



Appeal Decision

Inquiry held on 10-12 October 2007

Site visits made on 10 and 11 October 2007

by **M T O'Rourke** BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State
for Communities and Local Government

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Decision date:
8th November 2007

Appeal Ref: APP/P4605/A/07/2039953

134, 139, 140, 141 Bromsgrove Road, Unity House and The Armouries site, Birmingham B5 6RG

- 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 Crosby Homes Special Projects (now known as Crosby Lend Lease) and Sir Timothy Robert Sherlock Gooch Baronet and Benacre Estates Company against the decision of Birmingham City Council.
- The application Ref C/03254/06/FUL, dated 26 May 2006, was refused by notice dated 1 February 2007.
- The development proposed is erection of 2 buildings and retention of Unity House to provide 162 apartments, 395 sqm of ground floor commercial floorspace (A1, A2, A3, A4, B1, D2) and 98 car parking spaces (resubmission of C/61334/06/FUL).

Decision

1. I allow the appeal and grant planning permission for erection of 2 buildings and retention of Unity House to provide 162 apartments, 395 sqm of ground floor commercial floorspace (A1, A2, A3, A4, B1, D2) and 98 car parking spaces (resubmission of C/61334/06/FUL) at 134, 139, 140, 141 Bromsgrove Road, Unity House and The Armouries site, Birmingham B5 6RG in accordance with the terms of the application, Ref C/03254/06/FUL dated 26 May 2006, and the plans submitted with it, subject to the conditions set out in the attached Schedule.

Application for costs

2. At the Inquiry an application for costs was made by the appellants against the City Council. This application is the subject of a separate Decision.

Main issues

3. The site lies within a mixed use area close to the City Centre that has been the subject of considerable recent regeneration, including major new residential developments. It is a sustainable location close to public transport, shops, services and facilities and public open space. There is an agreed Statement of Common Ground (SoCG). The Council has no objection to the amount, scale, layout or design of the proposed development which would be in keeping with other city centre apartment developments and would be a considerable improvement to the character and appearance of the area. There is no issue relating to the provision of car parking with an agreed condition covering the establishment of a car club or to the affordable housing offer which the Council

agrees could be satisfactorily provided through the signed Unilateral Undertaking. The single reason of refusal relates to the adverse effect of noise arising from late night entertainment premises on the amenity of occupiers of the proposed apartments.

4. Having regard to the foregoing, I consider that the main issue in this case is whether the living conditions for residents of the proposed apartments would be acceptable. In coming to a conclusion on that issue, it is necessary to consider the standard to be used to assess the acceptability of the living conditions; can it be secured by condition; and the implications, should that standard be secured and permission granted, for adjoining land uses.

Reasons

5. The Birmingham Plan (UDP), adopted in July 2005, promotes housing in the city, described as 'City Living', and its promotion, together with the provision of a quality environment and the infrastructure necessary to support it, is a major theme of the UDP strategy (paragraph 2.8E). Paragraph 2.24 encourages 'City Living' with new housing provided in the City Centre to meet a wide range of different needs, particularly in mixed use developments and through the urban village concept. Whilst City Living is not defined in the Plan or in supplementary planning guidance, the parties were of a common view that it essentially means high density apartment development, in close proximity to jobs, shops and leisure activities, with less than 100% parking and limited private amenity space, as proposed in the appeal scheme.
6. The City Centre is divided into various quarters and the appeal site lies within the Bull Ring/Markets Quarter for which a Planning and Urban Design Framework was approved as Supplementary Planning Guidance (SPG) in March 1998. Whilst of some age, the SPG is supported by the general policies of the UDP and remains a relevant material consideration. In accord with the City Living strategy, housing is seen as having an important role to play in bringing life to the Central Area and supporting businesses and other facilities and residential developments forming part of mixed use schemes are encouraged.
7. The appeal site comprises Unity House and The Armouries on opposite corners of Bromsgrove Street and Lower Essex Street within the Entertainment Zone of the Quarter. Centred on the Hippodrome Theatre it stretches out to encompass the restaurants and shops of Chinatown, the Arcadian with its bars, restaurants and cinemas, a multitude of pubs, clubs, bars, restaurants and casinos, including alternative culture and attractions. New uses and activities that contribute to the diversity and attractiveness of the Zone are encouraged including the development of new City Living opportunities in mixed use schemes. In seeking the re-introduction of residential uses into the area the SPG requires that schemes should provide a range of housing and tenure types but indicates that family housing will not be acceptable.
8. The appellants are already committed to residential regeneration schemes in the area and their projects include Southside (which is completed and occupied) and I-land (under construction) on the opposite side of Bromsgrove Street whilst Wimpey are developing apartments on the east side of Hurst Street. The Armouries site is identified in the SPG as a housing opportunity. Unity House is locally listed and the main part of the building on the corner

would be retained and refurbished as part of the appeal scheme. The Council has confirmed in the SoCG that it has no objection in terms of UDP policy 3.14 to the scale, amount, layout or design of the proposed development. It would provide an active street frontage with commercial uses on the ground floor, windows facing the public realm, a range of one and two bedroom apartments and acceptable provision of affordable housing.

