



North Devon Council

Report Date: 28th April, 2023

TOPIC: Application for the review of a Premises Licence: The Woodpecker Bar and Kitchen, West Down, Devon, EX34 8NU

REPORT BY: Public Protection Manager

1. INTRODUCTION

1.1 The purpose of this report is to present an application for the review of the Premises Licence for The Woodpecker Bar and Kitchen, West Down, Devon, EX34 8NU Reference Number PLWA970 . This licence is shown at **Appendix A**.

1.2 The application (**Appendix B**) brought by the applicants Mr and Mrs Hayes, under Section 51 of the Licensing Act 2003 ('The Act') is made in respect of the alleged impact of The Woodpecker Bar and Kitchen (identified for the purposes of this report as 'The Woodpecker' for ease) on them and their family. They occupy a neighbouring residential property to the above licensed premises and allege that the following Licensing Objectives are undermined:

1.2.1 The prevention of Public Nuisance.

1.2.2 The prevention of Crime and Disorder.

In further support of this review the Police representation (**Appendix M**) adds Public Safety as an additional licensing objective relevant to this review.

1.3 Mrs Tina Marie Pearce is the Premises Licence Holder and Designated Premises Supervisor (DPS) for The Woodpecker. Mrs Pearce has responded to the review, by placing a representation, which is found at **Appendix C**. This representation includes a Noise Management Plan which Mrs Pearce cites 'was carried out by a professional company since October 2022.'

1.4 The Licensing Authority has received additional positive representations in support of The Woodpecker from the general public in regard to this application, namely:

1.4.1 A positive representation by email from Alan Hodgkinson (**Appendix D**).

- 1.4.2 A positive representation by email from Annie and Eric Davies (**Appendix E**).
- 1.4.3 A positive representation by email from Ian Huggins (**Appendix F**).
- 1.4.4 A positive representation by email from Joan Saddington (**Appendix G**).
- 1.4.5 A positive representation by email from Katherine Hudson (**Appendix H**).
- 1.4.6 A positive representation by email from Philip and Helen Milton (**Appendix I**). Please note that this representation is made by the owners of the premises for which the review is concerned.
- 1.4.7 A positive representation by email from Poppy Pearce (**Appendix J**). We understand this to be the daughter of the DPS and Premises Licence Holder.
- 1.4.8 A positive representation by email from Sandy Burkett (**Appendix K**).
- 1.4.9 A positive representation by email from Tommy Deaves (**Appendix L**).

1.5 Responsible Authorities

The following representations have been received from Responsible Authorities:

- 1.5.1 Devon and Cornwall Police – Representation received at **Appendix M**.
- 1.5.2 Devon and Somerset Fire and Rescue Service – No representation received.
- 1.5.3 NDC Environmental Protection – Representation received at **Appendix N**.
- 1.5.4 NDC – Health Food and Safety – No representation received.
- 1.5.5 NDC Planning – No representation, however observation received at **Appendix O**.

- 1.5.6 NDC Licensing – No representation received.
- 1.5.7 Devon County Council, Business Strategy and Support Services (Child Protection) - No representation received.
- 1.5.8 Devon County Council, Trading Standards – No representation received.
- 1.5.9 Public Health Devon – No representation received.
- 1.5.10 Home Office Immigration Enforcement – No representation received.

2. RECOMMENDATIONS

2.1 That the Licensing and Community Safety Sub Committee:

Considers the request for determination of the application for the review of the premises licence for The Woodpecker Bar and Kitchen, the additional representations and observation included in appendices **C to O** of this report together with any submissions at the hearing.

2.2 In determining the review, the Sub Committee may take any or all of the following actions:-

- i) No action.
- ii) Modify the conditions attached to the premises licence.

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 to it.

- iii) Exclude a licensable activity.
- iv) Remove the Designated Premises Supervisor.
- v) Suspend the premises licence for a period not exceeding 3 months.
- vi) Revoke the premises licence

2.3 The conditions of the licence, with the exception of mandatory conditions in annex 1 of the licence, may be modified to alter or omit any of them or

to add any new condition, including restricting the times at which licensable activities authorised by the premises licence can take place.

