

Arun District Council

Advice Note on Fitzalan Link Road Acoustic Barrier

1. Introduction

- 1.1 We are instructed by Arun District Council (“ADC”) to consider the planning position in relation to the ongoing erection of a 3.5 metre tall galvanised “weathered” steel acoustic barrier on the new Fitzalan Link Road, Littlehampton, West Sussex (the “Acoustic Barrier”).
- 1.2 This advice note has been prepared for the benefit of ADC only and shall not be relied on by any other party.
- 1.3 For the avoidance of any doubt, this note addresses the law and ADC’s options in the context of planning legislation (with some relevant references to highways legislation), it does not however cover other potentially relevant legislative regimes that may impact upon proposals (which will clearly also need to be considered when assessing ADC’s options).
- 1.4 We understand that the developer, Persimmon Homes (the “Developer”), who is undertaking the construction of the Acoustic Barrier has obtained a number of planning consents and approvals for the structure (as discussed in more detailed in section 2 of this Advice) and that they in are in the process of building out under these extant consents. We also understand, based on discussions with West Sussex County Council (“WSCC”) officers, that construction of the Acoustic Barrier is now very nearly completed, if not completed already.
- 1.5 We are aware that a number of complaints have been made by individuals whose properties abut the Acoustic Barrier who allege that it will impact upon their amenity as, in summary, they consider it to be unsightly in appearance and overbearing in nature (primarily on the basis of its height and the materials used for its construction). We also note that our commission to review ADC’s options in respect of the Acoustic Barrier follows on from these concerns and the desire of ADC Councillors to explore potential alterations to the barrier, particularly whether there is scope for a reduction in its height or relocation. We also aware that the matter has attracted some local press coverage¹.
- 1.6 We understand that ADC has made contact with the Developer to explore potential reductions in the height of the barrier, however, the Developer has confirmed that it is not willing to make any alterations (in terms of height or materials) and is continuing with construction of the Acoustic Barrier in accordance with the approved planning consents and approvals.
- 1.7 We are asked to provide an advice note covering the following matters:
- (a) A review of the decisions already taken to establish if there are any issues (in process or judgment);
 - (b) To identify what legal options exist for securing changes to the Acoustic Barrier; and

¹ <https://www.littlehamptongazette.co.uk/news/politics/developer-explains-rationale-for-high-littlehampton-acoustic-fence-3192270>
<https://www.littlehamptongazette.co.uk/news/politics/controversial-fence-between-new-road-and-littlehampton-homes-to-be-discussed-3240751>
<https://www.theargus.co.uk/news/19486765.furious-littlehampton-residents-slam-new-massive-prison-like-acoustic-barrier/>

- (c) Confirm the implications of the matters set out in (b) above, including financial (compensation and legal implications).
- 1.8 We are asked to specifically advise, which we have incorporated when dealing with the headings above, as to which of the identified options has the most likely chance of success and the potential costs attached. We are also asked to specifically consider whether section 97 of the Town and Country Planning 1990 (“TCPA”) (relating to the revocation or modification of planning permission) would be an available / appropriate option.
- 1.9 We understand that ADC is seeking technical advice on noise and highways matters to establish whether alternative options could be feasible separately from this advice.

2. Factual background / Planning History

- 2.1 The background to this matter is set out in detail in the Report to ADC’s Special Development Control Committee of 18th May 2021.
- 2.2 The report identifies the planning history of the Acoustic Barrier and specifically highlights the following planning decisions which form the consenting regime under which the Acoustic Barrier is currently being erected –

- (a) Outline planning application LU/63/11 which was granted on 6th June 2012 for:

Outline Application for the construction of the "Fitzalan Link Road" between the A259 Worthing Road & the East Street/Fitzalan Road roundabout - This application affects a Public Right of Way

(the “**Outline Planning Permission**”)

The Outline Planning Permission included condition 18 which states:

No development shall take place until a scheme of noise mitigation measures to reduce the impacts of noise from the proposed highway affecting residential or commercial properties in the area has been submitted to and been approved in writing by the local planning authority. This shall include details of the height, specification and positioning of noise barriers. The approved scheme shall be implemented prior to the commencement of the use and be permanently maintained thereafter.

