

ARUN DISTRICT COUNCIL

REPORT TO AND DECISION OF SPECIAL PLANNING COMMITTEE ON 15 DECEMBER 2021

SUBJECT: Fitzalan Link Road, Littlehampton

REPORT AUTHOR: Neil Crowther, Group Head of Planning

DATE: November 2021

EXTN: 01903 737839

AREA: Planning

EXECUTIVE SUMMARY:

The acoustic fence was granted permission under permission LU/234/16/RES at Arun's Development Control Committee on 17 October 2017. This report invites the committee to consider whether they wish to investigate options around amending/withdrawing the permissions granted and follows the decision of the Committee on 18 May 2021 to commission an independent report to undertake a review of previous decisions and provide advice on possible actions available to the Council.

RECOMMENDATIONS:

That the Committee

- i. Support the principle of reducing the height of the acoustic barrier to 2.5m subject to further work being undertaken regarding the quantification of the costs that the Council would be liable for the physical works, potential scale of any future compensation claims, and the likely costs associated with pursuing a formal modification of the planning permission through Section 102 & 103.
- ii. Require a focused consultation takes place for properties on the eastern side of Highdown Drive to gauge public opinion.
- iii. Confirm that discussions continue with West Sussex County Council and Persimmon Homes to seek an agreed solution seeking to negate the need for any formal legal process.
- iv. Require a further report to be provided to the committee on progress on these matters.

1. BACKGROUND:

1.1 On 18 May 2021, the Committee resolved to commission a report from independent experts to review the decisions taken, identify what legal options exist for securing changes to the acoustic fence that had been granted planning permission to the rear of Highdown Drive and consider the implications, including financial and legal, of those options.

1.2 Following the meeting, briefs were prepared in consultation with the Chairman and Portfolio Holder at the time, to seek fee proposals for this work. No fee proposals were initially received from planning consultants to provide advice on the technical aspects on what options there were for changing the fence and whether these options have technical implications. Specialist noise consultants were then approached, and this instruction was delayed until early August.

1.3 The reports on the legal options and the technical aspects of the options have now been received. These reports are appended in full to the cover report.

Legal Options

1.4 The report from Town Legal makes the following comments on the legal options open to the Council;

- (Para 2.6) There does not appear to be any obvious errors in process or judgement in relation to the decision making relating to the acoustic barrier.
- The barrier has been constructed lawfully.
- The Council has legal powers to revoke or modify a planning permission but that cannot affect those operations that have been previously carried out.
- There are also powers (para 3.3) to permit alterations to works already carried out. The use of this power would essentially be to create a new permission. However, only the Secretary of State has the power to confirm this, and this will only be done following representations from all parties.
- The advice is that the lowering of the height of the existing fence would constitute an 'alteration', but the relocation of the fence may not.
- In order to be successful in this process, the Council would need to produce robust evidence to support the decision (para 3.8).
- This process will also involve compensation to the developer and any alterations would need to be carried out at the Council's cost.

1.5 In addition this would include any costs assisted with Part 1 claims under the land compensation act 1973.

1.6 If the Council decided to pursue the use of Section 102 & 103, then it would need to instruct legal Counsel at the start of the process to ensure that all the correct processes and documentation are followed as well as discussing what litigation liabilities there may be with suitably qualified legal advisor.

1.7 An alternative to the use of Section 102, would be to make a request to WSCC to carry out further mitigation work under the terms of their S278 agreement. This could only be done after a new planning permission had been granted. WSCC could make amendments to the barrier but para 3.23 & 3.24 of the report highlights that it would be unlikely to use this power. There are alternative powers available to Highway Authority to improve the amenity of the highway, but this would only serve to mitigate the existing rather than change it.

1.8 WSCC would not make any changes to the barrier without a new planning permission in place because they could not make any changes that would breach existing permissions and these works would almost certainly indemnify the s278 agreements that currently exist.

