

**Application No:** Y19/0814/FH

**Location of Site:** 7 The Old High Street, Folkestone, Kent

**Development:** Section 73 application to vary condition 3 of planning permission Y16/1125/SH (Change of use from retail to mixed use of retail, drinking establishment and exhibition space) to vary the opening times in line with the premises licence opening hours.

**Applicant:** Mr Andrew Shorten

**Officer Contact:** Louise Daniels

## SUMMARY

This report considers whether planning permission should be granted for a variation to the previously approved scheme which was for the change of use from retail to a mixed use of retail, a drinking establishment and an exhibition space. This previously approved scheme was granted subject to restricted opening hours and this report considers whether the proposed alterations to the opening hours are acceptable. The report recommends that planning permission be granted for a temporary three year period as it is considered that this would safeguard the amenities of existing and future occupants allowing the extended operational hours to be tested and by restricting the playing of live and recorded music.

## RECOMMENDATION:

**That planning permission be granted subject to the conditions set out at the end of the report and that delegated authority be given to the Chief Planning Officer to agree and finalise the wording of the conditions and add any other conditions that he considers necessary.**

## 1. INTRODUCTION

1.1 The application is reported to Committee as per the Council's Scheme of Delegation due to Folkestone Town Council objecting to the application and as the recommendation is for approval.

## 2. SITE AND SURROUNDINGS

2.1 The application site is located within the settlement boundary of Folkestone, the Folkestone Leas & Bayle Conservation Area and an area of archaeological potential. The application site is identified as secondary shop frontage as defined on the Proposals Map of the Shepway District Local Plan Review. The application relates to an existing ground floor retail unit with shop frontage on The Old High Street with access for the residential flat above (No.7A) from Payers Park to the rear of the property.

2.2 A site location plan is attached to this report as **Appendix 1**.

## 3. PROPOSAL

- 3.1 Planning permission is sought for the variation of condition 3 of planning permission Y16/1125/SH, which previously approved the change of use of the ground floor (excluding the rear outside space) from a retail use to a mixed use of retail and drinking establishment together with an exhibition space.
- 3.2 Condition 3 of that permission restricted the opening times to be within:
- 08:00 - 23:30, Monday - Thursday,
  - 08:00 - 00:00, Friday - Saturday
  - 08:00 - 23:30, Sundays/Bank Holidays.
- 3.3 This application seeks to alter these opening times to the following:
- 12:00 - 23:30, Monday -Thursday
  - 12:00 - 02:30, Friday - Saturday and Bank Holidays/ 31<sup>st</sup> October, Christmas Eve, New Year's Eve
  - 12:00 - 23:00, Sundays
- 3.4 These proposed opening times would be in accordance with the opening hours granted in May 2019 by the Members at the Council's Licencing hearing.
- 3.5 As this application is a variation of Y16/1125/SH, the proposed hours only refer to the internal ground floor of the building and not the rear outside space, which was excluded from the application site in the previous application.

## 4. RELEVANT PLANNING HISTORY

- 4.1 The relevant planning history for the site is as follows:
- 4.2 The following two approvals (Y17/0403/SH and Y16/1125/SH) only referred to the building rather than the rear outside area.
- 4.3 Y16/1125/SH - Change of use from retail (A1) to mixed use of retail (A1), drinking establishment (A4) and exhibition space (D1). Approved with conditions.
- 4.4 Y17/0403/SH - Section 73 application for the variation of conditions 3 and 4 and removal of condition 5 of planning permission Y16/1125/SH (Change of use from retail (A1) to mixed use of retail (A1), drinking establishment (A4) and exhibition space (D1)) to enable live/amplified music to be played on three days per week, subject to controls of noise levels and timings. Approved with conditions.
- 4.5 Planning permission Y18/0168/SH related to the building and the rear outside area and was approved with conditions. The application granted retrospective permission for the erection of a single storey outbuilding for use as a bar and seating area, together with change of use of rear yard to an ancillary use in association with the retail (A1), drinking establishment (A4) and exhibition space (D1) mixed use of the main building.

## 5. CONSULTATION RESPONSES

- 5.1 The consultation responses are summarised below.

