

**SCOTTISH BORDERS COUNCIL**

**APPLICATION TO BE DETERMINED UNDER POWERS DELEGATED TO  
CHIEF PLANNING OFFICER**

**PART III REPORT (INCORPORATING REPORT OF HANDLING)**

**REF :** 17/01368/FUL

**APPLICANT :** Mark Deans

**AGENT :** R Bannerman

**DEVELOPMENT :** Variation of condition 4 of planning permission 16/00753/FUL to reinstate 2 no windows in lieu of air conditioning units

**LOCATION:** Deans Bar  
3 Orrock Place  
Hawick  
Scottish Borders  
TD9 0HQ

**TYPE :** FUL Application

**REASON FOR DELAY:**

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**DRAWING NUMBERS:**

<b>Plan Ref</b>	<b>Plan Type</b>	<b>Plan Status</b>
WINDOWS	Location Plan	Refused
	Floor Plans	Refused
	Specifications	Refused
	Photos	Refused

**NUMBER OF REPRESENTATIONS: 1**  
**SUMMARY OF REPRESENTATIONS:**

**REPRESENTATIONS**

The same individual, a neighbouring resident, has provided two representations in objection to this application. These object on the basis of excessive and unreasonable noise disturbance to the objector within his own home. He make the following points:

- (i) the objector maintains concern that the back room should only be used if a low noise air conditioning unit is installed;
- (ii) the objector advises that there is little or no sound-proofing between the back room and the objector's property;
- (iii) the objector is unable to open windows at the back of his property due to noise impacts. A beer chiller unit is specifically mentioned;
- (iv) the objector in his second representation advises that the proposed windows have been installed and therefore understands that the neighbour is in breach of the conditions of the original planning consent.

**ENVIRONMENTAL HEALTH CONSULTATION RESPONSES**

Environmental Health originally responded to advise that no assessment had been undertaken on the noise impact of the proposals and that no information had been provided on measures to reduce the breakout of noise from the premises. While it was observed that opening up two windows would

significantly reduce the sound insulation properties of the structure, and could lead to serious adverse effects on the amenity of other occupiers in the vicinity, the ultimate conclusion was that there was a need for further information.

Further to its review of the requested Noise Impact Assessment Report, and having taken advice from an independent noise consultant (Carmichael Acoustics), Environmental Health has advised that it cannot support the application and would recommend its refusal. With respect to the concerns informing its conclusions, EH particularly notes that most of the issues arise from the fact that a noise assessment was commissioned on a similar basis to the condition recommended for installation of a ventilation system. These issues include:

- (i) the report is limited to the attenuation from the windows, and does not consider the structure as a whole and therefore lacks consideration of the roof, emergency exits and importantly noise breakout from the installation of wall vents/fans which appear to have no acoustic attenuation; and
- (ii) the assessment has been carried out on the basis of a design criteria of NR20. This criteria is only suitable for plant and machinery and is not suitable for noise from amplified music.

It further notes that a number of assumptions have been used by the consultants which introduce an unacceptable level of uncertainty:

- (i) the report is based on predicted noise levels of amplified music. Amplified music is highly variable particularly in relation to bass beat. In addition to this, there is currently no measurement or control over the level of noise emitted in the function room and therefore difficult to apply this assumption to the specific noise immissions from Deans Bar;
- (ii) assumptions have been made regarding the sound reduction achieved by the windows. This does not appear to have been tested;
- (iii) a 15dB reduction in sound levels has been attributed to the receptor's windows. As the noise from amplified music is dominated by bass beat, 15dB is not a suitable reduction assumption and 10dB would be more acceptable; and
- (iv) the use of room acoustic assumptions rather than measurements (such as reverberation time and room volumes) should not normally be used in noise assessments as it could lead to underestimating the noise levels in the receiving property.

It is also pointed out that the assessment of the report has also highlighted a number of inconsistencies which reduce confidence in the robustness of the report.

In summary, the report submitted in support of the application does not provide the assurance that surrounding amenity would not be detrimentally impacted by noise. Environmental Health would also reiterate that the windows would need to be opened for ventilation purposes if there is no additional ventilation system to be installed. Also, noise breakout from the current ventilation fans in the function room has been omitted from the report. Environmental Health advises that it has witnessed several occasions where unacceptable levels of noise from amplified music in the function room are audible within nearby noise sensitive receptor. For these reasons, the application is not supported and Environmental Health recommends its refusal.

