

LICENSING SUB-COMMITTEE

Minutes of the meeting held at 10am on 7 December 2022

Present:

Councillor Kira Gabbert (Chairman)
Councillors Nicholas Bennett J.P. and Pauline Tunnicliffe

Also Present:

4 APPOINTMENT OF CHAIRMAN FOR THE MEETING

Councillor Kiera Gabbert was appointed Chairman.

5 DECLARATIONS OF INTEREST

Both Councillors Bennett and Tunnicliffe said they had on a single occasion dined at the premises. Councillor Gabbert said she had dined there on several occasions

6 APPLICATION FOR A REVIEW OF THE PREMISES LICENCE AT PIERLUIGI 86-90 HIGH STREET BECKENHAM BR3 1ED

Preliminary Matters:

Mr Dadds, (the Premises Licence Holder's representative), stated that while a witness statement from PC Sear dated 21st September 2022 could be considered, a different witness from the police should not be allowed to give evidence on the same statement. Mr Dadds said that the police had not raised a formal representation, but had simply presented a witness statement to be considered along with all the other information presented by Mr Phillips. The Sub-Committee agreed with the request.

Complaint of Bias:

Mr Dadds (on several occasions throughout the meeting) complained that he felt the Licensing Sub-Committee was biased in terms of any questions raised by Members and also in terms of the procedure adopted. He expressed the view that the panel had not shown detachment from the Council officer applicant. On more than one occasion he threatened to leave the meeting room.

In terms of the questions raised by members of the Sub-Committee, the Council is satisfied that the Committee was even handed and was simply seeking to elucidate the case being presented by the parties. In terms of the procedure, the Hearing Regulations provide that a hearing shall take place in the form of a discussion led by the authority and that cross examination shall not be permitted unless the panel thinks it is required. The panel did nevertheless in the interests of fairness allow both Mr Dadds and the applicant for the review, Mr Phillips, to put questions to the other. The Council

is satisfied that the procedure adopted fully complied with the regulations and was fair in all respects.

Finally, Mr Dadds alleged that Mr Phillips had withheld incorrectly, information from the panel in terms of a statutory abatement notice served on 22nd January 2022 on a nearby business at My Place, 59-63 High Street, Beckenham.

(i) The Case for the Applicant:

The applicant, Mr Steve Phillips, presented the information contained in his review application. Mr Phillips introduced his presentation by noting the plan showing the area of the licensed premises and referred to photographs showing that in more recent times, the area of trading had been extended southwards to include a "tented" side extension on the southern elevation outside of this area. The Council had conducted a joint investigation with the police concerning breaches of the Coronavirus regulations and, with the help of the Statutory Nuisance Team, had investigated complaints regarding noise nuisance. These investigations lead to the service of a prohibition notice and a fixed penalty notice under the Coronavirus regulations on 11th May 2021, a further letter from the police on 10th June 2021 and to the service of a noise abatement notice (which is currently the subject of an appeal) following a weekend visit on 14th May 2022.

Mr Dadds questioned whether Mr Phillips had raised this extent of the licensed area as an issue in his application. However, page 12 of the agenda showed that Mr Philips did assert that the business was actively utilising unlicensed areas of the site.

In response to a question from Mr Dadds, Mr Phillips confirmed that while he was the manager of both the Licensing Team and of the Nuisance and Anti-Social Behaviour Team, the review application had been submitted on behalf of the Nuisance and Anti-Social Behaviour Team.

Mr Phillips also confirmed that there were 17 complaints about Pierluigi's from 6 individuals over an 18 month period from 2021 to date. Mr Phillips said that he had not included those complaints in the review application as they had led to investigations and the result of those investigations had been included in the agenda papers. Subject to the initial discussion recorded above, Mr Phillips said that there had been no other representations from the responsible authorities.

(ii) The Case for the Premises Licence Holder:

The premises license holder was represented by Mr Dadds, a solicitor/advocate of Dadds LLP, who in advance of the hearing, submitted additional documents comprising the witness statement of Marco Bianchi, a witness statement of Sofia Martin and a noise abatement report prepared by Enzygo, environmental consultants. The documentation included a sample

menu, photographs and letters from nearby residents saying they were not affected by the restaurant..

