

# Cheltenham Borough Council

## Licensing Sub Committee – 24 September 2020

### Licensing Act 2003: Determination of application to vary a Premises Licence

131 Promenade, 129 - 133 Promenade, Cheltenham

#### Report of the Licensing Team Leader

#### 1. Introduction

- 1.1 The Licensing Act 2003 (the Act) allows applicants to apply for a variation of a premises licence at any time. In this case, an application was received on 17.07.2020 from 131 Promenade Ltd in respect of 131 Promenade, 129 - 133 Promenade, Cheltenham. A copy of the application is included at **appendix A**.
- 1.2 The application is to vary the licence as outlined in the table below:

Activity	Terminal hour outdoor - front	Terminal hour outdoor - rear	Terminal hour indoors
Recorded Music	<b>Thurs – Sun: 10:00 to 23:00</b>  Limited by proposed condition	<b>Thurs – Sun: 10:00 to 01:00</b>  Limited by proposed condition	<b>Thurs – Sun: 10:00 to 03:00</b>
Provision of late night refreshment	No licence as per proposed condition i.e. “after 23:00 hours, no late night refreshment would be available externally to the front”	<b>Thurs – Sun: 23:00 to 01:00</b>  Limited by proposed condition	<b>Thurs: 23:00 to 02:00</b> <b>Fri – Sun: 23:00 to 03:00</b>
Supply of Alcohol	<b>Mon – Sun: 07:00 to 00:00</b>  Limited by proposed condition	<b>Mon – Sun: 07:00 to 02:00</b>  Limited by proposed condition	<b>Mon – Wed: 07:00 to 02:00</b>  <b>Thurs – Sun: 07:00 to 03:00</b>

- 1.3 The applicant has proposed the following conditions:

1.3.1 Recorded music

(a) The management and DPS of the premises will ensure that after 23:00 hours, no recorded music provision would be available externally to the front of the buildings

(b) The management and DPS of the premises will ensure that after 01:00 hours, no recorded music provision would be available externally to the rear of the buildings

### 1.3.1 Late night refreshment

(c) The management and DPS of the premises will ensure that after 23:00 hours, no late night refreshment will be available outdoors to the front of the building

(d) The management and DPS of the premises will ensure that after 01:00 hours, no late night refreshment will be available outdoors to the rear of the building

### 1.3.2 Sale of alcohol

(e) The management and DPS of the premises will ensure that after 00:00 hours, no alcohol will be sold outdoors to the front of the building and customers will not be permitted to be in this area

(f) The management and DPS of the premises will ensure that after 02:00 hours, no alcohol will be sold outdoors to the rear of the building and customers will not be permitted to be in this area

1.4 A copy of the current premises licence is attached at **appendix B** for reference.

## 1.5 Implications

### Legal

A sub-committee is required to discharge its duty and determine an application with a view to promoting the licensing objectives. These objectives, which are set out in section 4(2) of the Licensing Act 2003, are: (a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm.

### **Legal Services**

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## 2. Application (Ref. 20/00977/PRMV)

2.1 Applicant: 131 Promenade Ltd

2.2 Agent: N/A

2.3 Premises: 131 Promenade 129 - 133 Promenade Cheltenham Gloucestershire

## 3. Responsible Authorities

3.1 No representations were received from any responsible authority.

## 4. Interested Parties

4.1 Ten representations were received from interested parties. These are outlined in **appendix C** of this report.

4.2 Members should, in addition to appendix C, also refer to the officer's comments section of this report which outlines the officer's comments on the relevance of representations, and other relevant comments on the representations.

## 5. Local Policy Considerations

5.1 Below are extracts of the relevant part of the adopted Statement of Licensing Policy 2015 for Member's information. These extracts are to assist Members with the relevant guidance, but should be read in the context of the wider policy.

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The policy sets the following policy vision:

*We want Cheltenham to be a safe and clean town that offers a greater diversity in the night time economy that is less focused on alcohol and protects the quality of life for residents.*

5.2 The 2003 Act introduced a unified system of regulation through two types of licence: the premises licence (club premises certificates for qualifying clubs) and the personal licence. The Borough Council, as the licensing authority, is responsible for licensing all outlets in the borough that sell or supply alcohol or carry out any other 'licensable activities': public entertainment, theatre, cinema, or late night refreshment.

53 The system is underpinned by four objectives:

- i) the prevention of crime and disorder;
- ii) public safety;
- iii) the prevention of public nuisance; and,
- iv) the protection of children from harm.

The licensing authority must promote these objectives in carrying out its functions.