Environmental Health has also provided this summary timeline, which takes in not only its consideration of the current application, but also additional concerns relating to a wider history of investigations of noise impacts from the premises at Deans Bar:

The premises is licenced until 1am and therefore has a potential to have a detrimental impact on surrounding residential amenity in relation to noise. Due to noise nuisance issues from the previous use of the building (Hawick RF Club), the windows at the rear of the function room were infilled with brickwork to attenuate the noise levels. On consultation of Application 16/00753/FUL, Environmental Health recommended on 2 September 2016, that a noise assessment should be submitted in relation to amplified noise. On further consultation of Application 16/00753/FUL, Environmental Health further recommended that noise from any plant and machinery i.e. a ventilation system should not exceed NR 20 night time and NR 30 at all other times. In March 2017, the applicants were advised in writing by Environmental Health not to reinstall windows due to potential noise nuisance. In November 2017, Environmental Health was consulted on the current application and it advised that reinstating the windows would significantly reduce noise attenuation levels and further information would be required. In December 2017, Environmental Health served an abatement notice on the proprietor/applicant as a

noise nuisance from the operational activities (and in particular amplified music) was established. During this time the applicant reinstated the windows in the function room and the application is therefore retrospective. The applicant was required to comply with the abatement notice by 31st March which was subsequently extended to 10th August 2018. During August and September 2018, Environmental Health has witness non-compliance with the abatement notice and therefore an offence has been committed. A noise assessment report was received in September 2018. Given the sensitivities surrounding the Environmental Health investigation, the report was forwarded to an independent noise consultant for assessment.

#### OTHER CONSULTEES

Flood Prevention and the Community Council were consulted on this application, but did not respond to the public consultation.

#### PLANNING CONSIDERATIONS AND POLICIES:

Local Development Plan 2016

PMD2: Quality Standards  
ED3: Town Centres and Shopping Development  
HD3: Protection of Residential Amenity  
EP9: Conservation Areas  
IS8: Flooding

Supplementary Planning Guidance:

Guidance on Householder Developments July 2006  
Placemaking and Design January 2010

#### **Recommendation by** - Stuart Herkes (Planning Officer) on 10th December 2018

The determination of this application had been delayed pending provision of a report on a Noise Impact Assessment. It is regrettable that it has ultimately taken until later September 2018 for a Noise Impact Assessment Report to be provided to the Planning Authority. In the period since, Environmental Health has sought to get clarification on certain matters, both from the Applicant's agent and from an independent noise consultant. However, Environmental Health has now - on 21 November - responded to provide its assessment of the Applicant's Noise Impact Assessment Report. Its response is summarised above in the 'Representations' Section. Further to this advice, it is considered that sufficient clarification on the noise impacts relating to these proposals has now been provided to now enable the Planning Authority to determine this planning application.

#### SITE DESCRIPTION AND PROPOSED DEVELOPMENT

This application relates to the public bar premises, 'Deans Bar', at No 3 Orrock Place, in Hawick's Town Centre and Conservation Area. It has two proposals, which are:

- (i) to allow the - now retrospective - installation of two windows in the rear wall of a function room at the back of the public bar premises; and
- (ii) to vary Planning Condition No 4 attached to Planning Consent 16/00753/FUL, to allow for the aforementioned function room to be used to accommodate customers, and their entertainment (music and bands), without the need for the prior approval and installation of a ventilation system within this same function room, in advance of any actual use of it by/for customers.

The two proposals are related in so far as it is the Applicant's intention that the proposed windows should serve as the function room's ventilation in lieu of the installation of the ventilation system, the prior approval and installation of which are explicitly required under Planning Condition No 4 as prerequisites to the public bar being able to use and offer the function room as a facility to its customers and venue for their entertainment.

The function room is accommodated within the ground floor of a building that also accommodates residential properties on its upper floors. There are also residential properties on adjoining land. The function room is specifically accommodated within a single storey rear offshoot.

Since this current planning application was originally made (in later 2017), the windows it proposes, have in fact now been installed but without any approval or authorisation by the Planning Authority. This installation also occurred notwithstanding Environmental Health's identified requirement at the time of the public consultation in 2017 on the current application that further information on the noise impacts of the proposal should first be provided for its review.

It is further understood that the Applicant is also using the function room to accommodate customers without first having met the requirements of Condition No 4. The aforementioned condition explicitly requires that the function room should be kept locked and off limits to customers until an appropriate ventilation system has been approved and installed.

The Applicant describes the proposed windows installation as a reinstatement, but such a context does not in itself, negate the need for full planning approval.

