

Public Document Pack
Blackpool Council

Dear Councillor

LICENSING PANEL - THURSDAY, 24TH MARCH, 2022

Please find attached additional information from the applicant for Thursday, 24th March, 2022 meeting of the Licensing Panel, which were received after the agenda had been despatched.

Yours sincerely

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17 March 2022

Dear Sir/Madam

I have been instructed by Mr. Alex Huckerby in relation to the new application for a premises licence which is scheduled to be considered by the Licensing Authority on the 24th of March 2022.

I attach a written submission along with attachments that cover the topics we wish to cover at the hearing.

The intention of this submission is to save time at the hearing and avoid straying into areas that we have not disclosed prior to the hearing, the relevant paragraph of the Sec 182 Guidance is found below.

9.37 As a matter of practice, licensing authorities should seek to focus the hearing on the steps considered appropriate to promote the particular licensing objective or objectives that have given rise to the specific representation and avoid straying into undisputed areas. A responsible authority or other person may choose to rely on their written representation. They may not add further representations to those disclosed to the applicant prior to the hearing, but they may expand on their existing representation and should be allowed sufficient time to do so, within reasonable and practicable limits.

The submission makes reference to 2 documents those being;

1. The Noise Assessment Report drafted by Neil Martin
2. The case of Daniel Thwaites v Wirral Council

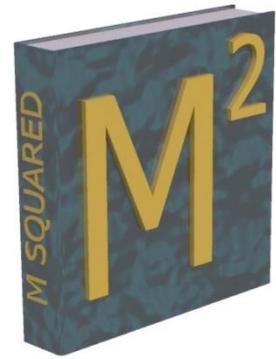
Both these documents are included for the Committee's reference.

I would be grateful if you could confirm whether you would like me to communicate directly with the interested parties or would you be happy to send the documents on to them yourself?

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17 March 2022

Yours

A handwritten signature in black ink, appearing to read 'Mark Marshall'.

Mark Marshall FCILEX
Director

Emailed: 17.03.2022

Written Submission

Re; New Premises Licence Application- Marvin's, Highfield Road, Blackpool, FY4 2JD

General Background

1. The documentation is submitted in advance of the hearing scheduled for 10 am on the 24th of March 2022 to set out why the Committee should consider the application favorably.
2. The application has attracted 2 objections from interested parties, the contents of which will be addressed in this submission.
3. The application is made by Marvin's Blackpool Ltd, a Limited Company operated by 3 Directors, Graham Barr, Adam Reed, and Alex Huckerby.
4. An introduction of Mr. Huckerby who will be present at the hearing will be made verbally on the day.
5. The application was submitted with careful thought and consideration, especially with regards to the views from the Responsible Authorities, as such Mr Huckerby made contact by email on the 3rd of August 2021 to Ms. Jennifer Clayton who is the Manager for Environmental Protection and has responsibility for noise-related issues and is a statutory consultee in both the Licensing and Planning Process.
6. A series of conditions were offered as a starting point with an open offer of being receptive to any other controls they deem appropriate.
7. A similar exercise was also undertaken with the Police who offered some suggested conditions, all of which were duly incorporated into the operating schedule.
8. As a result of this diligent and considerate approach no objections have been submitted by the relevant Responsible Authorities.
9. Mr. Huckerby's operating style is well known to the Police due to the fact he operates in neighboring Authorities these being, Fylde and Wyre. Marvin's in Poulton has been in operation since 2018 and the Lytham premises since 2019. Mr. Huckerby has also had experience with other premises in Poulton (no longer operating) called Truth. Truth also faced opposition at the application stage and the issue of adjoining premises fearing noise break out was a substantial ingredient of the objections. With careful planning and construction of sound installation within the premises and added measures which included carrying work out within neighboring properties, they were able to address the concerns and operated without concern for over 2 years.

Policy and Guidance Considerations

10. The application accords well with numerous paragraphs of the Section 182 Guidance as well as the Statement of Licensing Policy. Paragraphs 8.41-8.48 from the Guidance are shown below with comments (in blue text) that demonstrate due consideration to best practice has been made.

8.41 In completing an operating schedule, applicants are expected to have regard to the statement of licensing policy for their area. They must also be aware of the expectations of the licensing authority and the responsible authorities as to the steps that are appropriate for the promotion of the licensing objectives, and to demonstrate knowledge of their local area when describing the steps they propose to take to promote the licensing objectives. Licensing authorities and responsible authorities are expected to publish information about what is meant by the promotion of the licensing objectives and to ensure that applicants can readily access advice about these matters. However, applicants are also expected to undertake their own enquiries about the area in which the premises are situated to inform the content of the application.

The applicant was aware of the expectations of Responsible Authorities by conducting pre-application consultation.