Mr Dadds questioned whether a licence was needed for the extension of the premises over the tented area. This was irrespective of whether the music was played before or after 23.00 hours. He referred to his letter of 2nd August 2021 to the Council's Licensing Team. In his submission, although the tented area was outside of the licensed area, the exemption contained in paragraph 7, schedule 1, part 2 to the Licensing Act 2003 applied. This provided that the performance of live music or the playing of recorded music was not to be regarded as the provision of regulated entertainment to the extent that it was incidental to some other activity which was itself not entertainment. Mr Dadds said that the provision of music at Pierluigi's was incidental to the primary purpose of the business as a restaurant.

On this issue, Mr Phillips replied that it was the character of the provision of music that needed to be considered. If the music drowned out the activities of the business as a restaurant or was advertised separately, then that was an indication that the activity was not an incidental one.

Mr Dadds criticised the review application in that the complaints from the residents had not been included. In his submission, there was a difference between the test required for the service of a statutory abatement notice and the test required for a public nuisance to arise. A statutory noise abatement notice could be served on the evidence of a professional local authority officer. However, for a public nuisance, the panel would need to be satisfied that more than one member of the public was affected by the nuisance complained of. In this case the complaints received by the Council had not been included in the application. There was no evidence, in his submission, for the panel to conclude that residents had suffered public nuisance arising from the premises. The licence holder had commissioned a noise impact assessment. The writer of that report had been able to visit one of the flats. The report did not support the existence of a public nuisance [NOTE the report concluded that while noise from the premises was a contributing factor to the general noise climate and on occasion was subjectively audible, it did not dominate the prevailing ambient noise level].

Mr Dadds read the following extract from the Court of Appeal Judgment in the case of Attorney General v PYA Quarries Limited:

"I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbour", but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously

affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue”.

Mr Dadds asked that this be taken into account.

Reasons for Decision:

Members considered the application, the written and oral representations, the Council’s Statement of Licensing Policy and statutory guidance. Members were satisfied that in pursuance of the Licensing Objectives, further conditions should be imposed on the premises licence.

Members considered the representation that no licensable activity was being carried out in the tented extension and whether the music could be said to be incidental to the restaurant business. We considered the statement of Sarah Newman made on 5th April 2022 concerning her visit on 2nd April 2021. She noted:

“At 22.15 I stood in line with the façade of the two blocks of flats to the rear of Pierluigi Restaurant. Away from the roadside, the music noise was very loud in comparison [to] the background noise level and was similar to that which would be experienced in a youth orientated Mediterranean holiday resort. The ‘Bassline style’ dance beat (boink, boink, boink) and amplified music emanating from the premises were prominent over both road traffic and night-time patrons on the pavements in the area calling to each as they moved between licensed premises. At 22.16 hours the saxophone stopped but the amplified dance music continued”.

Ms Newman then walked away from the premises in both directions along the High Street and the beat from the amplified music could be heard over 100 yards away in both directions along the High Street. Ms Newman returned after 23.00 hours but concluded the situation had not improved.

The panel did not accept the suggestion that an activity generating this level of noise, particularly at the times stated by Ms Newman, could be described as incidental or background to the eating of a restaurant meal. There was also reference in the letter of 18th November 2021 to noise complaints being received and that on a visit lasting after 23.00 hours, amplified music could clearly be heard as well as live music, namely the playing of saxophone and drums causing a nuisance to local residents. A further letter of 16th May 2022 records a site visit on 14th May 2022. An on-call officer, after receiving an out of hours complaint about loud amplified music, visited the area between the hours 22.55 and 23.30 hours and said he witnessed music being played at statutory nuisance levels. The music continuing at that level when he left. Again, the opinion of the Panel was that this was not a description of an incidental activity to the taking of a restaurant meal.

The Panel presumed that customers seated in the tented extension would be supplied with alcohol with their meal, if requested. The photographs supplied by the premises licence holder of the tented extension showed wine glasses on the tables.