9. However that is not the end of the matter in that the UDP also requires the Council, when assessing proposals for new housing, to take account of the suitability of the location for housing and whether there are any serious physical constraints (policy 5.25C). Policy 5.32B specifically addresses City Living and seeks an element of residential in mixed use schemes where it would not undermine the primary economic function of an industrial or commercial area and would not create an unacceptable living environment for the occupants of the proposed housing. This appeal is concerned with whether the proposed development would satisfy these requirements.

Whether the living conditions for residents would be acceptable

10. This is a vibrant lively area which is noisy at night with a number of late night entertainment venues in the block formed by Bromsgrove Street, Hurst Street, Kent Street and Lower Essex Street including The Loft Lounge, Pink Planet, Equator, Angels, Missing and Route 2. Unity House and The Armouries immediately abut the Innov8/DV8 and Nightingales nightclubs on opposite corners of Lower Essex Street and Kent Street. Both nightclubs open till late although Nightingales is the larger venue, with capacity for 1,600 people on three floors, licensed for live and recorded music and able to open until 04.00 hours on weekdays and 06.30 hours at the weekends. It has an external garden area with a bar, provided for smokers, that bounds The Armouries and would be diagonally opposite the new apartment block on the Unity House site. Whilst the Council's decision refers generally to noise from late night entertainment premises, its evidence at the inquiry referred particularly to noise from Nightingales (the Club).
11. Planning Policy Guidance note 24 on Planning and Noise (PPG24) advises that the impact of noise can be a material consideration in the determination of planning applications and that noise sensitive development should not normally be permitted where high levels of noise will continue throughout the night, especially during the hours when people are normally sleeping. Whilst it identifies noise exposure categories, these are for use when assessing a residential proposal near a transport related noise source. Nightclubs are identified in Annex 3 as one of a number of commercial developments that pose particular difficulties, not least because associated activities are often at their peak late at night and noise is not only generated within the premises but also attendant problems of noise that may be made by customers in the vicinity and disturbance that can be caused by traffic. However no guidance is given on how to assess such disturbance or what would be an unacceptable level of noise.
12. I noted on a late night site visit that night time noise is made up of three main components – traffic noise including taxis travelling up and down Bromsgrove Street and Lower Essex Street dropping off and picking up clubbers, people moving along and shouting in the street and music noise from the clubs and

bars, but particularly from Nightingales. The latter is clearly audible outside the appeal site and inside the Southside apartments fronting Bromsgrove Street if the windows are open. There are no joint noise surveys and therefore agreed ambient levels. The most recent survey was carried out by the Council on a Saturday night in June this year, when the Club insists there were no external speakers operating, and levels were recorded in Lower Essex Street of 63 and 64dB_{L_{Aeq}} at locations approximate to one metre from the facades of the new buildings. Higher levels were recorded outside the Club's garden area and near the junction. Whilst road traffic noise was audible, music noise was dominant. The appellants' June 2006 survey undertaken during the Gay Pride weekend was atypical but the results from the appellants' July 2006 survey are not dissimilar to the Council's indicating a similar pattern to the continuous and elevated nature of the nightclub noise and contributing significantly to the L_{Aeq} noise in the area.

13. A particular and noticeable feature of the music noise is the repetitive low frequency bass beat, variously described at the inquiry as a 'boom', 'thud' or 'thump'. Octave band analysis of the survey data records high levels in the 63Hz and 125Hz bands where audible bass type low frequency noise is concentrated. The surveys also recorded high noise peaks (L_{Amax}), attributable to people shouting in the street, car horns and passing traffic, but it was confirmed at the inquiry that no case was being made for the Council in relation to road traffic noise or disturbance from the comings and goings of patrons of the clubs.

