

# Minutes

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## Licensing Sub-Committee Thursday, 20th May, 2021

### Attendance

Cllr J Cloke (Chair)  
Cllr Tanner

Cllr Fryd

### Apologies

### Substitute Present

### Also Present

### Officers Present

Paul Adams	- Principal Licensing Officer
Dave Leonard	- Licensing Officer
Asitha Ranatunga	- Legal Representative
Dominika Jaskolska	- Environmental Health Admin Officer
Zoe Borman	- Governance and Member Support Officer

### LIVE BROADCAST

[Live broadcast to start at 7pm and available for repeat viewing.](#)

### 17. Appointment of Chair

Members **RESOLVED** that Cllr J Cloke should Chair the meeting.

### 18. Administrative Function

Members were respectfully reminded that, in determining the matters listed below, they were exercising an administrative function with the civil burden of

proof, i.e. 'on the balance of probabilities'. The matter would be determined on the facts before the Sub-Committee and the rules of natural justice would apply.

**19. Application to Vary a Premises Licence, Dusk, Ongar Road, Pilgrims Hatch CM15 9SS**

- 1 This is the Decision Notice relating to the above application together with the reasons for the decision. The decision follows a hearing which took place before the Licensing Sub-Committee at the Town Hall on 20 May 2021 at 7pm which was attended by the Applicant, responsible authorities, and other persons. The Committee deliberated after that hearing and provided a brief summary of its decision for the benefit of those who attended.
- 2 Members carefully considered the application for a variation of the premises licence with a view to promoting the licensing objectives, as required by the Licensing Act 2003. The Committee also had regard to the National Guidance and the Council's own Licensing Policy in making this decision.
- 3 Members considered the written relevant representations and other documentation contained within the Agenda and put before the Committee, as well as the oral representations made by all parties who attended the hearing on 20 May 2021.
- 4 The Committee heard oral representations from Paul Adams (Licensing Officer), Councillor Vicky Davies, Megan Bashir, Asha Bashir, Brian Billington, Lawrence Morrison, Councillor Poppy, David Carter (Environmental Health), and Dave Leonard (Licensing Authority). We also heard from Kevin Leigh (Counsel) on behalf of the Applicant, supported by Shakil Islam and Sharif Uddin from Dusk, and a Door Supervisor from the premises. Emails from other persons (Councillor Keith Parker and Greg Hart), who had made relevant representations but could not attend the hearing, were read out to the Committee by the Licensing Officer.
- 5 Considered was given to the particular locality of the premises in a semi rural setting located to the west of Bentley Golf Club (with which the car park is shared). The surrounding area is relatively flat. The nearest residential dwellings are approximately 100m to the south west and 160m to the north of the premises.
- 6 The premises operate as a multi-cuisine, fine dining restaurant, with a function room and an outside shisha smoking lounge in a dedicated enclosed area complete with a retractable roof.

- 7 Members had regard to the previous application history which was set out in an Appendix to the Officer Report [83-84].
- 8 As relevant, Members noted that the Applicant was granted a premises licence on 1 October 2019. The Applicant then applied to vary the licence to add the sale of alcohol. That application was granted on 11 November 2020 when a condition was imposed preventing the consumption of alcohol on the premises other than alcohol sold under the authorisation of the licence. The rationale for imposing that condition was that adding the sale of alcohol to the licence would bring about greater regulation, which should be balanced by stopping the bring your own alcohol policy which the premises had previously been operating, and that it would not promote the licensing objectives for the premises to operate both. On 23 November 2020, following a review application brought by a local resident based on persistent noise nuisance, one of the conditions imposed by the Committee was that no live / recorded music shall be played in the outside (lounge) area after 2230hrs. The focus of the concerns raised in that review application was the use of the outside (lounge) area and the noise which this generates, particularly later in the evening and into the night. That remains the focus of the concerns raised by the Responsible Authorities and other persons in response to the current variation application.
- 9 The current variation application was received on 26 March 2021. The application seeks:
- (1) To remove the licensable activity allowing the sale of alcohol at the premises.
- This was the licensable activity which the Applicant itself sought to have included on the licence and was granted in November 2020. Whilst it is acknowledged that that application was made following discussions with officers at the Council, the Applicant had the benefit of their own legal advisors at the time in deciding to make that application.
- The Applicant has stated that the sale of alcohol from a premises which they operate would run contrary to their religious beliefs. Members had regard to their duties under the Equality Act 2010, which make it unlawful to discriminate against someone because of their religion or belief. Members do not consider their decision in this case discriminates against the Applicant's religious beliefs given the background to the application and the ultimate decision reached.
- (2) To remove Condition 9 of Annex 3: *'Customers must not be permitted to consume any alcohol on the premises other than alcohol sold or supplied under the authorisation of this licence.'*

As set out above, this condition was imposed by the Committee when the application to vary the licence to include the sale of alcohol was granted. The rationale behind that decision is referred to above.

Members noted that the Applicant had legal representation at the time of that application. No appeal was made against the decision.

