



Appeal Decision

Hearing held on 20 September 2022

Site visit made on 20 September 2022

by Graham Wraight BA(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 November 2022

Appeal Ref: APP/Z2260/W/21/3278199

**The St Mildred's Bay, St Mildred's Gardens, Westgate-on-Sea, Kent
CT8 8TP**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
 - The appeal is made by Mr Paul Glicksman (St Mildred's Bay Limited) against the decision of Thanet District Council.
 - The application Ref F/TH/20/1406, dated 21 October 2020, was approved on 4 January 2021 and planning permission was granted subject to conditions.
 - The development permitted is *Change of Use from cafe (use class E (b)) to a mixed use bar and cafe (Use class E (b) and Sui-generis) together with alterations to height of roof, fenestration of store and existing cafe, alterations to boundary treatment and installation of 1No. air conditioning unit.*
 - The conditions in dispute are Nos 3, 4 & 7 which state that:
 - (3) *The use of the premises hereby approved shall not be used other than between the hours of 0900 and 2300.*
 - (4) *The use of the external courtyard hereby approved shall not be used other than between the hours of 0900 and 2100 Monday to Sunday.*
 - (7) *No amplified music is permitted in the external courtyard hereby approved at any time.*
 - The reasons given for the conditions are:
 - (3) *To safeguard the residential amenities currently enjoyed by the occupiers of nearby residential properties in accordance with Policy QD03 of the Thanet Local Plan.*
 - (4) *To safeguard the residential amenities currently enjoyed by the occupiers of nearby residential properties in accordance with Policy QD03 of the Thanet Local Plan.*
 - (7) *To safeguard the residential amenities currently enjoyed by the occupiers of nearby residential properties in accordance with Policy QD03 of the Thanet Local Plan.*
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Decision

1. The appeal is dismissed.

Background & Main Issue

2. Planning permission has been granted to change the use of the appeal premises from a cafe to a mixed use bar and cafe, together with a number of physical alterations. The appellant seeks to vary Conditions 3, 4 and 7 of the permission which respectively refer to the permitted hours of opening, the permitted hours during which the external courtyard can be used and the prevention of the playing of amplified music within the courtyard.
3. The main issue is the effect that varying the conditions would have on the living conditions of the occupiers of nearby dwellings, with particular reference to noise and disturbance, and whether or not the conditions meet with the

6 tests set out in paragraph 56 of the National Planning Policy Framework (the Framework).

Reasons

Condition 3

4. The premises is located immediately opposite a large residential building known as Marine Heights. That building contains a number of flats, many of which have balconies and windows overlooking onto the appeal property and which are positioned in close proximity to it. Surrounding land use is predominantly residential and whilst Millie's Bar is located nearby, it too is understood to have restrictions on its hours of opening that do not permit it to be open late into the night. Due to the close proximity to Marine Heights and the size of the appeal premises, noise from people arriving and leaving has the potential to generate significant levels of disturbance. This would be through general chatter, raised voices and via the arrival and departure of vehicles including the closing of car doors. This would be likely to be most acute at closing time, when there would be likely to be a greater concentration of people vacating the premises.
5. Such noise would have an effect on the living conditions of the occupiers of the nearest dwellings at Marine Heights, including a strong likelihood of being audible in rooms used for living and sleeping, especially in warmer weather when windows would need to be open. The closing hour of 2300 that has been permitted means that such noise currently does not occur late into the night or into the early hours, when people are more likely to be in bed and as a result be more susceptible to disturbance. Therefore, even if noise levels generated by the operation of the business do indeed currently reach levels where they could be classed as significant, they do not occur at the most sensitive times when they have substantially more potential to cause harm to living conditions.
6. The proposed variation to Condition 3 would, in its totality, extend the permitted hours of opening by a considerable duration. It would include the allowing of the use of the premises until 0015 on weekdays and Sundays and 0115 on Fridays and Saturdays, with provision being made for further extensions on specified days such as bank holiday weekends, Christmas Eve and New Year's Eve. This would extend the noise environment associated with comings and goings to the premises and introduce it into much later hours than can presently occur.
7. No assessment of the impact that would arise from the proposed extension of opening hours that are sought has been provided. Therefore, no details are available with respect to the existing background noise levels or noise levels that result from the use of the premises. Consequently, there is no substantive evidence available to demonstrate the noise levels that might arise from a later use, the impact this would have on the nearest residential receptors, nor any proposals for mitigation measures that may be reasonably required to address harm to living conditions that could arise. It is noted in that respect that Policy SE06 of the Thanet Local Plan 2020 (LP) requires that development proposals that generate significant levels of noise must be accompanied by a scheme to mitigate such effects. Whilst the appellant questions why such information was not requested during the course of the planning application itself, the Council explained at the hearing that it was not required because they were content with the 2300 closing hour put forward by the appellant themselves.

