

PLANNING COMMITTEE – 7 APRIL 2022**PART 3**

Report of the Head of Planning

PART 3Applications for which **REFUSAL** is recommended

3.1 REFERENCE NO - 21/505806/FULL		
APPLICATION PROPOSAL Section 73 - Application for Variation of condition 6 (to allow change of opening hours from 11:00 hours - 21:00 hours to 11:00 hours - 23:00 hours) pursuant to SW/05/1274 for - Extension to existing shop and formation of take away (class A5).		
ADDRESS 114 Lower Road Faversham Kent		
RECOMMENDATION Refuse		
REASON FOR REFERRAL TO COMMITTEE Town Council support.		
WARD Watling	PARISH/TOWN COUNCIL Faversham Town	APPLICANT Mr Ravinder Singh Bain AGENT Go To Professional Services
DECISION DUE DATE 24/12/21	PUBLICITY EXPIRY DATE 25/11/21	

Planning History

SW/05/1274

Extension to existing shop and formation of take away (class A5) within
Approved Decision Date: 06.01.2006

SW/04/1359

Extensions to existing retail/residential premises to form two new flats over and erection of one self contained bungalow.

Approved Decision Date: 06.12.2004

SW/83/1221

Change of use to hot food to take away (fish and chips) – temporary permission until February 1986

Approved Decision Date: 24.02.1984

SW/83/0996

Change of use to launderette

Approved Decision Date: 14.11.1983

SW/83/0935

Change of use to hot food take away (fish and chips)

Refused Decision Date: 21.10.1983

1. DESCRIPTION OF SITE

- 1.1 114 Lower Road is currently used as a fish and chip shop and is situated alongside a convenience store. There is residential accommodation above both retail units. The site lies outside the town centre, on Lower Road within a predominately residential area. A parking bay and bus stop are located immediately in front of the retail units, and there are no parking restrictions in the surrounding area.
- 1.2 The property was previously occupied as one retail unit but planning permission was approved in 2006 under planning reference SW/05/1274 to change the use of part of the shop (use class A1) to a takeaway (use class A5) together with an extension to the shop and internal alterations.
- 1.3 Condition 6 (opening hours) of planning permission SW/05/1274 states:

No use of the premises for sale of hot food shall take place other than within the hours of 1100 hours to 2100 hours on any day of the week.

Grounds: In the interests of the amenities of the area, in pursuance of policy G1 of the Swale Borough Local Plan.

2. PROPOSAL

- 2.1 The current application is made under section 73 is to vary the current permitted opening hours to allow the premises to remain open seven days a week from 11am to 11pm.
- 2.2 The application form states later opening hours are being proposed for the following reason:

“We wish the condition to be changed to extend the hours of operation due to the nature of the demand at around closing time of the takeaway causing a build-up of customers on the busier days i.e., weekends and Fridays including orders alternative orders such as over the phone. The premises does not want to be forced to close later than the time permitted.

We wish the hours of operation to be amended from 1100 hours – 2100 hours to 1100 hours – 2300 hours. An increase of 2 hours to 11pm for operation.”

- 2.3 Since submission, a Noise Impact Assessment Report (NIA) for the current kitchen extraction system has been carried out. This report recommends installing silencers and an extraction fan jacket to the current extraction system in order to meet the Council’s noise requirements.

3. PLANNING CONSTRAINTS

- 3.1 None

4. POLICY AND CONSIDERATIONS

- 4.1 Development Plan: Bearing Fruits 2031: The Swale Borough Local Plan 2017:
Policy CP1 Building a strong, competitive economy

Policy DM1 Maintaining and enhancing the vitality and viability of town centres and other areas

Policy DM2 Proposals for main town centre uses

Policy DM14 General development criteria

4.2 The National Planning Policy Guidance (NPPG) contains the following advice on noise:

Can noise override other planning concerns?

It can, where justified, although it is important to look at noise in the context of the wider characteristics of a development proposal, its likely users and its surroundings, as these can have an important effect on whether noise is likely to pose a concern.

What are the observed effect levels?

Significant observed adverse effect level: This is the level of noise exposure above which significant adverse effects on health and quality of life occur.

Lowest observed adverse effect level: this is the level of noise exposure above which adverse effects on health and quality of life can be detected.

No observed effect level: this is the level of noise exposure below which no effect at all on health or quality of life can be detected.

How can it be established whether noise is likely to be a concern?

