

**REPORT TO:** Planning Committee  
**MEETING DATE:** 7 June 2022  
**BY:** Executive Director for Place  
**SUBJECT:** Application for Planning Permission for Consideration

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*Note - this application was called off the Scheme of Delegation List by Councillor Findlay for the following reasons: To allow the Committee to decide whether an increase in noise levels and neighbour disturbance is acceptable in a residential and conservation area.*

Application No. **22/00266/P**

Proposal Change of use of garden area to outdoor eating/seating area  
(Retrospective)

Location **40 Main Street  
Gullane  
EH31 2AL**

Applicant Mr L Crolla

Per Format Design

**RECOMMENDATION** Consent Granted

## **REPORT OF HANDLING**

### **PROPOSAL**

This application relates to the restaurant named 'Main Course' which occupies the ground floor premises of a two storey and attic terraced building located at the west end of Rosebery Place on the south side of Main Street in Gullane. The first floor component of the building is in use as a residential flat. The building is located within a predominantly residential area as defined by Policy RCA1 of the adopted East Lothian Local Development Plan 2018 and it is also within Gullane Conservation Area.

The premises fronts onto the public road of Main Street to the north. To the west is the residential property named 'The Saughs', to the east are the ground floor commercial properties of Rosebery Place with flats above and to the south of the premises is the rear garden of the neighbouring house named 'Kirklands'.

In October 2013, planning permission (Ref: 13/00643/P) was granted for the change of use of the premises from a delicatessen (Class 1) to restaurant (Class 3) and for the extension to an existing chimney pot on the rear (south) elevation of the building. Planning permission 13/00643/P has been implemented for some time.

In January 2015, planning permission (Ref: 14/00925/P) was granted for alterations to shopfront and installation of awnings. Planning permission 14/00925/P has been partly implemented as the alterations to the frontage of the building have been undertaken.

In March 2017, planning permission (Ref: 16/01027/P) was granted for a single storey flat roofed extension onto the rear (south) elevation of the building. Planning permission 16/01027/P has been implemented and the extension now forms part of the built form of the building.

In February 2021, planning permission (Ref: 20/01391/P) was granted for alterations and extension to the building, formation of hardstanding area and erection of shed and fencing (Part Retrospective).

In March 2021, the Council refused a certificate of lawfulness (Ref: 20/01403/CLU) for the use of the rear garden area of the building as a restaurant (Class 3) use for the following reason:

'It has not been demonstrated that the lawful use of the rear garden area has changed from a domestic garden associated with the first floor flat of 41 Main Street to an outdoor drinking/dining area used in association with the restaurant use operating from 40 Main Street. Neither has it been demonstrated that the rear garden has been in use as an external dining/drinking area for a period of 10 years or more. Therefore the rear garden area of the building of 40/41 Main Street cannot be lawfully used as an external dining/drinking area in association with the existing restaurant use operating from the ground floor premises of the building'.

The applicant appealed against the decision to refuse a Certificate of Lawfulness to the Scottish Government's Directorate of Planning and Environmental Appeals on 25th March 2021. On 15th June 2021 the Reporter, appointed by the Scottish Ministers to determine the appeal, dismissed the appeal concluding that a certificate of lawfulness should not be granted.

Planning permission is now retrospectively sought for the change of use of the rear garden area for use as an outdoor seating, eating and drinking area in association with the existing restaurant use operating from the ground floor premises of the building.

Through separate application 22/00267/P planning permission is sought for Erection of covered roof area (Retrospective). A separate report on application 22/00267/P is, at this time, on the Council's Scheme of Delegation List.

## **DEVELOPMENT PLAN**

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) and the adopted East Lothian Local Development Plan 2018.

There are no policies of the approved South East Scotland Strategic Development Plan

(SESplan) relevant to the determination of this application. Policies RCA1 (Residential Character and Amenity), CH2 (Development Affecting Conservation Areas), DP2 (Design) and T2 (General Transport Impact) of the adopted East Lothian Local Development Plan 2018 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.

## **REPRESENTATION**

Twenty objections to this application have been received. The main grounds of objection are summarised below:

- (i) the use of the garden area as an outdoor seating, eating and drinking area will encourage, and increase, outdoor noise which will be a nuisance to neighbouring residential properties;
- (ii) the use of the garden area as an outdoor seating, eating and drinking area will exaggerate the spread of cooking smells and cigarette smoke;
- (iii) there are noise and smells emanating from the kitchen of the restaurant which is supposed to have a self-closing door but the door is always left open;
- (iv) the rear garden was not intended to be used as an outdoor seating area, eating and drinking area and was not included in the original 'change of use' application when the building became a restaurant in 2013;
- (v) there are bright lights which keep the outdoor space lit at night which impact on the amenity of a neighbouring residential property;
- (vi) the hardsurfaced area created around the garden space being used as an outdoor seating, eating and drinking area amplifies noise considerably to the detriment of neighbouring residential properties;
- (vii) the use of the rear garden area as an outdoor seating area impacts on the privacy of neighbouring residential properties; and
- (viii) if approved, the use of the outdoor seating, eating and drinking area should have strict conditions to ensure that alcohol is only served with food within the garden area and that the use of the garden area should only operate during specific timeframes throughout the day.

