

**REPORT TO:** Planning Committee

**MEETING DATE:** Tuesday 19 April 2016

**BY:** Depute Chief Executive (Partnerships and Community Services)

**SUBJECT:** Application for Planning Permission for Consideration

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***Note** - this application was called off the Scheme of Delegation List by Councillor Goodfellow for the following reason: The premises concerned has lain empty for some time and our decision that retail use of the premises is still viable should be decided at Committee.*

*This application was also called off the Scheme of Delegation List by Councillor Berry for the following reason: This is a change of use to a hot food takeaway in an area already supplied by two already. Local residents have expressed concern about its impact, especially in a narrow High St (for noise) and with no space on narrow pavements.*

Application No.      **15/00916/P**

Proposal              Change of use of shop (class 1) and area for preparation of food for distributing off premises to hot food takeaway and installation of extract duct

Location              **5 High Street  
North Berwick  
East Lothian  
EH39 4HH**

Applicant             Mr Franco Cucchi

Per                      Somner Macdonald Architects

RECOMMENDATION      Application Refused

#### PLANNING ASSESSMENT

Planning permission is sought for the change of use of the currently vacant ground floor premises of 5 High Street, North Berwick. The existing use of the premises is as a shop, a use within Class 1 of the Town and Country Planning (Use Classes) (Scotland) Order 1997 with an associated area for the preparation of food off the premises. The proposal is to change the use of the premises to a hot food takeaway, a sui generis use. Planning permission is also sought for the installation of an extract duct on rear elevation of the building that contains the premises.

The premises occupy the ground floor of a three-storey building that is situated on the south side of High Street. The upper floors of the building contain a residential flat. The premises are part of a well established commercial ground floor frontage along the south

side of High Street. By being within North Berwick Town Centre the premises are within a mixed use area as defined by Policy ENV2 of the adopted East Lothian Local Plan 2008. The premises are also within the North Berwick Conservation Area. Section 25 of the Town and Country Planning (Scotland) Act 1997 requires that the application be determined in accordance with the development plan, unless material considerations indicate otherwise.

The development plan is the approved South East Scotland Strategic Development Plan (SESplan) June 2013 and the adopted East Lothian Local Plan 2008.

Policy 1B (The Spatial Strategy: Development Principles) of the approved South East Scotland Strategic Development Plan (SESplan) and Policies ENV2 (Town and Village Centres, Other Retail or Mixed Use Areas), ENV4 (Development Within Conservation Areas), R3 (Hot Food Outlets) and T2 (General Transport Impact) of the adopted East Lothian Local Plan 2008 are relevant to the determination of the application.

Material to the determination of the application are Section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and the Scottish Government's policy on development within a conservation area given in Scottish Planning Policy: June 2014.

Scottish Planning Policy echoes the statutory requirements of Section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 that a planning authority must have regard to the desirability of preserving or enhancing the character or appearance of a conservation area in exercising its responsibilities in the determination of any application for planning permission for development affecting a conservation area. It is stated in Scottish Planning Policy that proposed development within conservation areas and proposals outwith which will impact on its appearance, character or setting, should preserve or enhance the character and appearance of the conservation area. Proposals that do not harm the character and appearance of the conservation area should be treated as preserving its character and appearance.

Four written objections to the application have been received, one of which has four signatories. The objections are from local residents and proprietors. They are made on the grounds that:

(i) An earlier application for the change of use of the shop at 1 High Street was turned down because of concerns about overcrowding in the street;

(ii) if queues form outside the premises, people will be unable to pass safely on the pavement and could be forced into the road, particularly if they have baby buggies or wheelchairs;

(iii) There is quite heavy traffic on High Street including delivery lorries and an accident is highly likely;

(iv) Double yellow lines mark the road outside the premises and people park their illegally already - further traffic will worsen this situation and potentially limit access to neighbouring residential properties;

(v) In its location the hot food takeaway would not ease congestion on footpaths but would increase activity on the highway;

(vi) The previous use of the premises as a deli had pedestrian overflow problems;

(vii) As the pavement is narrow outside the premises, it is already difficult to walk past at that point as vehicles park on the double yellows;

(viii) Deliveries to and from the premises would not be possible without breaching parking restrictions;

(ix) Because of the narrowness of the pavement in front of the premises there is nowhere to store bins close to the premises; this is bound to lead to rubbish on both pavement and road which would detract from High Street, is unhygienic and would attract seagulls;

(x) There should be investment in the location for disposal and handling of waste;

(xi) The most recent use of the premises was as an energy shop and not Cater Ceilidh as advised in the supporting statement and any waste disposal would be significantly different from an office based use to a food preparation unit;

(xii) Cooking smells will seriously affect the outside space for a neighbouring residential property as well as the area in general;

(xiii) There are already two fish and chip/pizza carry out premises in the area in addition to a number of restaurants, cafes and pubs serving food; is there justification for a further takeaway?