Proposed noise mitigation measures

14. In response to the impact of the night-time noise climate, dominated by noise from the nightclubs in the area, the appellants propose a package of mitigation measures, to be secured by condition, which they consider would adequately control all environmental noise to within acceptable standards and would minimise, through enhanced sound insulation, the bass content of the music noise to achieve a reasonable noise environment within the apartments. Their proposals include the provision of an attenuated central mechanical ventilation system and triple glazing so as to achieve an internal level within the apartments of L_{eq} NR20.
15. In addition, the appellants had looked at the source of the music noise. Nightingales Club occupies a 3 storey corner building that has the external appearance of office or commercial premises. It has a flat roof with a number of external vents, large windows boarded up internally, an external fire escape staircase on its rear wall covered by metal profiled sheeting with access from fire doors on each level and appears to be used by clubbers as a quieter area in which to drink and talk as well as a way to get from one floor to another. Various measures were proposed to the Club that could be taken to reduce the noise breaking out from the building which included the appellants themselves purchasing and installing a noise limiter. But whilst it seems the Club had initially been keen to co-operate, it declined to use the limiter and for whatever reason negotiations between the parties broken down as a consequence of which the suggested works were not carried out. However I was told that the Club of its own volition had done some works, including removal of the external speakers in the outside garden area and is proposing to construct internal lobbies to the rear fire doors.

16. The Council accepted that in principle an approach using Noise Ratings was appropriate and that the use of NR20 as opposed to a L_{Aeq} test has the advantage of flexibility to deal with noise in different octave bands. However even with improved glazing, because of the closeness of the apartments to the clubs, the characteristics of low frequency noise which attenuates less rapidly than higher frequencies and is not well attenuated by glass, it argued that music noise in the 63HZ and 125HZ octave bands would still be audible in bedrooms. This would be disturbing to residents trying to sleep, make their living environment unacceptable and give rise to complaint. The Council's requirement is that the noise from the night clubs should be inaudible. That could not be secured in the current scheme, with 61 of the proposed 162 apartments having bedrooms overlooking Lower Essex Street, some in direct line of sight to the clubs. Thus the Council argued NR20 would be in excess of inaudibility and would not meet its requirement.

What should be the standard used to assess acceptability

17. Much of the debate at the inquiry focussed on the requirement for 'inaudibility' – whether it was reasonable, had been applied consistently and whether it was supported by national and international accepted criteria. In particular I was referred to the World Health Organisation (WHO) Guidelines for Community Noise and BS:8233 1999 'Sound insulation and noise reduction in buildings – Code of Practice' and also the Institute of Acoustics' (IOA) 2003 Good Practice Guide on the Control of Noise from Pubs and Clubs and two Defra commissioned research projects on Noise from Pubs and Clubs, Phase 1 (2005) and Phase 2 (2006).
18. Turning first to the Council's own policy and guidance, the UDP requires that sites for mixed use schemes including residential should not be subject to serious physical constraints nor should residents endure an unacceptable living environment. Whilst the Plan encourages City Living and new residential development within the Entertainment Zone of the Bull Ring/Market Quarter, the UDP does not itself identify standards to assess night club noise. Nor does it indicate a requirement for inaudibility.
19. There is a Planning Guidance Note 1 on Noise and Vibration (PGN1), written to aid the Council's Environmental Protection Officers when responding to consultations on planning applications. Although it was adopted in March 2002 within Regulatory Services as policy, it has not been adopted by the Council as SPG because at the time it was thought the revision of PPG24 was imminent. It remains a relevant material consideration but as it has not been formally adopted the weight it can be given must be limited. Nonetheless it is a useful guide against which to assess the appeal proposal and it sets standards to be achieved based upon the WHO Guidelines of internal night-time noise levels of L_{Aeq} of 30dB and L_{AFmax} of 45dB. These are described in the text as minimum standards to be improved upon whether practicable.
20. Whilst PGN1 was pertinent to the recent Inspector's decision on the Silver Blades proposal, the concern in that appeal was not so much background noise levels but the potential for infrequent loud noises from the operation of the markets disturbing residents' sleep, and thus the L_{AFmax} levels, which the Council has confirmed are not an issue here. The appeal proposal includes provision for mechanical ventilation of the new apartments and with closed

windows it was accepted for the Council that the proposed attenuation would secure internal noise levels in the bedrooms below the PGN1 requirements and the WHO Guidelines.

