



Purpose: For Decision

# Committee report

Committee	<b>LICENSING SUB COMMITTEE</b>
Date	<b>19 MAY 2023</b>
Title	<b>TO DETERMINE AN APPLICATION FOR THE VARIATION OF A PREMISES LICENCE UNDER SECTION 34 OF THE LICENSING ACT 2003 FOR THE GARDEN, 48 HIGH STREET, COWES, ISLE OF WIGHT, PO31 7RR.</b>
Report Author	<b>COLIN ROWLAND DIRECTOR OF NEIGHBOURHOODS</b>

---

## 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. 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.
3. An application for a variation to the premises licence for The Garden, 48 High Street, Cowes, Isle of Wight, P031 7RR was submitted to the licensing authority on 22 March 2023 - Appendix 1.
4. A copy of the current licence can be found at Appendix 2
5. The premises is a restaurant/café located in Cowes High Street.
6. The applicant is applying to update the plan of the premises to incorporate the first floor and the rear garden of the premises and to show the area to the front of the premises which is now subject to a Pavement licence under the Business and Planning Act 2020. The plan can be found at Appendix 3.
7. Initially an application was made under section 41A for a minor variation to the licence to effect these changes. However, officers from the Environmental Health department advised that two noise complaints had been made to the department since February 2023 and consequently it would have been necessary for the licensing authority to reject the application.

8. The applicant was informed of this during a meeting at the premises with the licensing officer and an officer from the Environmental Health department and advised that a full variation would be required to make the changes.
9. He subsequently withdrew the minor variation application and made the application that is being determined today.
10. There are no changes being in sought in relation to timings or activities.

### CONSULTATION

11. The Licensing Act 2003 prescribes a twenty-eight-day consultation period, commencing the day after the application has been correctly served. 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.
12. The application for a variation of the premises licence was received on 22 March 2023. The application was advertised in the Observer on 24 March 2023, at the premises and on the Council's website. The consultation period ended on 19 April 2023.
13. The outcome of the consultation in respect of this application is as follows:

#### Responsible Authorities

Children's Services	No Representation made
Environmental Health	Representation made conditions recommended
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
Immigration Enforcement	No Representation made

#### Environmental Health Department

14. An officer from the Environmental Health department has recommended four conditions which can be found at Appendix 4.
15. The officer originally recommended a condition restricting use of the garden area between 09:00 and 20:00 hours Sunday to Thursday and until 21:00 hours

Friday and Saturday. These hours were revised following discussions with the applicant to the hours shown in the condition below but currently this has not been agreed.

16. This condition is as follows:  
*The use of the external area referred to as the 'garden area' hereby permitted and marked 'XX' on the accompanying plan, shall be open to customers between the following times only:*  
*Sunday-Thursday –09:00 until 21:00hrs*  
*Fri/Saturday –09:00 until 22:00hrs*
17. The applicant has indicated during discussions that he would be agreeable to conditioning the hours of use of the garden if the terminal hour could be extended until 22:00 hours during the summer months (July & August), as this would allow them to provide two sittings from 18:00 – 20:00 & 20:00- 22:00 hours.
18. This proposal was discussed with the EH officer who stated that he was concerned at such a lengthy period of extension, as the potential for nuisance to be caused was at its greatest at this time of year. He stated that he would possibly be willing to discuss a 22:00 terminal hour for the duration of the summer holidays (6 weeks) with his line manager, if the applicant would agree to this, but when this was put forward the applicant rejected this and indicated his wish to have this matter determined by the licensing sub committee.
19. In considering this application and the formulation of these conditions the officer has carried out a noise assessment and a venue risk assessment, this report and the results can be found at Appendix 5.

