

NORTH DEVON COUNCIL

Minutes of a meeting of Licensing and Community Safety Sub Committee C held at Node Cowork on Friday, 28th April, 2023 at 10.00 am

PRESENT: Members:

Councillor Tucker (Chair)

Councillors Chesters and Walker

Officers:

Public Protection Manager, Legal Officer, Environmental Protection Consultant, Police Licensing Officer and Corporate and Community Services Officers

27. APPOINTMENT OF CHAIR

The Corporate and Community Services Officer requested a nomination for Chair.

RESOLVED that Councillor Tucker be appointed Chair of this Sub-Committee C.

28. APOLOGIES FOR ABSENCE

There were no apologies for absence.

29. DECLARATIONS OF INTEREST

There were no declarations of interest announced.

30. EXCLUSION OF PUBLIC AND PRESS RESTRICTION OF DOCUMENTS

RESOLVED:

(a) that under Section 100A (4) of the Local Government Act 1972, the public and press be excluded from the meeting for the discussion of Appendix M of the agenda as it contains exempt information namely information relating to any action taken or to be taken in connection with the prevention, investigation or prosecution of crime; and

(b) that all documents and reports relating to Appendix M be confirmed as “Not for Publication”.

31. APPLICATION FOR THE REVIEW OF A PREMISES LICENCE: THE WOODPECKER BAR AND KITCHEN, WEST DOWN, DEVON,

EX34 8NU

The Sub-Committee considered a report by the Public Protection Manager (circulated previously), regarding a premises licence review application in respect of the Woodpecker Bar and Kitchen, West Down, Devon, EX34 8NU.

Also present:

Mr K and Mrs D Hayes, the applicants.

Mrs T Pearce, Designated Premises Supervisor (DPS) and Premises Licence Holder with her sister Lyn Constantine in support.

Mr P Butler, Police Licencing Officer.

Mr D Morgan, Environmental Protection Consultant.

The Chair introduced himself and invited those present to do the same.

The Legal Officer outlined the hearing process.

The Public Protection Manager presented her case and highlighted the following:

- Appendix A of the report showed the existing premises licence for the Woodpecker Bar and Kitchen.
- Paragraphs 1.2.1 and 1.2.2 detailed the Licensing Objectives the Applicants alleged to being undermined, namely the Prevention of Public Nuisance and the Prevention of Crime and Disorder.
- The Police representation in support of the review application was detailed at Appendix M of the report, which added public safety as an additional licensing objective relevant to the hearing. The documents at Appendix M were not for publication and were restricted to the Sub-Committee members, the Applicants and the DPS.
- Appendix C of the report was the representation made by the DPS in response to the applicant as well as the findings of an assessment of music noise at the premises undertaken by an independent company.
- Positive representations in support of the premises were detailed in Appendices D to L inclusive.
- Planning authority observations were detailed in Appendix O of the report.
- Appendix P were internal photographs of the licensed premises and external photographs showing location of nearby property, the Public Protection Manager explained what each photograph was showing.
- Appendix Q showed an aerial view of the location of the premises in relation to the Applicants property as well as a map detailing the location of the premises alongside the A361.
- Paragraph 4.3 of the report listed the current licensable activities authorised by the licence of the Woodpecker Bar and Kitchen.
- The Public Protection Manager highlighted that the activities of live and recorded music were currently not licensable due to their hours of operation, but despite this a review could be sought. She explained that the Sub-Committee had powers to apply conditions relevant to the live and recorded music, as outlined in Paragraph 4.8 of the report. Moreover, it was highlighted

that if imposing conditions a relevant statement would need to be inserted into the licence to the effect that Section 177A of the Licensing Act 2003 would not apply.

- The Public Protection Manager advised the Sub-Committee that they should be mindful to only consider matters that related to Licensing and not to consider any Planning issues or civil matters. Examples were given of ownership of a bank, access issues and siting of cockerels. Any information provided in relation to these areas should be treated purely for context and have no bearing on the decision which must be based upon the licensing objectives.
- Paragraph 5 of the report listed the relevant licensing policy and statutory guidance considerations.
- Paragraph 2 listed the actions the Sub-Committee could choose to take in relation to the review of the premises licence.
- Paragraph 3 gave reasons for the recommendations made at Paragraph 2.

