for Rides House the Inspector in allowing the appeal found no unacceptable harm would arise, whereas I have concluded there would be unacceptable harm to the living conditions for the prospective occupiers of the dwellings. The circumstances of the Rides House case are therefore not directly comparable with the appeal before me.

### **Planning balance**

31. The development would provide very poor living conditions for its residential occupiers and because of that I consider it would be harmful. I therefore consider substantial weight should be attached to the conflict that aspect of the development has with Policies CP4(1) and DM14(8). Policies CP4(1) and DM14(8) being consistent with the Framework and are applicable to all types of development and not just new housing schemes.
32. The positive aspects of the development concern the reuse of previously developed land relating well to the town, with there being no harm to the supply of industrial/commercial land, the SPA or the CA. Provision would be made for some dwellings and the reinstatement of commercial premises, with the former making a very modest contribution to reducing the 5yrHLS shortfall. There would therefore be various, economic, social and environmental benefits weighing for this scheme, including the creation of employment opportunities. Those matters gain support from a number of policies stated in the Framework. However, that Framework support is countered by the conflict with the Framework's policies which, as part of achieving well designed places, require new development to promote health and wellbeing for the occupiers of new dwellings.
33. Given the absence of a 5yrHLS what is commonly referred to as the "tilted balance" under paragraph 14(d) of the Framework is engaged. However, for the reasons I have set out above, most particularly in relation to my first main issue, I am of the view that the adverse impacts of the development that I have identified would significantly and demonstrably outweigh the benefits when assessed against the Framework's policies taken as a whole. I am therefore of the view this would not be a sustainable form of development.

### **Conclusions**

34. The residential element of the development would be contrary to the development plan and I consider the development in its totality could not be made acceptable through imposing reasonable planning conditions.
35. While the tilted balance under paragraph 11 of the Framework is engaged, I am of the view that the development's adverse impacts outweigh its benefits. I am further of the view that the matters weighing for the development do not indicate that a decision should be made otherwise than in accordance with the development plan. I therefore conclude that the appeal should be dismissed.

*Grahame Gould*  
INSPECTOR