

REPORT SUMMARY

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| REFERENCE NUMBER: 24/502003/FULL | | |
| APPLICATION PROPOSAL: Section 73 Application for Minor Material Amendment to approved plans condition 2 and 6 (to allow for the removal of stairs, existing front doors to be retained and layout amendment) (part retrospective), pursuant to 23/502781/FULL for Change of Use from ground floor Sui Generis (Public House) to Class E restaurant part retail facilities with ancillary Sui Generis use (Takeaway). | | |
| ADDRESS: The George Benover Road Yalding Maidstone Kent ME18 6EJ | | |
| RECOMMENDATION: In the absence of the appeal against non-determination the officer recommendation would have been GRANT PLANNING PERMISSION subject to conditions. | | |
| SUMMARY OF REASONS FOR RECOMMENDATION: <ul style="list-style-type: none"> • The scale of the proposed changes would not be harmful to local character. • The harm caused by removal of the internal modern staircase (no need for planning permission) is outweighed by benefits. • No harm to neighbour amenity. • No highways or parking issues that would justify refusal of planning permission. • In accordance with policies LPRSP11 (c) Town, district, and local centres and LPRCD1 Shops, facilities, and services. | | |
| REASON FOR REFERRAL TO COMMITTEE: Call in from Yalding Parish Council and Cllr Claudine Russell. | | |
| WARD: Marden And Yalding | PARISH COUNCIL: Yalding | APPLICANT: Mr Dan Mahendran AGENT: Rory Newell Chartered Architect |
| CASE OFFICER: Francis Amekor | VALIDATION DATE: 15/05/24 | DECISION DUE DATE: 30/11/24 |
| ADVERTISED AS A DEPARTURE: No | | |

Relevant planning history

- 23/501342/FULL Change of Use from ground floor Sui Generis (Public House) to Class E restaurant part retail facilities with ancillary Sui Generis use (Takeaway). approved 26.05.2023.
- 23/502781/FULL Change of use of ground floor from public house (Sui Generis) to Class E restaurant part retail facilities with ancillary takeaway use (Sue Generis) Approved 09.08.2023. (NB: Yalding Parish Council comments on this application were "Councillors feel that a change of use to class E for eating and drinking on the premises and the sale of local produce and the Sui Generis use as a takeaway continues to support its retention as a valuable community asset").
- Condition 2 attached to 23/502781/FULL states "The development hereby permitted shall be carried out in accordance with..." the approved plans that include drawing "200 Proposed Ground Floor Plans". Reason: To clarify which plans have been approved.

- Condition 6 attached to 23/502781/FULL states “The area of floorspace to be used for restaurant and retail use shall be as set out on approved drawing 200 (proposed plans). Reason: Unrestricted use of the building or land could cause demonstrable harm to the character, appearance and functioning of the surrounding area and/or the enjoyment of their properties by adjoining residential occupiers.
- The following two separate planning applications have been submitted for the application site, with decisions currently pending on these applications:
 - 24/503344/FULL Change of use of the existing residential accommodation on the upper floors of the building to a 7-bedroom HMO (Sui Generis) for 10 occupants.
 - 24/504670/FULL Installation of Inpost Locker to south side elevation (retrospective).

Appeal history:

- Following the deferral of this application 24/502003/FULL at the September planning committee meeting the applicant has submitted a non-determination appeal to the Planning Inspectorate. This appeal is currently in progress.

Application building frontage



1. BACKGROUND

- 1.01 This application was reported to Planning Committee on 26 September 2024 (adjourned meeting from the 19 September 2024 committee). The Committee deferred a decision on the application.
- 1.02 Following the committee deferral, the applicant has submitted a non-determination appeal to the Planning Inspectorate in Bristol. The option of a non-determination appeal is available to any applicant where a planning application decision is not made in the timescale set out in legislation (normally 8 or 13 weeks) or any extension to this timescale agreed by the applicant. There is no obligation on an applicant to grant an extension to the determination timescale.
- 1.03 The submission of a non-determination appeal means that Maidstone Council is no longer the decision maker for this planning. The final decision on this application will be taken by a Planning Inspector.
- 1.04 With no planning application to be decided by the council, the purpose of this committee report is to seek direction from the committee as to the approach that officers take to the council’s appeal submissions. This committee report concludes that had the non-determination appeal not been submitted, the officer

recommendation to the committee would have been to grant planning permission subject to planning conditions.