8.42 Applicants are, in particular, expected to obtain sufficient information to enable them to demonstrate, when setting out the steps they propose to take to promote the licensing objectives, that they understand: 56 | Revised Guidance issued under section 182 of the Licensing Act 2003 • the layout of the local area and physical environment including crime and disorder hotspots, proximity to residential premises and proximity to areas where children may congregate; • any risk posed to the local area by the applicants' proposed licensable activities; and • any local initiatives (for example, local crime reduction initiatives or voluntary schemes including local taxi-marshalling schemes, street pastors and other schemes) which may help to mitigate potential risks.

8.43 Applicants are expected to include positive proposals in their application on how they will manage any potential risks. Where specific policies apply in the area (for example, a cumulative impact policy), applicants are also expected to demonstrate an understanding of how the policy impacts on their application; any measures they will take to mitigate the impact; and why they consider the application should be an exception to the policy.

8.44 It is expected that enquiries about the locality will assist applicants when determining the steps that are appropriate for the promotion of the licensing objectives. For example, premises with close proximity to residential premises should consider what effect this will have on their smoking, noise management and dispersal policies to ensure the promotion of the public nuisance objective. Applicants must consider all factors which may be relevant to the promotion of the licensing objectives, and where there are no known concerns, acknowledge this in their application.

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The applicant has been in contact with the owner of nearby properties and is very familiar with the local issues and has experience of overcoming difficulties from his experience of operating multiple premises.

8.45 The majority of information which applicants will require should be available in the licensing policy statement in the area. Other publicly available sources which may be of use to applicants include: • the Crime Mapping website; • Neighbourhood Statistics websites; • websites or publications by local responsible authorities; • websites or publications by local voluntary schemes and initiatives; and • on-line mapping tools.

8.46 While applicants are not required to seek the views of responsible authorities before formally submitting their application, they may find them to be a useful source of expert advice on local issues that should be taken into consideration when making an application. Licensing authorities may wish to encourage co-operation between applicants, responsible authorities and, where relevant, local residents and businesses before applications are submitted in order to minimise the scope for disputes to arise.

The applicant took the advice from the Police and Environmental Protection in formulating the Operating schedule.

8.47 Applicants are expected to provide licensing authorities with sufficient information in this section to determine the extent to which their proposed steps are appropriate to promote the licensing objectives in the local area. Applications must not be based on providing a set of standard conditions to promote the licensing objectives and applicants are expected to make it clear why the steps they are proposing are appropriate for the premises.

8.48 All parties are expected to work together in partnership to ensure that the licensing objectives are promoted collectively. Where there are no disputes, the steps that applicants propose to take to promote the licensing objectives, as set out in the operating schedule, will very often translate directly into conditions that will be attached.

The applicant is prepared to stand by the Operating Schedule and is open to any additional conditions being added that the Committee feels are necessary and appropriate in the circumstances.

11. The Policy areas highlighted largely replicate the requirements of the guidance but provide a useful tick list which again demonstrates the careful and considerate approach to the application.

4.4.1 The authority wishes to encourage high quality, well-managed premises. The operating schedule should describe how these high management standards will be achieved. In particular, applicants will be expected to demonstrate:

- Knowledge of best practice
- That they understand the legal requirements of operating a licensed business

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- Knowledge and understanding of the licensing objectives, relevant parts of the licensing policy, and their responsibilities under the Licensing Act 2003

The applicant's track record operating high-quality establishments, the high regard he is held in by Responsible Authorities, peers, and his commitment to achieving the best possible outcome for all parties meet the requirements of the paragraph above.

4.1.2 The operating schedule must include all of the information necessary to enable the licensing authority, responsible authorities and members of the public to assess whether the steps outlined for the promotion of the licensing objectives are sufficient. This will mean that applicants will need to complete their own risk assessments on their businesses. Where the operating schedule does not provide enough detail, there is an increased likelihood that representations will be made.

The applicant has produced a detailed and comprehensive operating schedule that has satisfied the Responsible Authorities.

4.1.3 Applicants are not required to seek the views of responsible authorities before submitting their applications however they may find them a useful source of expert advice about the local issues that should be taken into consideration when making an application. Discussions with the responsible authorities, and where relevant local residents, before applications are submitted may minimise disputes during the application process.

4.1.4 The authority will expect that the completed operating schedule is specific to the premises subject to the application and the licensable activities to be carried out rather than containing general or standard terms. Key Message: Applicants are expected to demonstrate knowledge of the local area in which they propose to operate and an understanding of the problems and issues in that area

The applicant has excellent local knowledge of the area understanding the demographic and issues that he needs to be mindful of.

