
Decision by Philip Barton, a Reporter appointed by the Scottish Ministers.

- Planning appeal reference: PPA-130-2078
- Site address: The Clyde Bar, 62-64 West Clyde Street, Helensburgh. G84 8AX
- Appeal by Mr John Rapallini against the decision by Argyll and Bute Council.
- Application for planning permission reference 20/01028/PP, dated 11 June 2020, to carry out the development without compliance with condition 2 imposed in the grant of planning permission reference 17/01756/PP, dated 24 August 2017.
- The development proposed: revision of opening hours for beer garden from 21hrs to 22hrs for 7 days a week.
- Date of site visit by Reporter: not applicable

Date of appeal decision: 4 February 2021

Decision

I dismiss the appeal and refuse to grant planning permission as sought in the application.

Preliminary Matters

1. The description of development shown on the application form for 20/01028/PP (hereinafter 'the 2020 application') is unclear. It could be read to mean that the appellant wishes to open the beer garden for 22 hours a day, seven days a week. This lack of clarity is compounded by the fact that neither notice published by the council specifies the precise nature of the extension being requested. Furthermore, the wording of these notices could be interpreted to mean that the appellant is seeking to harmonise the opening hours for both the indoor and outdoor drinking areas, such that the entire site would be open until up to 02:00 in the morning. However, it is clear from the appellant's submissions that he wishes to extend the period during which the beer garden is open for one additional hour, such that it would close to customers at 22:00 every day. I have dealt with the appeal on this basis.
2. In his appeal statement, the appellant indicates that, in response to concerns raised by neighbours, his intention is to close the premises at 01:00 on Fridays and Saturdays. No further process would be required for the appellant to close earlier than is currently permitted. This is not, therefore, a matter for me to consider as a part of this appeal.
3. Although I have the power to revisit any of the other conditions attached to application reference 17/01756/PP (hereinafter 'the 2017 application'), this power is to be exercised exceptionally. I shall not, therefore, address the appellant's request to clarify the scope of condition three attached to the 2017 permission. Application may be made to establish the lawfulness of any proposed change(s) to the operation of the beer garden.

4. I agree with the council that a site inspection is not necessary in this case. This is because the current lockdown situation means that The Clyde Bar should not be open to customers and I would therefore be unable to make any useful assessment of current noise levels on the premises. I have given the appellant an opportunity to submit any further evidence that he considers to be relevant to my consideration of the appeal.

Reasoning

5. I am required to determine this appeal in accordance with the development plan unless material considerations indicate otherwise.

Relevant Development Plan Policies

6. The development plan for the area comprises the Argyll and Bute Local Development Plan, adopted March 2015 (LDP), and includes Supplementary Guidance (SG), adopted March 2016.

7. The council's decision notice refers principally to conflict with SG LDP BUS 1 and SG LDP BAD 1. These policies support Policy LDP 5 – Supporting the Sustainable Growth of Our Economy and Policy LDP 8 – Supporting the Strength of Our Communities respectively. Policy LDP 5 supports businesses which help deliver sustainable economic growth and requires full account to be taken of the economic benefits of any proposed development. Policy LDP 8 supports sustainable development proposals that seek to strengthen communities, making them better places to live, work and visit. The appellant does not dispute the relevance of these policies, or the content of their associated guidance.

8. However, SG LDP BUS 1 relates specifically to development that falls within Use Classes 4, 5, 6 and 7, as well as waste management development. This does not include public houses, which are classed as sui generis by Section 3(5)(h) of The Town and Country Planning (Use Classes) (Scotland) Order 1997. Consequently, I consider Policy LDP 5, Policy LDP 8 and SG LDP BAD 1 to be the most relevant development plan policies in this appeal.

Material Considerations

9. Circular 4/1998 The Use of Conditions in Planning Permissions (hereinafter 'the Circular') explains the six tests that all conditions must meet. I have measured the disputed condition against these tests. I am not required to assess the merits of the appellant's proposal to open the beer garden until 22:00 daily, unless I were first to find that the disputed condition fails any of the six tests.

10. I note the representations made by people both in support of and in opposition to the proposal. This evidence pulls in both directions, which is not unusual. It is not my role to determine the veracity of each such representation. I shall exercise my own professional judgement in assessing the totality of the evidence placed before me.

11. The proposed Local Development Plan 2 (LDP2) is likely to be submitted for impartial examination during April 2021. Neither the council nor the appellant has referred to LDP2 policies. Consequently, I need not consider the relevance of LDP2 any further.

Main Issue

12. Having regard to the provisions of the development plan, the main issue in this appeal is whether the disputed condition meets the six tests in the Circular and safeguards living conditions for occupants of surrounding dwellings, with particular reference to noise and disturbance.