## Consultees

**Folkestone Town Council:** Object unless closing time is midnight or earlier.

**Environmental Health:** No objection to the opening times of the internal area, issues relating to noise will be addressed through licensing conditions.

## Local Residents Comments

5.2 4 neighbours directly consulted. 5 letters of objection received.

5.3 The key issues are summarised below:

### Objections

- The rear extension and rear yard are the most significant source of noise and light disturbance. Kipps Ale House has a restriction on the rear yard after 8pm.
- Space rear extension and yard is substantially larger than Kipps and can hold more people. There is no sound proofing to the rear extension.
- No objection to varying the opening times of the main building but should have the same restriction on the outside area as Kipps.
- Residents of Kathleen Mews have already been subject to excessive noise and light from this bar. The current opening times are not adhered to.
- Application is attempting to achieve permission for something that should be the subject of a separate application that is the licensing of the outdoor bar space area.

5.4 Responses are available in full on the planning file on the Council's website:

<https://searchplanapps.folkestone-hythe.gov.uk/online-applications/>

## **6. RELEVANT PLANNING POLICY**

6.1 The Development Plan comprises the saved policies of the Shepway District Local Plan Review (2006) and the Shepway Core Strategy Local Plan (2013)

6.2 The new Places and Policies Local Plan Submission Draft (February 2018) has been the subject of public examination, and as such its policies should now be afforded significant weight, according to the criteria in NPPF paragraph 48.

6.3 The Folkestone & Hythe District Council Core Strategy Review Submission Draft (2019) was published under Regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations (2012) for public consultation between January and March 2019, as such its policies should be afforded weight where there are not significant unresolved objections.

6.4 The relevant development plan policies are as follows:-

Shepway District Local Plan Review (2006)

SD1 - Sustainable development

S4 - Folkestone Town Centre – Secondary shopping area as defined on the Proposal Map.

Shepway Local Plan Core Strategy (2013)

DSD - Delivering sustainable development

SS1 - District spatial strategy

SS4 - Priority centres of activity strategy

CSD6 – Central Folkestone

Places and Policies Local Plan Submission Draft (2019)

HB1 - Quality places through design

RL2 - Folkestone main town centre

Core Strategy Review Submission draft (2019)

SS1 - District spatial strategy

SS4 - Priority centres of activity strategy

CSD6 – Central Folkestone

National Planning Policy Framework (NPPF) 2019

6.5 Members should note that the determination must be made in accordance with the Development Plan unless material considerations indicate otherwise. A significant material consideration is the National Planning Policy Framework (NPPF). The NPPF says that less weight should be given to the policies above if they are in conflict with the NPPF. The following sections of the NPPF are relevant to this application:-

Paragraph 11 - Presumption in favour of sustainable development.

Paragraph 47 - Applications for planning permission be determined in accordance with the development plan.

## 7. APPRAISAL

7.1 In light of the above the main issues for consideration are:

- a) Licencing and planning differences
- b) Principle of development
- c) Previous planning permission
- d) Residential amenity

**a) Licencing and planning differences:**

# DCL/19/31

7.2 As mentioned previously, the proposed opening hours have already been granted, in May 2019, by the Council's Licencing team following a Hearing. However, it is important to note that the planning system and licensing operate under separate legislative frameworks; they are two separate systems with their own rules, criteria, policies and guidance. The key differences being:

- a. Planning will consider the use in light of local and national policies and the effects of the development on amenity (amongst various other considerations); and
- b. Licensing must carry out its functions with a view to promoting the four licensing objectives. These are: the prevention of crime and disorder; public safety; the prevention of public nuisance; and the protection of children from harm.

7.3 Because of these differences, the two regimes do not always come to the same conclusions. Even where permissions are granted by both the planning and licensing authorities, those permissions might not necessarily be the same; allowing different operating hours or other restrictions/conditions. In such circumstances the more restrictive set of permissions would prevail.

## **b) Principle of development**

7.4 The application is a variation of the previously approved application (Y16/1125/SH). The change of use has already been approved and implemented. As such, this application is only considering the change of opening hours and whether or not that is acceptable.