4.1.5 For an applicant to assess what steps are appropriate for the promotion of the licensing objectives, they must first understand the area in which they intend to operate. By way of example the controls required in an area suffering from a high level of deprivation, alcohol dependency and street drinking may be completely different to those required in other areas. Applicants are expected to make their own enquiries and demonstrate how they have considered the following in the operating schedule:

- The layout of the local area and physical environment including crime and disorder hotspots, proximity to residential premises and proximity to areas where children and young persons may congregate;
- Any risk posed to the local area by the proposed licensable activities; and
- Any local initiatives (for example local crime reduction initiatives or voluntary schemes which may help mitigate potential risks)

4.4.1 There are no standard permitted hours for the sale of alcohol prescribed in the Act instead the Council has the power to make decisions on hours based on local

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knowledge. In some circumstances, staggered licensing hours will allow for a more gradual dispersal of customers reducing potential disorder and disturbance at for example late night food outlets and taxi ranks. There is no general presumption in favour of lengthening licensing hours and the four licensing objectives will be the paramount consideration at all times

The applicant considered the operating hours of premises in the locality and purposefully chose his operating hours to mirror those of his competitors. The reason for this is he believes that staggered closing times in an area such as this may only seek to exasperate issues of migration. Whilst some schools of thought encourage staggered closing times, in this location, it is not a good idea. If all premises close at a similar time customers are left with little or no choice but to go home rather than make their way to nearby premises that perhaps have a later terminal hour.

The agenda pack produced by the Licensing Authority also highlights areas of the Guidance and Policy, found in paragraphs 6.4-6.6 of the report.

Our comments are as follows;

We believe the conditions proposed on the Operating Schedule are appropriate for the location, the experts (Responsible Authorities) were consulted and helped to influence the measures.

There will be no designated outside area as the premises is landlocked. Smokers will be supervised and controlled at the front of the premises.

Extensive planning and design have been done to control the noise that could emanate from the premises.

Relevant Representations

11.Mr Newman states; (our comments inserted in blue text)

To whom it may concern.

I live in Flat 5,3 Mayfield Avenue, Blackpool, FY42NT. Where I live backs directly onto the proposed property where Marvin's is going to be located.

I am obviously more than a little concerned about the granting of licensing for this concerned.

The playing of music from 11am in the morning to at times 1.30am will be unbearable and being as though where I live is next to the proposed building I can foresee endless days of continuous noise coming into my property.

The noise attenuation works which will be influenced by the applicants own expert should reduce the risk of noise breakout, to suggest that the issues will be unbearable seem to be based on a speculative theory. However, the applicant recognises that no system of construction is perfect and is committed to conducting a post-development

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assessment. This assessment can include taking measurements of the sound from within Mr Newmans property to ensure inaudibility is achieved

I put in a concern when it was first proposed and I did not even get a email to say that permission had been granted. Having only finding out because of the building work going on in said property. That and the selling of alcohol I can only believe will make Highfield Road into even more of an area of bad reputation where police are called to other premises just a short distance away from myself.

Mr Newmans comments are based on his experiences of existing operators, not the applicant, the Police appear satisfied with the style of operation proposed and can base their experiences on the applicant's other venues in neighboring authorities, if these concerns had serious merit the experts would have made their opinions clear and lodged an objection.

I can only say in the strongest possible way that I am against the granting of a licence for this concern.

It will, I'm sure lead myself and others in the immediate vicinity to look elsewhere for somewhere to live and perhaps leading to a environment of an area that only those who drink and don't mind the licensing of alcohol and loud music to be heard every single day and night to live.

The applicant is committed to maintaining good relationships with his neighbours and if required with conduct assessments from within Mr Newmans property to ensure that his quiet enjoyment of his property is maintained

I'm sure that nobody if asked would choose to live next door to such a place where you will be unable to sleep or relax in your own home, worried about drunkenness and possible violence outside your front door.

If there is the promise of soundproofing which I believe there is, then I hope someone checks out that it is the case by coming into our building and gauging the noise level. Is there any offer of help to find somewhere else to live if the licence is granted because it seems like it will be a nightmare living here. This is a given

Thank you very much for taking the time to read and I'm sorry for complaining but feel as if I didn't I would have to grin and bear it which I don't intend to do.

12. Mr Etherington states;

As the owner of 25/27 Highfield Road, 1 & 5 Mayfield Avenue and six residential apartments at 3 Mayfield Avenue Blackpool . My tenants and I strongly oppose the granting of an alcohol late night music venue at the above address on the following grounds;

Prevention of crime and disorder

I am assuming that the venue will employ door supervisors to deal with any assaults and drunk and disorderly patrons. Whilst I accept that this is common place at drinking venues, the close proximity to residents is likely to cause further offences such as breach of the peace.

The applicant has offered a condition that imposes the requirement for door staff on a Friday and Saturday night however from the first moment he opens his doors he understands that there will be a need to set out his stall. As such he will be employing doors staff every night of the week in order to clearly lay out the standard of behavior expected at the premises. This will enable him to accurately assess the risk and

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respond to any initial teething problems that may come about from people exploring the new premises on the road

Prevention of public nuisance

The bedroom and living room windows are only a few metres away from the private dwellings. The living room windows are almost vertically above the entrance/exit of the establishment. The building shares a dividing wall between the two properties that even when soundproofed will undoubtedly cause distress and nuisance to the residents.