- 1.05 The deadline for the council's appeal submission is 11 December 2024 (day before the committee meeting). The council have made two separate requests to the Planning Inspectorate for the above appeal submission deadline to be moved to after the 12 December committee meeting, these requests have been declined. In these circumstances it is the intention to report to Planning Inspectorate the minutes of the 12 December meeting, on the basis that this information was not available within the rigid deadlines set.

2. APPRAISAL

- 2.01 The following two points in the minutes of the Planning Committee on 26 September 2024 are considered below. *1. Amend the application to state that it is retrospective. 2. Seek further information on compliance with conditions, size of the floor plan and contemporary photography of the application.*

1. Amend the application to state that it is retrospective.

- 2.02 The description of development has been amended to set out that the s73 application is 'part' retrospective. The internal staircase has already been removed and changes have been made to the layout approved under the original application (23/502781/FULL). The application is part retrospective as the restaurant with ancillary take away use has not commenced in the amended location.

2. Seek further information on compliance with conditions, size of the floor plan and contemporary photography of the application.

- 2.03 The following two questions have been raised in relation to the assessment of the changes made to planning permission ref:23/502781/FULL. a) Can the extent of the proposed changes be considered under a s73 planning application (variation of conditions 2 and 6), and b) the acceptability of the proposed changes?

a) Can the extent of the proposed changes be considered under a s73 planning application (variation of conditions 2 and 6).

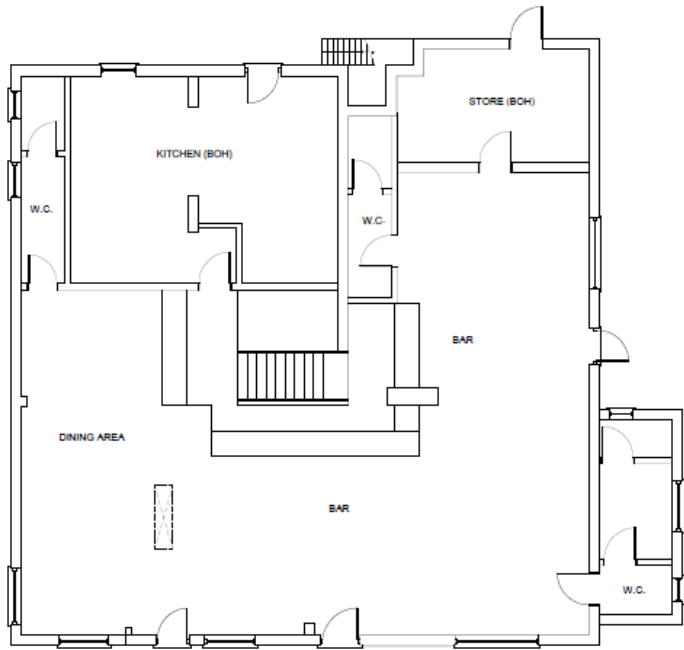
- 2.04 Planning conditions cannot lawfully prevent future changes to development granted planning permission. Planning conditions can introduce a requirement for planning permission for works that would otherwise not require planning permission. Proposed changes are then considered again as part of a second planning application.

- 2.05 National legislation has determined that in terms of relative impact, there is no requirement for planning permission to change the use of a building from a restaurant, or café (sale of food and drink consumed mostly on the premises – class Eb) to any kind of retail shop. This flexibility is in the Use Classes Order 1987 (as amended) and the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

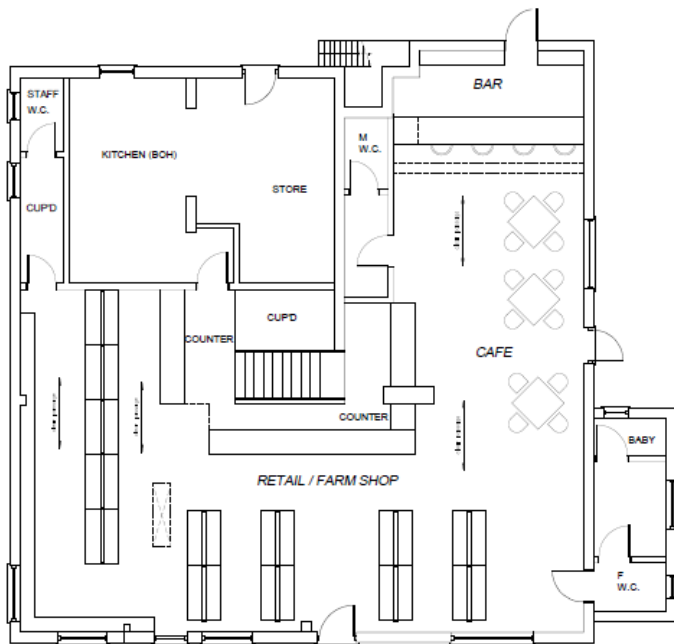
- 2.06 The changes being considered in this report only require planning permission due to conditions 2 (approved plans) and 6 (restricted floor area) attached to the planning permission under ref:23/502781/FULL.