Mr Dadds referred to the statement of Ms Newman and made a criticism that Mr Phillips had not included the information that a statutory abatement notice had been issued on 22nd January 2022 on the nearby business called My Place, i.e., after the site visit described in her statement, but before the statement was made on 5th April 2022. What Ms Newman said in her statement was that after having established the levels of noise emanating from Pierluigi's, she then took steps to establish that the noise she had identified could not have originated elsewhere. 'My Place' was playing music at volume, but on that night, she was satisfied that the noise from those premises was not unduly loud i.e., My Place was not the source of the noise nuisance she had identified as being unacceptable. At the Hearing the panel was advised that a statutory abatement notice had been subsequently served on My Place on 22nd January 2022, but this did not alter the conclusions in respect of the visit made by Ms Newman and described in her evidence.

The Panel considered the representations that the complaint letters had not been included in the pack and therefore there was no evidence to conclude that a public nuisance had occurred. The statutory Government guidance states that although public nuisance is given a statutory meaning in many pieces of legislation, it is not narrowly defined in the Licensing Act 2003 and retains its broad common law meaning. It would follow that it is a matter for the decision taker to decide on the facts of a particular case as to whether a public nuisance has occurred, after taking full account of the rulings from the judicial authorities.

The panel noted and accepted that the tests for assessing whether a public nuisance and a statutory nuisance have occurred were distinct. Nevertheless, the issue of whether a statutory nuisance has arisen is likely, in our opinion, to be an indicator to be taken into account as to whether a public nuisance has also arisen. The panel considered Mr Dadds' submission as to whether, in the absence of the inclusion in the agenda papers of the residents' complaints, there was evidence of a nuisance which materially affected the reasonable comfort and convenience of life of a class of persons. In the panel's opinion there was ample evidence to reach this conclusion. Firstly, there was Ms Newman's witness statement. The Committee was informed that she stood in line with the façade of the two blocks of flats to the rear of Pierluigi's restaurant and concluded that the noise from Pierluigi's was very loud in comparison to the background noise level to an unacceptable extent. The Committee was not persuaded by the submission from Mr Dadds that these flats had acoustic glazing, as the residents should be entitled to open their windows without being subject to nuisance. There was also evidence in the correspondence that complaints were being received by the Council concerning noise being emitted from the premises (see letters from the Council dated 28th May 2021 and 18th November 2021). At the hearing the Committee was advised that six individuals had made complaints to the Council and that there were 17 complaints in total. The Committee noted the photographs and plans showing the location of the nearby residential properties. Objective evidence from Council officers of the extent of the noise and resulting nuisance had been provided which was clearly giving rise to

complaints and could impact a defined group of individuals. In the Committee's opinion there was a class of persons whose reasonable comfort and convenience of life had been unacceptably affected by noise identified as coming from Pierluigi's.

The Committee concluded that the grounds for the review application had been correct. In considering what appropriate and proportionate steps should be taken the Committee in particular noted the long-standing nature of the business. It was not considered necessary to revoke or suspend the licence or to remove the designated premises supervisor. It was felt that the harms identified could be addressed by the imposition of conditions and by an informal warning/recommendation to the licence holder.

The panel noted that the premises had already installed a noise limiter. Notwithstanding the provisions of the Live Music Act 2012, it was felt that a condition should be added relating to the playing of amplified music to require its level to be set in conjunction with the Council. This would limit the opportunity for possible noise outbreak from amplified music and was required to promote the prevention of the public nuisance objective.

Although the police had indicated that, by letter dated September 2021, they had informed the premises that they were no longer under investigation, it was noted that the police by letter dated 10th June 2021 had previously suggested some conditions. In respect of the crime and disorder objective, there was evidence of a breach of regulations and of the inadequate management of the premises (see for example the Prohibition and Fixed Penalty Notices issued under the Coronavirus Regulations as well as the letter dated 10th June 2021 from the police). It was concluded that conditions numbered in that letter 1 to 10 and 15 should be imposed on the licence to promote the prevention of crime and disorder objective. Conditions concerning signage, training of staff, a challenge 25 policy an incident register and proper record keeping are what would be expected of any well managed licensed premises. The Committee also felt it would be helpful to replace the existing condition 12 in respect of the supply of alcohol with an updated condition that would be easier to follow.