Reason: In order that noise levels may be agreed prior to the commencement of works on site and to safeguard the amenities of nearby occupiers.

Under the “NOISE” heading of the Officers Report for the Outline Planning Permission it is stated that:

Some residential properties adjoining the application site will see an increase in noise levels as a result of the road. The predicted noise levels have been used to include noise mitigation in the final design where possible. The existing boundary fences along the rear gardens of Rosemead, Paterson Wilson Road, Highdown Drive and Amberley Close, some of which are low, open or in a poor state of repair, and will not be very effective noise barriers, will be upgraded to 2m close boarded, double lapped timber fences as part of the scheme. A low (1m) graded landscape noise bund has been incorporated into the landscape design where possible. Further mitigation to protect against excessive noise during the construction is also to be incorporated into the Construction Environmental Management Plan.

- (b) Reserved matters application LU/234/16/RES which was granted on 19th October 2017 for:

Application for reserved matters relating to access, appearance, landscaping, layout and scale of the previously approved LU/63/11/. This application affects a Public Right of Way (the “Reserved Matters Approval”)

The Reserved Matters Approval included condition 7 which states:

“Prior to the commencement of development, details of the 3.5 metre high acoustic barrier shall be submitted and be approved by the Local Planning Authority. The Link Road shall not be brought into use until such acoustic barriers have been completed.

Reason: In the interests of the environment of the development, in accordance with Arun District Local Plan policy GEN7.

There are a number of more detailed paragraphs within the Officers Report that deal with the Acoustic Barrier namely –

Under the “LAYOUT” heading: The applicant's noise consultants have confirmed that a 3.5 metre noise barrier, imposed by means of a condition, would provide sufficient noise mitigation relating to a speed limit of 40 mph.

Under the “NOISE” heading: A noise assessment report was submitted by the applicant, which concludes that the beneficial effects of erecting 3.5 metre high acoustic barriers along the west of Fitzalan Link Road, would reduce traffic noise levels by up to 7.3dB. The report has been agreed with the Environmental Health Officer. It is considered necessary to impose a condition regarding the size, location and appearance of the acoustic fencing. Revised noise modelling has been carried out for the whole length of the Link Road including properties TR39-TR42. to reflect the change from 30 mph to 40 mph; everything south of the signal crossing and roundabout is proposed to be 30mph. These receptors (TR39-TR42) are outside the redline boundary of the planning application, therefore without the protection of the barrier the noise levels at these properties are higher than the ones opposite the Link Road, with the barrier in place. However they are below the 68dB guidance for the requirement for provision of noise insulation. The EHO is satisfied with the results of the noise modelling. The proposed development complies LU/234/16/RES report with Policy QE DM1 of the eALP.

Under the “VISUAL IMPACT OF ACOUSTIC BARRIER” heading: The erection and retention of a 3.5 metre high acoustic barrier alongside the Link Road, backing onto the rear gardens of residential properties will have a visual impact upon the amenity of local residents, but this needs to be measured against the noise emissions from the vehicles travelling along the Link Road. It is considered that the higher the acoustic barrier is, the lower the noise emissions and the lower the acoustic barrier is, the higher the noise emissions will be. On balance, it is considered that the visual impact of a 3.5 metre high acoustic barrier is acceptable when measured against the noise levels emitted by vehicles on the Link Road.

- (c) Approval of details application LU/426/17/DOC which was approved on 6th June 2018 in relation to the approval of details under condition 7 of the Reserved Matters Approval.
(the “First AoD”)

This included technical noise analysis and highways and landscaping plans. The noise report actually sought to address condition 18 of the Outline Planning Permission, however, the First AoD only refers to approval of condition 7 of the Reserved Matters Approval. We understand that Condition 18 has not been formally discharged, however ADC officers are

of the view that it has for all intents and purposes been approved as part of the approval of details applications to the Reserved Matters Approval.

The plans and noise reports secured by this approval confirmed that the Acoustic Barrier would be a 3.5m high close board fence with softwood boarding with an alkaline copper quaternary treatment.