## PLANNING HISTORY

Planning Consent 16/00753/FUL was issued on 17 November 2016, and consented a "change of use from rugby club to public house and external re-decoration", subject to four planning conditions. Besides a conformity condition (No 1) and a condition requiring that all plant and machinery should be maintained and serviced in accordance with manufacturers' instructions (No 3), Condition No 2 requires that noise outputs from plant and machinery used on the premises, should not exceed specified noise limits at specific hours. Planning Condition No 4 - which this application specifically seeks to vary - is in full, as follows:

"The function room not to be used, open or accessible to members of the public/patrons until full details of a ventilation system for the function room have been submitted to, approved in writing by the Planning Authority and installed in accordance with the approved details. These details to include an external elevation drawing of the building showing the units in place, details of the ducting required and the specification of the units. The door to the function room to be locked whilst the public house is open to members of the public/patrons and a "no entry" sign placed on the door. These measures to be kept in place until the approved ventilation system has been installed.  
Reason: To protect the residential amenity of nearby properties".

The above noted conditions, including Condition No 4, were imposed by the Planning Authority in response to the assessment that was set out within the associated Report of Handling on Planning Application 16/00753/FUL, and specifically with respect to the potential for unacceptable noise impacts to be generated by the operation of the public bar use from the premises and the need to regulate these same impacts acceptably. At the time of its consideration of the proposed use of the premises as a public bar, the Planning Authority was only reasonably able to take account of the site as it was then configured, and of the details of the specific proposed use and accommodation of that use within the premises, which did not include any new openings. With regard to the function room, there was a specific concern that this room was not in its current state appropriately included within the accommodation that would be made available to customers or their entertainment. This was due to the lack of appropriate ventilation, and a concern that this would result in a rear fire door being kept opened, were the room to be used as customer accommodation. However, the Applicant at the time confirmed to the Planning Authority that he was content to install a ventilation system that would overcome this concern, and allow the room to be used by customers, without requiring any openings to the exterior for its ventilation. On this basis, the Planning Authority was content to support the proposed change of use but subject to a planning condition - specifically Planning Condition No 4 - to regulate this matter.

I would note that at the time of its determination of Planning Application 16/00753/FUL, the Planning Authority was able to take account of the fact that any proposed new openings in the walls of the function room, would require express planning consent. This was due to the Conservation Area designation. Therefore no planning condition to the effect that there should be no new openings, was reasonably or necessarily imposed to regulate this matter directly. For clarity though, there is an explicit concern within the

Report of Handling to ensure that the function room could operate without there being any inherent requirement for there to be openings open for ventilation purposes, when the room was in use.

Rather than progress matters in accordance with the explicit requirements of Planning Condition No 4 however, the Applicant has opted instead, and at his own risk, to install windows unlawfully and seek their approval (now retrospectively). The question now before the Planning Authority when assessing the proposed windows installation then, is whether or not this is an acceptable addition or revision to the operation that is approved and regulated under Planning Consent 16/000753/FUL; and specifically whether or not it is generating, or is liable to generate, any unacceptable impacts upon the environment or amenity of its neighbours which are, or were, simply not able to occur within the operation consented, and regulated, under Planning Consent 16/00753/FUL.

## ASSESSMENT

The Applicant's proposals are essentially twofold: firstly, the installation of new windows in relation to the function room; and secondly, the variation of Planning Condition No 4 attached to Planning Consent 16/00753/FUL.

The proposed windows require planning consent in their own right, because the property lies within the Conservation Area at Hawick. However, given that the elevation concerned is a well-screened rear and ground floor elevation, relating to a fairly ancillary section of the building, I am content that the proposed windows would not have any unacceptable impacts upon the visual amenities or historic value of the Conservation Area. There is reasonably no objection to the windows' appearance in terms of their impacts upon the appearance or character of the Conservation Area.

The proposed windows would also not give rise to any unacceptable overlooking impacts. They are at ground floor level, and predominantly face towards a high boundary wall.

As openable windows they are though readily capable of reducing the noise attenuation properties of the function room. Had this current proposal simply been the insertion of the windows, and had the operation of the function room not been subject to Condition No 4, it might have been possible to recommend the windows for approval subject to an informative to the effect that these works would have the potential to lessen noise attenuation relative to the function room, and to this end, that the Applicant should first establish whether or not this reduction was liable to result in any noise impacts that might be of sufficient severity as to constitute a statutory nuisance (and as such, be liable to enforcement action under environmental health regulations).

The position is not however straightforward, in that: (a) the operation of the function room is the subject of Condition No 4, and the proposed windows installation has potential to conflict with the purpose, if not the wording, of that same planning condition; and (b) the Applicant has more directly applied to vary Planning Condition No 4 so that the ventilation requirement could be met by the windows and not the ventilation units required under the aforementioned condition.