5.4 The Council's adopted licensing policy statement (approved December 2015) includes the following:

5.5 The objective of this policy is to: a) promote the four licensing objectives; b) ensure that the premises are appropriate for their proposed use; c) ensure the premises layout and condition is acceptable for the proposed use; d) ensure that the premises are being managed responsibly; and e) promote the policy vision statement. (para 1.9)

5.6 This policy also seeks to promote the council's wider priorities, in particular that: Cheltenham has a clean and well-maintained environment; Cheltenham has a strong and sustainable economy; communities feel safe and are safe; people are able to lead healthy lifestyles; and our residents enjoy a strong sense of community and are involved in resolving local issues. (para 1.10)

5.7 The council's powers and duties as the licensing authority are delegated by the council to its licensing committee, sub-committees and officers. The council approaches these delegations in accordance with the table of delegation or otherwise in accordance with the council's adopted constitution. (para 1.11)

5.8 The policy will be used as a basis in coming to consistent and transparent decisions in respect of licence applications. (para 1.12)

5.9 The policy does not: (a) Undermine the right of any individual to apply for a variety of permissions and to have each application considered on its individual merits; or (b) Override the right of any person to make representations on an application, or seek a review of a licence or certificate, where the Act allows. (para 1.13)

5.10 In determining a licensing application, the overriding principle adopted by the council will be that each application is determined on its merits. Licence conditions will be tailored to the individual application and only those necessary to promote the licensing objectives will be imposed. (para 1.16)

5.11 The council will also have regard to wider considerations affecting the residential population and the amenity of the area. These include littering, noise, street crime and the capacity of the infrastructure. (para 1.17)

5.12 Each of the four objectives is of equal importance and will be considered in relation to matters centred on the premises or within the control of the licensee and the effect which the operation of that business has on the vicinity. (para 1.18)

### 5.13 Measures to limit nuisance

The council will expect applicants to set out in their operating schedules the steps taken, or proposed to be taken, to deal with the potential for public nuisance arising from the operation of the premises. (para 3.20)

5.14 Applicants should identify and describe through a risk assessment how these risks will be managed. Public nuisance could include low-level nuisance perhaps affecting a few people living locally as well as major disturbance affecting the whole community. (para 3.21)

5.15 Applicants will be expected to have included measures in their operating schedules that make adequate provision to:

- a) restrict the generation of noise within the premises and from activities associated with the premises in the vicinity, or from an open air site;
- b) limit the escape of noise from the premises or open air site;
- c) restrict noise emissions to below levels that could affect people in the vicinity going about their business, at work and when at home both while relaxing and while sleeping;
- d) minimise and control noise from customers arriving at the premises, or open air site outside it and departing from it;
- e) minimise and control noise from staff, contractors and suppliers and their activities;
- f) minimise and control noise from vehicles associated with and providing services to the premises or open air site and their customers;
- g) determine whether people standing or sitting outside premises are likely to cause obstruction or other nuisance;
- h) whether the premises are under or near to residential accommodation;
- i) the hours of the sale of alcohol in open containers or food for consumption outside the premises;
- j) measures to make sure that customers move away from outside premises when such sales cease;
- k) measures to collect drinking vessels and crockery, cutlery and litter;
- l) the extent and location of areas proposed to be set aside for the consumption of food and alcoholic drink and for smoking;
- m) whether there is a need for door supervisors to prevent or to control customers congregating in outdoor areas to smoke, consume food or drink (whether supplied from the premises or not).
- n) adequate measures to prevent the following arising from the proposed licensable activity that may cause disturbance to people in the vicinity: a. litter, smells, fumes, dust, smoke, or other emissions; b. street fouling; c. light pollution. (para 3.22)

5.6 The role of the council is to maintain an appropriate balance between the legitimate aspirations of the entertainment industry and the needs of residents and other users of the town including businesses, workers, shoppers and visitors. (para 3.23)

5.17 Playing of music can cause nuisance both through noise breakout and by its effect on patrons, who become accustomed to high sound levels and to shouting to make themselves heard, which can lead to them being noisier when leaving premises. Other major sources of noise nuisance are vehicles collecting customers, the slamming of car doors and the sounding of horns. These noises can be particularly intrusive at night when ambient noise levels are lower. (para 3.24)

5.18 Where relevant representations are received, the council may attach appropriate conditions to licences, necessary to support the prevention of undue noise disturbance from licensed premises. Where premises remain open after 23:00, the licence holder will be expected to provide facilities which are relevant to controlling noise and the patrons of those premises late at night. The council also expects that premises which produce noise generating licensable activities are acoustically controlled and engineered to a degree where the noise from the

premises when compared to the ambient noise level will not cause undue disturbance. (para 3.25)