(3) To remove Condition 5 of Annex 3: *'No live or recorded music shall be played in the outside (lounge) area after 2230hrs.'*

Members noted that this condition was imposed following a review brought by a local resident which was supported by Environmental Health and the Licensing Authority, as well as 11 representations from other persons (6 households). The Applicant had legal representation at the time of that application. No appeal was made against the decision.

- 10 Overall, having regard to the licensing history of the premises and the way this application has come forward, Members share the concerns raised by the Licensing Authority and other persons who understandably seek some certainty as to the operation which the Applicant seeks to run within the terms of the licensing regime, and who question the Applicant's understanding of the licensing regime and the responsibilities placed upon it.
- 11 Having said that, this application must be considered on its own merits. Many of the representations are supportive of the business and the operation of a thriving restaurant in the area. The officers acknowledge that Mr. Islam and Mr. Uddin are very affable, competent restaurateurs, and appear to be acting in good faith.
- 12 There was much discussion at the hearing about noise nuisance from the use of the outside (lounge) area, particularly in the evening and later into the night. Having evaluated the representations, Members considered that the following factors suggest that the use of the outside area could undermine the public nuisance licensing objective if not properly regulated:
  - (i) The area becomes very quiet, particularly during the night-time hours, even allowing for local traffic.
  - (ii) The proximity of the nearest residential premises at approximately 100m and 160m away.
  - (iii) The numbers of people who have used and are expected to use the outside area given its size.
  - (iv) The outside area is required to be at least 50% open to comply with smoking legislation, which affects the extent to which noise attenuation can be provided.

- (v) There has been a large increase in the number of complaints received since the opening of Dusk, largely relating to the use of the outside (lounge) area.
  - (vi) Several of the complaints of noise nuisance are specific and detailed and relate to the operation of the premises. They cannot sensibly be attributed to the golf club, which generally closes at 6pm, and there is nothing to suggest that the complaints relate to the operation of the function room at the golf club.
  - (vii) There is a general lack of complaint about the previous use of the site by a Chinese restaurant, where the operation took place indoors.
  - (viii) Concerns have also been raised about noise nuisance from patrons using the car park once they have left the premises.
  - (ix) The complaints have been made by a range of people and have been corroborated to a degree by the visits to the premises and surrounding area by officers at the Council, including Environmental Health and Licensing.
- 13 There are a series of conditions on the licence which seek to control outside noise. These include: Annex 2 Condition 11 (chaperone patrons to their vehicles when they leave); Annex 3 Condition 10 (agreed noise management policy); Condition 3 (terminal hours for use of outside area except for smoking); Condition 4 (staffing of outside area when in use); Condition 7 (installation of a noise limiting device with noise agreed noise limits).
- 14 Of those conditions:
- Annex 3 Condition 10: The Applicant suggested at the hearing that the document at [47-57] was a noise management policy. It is not such a document on its face. Rather it is a tick box Operating Schedule which refers at no. 89 to a noise management plan being devised and in operation. No such policy has been provided to the Committee.
  - Annex 3 Condition 7: The Applicant accepted that the noise limits for a noise limiting device had not been agreed with the Council's Environmental Health Team. It was acknowledged by Environmental Health that this could not be done whilst the restrictions relating to the pandemic remained in place (e.g. the absorption effect of people in the outside area and its effect on noise levels could not be tested until people were allowed back into the premises in numbers).
- 15 Members consider that the above conditions (and others on the licence), if fully complied with, should go a long way to preventing public nuisance arising from the outside (lounge) area of the premises.

Whilst they acknowledge that certain aspects of those conditions have not yet been agreed with the Council because of the Covid-19 restrictions, the Applicant should be aware that the licence should not be used for licensable activities until those conditions are in place.

- 16 Given the clear basis on which Condition 5 of Annex 3 was imposed on the licence following a review application, and considering the thrust of the representations heard by the Committee, Members consider it remains appropriate and proportionate for this condition to remain on the licence.
- 17 Further to discussion at the hearing, the Applicant stated that all it was seeking was to make clear that this Condition did not prevent background music being played. In a section on incidental music (paras. 16.57-16.61) the National Guidance explains that the performance of live music or playing of recorded music is not regulated entertainment under the 2003 Act if it is incidental to another activity (which is not itself a description of entertainment falling within para. 2 of Schedule 1 to the 2003 Act).
- 18 The Guidance goes on to provide that whether or not music is incidental to another activity will depend on the facts of each case. One factor could be whether, against the background of the other activities already taking place, the addition of music will create the potential to undermine the promotion of one or more licensing objectives. Another factor is whether the volume of the music disrupts or predominates over other activities, or could be described as 'background' music (para. 16.59).
- 19 It would not be appropriate to amend the wording of the Condition on the licence - which is clear on its face - to reflect the fact that background / incidental music would not be caught by the condition. However, in order to assist the Applicant, we have clarified above what incidental music is by reference to the National Guidance. We acknowledge that incidental music as explained in the National Guidance would not be regulated entertainment. The Guidance provides that in any disputed case, it will be for the licensing authority initially, and, ultimately, for the courts to consider whether music is 'incidental' in the individual circumstances of any case. We would note that after 2230hrs, the limit for the noise limiting device could be set at level which ensures that any live / recorded music does not increase above background levels, in agreement with the Council's Environmental Health Department.
- 20 For the above reasons, the application to remove Condition 5 of Annex 3 on the licence is refused.