(xiv) The proposal has the potential to devalue neighbouring residential property;

(xv) The application is not in the interests of residents on High Street or near the High Street. Nor is it in the interests of pedestrians or surrounding businesses; and

(xvi) The application is only within the interests of one business that already has a safer, larger pavement base.

As a consultee to the application North Berwick Community Council do not raise objection to the application. They do however raise concern with regard the height of the proposed extract duct. They are of the view that the design of the flue should minimise odour discharge.

In April 2006 planning application 06/00443/FUL was submitted for the change of use of the shop premises at 1 High Street, North Berwick to a licensed betting office. Associated listed building consent application 06/00443/LBC was also submitted for alterations to the building and for the display of signage all to facilitate its proposed new use. In June 2006 planning application 06/00443/FUL and listed building consent application 06/00443/LBC were withdrawn without having been determined. The reason for the withdrawal given by agent acting on behalf of the applicant for the applications was that the applicant had not been successful in securing the lease for the property and as such did not want to continue with the applications. Contrary to that alluded to by one of the objectors, the reason for the withdrawal of the applications was not therefore attributed to concern raised by the Planning Authority regarding the overcrowding or overspill of patrons from the premises onto High Street.

The effect of development on the value of neighbouring property is not a material consideration in the determination of a planning application.

Matters of refuse collection and littering are controllable under other legislation other than planning.

Policy ENV2 applies to North Berwick Town Centre, an area it defines as being of mixed uses and one in which uses appropriate to a town centre area will be acceptable in principle. These uses include retailing, business and office use, restaurants, and leisure and entertainment.

Policy ENV2 states that within town centres changes of use of retail units to other town centre uses will only be acceptable where the Council is satisfied that a retail use is no longer viable or the benefits of the proposed use to the viability and vitality of the area outweigh the loss of the shop.

The applicant's agent has submitted a supporting planning statement with this application, which provides some of the occupation history of the premises and a review of the proposed change of use and proposed extract duct installation against relevant development plan policy.

The statement informs that in the premises were occupied by Cater Ceilidh, a food sales business. During their occupation of the premises planning permission ref: P/00063/93 was granted on 15 April 1993 for the preparation and distribution of food for sale off the premises. The business operation is alleged to have included delicatessen sales on the premises and outside catering for functions for which food was cooked at the premises. The premises were subsequently occupied by Paprika, also a delicatessen.

In 1993 the premises subsequently fell vacant and were marketed by solicitor's Paris Steele.

It is alleged in the written statement that the combination of shop deli and outside catering uses continued from 1993 until the premises fell vacant. However there is evidence to suggest that the last know use of the premises was as a green energy shop. This evidence is in the form of signage currently displayed on the front of the vacant premises comprising the text "APA Green Energy Systems".

The supporting statement also advises that the premises of 5 High Street have been purchased by the applicant who is part of the family business operating the North Berwick Fry and Diner and Cucina Amore restaurant in Quality Street. The applicant is also the owner of the two storey flat of 5a High Street above the premises the subject of the proposed change of use.

The statement further informs that the applicant had observed the operation and use of the premises prior to them becoming vacant. It is alleged that when in operation as a food business the premises where operating as a hot food takeaway and this use was not challenged, reported or planning enforcement action taken.

There is no evidence to contradict these statements.

The statement informs that the proposed extract system would be an improvement to existing extractions arrangements and is similar in form to that already in place at the North Berwick Fry and Diner.

With regards the compliance of the proposal with Policy R3 of the adopted East Lothian Local Plan 2008 the statement advises that:

- (i) the premises are within a town centre and this is an established shopping location,
- (ii) there are several restaurants and hot food takeaways. The town centre is a busy visitor location with significant footfall of residents and tourists and the current standard of behaviour of visitors can be readily observed,

- (iii) The applicant operates existing food businesses in the area and is responding to consumer demand,
- (iv) The application includes details of the means of extraction of cooking smells to roof level. Therefore it is not anticipated that there will be harm to local amenity due to the operation of the proposed use, including the behaviour of customers out-with the premises.
- (v) It is not anticipated that the proposed use would present a threat to road safety.
- (vi) There are no external alterations proposed that would be harmful to the character and appearance of the building and,
- (vii) The applicant does not propose to operate out-with the hours stated in Policy R3 as being between 7.30am and 12 Midnight.

