



## Committee report

Committee	<b>LICENSING SUB COMMITTEE</b>
Date	<b>13 JULY 2015</b>
Title	<b>TO DETERMINE AN APPLICATION FOR THE VARIATION OF A PREMISES LICENCE UNDER SECTION 34 OF THE LICENSING ACT 2003 FOR THE BEACH SHACK, DEVONIA SLIPWAY, ESPLANADE, SANDOWN, ISLE OF WIGHT, PO36 8NJ.</b>
Report Author	<b>JOHN METCALFE DEPUTY MANAGING DIRECTOR</b>

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### BACKGROUND

1. Under section 34 of the Licensing Act 2003, a premises licence holder may apply to vary the licence to add licensable activities or alter the times for such activities, or to remove conditions, where this cannot be done by way of a minor variation.
2. The applicant is required to submit a copy of the application to Responsible Authorities, as defined in the Licensing Act, and to place a notice of the application at the premises and in a local newspaper.
3. Any person may make representations in respect of the application and if these are not resolved the licensing authority must hold a hearing to determine the application.
4. A copy of the current licence can be found at Appendix A.
5. An application for the variation of the premises licence was submitted to the licensing authority on 19 May 2015 for The Beach Shack, Devonian Slipway, Esplanade, Sandown, Isle of Wight, PO36 8NJ (Appendix B).
6. The premises is a beach café/restaurant. It has 35/40 covers inside with another 35/40 covers provided in a garden area to the side of the premises. A further 20/30 covers are located at the front of the premises along the revetment. This area forms part of the licensed premises. The applicant states that the number of seats outside the premises has remained the same for approximately 14 years. Photographs of the premises can be found at Appendix C.
7. The applicant describes the nature of the variation as a change of the internal layout, change of trading hours and a change to the conditions on the licence.

8. The applicant has also requested an extension to the hours for the supply of alcohol and the addition of late night refreshment and recorded music on Friday and Saturday evenings.
9. The application form shown at Appendix B shows recorded music being requested each day until 22:00 hours Sunday to Wednesday and until 23:00 hours on Thursdays.
10. Since The Legislative Reform (Entertainment Licensing) Order 2014 came into force on 6 April 2015 the playing of recorded music before 23:00 hours has been de-regulated. Therefore the applicant does not require a licence for the playing of recorded music between Sunday and Thursday.
11. A plan was submitted with the application (Appendix D) this shows the new internal layout. The plan does not show the external seating area to the front of the premises; however, this area remains unchanged and does not form part of the variation application.
12. The applicant has since updated the plan to show the external seating to the front of the building as this area already forms part of the licensed area (Appendix E). If the variation is granted, it is this plan that will be shown on the licence.
13. With regard to the change of licence conditions that the applicant has requested, a schedule of the revised conditions that the applicant has agreed with the police and the Environmental Health Department can be found at Appendix F.

#### CONSULTATION

14. The Licensing Act 2003 prescribes a twenty eight day consultation period, commencing the day after the application has been correctly served. Applicants are required to serve each of the Responsible Authorities with a copy of the application, advertise the application at or on the premises and also in the local newspaper.
15. The application for the variation of the premises licence was received on 19 May 2015. The application was advertised in the Isle of Wight County Press, at the premises and on the Council's website. The consultation period ended on 16 June 2015.
16. Prior to the application being made, the applicant met with PC Bradley of the Police Licensing Unit. PC Bradley discussed with the applicant his proposals and agreed the removal of conditions 2, 4, 5 & 7 on the current licence. The rewording of conditions 1 and 6 and the agreement to condition 3 remaining. It was also agreed that three further conditions would be added to the licence. These conditions require an incident log and a refusals log to be maintained and for door supervisors to be employed at the premises if in the future any event is held that would warrant their presence.
17. Following the consultation period it was noted that there were some discrepancies with the timings that the applicant has advertised. On Thursday, Friday and Saturday the timings for activities were advertised as 23:00 hours on Thursday and 23:59 hours on Friday and Saturday with the premises closing half an hour later.