- (d) Approval of details application LU/366/19/DOC which was approved on 6th April 2020 also in relation to the discharge of condition 7 of the Reserved Matters Approval.

(the “**Second AoD**”)

This included revised details for the materials to be used for the Acoustic Barrier, instead proposing a galvanised steel material with an aluminium coloured finish. The decision notice confirms that the panelling should be “Ridged Panels in Weathering Steel, manufactured by Gramm Barrier Systems Ltd”.

The decision notice for the Second AoD includes a note which states:

The Local Planning Authority attempted to secure improvements to the acoustic fence by it being constructed on top of the landscaped bund, where there are landscaped bunds proposed. If the bund is 2.0 metres high for example, 1.5 metre high acoustic fence could be constructed on top of the bund, so as to provide a total height of 3.5 metres. It is understood that this is not possible because the road is not creating a landscaping bund as the whole road is elevated between 100mm and 400mm above exist ground level, with a small slope to the back fences. Therefore there is no option to lower the height of the fence.

The application attracted a lengthy commentary analysis from WSCC discussing the benefits of metal and timber barriers, concluding: “...decisions regarding the proposed acoustic fences should be taken with a holistic view of form vs function. A metallic fence will provide far longer acoustic and non-acoustic lifespans (up to 60 years), and therefore provide longer term savings, but subjectively it doesn’t have the aesthetic appeal of a timber alternative. A ‘weathering steel’ acoustic fence is the preferred solution of the WSCC Structures Department that not only meets the acoustic and non-acoustic criteria, but also has an aesthetic appeal...”

- 2.3 As mentioned above, there are several references within the First AoD and Second AoD to the discharge of condition 18 under the Outline Planning Permission and, also as above, we understand that while ADC has not formally discharged condition 18 in writing, officers are of the view that given that the substance of condition 7 of the Reserved Matters Approval clearly also seeks to address condition 18, the essence of both conditions have been approved.
- 2.4 A section 106 agreement was entered into on 23 January 2013 in relation to planning application ref LU/47/11 for a mixed used development located north of Toddington Lane, which included highways improvement works to the Fitzalan Link Road (the “**S106 Agreement**”). The S106 Agreement does not contain any provisions relating specifically to the provision of the Acoustic Barrier; however, the deed of variation to the S106 Agreement, dated 11 September 2018, required entry into a highways agreement under section 278 of the Highways Act 1980 in relation to the “Fitzalan Link Stage 2 Works” (the corresponding plan for which includes the land on which the Acoustic Barrier has been constructed) prior to occupation of 150 dwellings.
- 2.5 In the course of producing this Advice we have received a copy of the corresponding section 278 agreement, dated 2 December 2019 (the “**S278 Agreement**”), from WSCC. Clause 29 of the S278 Agreement confirms that adoption of the “Road” (which includes ancillary items to the carriageway,

which could be deemed to include the Acoustic Barrier) by the WSCC shall take place automatically upon the issue of the Final Certificate signing off the works (following the initial maintenance period). Clause 10 requires the Developer, to submit AIP ('approval in principle') documents for the Acoustic Barrier, as well as design and check certificates, prior to construction. The Developer is further required to complete the Acoustic Barrier prior to issue of the "Part Two Certificate", and maintain the Acoustic Barrier until the issue of the Final Certificate "after which the Council will maintain in perpetuity" (the obligations on the Council in relation to maintenance of the Acoustic Barrier are discussed further below). There is also a requirement for the Developer to pay WSCC a commuted sum for the Acoustic Barrier's future maintenance, which is relatively common in respect of highways structures (as the cost of maintenance for such structures is often above general highway maintenance expense). While the S278 Agreement is not definitive on the whether the Acoustic Barrier itself is to be formally adopted as a highways structure, the ADC Committee Report 18th May 2021 states that it is officers understanding that it will be, and in any event, the provisions of the S278 Agreement are clear that it will be maintained in perpetuity by WSCC as highway authority, and so the distinction is likely to be unimportant.