Technical Options

1.9 The appointed consultant (24 Acoustics) advises that both their assessment and the assessment undertaken to accompany the application demonstrate that mitigation against adverse impacts of the new road is required. The road will result in additional noise levels of approx. 18db which should be mitigated.

1.10 The appointed consultant has assessed the likely noise impacts that may result after mitigation. They conclude that a 3.5m high barrier will provide adequate mitigation but they consider that the noise levels that properties will experience will be higher (by about 5db) than the survey that accompanied the application.

1.11 However, this is due to a number of factors that include the fact that the barrier assessed was in a different location to that shown on the application drawings (it was shown adjacent to the carriageway and not to the rear of properties in Highdown Drive), the assumptions for the percentage of HGV movements and the fact that the only assessment was at 4m (first floor windows).

1.12 The assessment that accompanied the application also only assessed one option – a 3.5m barrier. This demonstrated that this would provide suitable mitigation, but it did not carry out an assessment of any other option to determine if these would provide adequate mitigation.

1.13 The consultant has assessed the likely mitigation at both 4m (first floor window height) and 1.5m (levels in rear gardens). They have also assessed the likely difference between a 3.5m barrier and a 2.5m barrier and other variables. The conclusions are;

- A 2.5m barrier results in noise levels being increased by approx. 3 – 4db. The minimum perceptible difference is 3db but that would only be relevant if the noise source existed at present (if the noise source was already occurring).
- A 2.5m barrier would result in night time noise levels of 50 - 53 db. These are within the recommended levels of 55db.
- A difference in surface materials would account for only 1db difference.
- A change to a 30mph road would account for only 1- 2db reduction in levels.

1.14 They conclude that, even though a 2.5m barrier would provide less mitigation than a 3.5m barrier, the levels would still be within recommended levels.

Officer Comment

1.15 From the advice received it would appear to Officers that there is an acceptable technical solution. The barrier could be reduced in height to 2.5m and still retain an acceptable level of noise protection to the properties in Highdown Drive. The technical assessment undertaken has not assessed the potential impact on type 1 claims under the Land Compensation Act and this matter will require further consideration. It is not a straightforward process to just get the barrier changed in height. If the Committee were to resolve that this was the preferred course of actions, there are essentially two processes that could be followed.

1. Arun District Council could seek to persuade Persimmon Homes (or WSCC) to submit a planning application to amend the height of the barrier. If they agree to the principle of this, ADC will likely have to meet all of the costs associated with the planning process and the operational works required to reduce the height. ADC could submit the application on but there would be greater issues around having the correct technical officers/consultants to carry out this work (WSCC and Persimmon would have them in-house).

In addition, there would need to be an indemnity for potential compensation claims.

2. If Persimmon and WSCC do not agree to this process, ADC would have to pursue a legal process outlined in para 1.5 which would obviously involve greater costs and a longer time period because Legal Counsel would need to be instructed to guide the Council through the process. This would also only be successful if the Council were able to convince the Secretary of State to agree. Once a legal process is complete, and if successful, all of the costs outlined in 1. Above would apply.

Other Matters

1.16 As mentioned above, it is not simply a case of getting the barrier reduced in height. There are significant issues that need to be considered before a final commitment to this process can be stated.

1.17 If the height of the barrier was reduced in height and it did not perform mitigation of noise to an acceptable degree, then the residents of Highdown Drive could potentially make a compensation claim to the Council. Officers have sought advice from consultants who normally act for the County Council regarding land compensation claims on other road schemes. However, to date, we have not been successful in getting any response from them. Officers have been unable to make any progress on this matter to date. Committee need to be aware that there is potential for compensation claims which the authority would need to be prepared to bear the cost of these if they were successful. Members should also be mindful that this issue is likely to take a significant length of time to resolve.