18. These times actually reflect the times that the police have agreed the premises should be closed to the public and all persons should have left the building.
19. The applicant has since revised the timings for licensable activities on these days and has reduced them by thirty minutes respectively in line with police recommendations. The revised timings for activities are now as follows:

20. Recorded Music

- Sunday – Wednesday 08:00 – 22:00 not licensable
- Thursday 08:00 – 22:30 not licensable
- Friday & Saturday 08:00 – 23:30

Late Night Refreshment

- Friday & Saturday 23:00 – 23:30

Supply of Alcohol

- Sunday – Wednesday 10:00 – 22:00
- Thursday 10:00 – 22:30
- Friday & Saturday 10:00 – 23:30

Hours Open to the Public

- Sunday – Wednesday 08:00 – 22:30
- Thursday 08:00 – 23:00
- Friday & Saturday 08:00 – 23:59

21. The applicant is therefore requesting an additional half an hour for licensable activities on a Thursday and an additional hour and a half on Friday and Saturday.
22. The outcome of the consultation in respect of this application is as follows:

Responsible Authorities

Children's Services	No Representation made
Environmental Health	Condition agreed
Fire and Rescue Service	No Representation made
Trading Standards Service	No Representation made
Planning Services	No Representation made
Police	No Representation made
NHS	No Representation made
Licensing Authority	No Representation made

23. During the consultation period the Environmental Health department recommended one condition (Appendix G); this has been agreed by the applicant.

## Other Persons

24. Seven valid representations have been received from other persons (Appendix H) relating to the licensing objectives:
- Prevention of public nuisance
  - Prevention of crime and disorder
25. With regard to the prevention of public nuisance, concerns have been raised from local residents that if the hours for licensable activities are extended that they will experience nuisance from various sources of noise. Examples that have been given include:
- noise from the playing of music at the premises
  - noise from customers when using the external seating
  - noise from customers when leaving the premises
  - noise from smokers
26. Some residents are concerned that the premises is to become a music venue and that potentially recorded music could be played for up to fourteen hours a day every day of the year.
27. Concerns have also been raised that plans to provide late night refreshment both indoors and outdoors may encourage customers to take food and drink from the premises onto the revetment causing a nuisance to residents.
28. With regard to the prevention of crime and disorder, one resident has expressed concerns that to extend the hours for licensable activities will likely result in anti-social behaviour and non-reportable crime including shouting, swearing and littering.
29. Mr Bramley has submitted 2 x photographs (Appendix I) showing the proximity of the premises to his property and the outside seating area.
30. At the end of the consultation period, a letter (Appendix J) was sent to all of the interested parties. The letter clarified the revised timings and provided an explanation from the applicant of his intentions and his reasons for making the application. The letter also explained The Legislative Reform (Entertainment Licensing) Order 2014 that came into force on the 6 April 2015, and the remedies available to interested persons and Responsible Authorities if activities carried out at the premises were to cause a nuisance.
31. A copy of the revised conditions that have been agreed with the police and Environmental Health was also sent to interested persons.

## FINANCIAL/BUDGET IMPLICATIONS

32. Broadly, Council expenditure on licensing matters, and specifically those administered and enforced through Planning and Regulatory Services, balances income generated from fees.

## LEGAL IMPLICATIONS

33. The 28 day consultation period ended on 16 June 2015. Schedule 1 of the Licensing Act (Hearings) Regulations 2005 states that the application must be determined within 20 working days of the end of the consultation period.

### National Guidance

34. The following sections from the national guidance issued under section 182 of the Licensing Act 2003 are considered relevant to this application:

35. Each application on its own merits –

1.17 Each application must be considered on its own merits and any conditions attached to licences and certificates must be tailored to the individual style 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 any individual case.

36. Proportionality

10.10 The 2003 Act requires that licensing conditions should be tailored to the size, type, location and characteristics and activities taking place at the premises concerned. Conditions should be determined on a case by case basis and standardised conditions which ignore these individual aspects should be avoided. Licensing authorities and other responsible authorities should be alive to the indirect costs that can arise because of conditions. These could be a deterrent to holding events that are valuable to the community or of the funding of good and important causes. Licensing authorities should therefore ensure that any conditions they impose are only those which are appropriate for the promotion of the licensing objectives.