- 2.6 Upon review of the background consents, approvals and other relevant documents there did not appear to be any obvious errors in process or judgment in the decision-making relating to the Acoustic Barrier that would merit legal concern. On this basis we consider that the starting point for considering options is that the Acoustic Barrier is being constructed lawfully under an approved planning consent, and that it is subject to a number of conditions and covenants relating to its construction and future maintenance.

3. Options

- 3.1 This note will now analyse the options available to ADC to alter the Acoustic Barrier. These options have been split into three categories: options under planning legislation, options under highways legislation, and other more practical options that might be agreed with the Developer and/or WSCC.

Options in Planning Legislation

- 3.2 Section 97 of the Town and Country Planning Act 1990 ("TCPA") empowers a local planning authority to (by order) revoke or modify a planning permission relating to building operations "at any time before those operations have been completed"², but such revocation or modification "shall not affect so much of those operations as has been previously carried out"³.
- 3.3 As the Acoustic Barrier will most likely be completed by the time any such order could be made (if not completed already), it would appear that this power is not appropriate in the present case. However, section 102 of the TCPA provides a very similar power to that of section 97, but permits alterations to works already carried out. This would therefore appear the more appropriate power in this case and we have provided a detailed analysis below.
- 3.4 Section 102 of the TCPA empowers a local planning authority to (by order) "require such steps as may be so specified to be taken for the alteration or removal of the buildings or works"⁴, provided that the alteration or removal appears to them to be "expedient in the interests of the proper planning of the area (including the interests of amenity)"⁵. The local planning authority may also

² As per section 97(3)

³ As per section 97(4)

⁴ As per section 102(b)(iii)

⁵ As per section 102(1)

- use the order to grant a new and separate planning permission “for any development of the land to which the order relates, subject to such conditions as may be specified in the order”⁶.
- 3.5 It should also be noted that, under section 103, “an order under section 102 shall not take effect unless it is confirmed by the Secretary of State...”. The Secretary of State has broad power to modify the order as submitted, including the power to grant planning permission or modify the grant of permission under the order. Following submission of the order to the Secretary of State for confirmation, the local planning authority must serve notice on the owner and occupier of the land, and any other affected persons. These parties are then entitled to request and opportunity to appear before the Secretary of State, and the Secretary of State must allow at least 28 days for such requests before making their decision (the notice must make this time period clear to the recipient). If such an opportunity is given to a recipient, the local planning authority is also entitled to appear before the Secretary of State. Where the Secretary of State confirms the order, the local planning authority shall serve a copy of the order on the owner and occupier of the affected land (but not neighbours).
- 3.6 The power under this section seems much more appropriate to the facts at hand. If ADC thought it expedient to do so, it could issue an order for the Acoustic Barrier to be altered or removed, and simultaneously grant a new planning permission for the altered Acoustic Barrier.
- 3.7 The legislation does not define what constitutes ‘alteration’. In our opinion, keeping the Acoustic Barrier in the same place and reducing its height falls squarely within the scope. However, it is less clear whether relocating the Acoustic Barrier could be deemed an ‘alteration’. The details of any proposed relocation would be required to advise more fully and this would likely be something that could be picked up in further Counsel’s advice on risk as mentioned below.
- 3.8 It is important to note that to enable the exercise of section 102, ADC would need to produce a robust evidence base to justify the decision. This evidence base would also need to distinguish from its previous decisions on the matter and why the evidence is sufficient to essentially overturn the previous decision on the matter. Planning considerations (technical noise, highways and visual assessments etc.) will clearly be relevant as well as financial considerations (justifying the spend in the public interest) which we discuss further below.
- 3.9 Thorough consultation is also recommended prior to taking any action and to ensure that all representations received are carefully considered in the round. There is no statutory requirement for consultation by the local planning authority (beyond the opportunity to appear before the Secretary of State set out at paragraph 3.5 above). Therefore, who is consulted, and the extent of such consultation, would be at ADC’s discretion. We would suggest that at minimum those neighbouring residents who are affected by the proposals must be consulted, however ADC may wish the cast the net slightly wider to ensure that no-one who may be impacted is missed.
- 3.10 It should be borne in mind that issuing an order under section 102 will likely involve the payment of compensation to the Developer. Section 115 TCPA provides as follows:

115.— Compensation in respect of orders under s. 102, etc.