With respect to the first of these points, it is - theoretically at least - allowable that the window installation might not necessarily be incompatible with Condition No 4. This having been noted, there is a clear concern within the wording and reason for the condition, to protect the amenity of neighbouring properties from unacceptable noise nuisance. Accordingly (and despite there being no direct prohibition on new windows or openings), it would need to be established that the proposed windows could be installed without undermining or conflicting with the purpose or operation of Condition No 4. In these circumstances, it might have been appropriate to have explored with the Applicant how - perhaps more realistically, whether or not - he could still meet the full requirements of Planning Condition No 4 with the windows installed. This, though, is not the Applicant's proposal.

Ultimately, the Applicant is not concerned both to install the windows AND meet the requirements of Planning Condition No 4. On the contrary it is his clear intention that the windows should instead be installed in place of the ventilation system required under Condition No 4. As such, he has not reasonably been asked to consider how he might accommodate both proposals. However, in proposing that the windows should replace the ventilation units as the means of ventilating the function room - and in proposing that the function room should be used as customer accommodation - he is still reasonably required to

demonstrate that this substitution is at least appropriate in terms of addressing the concern that Planning Condition No 4 was imposed to address in the first place.

Given that the primary concern of Condition No 4 is that there should be no inherent requirement for the function room to be ventilated by openings in the interests of conserving as much noise attenuation as possible, the proposed window installation is clearly at cross-purposes with the purpose of the condition. The Applicant is though reasonably afforded the opportunity to demonstrate that the window installation would not cause or exaggerate any unacceptable noise impacts emanating - or liable to emanate - from the function room. On this basis, the Applicant was asked to provide a Noise Impact Assessment to establish what the noise impacts were, or were likely to be, from operating the function room as a public space in conjunction with the windows installation. Were the Noise Impact Assessment Report able to demonstrate that the windows would not directly facilitate or contribute towards unacceptable noise impacts, then it would be appropriate to allow that Planning Condition No 4 be removed or varied to allow the function room to be used while ventilated by the proposed windows. However, further to its review of the Noise Impact Assessment Report - and an independent assessment by Carmichael Acoustics - Environmental Health advises that the Noise Impact Assessment report submitted in support of the current planning application does not provide the assurance that surrounding amenity would not be detrimentally impacted by noise.

Environmental Health also documents its own experience in monitoring noise impacts at the site, and advises that it has witnessed several occasions where unacceptable levels of noise from amplified music in the function room are audible within a nearby noise sensitive receptor. It considers that the installation of the windows is objectionable on this basis.

Environmental Health is understood to advise that the installation of the windows is giving rise to a situation in which neighbouring properties are at risk of being subjected to unacceptable noise impacts (statutory nuisance). Environmental Health's detailed assessment of this matter is set out within its own second consultation response. I would note that the main concerns are in terms of noise from functions, customers' voices and musical entertainment within the function room (rather than from plant or machinery) and that the assessment rests in large part upon the Applicant's inability to provide appropriate information within the Noise Impact Assessment, to demonstrate that a statutory nuisance is not occurring, or liable to occur in the circumstance of the windows being open during a function or music performance held in the function room. Ultimately then, there is a failure to demonstrate that the insertion of the proposed windows is consistent with the operation of the function room in a way that would not have unacceptable noise impacts upon the amenity of neighbouring residential properties during a function or during a music event accommodated within the function room, and I concur with Environmental Health that the windows have further weakened the noise attenuation properties of the structure of the function room. On this basis, I am not supportive of the windows as any alternative to the ventilation system required under Planning Condition No 4. It might be added to this, that the neighbour who responded to the public consultation on this current application, is also concerned that his property is being subjected to an unacceptable level of noise from the function room.

Where unacceptable noise impacts are assessed as in fact actually occurring and in breach of Condition No 4, it is clearly not appropriate to allow the removal or variation of the condition. I therefore consider that the current application is only reasonably refused on the basis that the windows installation is contributing to (perhaps more accurately, exaggerating) unacceptable noise effects emanating from the function room and impacting surrounding residential properties. Condition 4 is not reasonably varied or removed to allow those impacts. For these reasons, the proposal is objectionable, and this planning application should be refused.

#### OTHER CONCERNS

The windows have been inserted contrary to the conformity requirement of Planning Condition No 1 of Planning Consent 16/00753/FUL. However, approval of the current application would remediate this position acceptably.