The Applicants were asked to present their case. The Sub-Committee confirmed that they had read the Applicant's statement.

The Applicants presented their response to the representations published in the agenda as follows:

- The reason this review had been requested was to enable Mr and Mrs Hayes the chance to regain their normal family life.
- A business of this nature could be run courteously without the issues of loud music.
- The DPS's husband was the main cause of aggressive behaviour and it was not their intention to stop the business running they would just appreciate some consideration.
- Initially contact had been made to the ward Member seeking advice on what options were open to them but since that contact, no Councillors had been approached or involved in their case.
- They were unaware that the noise complaint case had been closed, noise issues continued.
- They were very happy where they lived and had no issues with the A361 nearby and had indeed eaten at the premises under the previous ownership. Living next door to an eatery should be a positive.
- Their property was 50 meters away from the licensed premises.
- Sound recordings highlighted it was a rural setting but music could be heard over the sound of birds singing.
- The owner of the licensed premises had offered to purchase their property, at a lower than market value.
- In the August of 2022 a live music event held outdoors had ended a lot later than stated by the DPS. There was social media posts to verify the lateness of this event ending.
- The accusation of harassing the DPS and her husband had not been backed up with any evidence and this was requested.
- A lot of matters had not been dealt with in a timely manner – the Applicant confirmed the relevant authorities had issued apologies in relation to this.

The Applicants spoke with regard the placement of gabion baskets etc. The Chair reminded Mr Hayes that non-licensing issues could not be considered at this hearing.

- The sound recordings made by Mr Hayes had been uploaded to the Noise App. No evidence had been provided over the claims that the sound recordings were exaggerated.
- The Noise assessment that was completed in 2022 and detailed at Appendix C of the agenda didn't appear to have given consideration for the rural nature and location of the premises – the guidance gives consideration for clubs and busy town centre locations.
- The closest point of the property to the premises was 30 meters and the furthest 50 meters sounds should not be able to be perceived as audible at these distances.
- Music from the premises could still be heard in the living room over the TV.
- The representations in support of the premises are from residents not local to the premises.
- The decisions taken by the Applicants were joint decisions and not ones taken acting alone.
- With the consent of the Chair a 15 second video clip was played to the Sub-Committee showing Mr Pearce removing a sign and declaring that the cameras would be next.

Members were invited to ask any questions.

The Applicant did not have any witnesses.

Mrs Pearce, the DPS, presented her case.

Mrs Pearce highlighted the following:

- Concern over publication of part B material pertaining to her husband, and she queried who had access to this material. (It was explained by the Legal Advisor that solely parties to this hearing had access to this material, and that it was necessary for each party to have access to the same material, in order to ensure a fair hearing and that this material would be collected on close of the meeting. Moreover, Mr and Mrs Hayes acknowledged that this would not be discussed outside of the hearing).
- Mr J Pearce had signed a Community Protection Notice (CPN), which stated that he had to behave appropriately. The Police had decided to not charge her husband and she felt the CPN was working.
- The hay bales had been removed; they had been put in place to try to help dampen the noise.
- The bins had been moved so as to be furthest away from the neighbours property.
- PC Roger Copeland had met with Mrs Pearce and suggested mediation between the parties.
- It had been Mr Hayes who had declined the mediation.

- To address the noise complaints that speaker in the premises had been moved and affixed to a wall. A volume level had been found whereby the noise could not be heard outside.
- The marquee had been removed and there were no plans to re-install it.
- Live band events were scheduled for once a month or even 6 weekly and stopped at 10pm.
- Would welcome having a Noise Management Plan (NMP) in place.

The DPS did not have any witnesses.

Mr Butler, the Police Licensing officer was asked to present his case.