- (1) This section shall have effect where an order is made under section 102—*
(a) requiring a use of land to be discontinued,
(b) imposing conditions on the continuance of it, or

⁶ As per section 102(2)

- (c) requiring any buildings or works on land to be altered or removed.*
- (2) If, on a claim made to the local planning authority within the prescribed time and in the prescribed manner, it is shown that any person has suffered damage in consequence of the order—*
 - (a) by depreciation of the value of an interest to which he is entitled in the land or in minerals in, on or under it, or*
 - (b) by being disturbed in his enjoyment of the land or of such minerals, that authority shall pay to that person compensation in respect of that damage.*
- (3) Without prejudice to subsection (2), any person who carries out any works in compliance with the order shall be entitled, on a claim made as mentioned in that subsection, to recover from the local planning authority compensation in respect of any expenses reasonably incurred by him in that behalf.*
- (4) Any compensation payable to a person under this section by virtue of such an order as is mentioned in subsection (1) shall be reduced by the value to him of any timber, apparatus or other materials removed for the purpose of complying with the order.*
- (5) Subject to section 116, this section applies where such an order as is mentioned in subsection (6) is made as it applies where an order is made under section 102.*
- (6) The orders referred to in subsection (5) are an order under paragraph 1 of Schedule 9—*
 - (a) requiring a use of land to be discontinued, or*
 - (b) imposing conditions on the continuance of it, or*
 - (c) requiring any buildings or works or plant or machinery on land to be altered or removed, or an order under paragraph 3, 5 or 6 of that Schedule.*

- 3.11 To summarise under section 115 TCPA, any person with an interest in the land subject to the s102 order (i.e. just the Developer and anyone else with a legal interest in the land on which the Acoustic Barrister is sited, but not the neighbouring owners) who suffers damage on the following heads is entitled to compensation:
- (a) in respect of depreciation in the value of land or minerals;
 - (b) in respect of disturbance (this generally relates to the reasonable expenses involved with being displaced from the land);
 - (c) any expenses reasonably incurred in carrying out works in compliance with the order; and/or
 - (d) rehousing.
- 3.12 However, subsection 115(4) states that any timber, apparatus or other materials removed for the purpose of complying with the section 102 order are to be deducted from the compensation payable.
- 3.13 We would not anticipate any material depreciation in value of the land, nor would we anticipate any extensive disturbance caused to the Developer, although we would still suggest this is still carefully examined when carrying out any technical survey work assessing the cost of any proposed alterations. The obvious main head of compensation would therefore be the cost to the Developer of altering the Acoustic Barrier in compliance with the order. We are not in a position to accurately estimate these costs, and a detailed assessment would need to be undertaken prior to exercising the power to ensure that ADC were fully aware of the potential compensations sums that may be involved.
- 3.14 As mentioned above section 115 only applies to those with an interest in the land directly affected by the order. Aggrieved neighbours would therefore not have a claim to compensation under that

section. However, there may be a risk that neighbours could bring a claim in private nuisance under common law for interference with their quiet enjoyment of their land. Private nuisance is outside the scope of the planning regime – for analysis of the risk and potential quantum, we would recommend advice is sought from a litigation specialist.

