

Mon 03/04/23 18:50

Dave M <[REDACTED]@[REDACTED].com>

Review of Premises Licence, The Woodpecker Bar and Kitchen, West Down, Ilfracombe

Dear Licensing,

**Responsible Authority Representation - Environmental Protection
Licensing Act 2003 - Review of Premises Licence, The Woodpecker Bar and
Kitchen, West Down, Ilfracombe
Premises Licence - PLWA0970
EP Ref: WK/202209341**

I have been asked to provide representation comments on behalf of North Devon Council's Environmental Protection service in relation to the above review of premises licence application .

1 Grounds for Review

Mr and Mrs Hayes raise two grounds for reviewing the Licence as follows:

"Since spring 2021 and the opening of the Woodpecker we have endured loud music being played at varying times of day and night and unreasonable, aggressive and intimidating behaviour."

These grounds relate to two of the licensing objectives - the prevention of public nuisance; and the prevention of crime and disorder.

2 Environmental Protection Representation

Environmental Protection is a responsible authority with respect to the prevention of public nuisance under the Licensing Act.

I have prepared these comments following a review of noise complaint and investigation records held by Environmental Protection with respect to the Woodpecker Bar and Kitchen. I have also reviewed the current Premises Licence and familiarised myself with the locality of the premises.

3 Statement of Qualifications and Experience

I am an accredited member of the Institute of Environmental Health and am currently employed as an Environmental Health Consultant. I hold a B.Eng.(Hons) degree in Environmental Engineering and an M.Phil. degree in Environment and Development. In 1999 I obtained the Certificate of Competence in Environmental Noise Measurement from the Institute of Acoustics. I have more than 20 years experience of dealing with noise related issues including the investigation of complaints of statutory noise nuisances and complaints about licensed premises noise. I previously managed a district council noise service for more than 10 years.

4 Environmental Protection Involvement - Noise Complaints

North Devon Council's Environmental Protection service has received a number of complaints about noise from the Woodpecker Bar and Kitchen since it opened in 2021.

The logged entries for each complaint investigation are numerous. The following is intended to provide a summary of each complaint, including a selection of the most relevant logged entries, investigation findings and actions as I see it:

Please note that the complaints are listed in order of date closed rather than date started so that the most recent actions come last.

4.1 Noise Complaint: Received 1 September 2021

NDC Ref: WK/202104606

Complainant: Mrs Hayes, Hills View House, West Down

Investigating Officer Ronan Flynn. (Ronan has now left the Council)

On 1 September 2021, Mrs Hayes contacted the EP service to complain about:

"Very loud music being played at various and random times of day from 7.30am to after 11pm"

On 10 September Mr Flynn visited the Woodpecker premises and spoke to the "bar manager", Helen. The file note states he made Helen aware of the complaint and also updated Mr Pearce (partner of the Licence holder Mrs Pearce) on the phone later the same day. .

The complainant subsequently contacted Mr Flynn on a number of occasions to complain about noise (music and bottle emptying). Mrs Hayes described a live music event held on 9 October 2021 under a Marquee sited in the car park area as "ridiculously loud".

On 22 October 2021, Mr Flynn and another Council Officer met Mr Pearce on site to discuss the complaints. The file note indicates that Mr Flynn gave advice about an acceptable level of background music noise and discussed the other aspects of the complaint with Mr Pearce.

The complaint was closed on 9 November 2021 pending further contact from the complainant.

4.2 Noise Complaint: Received 16 May 2022

NDC Ref: WK/202201330

XXXXXX, Foxhunters Lodge, West Down

Investigating Officer Ronan Flynn

On 16 May 2022, XXXXXX contacted the EP service to complain about:

"Loud music"

The complainant referred to noise during a music event taking place at the licensed premises on Friday 6 May 2022. The file notes indicate the complainant had visited the licensed premises during the event to ask for the noise to be reduced and had subsequently messaged Mrs Pearce. The message to Mrs Pearce was copied to the Council and included the following statement:

"After I left the pub, the music was turned down a notch, but was still very loud with an extremely bassy beat. I recorded the music from my open bedroom window to send it to the noise App. and the Council or Environmental Health. At 23.48 the music still continued, at 23.58 the music was still playing at the same volume, but I can now hear people shouting and 'whooping.'"

Complaint case moved over to case WK/202200278 (see below)

The 7 October 2022 file note records a contact from XXXXX confirming this complaint related solely to the event on 6 May 2022. No further complaint entries are logged for this complainant.

