

NEW FOREST DISTRICT COUNCIL

LICENSING ACT 2003

**APPLICATION: MARINE CAFÉ BAR AND RESTAURANT, HURST ROAD,
MILFORD ON SEA**

**Decision of the Licensing Sub-Committee hearing held at Appletree Court,
Lyndhurst on Thursday, 8 July 2010 at 10.00am**

1. Members of the Licensing Sub-Committee

Councillor P R Woods - Chairman
Councillor J A G Hutchins
Councillor S S Wade

2. Parties and their Representatives attending the Hearing

Mr & Mrs Thompson – Applicant
Mr Day – Solicitors for the Applicant
Mr De Kaldam – General Manager
Mr Ackerman – Chef

Objectors:
Cllr B Giles – Milford on Sea Parish Council
Mr & Mrs Austin
Miss Austin
Mr Backer
Mr and Mrs Burgess
Mr and Mrs Butcher
Mr G Estill
Mr and Mrs J S Goddard
Mr & Mrs Grimes
Mr P J Hallt
Mr and Mrs Hand
Mr and Mrs A Harrison
Mr & Mrs Lawrence
Miss H Lister
Mr A J Milnes
Mr Phair
Mr & Mrs Plummer
Mr Shergold
Mr and A C Smith
Mr Stockwell
Mr & Mrs Walker

3. Other Persons attending the Hearing

Edward Vandyke
Cllr Pemberton (Observer only)
Cllr Puttock (Observer only)

4. Parties not attending the Hearing

Objectors:

Mrs B E Masri
Mr L A Austin
Ms R Hilleard
Ms R Bufton
Mr T Bufton
Mr and Mrs R Armstrong
Mrs E K Spackman
Mrs J Schofield
Mrs R Pitt
Mr and Mrs G Thomas
Mr R D Lawrence
Mr K Smith
Mr I Roberts
Mr G Sandford
Mr R A Coghlan
Mr D W Lait
Ms G Clarkson
Mr and Mrs Adcock
Mr and Mrs Blundell
Mr J D McDonald
Mr T C Reeve
Mr and Mrs Newland
Mrs N Knaggs
Dr A Blaikley
Mr and Mrs Whiting
Mr T Talliss - Represented by Mr Harrison
Mrs J Milner- Represented by Mr Harrison
Mr and Mrs Nicholls - Represented by Mr Harrison
Mrs D Moss - Represented by Mr Harrison
Mrs P Irvine - Represented by Mr Harrison
Mr and Mrs Highett-Smith - Represented by Mr Harrison
Mr M Whiting – Represented by Mr Milnes
Mr and Mrs H Weston – Represented by Mr Milnes
Miss C Moth – Represented by Mr Milnes
Mr and Mrs Jerrett – Represented by Mr Milnes
Mr G Morton – Represented by Mr Milnes
Mr and Mrs P Kemp – Represented by Mr Milnes
Mr and Mrs C T C Harwood – Represented by Mr Milnes
Mrs F E Darling – Represented by Mr Milnes
Mr and Mrs Lawrence – Represented by Mr Milnes
Mr and Mrs Davis – Represented by Mr Milnes
Mr and Mrs Collinge – Represented by Mr Milnes
Mr A Norris & Mrs K Ash – Represented by Mr Milnes
Miss S & M Andrews – Represented by Mr Milnes
Mrs R M Milnes – Represented by Mr Milnes
Mrs B F Edwards – Represented by Mr Milnes
Mr M Cottingham – Represented by Mr Milnes

Mr B B Warren – Represented by Mr Milnes
Mr R C Sworn – Represented by Mr Milnes
Mr A C Blackburn – Represented by Mr Milnes
Mr C Duddridge – Represented by Mr Milnes
Mr and Mrs Ray – Represented by Mr Milnes
Mr and Mrs Trice – Represented by Mr Milnes
Mr and Mrs Tyler – Represented by Mr Milnes
Mr and Mrs Wickham – Represented by Mr Milnes
Mr and Mrs Allen – Represented by Mr Milnes
Mr G Clarke – Represented by Mr Milnes

5. Officers attending to assist the Sub-Committee

Edward Williams – Legal Advisor
Melanie Stephens- Clerk

6. Decision of the Sub-Committee

The application is granted on the following terms and conditions.

