
Appeal Decision

Site visit made on 15 March 2022

by Darren Hendley BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 April 2022

Appeal Ref: APP/H2733/W/21/3288525

Unit 1A, Kepwick House, Peasholm Gap, Scarborough YO12 7TN

- 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 Mr Luke Austin against the decision of Scarborough Borough Council.
 - The application Ref: 21/00020/FL, dated 4 January 2021, was refused by notice dated 9 June 2021.
 - The development proposed was originally described as a 'change of use for unit 1A from A3 to A5'.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The proposal comprises a hot food takeaway use. The description of development in the banner heading above is taken from the planning application form. It refers to Class A uses that were revoked on 1 September 2020, under the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. Former Class A5 hot food takeaways no longer fall within any use class and so are sui generis. This is reflected in the description that is set out on the Council's decision notice. Accordingly, I have considered the appeal on this basis.
3. The appellant submitted a Noise Impact Assessment (NIA), as well as an extraction proposal and a crime assessment with the appeal. Whilst these documents were not submitted as part of the planning application submission, the Council and interested parties have had the opportunity to comment on them during the course of the usual appeal timetable. I have therefore had regard to these documents in my decision. Likewise, in respect of a drawing (ref: FLO-PR-100147 Rev P02) that was submitted with the appeal which shows a frying range and the means of extraction.

Main Issue

4. The main issue is the effect of the proposal on the living conditions of the occupiers of Kepwick House by way of noise and disturbance.

Reasons

5. The appeal property consists of a small retail unit. It lies on part of the ground floor of a much larger building known as Kepwick House where the ground floor is used for commercial or access purposes. The above storeys are in residential use, whether permanently occupied or as holiday lets. The level above the appeal property has been converted into apartments, so that a residential use lies immediately above. Balconies are found on a number of the apartments in the building, including close to the appeal property.
6. The appeal property also lies close to the sea front area of the North Bay of the town. There are a number of other recreational related uses in this area, including the beach, parks and open spaces, mini-golf, an open air theatre and a narrow gauge railway. Commercial uses are of a limited nature beyond the ground floor of Kepwick House, apart from a nearby ice cream parlour. The surroundings are pleasant for residents and tourists alike.
7. When considering the nature of a hot food takeaway use, there is the potential for noise and disturbance from both the operation of plant and from customers to impact on the living conditions of the occupiers of Kepwick House. The Council were unsurprisingly concerned that an NIA did not accompany the planning application, which the appellant has sought to rectify through the appeal submission.
8. The NIA has regard to the proposed plant that would be required to provide extraction associated with the takeaway use, with the potential noise impact calculated and rated in accordance with BS4142¹. The extraction route would exit the building on its roof and it would incorporate multiple silencers en-route to reduce the related noise. The NIA considers that there would be a likelihood of a low impact with regard to the noise sensitive residential receptors in Kepwick House. Subject to the incorporation of the silencers to reduce noise, the proposal would not be unacceptable in this respect.
9. With regard to the noise from customers, the floor area of the appeal property is modest and would be further limited by the positioning of the range. This would restrict the potential for customers to wait inside. In all likelihood, this would necessitate customers congregating outside on the public realm, especially during the busier seasonal times. There would be noise and disturbance associated with their conversations, as well as from their comings and goings. This would occur up to 9pm or 10pm in the evenings, or match all neighbouring store night opening hours when the open air theatre is operational, based on the proposed opening hours.
10. The NIA applies IEMA guidelines² and considers that the effect of such noise on the nearest noise sensitive receptors would be negligible. I am not persuaded this fully accounts for the nature of this noise, as it would occur at the times of the day in the evenings when residents would reasonably expect some degree of peace and quiet, even with nearby attractions. Noise from customers would also not be constant and would in all likelihood fluctuate. Hence, it would also create disturbance in this respect.
11. The Planning Practice Guidance: *Noise* (PPG) recognises that the subjective nature of noise means that there is not a simple relationship between noise

¹ BS 4142 2014: A1+2019, Method for rating and assessing industrial and commercial sound

² IEMA Guidelines for Environmental Noise Impact Assessment Version 1.2, November 2014

levels and the impact on those affected. It refers to that some types and level of noise will cause a greater adverse effect at night than if they occurred during the day, as well as where the nature of noise is non-continuous. Hot food takeaways are specifically cited in relation to their often peak hours in the evening, including the noise that may be made by customers in the vicinity.

12. The nearest residents in Kepwick House would be no more than a few metres from this source of noise emanating from the customers outside, including when residents are using their habitable rooms, in particular the apartment above the appeal property. When this disturbance would occur in the quieter evening times, it would be of detriment to the enjoyment of those apartments and it would unduly disrupt the living conditions of their occupiers, even with the reduced opening hours that the appellant has put forward at the final comments stage as they would still permit use well into the evening time.
13. The NIA points to the existing noise from road traffic and patrons using premises elsewhere. However, unlike these sources, the proposal would provide an additional focal point for such noise in very close proximity to residential properties. The further units at ground floor level in Kepwick House, including café use, which may be used by customers during evening times would not account for noise emanating from the congregation of customers and their comings and goings associated with the proposed hot food takeaway use, as is recognised by the PPG. Nor can noise from the sea be considered comparable in this context because it is not a source of noise that most people would consider constitutes a disturbance.
14. With regard to the noise from recreational uses in the area, they are generally low key informal sources where there would not be the same congregation of customers, at least in the evenings. An exception to this would be the open air theatre that I have been referred to, but such noise would be considerably more occasional than the more regular noise associated with the proposal.
15. The appellant has sought to lessen the potential effects from noise through a management plan. It is questionable how effective the measures that it contains would be though because the size of the premises would necessitate customers being outside at times, as is acknowledged by the NIA. There would be considerably less control that can be imposed by the appellant outside because this is a public area. The management plan does not alter my conclusion in this regard.
16. The same applies in relation to where customers would consume their purchase and 'click and collect'. It is not evident how the appellant would restrict consumption directly outside the premises and this would not in any event account for the comings and goings of customers. The potential for noise and disturbance from customers to impact on the living conditions of the occupiers of Kepwick House is decisive on this issue.
17. I conclude that the proposal would have an unacceptable effect on the living conditions of the occupiers of Kepwick House by way of noise and disturbance. As such, it would not comply with Policy DEC4 of the Council's Scarborough Borough Local Plan (2017) which states that proposals should ensure that existing and future occupants of land and buildings are provided with a good standard of amenity, and should not give rise to unacceptable impacts by means of disturbance arising from such things as noise, amidst other considerations.

Other Matters

18. The economic benefits and the improvement to the aesthetics of the appeal property would not outweigh the harm that would arise to the living conditions because of the likely noise and disturbance that the residents would have to endure at times. In relation to the support from the owner of the building, I have to consider the proposal on its own planning merits, which in this case counts against it.
19. Interested parties have raised a number of other concerns. Some of these would be addressed by the measures that are set out in the extraction proposal and the crime assessment, as well as through the proposed operation of the premises. As I am dismissing the appeal on other grounds, though, such matters do not change my overall conclusion and have therefore not had a significant bearing on my decision.

Conclusion

20. For the reasons set out above and having regard to all matters that have been raised, the appeal should be dismissed.

Darren Hendley

INSPECTOR