4.3 Noise Complaint: Received 19 August 2022

NDC Ref: WK/202204330

Complainant: Mrs Hayes, Hills View House, West Down,

Investigating Officer Ronan Flynn

On 19 August 2022, Mrs Hayes contacted the EP service to complain about:

"Various noisy activity, including inconsiderate use of bottle bin, tractor left idling, cockerels placed near house."

On 19 August Mr Flynn contacted Mrs and Mr Pearce to make them aware of the details of the complaint. Subsequent file notes indicate the issues complained about were resolved to some degree.

The case was closed on 21 October 2022 pending further complaint.

4.4 Noise Complaint: Received 8 April 2022

NDC Ref: WK/202200278 and WK/202204482

Complainants: Mr and Mrs Hayes, Hills View House, West Down

Investigating Officer Ronan Flynn

On 8 April 2022, Mr and Mrs Hayes contacted the EP service to complain about:

"Increase in the volume of music being played in recent weeks, now that the weather is improving. Almost daily, music is played so loudly that we can hear it across our garden and also within our home."

The complainants email to Mr Flynn stated:

"Almost daily, music is played so loudly that we can hear it across our garden and also within our home. We are starting to take note of these instances again, and have noted days and times and have some sound recordings, although they never seem to record the music as loudly as we hear it."

The file entry for 19 April states Mr Flynn *"Reviewed 3 recordings submitted by COMP with their email of 08/4; they indicated music being heard at high volume with very clear vocals at Comp's house - about 22:30 Fri 01/4 and about 19:40 Fri. 25/3."*

On 19 April Mr Flynn emailed the complainants with details of a third party 'Noise App' for making recordings of noise which could then be submitted to the Council for consideration..

- Written Warning Issued 22 April 2022

On 22 April Mr Flynn sent a written warning to Mrs Pearce, the Premises Licence Holder and DPS, under the Community Protection Notice (CPN) provisions of the Anti-social Behaviour, Crime and Policing Act 2014. The warning letter referred to recent further reports of excessive noise caused as a result of amplified music that is *"so loud it can be heard intrusively at nearby residential property"*.

The letter requested that, with immediate effect, Mrs Pearce *"Control the sound level of music played at the premises so that it does not cause annoyance or disturbance to the ordinary reasonable person on other property,"*

- Further Complaints Received

File notes made by Mr Flynn between 26 April and 30 May indicate that he reviewed noise recordings received from the complainant relating to noise occurring between 24 April and 28 May 2022. A total of 49 recordings are noted as received by this date. The file entries indicate that music noise had been recorded on various days of the week including a Tuesday, Thursday, Friday and Saturday.

A file note from 30 May 2022 provides Mr Flynn's observations of what he heard when listening to 4 of the recordings:

- *Fri 27/5 at 4.57pm: music appears to be intrusive - as heard on Comp's patio; bird song & wind noise.*
- *Fri. 27/5 at 5.27pm: still on Comp's patio; music seems a bit louder - some strong bass; bird song, traffic and wind noise in background - but music still audible over noise of traffic (sounds like trucks at times).*

- Sat. 28/5 at 7.04pm; in Comp's garden - music quite loud and lyrics clearly audible and in my opinion appears to clearly be very intrusive. COMP alleges this has been going on for 3 HOURS already.
- Sat. 28/5 at 7.47 pm: on Comp's patio - similarly loud music with clearly audible lyrics "Evil Woman"); Again this. in my opinion, will be very intrusive - and is most likely having significant impact on Comps' quality of life

Subsequent file notes indicate that Mr Flynn raised concerns about continuing noise with Mrs Pearce and that Mrs Hayes continued to complain about continuing music noise problems and submit associated noise app recordings..

The file note for Friday 12 August 2022 refers to a noise monitoring visit to the Complainant's property undertaken by Mr Flynn and another NDC Officer following a contact from Mrs Hayes. The Officers visited Hills View House at 21.50. The 12 August file note states:

"(I) saw the usual floor standing speaker device at the right hand side of the left hand doors (its usual position from what i've seen on previous visits). [...] I asked her [Mrs Hayes] to sit at their patio table and make some recordings using the NOISE APP. She made a number of these and submitted them for review by me back at the office. I concluded there and then that these were representative of unreasonable noise intrusion on their home and we left just after 10pm. "

A file note for 16 August 2022 states Mr Flynn reviewed all Noise App recordings from 5 July to 14 August and was satisfied that the recordings were representative of the noise level he witnessed on 12 August. Mr Flynn concluded that the continuing complaint about music noise was justified.