21. The WHO Guidelines advise that it should be possible to sleep with a bedroom window slightly open. The recorded levels of music noise in Lower Essex Street significantly exceed the WHO guideline of 45dB_{L_{Aeq}} outside of bedrooms on the external façade where there may be sleep disturbance. Existing noise levels in the area are such that many of the new residential developments, and those under construction, would not meet the WHO outside guideline if it had been universally applied at application stage. However it clearly was not and the permissions granted at I-land and to Wimpey indicate to me that the Council at that time made decisions on City Living proposals intended to balance the achievement of regeneration objectives with securing reasonable living conditions for future occupants.
22. The appellants presented evidence showing a theoretical boundary beyond which it would not be expected to hear the low frequency noise from the Club. It only considered music from the one Club and took no account of any masking or amplifying effects of buildings, or any change in the beat of the music. It showed that adoption of an internal inaudibility criterion would effectively blight an extensive area around the Club and the Club's own noise expert drew a similar conclusion. Within the exclusion area are all of the recently built residential developments, which are subject only to standard noise conditions relating to attenuation from traffic noise and do not have conditions protecting them from music noise.
23. The difficulty in reconciling some land uses with noise generating activities is recognised in PPG24. PGN1 states that new pubs and clubs should be designed to ensure that music is 'inaudible' within noise sensitive premises at all times, but there is nothing in PGN1, other than a worked example, to suggest that inaudibility is the appropriate standard for new residential development. Nor is there anything in the WHO Guidelines or in BS:8233 to support that view. If indeed that was the case, the appellants rightly asked why it appeared not to have been applied to other developments close by. Clearly there is a need for caution in comparing other sites with the appeal proposal but it is not unreasonable to look to see if they offer any parallels on the appropriate standard to apply. The appeal site may be the closest to Nightingales and Innov8/DV8, but there are new flats in Bromsgrove Street opposite the Loft Lounge (licensed to 02.00 hours), the Wimpey site is opposite the Missing club (licensed to 04.00 hours except on Mondays) and there are flats in the Arcadian development which includes busy bars, restaurants and a cinema. On none of these sites was I told that the Council had considered the night-time noise environment to be too noisy for people to live there and that there should be a separation of land uses. Further in a consultation reply on a proposal for one staff flat in Kent Street diagonally opposite Nightingales, there was no suggestion of an inaudibility requirement.
24. I am not satisfied that the conclusion is inevitable that where there is low frequency noise the test must necessarily be one of inaudibility. That does not allow for the exercise of judgement or for any account to be taken of the particular character of the area. Although there is a recognised threshold of inaudibility at the various octave bands, the noise source is outside the control

of the appellants and mitigation applied to the residential development might no longer be effective if the Club choose to turn up the levels or alter the frequency. It is inherently difficult to set noise limits at a receptor where the noise source is under separate control. The Council could not point to any proposal where it had required inaudibility by condition. Nor am I convinced that such a condition would be reasonable or sufficiently precise to meet the tests of Circular 11/95.

25. At the inquiry the Council appeared to move away from its demand for inaudibility to emphasise more the particular character of the night-time noise, its low frequency bass beat and recurrence numerous times in a minute over several hours most nights of the week. The problems of low frequency noise are recognised in PPG24, the WHO guidelines and BS:8233. Where there is noise with a distinguishable continuous tone PPG24 advises that it will require special consideration. The WHO Guidelines single out sources with low-frequency components as requiring special attention and where disturbance to sleep may occur even though the sound pressure level during exposure is below 30dBA. BS:8233 in setting design criteria and limits for external noise adopts similar figures to the WHO for reasonable resting/sleeping conditions but assumes a steady noise (which is not the case here), and advises that noise at low frequencies, which may not have much effect on the dBA or NR values, can be disturbing or fatiguing to occupants. However no advice is given as to what would be an objective standard of acceptability and it was not suggested at the inquiry, nor do I consider it to be the case, that low frequency noise would be likely wake people once they had got to sleep.
26. PPG24 refers in Annex 3 to noise from nightclubs but provides no further advice or guidance. Unlike traffic noise, music noise from pubs and clubs is not generally part of the normal noise environment. However when it occurs I accept it can generate complaints and exercise Councils. After a long gestation period during which time the Council produced its own PGN1, in 2003 the IOA produced a Good Practice Guide on Noise from Pubs and Clubs to help advise environmental protection officers and the industry. It advises that where entertainment takes place on a regular basis, music should not be audible inside noise sensitive property at any time. It was originally intended to be a Code of Practice but the industry representative withdrew and IOA was not satisfied with the draft annex, which would have set out criteria and a measurement methodology, and removed it from the final document. In the absence of that annex, it seems to me that the Guide takes me little further forward in assessing the appeal scheme offering no objective standard by which to measure inaudibility leaving it as a matter for subjective judgement.
27. The Council's witness also referred to the two Defra commissioned research projects on noise from pubs and clubs. One was a review of current practice whilst the second phase considered only infrequent late night entertainment events. Again I find that neither takes me much further forward although from the responses of the study group in the second report it appears that people's tolerance to music noise might be greater than first thought and that in certain circumstances inaudibility may not be a particularly good test. I accept that regular exposure to music noise, as would be the case here, might create a different response but the only record of complaint appears to be from one resident of Southside who has made 3 or 4 complaints in the last 2 years. The

Council has investigated and not found a statutory nuisance. In the absence of a rating method to support the Noise Act 1996, the finding of a nuisance remains a matter of judgement.