## **c) Previous planning permission**

7.5 A more recent planning application than the Y16/1125/SH, the Y17/0403/SH permission granted later opening hours for the following dates:

- 24<sup>th</sup> December - hours extended to 01:00am
- 31<sup>st</sup> December - hours extended to 02:00am
- 14<sup>th</sup> February - hours extended to 01:00am
- 1<sup>st</sup> April - hours extended to 02:00am
- Easter bank holidays - hours extended to 01:00am
- May bank holidays - hours extended to 02:00am
- August bank holiday - hours extended to 02:00am
- 31<sup>st</sup> October - hours extended to 02:00am
- 5<sup>th</sup> November - hours extended to 02:00am

7.6 The Y17/0403/SH permission granted 6 nights of the year to open until 2am and 3 nights of the year to open until 1am. However, condition 4 of this permission required noise levels to be agreed with an Environmental Health Officer prior to first use of the equipment and to date, this has not yet taken place, so the planning permission for these extended hours, has not been commenced and the time frame granted to allow for this was prior to 6th December 2019, which has now passed. Therefore the permission granted under Y17/0403/SH has ceased and the longer hours on these specific days no longer apply.

Condition 4 of Y17/0403/SH stated:

*A digital noise limiter shall be in operation during opening hours for all live and recorded music events, with the noise levels to be agreed and set with the Local Planning Authority in conjunction with the Environmental Health Officer prior to the first operation of the equipment and maintained at the set levels thereafter. Live music shall not continue after 22:30, recorded music shall end 30 minutes before the premises closes, and incidental music shall be kept to a level which permits normal conversation to be heard within the main building.*

*The use of the outdoor space/yard to the rear of the main building shall be subject to the controls above, however live and recorded music in this area of the site shall be limited to end at 18:00. Across the whole site, the number of events including live or amplified music shall be limited to a maximum of three events per week. The controls and mitigation measures shall be installed in full prior to the first use, in accordance with the RSBLU Updated Acoustic Report, received on the 15.09.17.*

*Reason:*

*In the interests of amenity of the locality in accordance with saved policy SD1 of the Shepway District Local Plan Review.*

#### **d) Residential amenity**

- 7.7 The opening hours proposed under this current application would extend the night time opening hours on Fridays and Saturdays from the hours approved under Y16/1125/SH.
- 7.8 As with previous applications for this site, and as evidenced from the representations received, the proposal is of concern to the residential occupiers of Kathleen Mews (nos. 1-4) which are located to the north-west of the site. There are other nearby residential properties including to the flats units above the application site (accessed from Payers Park) and those which front onto The Old High Street.
- 7.9 Saved policy SD1 of the Shepway District Local Plan Review states that all development proposals should safeguard and enhance the amenity of residents and HB1 of the Places and Policies Local Plan states that planning permission will be granted where proposals do not lead to an adverse impact on the amenity of neighbours. Paragraph 127 of the NPPF sets out that decisions should seek to secure a high standard of amenity for existing and future users.
- 7.10 The change of opening hours proposed would open the bar later in the day, currently the opening hours are from 8:00am onwards everyday whereas this application proposes a later opening of 12:00 midday every day. In addition, the opening hours for Sundays would be reduced from a current closing time of 11:30pm to 11:00pm instead. In terms of these changes proposed to the opening hours, they would have a slightly positive impact upon neighbouring occupiers with no early morning use proposed and an earlier Sunday closing time (with the exception of 31<sup>st</sup> October, Christmas Eve or New Year's Eve should they fall on a Sunday).
- 7.11 Fridays and Saturdays are proposed to be open longer than is currently allowed, with the current closing time being 12:00 midnight with this application proposing to lengthen the closing time to 02:30am, as well as for 31st October, Christmas Eve or New Year's Eve (should they fall on different days to Fridays and Saturdays).