8. The proposal also includes a request to bring forward the hour at which the premises can open to 0800 from 0900. Whilst noise generated at such a time may differ in character and intensity from that occurring from comings and goings towards the end of an evening out, it would still occur earlier in the morning than currently permitted. Given the size of the premises and the capacity this creates for a number of people to be moving to and from the site in close proximity to residential properties, this too has the potential to cause harm to living conditions. Again, there is no substantive evidence to demonstrate that this would not be the case.
9. As a whole, this means that there is nothing to dispel my concerns that noise generated from the comings and goings of a premises the size of the appeal property would be significant, and that if this was to occur during the extended times proposed there would be harm to the living conditions of the occupiers of nearby dwellings, namely the residents of Marine Heights whose properties front onto the appeal site. The condition is therefore reasonable and necessary in order to safeguard living conditions, and to ensure that the development accords with Policies QD03 and SE06 of the LP, where they seek to protect living conditions.

Conditions 4 & 7

10. In combination, these conditions prevent the use of the external courtyard outside of the hours of 0900 and 2100 on any given day and the playing of amplified music within it at any time. As it adjoins the main building of the premises, the courtyard is also located in close proximity to the residential properties at Marine Heights. Most of the windows and doors of those residential properties are elevated above the external courtyard, thus reducing any noise attenuation benefit of the ground level solid wall that runs along St Mildred's Gardens at the edge of the courtyard.
11. My site visit took place mid-afternoon on a mild and dry September day. Conversations taking place within the courtyard were clearly audible when stood on the pavement to St Mildred's Gardens immediately adjacent to Marine Heights. At that time there were approximately ten people sitting within the courtyard, but the area has the capacity for a significantly greater number than that, both standing and sitting. Whilst this represents only a snapshot in time, it demonstrates that there is clear potential for noise from those using the external area to spill towards the nearest dwellings. At times when there are a greater number of patrons within the courtyard, the levels of noise are also highly likely to be audible within the living and sleeping areas of these residences and to result in the generation of significant levels of noise and disturbance.
12. Consistent with my findings above, the impact of such noise would be lesser during hours when people would typically be awake than those times when they would be trying to sleep. The proposal is to align the hours that the courtyard can be used to those sought for opening under Condition 3. This would mean that noise from the courtyard could extend from the currently permitted time of 2100 until 0015 on an average weeknight and Sunday and until 0115 on an average Friday and Saturday, with later times around the specified holiday periods referred to previously. Again, there is no substantive assessment of the impacts that would arise, which would be a reasonable

expectation and starting point for a proposal in such close proximity to a sensitive receptor such as residential properties.

13. As with the permitted hours of opening, there is no substantive evidence to demonstrate that use of the courtyard from 0800 would not cause harm to the living conditions of nearby occupiers. There is, therefore, also nothing to dispel my concerns that the proposed variations to Condition 4 would cause harm to the living conditions of the occupiers of nearby dwellings.
14. Noise from the external speakers that have been erected was not readily audible during my site visit. However, this is dependent on the volume at which it is played, background noise levels and no additional speakers being added. There is no suggested control on these matters, nor any details as to what volume levels would be appropriate in light of the relationship to residential dwellings. In the absence of this, I too can only conclude that the permitting of the playing of amplified music has the potential to cause significant harm to the living conditions of the occupiers of nearby dwellings due to noise and disturbance.
15. The appellant referred at the hearing to the possibility that people can congregate on the seafront walkway later than 2100, and that they also could indulge in the drinking of alcohol whilst doing so, potentially even obtained from the appeal premises in accordance with its off-sales license. However, the possible presence of members of public on the seafront does not justify the harm that would be associated with the use of the external courtyard at the later hours proposed. The fact that some regulations with regard to outside drinking may have been relaxed during the Covid pandemic also does not justify a proposal which would cause harm, and which would be permanent in its presence.
16. For the above reasons and on the basis of the evidence that is before me, I conclude that the proposed variations to Conditions 4 & 7 would cause significant harm to the living conditions of the occupiers of nearby dwellings from noise and disturbance. The conditions are therefore reasonable and necessary to safeguard living conditions and to ensure that the development accords with Policies QD03 and SE06 of the LP, where they seek to protect living conditions.

Other Considerations

Economic benefits

17. Policy SP04 of the LP promotes economic growth in the district, which is an aim consistent with that of the Framework. There is however nothing substantive before me to demonstrate that the operation of the business with the restrictions imposed by the planning conditions means that it is not viable. Whilst operation to later hours would in turn create more employment hours and more economic activity in general, this does not justify the harm to living conditions that I have found. This consideration therefore carries only limited weight in support of the proposal.

