

Our Ref: CXF/231492/00001



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By Special Delivery

16 August 2022

Dear Sirs

Letter before claim: planning application reference 22/00293/FUL at Former Contract Chemicals Site, Bristol Road, Gloucester

We act for Avon Metals Limited in relation to their representations on the above planning application. We understand that the Council shortly intends to grant planning permission. The purpose of this letter is to put the Council on notice of our client's concerns and to ask that permission is not granted and the matter referred instead back to Planning Committee, with an appropriate recommendation to refuse permission.

Our clients operate an established specialist alloy manufacturing business, providing significant local employment. The business premises includes modern furnaces and metal reprocessing facilities. It lies approximately 135 metres to the south-west of the Application site. Our client is deeply concerned regarding its ability to continue to operate those premises unfettered should the development which is the subject of the Application proceed, not least without incurring substantial costs which may render the business unviable in this location and which would result in substantial local job losses and significant economic losses to our client.

1 PROPOSED CLAIM FOR JUDICIAL REVIEW

To Gloucester City Council, PO Box 3252, Gloucester GL1 9FW

2 THE CLAIMANT

Avon Metals Limited
Ashville Road, Gloucester, Gloucestershire GL2 5DA

3 THE DEFENDANT'S REFERENCE

Planning application reference: 22/00293/FUL.

Planning case officer: David Millinship, Senior Planning Officer, Gloucester City Council.

4 THE CLAIMANTS' LEGAL ADVISERS DEALING WITH THIS CLAIM

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5 THE MATTER BEING CHALLENGED

Planning permission if granted by Gloucester City Council pursuant to application reference 22/00293/FUL (“**Application**”) for the erection of 43 dwellings, comprising 13 houses and 30 flats, together with associated parking and landscaping at the Former Contract Chemical Site, Bristol Road, Gloucester, following a Planning Committee meeting held on Tuesday 2 August 2022.

6 INTERESTED PARTIES

Matthew Homes Limited
Matthew House, 45 - 47 High Street, Potters Bar, Hertfordshire, EN6 5AW

7 THE ISSUE

7.1 Our clients made a number of representations to the Application, including on 14 January 2020, 24 June 2020 and 20 January 2021, through PJS Development Solutions.

7.2 The Report to Committee stated as follows:

7.2.1 Noise – WRS. Worcestershire Regulatory Services (WRS) as a statutory consultee is noted as considering that the submitted noise assessment is representative of the noise climate at the proposed development site (paragraph 4.12). WRS is said to have “concerns that in granting planning permission ... the future development / evolution of the Avon Metals site may be restricted and / or the amenity of future residents may be compromised” (paragraph 4.13). WRS acknowledge that the site has not been allocated for residential development and had previously commented that intervening B1 / Retail Use between Avon Metals and the proposed development site would have been preferable (paragraph 4.14). If permission is granted, in terms of the proposed glazing and ventilation strategy, a “plot by plot specification” is sought and acoustic consultants should confirm that the product will “meet or exceed the noise reduction levels detailed within the submitted noise assessment”.

7.2.2 Avon Metals’ objection to the scheme is noted at paragraph 5.2 and summarised merely as “the proposal is fundamentally unacceptable as the proposed land use ... is wholly incompatible with its near industrial neighbours’ ... operations”; further, “it has also been suggested that the methodology and proposed mitigation measures of the submitted noise survey have not properly taken into account the noise from the adjacent industrial sites.” No details are given as to how the methodology and mitigation are considered to fall short of requirements, despite those being set out in our clients’ representations and associated expert noise reports. Those representations were not available to Committee. The hyperlink in paragraph 5.3 did not work, due to the Council’s ongoing IT failures.

7.2.3 In the “Officer Opinion” suggestions, at paragraph 6.29, noise is identified as a potential issue due to the location of the Application site and the proximity of the A Class Bristol Road. Paragraph 6.29 also states that the applicant’s Noise Survey confirms that “less noise” is expected to be caused by the “adjacent commercial land uses” (i.e. less than the noise from Bristol Road). This does not explain the position regarding night-time noise (see below).