Licensable activities and times permitted:

E: Live Music (indoors and outdoors)

Monday 11.00 to 24.00
Tuesday 11.00 to 24.00
Wednesday 11.00 to 24.00
Thursday 11.00 to 24.00
Friday 11.00 to 24.00
Saturday 11.00 to 24.00
Sunday 11.00 to 24.00

Non-standard timings – 11.00 hours on New Year's Eve to 01.00 hours on New Year's Day

F: Recorded Music (indoors and outdoors)

Monday 11.00 to 24.00
Tuesday 11.00 to 24.00
Wednesday 11.00 to 24.00
Thursday 11.00 to 24.00
Friday 11.00 to 24.00
Saturday 11.00 to 24.00
Sunday 11.00 to 24.00

Non-standard timings – 11.00 hours on New Year's Eve to 01.00 hours on New Year's Day

I: Provision of facilities for making music (indoors and outdoors)

Monday 08.00 to 24.00
Tuesday 08.00 to 24.00
Wednesday 08.00 to 24.00
Thursday 08.00 to 24.00
Friday 08.00 to 24.00

Saturday 08.00 to 24.00
Sunday 08.00 to 24.00

Non-standard timings – 11.00 hours on New Year's Eve to 01.00 hours on New Year's Day

L: Late night refreshment (indoors and outdoors)

Monday 23.00 to 24.00
Tuesday 23.00 to 24.00
Wednesday 23.00 to 24.00
Thursday 23.00 to 24.00
Friday 23.00 to 24.00
Saturday 23.00 to 24.00
Sunday 23.00 to 24.00

Non-standard timings – 23.00 hours on New Year's Eve to 01.00 hours on New Year's Day

M: Supply of Alcohol (on the premises)

Monday 10.00 to 23.40
Tuesday 10.00 to 23.40
Wednesday 10.00 to 23.40
Thursday 10.00 to 23.40
Friday 10.00 to 23.40
Saturday 10.00 to 23.40
Sunday 10.00 to 23.40

Non-standard timings – 10.00 hours on New Year's Eve to 00.40 hours on New Year's Day

Hours premises to be open to the public

Monday 08.00 to 24.00
Tuesday 08.00 to 24.00
Wednesday 08.00 to 24.00
Thursday 08.00 to 24.00
Friday 08.00 to 24.00
Saturday 08.00 to 24.00
Sunday 08.00 to 24.00

Non-standard timings – 08.00 hours on New Year's Eve to 01.00 hours on New Year's Day

Mandatory conditions:

As provided in the Licensing Act 2003

Other conditions:

1. On each day that the premises are open, food in the form of light snacks shall be available at all times up until 23:00 hours. In addition, substantial refreshment in the form of table meals will be available (when the premises are open) between midday and 14:00 hours and between 19:00 hours and 21:00 hours, save on Christmas Day and New Year's Day.

2. At all times that the premises are open, tables and chairs to accommodate a minimum of 40 diners shall be made available inside the premises in the ground floor café/restaurant area.
3. During any indoor event involving live or amplified music (other than low level background music), all windows will be kept closed. External doors will also be kept closed except where necessary for access and egress i.e, the doors will not be secured open and will be fitted with self closers if necessary.
4. The disposal of empty bottles into outdoor storage areas will not take place between 19:00 and 07:00 hours.
5. Arrangements will be in place to ensure that deliveries of consumables will not take place between 19:00 and 07:00 hours.
6. Arrangements will be in place to ensure that waste collection contractors will not collect between 19:00 and 07:00 hours.
7. Notices shall be displayed at the exits requesting persons to leave the area quietly.
8. Signs shall be displayed at the exits from the premises to the effect that no alcohol may be taken away from the premises.
9. The Premises shall not provide any licensable activity until completed substantially in accordance with the plans deposited with the application or such other plan or plans as may be approved by the Licensing Authority from time to time. The holder of the licence shall notify the Licensing Authority of the proposed opening date at least fourteen days in advance thereof and shall provide representatives of all Responsible Authorities and the Licensing Authority an opportunity to inspect the Premises to ensure compliance with the plans.
10. The premises will operate a "Challenge 21" policy whereby photographic proof of age will be required from any person who appears to be under the age of 21 or who appears to be buying alcohol for consumption by a person under the age of 21. Such proof of age shall be by way of a photographic identification document such as a passport, driving licence or PASS card or such other means of identification as may be approved from time to time by the Police and/or Trading Standards Officers. "Challenge 21" posters shall be displayed in prominent positions at the premises.
11. All staff shall be trained to challenge every individual who appears to be under 21 years of age and to refuse service where individuals cannot produce acceptable means of identification. Such training shall be provided not less than every six months, and written records shall be kept of all training and refresher training and will be made available for inspection upon request by the Licensing Authority and Responsible Authorities.
12. A written log shall be kept of all refusals including refusals to serve alcohol. The holder of the premises licence shall ensure that the refusals log is properly maintained and this shall involve, but is not limited to, nominating in writing a responsible person to check and sign it on a weekly basis. The log will be made available for inspection upon request by the Licensing Authority and Responsible Authorities.
13. A CCTV system will be installed, or the existing system maintained, such system to be fit for the purpose.

