



Appeal Decision

Site visit made on 7 March 2023

by B Pattison BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 June 2023

Appeal Ref: APP/M2270/W/22/3293117

46a High Street, Tunbridge Wells TN1 1XF

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required by Schedule 2, Part 3, Class MA of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO).
 - The appeal is made by Mr Majid Djavadzadeh against the decision of Tunbridge Wells Borough Council.
 - The application Ref 21/03499/PNEC, dated 17 October 2021, was refused by notice dated 14 December 2021.
 - The development proposed is Notification of Prior Approval for change of use of the 2nd floor of the building from offices carrying out any operational or business functions (Class E(g)(ii)) to 1 no: 2 bedroom flat (Class C3) with no external alterations to building elevations.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mr Majid Djavadzadeh against the decision of Tunbridge Wells Borough Council. This application is the subject of a separate decision.

Preliminary Matters

3. Class MA of the GPDO permits a change of use of a building and any land within its curtilage from a use falling within Class E (commercial, business and service) to a use falling within Class C3 (dwellinghouses). The Council considers that the development complies with the requirements set out in Paragraph MA.1 of Class MA, and I see no reason to disagree.
4. Paragraph MA.2 sets out that development under Class MA is permitted subject to an application to the local planning authority for a determination as to whether prior approval is required in relation to the matters set out in paragraphs MA.2(2). This includes matter MA.2(2)(d) which relates to the impacts of noise from commercial premises on the intended occupiers of the development.
5. Part 3, Class W of the GPDO sets out the procedure for prior approval applications under Part 3. Paragraph W.10(b) requires the decision-maker to 'have regard to the National Planning Policy Framework so far as relevant to the subject of the prior approval, as if the application were a planning application'. Whilst I have had regard to the guidance within the National

Planning Policy Framework (2021) (the Framework), this is only where it is relevant to matters of noise.

Main Issue

6. The main issue is the impacts of noise from existing commercial premises on the intended future occupiers of the development.

Reasons

7. The appeal site lies within the town centre of Tunbridge Wells, located on the busy High Street. The High Street is a mixed-use area with retail units, restaurant and bars located at the ground floor level, and generally offices and residential units located on upper floors. The appeal site is a three-storey building with a basement which, both parties agree, has a longstanding use as a nightclub. The ground floor is in use as a restaurant. The appeal relates to the second floor of the building which has windows on both the front and rear facades.
8. The principle of residential uses co-existing with commercial uses in the town centre is not in question. However, it is common ground that in this case, the nightclub within the basement would be a source of noise that could affect the future occupiers of the proposed development. I am informed that the standard operations of the nightclub involve amplified and live music played up to 2am on weekdays and up to 3am on weekends.
9. The appellant submitted a Noise Assessment with the application. This indicates that a combination of acoustic insulation of the building, protocols on the entrance to the nightclub and a restriction on the sound levels of amplified music is necessary to ensure that a noise level reduction in the building to provide an acceptable noise environment for its intended occupiers.
10. The Noise Assessment highlights that unabated noise levels from the nightclub could reasonably be described as falling into the Lowest Observed Adverse Effect Level (LOAEL) in the Planning Practice Guidance (PPG) noise exposure hierarchy table. This is the level above which adverse effects on health and quality of life can be detected.
11. In order to achieve the required noise standards, the proposed residential use would require mitigation measures consisting of a "box within a box construction" involving a floating floor, wall lining and suspended ceiling details to form a light-weight structure to safeguard against noise break in from the nightclub use. Proposals for alternative means of ventilation to enable future occupiers of the flat to keep windows closed are also suggested.
12. The Noise Assessment also identifies the aim to achieve a "No Observed Effect Level", which is the level below which there is no detectable effect on health and quality of life due to noise. In order to achieve this, the Assessment suggests that an acoustic limiter should be implemented at the output stage of the club sound system to limit the low frequency output from the nightclub.
13. I acknowledge that it may be possible to impose conditions to secure the various noise mitigation measures proposed within the proposed flat, provided that these do not amount to operational development. Even so, the Noise Assessment confirms that additional practical measures at the nightclub would also be required to achieve satisfactory noise levels for future residential

occupiers. As well as the acoustic limiter control on the level of the amplified music, a managed entry and exit protocol to the smoking area would be needed. Although it is suggested that the whole of the building in which the flat is proposed is owned by the appellant, the evidence is that the nightclub is leased. Therefore, I cannot be satisfied that it would be possible to impose a condition restricting the operation of the nightclub without control of the business.

14. Overall, I conclude that the impacts of noise from existing commercial premises on the intended occupiers of the development would be harmful and cannot be appropriately mitigated even having regard to the suggested conditions set out in the acoustic report. Whilst not determinative, I have had regard to paragraph 130 f) of the Framework which requires developments to ensure a high standard of amenity for existing and future users. Similarly, I have had regard to paragraph 185 which requires that decisions should also ensure that new development is appropriate for its location taking into account the likely effects of pollution on health, living conditions, and avoid noise giving rise to significant adverse impacts on health and the quality of life.
15. Whilst the site is within an area where there are a number of other bars and restaurants, there is little substantive evidence that noise from people passing the site on the street would be linked to specific commercial uses and in any case it appears to me that the box within the box construction proposed and associated mechanical ventilation would mitigate any noise concerns in this respect. I therefore do not find that this particular element would fail to comply with Schedule 2, Part 3, Class MA paragraph MA.2(2)(d) of the GPDO.
16. The appellant has referred to a separate decision (14/500467/FULL) relating to residential units within other parts of the same building. Details of this case are not before me, and in any event, the current appeal relates to an application for Prior Approval which must be assess only the matters identified within the GPDO.
17. Whilst there may be existing residential flats directly above the nightclub closer than the appeal site, I conclude that the impacts of noise from existing commercial premises on the intended occupiers of the development would be harmful. Accordingly, the proposal would fail to satisfy provision MA.2(2)(d) of Schedule 2, Part 3, Class MA of the GPDO.

Other Matters

18. The concerns expressed regarding the Council's conduct during the processing of the application fall outside of the remit of this Decision and are the subject of a separate Costs Decision.
19. The proposal would provide a windfall residential unit. It has also been put to me that the proposal would provide an opportunity to improve the noise environment for other nearby residential properties. However, these are not prior approval matters concerning Class MA.

Conclusion

20. For the reasons given above I conclude that the appeal should be dismissed.

B Pattison

INSPECTOR