- 2.4 The licensing authority may decide that no action is appropriate if it finds that the review does not require it to take any steps that are appropriate to promote the licensing objectives
- 2.5 It will be best practice, as well as a matter of elemental fairness, that at a hearing, the licensing authority ensures that parties are aware of any condition the licensing authority is proposing to add of its own volition to a premises licence, in advance of the decision being made.
- 2.6 When Members are considering adding a condition that has not been addressed during the hearing, for example because it is raised after the Members have retired to consider their decision, the parties should be given an opportunity to address the Members on the new condition being considered. This can be done informally, for example, by the legal advisor passing a message to the waiting parties.
- 2.7 If the proposed condition proves controversial, the parties should be afforded the opportunity of addressing the Members further on both the principle of the condition or its specific working. This is likely to serve the interests of all parties, including the Members who will be better informed about the impact and practicability of their proposal. Moreover, a failure to follow this approach risks attracting criticism from the appeal courts.
- 2.8 Whilst the applicants for this review have provided extensive evidence pertaining to issues surrounding the premises and car-parking/access arrangements, some of these are general and do not relate to licensable activity. The Sub-Committee can only apply conditions in respect of licensable activity and it is recommended that careful consideration is made to the relevance of each area of this review and the licensing objectives.
- 2.9 Evidence of fitness and propriety of the husband of the DPS, whilst relevant in providing an overview of historic matters and due to the fact that he works at this premises, must also be treated with caution, in light of the fact that this individual is not the current DPS or a Premises Licence Holder. The sale and supply of alcohol, because of its impact on the wider community and on crime and anti-social behaviour, carries with it greater responsibility than the provision of regulated entertainment and late night refreshment. This is why sales of alcohol may not be made under a premises licence unless there is a DPS in respect of the premises (who must hold a personal licence); and every sale must be made or authorised by a personal licence holder. The committee may wish to examine whether they believe authorisation to the husband of the DPS is appropriate given the circumstances.

3. REASONS FOR RECOMMENDATIONS

3.1 The recommendations are made so that the Sub-Committee fulfils its duty under section 52 of the Licensing Act 2003 to determine the application for a review of the premises licence for The Woodpecker Bar and Kitchen.

4. REPORT

4.1 The relevant premises, The Woodpecker Bar and Kitchen, West Down, Devon, EX34 8NU has the benefit of a Premises Licence PLWA970 (**Appendix A**), granted 6 October 2021, of which Annex 4 contains a plan of the premises. This plan encompasses an outdoor area.

4.2 A location map and aerial view of this premises is shown at **Appendix Q**, onto which the home of the applicants for this review is identified by way of a yellow star. A series of photographs of the premises both inside and out is also presented at **Appendix P**.

4.3 The current premises licence holder and DPS of The Woodpecker Bar and Kitchen is Tina Marie Pearce. Her husband Jamie Pearce has also been found to be managing the premises on the occasions that the Licensing Authority and Police have attended this premises. The following are licensable activities authorised by the licence:

4.3.1 a performance of live music

4.3.2 any playing of recorded music

4.3.3 entertainment of a similar description to that falling within a performance of live music, any playing of recorded music or a

4.3.4 performance of dance

4.3.5 the supply of alcohol

4.4 Hours cited on the licence include:	From	To
Provision of Live Music (Indoors and Outdoors) Monday to Sunday	11:00	22:00
Provision of Recorded Music (Indoors and Outdoors) Monday to Sunday	11:00	22:00

Entertainment of a similar description to that falling within E, F, or G (Indoors and Outdoors) Monday to Sunday	11:00	22:00
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Supply of Alcohol for consumption (on and off the premises)		
Sunday to Thursday	11:00	22:30
Friday	11:00	23:30
Saturday	11:00	23:30

Opening hours of the premises are listed as:

Sunday to Thursday	8:00	23:00
Friday	8:00	00:00
Saturday	8:00	00:00

4.5 It is important to note that the introduction of legislation including the Live Music Act 2012 and The Legislative Reform (Entertainment Licensing) Order 2014, created a situation that whilst live and recorded music are listed on the licence, these areas are not licensable based upon the current hours of operation of the Woodpecker. Section 16.6 of the Statutory Guidance issued under Section 182 of the Licensing Act 2003, outlines the deregulatory changes that have amended the Licensing Act 2003 to make certain activities non-licensable. Of particular relevance to this application for review are the following provisions introduced by the Live Music Act 2012:

- Live music: no licence permission is required for:
 - a performance of unamplified live music between 08.00 and 23.00 on any day, on any premises.
 - a performance of amplified live music between 08.00 and 23.00 on any day on premises authorised to sell alcohol for consumption on those premises, provided that the audience does not exceed 500.
- Recorded Music: no licence permission is required for:
 - any playing of recorded music between 08.00 and 23.00 on any day on premises authorised to sell alcohol for consumption on those premises, provided that the audience does not exceed 500.