- Community Protection Notice Served 25 August 2022

Following discussion with the Council's Legal Team, Mr Flynn served a Community Protection Noise (CPN) on Mrs Pearce on 25 August 2022. The CPN set out the following requirements to apply with immediate effect and for a period of 2 years:

1. control the sound level of music played at the premises so that it does not cause annoyance or disturbance to the ordinary reasonable person on other property, and in order to do so, ensure when you are not at the premises yourself that your business partner and all staff are aware of this requirement and trained in how to comply with it, including but not limited to regular checking close to the boundary of any property likely to be affected, such checks to be made without disturbing residents, and making a reasonable person assessment as to whether any resident can reasonably be expected to be exposed to such noise, and

2. ensure that any associated noise, for example singing to any music by staff or customers or any other persons on your property, is similarly controlled,

- Further Complaints Received

Shortly after serving the CPN, Environmental Protection received further complaints about music noise from Mrs Hayes along with some further noise recordings.

Mr Flynn reviewed the further noise recordings on 9 September 2022 and concluded that significant music noise problems persisted.

A file note for 13 September 2022 indicates Mr Flynn sought advice from his Line Manager, Andy Cole and a Licensing Officer, in relation to the next steps for addressing the situation.

A file note for 20 September 2022 refers to an email from Mr Cole to Mr Flynn. The email refers to a discussion between Mr Cole and the Council's legal team during which it was agreed that, moving forward, the noise complaints would best be dealt with under the statutory noise nuisance provisions of the Environmental Protection Act 1990.

File notes for 7 October indicate Mr Flynn updated the complainant and the Licence holder Mrs Pearce regarding this shift of approach and that future complaints would be investigated under statutory nuisance provisions.

Mr Flynn left the Council at the end of October 2022.

5 Review of Noise Issues by Service Lead

In November 2022, following Mr Flynn's departure from the Council, the noise case was reallocated to Andy Cole, the Council's Lead Officer for Environmental Protection.

The file note for 8 December 2022 states that Mr Cole reviewed the case in detail

Mr Cole's notes indicate that he was satisfied that there were real noise concerns at issue. However, the notes also mention a desire to draw a line under the investigation following Mr Flynn's departure, and to move forward on the basis of fresh evidence and clarity as to what is expected. The file note states:

"The situation needs to be explained to the subject to give them absolutely clear advice concerning the current situation, explaining noise issues stem from the playing of live and recorded music outside, and/or inside with the doors / windows open."

- Meeting with Mrs Pearce

On 8 December, Mr Cole visited the premises with one of the Council's Licensing Officers and met Mrs Pearce..

The file note states that Mr Cole explained EPs involvement to date in relation to service of a CPN, and the Licensing and Statutory Nuisance regimes.

"I explained that notwithstanding the recent actions and decisions which had been taken regarding the noise issues, the Council would not be serving an abatement notice at this time - as I wasn't satisfied that she had been given sufficiently detailed information about what is expected of her."

The note goes on to state

"I made it very clear that it was considered likely that a statutory noise nuisance could occur if live/recorded music was played outside, or inside with the doors / windows open. We discussed this in detail and Mrs Pearce [said] she was grateful for me providing the clarity and confirmed she completely understood. "

The notes mention that Mrs Pearce stated she had engaged a specialist noise consultant to produce a Noise Management Plan.

The note refers to advice given by Mr Cole regarding future loud music:

"We discussed "reasonableness" - and I made it very clear that if she is to have events in the future, she would need to give careful thought to the amount of events, and times - so that she could demonstrate reasonableness if need be. [...] We ended the meeting with her having a very clear understanding that there was nothing to stop her having live music /playing recorded music - but that the onus is on her to manage such events in a way that does not result in further complaints being received - and that it was considered likely that a statutory nuisance may be caused by the playing of music outside / inside with doors/windows open. "

Mr Cole left the Council on 21 December 2022.

6 Current Circumstances - Likelihood of Noise Impacts

The Licensed Premises is located in a rural setting just off the A361, to the west of West Down. There are two residential properties in close proximity - Hills View to the South and the Foxhunters Lodge to the north. The former Foxhunters Inn is located to the east, at the other side of the A361 highway.

Although the Foxhunters Lodge is located somewhat closer to the Woodpecker building than Hills View House, it appears to be better protected in terms of acoustic screening. The licensed premises faces towards Hills View, with doors, windows and outside seating areas mainly facing towards or located to the south of the main building. A similar situation applies to any loud music arising in the car park area, such as that referred to from a marquee event.