As highlighted in Mr. Newman's objection the applicant will be conducting a post-development assessment, this again can be done from within any unit of Mr Etherington's choosing, the offer to make improvements (additional soundproofing) into either the applicant's premises or Mr. Etherington's premises will be fully funded by the applicant

A designated smoking area would possibly be provided outside of the front doors of the building, irrespective of this, people will congregate and smoke there, causing further disruption to the residents until the early hours of the morning, exacerbated by people entering and leaving the venue. This will therefore be a breach of the peace.

The applicant has offered the only condition possible to control smokers outside, that being that they will be supervised by a competent person. The installation of an acoustic lobby will mitigate the noise from the premises as customers step outside to smoke. The door staff will be positioned at the front door and will always maintain order. Sadly, the applicant can only be responsible for customers when they are under his control, once away from the premises their behaviour is a matter of personal responsibility. This is also supported by paragraph 2.21 of the Section 182 Guidance which states ;

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 antisocial behaviour is accountable in their own right. However, it would be perfectly reasonable for a licensing authority to impose a condition, following relevant representations, that requires the licence holder or club to place signs at the exits from the building encouraging patrons to be quiet until they leave the area, or that, if they wish to smoke, to do so at designated places on the premises instead of outside, and to respect the rights of people living nearby to a peaceful night.

The applicant will have prominent notices posted at the entrance/exit advising customers to respect the needs of the residents, this has already been offered as a condition within the operating schedule.

Construction and Operational Steps to Control Noise

13. The applicant has already been through the Planning Process where matters of noise nuisance were considered in depth. The Decision notice was signed on the 8th of February 2022. The Planning Authority has insisted that the works to soundproof the building are to be carried out in accordance with Neil Martins report (the applicant's noise consultant)

14. The Committee should be aware that if the works are carried out in accordance with the recommendations this should achieve a reduction of 54db meaning that the sound from within the premises could be set at 84db.
15. The applicant will be taking a further step, over and above what is required by Planning which will be the post-development assessment. In other words when the premises are fully fitted out. Technical issues such as where speakers are mounted or pointing can change the way sound moves around the building and consequently, a “belt and braces” approach is to be taken.
16. The condition proposed in the Operator Schedule already requires this additional step to be made so is therefore enforceable. The condition also compels the applicant to adopt any measures or steps proposed in the further assessment.
17. With all these steps the risk of offending the Protection from Public Nuisance Objective has been reduced to an acceptable level.
18. A copy of the assessment produced by Mr. Martin is included with this submission for the Committee’s assistance.

Conclusion

19. Passing reference within the submission has been made to the absence of any Responsible Authority in these proceedings. It is of considerable importance to highlight this as they are the Licensing Authorities experts in their respective fields.
20. The case of Daniel Thwaites plc v Wirral Borough Magistrates' Court [2008] EWHC 838 (Admin), CO/5533/2006 deals with many points.
21. Commentators will pull out the relevant parts of the case to assist their own arguments one of which is there must be tangible or empirical evidence to support any representations, mere speculation will not be enough.
22. The GOV.UK web site provides a short narrative about the case which is as follows;

This case, referred to as ‘the Thwaites case’, is important because it emphasises the important role that Responsible Authorities have in providing information to decision makers to contextualise the issue before them.

This case is sometimes misconstrued as requiring decisions to be based on ‘real evidence’, and that conditions cannot be imposed until problems have actually occurred. This is wrong. The purpose of the

Act is to prevent problems from happening. Decisions can and should be based on well-informed common sense. The case recognises that Responsible Authorities are experts in their fields, and that weight should be attached to their representations. It is most relevant when opposing grant applications.

The Honourable Mrs Justice Black said:

[D]rawing on local knowledge, at least the local knowledge of local licensing authorities, is an important feature of the Act's approach. There can be little doubt that local magistrates are also entitled to take into account their own knowledge but, in my judgment, they must measure their own views against the evidence presented to them. In some cases, the evidence presented will require them to adjust their own impression. This is particularly likely to be so where it is given by a Responsible Authority such as the police.

23. The Government summary of the case focuses on the issue of Responsible Authorities being experts in their respective fields and the absence of those Authorities, in this case, supports the following comments.

The Applicant is experienced at running similar establishments, has a good track record, and enjoys the confidence of the Authorities (particularly the police)

The proposal submitted in both pre-application communication and the application itself has given the Authorities the necessary confidence that the Licence Objectives will not be harmed

There is a belief that the applicant will deliver on any commitments made or will adjust his style to rectify any concerns raised.