4.6 The Act also disapplies any live or recorded music related conditions (e.g. doors to be shut whilst live music played) on a licence where the premises licence in place permits 'on sales'; the premises are open for the sale or supply of alcohol for consumption on the premises; and live or recorded music is taking place between 8am and 11pm. In the case of

The Woodpecker, there are 15 conditions imposed by way of the operating schedule, and there are no conditions such as this. The only condition pertaining to nuisance reads:

- 4.7 *11. Steps shall be taken to ensure that any patrons drinking and/or smoking outside the premises do so in an orderly manner and are supervised by staff to ensure that there is no public nuisance.*
- 4.8 Although live and recorded music have been deregulated subject to the conditions set out above, under Section 177A of the Licensing Act 2003 it is still open to the Licensing Authority to add conditions to a Premises Licence upon determination of a review as though the live or recorded music were regulated entertainment authorised by that Premises Licence (between 8am and 11pm), where the Licensing Authority believe it is necessary for the promotion of the licensing objectives. Where this does take place it is necessary that any condition clearly cites this (namely that Section 177A does not apply to it).
- 4.9 An application for the review of The Woodpecker Bar and Kitchen has been received from Mr and Mrs Hayes, of Hills View House, Foxhunters, West Down, EX34 8NU, as shown in **Appendix B**. In addition they have provided a video clip of actions of the husband of the Premises Licence Holder and DPS which will be shown at the hearing.
- 4.10 The application is based on alleged issues of the operation of The Woodpecker undermining the prevention of public nuisance, and the prevention of crime and disorder licensing objectives. It covers alleged issues of noise emanating from the premises; details the doors to be kept open; speaker position being problematic, etc. Furthermore, it covers the alleged intimidation and harassment of the applicant's both in and outside of their home by the husband of the DPS, with reported criminal damage etc. Some of the issues raised in the representation are not relevant in terms of the licensing objectives or the determination of this review. Whilst not an exhaustive list, these include for example those in relation to the boundary of the premises that was in dispute; carpet being placed on a bank; siting of cockerels; and placement of a double decker bus.
- 4.11 In response Mrs Pearce, Premises Licence Holder and DPS has furnished a representation at **Appendix C** which includes a Noise Management Plan.
- 4.12 Mrs Pearce in her representation addresses those points listed by the Hayes in turn in their original application.
- 4.13 As outlined in Section 1.4, nine positive representations have been received from members of the public in support of Mrs Pearce the Premises Licence Holder and DPS. These contain statements to the

effect that those attending have not determined noise ever to be of a level that would constitute a nuisance, the fact that they believe the premises is well run, and managed, and that there has been no evidence of criminal activity to them. Moreover, representations highlight what they cite as a family orientated premises, with community value, and an excellent food offering. One of these nine representations is from Mr and Mrs Philip Milton, owners of The Woodpecker who support Mrs Pearce in this premises licence review. They provide further detail pertaining to the carpark and a covenant exerted over the deed of the applicant's home, pertaining to the access to their property via the carpark.

- 4.14 It is worthy to note that whilst the applicants suggest that other members of the public would be supportive of the review, none have come forward.
- 4.15 A representation has been received from Paul Butler, Alcohol Licensing Officer, for Devon and Cornwall Police (**Appendix M**). **Due to the nature of this representation it shall be covered in PART B.** The representation covers police dealings with The Woodpecker since the grant of the licence. It specifically raises concerns in respect the licensing objectives Public Safety and Prevention of Crime and Disorder whereby discussion is made surrounding an individual in drink who was believed to be likely to drive a motor-vehicle. A letter from the Police to Mrs Pearce, the DPS is encompassed as part of **Appendix M** in relation to this incident, and the representation also covers further information relevant to crime and disorder. The crime and disorder issues are not directly linked to the Premises Licence Holder or DPS, and relate to her husband only. The Licensing Authority believes they are prudent to be heard by members given the presence of the DPS's husband at The Woodpecker, working behind the bar etc.
- 4.16 A representation has been received from David Morgan, Environmental Health Consultant on behalf of North Devon Council's Environmental Protection Team (**Appendix N**). This representation details the involvement of Environmental Protection with this premises and provides recommendation in respect of the removal of the deregulatory nature of the Live Music Act amendments, and in consideration of the imposition of a condition pertaining to a Noise Management Plan.
- 4.17 An observation has been received from Jenni Meakins of North Devon Council's, Planning Authority at **Appendix O**. This representation details that the Planning Authority is in the process of assessing a planning enforcement investigation. The observation provides detail of potential outcomes.