Previous Use/Fallback

18. The appellant points to both the previous use of the premises, and to a fallback position which would involve a reversion to the unrestricted former use under class E(b) only. In respect of the fallback, it was advanced at the hearing that

the planning permission to which this appeal relates has not in fact been lawfully implemented and therefore the permission in place is that which preceded it. That is not an argument that had previously been put forward in written submissions but, regardless of that circumstance, it is not a matter for me to determine in the context of an appeal made under section 78 of the Town and Country Planning Act 1990. It is open to the appellant to apply to have the matter determined under sections 191 or 192 of the Act. It is not, as a result, certain that this fallback position exists but, even if it did, the previous permitted use did not include the sui-generis mixed use element that comprises the bar.

19. Whilst movement between use classes does not always represent a material change of use requiring planning permission, a use operating under class E(b) would primarily be food based and would be unlikely to attract the same volume of visitors at late night hours, in comparison to a mixed use that permits a bar and which may not have the same association with food. Therefore, people are less likely to arrive at and leave the venue in the later night/early hours of the morning in association with a cafe or restaurant type use when compared to the permitted mixed use. A cafe or restaurant would also not be likely to be seen as a late night 'destination' in the same way as a bar. Indeed, it is suggested anecdotally that previous operations under what is now class E(b) did not in fact involve late night opening, notwithstanding that a license under the Licensing Act 2003 had been granted to allow for this.
20. Although there is merit in the appellant's suggestion that noise levels generated by persons eating a meal would be no different to those occurring from people drinking without food, the key point is aligned to the likely hours that the two different uses would attract patrons and therefore when comings and goings would occur. It may also be that drinking without food could take place on an ancillary basis under class E(b) but that would be a matter of fact and degree and would not be likely to be possible to the same level permitted under the approved mixed use. I do not wish to question the appellant's intentions to operate a high end establishment that is food led, even under the new planning permission, but circumstances could change or the premises could come under new ownership. Whilst there would remain an element of E(b) use under the appeal permission, nonetheless for the reasons set out the previous use solely under E(b) would be materially different to the one that has been permitted by the planning permission subject to this appeal.
21. The fact that the previous use may have been able to operate before 0900 offers some support to a variation of hours in that limited respect. However, there is still a material difference between that use and the approved mixed use, and I cannot be sure based on the evidence provided that there would not be harm from the proposed opening time and use of the courtyard from 0800.
22. It would appear that there were no restrictions on the playing of amplified music on the previous use, however, I have found that an absence of such control could lead to harm to living conditions in this instance and there is nothing before me to suggest such music was actually played outside in the past. The absence of a previous restriction does not therefore justify the permitting of the variation of Condition 7 sought, when I have found that harm could arise from doing so.

23. The previous use and possible fallback would be materially different to the use which includes a mixed use bar element. The impact of an operation under those terms would not therefore have the same, or a worse, impact than what is before me. Therefore, I give only limited weight to the previous use/fallback.

Recent use

24. The appellant further advanced verbally at the hearing that a mixed café and bar use has been operated outside of the hours permitted by the planning permission subject to this appeal, for approximately 180 days over the summer that has just passed. However, the exact parameters have not been set out in terms of the full hours that the premises and courtyard were open and whether music was played and to what volume levels. Consequently, there is inadequate evidence available on which to establish on what basis that the business has operated, and the Council were not in a position to be able to reasonably respond on such at the hearing.
25. Furthermore, as referenced by the appellant during the course of the hearing, there have been recent complaints made to the Council regarding the operation of the appeal premises which are being investigated by the Environmental Health (EH) department. Information with respect to this is not before me as part of my determination of the appeal, so I have not been able to be informed as to the progress of the Council's investigations or whether these complaints are likely to have merit or not. Therefore, as evidence either way is incomplete and inconclusive at the current time, I cannot give the recent use weight either in support or against the proposal.

Licensing Act 2003

26. The premises has been granted a license under the Licensing Act 2003 to open for the full extent of the hours sought by this appeal. The license also places no restriction on the use of the courtyard during those times and permits the playing of recorded music beyond the hour of 2300, before which there is deregulation under that Act. The prevention of public nuisance is an objective of the Licensing Act and therefore this consideration formed part of the Council's assessments when deciding to grant the license on the terms it has. The Secretary of State's s.182 Guidance on the Licensing Act encourages discussion between the planning and licensing functions of a Council, but there is no obligation to do so. There was also no meaningful objection raised by the planning department following their formal consultation on the pending licensing applications. In this instance, the apparent lack of liaison has led to a situation whereas the Council has restricted the operation of the premises in two different ways.
27. However, in making my determination of this appeal I am not bound by the findings of the Council's Licensing Committee. Having exercised my own planning judgement based on what I observed during my site visit, the evidence that is available and all that I have read and heard, I have found harm for the reasons set out above and conflict with policies of the development plan. In addition, I cannot be certain what was put before the Licensing Committee, as it would appear from the papers I have been provided with that the decision was made with a great reliance on verbal representations at the meeting. There is no detailed report before me as to what exactly was considered or how the relevant representations and evidence were weighed against one another.