Overall conclusion

28. Drawing these matters together, I am not satisfied that there is support in national, international or local guidance for a standard of inaudibility as an appropriate test to be applied to this new residential scheme. The test in UDP policy 5.32B is whether living conditions in the new development would be acceptable which in the absence of any agreed/adopted standard requires the exercise of judgement on the part of the decision maker. The attenuation/mitigation measures proposed would secure an internal noise level of NR20 (with the windows closed). This would improve upon the requirements of PGN1, the WHO guidelines and BS:8233 for night time internal noise levels and would exclude most frequencies but would not make inaudible the low frequency bass beat. Nonetheless, it was agreed that it would be very quiet inside the flats such that other sounds like the ventilation system, hum of a fridge or television or music playing in nearby flats would be more likely to be heard.
29. The use of NR20 is the appellants' noise expert's own judgement and is not based on any objective standard. Nevertheless it would result in a noise environment inside the apartments that would be quieter in nearly all frequency bands than that recommended in the WHO guidelines for suitable recuperative sleep. The bass beat of the music would not be inaudible but would be reduced to a dull low thud and based on my experience of what I heard at night at the Southside apartments and my assessment of the site circumstances, I consider that the use of NR20 is reasonable and am satisfied that it would offer acceptable living standards for the residents of the new apartments in which they would be able to fall asleep and where they would be unlikely to be woken by one-off L_{Amax} events, unlike at Silver Blades.
30. In coming to this view I have given weight to the fact that the site is within the Entertainment Zone of the Bull Ring/Markets Quarter within the City Centre; an area where the Council are encouraging a vibrant and lively night life and encouraging new non-family housing. When compared to other sites in the vicinity where residential development has been permitted, I do not consider that the appeal site suffers such serious physical constraints in terms of its closeness to the nightclubs to make it inherently unsuitable for housing. Nor that its juxtaposition warrants the sacrifice of other desirable design and public realm objectives to justify a substantially different internal layout with no bedrooms on the street frontages.
31. City Living is not for everyone. Those choosing to occupy apartments in the appeal scheme would be aware of the nature of the area and if not before, it would only take a short walk around the block when first viewing to be aware of the number of clubs and bars in the area, their proximity to the apartments and thus the likely night time street and noise environment. Those whom it would not suit would go elsewhere. Many of the apartments would be likely to be let on shorthold tenancies, as is the case at Southside, and it was suggested that tenants might be more inclined to accept noisier surroundings knowing that they could move away after 6 months. However I heard nothing to

support this assumption the only evidence being the record of complaints from Southside, where the appellants' survey had recorded higher internal noise levels than would be found at Unity House/The Armouries. Complaints appear to be from one resident and from comments on its residents' forum it appears others take a different view. It was suggested for the appellants that residents would become accustomed to the noise. Whilst that might be the case, it would not justify allowing development where living conditions would be unacceptable but for the reasons I have given I have not found that would be the case here.

Whether acceptable living conditions can be secured by condition

32. I am satisfied that the condition agreed between the Council and the appellants which would require the submission of a design scheme to ensure that the internal noise level in habitable rooms resulting from the external noise from pubs and clubs should not exceed L_{eq} NR20 would secure acceptable living conditions within the new apartments, would meet the requirements of that part of UDP policy 5.32B and would pass the tests of Circular 11/95.

The implications for adjoining land uses

33. However that is not the end of the matter and it is necessary to consider the implications of residential occupation of the proposed apartments on the existing land uses and particularly Nightingales. Like PPG24, PPG4 asks local planning authorities to carefully consider whether new development might be incompatible with existing commercial activities and cautions that the expectations of residents (of new development) might exceed the standards used by the authority and give rise to pressure to curtail the existing use.
34. Evidence to the inquiry was that Nightingales is the lead gay club and at the heart of the gay village in Birmingham, which includes a number of other smaller clubs. It has been in existence for 40 years, having had three other sites and moving to Lower Essex Street/Kent Street around 12 years ago. It recently won an award as the second best run club of any kind in the country and is unusual in being owned by its members, non-profit making and run by an elected board. It was described as a major player attracting into the area large numbers of people who also use the other bars around.
35. As part of its evidence to the inquiry, the appellants provided details of the premises' licences in the vicinity of the appeal site. Whilst some of the clubs and bars remain subject to a standard 'inaudibility' condition (that no music should be audible within a dwelling (window open) between 23.00 and 14.00 hours on the following day), I was not told whether, how or even if it was enforced. In any event a variation to Nightingales' licence granted in May 2007 removed that condition and an application by the appellants to the licensing committee for its reinstatement was unsuccessful.
36. The Club's concerns, which the Council share, are that if the appeal was to be allowed, it could lead to noise complaints from occupants of the proposed apartments, which the Council, under nuisance legalisation, would have a duty to investigate and if necessary abate. This might lead to restrictions on the range of activities and hours of opening of the Club and the risk, seen as very real, that the Club's economic viability could be threatened and this in turn could lead to its closure. That would have a knock-on effect on the smaller