Need for a Condition

13. Disputed condition 2 states: “Notwithstanding the provisions of Condition 1 [the plans condition], the development hereby permitted shall be restricted to the specified operational hours of midday to 9pm on any day”. The reason given for attaching the condition is: “in order to protect the amenity of the area”.

14. I note from the photographs submitted by the appellant and third parties that there are a number of residential flats opposite the rear of the The Clyde Bar whose rear windows look out onto a communal garden area and, in the case of upper floors, into the beer garden. There are also flats above premises in West Clyde Street. It is likely that some of these windows are to main living rooms. It is clear from the Report of Handling for the 2017 application that the council quite properly balanced the economic benefits of the proposal to open a beer garden against the legitimate expectation of people living nearby to enjoy good living conditions.

15. There appears to have been no material change of circumstances as far as the relationship between the beer garden and the surrounding flats is concerned. There were eight representations to the 2017 application from people living nearby. Three of the objectors to the 2020 application appear to be the same individuals who made representations to the 2017 application.

16. There is clearly a continuing need to balance economic considerations, including the specific commercial considerations of the appellant’s business, against the effect of the operation of the beer garden upon living conditions. In response to internal consultations, the Environmental Health Officer recommended a condition requiring the submission of a noise mitigation plan. I consider this to be a strong indication that, although not sufficient to constitute a statutory nuisance, the amount of noise generated by the beer garden would nevertheless require some degree of control. In my view, this is best achieved by attaching a condition limiting its hours of operation, which the disputed condition does.

17. I am satisfied that the test of necessity in the Circular is met.

Relevance to Planning

18. The level of noise and degree of disturbance required to constitute Planning harms are lower than those above which a statutory nuisance would result. Consequently, the absence of an objection from the council’s Environmental Health Officer does not mean that concerns about noise and disturbance generated by the use of the beer garden are irrelevant to Planning. The thirteenth bullet point of Scottish Planning Policy paragraph 29 includes “protecting the amenity of new and existing development” as one of the factors contributing to sustainable development. In this case, “amenity” may be defined as a minimum standard of living conditions that people have a right to expect.

19. I am satisfied that the test of relevance to planning in the Circular is met.

Relevance to the Development to be Permitted

20. The disputed condition relates to the hours of operation for an external drinking area associated with an adjacent indoor drinking establishment. There is a clear relationship between the condition and the permitted use.

21. Section 4) of Schedule 7 to the Town and Country Planning (General Development Procedure) (Scotland) Order 1992 includes “licensed premises” within a list of “Bad Neighbour Development”. The beer garden is part of The Clyde Bar, which is a public house and is therefore required to hold a license for the sale of alcohol.

22. Bad neighbour development is required to accord with all five of the criteria set out in SG LDP BAD 1. Criterion (A) of this policy requires there to be “no unacceptable adverse effects on the amenity of neighbouring residents”. The disputed condition clearly seeks to ensure that the use of the beer garden would accord with this requirement.

23. I am satisfied that the test of relevance to the development to be permitted in the Circular is met.

Ability to Enforce

24. The beer garden is accessed only through the adjacent building. The indoor drinking area is open much later each day (up to 02:00) than the beer garden is (up to 21:00). Consequently, it should be a very straightforward matter to check that the operator is abiding by the disputed condition.

25. I am satisfied that the test of ability to enforce in the Circular is met.

Precision

26. The wording of the disputed condition is somewhat verbose, but there is no realistic potential for confusion about its requirements. The reason given for attaching the condition is: “in order to protect the amenity of the area”. This reason adequately explains and justifies the need to protect the living conditions of occupants of surrounding dwellings on the basis of Policy LDP 8, which expects development to contribute to making better places to live, work and visit.

27. I am satisfied that the test of precision in the Circular is met.

Reasonableness

28. There are a number of people living within earshot of the beer garden – both in the flats opposite and in flats above premises in West Clyde Street. It is reasonable to take account of the effect of activity in the beer garden upon the living conditions of these people. The question here is whether restricting opening hours to 21:00 is reasonable. Although most people are asleep between 23:00 and 07:00 the next day, some of these flats may be occupied by families with children, who should go to bed earlier. People have differing work patterns too, which dictate when they might be sleeping.

29. I find that the disputed condition reasonably balances the twin objectives of supporting the appellant's business and protecting living conditions for people residing nearby. It is not unduly restrictive or onerous because it allows the beer garden to remain open for nine hours every day.

30. I am satisfied that the test of reasonableness in the Circular is met.

Conclusion

31. The disputed condition reasonably and necessarily balances the requirements of Policies LDP 5 and LDP 8 which seek to promote economic development whilst also strengthening communities, making them better places to live, work and visit. It also accords with the requirements of SG LDP BAD 1 criterion (A).

32. The disputed condition accords with relevant development plan policies and meets all of the six tests in Circular 4/1998. Consequently, I conclude that the appeal must be dismissed.

Philip Barton
Reporter