- 2.07 The planning system allows submission of retrospective planning applications and there are no penalties in place for submitting a retrospective application. The planning application is considered in the same manner regardless of whether the application is retrospective or proposed.

- 2.08 The food and drink area on the original layout plan (23/502781/FULL) is annotated as a 'café' (i.e. not a restaurant). As highlighted in representations on application 23/502781/FULL, the kitchen was originally on the opposite side of the building to the location shown as part of the current application. This layout meant that the route from kitchen to café was originally through the retail space.
- 2.09 The removal of the central staircase has increased the ground floor internal area of the building. The conservation officer has confirmed that as the staircase was a modern building addition there is no objection to its loss. The changes to the windows are not part of the current application.
- 2.10 The planning condition restricting floorspace changes did not specify a minimum number of tables or covers and did not specify a minimum area of floorspace for each use. The condition stated, "*The area of floorspace to be used for restaurant and retail use shall be as set out on approved drawing*".
- 2.11 It is clear and agreed that the area of floorspace set out in the existing building is different to the approved building. The planning condition restricting floorspace changes did not specify a minimum number of tables or covers and the condition does not prevent a reduction in the number of tables.
- 2.12 The term 'minor material amendment' is inaccurate as there is nothing in the Town and Country Planning Act 1990 Act that limits the extent of changes that can be considered in a minor material amendment application. In addition, there is no definition of what constitutes a "minor material amendment" in national planning practice guidance.
- 2.13 The high court judgement *Armstrong v Secretary of State for Levelling-up, Housing and Communities & Anor* [2023] EWHC 176 (Admin) is also relevant. The proposal considered by the court involved a change in design from a modernist dwelling to an alpine lodge style dwelling in Cornwall. The *Armstrong v Secretary of State* judgment determined that the remit of a s73 application included "*a fundamental variation to the design*" of a single dwelling, providing it was permitted by the operative part of the planning permission (description of the development).
- 2.14 It is clear from the above guidance and the high court decision that the scope of a s73 application is wide. It is also clear in terms of The George that a s73 application can be used to consider both minor and substantial changes to the original permission. The changes to the current application building assessed as part of this application are purely internal and without the planning conditions, the changes would not have required planning permission. In this context, officers are satisfied that the proposed changes are 'minor'.
- 2.15 In any event, even if the changes to permission 23/502781/FULL were not 'minor', the changes are still within the scope of a s73 application for the reasons set out above. There is no proposed change to the description of the development.
- 2.16 The submitted application is 'part' retrospective. Whilst not the preferred route, there is no penalty in the planning system for submitting a retrospective planning application. A retrospective planning application is considered the same way as a proposed application. Legislation also allows proposed and retrospective (s73A) changes to be considered to a planning permission. The following page provides images of the original ground floor public house layout, the layout approved under permission 23/502781/FULL and the revised layout submitted under application 24/502003/FULL.



Original ground floor layout



Layout 23/502781/FULL



Revised layout 24/502003/FULL

b) acceptability of the changes

- 2.17 It is accepted that a larger retail space being considered will provide greater competition to the adjacent shop. As set out on the council's website, business competition is not a valid planning consideration. In terms of retail uses LPRSP11(C) states that uses will be located "*...in order to promote choice, competition and innovation*". There is no evidence available to justify the refusal of planning permission on the basis that approving the current application will result in the loss of both existing businesses.
- 2.18 A concern has been expressed that a reduction in the number of tables/covers in the food and drink space will lower the standard of the community facility. The plans on the preceding pages show 3 tables and 12 covers on the approved plan and 4 tables and 8 covers on the revised plans. Condition 6 does not control the number of tables or covers (only the sub division of the floorspace) It is acknowledged that the parish council feel that the revised provision is not what was promised, however this is not grounds to refuse planning permission.
- 2.19 Representations refer to changes to the windows and external seating areas. The current submission does not involve any external changes to the building. The applicant needs to comply with other legislation regarding toilet provision for staff and customers. The track record of the applicant in terms of the changes made to the original planning permission is also not grounds to refuse planning permission.