- 7.2.4 Paragraph 6.30 refers to a scheme of mitigation with “enhanced glazing along with alternative ventilation” for the facades directly adjacent to the industrial units to the south-west.
- 7.2.5 It is asserted that, in accordance with the guidance in BS4142, noise associated with the industrial operations has been assessed and mitigation measures outlined to “reduce the effects” of any noticeable or intrusive noise sources within dwellings. As such, the conclusion in paragraph 6.30 is that there are not expected to be any ‘significant adverse impacts’ relating to noise and the matter can be controlled by condition. There is no detailed explanation as to how the effects are “reduced” or to what level. There is no mention of what might happen if the windows are opened nor the use of external living space.
- 7.2.6 The Avon Metals objection is acknowledged in paragraph 6.31 and summarised as being that the proposal is “fundamentally unacceptable as the proposed land use (residential) is wholly incompatible with its near industrial ... operations; noise impacts have not been properly assessed and would be unacceptable”; further that the proposal conflicts with the aims of NPPF paragraph 182 (July 2021 para.187) and, as a result, JCS policies SD14 and emerging GCP policy A1. No detail is given and, as noted above, the full representations were not available to Committee.
- 7.2.7 Paragraph 6.32 quotes what is known as the “agent of change principle” and notably that “Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or ‘agent of change’) should be required to provide suitable mitigation before the development has been completed”.
- 7.2.8 Paragraphs 6.33 and 6.34 refer to the above as resulting from impact on licenced premises and state that the NPPF specifically points towards “community and entertainment venues” with “social and cultural value”. The Report states that the NPPF does not specifically reference industrial sites, but there is a reasonable expectation that some consideration of the possible impact of a residential development on any type of commercial land use should be undertaken, the key consideration being whether a use could give rise to “significant adverse effects” and, if so, whether mitigation can be provided. Of course, the relevant paragraph of the NPPF actually refers to “existing businesses”, which is not acknowledged.
- 7.2.9 The Avon Metals site is described at paragraph 6.35 as being “mainly centred around manufacturing, processing and trading of non-ferrous and ferrous metals. The site includes buildings and open yard areas. It is not clear whether the site may (or may not) be in 24hr operation.” It can be confirmed that the site is in 24-hour use and operation. This is a vital consideration in any assessment of noise impacts. The Council can and should have made itself aware of that position; it had in any event been noted by WRS.
- 7.2.10 Paragraph 6.35 goes on to state that “It is reasonable to expect that the waste processing and manufacturing uses certainly generate noise of a level and character that has the potential to be audible at the application site but, the risk that the operations would give rise to ‘significant adverse effects’ on the future occupiers of the application site appears to be relatively low.” Save as referred to below, the reasons for this conclusion are not specified and are set in a way that leaves doubt (“appears to be relatively low”). No information is given for members to consider as to how that doubt arises, particularly in the context of a clear objection by Avon Metals as to the methodology utilised, of which no detail is set out in the Report.