24. In most cases when dealing with new applications it will be difficult for anyone to adduce actual evidence that problems will occur, residents know the area they live in better than anyone and the applicant takes all the points raised very seriously.

25. He has sought to focus his attention on offering practical solutions to maintain good relations with his neighbors. His commitment to having an ongoing dialogue with them is sincere. He also has commercial interests to ensure noise containment as the flats above his premises will in time be used for residential purposes.

26. The venture will be marketed to a more mature demographic and the pricing and entertainment policies will be something that the younger end of the market would not necessarily be attracted to.

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27. The premises will take a disused store and transform the facade into a modern and attractive premise which will be an immediate visual improvement to the area.

28. For all the reasons raised in this submission we believe the Committee can have confidence in the applicant and if granted, this licence with the conditions proposed will not have an adverse impact on the Licensing Objectives.

A handwritten signature in black ink, appearing to read 'M. Marshall'.

Mark Marshall FCILEX
Director



Acoustic Survey and Assessment for Proposed Drinking Establishment at, 19-23 Highfield Road, Blackpool, FY4 2JF.

Prepared for:

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August 2021



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1. Introduction

- 1.1. Martin Environmental Solutions has been commissioned to undertake an acoustic assessment to support a planning application for the conversion of 19-23 Highfield Road, Blackpool, FY4 2JF to a drinking establishment.

Site Location and Context

- 1.2. The development site is situated along Highfield Road, a busy commercial road, with commercial units to each side and opposite. Above the development site are situated residential flats.
- 1.3. An aerial Photograph is enclosed in Figure 1.
- 1.4. It is the potential impact on the above residential properties that has raised concerns and prompted the production of this report.



2. Policy and Guidance

- 2.1. The impact of noise can be a material consideration in the determination of planning applications. The planning system has the task of guiding development to the most appropriate locations. It is recognised that on occasions it will be difficult to reconcile some land uses, such as housing, hospitals, or schools, with other activities that generate high levels of noise. However, the planning system is tasked to ensure that, wherever practicable, noise-sensitive developments are separated from major sources of noise (such as road, rail and air transport and certain types of industrial development).
- 2.2. The Government's publication of the National Planning Policy Framework (NPPF), updated in February 2019, states that planning policies and decisions should prevent new and existing development from contributing to or being put at unacceptable risk from, of being adversely affected by unacceptable levels of noise pollution.
- 2.3. The Government have also issued the Noise Policy Statement for England (NPSE). The NPSE clarifies the Government's underlying principles and aims in relation to noise and sets a vision to promote good health and a good quality of life through the effective management of noise while having regard to the Government's sustainable development strategy. The NPSE aims to mitigate and minimise adverse impacts on health and quality of life through the effective management and control of noise.
- 2.4. The NPSE introduces the following terms, although no sound levels are given to represent these, many authorities have identified the sound level criteria in line with the World Health Organisation, BS8233:2014 and BS4142: 2014 levels. The terms introduced by the NPSE are:
- NOEL – No Observed Effect Level (<30dB(A) inside <50dB(A) outside, 10dB below background)
- LOAEL – Lowest Observed Adverse Effect Level (30-35dB(A) inside 50-55dB(A) outside, background to +5dB)
- SOAEL – Significant Observed Adverse Effect Level (>35dB(A) inside, >55dB(A) outside, >+10dB above background)
- 2.5. The sound levels within the brackets of the previous paragraph are those determined as appropriate levels to indicate the relevant effect levels represented by the NPSE.



- 2.6. Other commonly used examples of standards utilised by Local Planning authorities for the consideration of noise impacts include comparison of the likely noise levels to be experienced at a development, with levels that have been recommended by the World Health Organisation (WHO) as Guidelines for the prevention of Community Noise Annoyance and within BS8233: 2014.
- 2.7. The WHO recommended noise levels for outdoor amenity areas (gardens) that should not be exceeded are 55dB(A) $L_{Aeq,16hr}$ in order to avoid 'Serious Community Annoyance' or 50dB(A) $L_{Aeq,16hr}$ to avoid 'Moderate Community Annoyance' during the day. For indoor levels WHO set 35dB(A) $L_{Aeq,16hr}$ during the day to prevent Moderate Annoyance and 30 dB(A) $L_{Aeq,8hr}$ at night to prevent sleep disturbance.
- 2.8. The WHO guidance also recommends that maximum sound levels at night should not regularly exceed 45dB(A) within bedrooms to prevent sleep disturbance. Regularly is considered to be more than 10 times during any 8-hour night-time period.
- 2.9. BS 8233:2014 'Guidance on sound insulation and noise reduction for buildings' also specifies desirable noise levels to be achieved inside dwellings.
- 2.10. BS 8233:2014 'Sound insulation and noise reduction for buildings – Code of Practice' also specifies desirable noise levels to be achieved inside dwellings. BS 8233 presents two levels, the first between the hours of 07:00 – 23:00 and the second between 23:00 -07:00.
- 2.11. In addition, the 'ProPG Planning & Noise, Professional Practice Guidance on Planning & Noise, New Residential Development' provides a 4-staged approach to undertaking a risk assessment in relation to anticipated sound levels at new residential development and the provision of mitigation measures. The guidance is principally aimed at sites exposed predominantly to noise from transportation sources.
- 2.12. The first stage consists of an initial noise risk assessment, based on indicative day and night-time noise levels. Simply put, the higher the ambient noise in an area the greater the impact. The levels given are shown below although it should be noted that these are in excess of both the Lancashire guidance, WHO and BS 8233: 2014.