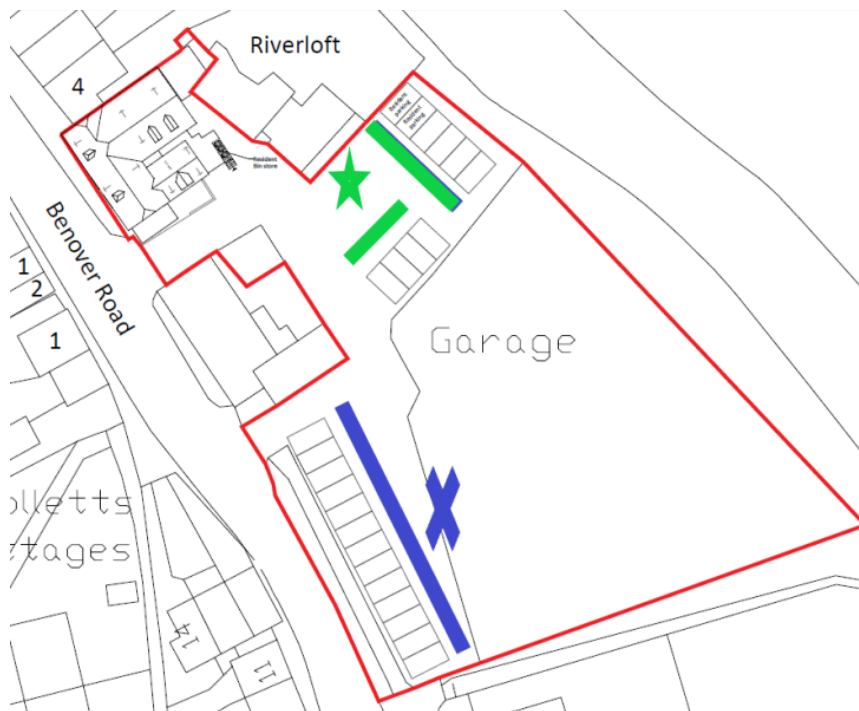
Current internal images of retail floor space



- 2.20 This report considers the changes made to conditions 2 and 6 of application 23/502781/FULL. The representation from Yalding Parish Council also provides comments on conditions 3 and 4 attached to the permission under reference 23/502781/FULL.

- 2.21 Condition 3 *attached to the permission under reference 23/502781/FULL states "No development shall take place until the applicant, or their agents or successors in title, has secured the implementation of a programme of building recording in accordance with a written specification and timetable which has been submitted to and approved by the Local Planning Authority. Reason: To ensure that historic building features are properly examined and recorded"*.
- 2.22 Condition 3 was attached to the permission at the request of KCC Archaeology. The applicant has submitted details to discharge the condition (24/502492/SUB) and KCC Archaeology have raised no objection to the discharge of this condition (December 2024). The condition has not been discharged at the current time as further details requested by the council's conservation officer are awaited from the applicant.
- 2.23 Condition 4 *attached to the permission under reference 23/502781/FULL states "No development shall take place until the applicant, or their agents or successors in title, has secured the implementation of a watching brief to be undertaken by an archaeologist approved by the Local Planning Authority so that the excavation is observed, and items of interest and finds are recorded. The watching brief shall be in accordance with a written programme and specification which has been submitted to and approved by the Local Planning Authority. Reason: To ensure that features of archaeological interest are properly examined and recorded"*.
- 2.24 Condition 4 relates to approval of a watching brief for groundworks. The development carried out following approval of permission 23/502781/FULL has not included any ground works and as a result there is no requirement for a watching brief to monitor groundworks.
- 2.25 Condition 7 *attached to the permission under reference 23/502781/FULL states "The off street car parking and access shown on drawing 1001 Site Block Plan shall be retained for use by customers and staff of the application building. Reason: In order to ensure that car parking will not be displaced on to the street where it may cause harm to highway safety"*.