#### Other Persons

20. Five (5) representations were received by 'other persons' during the consultation period. Four (4) of these were in support of the application and one (1) was an objection on the grounds of :
  - Prevention of public nuisance
21. Mr & Mrs Wood-Jenkins have made representations in respect of noise nuisance in the form of music and people noise which they state emanates from the rear garden of the premises. They state this disturbs local residents, particularly those who reside in the flats directly behind the premises.
22. Concerns have also been raised in respect of disturbance that has previously been caused on one occasion when a private party was held on the first floor under the authorisation of a temporary event notice. A copy of Mr & Mrs Wood Jenkins representation can be found at Appendix 6.
23. The proposed Environmental Health conditions were forwarded to Mr & Mrs Wood-Jenkins who replied that it would be encouraging if these conditions were to be agreed.

24. However, during negotiations it wasn't possible for agreement to be reached in respect of condition 1 and Mr & Mrs Wood-Jenkins were subsequently advised that only three of the four conditions had been agreed. They were asked to confirm if on this basis they wished their representation to remain. They replied that they would like their concerns and that of the other residents of the flats noted.
25. Please note that whilst reference has been made to other residents having concerns, no other representations were received during the consultation period and therefore this comment cannot be given additional weight simply because of the reference to other persons also being affected. Copies of these communications can be found at Appendix 7.
26. The representations received in support of the application can be found at Appendix 8.

#### FINANCIAL/BUDGET IMPLICATIONS

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

#### LEGAL IMPLICATIONS

28. The 28-day consultation period ended on 19 April 2023. 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

29. The following sections from the national guidance issued under section 182 of the Licensing Act 2003 are considered relevant to this application:
30. Each application on its own merits –
  - 1.17 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.

## 31. Public nuisance

- 2.15 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.
- 2.16 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.
- 2.17 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 (see chapter 16). 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.
- 2.18 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.

2.19 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.

2.21 Beyond the immediate area surrounding the premises, these are matters for the personal responsibility of individuals under the law. An individual who engages in anti-social 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.

### 32. Determining actions that are appropriate for the promotion of the licensing objectives

9.44 Determination of whether an action or step is appropriate for the promotion of the licensing objectives requires an assessment of what action or step would be suitable to achieve that end. While this does not therefore require a licensing authority to decide that no lesser step will achieve the aim, the authority should aim to consider the potential burden that the condition would impose on the premises licence holder (such as the financial burden due to restrictions on licensable activities) as well as the potential benefit in terms of the promotion of the licensing objectives. However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters. As with the consideration of licence variations, the licensing authority should consider wider issues such as other conditions already in place to mitigate potential negative impact on the promotion of the licensing objectives and the track record of the business. Further advice on determining what is appropriate when imposing conditions on a licence or certificate is provided in Chapter 10. The licensing authority is expected to come to its determination based on an assessment of the evidence on both the risks and benefits either for or against making the determination.

### 33. 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. For example, conditions should not be used to implement a general policy in a given area such as the use of CCTV, polycarbonate drinking vessels or identity scanners where they would not be appropriate to the specific premises. Conditions that are considered appropriate for the prevention of illegal working in premises licensed to sell alcohol or late night refreshment might include requiring a premises licence holder to undertake right to work checks on all staff employed at the licensed premises or requiring that a copy of any document checked as part of a right to work check is retained at the licensed premises. 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 for 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.

34. Hours of trading

10.13 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 about the hours during which premises can conduct licensable activities as part of the implementation of its licensing policy statement. 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.

Implications under the Crime and Disorder Act 1998

35. 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

36. Members are advised that this application must be considered against the background of the implications of the Human Rights Act 1998.

37. 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".

38. 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.
39. It is considered that the following paragraphs from the Licensing Authority's Statement of Licensing Policy 2019 – 2024 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	4.1 – 4.8
Paragraph 5	Approach to Licensing Applications	5.1 – 5.4 & 5.7



Paragraph 6	Major Events & Isle of Wight County Council Act	N/A
Paragraph 7	Cumulative Impact	N/A
Paragraph 8	Representations, Review, Appeals & Complaints	8.1 – 8.6, 8.11 – 8.15
Paragraph 9	Enforcement	N/A
Paragraph 10	Operating Schedules	10.1 & 10.2, 10.9 – 10.16
Paragraph 11	Data Protection	All
Paragraph 12	Related Documents	All

### EQUALITY AND DIVERSITY

40. 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).
41. 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 proportionate to promote the licensing objectives.
- Option 3: Refuse the whole or part of the application.