37. Hours of trading

10.11 The Government acknowledges that different licensing strategies may be appropriate for the promotion of the licensing objectives in different areas. The 2003 Act gives the licensing authority power to make decisions regarding licensed opening hours as part of the implementation of its licensing policy statement and licensing authorities are best placed to make decisions about appropriate opening hours in their areas based on their local knowledge and in consultation with responsible authorities. However, licensing authorities must always consider each application and must not impose predetermined licensed opening hours, without giving individual consideration to the merits of each application.

10.12 Where there are objections to an application to extend the hours during which licensable activities are to be carried on and the licensing authority determines that this would undermine the licensing objectives, it may reject the application or grant it with appropriate conditions and/or different hours from those requested.

## 38. Public nuisance

- 2.18 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.
- 2.19 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 is important to remember that the prevention of public nuisance could therefore include low-level nuisance perhaps affecting a few people living locally as well as major disturbance affecting the whole community. It may also 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.
- 2.20 Conditions relating to noise nuisance will normally 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 more sophisticated measures like the installation of acoustic curtains or rubber speaker mounts. Any conditions appropriate to promote the prevention of public nuisance should be tailored to the type, nature and characteristics of the specific premises. Licensing authorities should be aware of the need to avoid inappropriate or disproportionate measures that could deter events that are valuable to the community, such as live music. Noise limiters, for example, are very expensive to purchase and install and are likely to be a considerable burden for smaller venues.
- 2.21 As with all conditions, those relating to noise nuisance may not be appropriate in certain circumstances where the provisions of the Environmental Protection Act 1990, the Noise Act 1996, or the Clean Neighbourhoods and Environment Act 2005 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.
- 2.22 Where applications have given rise to representations, any appropriate conditions should normally focus on the most sensitive periods. For example, music noise from premises usually occurs from mid-evening until either late-evening or early-morning when residents in adjacent properties may be attempting to go to sleep or are sleeping. In certain circumstances, conditions relating to noise immediately surrounding the premises may also prove appropriate to address any disturbance anticipated as customers enter and leave.

## Implications under the Crime and Disorder Act 1998

39. Members are advised that without prejudice to any other obligation imposed on it, it shall be the duty of each authority to which this section applies to exercise its functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area.

## Human Rights

40. Members are advised that this application must be considered against the background of the implications of the Human Rights Act 1998.
41. There are three convention rights, which need to be considered in this context:

### Article 6 - Right to a Fair Trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It has been held that the fact that there is a right of appeal to the Magistrates' Court from any decision of the Licensing Authority is sufficient to make the Council's licensing system compliant with the convention rights.

### Article 8 - Right to Respect for Private and Family Life

Everyone has the right to respect for his private and family life, his home and his correspondence. In the case of article 8 there shall be no interference by a public authority with the exercise of this right except as such in accordance with the law and is necessary on a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder and crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

### Article 1 - First Protocol Protection of Property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. In the case of Article 1 of the first protocol it states that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions (of which articles 6 and 8 are but two) shall not however in any way impair the right of the state to enforce such laws as it deems necessary to control the use of the property in accordance with general interest or to secure the payment of taxes or other contributions or penalties".

42. The Licensing Authority acknowledges the right of businesses in its area to operate, but equally acknowledges the fact that this must be balanced against the rights of residents not to be disturbed by unreasonable noise and nuisance caused by licensed premises. The Sub-Committee needs to be clear as to the rights granted and the need to ensure that the reasons given for any interference are proportionate and in accordance with the Council's legitimate aim.