Plan submitted with 24/503344/FULL (HMO) annotated by officers.



- 2.26 The parish council have questioned compliance with condition 7 as '...the same parking spaces are being used in both applications (i.e. HMO 24/503344/FULL and application 23/502781/FULL).
- 2.27 The block plan submitted with the HMO application 24/503344/FULL is on the preceding page. The off street parking marked with the blue cross are the 13 parking spaces referred to in condition 7 attached to the earlier approval application 23/502781/FULL. The parking marked with a green star are a further 10 car parking spaces introduced on the plan as part of the HMO application.
- 2.28 There are two points made in response to the concerns of the parish council. Firstly condition 7 does not require the 13 car parking spaces to be for the 'sole use' of customers and staff and the condition does not preclude shared use. Secondly. The plan submitted with the HMO application shows retention of the 13 spaces and an additional 10 car parking spaces for the HMO. This total provision of 23 spaces is considered to sufficient off street car parking space for the ground and upper floor uses of the application building.
- 2.29 The parish council state that in relation to the changes from the earlier permission "*The loss of the historic fabric and core of the ground floor of the building has irrevocably damaged the character and appearance of the building*".
- 2.30 The internal changes from the previously approved application include the removal of the staircase and counters in the middle of the building and removal of the central male WC. The original storeroom in the rear corner of the building is now retained on the revised plan, this was shown as being removed as part of the earlier approval to form a bar.
- 2.31 Heritage is considered in the original committee report however it is highlighted that the application building is not listed but is considered a non-designated heritage asset. Whilst condition 6 restricts changes to the restaurant and retail layout, the status as a non-designated heritage asset still allows other changes to be made to the building fabric without any need for permission or consent. As the internal staircase is a modern addition to the building there is no objection to its loss and the conservation officer has not raised any objection.
- 2.32 There are no changes to the windows as part of the current application. If reported to the planning enforcement team they will investigate whether the changes to the windows required planning permission.

3. CONCLUSION

- 3.01 For the reasons set out in the original report the proposals are considered to comply with all relevant Development Plan policies and permission is recommended subject to conditions.
- 3.02 In accordance with standard planning appeal procedure, and without prejudice the council have to provide suggested planning conditions to the Planning Inspector in the event that the appeal is allowed. These suggested conditions are set out below.

4. RECOMMENDATION:

In the absence of the appeal against non-determination the officer recommendation would have been GRANT PLANNING PERMISSION. Without prejudice, if the appeal against non-determination is allowed the Planning Inspector is requested to attach the following conditions, with delegated powers to the Head of Planning and Development to be able to settle or amend any necessary planning conditions and/or informatives in line with the matters set out in the recommendation and as resolved by the Planning Committee:

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans:
001 Site Location Plan
200 A Proposed Ground Floor Approved
205 D Proposed Ground Floor Plan
Heritage Impact and Design and Access Statement
Reason: To clarify which plans have been approved.
- 2) The ground floor of the building shall only be used as a cafe, restaurant with ancillary takeaway and bar and for retail purposes and shall not be used for any other purpose (including any other purpose in Class E of the Schedule to the Town and Country Planning (Use Classes) Order 1987 or permitted under the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 or any statutory instrument revoking and re-enacting those Orders with or without modification);
Reason: Unrestricted use of the floorspace could cause demonstrable harm to the character, appearance and functioning of the surrounding area and/or the enjoyment of their properties by adjoining residential occupiers.
- 3) The area of floorspace to be used for restaurant and retail use shall be as set out on approved drawing 205 D (Proposed Ground Floor Plan).
Reason: Unrestricted use of the building or land could cause demonstrable harm to the character, appearance and functioning of the surrounding area and/or the enjoyment of their properties by adjoining residential occupiers.
- 4) The existing off street car parking and access shall be retained for use by customers and staff of the application building.
Reason: To ensure that car parking will not be displaced on to the street where it may cause harm to highway safety.
- 5) No additional advertisement or signage shall be displayed on the building or on the wider red line application site without the submission of details to, and the prior written approval of the Local Planning Authority. This requirement is regardless of whether the advertisement or signage is permitted by the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (as amended).
Reason: To ensure that advertisement or signage does not impact on the appearance of the building and the surrounding conservation area.

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