At the lowest extreme, when noise is not perceived to be present, there is by definition no effect. As the noise exposure increases, it will cross the ‘no observed effect’ level. However, the noise has no adverse effect so long as the exposure does not cause any change in behaviour, attitude or other physiological responses of those affected by it. The noise may slightly affect the acoustic character of an area but not to the extent there is a change in quality of life. If the noise exposure is at this level no specific measures are required to manage the acoustic environment.

As the exposure increases further, it crosses the ‘lowest observed adverse effect’ level boundary above which the noise starts to cause small changes in behaviour and attitude, for example, having to turn up the volume on the television or needing to speak more loudly to be heard. The noise therefore starts to have an adverse effect and consideration needs to be given to mitigating and minimising those effects (taking account of the economic and social benefits being derived from the activity causing the noise).

Increasing noise exposure will at some point cause the ‘significant observed adverse effect’ level boundary to be crossed. Above this level the noise causes a material change in behaviour such as keeping windows closed for most of the time or avoiding certain activities during periods when the noise is present. If the exposure is predicted to be above this level the planning process should be used to avoid this effect occurring, for example through the choice of sites at the plan-making stage, or by use of appropriate mitigation such as by altering the design and layout. While such decisions must be made taking account of the economic and social benefit of the activity causing or affected by the noise, it is undesirable for such exposure to be caused.

At the highest extreme, noise exposure would cause extensive and sustained adverse changes in behaviour and / or health without an ability to mitigate the effect of the noise. The impacts on health and quality of life are such that regardless of the benefits of the activity causing the noise, this situation should be avoided.

5. LOCAL REPRESENTATIONS

- 5.1 One representation has been received raising concerns that allowing later opening hours could result in anti-social behaviour.

6. CONSULTATIONS

- 6.1 Faversham Town Council supports the application for the following reason:

1) *Members agreed to support the local business.*

- 6.2 The Council's Environmental Health Manager (EHM) requested a Noise Impact Assessment (NIA), but the agent questioned whether this was necessary given that only deliveries will be taking place after 9pm. The EHM responded to say the cooking process may still give rise to noise primarily from the extraction system but also from noise from within the kitchen or service areas. Therefore, a NIA would need to be submitted.

- 6.3 Following submission of the NIA, the EHM responded as follows:

"I have read the Noise Impact Assessment submitted which addresses the potential adverse impact of the kitchen extraction system on occupants of the residential flat above the shop. However, the very likely additional noise resulting from vehicles operating the delivery service late into the evening together with individuals congregating at the front of the premises, will undoubtedly have an adverse impact on what is predominantly a residential area. I must therefore raise objection to the additional 2 hours on 7 days a week for this reason."

Notwithstanding this, I realize that there may be a genuine business need for the extended hours.

Whilst it is important to protect the existing residential amenity, I think there is generally a higher tolerance for a later opening hour on a Friday and Saturday and this department would be amenable to an extended closing time of 10pm on these two days of the week only.

- 6.4 The agent was given the opportunity to seek an extension to the opening times until 10pm on Fridays and Saturdays only but they responded to say their request for an additional 14 hours a week would be reduced to just two. They also explained the applicant is willing to use electric mopeds to aid the reduction of noise, and requested the hours are extended on Monday to Wednesday until 9.30pm and Thursday to Sunday until 10.30pm.

- 6.5 The EHM responded to say that a complaint has now been received regarding noise and odour from the fish and chip shop and suggested the latest time it could be open is 9.30pm Sunday to Thursday, and 10.30pm Friday and Saturday. However, the applicants would be expected to implement the noise mitigation measures recommended in the NIA and an odour

assessment be carried out. In addition to this, a temporary permission would be appropriate, in order to assess the impact in three years' time.

