IN THE MATTER OF A S.73A TCPA 1990 APPLICATION
RELATING TO ST. GEORGE'S COURT, CAMBERLEY

ADVICE

Introduction

1. I am asked to advise Surrey Heath Borough Council ("the Council"), in its capacity as local planning authority, in relation to an application ("the Application") pursuant to s.73A of the Town and Country Planning Act 1990 ("TCPA") in respect of 1-23 St. George's Court, Camberley ("the Development"). This advice is supplemental to my initial view contained in an email dated 7 August 2018.

2. The facts are set out in my instructions and accompanying hardcopy and electronic documents (including those on the Council's planning portal); I do not propose to repeat them here. In summary, and for reasons set out in this advice, the Application must be determined by reference to the current noise standards and the latest noise survey data.

Legal framework

3. S.73A confers a general power on a local planning authority to grant planning permission with retrospective effect, including where development has been carried out without complying with some condition(s) subject to which planning permission was granted: s.73A(2)(c) TCPA.

4. An application for planning permission under s.73A is in all respects – except that development will have been carried out – a conventional planning application: *Wilkinson v Rosendale BC* [2002] EWHC 1204 (Admin), per Sullivan J (as he then was) at §49. Therefore, in dealing with such an application, "the local planning authority must have regard to the provisions of the development plan, so far as material, and to any other material considerations" (§49).

5. I note that while *Wilkinson* has not been followed in subsequent cases, this has been on a different point, namely, the scope for examining the wider planning merits (beyond those concerning the condition in issue) when determining applications under ss.73 and 73A TCPA: see for e.g. *Lawson Builders Ltd v Secretary of State for Communities and Local*

Government [2015] EWCA Civ 122 at §32-33. Both *Lawson* and *R (Thomas) v Merthyr Tydfil CBC* [2016] EWHC 972 (Admin) confirm that the ambit of consideration of the broader planning merits (whether under s.73 or s.73A) depends on the nature and stage of the development and the individual circumstances of each application.

6. The uncontested principle in *Wilkinson*, however, simply restates the obligations contained in s.70(2) TCPA 1990 and 38(6) of the Planning and Compulsory Purchase Act 2004, i.e., to have regard to the provisions of the development plan and any other material considerations.

7. When determining an application under this section, the authority must look at the planning circumstances existing at the date of the decision, and should not focus on whether the condition had been inappropriately imposed in the first place: *Sevenoaks DC v Secretary of State for the Environment* (1995) 69 P. & C.R. 87. This approach – i.e. of focusing on the appropriateness of a condition at the time of the decision, and not when it was originally imposed – was also followed in the related context of considering an enforcement notice issued for breach of condition: *Bannister v Secretary of State for the Environment* [1994] 2 P.L.R. 90.

Discussion

8. There is not an abundance of case law nor guidance on this issue. That being said, the cases referred to above make it clear that authorities must look at the current planning circumstances when determining applications for retrospective planning permission. This is because a s.73A application is treated as a conventional planning application. There are certainly no special or separate rules when it comes to s.73A applications either in statute or the National Planning Policy Framework.

9. As a matter of pragmatism, too, it would seem counterintuitive for a planning application (even one under s.73A) or appeal to be determined by reference to historic material considerations, be it old development plan policies that had clearly been overturned or old factual circumstances that no longer existed.

10. Therefore the Council must determine the Application by reference to the current noise standards, the latest noise survey data, and the existing noise climate in the town centre. To look to the noise climate as it existed in 2004-2005 to assess the Application would in my view be contrary to the case law.

11. As regards the noise standards, in particular, I note that I have not had sight of either BS 8233:1999 or BS 8233:2014. My understanding of how the British Standards operate is that

the latest version supersedes any previous version. As far as I am aware, the standards do not have any form of transitional arrangements (such that when considering applications until a certain date, one must look to the old standards). Those instructing me will be able to confirm this point, but subject to anything to the contrary, it does appear to be a case of a new set of standards simply revoking and replacing any older version. For this reason, too, I do not consider that the Council can determine the Application by reference to the old, 1999 standards.

12. I appreciate the Council has every sympathy for the residents involved, and it does appear that they have suffered numerous issues with respect to the Development, not solely limited to the conditions at the heart of this Application. However, in planning terms, the focus in determining the Application must remain on the present planning circumstances.

Next steps

13. I trust I have covered the issues raised, but please do not hesitate to contact me if there are any questions arising.

[redacted]
Cornerstone Barristers
23 August 2018