clubs in the area and lead to the demise of the gay village, with the loss of a considerable number of jobs, as well as damage to an important entertainment area in the city. This would be to the detriment of the economic revitalisation of the City Centre, to the objectives of the UDP (paragraphs 2.8 and 4.13) and the Bull Ring/Markets Quarter SPG and would be contrary to UDP policy 5.32B which requires that the residential element of a mixed use scheme should not undermine the primary economic function of a commercial area.

37. Whether the proposed development would have an impact on the Club's activities is an important material consideration and one to which I give considerable weight but, as indicated by the High Court in the Luminar Leisure Ltd case (Document APP7), the test should not be would there be any impact, however slight, on the Club's activities but would its future activities, using the words of that Inspector, be '*unreasonably stymied*'. In addressing that question, I make a number of findings. First, I have found that the evidence indicates that adequate measures could be taken to prevent future occupants of the scheme from being adversely affected by noise from the Club or other external sources. The grant of permission subject to the proposed NR20 condition would in effect keep the situation as it is. Secondly there are already residents living close to the Club at Southside who experience higher noise levels within their apartments (by some 20dB) who do not have the same level of noise attenuation as is proposed here, yet there has only been one complainant objecting to noise from the Club and when investigated the Council did not find a statutory nuisance. Thirdly it is within the control of the Club to limit bass levels by use of the limiter that the appellants had installed. I heard nothing to convince me that a small bass reduction would have any appreciable impact on the quality of the 'club experience' such as to threaten the viability of the club. Fourthly, it was clear to me on my site visit that even if there were to be complaints requiring action to be taken by the Council against the Club (which I have already concluded that I do not consider to be likely), there is considerable potential to enhance the ability of the building to attenuate the music noise that is currently 'leaking' out for example through the open fire doors, roof vents and speakers attached to the top floor ceiling; works that Crosby had offered to pay for.
38. Thus I am not satisfied that it is a realistic possibility that the Club would close if permission is granted or that this would lead its activity being '*unreasonably stymied*' through restrictions on its activities or hours of operation, bearing in mind the number of other clubs and bars in the immediate area which also generate music noise. Having reached the conclusion that there is little evidence that allowing the proposed development would harm the Club or other night time venues in the area, I find that in terms of UDP policy 5.32B the proposed development would not undermine the primary economic function of the commercial area.

Other matters

39. There are significant benefits that would arise from the scheme. The locally listed Unity House would be retained, restored and refurbished as part of the scheme. The development would make a considerable improvement to the character and appearance of the area. It would deliver new housing in a sustainable and accessible location and provide the 9 units of affordable

housing asked for by the Council. By building between Southside and the Club there would be some acoustic benefit to those apartments.

40. If this residential scheme were not to proceed, the evidence to the inquiry was that it was unlikely that a non-residential development would come forward. This was not an area intended for office development and nor was it an area where there was any commercial interest in offices. The likelihood was that the buildings would further deteriorate to the detriment of the appearance of the area and those living there. Clearly if permission were to be refused on noise impact grounds, another mixed use scheme on the site might come forward but because of the constraints that would be imposed on the internal layout to achieve inaudibility, it would be unlikely to offer the same advantages as the appeal scheme with windows overlooking the street and the positive contribution to the public realm. These are additional considerations that weigh in favour of the appeal scheme.

Conditions and unilateral undertaking

41. Conditions were agreed between the main parties and discussed at the inquiry when it was confirmed that condition 12, requiring the submission of a design scheme to secure an internal noise level not exceeding L_{eq} NR20, should include an implementation clause. Subject to that amendment, I am satisfied that they are all reasonable and necessary to ensure an appropriate standard of development and meet the tests of Circular 11/1995.
42. At the inquiry the appellants submitted a signed unilateral undertaking relating to details of transfer of the affordable housing units offered for intermediate rent and shared ownership which had been discussed with the Council. I am satisfied that it meets the tests set out in Circular 05/2005.