5. RELEVANT LICENSING POLICY AND STATUTORY GUIDANCE CONSIDERATIONS

5.1 The Sub-Committee is entitled to draw upon any of the considerations outlined in its Licensing Policy document. However the most significant policy considerations appear to be the following:

- Paragraphs 3.4 to 3.4.3 (Prevention of Public Nuisance).
- Paragraph to 3.2 to 3.2.2 (Prevention of Crime and Disorder).
- Paragraphs 3.3 to 3.3.2 (Public Safety).
- Paragraphs 9.2.1 to 9.2.7 (Review).

5.2 The Sub-Committee is entitled to draw upon any of the considerations outlined in the Statutory Guidance issued under Section 182 of the Licensing Act 2003 and published by the Home Office (December 2022). However, the most significant statutory guidance appears to be in the following:

- Paragraphs 2.15 to 2.21 (Prevention of Public Nuisance).
- Paragraphs 2.1 to 2.6 (Prevention of Crime and Disorder).
- Paragraphs 2.7 to 2.14 (Public Safety).
- Section 11 (Review).

6. OBSERVATIONS

6.1 The Committee must have regard to all the evidence it hears in reaching its decision.

6.2 Members must only consider those factors relevant to one of the four licensing objectives in making their determination. Other information whilst providing background should not influence a members' decision.

6.3 In determining this application, the Licensing and Community Safety Sub-Committee must take one of the following steps as outlined in section 2.2 of this report.

6.4 Any party to the hearing has the right of appeal to North and East Devon Magistrates' Court following the determination of the application under section 181 of the Act.

6.5 In deciding which of these powers to invoke, it is expected that licensing authorities should so far as possible seek to establish the cause or causes of the concerns that the representations identify. The remedial action taken should generally be directed at these causes and should always be no more than an appropriate and proportionate response to address the causes of concern that instigated the review.

7. RESOURCE IMPLICATIONS

- 7.1 There are no direct financial or human resource implications for the Council associated with this report.
- 7.2 Should an appeal against the decision of the Licensing and Community Safety Sub-Committee be brought there are potential financial consequences to the Council should the Council's decision be overridden.

8. EQUALITIES ASSESSMENT

- 8.1. Not applicable.

9. ENVIRONMENTAL ASSESSMENT

- 9.1. There are no direct environmental implications for the Council associated with this report.

10. CORPORATE PRIORITIES

10.1. What impact, positive or negative, does the subject of this report have on:

- 10.1.1. The commercialisation agenda: Neutral.
- 10.1.2. Regeneration or economic development: Neutral.

11. CONSTITUTIONAL CONTEXT

11.1. The Licensing Sub-Committee Article of part 3 Annexe 1 paragraph 4b.

11.2. Referred or delegated power: Delegated

12. STATEMENT OF CONFIDENTIALITY

Appendix M to be considered as not for publication 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.

13. BACKGROUND PAPERS

The following background papers were used in the preparation of this report:

- Licensing Act 2003.
- Amended guidance issued under section 182 of the Licensing Act 2003 (Home Office December 2022).
- Licensing Act 2003 (Hearings) Regulations 2005.

- North Devon Council Licensing Policy Approved 21.11.18.

- Appendix A Existing Premises Licence
- Appendix B Application for Review of PLWA970 from Mr and Mrs Hayes

- Appendix C Representation from Tina Marie Pearce, PLH and DPS
- Appendix D Representation from Alan Hodgkinson
- Appendix E Representation from Annie and Eric Davies
- Appendix F Representation from Ian Huggins
- Appendix G Representation from Joan Saddington
- Appendix H Representation from Katherine Hudson
- Appendix I Representation from Philip and Helen Milton
- Appendix J Representation from Poppy Pearce
- Appendix K Representation from Sandy Burkett
- Appendix L Representation from Tommy Deaves
- Appendix M Representation from Environmental Protection
- Appendix N Representation from Devon and Cornwall Police
- Appendix O North Devon Council, Planning observation
- Appendix P Photographs
- Appendix Q Location map and aerial view

14. STATEMENT OF INTERNAL ADVICE

The author (below) confirms that advice has been taken from all appropriate Councillors and Officers:

Katy Nicholls, Public Protection Manager, 18 April 2023