28. I cannot therefore be sure that the evidence on which the Licensing Committee made its decision is the same as what is before me. Indeed, it would seem from the minutes that have been provided that the Licensing Committee was able to give weight to the appellant's past record as a responsible licensee. That however is not a planning land use consideration and suggests that considerations under the different legislative regime of licensing may not be entirely the same as those on which I must make my decision. I acknowledge that Condition 7 in effect takes away deregulation rights with respect to the playing of recorded music. However, I have set out that there would be planning harm in not doing so, which justifies the prevention of what would normally be outside of licensing control.
29. It has also been put to me that I can, and indeed should, rely upon the potential that a review of the license could be instigated and undertaken. However, it is uncertain whether this would occur, and it is not clear or certain on what terms and at what thresholds it might take place. Such an approach therefore runs the risk that the planning harm that I have identified as being likely to occur would not be addressed. In the scenario that a review does not take place, the harm would prevail, as would the conflict with the development plan. Taking all of these considerations together, I give limited weight to the fact that the Council has granted a license under the Licensing Act 2003 on the same terms as the appellant makes this planning appeal.

Environmental Health position

30. The appellant contends that the Environmental Health department (EH) has approached the planning and licensing submissions in different, and inconsistent manners. However, EH did raise an objection to the second licensing application that removed the requirement to only serve alcohol with a meal. This is in essence consistent with my own findings that there would be a material difference in a mixed use including a bar as opposed to one that is for a restaurant or cafe use only. I therefore do not find anything unreasonable or inconsistent in the approach that EH have taken, and they were clear at the hearing that they maintain their objection to the proposed variation of the conditions that has been put forward. Whilst the appellant contends that EH were unable to demonstrate harm arising from the previous E(b) use, there is no evidence to confirm during which hours that use actually operated.
31. The matter of whether any noise and disturbance complaints can be addressed under EH legislation was also raised at the hearing. However, this possibility was not raised previously and there is again uncertainty as to what extent this could address any subsequent noise and disturbance matters if this appeal were to be allowed on the basis sought by the appellant. Therefore, it too cannot be certain that it would address the planning harm I have found and the conflict with the development plan policies. This consideration also carries limited weight.

Other Matter

32. The appellant suggests that Condition 4 as worded on the decision notice is not precise, as technically it prevents access and egress to and from the building after 2100. However, at the hearing they did not wish to provide any suggested alternative wording to address the concern that they raise and offered the view instead that Condition 4 could remain unaltered in the event that the appeal

was otherwise unsuccessful. Given that I do not have a suggested amended wording before me, I shall not seek to make any change to Condition 4.

Planning Balance and Conclusion

33. The proposed variations of Condition 3, 4 and 7 would be likely to give rise to significant noise and disturbance that would result in harm to the living conditions of the occupiers of nearby dwellings, for the reasons I have set out. There is no substantive evidence available to dispel these concerns or suggest mitigation measures. Whilst there is support in Policy SP04 of the LP for economic growth, on the basis of the information that is before me I give this consideration limited weight and it does not outweigh the conflict with those policies of the development plan that seek to protect living conditions. Therefore, the proposal fails to accord with the development plan taken as a whole.
34. I give limited weight to the previous use/fallback position, as that use is materially different in its impact to the use which is the subject of this appeal. Whilst a license has been granted under the Licensing Act 2003 on the terms requested by the appellant in this appeal, I am not bound to come to the same conclusion. Furthermore, I cannot be certain that action under the Licensing Act, or under Environmental Health Legislation, would take place or be effective to address the harm I have found and the consequent conflict with the development plan. These considerations also carry limited weight and individually and collectively do not outweigh the conflict with the development plan.
35. The proposed variations put forward by the appellant would therefore fail to accord with Policies QD03 and SE06 of the LP. The conditions are as a result required to ensure that the development accords with the development plan. I also find all three conditions to be reasonable and necessary. The appeal should therefore be dismissed.

Graham Wraight

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Sarah Clover – Barrister, Kings Chambers

Chris Weetman – Chartered Town Planner

Michael Kheng – Licensing Consultant

Matthew Gerlack – Planning Agent

Paul Glicksman – Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Anna Hemmings – Principal Planning Officer

Duncan Fitt – Planning Officer

Amanda Berry – Senior Environmental Health Practitioner

Katie Lane – Environmental Health Protection Officer

INTERESTED PARTIES:

John Collins – Local resident

Janet Collins – Local resident

John Richardson – Local resident