### RISK MANAGEMENT

42. With regard to Option 1: To grant the licence as per the application may not adequately mitigate the risk of a nuisance being caused to local residents from the customers using the garden of the venue; 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.
43. With regard to Option 2: The risk of 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.

44. 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

45. Regulations made under the Licensing Act 2003 require a premises licence to show a plan of the premises. This plan must show the extent of and the boundary of the premises. Currently the plan on the existing premises licence for The Garden is not compliant as it does not show the first floor or the garden area, hence the reason for this application.
46. Whilst currently there are no licensable activities taking place in the rear garden (as consumption is not a licensable activity), it does form part of the premises and the use of this area has the potential to undermine the licensing objectives in relation to the prevention of public nuisance. The use of this area does therefore need to be considered in the same way as the use of a beer garden in a public house.
47. The basis for the objection to this application is noise nuisance from people using the garden and from music being played in the garden or from the first floor of the premises during private functions.
48. The objector states that music has on occasion been intrusive and there are two recorded complaints on our database to support this claim. One of these complaints was received in February 2023 when a private party was taking place under the authorisation of a Temporary Event Notice (TEN).
49. The other complaint cited concerns in relation to the continued use of the garden, the noise of which is most pronounced during periods of warm weather. This included suggestions of the noise from recorded music and people noise being intrusive from the internal parts of the complainant's property. The complaint was received in Feb 2022 following a TEN but the log sheets were not returned given the adverse weather thereafter. However, further concerns have been raised regarding the potential for further noise disturbance on the return of warmer weather.
50. The applicant maintains that the music played throughout the premises (with the exception of the private party referred to above), goes through one system, and therefore the levels being played inside are the same as the levels outside, which he states is background level only.
51. The Live Music Act disapplies live music related conditions if the following criteria are satisfied:
- *There is a premises licence or club premises certificate in place permitting 'on sales';*
  - *The premises are open for the sale or supply of alcohol for consumption on the premises;*

- *Live or recorded music is taking place between 8am and 11pm;*
- *If the live music is amplified or recorded, the audience consists of no more than 500 people*

52. It is therefore not possible for conditions to be applied in relation to the playing of music before 11pm, although the Environmental Health department maintain their powers under the Environmental Protection Act 1990.
53. Members are asked to note that the premises is located in a high street location and in comparison to other high street venues the activities that take place are relatively low key. However, given the proximity of the nearest residents there is a potential for nuisance to be caused from people noise and the needs of these residents need to be balanced against the rights of the applicant to run his business.
54. 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.
55. The 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:
- The Prevention of Crime and Disorder
  - The Prevention of Public Nuisance
  - Public Safety
  - The Protection of Children from Harm

### RECOMMENDATION

It is the view of the Licensing department that the application should be granted in accordance with Option 2.

### APPENDICES ATTACHED

Appendix 1 - Application for a variation of a premises licence under section 34 of the Licensing Act 2003

Appendix 2 - Current premises licence

Appendix 3 - Plan showing the first floor, rear garden and area to the front of the premises

Appendix 4 Conditions recommended by Environmental Health Department

Appendix 5 Noise assessment carried out by Environmental Health Department

Appendix 6 Objection from Mr & Mrs Wood-Jenkins

Appendix 7 Communications with Mr & Mrs Wood-Jenkins

Appendix 8 Letters/Emails from local residents supporting the application

### BACKGROUND PAPERS

Isle of Wight Council Licensing Authority Statement of Licensing Policy 2019 – 2024. <https://iwc.iow.gov.uk/azservices/documents/1226-Approved-Licensing-policy-2019-24.pdf>

Contact Point: Andrea Bull, Licensing Officer, ☎ 823159 ext 6126, e-mail [Andrea.bull@iow.gov.uk](mailto:Andrea.bull@iow.gov.uk)

COLIN ROWLAND  
Director of Neighbourhoods