43. It is considered that the following paragraphs from the Licensing Authority's Statement of Licensing Policy 2014 – 2019 have a bearing upon the application. Members' attention in respect of this particular application is drawn to:

Paragraph 1	Introduction	All
Paragraph 2	Licensing Objectives	All
Paragraph 3	Licensable Activities	All
Paragraph 4	Integration of Strategies and Other Legislation	All
Paragraph 5	Approach to Licensing Applications	All
Paragraph 6	Cumulative Effect	N/A
Paragraph 7	Representations, Reviews, and Appeals	7.1 – 7.3, 7.8 – 7.11
Paragraph 8	Enforcement	N/A
Paragraph 9	Operating Schedules	9.3 – 9.6, 9.9 -9.17

### EQUALITY AND DIVERSITY

44. The council as a public body is subject to general and specific duties under equality and diversity legislation and as such has a duty to go beyond prohibition and publish and promote service improvements by engaging with the local community to assess the impact of any decision on the local community. As a requirement under the Equality Act 2010 and further improvements to diversity legislation all local authorities are required to impact assess their services, policies/strategies and decisions with regard to diversity legislation – race, disability, gender, age, sexual orientation and religion/belief. (NB: this list is not exhaustive, it does cover current legislation but future development could also include poverty and social inclusion as an example).

45. There is no requirement for an equality impact assessment to be carried out.

### OPTIONS

- Option 1: Vary the licence as per the application.
- Option 2: Vary the licence as per the application with any additional conditions that the Sub-Committee deem reasonable and proportional to promote the licensing objectives.
- Option 3: Refuse the whole or part of the application.

### RISK MANAGEMENT

46. With regard to Option 1: To grant the licence as per the application may not adequately mitigate the risk of a nuisance arising from licensable activities taking place should the Sub-Committee deem this to be a likely outcome. The decision not to address the concerns raised may subsequently be appealed by those parties who have made representations.

47. With regard to Option 2: The risk of crime and disorder or nuisance being attributed to the premises could be reduced by attaching conditions to the licence to promote the licensing objectives. Conditions must be appropriate and proportionate. Any decision to attach additional conditions may be appealed by all parties if they believe the conditions do not adequately promote the licensing objectives.
48. With regard to Option 3: If the Sub-Committee decides to refuse all or part of the application, the decision may be appealed by all parties.

## EVALUATION

49. The majority of the concerns raised by interested parties have been made in relation to the licensing objective of the Prevention of Public Nuisance. During the consultation period the Environmental Health department considered the application and recommended one condition, this states: no consumption of alcohol or other food and beverages shall be allowed in the external area of the premises between 23:00 hours and 08:00 hours. The applicant has agreed this condition.
50. The Environmental Health department were contacted again on receipt of the representations made by interested parties. They were asked to comment on the concerns raised and responded via email on 26 June 2015 (Appendix K).
51. With regard to the issues raised by interested parties, they confirm that there have been no previous complaints made with the exception of one complaint from an event in 2013 which appeared to relate to a one off private party.
52. They consider that the agreed condition will be sufficient to effectively control customer noise from outside the premises, whilst encouraging those customers who wish to stay after 23:00 hours to remain inside where due to the size of the premises numbers would be restricted.
53. Interested parties have queried whether the seating on the revetment would be subject to the condition recommended by Environmental Health as this seating wasn't shown on the plan submitted with the application.
54. The condition does apply to this area as explained in paragraphs 10 and 11 of this report.
55. With regard to recorded music the Environmental Health department state that they are restricted from imposing any conditions on live or recorded music before 23:00 hours due to the provisions of the Live Music Act 2012 and The Legislative Reform (Entertainment Licensing) Order 2014.
56. Officers retain their powers under the Environmental Protection Act 1990 and as a Responsible Authority under the Licensing Act 2003 can call for the review of the premises licence if required.
57. Mr Bramley in his representations specifies a number of conditions that he considers should be imposed on the licence if the application is granted. These conditions are as follows:
  - that the type of music entertainment permitted is restricted to prevent heavy bass and discos
  - that a sound limiting device is installed