- 7.2.11 Paragraph 6.35 goes on to states that “the main source of noise affecting the application site has been identified as Bristol Road, that is a very busy main transport route into (and out of) the city centre. Noise from Bristol Road would occur over 24hrs.” As described below, this is not correct.
- 7.2.12 Paragraph 6.36 asserts that the Avon Metals site is a “significant distance” from the application site with an intervening storage building that would act as an acoustic screen and B8 storage yard within the intervening land. The wider B2 and B8 commercial / industrial uses are referred to. However, WSP confirm that the acoustic screening does not assist by way of acoustic attenuation to some parts of the proposed development.
- 7.2.13 It is stated that the Council’s “Env. Protection advisor has confirmed that no historic nuisance complaints from nearby residential properties have been made about any of the existing industrial businesses. As such, it is considered the potential for ‘significant adverse effects’ to occur is reasonably considered to be low.” This is also incorrect, as described below.
- 7.2.14 Reference is made (paragraph 6.37) to the fact that uses could change or intensify at the neighbouring sites, but that impacts from such changes are not possible to quantify and may require planning permission, site licence and/or an Environmental Permit. Indeed, businesses including Avon Metals are noted to already operate under site licences and Environmental Permits and there is noted to be little evidence to expect that the proposed residential development would influence changes to these permits/licences that would be tantamount to ‘unreasonable restrictions’. Should the Avon Metals site seek to expand into adjacent land any operations would be expected to comply with planning policies and environmental protection legislation in force at that time (and whatever mitigation may be necessary). It is concluded that there is no current compelling reason to consider that future development at the existing Avon Metals site (or possible expansion into the adjacent site) would be prevented as a result of this application proposal.
- 7.2.15 Paragraph 6.38 concludes that mitigation has been proposed within the submitted noise survey (in line with BS4142) which can be secured by planning condition. Whilst the Avon Metals objection is referred to, officers conclude that the use of enhanced glazing along with mechanical ventilation is an established technical solution to mitigate against noise (which can be secured by condition) and assert there has been no compelling evidence put forward by the third-party to suggest otherwise (no details of the Avon Metals’ representations being explained).
- 7.2.16 Officers do not consider “on balance” (although why the decision is “on balance” is not set out for members to consider) that there is sufficient evidence to demonstrate that the proposed residential development would act as an ‘agent of change’ with any great potential for ‘unreasonable restrictions’ to be placed on the uses of neighbouring commercial sites (paragraph 6.39). Subject to the recommended conditions, officers conclude that the proposal is considered to comply with the aims of policy and the NPPF.
- 7.3 Nowhere in that assessment are the concerns of the statutory consultee referred to or explained, given they are the experts in noise.
- 7.4 Nowhere in that assessment are the concerns of Avon Metals or their noise consultants explained, despite the decision being “on balance”.
- 7.5 Of course, the issue is compounded as Avon Metals were not invited to make oral representations to Committee, despite their letters of objection backed up by technical, expert assessments. The

Statement of Community Involvement confirms that public speaking is allowed at Committee. The Council's own "Guide to Public Speaking at Planning Committees" states that "members of the public have the opportunity to speak at Committee to state their views, either supporting or opposing specific proposals". Further, "all "interested parties" are advised when an application is going to Planning Committee, approximately a week before the committee meeting." This was not done.

- 7.6 The Minutes of the meeting show that the applicant's noise consultant did indeed speak at Committee. The Minutes state that the noise consultant asserted:
- 7.6.1 numerous noise surveys had been undertaken during both day time and night time and all had returned assessments under statutory noise limits and within WRS criteria;
 - 7.6.2 WRS had not raised any objections to the proposal;
 - 7.6.3 Avon Metals had objected due to the "Agent of Change" principle, but a freedom of information request had confirmed that no complaints regarding noise had been made.
- 7.7 The Senior Planning Officer is noted to have confirmed the following of relevance:
- 7.7.1 That there was a large storage unit between the development and it was "his assessment" (not being a noise expert) that Avon Metals "could largely block noise from the development site". It is assumed this was meant to refer to blocking noise from the Avon Metals site, although it is not clear. As above, WSP have confirmed that the intervening building does not provide acoustic attenuation to all parts of the proposed development.
 - 7.7.2 That the Noise Consultant confirmed that they were satisfied that the levels met the necessary criteria and no noise complaints had been made by occupiers of existing dwellings located the same distance from the Avon Metals site. As noted above and below, this was incorrect.
 - 7.7.3 That the operating times of both Avon Metals and the adjacent storage warehouse would have been assessed as part of the noise survey. It was anticipated that operating times would likely be broadly in line with office hours. As noted above, this was incorrect. The site is a 24-hour operation.
- 7.8 Officers should have checked the factual position with Avon Metals. The key concerns of our client are summarised below:
- 7.8.1 There have been numerous noise complaints relating to activities at the Avon Metals facility. Some complaints were received by Avon Metals via the Council and further detail is available from Avon Metals, including the associated costs incurred in addressing those complaints. We understand that this is confirmed in WRS's undated review of the first WYG noise assessment report, which included a section on historic complaints that were investigated by the Council's environmental health department over several years, and notes that significant investment was subsequently made by Avon Metals to make acoustic improvements in response to those complaints.
 - 7.8.2 The Avon Metals facility is a 24-hour operation. This is confirmed in the WRS review of the first WYG noise assessment report. The submitted and reviewed noise assessment work is grounded on an assessment of both daytime and night-time noise, confirming at numerous points that there is operational noise from Avon Metals during the night-time period. The position on night-time noise is not properly addressed in the above officer assessment.