5.19 The provision of tables and chairs outside the premises, either on the highway or on private land, and the provision of beer gardens, can enhance the attractiveness of the venue. It can have the benefit of encouraging a continental style café culture and family friendly venues. However, late at night, tables and chairs and beer gardens can cause significant public nuisance to residents whose homes overlook these areas. (para 3.26)

5.20 The ‘smoke free public places’ legislation in July 2007 has led to an increase in the number of people outside licensed venues. Where outside facilities are provided the council expects applicants to provide details in their application of:

a) the location of open air areas; and

b) how the outside areas will be managed to prevent noise, smell, or obstruction and nuisance to neighbours and the public. (para 3.27)

5.21 Licensees and their staff are expected to have sufficient measures in place to prevent such problems arising including a suitable litter and waste management program to ensure that the area outside the premises is kept free of litter at all times. (para 3.28)

5.22 Where the council receives relevant representations, or where a responsible authority or an interested party seeks a review, the council may consider imposing conditions to improve the management of the outside area or prohibiting or restricting the use of these areas in order to promote the public nuisance objective. (para 3.29)

5.23 Conditions may include maximum noise levels over particular time periods, the installation of acoustic lobbies, provision of signs, publicity and dispersal policies. (para 3.30)

#### 5.24 **Core Hours for Licensable Activities**

The council will avoid arbitrary restrictions on licensing hours that undermine the principles of flexibility and consideration of each application is on its own merit. (para 6.39)

5.25 The council believes that licensable activities carried on within the core hours set out below will generally not have a harmful impact on the licensing objectives, address the concerns raised by local residents and businesses and are less likely to attract representations. (para 6.40)

5.26 Furthermore, earlier closing will result in less alcohol consumption and drunkenness and would also be consistent with the ability to get crowds dispersed from the town centre.

Table 1: Core Hours for Licensable Activities

Type of premises	Commencement hour no earlier than	Terminal hour no later than
Off licence	09:00	23:00
Restaurant	10:00	01:00
Theatres, cinemas and other performance venues	10:00	00:00
Pubs / bars / nightclubs	Town centre *	
	10:00	03:00
	Local neighbourhood areas	
	10:00	00:00

Takeaways	n/a	04:00
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(para 6.41)

5.27 Where relevant representations have been made, it will take the following matters into consideration when making a decision. These are not a definitive list and other matters may be considered:

- a) Operating schedules - demonstration of compliance with management standards to support each of the licensing objectives.
- b) Proximity to residential accommodation - the likelihood of the operation to have an adverse impact on the peace and quiet of local residents.
- c) Potential noise and nuisance from people leaving and entering the premises.
- d) Ability to demonstrate that systems in place to ensure timely dispersal of customers away from residential areas.
- e) Use of external areas for carrying out the licensable activities and potential noise impact on local residents.
- f) Proposed hours of the licensing activities and general opening times for the public – the use of winding down periods to enable more efficient dispersal.
- g) Type of use – alcohol led premises such as pubs, bars and nightclubs, off licenses and hot food take away premises are more likely to be associated with crime and disorder and public nuisance than other premises such as seated restaurants, theatres, cinemas and other cultural activities.
- h) Availability of public transport to assist in the timely dispersal of customers from the vicinity and to ensure safe travel home.
- i) The potential for contamination of the street environment through increased litter and other pollution of the streets by customers. (para 6.42)

## 6. National Guidance

6.1 Statutory guidance has been issued under Section 182 of the Licensing Act 2003 (guidance updated March 2015). The committee must have regard to the guidance when determining this application. Below are relevant extracts for the benefit of the committee.

### Licensing objectives and aims

6.2 The legislation provides a clear focus on the promotion of four statutory objectives which must be addressed when licensing functions are undertaken. (1.2)

6.3 The licensing objectives are:

- The prevention of crime and disorder;
- Public safety;
- The prevention of public nuisance; and
- The protection of children from harm. (1.3)

6.4 Each objective is of equal importance. There are no other statutory licensing objectives, so that the promotion of the four objectives is a paramount consideration at all times. (1.4)

6.5 However, the legislation also supports a number of other key aims and purposes. These are vitally important and should be principal aims for everyone involved in licensing work. They include:

- protecting the public and local residents from crime, anti-social behaviour and noise nuisance caused by irresponsible licensed premises;
- giving the police and licensing authorities the powers they need to effectively manage and police the night-time economy and take action against those premises that are causing problems;
- recognising the important role which pubs and other licensed premises play in our local communities by minimising the regulatory burden on business, encouraging innovation and supporting responsible premises;