The Committee noted that there was an appeal to the Magistrates Court against the service of the Abatement Notice, but that this was distinct from the Review. The Committee did consider the report presented by Enzygo Consultants based on a survey undertaken between 8th and 9th October 2022 and directed to the abatement notice. However, the Committee was satisfied that the evidence provided by Ms Newman of her visit clearly demonstrated that steps were necessary to further the prevention of public nuisance objective.

Decision

That the following conditions, in addition to those currently on the licence, be imposed on the Premises Licence for the premises:

1. A noise limiter must be fitted to the musical amplification system set at a level determined by and to the satisfaction of an authorised officer of the Environmental Health Service, so as to ensure that no noise nuisance is caused to local residents or businesses and:

- The operational panel of the noise limiter shall then be secured by key or password to the satisfaction of officers from the Council and access shall only be by persons authorised by the Premises Licence holder.
- The limiter shall not be altered without prior agreement with the Council.
- No alteration or modification to any existing sound system(s) should be effected without prior knowledge of an authorised Officer of the Council.
- No additional electrical sound generating equipment shall be used on the premises without being routed through the sound limiter device.

Section 177A of the Licensing Act 2003 shall not apply to this condition.

2. A CCTV system will be installed and maintained at the premises covering all the customers areas of the premises, all customer and staff entrances and exits, and areas outside of the premises. Recordings shall be stored for a minimum of 28 days and CCTV images shall be retrieved in a digital format and supplied immediately to a police or council officer on request.

3. At least one CCTV camera shall be installed by the entrance door that enables face, head and shoulder images of a standard that will enable identification of each person entering and leaving the premises.

4. Signage shall be displayed on the premises reminding customers that CCTV is in operation, or alternatively display (within the public area of the premises) live images from the premises CCTV, for the purposes of crime prevention

5. The licence holder shall notify the Police within 24 hours when they become aware that the closed-circuit television (CCTV) system provided by the premises is not in operation

6. Signage shall be displayed by the main exit reminding anyone leaving the premises to “please respect our neighbourhood and leave the premises quietly, thank you” or similar wording to this effect.

7 Alcohol shall not be supplied to take away customers in open containers.

8 All staff and management will receive training in their role prior to taking on any role within the business, and in relation to the Licensing Act 2003 and conflict management. The training to be recorded and refresher training carried out every 6 months (or earlier as necessary) and will also be recorded.

9. Ensure that a Challenge 25 policy is operated at the premises with appropriate signage displayed both inside the premises, and on the publicly

accessible internet pages including social media controlled by the premises where that content promotes alcohol.

10. Maintain an incident register that is accessible on the premises. The DPS, or a member of management shall ensure that the details of incidents shall be added to the register within 24 hours of any incident. The following details shall be recorded:

- Date
- Time
- Location
- Persons concerned (or at least a description)
- Summary of incident
- Identification of any Emergency Services Personnel who attended
- Crime or appropriate reference number provided by the Emergency Services that relates to the incident and any linked incidents

11. A refusals record shall be maintained at the premises and that such a record shall be made immediately for inspection by the Police or an authorised Officer of the Council.

12. The records to be maintained pursuant to conditions shall be made available on request to any Relevant Authority for the purpose of investigating or preventing crime or apprehending or prosecuting an offender.

Condition 12 on the Premises Licence shall be replaced with the following condition:

Alcohol for consumption on the premises

Alcohol will only be supplied ancillary to a substantial meal

Off Sales

Alcohol for consumption off the premises

Alcohol will only be supplied to customers who have been provided with a meal for take-away or delivery

Informal warning/recommendation:

The Sub-Committee given its findings that the use of the tented area was not an incidental activity, recommended that the licence holder submits an application to include the tented extension in the licensed area for the consideration of the Council. This informal warning/recommendation could be taken into account in any relevant future decision.

Appeals against a decision of the Licensing Sub Committee

1. The applicant, Responsible Authority or interested party (objector) may appeal against a decision of the licensing sub-committee in certain circumstances. These are laid down with Schedule 5 of the Licensing Act 2003.

2. Any appeal should be made to the Magistrates Court, London Road, Bromley, BR1 1BY. An appeal must be lodged within 21 days beginning the day on which you were informed of the decision of the committee.

3. It should be noted that there is a cost in making an appeal to the Magistrates Court that must be met by the appellant. These costs can be significant as they can include the legal fees of the person you are appealing against (Respondent).