Conclusions

43. The appeal site lies within Birmingham City Centre in the Entertainment Zone of the Bull Ring/Markets Quarter. It is an area that includes major new high density residential development bringing forward the Council's aspirations for City Living as well as a large number of entertainment and leisure facilities. In all respects, other than the concerns about low frequency bass noise, the application was considered to accord with the development plan and SPG policy and I have found no objection to the principle of mixed use development including residential on the site which enjoys support from PPS1, PPS3 and PPS6. The development of residential apartments in the close proximity of night clubs and the particular problems of low frequency noise may present particular challenges but that does not preclude its successful execution.
44. I have concluded that the Council's requirement for inaudibility is unsupported by its own UDP policy and unadopted PGN1 and has no basis in national or international guidance. Whilst the IOA Good Practice Guide recommends inaudibility, the lack of any detail on how that could be objectively assessed and measured must significantly limit its value. Both parties accepted in closing that the decision was a matter for my judgment. Having heard detailed noise evidence from the Council, appellants and the Club and visited the area in the early evening and in the early hours of the morning and having been inside the Club and a Southside apartment, I am satisfied that the achievement of acceptable living conditions for the residents of the proposed flats would be

possible in the current external noise environment, would meet accepted standards and could be secured by way of condition. I have further concluded that the scheme would not adversely impact on the adjoining land uses and more particularly the operation and activities of Nightingales. I have taken into account all other matters raised but I find none to be of such weight as to override my conclusions that the appeal should be allowed subject to the conditions set out in the attached schedule.

Mary O'Rourke

Inspector

APP/P4605/A/07/2039953

Schedule of Conditions

- 1 The development hereby permitted shall be begun before the expiration of three years from the date of this permission.
- 2 Before construction of each of the buildings hereby permitted commences, details of all external materials to be used on the relevant building shall be submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 3 The development shall not be commenced until drainage works have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 4 Before any of the dwellings in each building is occupied, secure cycle and motor cycle parking stores shall be provided for the relevant building as shown on drawings ref 1332/PL100 Rev B and 1332/PL101 Rev B.
- 5 None of the car parking spaces hereby approved shall be brought into use until a parking management strategy has been submitted to and approved by the local planning authority. The strategy shall be implemented as approved.
- 6 Prior to the first occupation of the proposed scheme, the details of a car club shall be submitted to and approved in writing by the local planning authority. The details shall include the proposed management arrangements and number of cars. The car club shall be implemented in accordance with the approved details, unless otherwise agreed in writing by the local planning authority.
- 7 The development shall not be commenced until details of materials and a scheme for the drainage of the parking and vehicular circulation areas has been submitted to and approved by the local planning authority. Development shall be carried out in accordance with the approved details.
- 8 Before any of the dwellings in each building is occupied, the car parking spaces shall be provided for the relevant building as shown on drawings ref 1332/PL 100 Rev B and 1332/PL101 Rev B.
- 9 A scheme for hard and soft landscaping of the site shall be submitted to and approved by the local planning authority prior to the commencement of development. The approved scheme for each building shall be completed within one year of the occupation of the first dwelling in the relevant building unless otherwise agreed in writing with the local planning authority. Any plants which are planted and die within two years of planting shall be replaced to the satisfaction of the local planning authority.
- 10 Before construction of each building hereby permitted commences, a scheme of noise insulation between the proposed commercial units and the

residential units in the relevant building shall be submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved scheme.

- 11 Before the development commences, a design scheme shall be submitted to and approved by the local planning authority for allowing ventilation in habitable rooms facing Lower Essex Street without the requirement for windows to be opened. The residential use of the relevant properties shall not commence until the approved ventilation scheme has been installed.
- 12 Before development commences, a design scheme (which must include the sound attenuation of the building envelope, the acoustic performance of any ventilation system and the detailed layout of the building) shall be submitted to and approved by the local planning authority to ensure that the internal noise level in habitable rooms resulting from the external noise from pubs and clubs shall not exceed $L_{eq}NR20$. As part of this scheme the external free field sound pressure levels at the development site should be determined by means of a further Assessment of Noise in the Lower Essex Street frontage, which will be submitted to and approved by the local planning authority. Development shall be carried out in accordance with the approved scheme.
- 13 The proposed commercial uses hereby approved shall not be commenced until details of all extract ventilation systems and odour control equipment including details of any noise levels and external ducting, have been submitted to and approved by the local planning authority and the equipment so approved has been installed. The extract ventilation system equipment and odour control equipment shall be operated at all times when cooking is carried out and maintained in accordance with the manufacturers instructions. The external ducting shall be removed as soon as possible when no longer required.
- 14 Development shall not commence until a scheme to deal with contamination of the site ('the contamination scheme') has been submitted to and approved by the local planning authority.
- 15 The contamination scheme shall include an investigation and assessment to identify the extent of contamination and the measures to be taken to avoid risk to the occupants of the buildings when the site is developed.
- 16 Development of each building shall not commence until the measures approved in the contamination scheme for the relevant part of the site have been implemented.
- 17 The access ramp to basement parking areas shall be at a maximum gradient of 1:7.
- 18 Prior to first occupation of the dwellings, a nesting box suitable for use by kestrels shall be provided in accordance with a scheme to be submitted to and approved by the local planning authority.