Noise Risk Category*	Potential Effect if Unmitigated	Pre-Planning Application Guidance
0 – Negligible $L_{Aeq,16hr} < 50dB$ $L_{Aeq,8hr} < 40dB$	May be noticeable but no adverse effect on health and quality of life	In this category the development is likely to be acceptable from a noise perspective, nevertheless a good acoustic design process is encouraged to improve the existing environment and/or safeguard against possible future deterioration and to protect any designated tranquil areas. A noise assessment may be requested to demonstrate no adverse impact from noise. Application need not normally be delayed on noise grounds.
1 – Low $L_{Aeq,16hr} 50-63dB$ $L_{Aeq,8hr} 40-55dB$	Adverse effect on health and quality of life	In this category the development may be refused unless a good acoustic design process is followed and is demonstrated via a Level 1 Acoustic Design Statement which confirms how the adverse impacts of noise on the new development will be mitigated and minimised and that a significant adverse impact will not arise in the finished development. Planning conditions and other measures to control noise may be required.
2 – Medium $L_{Aeq,16hr} 63-69dB$ $L_{Aeq,8hr} 55-60dB$ $L_{AFmax} > 80dB^{**}$	Significant adverse effect on health and quality of life	In this category the development is likely to be refused unless good acoustic design process is followed and is demonstrated via a Level 2 Acoustic Design Statement which confirms how the adverse impacts of noise on the new development will be mitigated and minimised, and clearly demonstrates that a significant adverse noise impact will not arise in the finished development. Planning conditions and other measures to control noise will normally be required.
3 – High $L_{Aeq,16hr} > 69dB$ $L_{Aeq,8hr} > 60dB$ $L_{AFmax} > 80dB^{**}$	Unacceptable adverse effect of health and quality of life	In this category the development is very likely to be refused on noise grounds, even if a good acoustic design process is followed and is demonstrated via a Level 2 Acoustic Design Statement. Applicants are advised to seek expert advice on possible mitigation measures. Advice on the circumstances when the refusal of a new housing on noise grounds should normally be anticipated is included in the ProPG.

2.13. Stage 2, consists of a full assessment of the prevailing ambient noise and requires 4 elements to be considered:

- I. Element 1 – Good Acoustic Design
- II. Element 2 – Internal Noise Level Guidelines
- III. Element 3 – External Amenity Area Noise Assessment
- IV. Element 4 – Assessment of Other Relevant Issues

2.14. A good acoustic design is implicit in meeting the requirements of the NPPF and can help to resolve many potential acoustic issues.

2.15. Details of the criteria considered suitable are provided above for both internal and external sound levels. Element 4 includes such issues as local and national policy, likely occupants, wider planning objectives.



3. The Assessment

- 3.1 The use of the ground floor as a drinking establishment has the potential to impact on the existing adjacent residential properties. The potential source of adverse sound could be internal or external.
- 3.2 It has been confirmed that there will be no external plant or extraction equipment installed as part of the development and there will be no external area for customers. This leaves the internal sound levels and the potential for sound transfer through the structure.
- 3.3 Previous monitoring by Martin Environmental Solutions has identified sound levels of up to 81dB(A) in a full bar of a similar size. This also relates to the lower value identified in the Noise at Work Regulations 2005.
- 3.4 The criterion identified above from the guidance suggests a recommended level of 35dB(A) during the day and 30dB(A) at night within the flats above. A reduction of at least 51dB is therefore required between the ground and first floor.
- 3.5 A suggested build specification for the dividing floor/ceiling has been identified to provide this level of attenuation. In addition, to prevent any potential flanking noise it is advised to treat the walls of venue. This will also prevent the passage of sound to the adjacent commercial properties.
- 3.6 The proposed ceiling specification builds upon the existing ceiling/floor construction and is based around the iKoustic Muteclip ceiling specification¹. Alternative specifications and materials are available to achieve the same level of attenuation.
- 3.7 The following specification when installed should provide a 54dB reduction (61(-1;-7)dB $D_{n,T,w}(C:C_{Tr})$).
- The existing joists should be filled with acoustic mineral wool (60Kg/m³) insulation should fill approx. 80% of the void depth to prevent it from being compressed.