- 3.15 Section 190 of the TCPA provides that if the s102 order was not complied with, ADC would be able to enter onto the land to take the steps required by the s102 order and recover their costs in doing so (although clearly this would need to be balanced against the compensation payable). Section 189 also confirms that it is an offence not to comply with the terms of a s102 and persons who do not comply may be prosecuted under this section.
- 3.16 There is no automatic route of appeal against a section 102 order, however “a person aggrieved” may legally challenge the decision under section 288 TPCA, which would be dealt with in the High Court. An order may be challenged on the grounds that its issue was not within the powers of the TCPA. The case of *Ashbridge Investments*⁸ broadened the scope of this ground to include misuse of a discretionary power, for example by reaching an unreasonable conclusion or failing to take relevant considerations into account. In this case for example, it may be alleged that an order unreasonably contradicted the recently granted Outline Planning Permission and Reserved Matters Approval without any change to the factual context, or that ADC failed to properly consider the noise impact if it could be shown that the shorter barrier required under the order failed to mitigate the noise impact as well as the Acoustic Barrier. Of course, the risk of a section 288 challenge would be greatly reduced if the results of the technical assessments currently being undertaken suggest that a shorter Acoustic Barrier could in fact achieve a similar reduction in noise impact.
- 3.17 Other potential grounds for challenge to be aware of are the potentially high public cost involved with issuing the order (and any corresponding compensation to the Developer). The Supreme Court case of *HSE v Wolverhampton City Council*⁹ confirmed that, when considering whether to make a section 102 order: “as custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering any case whether the cost is proportionate to the aim to be achieved, and taking into account more economic ways of achieving the same objective”.
- 3.18 There would also be a potential risk of challenge for procedural unfairness. Any order would have to be preceded by a robust consultation of all neighbours and potentially affected parties, as of course while visual impact is important to some, noise impacts may be more important to others.
- 3.19 It is important to note that the most likely remedy for any legal to the section 102 order would be to quash the decision (which in effect means the Court would nullify the effect of the order). If that were to occur ADC would need to decide afresh whether there was merit in pursuing the issue further through remaking the order or appealing the Court’s judgment.
- 3.20 There are few cases dealing with challenges to section 102 orders that can serve as an illustration. The most useful is perhaps the decision by the Secretary of State to confirm the section 102 order

⁷ The concept of who will be a "person aggrieved" is broad. Lord Reed endorsed Lord Denning's observation in *Attorney-General of Gambia v N'Jie* [1961] AC 617 that it is "of wide import and should not be subjected to a restrictive interpretation". A "person aggrieved" is not restricted to a person with a legal grievance and it will turn on its facts in each case.

⁸ *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 W.L.R. 1320

⁹ *The Health and Safety Executive (Appellant) v Wolverhampton City Council (Respondent)* [2012] UKSC 34

for discontinuance of use¹⁰ relating to Home Farm, Somerton. The Secretary of State first looked to the material considerations to support the order, then the material considerations indicating against issue of the order. The mixed farm/residential use had changed from what was originally anticipated, and the land fell into disrepair – the impact on the residential nature of the surrounding locality and the impact on amenity were held to be material considerations to support the order. There were no material considerations found to indicate against the order.

- 3.21 By way of concluding comments on above, in order to exercise section 102 to alter the Acoustic Barrier, a great deal of preliminary work will be required particularly obtaining appropriate technical evidence in relation to the justification (i.e. the noise and highways work currently being undertaken) and detailed analysis as to potential compensation/other associated costs for proposals (the cost of the proposed alterations, and an assessment in respect of any resulting land value depreciation). As above we would also recommend that further legal advice is sought from a litigation specialist in terms of potential claims that could potentially be made by neighbouring residents under other legal regimes (e.g. private nuisance, environmental legislation etc). Finally a clear assessment against both planning and public law considerations will be required to ensure a robust and defensible order is capable of being made. On the final point there would appear merit in obtaining Counsel's opinion following completion of the evidence gathering/cost analysis exercise, to assist in preparing the ADC's final justification report and to provide a final view on chances of success/susceptibility to challenge.

Highways Options

- 3.22 In addition to the powers exercisable under planning legislation as set out above, an alternative route open to ADC may be to request that WSCC undertake further works to mitigate the harm caused by the barrier in their capacity as highway authority, following the handover of the Acoustic Barrier to WSCC pursuant to the terms of the S278 Agreement.
- 3.23 WSCC may have a number of powers available to it as highway authority under the Highways Act 1980, to remove or make amendments to the Acoustic Barrier (potentially under sections 62, 80 or 282 – although WSCC will likely be best placed to confirm any appropriate power). Notwithstanding the potential availability of powers, we would suggest that WSCC would likely be unwilling to take such action (even with potential indemnification i.e. agreement by ADC to compensate for any legal action taken against WSCC following the exercise of its powers) for a number of the reasons, including but not limited to:
- (a) From a highways authority perspective the height and material of the fence were considered to be appropriate on the basis that it appropriately mitigates the noise impact from the road and the steel material used was considered lower maintenance than the timber alternative;
 - (b) There is a risk that any decision made by WSCC to undertaken amendments could be legally challenged on similar grounds to those discussed above for ADC's exercise of s102; and
 - (c) The exercise of any highways power would not override the planning restrictions that have been established by the extant planning consents and approvals.