Mr Butler highlighted the following:

- He outlined his experience and background.
- He had received the application for the Woodpecker Bar and Kitchen on 21 May 2021 with a due date of 15 June 2021. After a visit to the premises and a meeting with Mrs Pearce as DPS on 4 June 2021 proposed conditions were emailed to her.
- Mrs Pearce emailed back on 10 June 2021 accepting the conditions.
- The proposed conditions were then passed onto North Devon Council.
- With regard to concerns raised by Mrs Pearce in respect of the Part B material, he sited that his colleagues, Inspector Rich Preston (sector Inspector) and Police Sergeant Malcolm Kirk (NTL) were requested to comment on the Police log that was submitted as part of the agenda at Appendix M, neither had any concerns with the information being presented as long as it was restricted.

The Police had no witness.

Mr Dave Morgan, responsible authority, Environmental Protection presented his case.

Mr Morgan highlighted the following:

- He had been asked to review the case in the absence of the two previous North Devon Council officers.
- He had concluded that music noise had caused and would likely always cause a noise disturbance at the neighbouring property.
- Mr Flynn had received the noise recordings and on visiting the property had witnessed the noise intrusion first hand.
- Satisfied that a noise issue had to be dealt with a Community Protection Notice (CPN) was issued to bring the noise under suitable control.
- Subsequently changes had been made at the premises, namely that the speaker had been moved and affixed to a wall. A consultant had been employed to assess the situation and to set a level of sound so as not to cause disturbance.

- When a significant change happens a line is drawn under the complaint. Going forward if there were still issues a new case would have to be started with the process of investigation starting from scratch.
- Being a rural setting the residual background noise would be quiet so any outdoor/live event would cause disturbance to the neighbouring property.
- In defence of Environmental protection officers at North Devon Council it was a very difficult job to balance the situation when there was no background noise available to mask music noise. A licensed premises would never have no sound emitting.
- It was not acceptable to be able to hear music playing over the TV indoors but there had to be acceptance that there would be noise disturbance form time to time.
- Improved control at the premises was required and this would be challenging.
- A Noise Management Plan would be appropriate. There was a large variable between a speaker fixed to a wall indoors and live music outside once a month.
- Mr Morgan suggested that the Environmental Protection Team would be more than happy to help the DPS close this gap.

In response to a question, the Public Protection Manager confirmed there was only one speaker inside the premises and in Appendix P of the agenda, on page 103, a photo showing this speaker could be seen.

The Public Protection Manager advised the Sub-Committee that on page 24 of the agenda a plan of the licensed premises was presented for which the licensed area was edged in red. She highlighted that the exemptions added by way of the Live Music Act related to the licensed area but that there was a 'workplace exemption' relevant to live amplified music in the carpark, again between 8am and 11pm, but cited it should be noted by Members that the workplace exemption did not apply to recorded music. The marquee and the double decker bus for example were situated outside of the licensed area. As such, she suggested that in future proofing licence, that the Premises Licence Holder be asked about the siting of a double decker bus, whether this would be used by patrons and the large marquee that was positioned in the carpark which Mrs Pearce had just described as being removed, but which was present during the recent visit to the licensed premises

In response Mrs Pearce explained that the double bus was a project not linked to the licensed premises and this was the only place available to park it at this time, but that it would be removed in due course. She said the marquee had currently been removed, and there were no plans to re-erect it at this stage due to the concerns raised by the Planning Authority.

Mr Morgan had no witness.

In her summing up the Public Protection Manager cited that the applicant's had alluded to the fact that noise should be inaudible. She warned members about imposing any condition referring to inaudibility and read from page 7 of Journal of Licensing (the Journal of the Institute of Licensing) No. 24 July 2019 "In terms of noise nuisance, the types of conditions that have been found to be unenforceable

include references to noise being “inaudible” at the “nearest noise-sensitive premises”. This is not least because a test of “audibility” is hopelessly dependent on the person seeking to “hear” the noise; humans range in their ability to hear noises, and so “audible” is usually considered to be an unacceptably subjective standard, and because merely being able to hear a noise does not make it a nuisance. Indeed, in *R v Developing Retail Ltd v East Hampshire magistrates’ Court* [2011] EWHC 618, the court held such a condition to be “so vague as to be unenforceable” both as to the phrase “nearest noise-sensitive premises” (which was not defined) and as to the requirement that noise be “inaudible” there”.