¹ <https://www.ikoustic.co.uk/systems/timber-ceiling/muteclip-double>



- MuteClip isolation clips are then fitted to the joists. They should be fitted no nearer than 100mm to adjacent walls and spaced no more than 400mm vertically and 800mm horizontally to form a diamond configuration.
- Muteclip channels are then installed perpendicular to the joists and must overlap by 200mm when joining to channels together.
- Fix the first layer of acoustic plasterboard to the runners. A 2-3mm gap should be left around the room. The plasterboard must not come into contact with the walls. Any gaps to be filled with acoustic sealant.
- Adhere 'Tecsound' to the acoustic plasterboard staggering joints.
- Fix second layer of acoustic plasterboard, stagger joints and leave the 2-3mm gap around the edge of the room. Make sure the screws go into the Muteclip channels. Seal all gaps with acoustic sealant.
- Scrim tape all joints and finish with a skim plaster.

- 3.8 Below the new ceiling it is recommended that an independent stud wall is installed on separating walls, with a 600mm spacing. Resilient bars or the above Muteclip system to be fitted to the stud wall and the voids filled with acoustic mineral wool (60Kg/m³) insulation should fill approx. 80% of the void depth to prevent it from being compressed. One layer of 15mm soundbloc acoustic plasterboard to be fitted with a 2-3mm gap and any gaps filled with acoustic sealant. The joints can then be scrim taped and a skim plaster finish provided.
- 3.9 The above specifications will ensure that the separating structure between the ground floor drinking establishment and the first-floor residential accommodation will achieve a minimum of 51dB reduction, while the wall specification will prevent flanking transmission and sound transmission to neighbouring properties.
- 3.10 This will allow the use of the drinking establishment to continue without exceeding the recommended night-time sound levels within the first-floor flat.



4 Conclusion

- 4.1 The proposed use of the development site has the potential to adversely affect the use of the existing first-floor accommodation. As such a design specification for improvements to the separating structure have been identified. This design will provide a minimum of 54dB reduction in sound level transference between the two uses.
- 4.2 This would allow sound levels of up to 84dB(A) at night to be generated within the ground floor while still achieving the recommended night-time sound level of 30dB(A) with the accommodation.
- 4.3 The inclusion of the above mitigation measures will ensure that the internal sound levels are acceptable within the above accommodation and will result in a No Observe Effect on the residents in line with the Noise Policy Statement for England.
- 4.4 As such the development will meet the objectives of the National Planning Policy Framework in ensuring that no significant adverse impact is experienced by the future residents. The development is therefore considered to be acceptable in terms of noise.

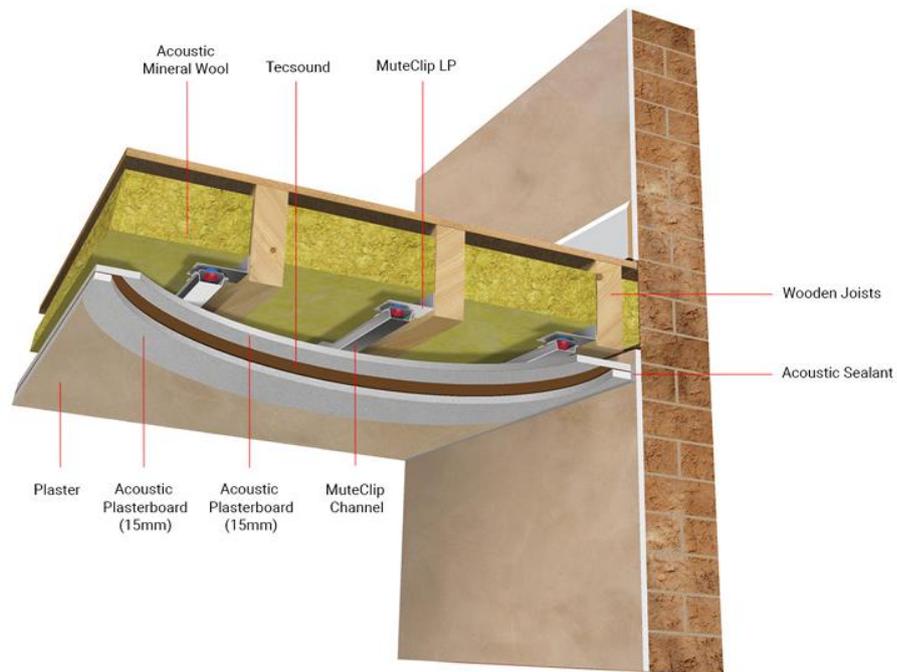
Figure 1 – Aerial Photograph



Appendix A – ceiling design Visual

MuteClip® LP Installation Guide Ceiling

To Wooden Joist Ceiling



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All England Official Transcripts (1997-2008)