- providing a regulatory framework for alcohol which reflects the needs of local communities and empowers local authorities to make and enforce decisions about the most appropriate licensing strategies for their local area; and
- encouraging greater community involvement in licensing decisions and giving local residents the opportunity to have their say regarding licensing decisions that may affect them. (1.5)

## Legal status

6.6 Section 4 of the 2003 Act provides that, in carrying out its functions, a licensing authority must 'have regard to' guidance issued by the Secretary of State under section 182. This Guidance is therefore binding on all licensing authorities to that extent. However, this Guidance cannot anticipate every possible scenario or set of circumstances that may arise and, as long as licensing authorities have properly understood this Guidance, they may depart from it if they have good reason to do so and can provide full reasons. Departure from this Guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken. (1.9)

## Licence conditions – general principles

6.7 Conditions on a premises licence or club premises certificate are important in setting the parameters within which premises can lawfully operate. The use of wording such as “must”, “shall” and “will” is encouraged. Licence conditions:

- must be appropriate for the promotion of the licensing objectives;
- must be precise and enforceable;
- must be unambiguous and clear in what they intend to achieve;
- should not duplicate other statutory requirements or other duties or responsibilities placed on the employer by other legislation;
- must be tailored to the individual type, location and characteristics of the premises and events concerned;
- should not be standardised and may be unlawful when it cannot be demonstrated that they are appropriate for the promotion of the licensing objectives in an individual case;
- should not replicate offences set out in the 2003 Act or other legislation;
- should be proportionate, justifiable and be capable of being met, (for example, whilst beer glasses may be available in toughened glass, wine glasses may not);
- cannot seek to manage the behaviour of customers once they are beyond the direct management of the licence holder and their staff, but may impact on the behaviour of customers in the immediate vicinity of the premises or as they enter or leave; and
- should be written in a prescriptive format. (1.16)

## Each application on its own merits

6.8 Each application must be considered on its own merits and in accordance with the licensing authority's statement of licensing policy; for example, if the application falls within the scope of a cumulative impact policy. Conditions attached to licences and certificates must be tailored to the individual type, location and characteristics of the premises and events concerned. This is essential to avoid the imposition of disproportionate and overly burdensome conditions on premises where there is no need for such conditions. Standardised conditions should be avoided and indeed may be unlawful where they cannot be shown to be appropriate for the promotion of the licensing objectives in an individual case. (1.17)

## Public nuisance

6.9 The 2003 Act enables licensing authorities and responsible authorities, through representations, to consider what constitutes public nuisance and what is appropriate to prevent it in terms of conditions attached to specific premises licences and club premises certificates. It is therefore important that in considering the promotion of this licensing objective, licensing authorities and responsible authorities focus on the effect of the licensable activities at the specific premises on

persons living and working (including those carrying on business) in the area around the premises which may be disproportionate and unreasonable. The issues will mainly concern noise nuisance, light pollution, noxious smells and litter. (Paragraph 2.14)

- 6.10 Public nuisance is given a statutory meaning in many pieces of legislation. It is however not narrowly defined in the 2003 Act and retains its broad common law meaning. It may include in appropriate circumstances the reduction of the living and working amenity and environment of other persons living and working in the area of the licensed premises. Public nuisance may also arise as a result of the adverse effects of artificial light, dust, odour and insects or where its effect is prejudicial to health. (Paragraph 2.15)
- 6.11 Conditions relating to noise nuisance will usually concern steps appropriate to control the levels of noise emanating from premises. This might be achieved by a simple measure such as ensuring that doors and windows are kept closed after a particular time, or persons are not permitted in garden areas of the premises after a certain time. More sophisticated measures like the installation of acoustic curtains or rubber speaker mounts to mitigate sound escape from the premises may be appropriate. However, conditions in relation to live or recorded music may not be enforceable in circumstances where the entertainment activity itself is not licensable. Any conditions appropriate to promote the prevention of public nuisance should be tailored to the type, nature and characteristics of the specific premises and its licensable activities. Licensing authorities should avoid inappropriate or disproportionate measures that could deter events that are valuable to the community, such as live music. Noise limiters, for example, are expensive to purchase and install and are likely to be a considerable burden for smaller venues. (Paragraph 2.16)
- 6.12 As with all conditions, those relating to noise nuisance may not be appropriate in certain circumstances where provisions in other legislation adequately protect those living in the area of the premises. But as stated earlier in this Guidance, the approach of licensing authorities and responsible authorities should be one of prevention and when their powers are engaged, licensing authorities should be aware of the fact that other legislation may not adequately cover concerns raised in relevant representations and additional conditions may be appropriate. (Paragraph 2.17)
- 6.13 Where applications have given rise to representations, any appropriate conditions should normally focus on the most sensitive periods. For example, the most sensitive period for people being disturbed by unreasonably loud music is at night and into the early morning when residents in adjacent properties may be attempting to go to sleep or are sleeping. This is why there is still a need for a licence for performances of live music between 11 pm and 8 am. In certain circumstances, conditions relating to noise emanating from the premises may also be appropriate to address any disturbance anticipated as customers enter and leave. (Paragraph 2.18)
- 6.14 Measures to control light pollution will also require careful thought. Bright lighting outside premises which is considered appropriate to prevent crime and disorder may itself give rise to light pollution for some neighbours. Applicants, licensing authorities and responsible authorities will need to balance these issues. (Paragraph 2.19)
- 6.15 Beyond the immediate area surrounding the premises, these are matters for the personal responsibility of individuals under the law. An individual who engages in antisocial behaviour is accountable in their own right. However, it would be perfectly reasonable for a licensing authority to impose a condition, following relevant representations, that requires the licence holder or club to place signs at the exits from the building encouraging patrons to be quiet until they leave the area, or that, if they wish to smoke, to do so at designated places on the premises instead of outside, and to respect the rights of people living nearby to a peaceful night. (Paragraph 2.20)