## **COMMUNITY COUNCIL COMMENTS**

Gullane Area Community Council, as a consultee to this application, state that this application has the potential to cause noise and odour nuisance to neighbouring residential properties and, should planning permission be approved, that consideration be given to imposing conditions that could usefully be applied to limit any noise/odour concerns.

## PLANNING ASSESSMENT

To support businesses operating within the restrictions on social distancing during the COVID-19 pandemic the Scottish Government's issued guidance to local planning authorities in respect of outdoor dining at eating and drinking establishments in Scotland. The Chief Planner's letters of March and May 2020 included, amongst other matters, guidance for local planning authorities to, where possible to take a relaxed and supportive approach to local businesses who had made changes to their business practices and to avoid taking planning enforcement action which would result in unnecessary restrictions on those businesses during the COVID-19 pandemic. However, in November 2021 the Chief Planner issued further guidance which informed that this period of planning relaxation would be withdrawn by the end of September 2022 and that those business who have been benefitting from being allowed to operate temporarily without necessary planning permissions should apply for, and obtain, retrospective permissions before the end of September 2022 if they wish to continue beyond that point.

In accordance with the advice from the Scottish Government, the Council as Planning Authority took a relaxed and supportive stance in respect of the large open-sided marquee that was erected by the applicant within the garden area of the building and which was used as an external drinking/dining area in association with the restaurant use of the ground floor premise of 40 Main Street. That marquee has since been removed to facilitate the position of the extension, the subject of planning permission 20/01391/P.

As established through the determination of the certificate of lawfulness ref: 20/01403/CLU issued in March 2021 the lawful use of the rear garden area remains as a domestic garden belonging to the first floor flat of 41 Main Street. However, the applicant now owns both the first floor flat of 41 Main Street and the ground floor restaurant premise of 40 Main Street and has operated the rear garden area as an outdoor seating, eating and drinking area in association with the restaurant use of 40 Main Street since July 2020.

This planning application now seeks to formalise the use of rear garden area as a permanent outdoor eating/drinking and seating area in association with the existing restaurant use of the ground floor premises of the building.

Policy RCA1 of the adopted East Lothian Local Development Plan 2018 states that the predominantly residential character and amenity of existing or proposed housing areas will be safeguarded from the adverse impacts of uses other than housing. Development incompatible with the residential character and amenity of an area will not be permitted. Proposals for new development will be assessed against appropriate local plan policies.

The garden area, the subject of the change of use, is located immediately to the rear of the existing restaurant named 'Main Course'. It measures some 100 square metres in area and is fully enclosed along its south and west boundaries by a high stone wall and otherwise by a solid timber fence along its east boundary. Consequently it is not visible from a public place. In any views from within neighbouring properties the garden has a visual relationship with the building of 40/41 Main Street. Therefore, the use of the garden as an outdoor seating, eating and drinking area in association with the existing restaurant use of the premises of 40 Main Street is a natural extension of that well-established business, within the village of Gullane. The tables and chairs sited within the rear garden area, and which are used as seating areas, are not visible from a public place and do not appear as harmfully dominant or intrusive features within their setting. Therefore the change of use of the rear garden to an outdoor dining and drinking area

and the placing of tables and chairs within it is not inappropriate to its setting and does not harm the character and appearance of this part of the Gullane Conservation Area.

By virtue of their positions and orientations and due to the enclosures of the rear garden of the building, the use of the rear garden as an outdoor eating and drinking area and the erected tables and chairs do not allow for harmful overlooking or overshadowing of any neighbouring residential properties.