Given the above, I think it is reasonable to conclude that residents living at Hills View House are likely to be somewhat worse affected by loud music noise from the licensed premises (based on the circumstances described in the complaints) than residents at Foxhunters Lodge.

Notwithstanding the above, I think both existing residential properties are likely to be impacted if loud music is played within the licensed premises when doors / windows are open or is played outside. This view is supported by the fact that music noise complaints have been received from occupiers of both dwellings.

7 Current Premises Licence Controls

The current Premises Licence allows for live and recorded music to be played inside and outside 7 days a week from 11.00 to 22.00hrs

Additionally, the Live Music Act 2012 deregulates live and recorded music played at licensed premises from 08.00 to 23.00hrs.

In terms of the current premises licence controls therefore, live and recorded music can be played 7 days a week inside and outside from 08.00 to 23.00hrs.

8 Preventing Public Nuisance

Given the close proximity of the two closest dwellings and their garden areas, there is a potential for noise arising from the Woodpecker Bar and Kitchen to impact occupiers of these dwellings. Clearly, the potential for noise to amount to public nuisance for the purposes of the Licensing Act will depend on the specific circumstances involved.

When judging whether noise amounts to a public nuisance a number of factors need to be taken into account including the levels and types of noise in question, the frequency and duration with which noise occurs, the character of the area and the impact that noise is likely to have on residents living in the vicinity.

In my opinion, the circumstances at issue are such that public nuisance is likely to occur unless noise from the licensed premises is suitably managed and controlled.

The current Premises Licence allows loud music to be played indoors and outdoors 7 days a week from 08.00 to 23.00hrs (when taking account of the effect of the Live Music Act).

According to the findings of both the Council's Investigating Officer, Mr Flynn, and the Environmental Protection Service Lead, Andy Cole, residential neighbours are likely to be significantly impacted when loud music is played outside or inside with the doors / windows open. These findings are in line with my own observations of the situation.

Given the above, current licensing controls do not provide a level of control that is likely to *prevent* public nuisance in my opinion.

The Government's Revised Guidance issued under section 182 of the Licensing Act 2003 makes clear that the approach of licensing authorities and responsible authorities should be one of *prevention*.

- Recommended Considerations

I recommend the Licensing Sub-Committee give consideration to options for bringing live and recorded music played at the licensed premises under improved control in order to prevent public nuisance.

I believe there are a number of potential mechanisms for protecting residents that may be relevant in the circumstances:

- Upon a review of the premises licence the Licensing Authority can determine that conditions on the premises licence relating to live or recorded music will apply even between 8am and 11pm;
- If the Premises Licence doesn't presently authorise live or recorded music the Licensing Authority can add conditions to the Premises Licence as though the live or recorded music were regulated entertainment authorised by that Premises Licence, again to apply between 8am and 11pm;
- The Licensing Authority can determine that live or recorded music at the premises is a licensable activity and live or recorded music can no longer be provided without permission on the Premises Licence or a Temporary Event Notice;
- Controls under other noise legislation such as the statutory nuisance provisions of the Environmental Protection Act 1990.

- The Live Music Act

I recommend consideration be given to removing the effect of the Live Music Act such that live or recorded music at the premises is a licensable activity. This would enable the Licensing Authority to introduce reasonable controls to prevent public nuisance.

- Noise Management Plan

I recommend consideration also be given to including a Noise Management Plan Condition on the Premises Licence. The aim of such a condition would be twofold: firstly to prohibit the playing of loud music at the premises until such time as noise will be suitably controlled in accordance with a suitable Noise Management Plan (NMP); and secondly, to set out the circumstances for approving a NMP.

The NMP would be agreed on the basis that its implementation is likely to prevent public nuisance arising as a result of the licensed activities.

The NMP would describe the restrictions, mitigation measures and management procedures that, once implemented, will make it unlikely that residential neighbours will be significantly impacted by noise generated in connection with licensed activities.

I recommend consideration be given to imposing a condition along the lines of the following:

- *NMP Condition*

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 until such time as a Noise Management Plan (NMP) has been submitted to, and received written approval from, the Licensing Authority.

- 1. 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.*
- 2. 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.*
- 3. 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.*
- 4. The NMP shall be prepared having regard to relevant standards, guidance and best practice.*

Following written approval and thereafter, the NMP shall be implemented in full and as approved.

28 March 2023

David Morgan ACIEH
Environmental Health Consultant