## 7. Licensing Comments

- 7.1 When determining this application the sub-committee must have regard to the statutory guidance issued by the Secretary of State, the council's adopted policy statement, the representations made and the evidence it hears. In particular, the sub-committee must seek to promote the four licensing objectives when determining the application.
- 7.2 The four licensing objectives are: (a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm.
- 7.3 The role of the licensing authority is to ensure the promotion of the licensing objectives and, in so doing, to maintain an appropriate balance between the legitimate aspirations of applicants and businesses, and the reasonable needs and expectations of residents and other users of the town.
- 7.4 Members are also to note the authority's policy on "Core Hours for Licensable Activities" as outlined at paragraph 5.5 of this report. This application complies with a terminal hour of no later than 03:00 for bars in the town centre.
- 7.5 The scope of Member's consideration is limited to the merits of the variation applied for. As this is not a review of the premises licence, existing authorisations are not within scope.
- 7.6 With regards to the representations:
- 7.6.1 A number of objectors have made representations relating to the fact that licensable activities will continue at the rear until 03:00. Members are to note that from the table above, the terminal hour for licensable activities at the rear will be 02:00. The 03:00 relates to the terminal hour for indoors.
- 7.6.2 The committee is required to determine this application on its individual merits. As such, comments making reference to other licensed venues in the vicinity or the general area cannot be taken in to consideration unless there is evidence that more general issues can be attributable directly back to 131 The Prom.
- 7.6.3 A decision by the committee will not set a precedent because the authority is required to determine each case on its individual merits.
- 7.6.4 A comment was submitted in relation to the public notice. Members are to note that the applicant was required to delay the closing date for the consultation due to an incorrect public notice. They were also required to republish the notice in the local press to rectify the mistake. Once rectified, officers were satisfied with the compliance with the regulations. With this in mind, officers are not of the view that the application is defective.

Members are to note that in the case of R (D&D Bar Services Ltd) -v- Romford Magistrates Court and the London Borough of Redbridge [2014] EWHC 213 Admin, the High Court ruled that procedural defects do not automatically render licensing proceedings invalid. In the case HHJ Blackett held:

*"...in my view it could never have been the intention of Parliament that minor errors on a notice or advertisement for a licensing review should make any subsequent consideration of the licence void. Such an approach would lead to absurd consequences. It is clear that there must be substantial compliance with Regulations 38(1) (a) and 39 but the process should not be frustrated by minor errors. "*

- 7.6.5 On the final point of the change of company name, whilst this appears to have been an oversight on the part of the applicant, it does not materially affect this application and the ability of the authority to determine it. This is because the company number, and therefore the legal entity, has not changed. The change of name would be a simple administrative process to update.

- 7.8 The sub-committee, having full regard to the steps the applicants have proposed in their operating schedule and the representations received, must take such steps as it considers appropriate for the promotion of the licensing objectives.
- 7.9 Having considered all relevant issues, the sub-committee may:
- a) Grant the application subject to such conditions as are consistent with the operating schedule, and any additional amendments or conditions that the sub-committee considers appropriate for the promotion of the licensing objectives; or
  - b) Refuse all or part of the application.

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**Background Papers**

Service Records

**Report Author**

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