A further statement in the form of an email from the applicant's agent advises that the premises, following marketing by Paris Steele, were marketed privately by the then owner. The marketing of the premises was in the form of a "for sale" sign in the window of the premises. The length of time the premises were marketed in this way cannot be quantified but is considered to be more than 3 months. The previous owner confirmed that no offers were made for the property prior to interest being expressed by the applicant. Notwithstanding no offers were made for the premises other than by the applicant no details have been provided to demonstrate the level of interest in the premises.

The further written statement comments that Policy ENV2 states that changes of use of retail units to other town centre uses will only be acceptable where the Council is satisfied that a retail use is no longer viable or the benefits of the proposed use to the viability and vitality of the area outweigh the loss of the shop. Although in other parts of Policy ENV2 relating to other types of change of use, the wording is prescriptive in requiring that the premises be marketed, the only part of Policy ENV2 which relates to this type of change of use does not specify the means by which the Council has to be satisfied on this matter. Therefore whilst it is appreciated that a 3 month marketing campaign is the usual means of providing evidence, the wording of this clause of the policy leaves it open for the Council to be satisfied through consideration of other circumstances and means as suitable evidence.

Whilst the continued use of the ground floor premises of 5 High Street as a retail unit is the Council's preference it is acknowledged that a hot food takeaway use is an accepted town centre use, which might contribute positively to the viability and vitality of the area, but only if a retail use of the premises is proven to be no longer viable. In this regard, the method of marketing of the premises has not been sufficient to demonstrate that the retail use of the premises is no longer viable. The premises have not been marketed through formal marketing procedures and have not been exposed to a wide market.

In order to establish that a retail use is no longer viable it is the practice of the Council, as Planning Authority to apply the general rule that the premises should be formally marketed for a minimum period of 3 months. Whilst it is noted that a sign was in the window of the premises for a length of time alleged to be more than 3 months, the lack of exposure of the premises to a wider market is likely to impact upon the level of interest from prospective tenants. Premises are each unique in terms of their location, size and quality. Thus, it has not been demonstrated to the satisfaction of the Council that the retail use of the premises is no longer viable. Nor has it been demonstrated that the benefits to the viability and vitality of the area of the proposed use of the premises as a hot food takeaway outweigh the loss of the existing shop use.

Accordingly, the proposed change of use of the premises from a shop use (Class 1 use) to a hot food takeaway (Sui Generis use) is contrary to Policy ENV2 of the adopted East

Lothian Local Plan 2008.

Policy R3 of the adopted East Lothian Local Plan 2008 supports the provision of hot food takeaways in local shopping and commercial areas subject to the criteria of the Policy being met.

One of the criterion of Policy R3 is for it to be demonstrated that the operation of a proposed hot food takeaway use would not cause harm to local amenity and that, in this consideration, the cumulative effect of additional premises in locations already containing one or more hot food takeaways in close proximity will be relevant.

It is acknowledged that there are already other hot food takeaways in North Berwick Town Centre. However, in their locations they are generally dispersed from one another. In the consideration of this application no consultation response or public representation provides evidence that approval of the proposed hot food takeaway use would, due to the location of the premises in the town centre and of the existing number of hot food takeaways, result in a cumulative effect of hot food takeaway use harmful to town centre amenity.

The Council's Environmental Health Service has raised concerns that noise associated with the operation of the proposed extract duct could result in a loss of amenity to occupiers of neighbouring residential properties. Accordingly they recommend that:

(i) The Rating Level, LArTr, of noise emanating from the proposed extract duct, including noise from any associated plant or machinery, (when measured 3.5m from the façade of any neighbouring residential property) shall be no more than 5dB (A) above the background noise level, LA90T. All measurements to be made in accordance with BS 4142: 2014 "Methods for rating and assessing industrial and commercial sound". The difference between the Rating Level and Background Level can be increased to 10dB where the noise source does not have a tonal element; and

(ii) Noise associated with the operation of the proposed extract duct, including noise from associated plant and/or equipment, shall not exceed Noise Rating curve NR20 at any octave band frequency between the hours of 2300-0700 and Noise Rating curve NR25 at any octave band frequency between the hours of 0700-2300 within any neighbouring residential property. All measurements to be made with windows open at least 50mm.

The above controls could reasonably be secured as conditions imposed on a grant of planning permission.

The Council's Environmental Health Service advises that as the proposed extract duct would vent above the height of the dormer on the rear elevation of the roof slope of the building, it would facilitate adequate dispersal of cooking odours from the premises.