14. The CCTV system shall be capable of producing immediate copies of recordings on site. Copies of recordings will either be recorded on to CD/DVD or other equivalent media.
15. Any recording will be retained and stored in a suitable and secure manner for a minimum of 30 days and shall be made available, subject to compliance with Data Protection legislation, to the Police for inspection on request.
16. The precise positions of the cameras may be agreed, subject to compliance with Data Protection legislation, with the Police from time to time.
17. The system will display, on any recording, the correct time and date of the recording.
18. The CCTV system will be maintained and fully operational throughout the hours that the Premises are open for any licensable activity.
19. Save on News Year's Eve into New Year's Day, all customers will be required to vacate the roof terrace no later than 23:00 hours.
20. No admission to the premises will be permitted after 23:00 hours.
21. The volume of any amplified music provided at the premises shall be controlled and monitored and kept at such level to ensure that it is barely audible one metre from the façade of any nearby noise sensitive premises*, such that it is inaudible inside such properties with external doors and windows closed.
22. Save on New Year's Eve and into New Year's Day, no live or recorded music shall be provided after 23:00 hours other than to entertain customers attending a pre-booked private function and, on such occasions, after 23:00 hours the entertainment shall be provided indoors only and all windows and doors shall be kept shut save for access to and egress from the premises, and noise from the entertainment shall be controlled so that it is inaudible when measured at the boundary of all noise sensitive premises* in the locality.
23. No music (either live or recorded) is permitted on the roof terrace after 21:00 hours.
24. No regulated entertainment is to be permitted until the Council's Environmental Health Office has approved a scheme to control the emission of noise from the premises. This scheme should (a) ensure compliance with the existing proposed conditions relating to noise emissions and their effect on local residents and (b) ensure that the regulated entertainment does not cause a nuisance to the public visiting the surrounding area.

*Noise sensitive premises includes premises used for residential purposes, hospitals or similar institutions, education establishments (when in use) or places of worship (during recognised times and days of worship) or any premises used for any other purpose likely to be affected by the music noise.

7. Reasons for the Decision

The Sub-Committee carefully considered the application along with the evidence, both written and oral, supplied by the applicant and objectors.

The Sub-Committee took full account of the strong concerns raised by the large number of objectors (81 objections remained at the date of the hearing). These concerns covered a range of issues, notably the following:

- (i) noise nuisance caused by the music/ regulated entertainment especially from the proposed use of the roof terrace
- (ii) noise nuisance (in the form of car engines and rowdy behaviour) caused by patrons leaving the Premises at midnight 7 days a week
- (iii) public safety issues relating to parking
- (iv) public safety issues relating to the use of the roof terrace
- (v) public nuisance caused by lighting of the Premises
- (vi) public disorder relating to drunkenness
- (vii) drinkers migrating to the Premises after closing time in other licensed premises – objectors referred in particular to the fact that there was no condition restricting the sale of alcohol to patrons purchasing food.

On balance, the Sub-Committee felt that there was insufficient evidence at this point in time to restrict the licence, or to impose additional conditions over and above those already proposed and agreed by the Applicants, except in respect of noise nuisance arising from the proposed regulated entertainment at the Premises.