- 1.18 Officers have also approached WSCC to seek to determine whether they would be willing to discuss reducing the height of the barrier (after they adopt the road and barrier). They have been provided with copies of the consultant reports to consider. WSCC have confirmed that they would be willing to discuss do this. However, as per the advice from Town Legal, require a planning application to be made so that there was a clear and transparent decision-making process. This would allow so that all those affected by the proposal had the opportunity to comment.
- 1.19 Officers have sought to obtain an estimate of likely costs because the Council would be likely to be liable for the costs of any works. Officers requested Persimmon to provide a likely cost estimate for these works so that an informed decision could be taken. Whilst Persimmon are seeking these details, no firm estimate has been provided to date. On this matter it should also be noted that there may be potential issues with the warranty of the barrier if substantial works are proposed to it.
- 1.20 Officers are meeting with WSCC and Persimmon on 8 December so a verbal update may be provided at the meeting on these matters.

Conclusion

- 1.21 Based on the comments of members at the previous meeting, it would appear that there is a consensus among members that the height of the acoustic barrier should be lowered. Paragraph 1.15 of this report highlights the two options available in order to achieve this and it would be hoped that option 1 can be used with the willingness and agreement of all parties concerned. It will also be a lengthy process that will not be resolved over a few months.
- 1.22 However, it is not as simple as just deciding that the Council want to reduce the height of the barrier. Even if option 1 could be pursued, there are a number of implications as well as potentially significant costs to consider.
- The Council would likely have to cover to costs of submitting a planning application for the reduced height
 - There are risks of future compensation claims if a reduced height barrier does not perform as well acoustically
 - The Council would have to cover the costs of carrying out works to reduce the height of the barrier.
- 1.23 If option 1 cannot be pursued with the co-operation of West Sussex County Council and Persimmon Homes, then a formal legal process would have to be pursued. There would be obvious time and cost implications associated with this course of action. It is therefore necessary to understand the position of West Sussex County Council and Persimmon Homes.
- 1.24 As set out above, there are still a great deal of unknowns to investigate before a formal process can be followed. Officers will continue to seek details in respect of these so that any decision to reduce the height of the barrier can be taken with certainty of costs.

2. PROPOSAL(S):

1. Arun District Council could seek to persuade Persimmon Homes or WSCC to submit a planning application to amend the height of the barrier. If they agree to the principle of this, ADC will have to meet some or all of the costs associated with the planning process and the operational works required to reduce the height. ADC could submit the application on but there would be greater issues around having the correct technical officers/consultants to carry out this work (WSCC and Persimmon would have them in-house).
2. If Persimmon and WSCC do not agree to this process, ADC would have to pursue a legal process outlines in para 1.5 which would obviously involve greater costs and a longer time period because Legal Counsel would need to be instructed to guide the Council through the process. This would also only be successful if the Council were able to convince the Secretary of State to agree. Once a legal process is complete, and if successful, all of the costs outlined in 1. Above would apply.

3. OPTIONS:

1. To agree to the recommendation in this report
2. To confirm that the barrier, as built, will remain and that no further work or costs will be required.

4. CONSULTATION:

Has consultation been undertaken with:	YES	NO
Relevant Town/Parish Council		x
Relevant District Ward Councillors	x	
Other groups/persons (please specify)		
5. ARE THERE ANY IMPLICATIONS IN RELATION TO THE FOLLOWING COUNCIL POLICIES: (Explain in more detail at 6 below)	YES	NO
Financial	x	
Legal	x	
Human Rights/Equality Impact Assessment		x
Community Safety including Section 17 of Crime & Disorder Act		x
Sustainability		x
Asset Management/Property/Land		x
Technology		x
Other (please explain)		

6. IMPLICATIONS:

There are potentially significant legal and financial implications if the Council resolved to pursue a course of action to formally lower the height of the barrier.

7. REASON FOR THE DECISION:

8. BACKGROUND PAPERS:

[Planning Committee Agenda papers for 18 May 2021](#)