It is the intention of the applicant to operate the proposed hot food takeaway within the hours of 7.30am and 12 Midnight. These hours are within those set out in Policy R3 of the adopted East Lothian Local Plan 2008. As so operated, the proposed hot food takeaway by its nature and scale of operation would not be harmful to the amenity of the neighbouring and nearby residential properties or of the wider area.

Accordingly, in respect of the above matters, the proposed hot food takeaway does not conflict with Policies ENV2 or R3 of the adopted East Lothian Local Plan 2008.

Another determining criterion of Local Plan Policy R3 is that a proposed hot food

takeaway use does not present a threat to road safety. It must therefore provide, or be close to, safe on or off street parking such that it will not encourage parking in locations which could present a hazard to pedestrians or other road users.

The Council's Road Services advise that High Street is a one-way street westbound. Parking regulations exist on a part of it from its junction with Quality Street to the east. The Traffic Regulation Order (TRO) in place is indicated by double yellow lines and these are located on the carriageway in front of the premises as well in front of other premises at the east end of High Street. The TRO is such that there is no waiting, loading or unloading permitted at any time at this location. Currently the enforcement of these controls is regulated by Police Scotland.

Road Services do not recommend refusal of the application. They do however raise concern that the proposed hot food takeaway will increase the likelihood of inconsiderate and obstructive parking at this location. They are of the view that whilst parking restrictions exist outside the premises, the short term nature of visits to hot food takeaways can lead to customers breaching these restrictions.

In that a Traffic Regulation Order is in place to control indiscriminate parking outside the premises and is enforceable under legislation other than planning it would be unreasonable for the Planning Authority to refuse the application on the grounds that the proposed use may increase the likelihood of illegal parking at this location.

With regard to loading outside the premises and deliveries to it, Road Services recommend that a delivery and service plan statement be submitted to ensure that deliveries to the premises are undertaken in a legal and responsible manner. This matter could reasonably be controlled by a condition of a grant of planning permission.

On the consideration of general transport impact the proposal does not conflict with Policies R3 and T2 of the adopted East Lothian Local Plan 2008.

The proposed extract duct is required to improve existing extraction arrangements within the premises. It would be attached to the south (rear) elevation of the building, on a part of the building that is enclosed by other tall buildings. It would extend upwards through the flat roof of the rear projecting ground floor component of the building and thus through a part of the rear roof terrace of 5a High Street. In so doing it would abut the rear elevation of the first floor part of the building and be positioned to the west side of the first floor door openings and second floor dormer window of the first floor flat. It would be cylindrical in form and in terminating above the roof of the dormer of the first floor flat, it would follow the slope of roof of the building over which a part of it would be affixed. It would be constructed of galvanised steel and would have a diameter of some 0.55 metres.

In its elevated position on the southeast elevation of the building the extract duct would not be visible in public views of the building from High Street to the north or from Quality Street from the east. The extract duct would be visible from the windows of nearby first and second floor properties. However, it would be viewed in the context of the other extract ducts/systems on the rear elevation of adjacent buildings and against the backdrop of the external wall of the building and the adjacent buildings. Thus, by virtue of its size, elevated position and its juxtaposition with the existing building, adjacent buildings and the other extract ducts/systems on the rear elevations of adjacent buildings the proposed extract duct would not appear harmfully intrusive, exposed or incongruous and would not detract from the character and appearance of the building or of this part of the Conservation Area.

The proposed extract duct is consistent with Policy 1B of the approved South East

Scotland Strategic Development Plan (SESplan) June 2013, Policies ENV4 and DP6 of the adopted East Lothian Local Plan 2008 and with Scottish Planning Policy: June 2014.

Notwithstanding that the erection of the proposed extract duct is consistent with policy, that Road Services do not recommend refusal of the proposed change of use of the premises and that the Council's Environmental Health Service is satisfied that odour and noise can be adequately controlled to prevent harm to the amenity of neighbouring residential uses, these material considerations do not sufficiently outweigh the findings of this planning assessment that the change of use of the premises to a hot food takeaway is contrary to Policy ENV2 of the adopted East Lothian Local Plan 2008 as it has not been demonstrated to the satisfaction of the Council as Planning Authority that the retail use of the premises is no longer viable, or that the benefits of the proposed hot food takeaway use to the viability and vitality of North Berwick Town Centre would outweigh the loss of the retail use of the premises.

#### REASON FOR REFUSAL:

- 1 The proposed change of use of the premises to a hot food takeaway (Sui Generis use) is contrary to Policy ENV2 of the adopted East Lothian Local Plan 2008 as it has not been demonstrated to the satisfaction of the Council as Planning Authority that the retail use of the premises is no longer viable, or that the benefits of the proposed use to the viability and vitality of the area would outweigh the loss of the retail use.