¹⁰ Section 102 orders can order discontinuance of use as well as requiring modification of works. We don't believe this distinction changes the relevance of this case.

- 3.24 In respect of (c) it is important to note that the following planning conditions and S278 Agreement restrictions exist, and that these restrictions in principle prevent WSCC from making further amendments to the Acoustic Barriers without amendments to the relevant planning consent:

Condition 18 of the Outline Planning Permission:

*No development shall take place until a scheme of noise mitigation measures to reduce the impacts of noise from the proposed highway affecting residential or commercial properties in the area has been submitted to and been approved in writing by the local planning authority. **This shall include details of the height, specification and positioning of noise barriers. The approved scheme shall be implemented prior to the commencement of the use and be permanently maintained thereafter. [our emphasis]***

Clause 10.5 of the S278 Agreement:

*IT IS HEREBY AGREED AND DECLARED by and between the parties [the Developer and WSCC] to this Agreement as follows: THE Developer will maintain the acoustic fencing until the issue of the Final Certificate **after which the Council maintain in perpetuity [our emphasis]***

Condition 7 of the Reserved Matters Application appears to be slightly less of an issue as it simply requires the completion of the Acoustic Barrier. This was presumably not to fetter WSCC's power as highway authority to make amendments as they saw fit.

- 3.25 Condition 18 is of particular issue as altering or removing the Acoustic Barrier would be in breach of the terms of the condition, given that ADC is of the view that the details were effectively approved under the approval of details for condition 7 of the Reserved Matters Application. In addition it is likely that a further planning consent would be required to make amendments to the barrier in any event. It would technically be open to ADC not to enforce against a breach of the condition on the basis that it was "not expedient" to do so, however, this presents its own risks and would also be a decision open to potential legal challenge.
- 3.26 On this basis it would appear that further regularising action under the planning regime would be required prior to any actions being taken under the Highways Act.
- 3.27 That being said there may be more practical steps that could be taken by WSCC as the highway authority to improve the visual amenity of the Acoustic Barrier without taking actions that would make actual changes to the height/materials/location of the barrier or interfere with the planning restrictions.
- 3.28 For example section 115B of the Highways Act 1980 provides a power for the highway authority to:
- 115B(1) [...] (a) **to carry out works on, in or over a highway to which this Part of this Act applies;***
and
*(b) to place objects or structures on, in or over such a highway, **for the purpose—***
(i) of giving effect to a pedestrian planning order;
*(ii) **of enhancing the amenity of the highway and its immediate surroundings;** or*
(iii) of providing a service for the benefit of the public or a section of the public

Sub-section (3) goes onto confirm that *(3) Without prejudice to the generality of this section, the amenity of a highway may be enhanced by providing lawns, trees, shrubs or flowers.*

Section 96 also offers a wider general power for the provision of plants on highway land.

- 3.29 Section 274 provides that a council (which for the purposes of the Highways Act 1980 would include ADC) may contribute towards expenses incurred or to be incurred by a highway authority if, in the opinion of the council, the expenditure is or will be of benefit to the council's area.
- 3.30 It would therefore appear that the Highways Act 1980 provides a mechanism which would allow not only for WSCC to provide a scheme of work to improve the amenity of the highway (which may for example include a suitable planting scheme to improve the appearance of the Acoustic Barrier) but also a legal method of ADC contributing towards this enhancement. Indeed it is understood that part of the rationale for the "weathered steel" material used for the Acoustic Barrier was that it has an expected life span of 60+ years which would reduce maintenance and enable a planting scheme around the barrier to be established. The powers outlined above, may provide an opportunity for ADC to provide a financial "top-up" to existing planting proposals through engagement with WSCC.
- 3.31 It would appear that the risk attached to any such proposal would be relatively low as the height, materials and integrity in terms of noise mitigation of the Acoustic Barrier would seemingly not be compromised, it would merely be a method of improving the visual amenity of the structure. It would also obviously be a matter for ADC as to how much money had been spent, and to consider whether this would be a reasonable and proportionate response to addressing the issue. Further detailed cost and risk analysis would of course be prudent prior to committing funds in the manner set out above. We would suggest that WSCC would unlikely be willing to any actions to actually alter, remove or move the Acoustic Barrier under its highway powers for the reasons set out in paragraph 3.22 above.