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Peter Goatley	Of Counsel instructed by Stuart Evans of the Legal Department of Birmingham City Council
He called	
John Hinton MSc FIOA	Special Projects Officer (Acoustics)
Simon Hodge MRTPI	Team Leader for City Centre Development Control Team
Andrew Hall BSc(Hons) DipANC AMIOA	Environmental Protection Officer

FOR THE APPELLANTS:

Jeremy Cahill QC	Instructed by CSJ Planning, Somerville House, 20-22 Harborne Road, Edgaston, Birmingham B15 3AA
He called	
Peter Rogers BSc(Hons) MIOA	Associate of Cole Jarman Associates, consultants in acoustics
Graham Parker MRTPI	Director of CSJ Planning Consultants Ltd

INTERESTED PERSONS:

Derek Whitham	Director of the Nightingale Club, Kent Street, Birmingham
Garry Baker	Chairman of the Nightingale Club
Martin Stone	Martyn Bramich Associates for the Nightingale Club
David Clarke	Operational Director of Sound Research Laboratories Ltd for the Nightingale Club

DOCUMENTS

- 1 List of those at the inquiry
- 2 Comments made by Mr Stone on behalf of the Nightingale Club
- 3 Copy of representations dated 28 June 2006 made by Martyn Bramich Associates to the Council with SRL's Technical Report dated 8 May 2006
- 4 Letter from Light Design Ltd to the Nightingale Club dated 4 October 2007
- 5 Statement of common ground

COUNCIL'S DOCUMENTS

BCC1	List of agreed conditions
BCC2	Notification letter of the inquiry
BCC3	Mr Hall's consultation reply on 68 Kent Street
BCC4	Cole Jarman Associates' noise evidence of October 2007 given to the Licensing Sub-Committee on 8 October 2007
BCC5	Plan of the Gay Village provided by the City Council and taken from an unpublished May 2007 document on Environmental Improvements

BCC6 Press report on decision of Licensing Sub-Committee in Birmingham Post Tuesday 9 October 2007

APPELLANTS' DOCUMENTS

- APP1 Agreed list of documents considered by the Planning Committee
- APP2 A. Schematic plan showing residential and entertainment uses in the Lower Essex St/Bromsgrove St/Hurst St/Kent St block and indicating type of licensing conditions
B. Schedule of premises licences in the vicinity of the appeal site (green highlight indicating current licence conditions) (page 3 as amended by Council at the inquiry)
C. Copies of the premises licences
- APP3 A. Conditions of Licence PEL4/7
B. Conditions of Licence PEL4/6
C. Conditions of Licence PEL4/8
- APP4 Application made by the Nightingale Club for a variation of its licence March 2007
- APP5 Extract from the Construction Information Service on BRE documents relating to insulation from noise
- APP6 Article by Dani Fiumicelli of 4 August 2006 published on Chartered Institute of Environmental Health website entitled 'Legal Analysis: noise from licensed premises'
- APP7 Judgement of Mr Justice Sullivan re Luminar Leisure Ltd v SOS (CO/780/2006)
- APP8 Opening statement on behalf of the appellants
- APP9 Unilateral Undertaking given by the appellants relating to affordable housing
- APP10 Permission C/05410/05/FUL for Wimpey development in Hurst St
- APP11 Mr Rogers' correction of Mr Hall's Figures 1 and 2 qualified by attached agreed statement of Mr Hinton and Mr Rogers
- APP12 Letter dated 31 January 2007 from John Brown Managing Director of Crosby Special Projects to the Chairman of the Nightingale Club
- APP13 Earlier letter dated 8 December 2006 to the Nightingale from Stephen Woodward Crosby's Senior Design and Planning Manager
- APP14 Conveyance drawing of Southside apartment blocks with Block G marked
- APP15 Closing statement on behalf of the appellants
- APP16 Costs application on behalf of the appellants

PLANS

- A The application drawings are listed in document APP1.