Planning Conditions Nos 2 and 3 relate - respectively, directly and indirectly - to the control of noise impacts generated by plant and machinery on the premises. As far as the current proposal is concerned, it is certainly material whether or not the installation - and operation (opening) - of the windows has resulted in a position in which the operation of the public bar is now no longer capable of complying with the requirements of Planning Condition No 2. This would though, require some ability to distinguish between the contributions of different components within any recorded unacceptable noise nuisance impacts affecting neighbouring properties.

In concluding that the proposed windows are liable to be contributing directly to an unacceptable noise impact, I am aware that in the Report of Handling on Planning Application 16/00753/FUL that it was advised therein that there was no need or concern to regulate noise impacts from either customers' voices or music, and that these impacts were appropriately regulated by other authorities other than through planning (e.g. licensing and police). However, this assessment was made in the specific context of the review and determination of Planning Application 16/00753/FUL, and explicitly and directly took account of the fact that that proposal did not include any new openings to the function room. Moreover, neighbours' amenity is afforded protection from precisely these types of noise impacts by the operation of Planning Condition No 4, which only allows for the installation of a ventilation system for the function room, a requirement that was itself explicitly imposed to avoid the need for ventilation via any existing or new openings. As such, where the proposed works would directly contradict, or undermine, the noise mitigation arrangements that were assessed as being acceptable at the time of the approval of Planning Application 16/00753/FUL, it is reasonable to factor in the implications for the achievement and operation of acceptable noise mitigation on site for music and customers' voices as well as for that generated by the operation of plant and/or machinery. (The latter are themselves directly regulated under Planning Conditions Nos. 2 and 3). As such, where proposed works are directly controlled and controllable by planning, and where these would themselves directly contribute to unacceptable impacts upon the amenity of neighbouring properties - including from voices and music - I am content that such a proposal would only reasonably be assessed as being unacceptable in the circumstances I have outlined above.

## CONCLUSION

I find that the use of the function room for the accommodation of customers and their entertainment (including music and bands) IN COMBINATION WITH the insertion of the proposed windows, has resulted in an operation of the public bar use that is liable to have, and is liable to be having, unacceptable impacts upon the residential amenity of nearby residential properties. As such, I find that the proposed windows installation is unacceptable in itself, and that the application should be refused on this basis.

Since the Applicant has not directly or otherwise addressed the concern to protect the amenity of neighbouring residential properties from noise from the function room, I am not supportive of the variation, or removal, of Planning Condition No 4. Since the requirements of the latter condition remain to be satisfied and the Applicant has not proposed any acceptable alternatives, I am content that the condition should be maintained in full.

Accordingly, I consider that both aspects of the Applicant's current proposal are objectionable for the reasons that I have identified, and set out, in this Report of Handling.

## REASON FOR DECISION :

The planning application should be refused for the following reason:

The proposal does not comply with Adopted Local Development Plan Policy HD3 in that:

(a) where the proposed windows are both openable and required to be open for the purposes of ventilation; and

(b) where the function room were capable of being used to accommodate the public bar's customers and entertainment without there being any approved alternative ventilation system in operation to avoid the need to open the windows (or fire exit) when the function room is occupied by customers (that is, were the function room to be occupied contrary to the explicit requirements of Planning Condition No 4 attached to Planning Consent 17/01368/FUL);

then this would give rise to a set of circumstances in which the amenity of existing neighbouring residential properties would be liable to be subject to adverse impacts; specifically in terms of them being liable to be subject to disturbance from unacceptable noise nuisance impacts emanating from within the function room. Further, the Applicant's Noise Impact Assessment has neither provided any substantive evidence to the contrary nor has it identified any effective alternative scheme of mitigation, which might reasonably be employed to address these impacts appropriately.

**Recommendation:** Refused

- 1 The proposal does not comply with Adopted Local Development Plan Policy HD3 in that:
  - (a) where the proposed windows are both openable and required to be open for the purposes of ventilation; and
  - (b) where the function room were capable of being used to accommodate the public bar's customers and entertainment without there being any approved alternative ventilation system in operation to avoid the need to open the windows (or fire exit) when the function room is occupied by customers (that is, were the function room to be occupied contrary to the explicit requirements of Planning Condition No 4 attached to Planning Consent 17/01368/FUL);then this would give rise to a set of circumstances in which the amenity of existing neighbouring residential properties would be liable to be subject to adverse impacts; specifically in terms of them being liable to be subject to disturbance from unacceptable noise nuisance impacts emanating from within the function room. Further, the Applicant's Noise Impact Assessment has neither provided any substantive evidence to the contrary nor has it identified any effective alternative scheme of mitigation, which might reasonably be employed to address these impacts appropriately.

**“Photographs taken in connection with the determination of the application and any other associated documentation form part of the Report of Handling”.**