# DCL/19/31

- 7.12 Consultation with the Council's Environmental Health Officer resulted in no objection being raised to the proposed opening times in terms of likely noise nuisance as the licensing regime has strong powers to review licenses should an ongoing noise nuisance occur and the Environmental Health team have the ability to request the license be reviewed.
- 7.13 As stated previously, the proposed opening times would only be for the internal use of the building and would not apply to the rear outside area restricting the impact of any additional noise concerns. However, considering the location of the application site in relation to neighbouring residential properties, it is considered reasonable to grant a temporary permission of 3 years to allow for monitoring of the use and any impact to neighbouring properties to be fully assessed and understood. Granting a temporary permission, would allow for the opening times to be re-considered in 3 years time and for any noise complaints logged with Environmental Health during that time, to form part of any re-assessment. It is considered that this would avoid the situation whereby later opening times have been granted, but with no means of revoking this permission at a later date should the extended opening times prove to result in an unacceptably detrimental impact upon neighbouring amenity.
- 7.14 It is considered that a restriction on live music during these extended opening times, as was applied to the Y17/0403/SH, would also be reasonable given the adjacent residential uses. As such, a condition is proposed to restrict live music from continuing after 10:30pm, and recorded music to end 30 minutes before the premises closes.
- 7.15 It is also considered reasonable that a digital noise limiter shall be in operation during opening hours for all live and recorded music events, and that the noise levels shall be agreed with the Council's Environmental Health Officers within 1 month from the date of the planning permission being granted and that the digital noise limiter shall be maintained at the set levels as agreed thereafter.
- 7.16 It is therefore considered, that with these measures in place that the amenity of neighbouring occupiers would be safeguarded in accordance with policies SD1 of the Local Plan and HB1 of the Places and Policies Local Plan and paragraph 127 of the NPPF in terms of noise implications

## **Environmental Impact Assessment**

- 7.17 In accordance with the EIA Regulations 2017, this development has been considered in light of Schedules 1& 2 of the Regulations and it is not considered to fall within either category and as such does not require screening for likely significant environmental effects.

## **Local Finance Considerations**

- 7.18 Section 70(2) of the Town and Country Planning Act 1990 (as amended) provides that a local planning authority must have regard to a local finance consideration as far as it is material. Section 70(4) of the Act defines a local finance consideration as a grant or other financial assistance that has been, that will, or that could be provided to a relevant authority by a Minister of the Crown (such as New Homes Bonus payments), or sums that a relevant authority has received, or will or could receive, in payment of the Community Infrastructure Levy. There is no CIL requirement for this development.

## Human Rights

7.19 In reaching a decision on a planning application the European Convention on Human Rights must be considered. The Convention Rights that are relevant are Article 8 and Article 1 of the first protocol. The proposed course of action is in accordance with domestic law. As the rights in these two articles are qualified, the Council needs to balance the rights of the individual against the interests of society and must be satisfied that any interference with an individual's rights is no more than necessary. Having regard to the previous paragraphs of this report, it is not considered that there is any infringement of the relevant Convention rights.

## Public Sector Equality Duty

7.20 In determining this application, regard has been had to the Public Sector Equality Duty (PSED) as set down in section 149 of the Equality Act 2010, in particular with regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it. It is considered that the application proposals would not undermine objectives of the Duty.

It is considered that the application proposals would not conflict with objectives of the Duty.

## Working with the Applicant

7.21 In accordance with paragraphs 38 of the NPPF, Folkestone and Hythe District Council (F&HDC) takes a positive and creative approach to development proposals focused on solutions. F&HDC works with applicants/agents in a positive and creative manner.

## 8. CONCLUSION

8.1 It is considered that a temporary permission of 3 years together with conditions restricting the playing of live and recorded music for inside the application building only, that the amenity of neighbouring occupiers would be safeguarded in accordance with policies SD1 of the Local Plan and HB1 of the Places and Policies Local Plan and paragraph 127 of the NPPF in terms of noise implications.

## 9. BACKGROUND DOCUMENTS

9.1 The consultation responses set out at Section 5.0 are background documents for the purposes of the Local Government Act 1972 (as amended).

## 10. RECOMMENDATIONS

**That planning permission be granted subject to the following conditions and that delegated authority be given to the Chief Planning Officer to agree and finalise**



# DCL/19/31

**the wording of the conditions and add any other conditions that he considers necessary.**

## Conditions:

1. Three year temporary permission
2. Submitted plans
3. Opening times
4. Live and recorded music restriction times
5. Digital noise limiter
6. Restrict use to A1/A4/D1

## Informatives:

1. The planning permission (extended opening hours) would only apply to the internal ground floor and not to the outside rear area.

Appendix 1 – Site Location Plan