Other Options

- 3.32 In addition to the options outlined above, it may also be possible to seek to enter into a private arrangement with either the Developer or WSCC to seek to alter or move the Acoustic Barrier or, as discussed above, provide other measures to assist in mitigating the harm to visual amenity. In ADC's discussions with the Developer it is not clear as to whether ADC sought to provide financial input into the proposed amendments to the Acoustic Barrier, which may of course incentivise the Developer to make the changes required (providing it is at ADC's expense). The private arrangement may be contractual and legally binding or more informal depending on the nature of the proposal.
- 3.33 As outlined above in respect of the highways options, the planning restrictions would still need to be overcome, and if alternative applications (for example a further approval of details application or variation to condition 7) were submitted following discussion in respect of a private arrangement, ADC would need to be very careful to ensure that it did not fetter its discretion in terms of its responsibility for independent decision-making as local planning authority.
- 3.34 The decision to enter into any private arrangement would also be potentially subject to judicial review and so as with any decision to be made on this issue, ADC must ensure that the decision-making is legally robust.

4. Analysis and Recommendations

- 4.1 We have identified the following options as being available to the ADC:
- (a) Section 102 of the Town and Country Planning Act 1990 – this provides the most comprehensive solution to addressing the issue and may allow scope for reductions in the height of the Acoustic Barrier which we understand is Councillors and the current complainant's principle concerns (relocation *may* also be possible but it is less clear whether this would constitute an 'alteration'). Section 102 also provides a mechanism to grant a new planning permission or amend the existing planning consents (and the attached

conditions) so any further actions taken would not require additional amendments to the existing planning permissions - it would all be wrapped up in the s102 order. That being said this option is not without risk and there would almost certainly be compensation attached, at minimum being the cost of works to carry out the order (but this may be further reaching – see discussion above). In addition, the s102 order may also be amenable to potential legal challenge on a number of grounds. If s102 were to be pursued further detailed analysis would be required to robustly justify the action, including production of a clear and thorough evidence base that any alternative proposal continued to sufficiently mitigate noise impact and that the use of public funds were appropriate/proportionate. As mentioned above we would also recommend that a litigation lawyer's opinion is sought in respect of other potential claims that could be made by neighbouring residents that fall outside of the planning regime. We would also recommend that once all technical evidence has been compiled that Counsel's opinion is sought in advance of exercise of the power for a final view on the chances of success and any vulnerability to challenge;

- (b) Request that WSCC exercise appropriate highways powers – as outlined above, WSCC would appear unlikely to want to exercise powers to alter, remove or move the Acoustic Barrier in its capacity as highway authority, and this would not resolve the potential conflict with the terms of the relevant planning conditions. There may however be other appropriate powers that could be reasonably implemented by WSCC including enhancements to the visual appearance of the Acoustic Barrier (which may include a more complete planting scheme with the assistance of ADC funding);
- (c) A private arrangement with the Developer and/or WSCC – a further alternative could be to reach an agreement with the Developer and/or WSCC (which may be by legally binding contract or a more informal arrangement) to secure proposed alterations to the Acoustic Barrier. Clearly this will also attract the same issues outlined for the other options including the need for a robust evidence base in terms of rationale and use of any public funds, as well as being mindful not to fetter discretion on decisions made on future planning applications for amendments to the barrier and/or the planning conditions.

4.2 We hope that this assists ADC in their review of the matter and we would be happy to assist further as the matter progresses.

Town Legal LLP
20 September 2021