- 21 As to the application to remove the sale of alcohol from the licensable activities and Condition 9 of Annex 3, Members consider that these aspects of the application stand or fall together. On the face of it, given that the application is to remove a licensable activity, it is hard to see how the removal of a licensable activity from a licence could be said to undermine the licensing objectives. However, the Applicant has stated that it intends to revert to its Bring Your Own alcohol policy, which has allowed patrons to bring their own alcohol to the premises in the past. That was clearly the background against which Condition 9 of Annex 3 was imposed when the sale of alcohol was added to the licence. Having considered all of the representations made, we do consider that the consumption of alcohol on the premises has been a factor in undermining the public nuisance licensing objective, which in turn has led to complaints and the noisier behaviour of patrons which officers have witnessed.
- 22 The Applicant states that it can provide measures on the door to regulate the amount of alcohol brought into the premises and has offered to provide a “Bring Your Own” policy to the Council to that effect, which would be implemented by its Door Supervisors. The Applicant has also stated that there are further noise attenuation measures which it might be able to implement so as to reduce any noise emanating from the outside (lounge) area. There was discussion of the use of Anechoic Foam, sound deflection on the roof to the outside (lounge) area, and acoustic fencing. Finally, the Applicant stated that it does seek to monitor the car park area to ensure that noise in that area is kept to a minimum.
- 23 For the above reasons, Members consider that the removal of the sale of alcohol and Condition 9 of Annex 3 can be granted and that the licensing objectives will not be undermined, but only if the following conditions are imposed and adhered to:
- An Admissions Policy, including provisions to regulate the bringing of alcohol onto the premises for consumption by patrons (“Bring Your Own Alcohol”) shall be submitted to Brentwood Borough Council’s Licensing Department for agreement in writing. The Policy shall be implemented as agreed.
  - One SIA licensed door supervisor shall be stationed in the car park from 9pm on each day that the premises are open beyond that time, with a view to minimising disruption from patrons as they arrive and / or leave the premises. The door supervisor shall remain in position until the last patron has left the car park.
- [It should be noted that this condition is imposed in addition to Condition 11 of Annex 2 (chaperone patrons to their vehicles when they leave)]

- Condition 10 of Annex 3 will be amended so that it reads as follows:  
*'A written noise management policy which is acceptable to Brentwood Borough Council Environmental Health Team shall be put in place and adhered to. The Policy shall include noise attenuation measures to minimise noise emanating from the outside (lounge) area.'*
- 24 Members consider that the above conditions are both appropriate and proportionate, and would promote the licensing objective of preventing public nuisance.
- 25 Members reiterate that all of the above conditions will need to be in place before the premises can carry out the licensable activities under the licence.
- 26 The Committee are aware that the review mechanism under the Licensing Act 2003 provides a key protection for other persons if the concerns raised as to the effects of the grant of a licence do in fact materialize. There has already been one review of the licence. However, the premises does need to be given the chance to operate with the conditions in place, and once the Covid-19 restrictions are lifted, to see if it can be operated without undermining the licensing objectives. Premises which do not operate in an acceptable way in terms of the licensing objectives may in extreme cases have their licence revoked by the Licensing Authority if a review application is brought, evidenced, and justified.
- 27 Responsible Authorities and other persons are able to bring a review of a premises licence if there is evidence that the relevant licensing objectives are being undermined. Environmental Health also have separate powers and duties under the Environmental Protection Act 1990 in relation to statutory noise nuisance.
- 28 Members have sought to balance the competing interests in determining this application with a view to promoting the licensing objectives. Article 8 of the Convention provides for the right of peaceful enjoyment of one's home. It is a qualified right. Interference can be justified where in accordance with the law, necessary in a democratic society in the interests of the economic well-being of the country, and the protections of the rights and freedoms of others. A balance between the competing interests here is written into the 2003 Act, and backed by the availability of a review procedure if concerns arise in the future. The Committee does not consider that their decision would lead to an unjustifiable interference with Article 8 rights.
- 29 In summary:



- (1) The application to remove the sale of alcohol and Condition 9 of Annex 3 is granted, but subject to the imposition of 2 new conditions and an amendment to Condition 10 of Annex 3 (above).
- (2) The application to remove Condition 5 of Annex 3 is refused, and the scope of that Condition is clarified above.
- 30 Under the provisions of section 181 and schedule 5 of the Licensing Act 2003 there is a right of appeal against the decision of the Licensing Sub-Committee if you are aggrieved at the outcome. This right of appeal extends to the Applicant in the case of a refusal or restrictions on the licence, or the imposition of conditions to the licence. The right of appeal also extends to persons who have made representations where the variation has been granted, or that relevant conditions have not been imposed upon the licence. Full details of all the rights of appeal can be found within Schedule 5 of the Act.
- 31 Any appeal should be made to Essex Magistrates Court, Osprey House, Colchester Road Chelmsford CM2 5PF within 21 days from the date of notification of the decision. You must contact the Magistrates' Court to establish the formal procedure for the appeal.
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