7. BACKGROUND PAPERS AND PLANS

7.1 Application papers relating to 21/505806/FULL.

8. APPRAISAL

- 8.1 The principle of development has been established through the grant of planning permission SW/05/1274. What falls to be considered here is the proposed amendment to the opening hours of the takeaway shop.
- 8.2 There is a convenience store adjacent to the takeaway shop, but above are flats and the surrounding area is predominately residential in character. Policy DM14 of the adopted Local Plan seeks development that would not cause any significant harm to residential amenity. It is generally recognised that hot food takeaway shops can cause noise and disturbance to nearby residents, particularly in the evenings. Therefore, condition (6) of SW/05/1274 restricts an evening closing time of 9pm for the sale of hot food takeaway to prevent noise and disturbance to nearby residents. This is consistent with the Council's general longstanding approach to such uses in predominantly residential areas.
- 8.3 The applicant argues there is a demand for orders after 9pm and initially requested to open two hours later every day of the week.
- 8.4 I consulted the Environmental Health Manager who suggested extending the opening hours until 10pm only on Fridays and Saturdays provided the current extraction system was upgraded. However, the agent requested consideration be given to slightly later opening times during the week and at the weekend. I have carefully considered the agent's request, as well as the advice of the EHM but I remain of the view that allowing later closing times would give rise to significant harm to the living conditions of nearby residents.
- 8.5 I believe that an evening closing time of 9pm every day represents a reasonable compromise between the operational needs of the business and the need to protect residential amenities in what is essentially a residential area. I agree with the concerns raised by a local resident that extending the opening hours could result in noise and disturbance during less social hours.
- 8.6 I am guided in this conclusion by an appeal decision (APP/V2255/A/95/250712/P2) to reuse to extend opening hours (originally approved on appeal) beyond 9pm at 85B North Street, Milton Regis, Sittingbourne. This relates to a hot food take-away in a similar predominantly suburban residential area, which I consider to be a close parallel to the current application situation, and indicative of support for the Council's long term concern to limit the opening hours of such premises to protect the amenities of residential areas. The Inspector dismissed the appeal, concluding that:

Noise and disturbance tend to be more obtrusive as the evening progresses, when ambient noise levels become lower. At the time of my visit, North Street was busy, but I would expect the volume of traffic to fall later in the evening, with general activity and ambient noise levels also reducing. I note that the adjoining fish and chip shop apparently closes at 2100 hours Mondays to Saturdays, and is closed on Sundays. The

conversations of customers as they arrive and leave, the banging of car doors, vehicles slowing, turning and accelerating with the associated engine noise, would combine to be unacceptably intrusive to nearby residents during quieter and less social hours.

- 8.7 A second appeal relating to the same matter at the same premises was also dismissed in 2001 (APP/V2255/A/00/1054536). The Inspector concluded that:

In this case, it seems to me that the comings and goings of customers and their conversations, the slamming of car doors and reviving of car engines as they manoeuvre to park would all create additional disturbance to neighbours at a time of day when they might expect peace and quiet. I therefore concur with the views of the previous Inspectors that later opening would cause noise nuisance to nearby residents because of customers using the premises during these unsocial hours. I consider that the proposal to extend the opening hours would be contrary to criterion 5 of policy G1 of the Local Plan.

This leads to me the conclusion that the extended opening hours would materially harm the living conditions of nearby occupiers, with particular reference to noise and general disturbance.

- 8.8 I acknowledge that the EHM is amenable to extending the opening times on a temporary basis for three years if the extraction system is upgraded. However, this assumes that the applicant would be prepared to invest in upgrading the system for just two additional hours of trade per week, but I do not consider that the longer hours requested are acceptable, and I do not consider that the addition of new equipment will, in any case, have any effect upon noise arising from customers and deliveries which create most of the late night nuisance from such premises. As such, I see refusal of this application as consistent with the Council's careful and consistent approach to this issue.

9. CONCLUSION

- 9.1 The premises is located within a residential area. I believe that allowing later opening hours would seriously harm the living conditions of nearby residents, with particular reference to noise and general disturbance. I therefore recommend that this application to vary condition 6 (opening hours) of SW/05/1274 is refused.

10. RECOMMENDATION - REFUSE for the following reason:

- (1) The proposed extension of opening hours would detract from the amenity of residents living in the area, by virtue of noise, traffic, parking, and disturbance late at night, contrary to Policy DM14 of Bearing Fruits 2031: The Swale Borough Local Plan 2017.

The Council's approach to the application

In accordance with paragraph 38 of the National Planning Policy Framework (NPPF), July 2021 the Council takes a positive and proactive approach to development proposals focused on solutions. We work with applicants/agents in a positive and creative way by offering a pre-application advice service, where possible, suggesting solutions to secure a successful outcome and as appropriate, updating applicants / agents of any issues that may arise in the processing of their application.

The application was considered by the Planning Committee where the applicant/agent had the opportunity to speak to the Committee and promote the application.

NB For full details of all papers submitted with this application please refer to the relevant Public Access pages on the council's website.

The conditions set out in the report may be subject to such reasonable change as is necessary to ensure accuracy and enforceability.