The concerns regarding noise nuisance were substantiated by the following evidence and factors:

- some objectors had recently experienced, when positioned at some considerable distance from the Premises, noise emanating from the Premises. This highlighted the concerns raised by objectors that noise travelled very markedly in the area, especially in the evening when there was little other activity
- the area itself was very quiet, with an extremely low level of background noise. It is against such levels that noise nuisance should be measured
- it was not only the local residents that would be affected by noise emanating from the Premises. The Premises are situated next to the Sturt Pond Nature Reserve, which is designated a Site of Special Scientific interest. The public who visit the reserve for quiet recreational use are a class of people whose comfort and convenience would be materially adversely affected by noise emanating from the Premises (as are the residents).
- the Applicants themselves recognised the potential for noise nuisance by proposing conditions to reduce the impact of the noise. In particular, the Applicants recognised the potential for noise nuisance arising out of activities on the roof terrace by proposing that the live music outside should cease at 21.00 hours (but requesting live music continue indoors until 00.00 hours)
- with the agreement of the Applicant, the Council's Senior Environmental Health Officer addressed the hearing. The Officer suggested that further conditions should be applied to reduce the prospect of public noise nuisance

It should be noted that all of the conditions set out at section 6 above, apart from condition 23, were proposed by the Applicant either prior to or during the hearing.

The Council considered that condition 23 was necessary to promote the licensing objective of the prevention of public nuisance, for the following reasons:

- (i) The primary concern of the Sub-Committee was that regulated entertainment activities on the roof terrace would cause a public nuisance both to the local residents and to the public visiting the adjoining nature reserve and beach. The problem would be particularly pronounced in the evening time, when background noise levels would be minimal and when noise would become increasingly anti-social (due to residents going to bed). The Sub-Committee was also mindful of the evidence put forward by the objectors, based upon their own experience, as to how noise travelled in the area (especially in the evening time). All of this gave the Sub-Committee serious concerns that music, either live or recorded, being played outdoors after 21.00 would cause a noise nuisance.
- (ii) The Sub-Committee was satisfied that music being played indoors would be sufficiently muted by the acoustic treatment of the building, including the double-glazing. However, the Sub-Committee was also satisfied that music on the roof terrace would cause a noise nuisance to local residents and the public using the surrounding area for recreational purposes generally in the evening. It was notable that the Applicants themselves recognised this point because they proposed that no live music be permitted outdoors after 21.00 hours (despite there being other conditions to potentially limit the effect of noise nuisance on residents).
- (iii) The Sub-Committee was not satisfied that the proposed conditions would prevent a public noise nuisance from arising out of music being played on the roof terrace. For example, prior to 23.00 hours, the protection afforded the local residents is limited to music being barely audible with their windows and doors closed; the objectors protested that they should not be required to close doors and windows to avoid a nuisance. Furthermore, the proposed conditions did not protect the public using the surrounding area (the beach and the nature reserve). Whilst the new condition 24 would hopefully go some way to alleviating the problem, the Sub-Committee wished to have certainty that the primary cause of noise nuisance (music being played outdoors) be prohibited at the most sensitive hours.
- (iv) The Sub-Committee was mindful that the playing of incidental music does not require a licence. However, it does not follow (and would be inconsistent with the Act and the Section 182 Guidance) that the licensing authority cannot impose a condition prohibiting music generally, if such a condition is necessary to promote one of the licensing objectives. Case law is clear that, as a matter of principle, licensing authorities can impose conditions limiting opening hours, which themselves are not licensable matters under the Act (for example, see *R (on the application of Daniel Thwaites plc) v Wirral Borough Magistrates' Court*). Imposing a condition in respect of music (even if it encompasses incidental music) where such a condition is necessary to promote one of the licensing objectives is directly analogous and consistent with that principle. Furthermore, such a condition would ensure that the public will not be prejudiced by the Applicants subsequently seeking to argue that music, which may be causing a nuisance, is permitted under the license because it is 'incidental' to other activities (the Applicants acknowledged during the hearing that incidental music is difficult to define).

Accordingly, and notwithstanding the large number of objections, the Sub-Committee was prepared to grant the license in the terms applied for and proposed by the Applicants, save that the additional condition prohibiting all music (not just live music) on the roof terrace after 21.00 hours was deemed necessary to prevent public noise nuisance.

The Sub-Committee re-iterates the entitlement of any interest party and responsible authority to ask for the Premises licence to be reviewed by the Licensing Authority in the future if any of the licensing objectives have been prejudiced.

Date: 9 July 2010

Licensing Sub-Committee Chairman: Cllr P R Woods

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Decision notified to interested parties on 12 July 2010