The Public Protection Manager continued her summing up by reiterating to the Sub-Committee Members the recommendations shown at paragraph 2 of the report. She also passed out copies of the Pool of Licensing Conditions, Licensing Act 2003, drawn up by North Devon Council and read paragraphs 2.1 to 2.9 from the report, she finished by stating that not all the evidence submitted related to the licence considerations, and she reminded members that this could not form part of their consideration.

No other parties summed up.

RESOLVED that everyone be excluded from the meeting with the exception of Members, the Solicitor and Corporate and Community Services Officer in order for the Sub-Committee to receive legal advice in accordance with paragraph 5 of Schedule 12A of the Local Government Act 1972.

RESOLVED that everyone be re-admitted to the meeting.

The Chair requested the Clerk to read the proposed decision.

The Legal Officer checked with the Public Protection Manager that she was satisfied with the proposed decision.

The Public Protection Manager suggested that wording be amended to allow for activities be specified outside of the licensed area e.g. a marquee in the carpark, and that the condition pertaining to the timing of waste/recyclable collection be amended to ensure that it facilitated the ability for collection times by external contractors.

The Sub-Committee requested that following concerns about the timing of when rubbish could be placed in the outdoor bins, the timing be removed and the condition instead worded in terms of the location of where the bins should be placed.

The Legal Officer checked with the Premises DPS that she understood the proposed decision.

The Legal Officer checked with the Applicants that they were happy with the proposed decision.

The proposed decision as amended was voted on and approved:

RESOLVED that the premises licence in respect of the Woodpecker Bar and Kitchen, West Down, Devon, EX34 8NU has the following conditions attached to the Licence modified:

The following conditions to come into effect on Tuesday 9th May 2023.

To address the Prevention of Public Nuisance:

- (a) Under Section 177A of the Licensing Act 2003 on review of a premises licence a Licensing Authority may add a condition relating to live and recorded music as if the music were regulated entertainment. It should be noted that if this takes place the Licensing Authority must place a statement on the premises licence that Section 177A does not apply.
- (b) With the exception of 'background' music played inside the premises at a volume that does not present a risk of impacting neighbouring residents, no live or recorded music shall be played at the licensed premises and in association with Licensable activities of The Woodpecker Bar & Kitchen, until such time as a Noise Management Plan (NMP) has been submitted to, and received written approval from, the Licensing Authority.
- (c) The NMP shall set out a scheme of restrictions, mitigation measures and management procedures for effectively controlling noise generated as a result of the licensed activities. The NMP shall be sufficient to prevent public nuisance being caused by significant noise impacts at any residential property in the vicinity.
- (d) For the avoidance of doubt, the judgement of what amounts to a significant noise impact shall include consideration of the character of the area; whether noise is likely to be audible at residential properties and if so, the times and frequency with which audible noise can occur; any aggravating circumstances such as where music may contain a noticeable low frequency bass beat; existing background noise levels including those that are representative of typically quieter times.
- (e) The NMP shall identify any higher risk circumstances such as if live music events will occur and describe the specific restrictions, mitigation measures and management procedures that will be implemented to avoid significant impacts during these circumstances.
- (f) The NMP shall be prepared having regard to relevant standards, guidance and best practice.
- (g) Following written approval and thereafter, the NMP shall be implemented in full and as approved.
- (h) In the interim (until such time as a NMP be approved) all external doors and windows shall be kept shut at all times when the premises are open/during regulated entertainment. Doors may be opened for normal entrance and egress of people but must be shut immediately after.
- (i) All waste shall be properly presented and placed out for collection and remain at the front of the premises to the right of the entrance doors in the part of the premises adjacent to the A361, and on the opposite side of the car park to Hills View House; and

To address the prevention of crime and disorder:

- (j) The Designed Premises Supervisor must be in attendance at the Licensed Premises at all times whilst her husband Mr J Pearce is present at the Licensed Premises.

All agendas and reports were collected for appropriate confidential disposal.

Chair

The meeting ended at 1.19 pm

NOTE: These minutes will be confirmed as a correct record at the next meeting of the Committee.