- that all windows and doors are kept closed during music entertainment
58. Members should note that if minded to grant the extension to hours for licensable activities and to allow recorded music that due to the provisions of the Live Music Act 2012 and The Legislative Reform (Entertainment Licensing) Order 2014 any conditions that you are minded to impose in respect of music entertainment will only take effect after 23:00 hours. Such conditions will therefore only apply for thirty minutes on Friday and Saturday evenings.
  59. With regard to the concerns raised by interested parties that the premises is going to change from a beach café to a music venue, the applicant states that music will remain as background only (not licensable), unless the premises are being used for a private party or during tapas evenings.
  60. The applicant has indicated that tapas evenings will run for approximately 8-10 weeks starting at the beginning of the school holidays and any music provided on these occasions is likely to be someone playing a Spanish guitar or similar.
  61. The applicant states that when parties are held at the premises, other music entertainment may be provided; however, he does not foresee the number of these events increasing dramatically. Previously these events have been licensed under temporary event notices. Licensing section records show that since 2013 six temporary events have been held at the premises.
  62. Furthermore, the applicant states that in October this year building work is due to begin to build a 2-3 bedroom holiday apartment above the premises. He states that it is therefore not in his interests to hold events at the premises where music is likely to cause a nuisance to his paying guests and would not make good business sense to do so.
  63. With regard to the concerns raised that plans to provide late night refreshment may encourage customers to take food and drink from the premises onto the revetment. The condition imposed by Environmental Health prevents the applicant from allowing any customer to consume any food or drink in the external areas of the licensed premises after 23:00 hours.
  64. However, the beach and the revetment are public spaces and at any time members of the public may frequent them. The premises are currently licensed to remain open to the public until 22:30 hours and to date no complaints of this nature have been received. The public are permitted to access the beach at any time and once away from the licensed area can no longer reasonably be expected to be under the licensee's control.
  65. With regard to the prevention of crime and disorder, the police were provided with a copy of the representations and were asked to comment. PC Bradley of the Police Licensing Unit has provided a memo (Appendix L).
  66. The police state they have no objections to this application. The grant of the hours applied for would mean a slight extension into the night time economy period on Friday and Saturday only. The applicant intends to run a food led venue which historically has not attracted issues of crime and disorder and there is no evidence to suggest that it will do so.

67. Police records show only three incidents linked to the premises since 2009. These have been minor in nature consisting of two thefts and a criminal damage at times when the premises have been closed.
68. On 29 June 2015 two letters were received from interested persons in response to the information letter that was sent following the consultation period. These letters can be found at Appendix M.
69. The Sub Committee must have regard to all of the representations made and the evidence it hears as well as the national guidance issued under Section 182 of the Licensing Act 2003 and the Council's own Statement of Licensing Policy.
70. The Sub Committee should determine the application in accordance with section 35 of the Licensing Act 2003 and The Licensing Act (Hearings) Regulations 2005 and with a view to promoting the licensing objectives, which are:
  - a. The Prevention of Crime and Disorder
  - b. The Prevention of Public Nuisance
  - c. Public Safety
  - d. The Protection of Children from Harm

#### RECOMMENDATION

71. Members should determine the application in accordance with section 35 of the Licensing Act 2003 and The Licensing Act (Hearings) Regulations 2005. It is the view of the Licensing Section that based upon the information available at the time of producing this report that Option 2 is appropriate.

#### APPENDICES ATTACHED

- [Appendix A](#) Premises licence for The Beach Shack, Esplanade, Sandown, Isle of Wight, PO36 8JS
- [Appendix B](#) Application for the variation of a premises licence under section 34 of the Licensing Act 2003
- [Appendix C](#) Photographs of premises
- [Appendix D](#) Plan of the premises
- [Appendix E](#) Revised plan showing external seating area to the front of the premises
- [Appendix F](#) Agreed conditions
- [Appendix G](#) Environmental Health agreed condition
- [Appendix H](#) Representations from interested persons
- [Appendix I](#) Photographs from Mr Bramley x 2
- [Appendix J](#) Information letter sent to interested persons

[Appendix K](#) Environmental Health email in response to representations

[Appendix L](#) Police memo in response to representations

[Appendix M](#) Letters from interested persons x 2

### BACKGROUND PAPERS

- Isle of Wight Council Licensing Authority Statement of Licensing Policy 2014 – 2019: <http://www.iwight.com/azservices/documents/1226-Statement-of-Licensing-Policy-2014-2019-Adopted-v1.pdf>

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