- 7.8.3 It is not correct that the dominant source of noise is Bristol Road with less noise expected to be caused by the adjacent commercial land. The applicants' noise assessment work prepared by WYG states "The dominant noise sources found in the area include: road traffic noise from Bristol Road and Cole Avenue, and plant noise from the adjacent manufacturing plant.". We understand that the WRS review of the first WYG noise assessment also confirms that: "During the course of a night-time as the road traffic dies down on the Bristol Road AML [Avon Metals Ltd] becomes the most identifiable noise in the area".
- 7.8.4 Reliance is placed on mitigation. Mitigation only works if the windows are closed, and there does not appear to be anything proposed to prevent residents who may be affected by noise from opening those windows – and thereafter submitting complaints. That is particularly likely to be the case during the night. The likelihood of complaints arising from users of outdoor amenity space is also not addressed. These are also fundamental policy matters in respect of the amenity of future occupiers - NPPF paragraph 130(f) requires that a high standard of amenity is secured for future users, which the report does not address.
- 7.8.5 There is no commitment to warning future residents of the site of the noisy environment that they are proposing to move into including at night. No reference is made to Government guidance on Noise (which specifically addresses how planning can manage potential noise impacts in new development). Paragraph 9 states that "It can be helpful for developers to provide information to prospective purchasers or occupants about mitigation measures that have been put in place, to raise awareness and reduce the risk of post-purchase/occupancy complaints." An "information pack" regarding the 24-hour operations was not sought.
- 7.8.6 Officers rely on the submitted noise assessment, which our client's noise consultants WSP consider to be flawed for several reasons, including methodological errors, as well as accuracy and suitability issues. A noise assessment fully compliant with BS 4142 would have resulted in the identification of a significant noise effect. These concerns were simply not before Committee and the details of Avon Metals' representations were not available.
- 7.8.7 Paragraph 9 of the Government guidance "Noise" makes it clear that the agent of change will need to take into account not only the current activities that may cause a nuisance, but also those activities that businesses are permitted to carry out, even if they are not occurring at the time of the application being made. An assessment of any such current and other permitted activities was not done.
- 7.8.8 Paragraph 10 of the above guidance also refers to the fact that "For noise sensitive developments, mitigation measures can include avoiding noisy locations in the first place". The Application site is not allocated for residential development and our client maintains that it is unsuitable for it, as a result of all of the factors above.
- 7.9 As can be seen from the above, the decision-making process has been deeply flawed and is unlawful:
- 7.9.1 In light of the Council's published policy, Avon Metals had a legitimate expectation that they would have the opportunity to review the Report to Committee and put forward their oral representations to Committee. That opportunity was denied. It could have made a material difference to the outcome.
- 7.9.2 Committee members were materially misled in a number of critical ways which, again, could have made a material difference to the outcome.

7.10 Given that officers are aware of the above flaws which are material factors which Committee should have been aware of, there is a duty on officers to report the matter back to Committee.

8 THE ACTION THAT THE DEFENDANT IS EXPECTED TO TAKE

8.1 We request confirmation that:

8.1.1 the decision notice will not be issued; and

8.1.2 the matter is referred back to an appropriate Committee meeting with a Report to Committee that fully sets out our client's objection and concerns; and

8.1.3 our client is given the opportunity to make representations to Committee.

9 ADR PROPOSALS

9.1 Our client is willing to consider any proposals that the Council may have.

10 THE DETAILS OF ANY INFORMATION OR DOCUMENTS SOUGHT

10.1 No further information is requested at this stage.

11 THE ADDRESS FOR REPLY AND SERVICE OF COURT DOCUMENTS

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Ref: CF/231491/00001

12 PROPOSED REPLY DATE

Please respond within 14 days of the date of this letter.

Yours faithfully

Charles Russell Speechlys LLP

Charles Russell Speechlys LLP

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Tewkesbury, Gloucestershire, GL20 5TT