The **Council's Senior Environmental Health Officer** advises that he is aware of representations made from a neighbouring residential property concerning noise and lighting associated with the proposed use of the rear garden area as an outdoor eating/seating area. He also advises that Environmental Health cannot confirm that noise arising from patrons will, or will not, significantly impact upon residential amenity because noise associated with external drinking/dining areas is subjective and will vary from hour to hour and day to day and depend largely on the conduct of the persons using the external drinking/dining area and also upon effective management of such behaviour and associated noise by management. Therefore whilst he does not object to the application, to safeguard the residential amenity of the occupants of neighbouring residential properties he recommends that the following conditions be imposed, on any grant of planning permission:

- (i) the use of the outdoor seating, eating and drinking area shall be restricted to a temporary period of one year from the date of a grant of planning permission to allow any complaints that may arise due to noise to be monitored and assessed;
- (ii) the use of, and access to/from, the outdoor seating, eating and drinking area shall only be permitted between the hours of 1100-2000 on any day; and
- (iii) the design and construction of any proposed artificial lighting within the outdoor seating, eating and drinking area should take account of the Guidance contained within Annex 1 to Appendix 2 of Scottish Government Guidance to Accompany the Statutory Nuisance Provisions of the Public Health etc (Scotland) Act 2008. Accordingly, within an E3 Zone, (i.e. medium district brightness area such as small town centres or urban locations) light trespass (onto windows) of neighbouring residential properties, measured as Vertical Illuminance in Lux, (Ev), shall not exceed 10 between the hours of 0700-2300 and shall not exceed 2 between the hours of 2300-0700.

The above controls can reasonably be secured as conditions imposed on a grant of planning permission and subject to those conditions the use of the proposed outdoor seating, eating and drinking area would not, in its locational context within this predominantly residential area, and associated as it is with the existing and authorised restaurant use of the building of 40 Main Street, cause unacceptable harm through noise nuisance and disturbance to the amenity of neighbouring residential properties. In addition to these recommended conditions, it would also be prudent to impose further conditions to ensure that no public entertainment, amplified music, amplified vocals or live music be played in the outdoor seating, eating and drinking area and that any doors to the rear garden are self closing doors. Accordingly, and subject to those aforementioned planning controls, the retrospective change of use of the rear garden area to an outdoor seating, eating and drinking area does not conflict with Policy RCA1 of the adopted East Lothian Local Development Plan 2018.

The **Council's Road Services Officer** advises that this retrospective application is for an outdoor seating area for customers of the restaurant with a maximum capacity of 32 covers, which would be in addition to the main indoor seating area which currently has a capacity of 60 covers.

He states that the restaurant does not have a dedicated on-site car park but that there is

on-street parking adjacent to the site with a daytime restriction of 90 minutes maximum stay (Monday to Saturday between the hours of 0830-1730). The **Council's Road Services Officer** states that the proposals represent a theoretical increase in capacity proportionately but, given that it is outdoor seating that would be seasonal to a large extent, the number of visitors typically at the restaurant would increase to a lesser degree. He also advises that other commercial properties nearby are mainly focused towards daytime uses so some increases in parking demand associated with a restaurant use, being focused more towards the evening, is not likely to be problematic in terms of overall parking demands on-street in the area. Accordingly, the **Council's Road Services Officer** raises no objection to this application being satisfied that the proposals do not conflict with Policy T2 of the adopted East Lothian Local Development Plan 2018.

On these considerations, the proposals are consistent with Policies RCA1, CH2, DP2 and T2 of the adopted East Lothian Local Development Plan 2018 and with Scottish Planning Policy: June 2014. Therefore, the proposals are considered to be in accordance with the provisions of the stated relevant Development Plan policies and there are no material considerations which outweigh the proposal's accordance with the Development Plan.

#### CONDITIONS:

- 1 Planning permission is granted for a temporary period of 1 year, beginning from the date of this grant of planning permission, and after which time, unless planning permission is granted, the use of the rear garden as an outdoor eating and drinking area shall cease and the tables and chairs shall be removed from it.

Reason:

To enable the Planning Authority to monitor the noise impact of the outdoor seating, eating and drinking area, in the interests of the amenity of nearby residential properties.

- 2 The outdoor seating, eating and drinking area hereby approved shall only be used between the hours of 11:00am and 8:00pm, on any day of the week.

Reason:

To ensure that the use of the outside seating, eating and drinking area does not cause nuisance to neighbouring residential properties to an unacceptable level.

- 3 Any light trespass (onto windows) of neighbouring residential properties, as a result of the proposed lighting at the premise, measured as Vertical Illuminance in Lux, (Ev), shall not exceed 10 between the hours of 0700-2300 and shall not exceed 2 between the hours of 2300-0700.

Reason:

In the interests of protecting the amenity of neighbouring residential properties in the area.

- 4 There shall be no public entertainment, amplified music, amplified vocals or live music played in the outdoor seating, eating and drinking area hereby approved.

Reason:

To ensure that the use of the outside seating, eating and drinking area does not cause nuisance to neighbouring residential properties to an unacceptable level.

- 5 Within 1 month of this grant of planning permission any door(s) providing access to the outdoor seating area from the licensed premises of The Main Course restaurant shall be made self-closing, and that door(s) shall remain self-closing thereafter unless otherwise approved in writing by the Planning Authority.

Reason:

In the interests of safeguarding the amenity of neighbouring residential properties.