Daniel Thwaites plc v Wirral Borough Magistrates' Court

Licensing - Licence - Application for licence - Guidance issued by Secretary of State as to discharge of functions under legislation - Licensing authority granting licence - Local objectors appealing to magistrates' court - Magistrates' court imposing restrictions - Whether restrictions necessary to promote licensing objective - Whether magistrates' court having proper regard to guidance - Whether decision of magistrates' court lawful - Licensing Act 2003, s 4

[2008] EWHC 838 (Admin), CO/5533/2006, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

BLACK J

10 MARCH, 6 MAY 2008

6 MAY 2008

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

D MW Pickup for the Claimant

The Defendant did not appear and was not represented

D Flood for the First Interested Party

M Copeland for the Second Interested Party

Naphens plc; Kirwans; Wirral MBC

BLACK J:

[1] This is an application by Daniel Thwaites plc ("the Claimant") for judicial review of a licensing decision made by the Wirral Magistrates' Court ("the Magistrates' Court") on 5 April 2006 and that court's decision on 21 April 2006 concerning the costs of the proceedings. The Claimant seeks an order quashing both decisions. Permission to apply for judicial review was granted by Pitchford J on 2 November 2006.

THE FACTUAL BACKGROUND

[2] The Claimant owns the Saughall Hotel in Saughall Massie, Wirral which it operates as licensed premises ("the premises"). It originally held a licence under the Licensing Act 1964. In June 2005, it commenced an application to the Licensing Sub-Committee of the Metropolitan Borough of Wirral ("the licensing authority")

for the existing licence to be converted to a premises licence under the Licensing Act 2003 and for the licence to be varied simultaneously.

[3] In essence, the Claimant was seeking to conduct business at the premises for longer hours than were permitted under the original licence. The police did not support the extension of the hours to the extent that the Claimant initially proposed. The Claimant agreed to restrict the hours to those that were acceptable to the police. Accordingly, the licensing authority was asked to grant a licence that would permit music and dancing to 11pm and alcohol sales until midnight on all nights except Friday and Saturday and, on Friday and Saturday nights, music and dancing to midnight and alcohol sales until 1pm, with the doors closing one hour after the last alcohol sale every night.

[4] The police withdrew their representations against the modified proposals and did not appear before the licensing authority when the matter was heard on 23 August 2005. No representations were made by the Wirral Environmental Health Services either. However, there was opposition to the proposals at the hearing from the Saughall Massie Conservation Society ("the First Interested Party") and other Saughall Massie residents.

[5] The Claimant told the licensing authority at the hearing that the hours of operation at the premises would not vary significantly from the existing hours of operation and that the application for extended hours was to allow flexibility to open later "on special occasions" This was a matter of which the licensing authority took note as is recorded in the minutes of their determination.

[6] The licence was granted in the modified terms requested together with an additional hour for licensable activities and an extra 30 minutes for the hours the premises were to be open to the public over Christmas and at the major bank holidays. Special arrangements were also permitted for New Year's Eve. The licensing authority removed certain conditions that had been imposed on the old licence (requiring all alcohol to be consumed within 20 minutes of the last alcohol sale and banning children under 14 from the bar) and imposed other conditions which were obviously aimed at controlling noise, namely that the area outside must be cleared by 11pm, that the premises must promote the use of taxi firms which use a call-back system, that all doors and windows must be kept closed when regulated entertainment was provided and that prominent notices should be placed on the premises requiring customers to leave quietly.

[7] The Saughall Massie Conservation Society and "others" appealed against the licensing decision to the Magistrates' Court on the ground that the licensing authority's decision "was not made with a view to promotion of and in accordance with the licensing objectives pursuant to s 4, Pt 2 of the Licensing Act 2003".

[8] The appeal occupied the Magistrates' Court from 3 - 5 April 2006. The Respondents to the appeal were the licensing authority and the Claimant which both defended the licensing authority's decision. Witnesses were called including Saughall Massie residents, Police Sergeant Yehya who dealt with the stance of the Merseyside police, and Mr Miller, the manager of the premises.

[9] The justices granted the appeal. Their Reasons run to three pages of typescript, one page of which is entirely taken up with setting out the new hours of operation they imposed. These permitted entertainment until 11pm and alcohol sales until 11.30pm on all nights except Friday and Saturday when entertainment would be permitted until 11.30pm and alcohol sales until midnight. The premises could remain open to the public until midnight on all nights except Friday and Saturday when they could close at 1am. Similar provisions were imposed to those imposed by the licensing authority in relation to later opening at Christmas and major bank holidays and the provisions relating to New Year's Eve and the conditions of the licence remained unaltered.

[10] The new licence had come into effect on 24 November 2005 so the new arrangements had been running for several months by the time of the hearing before the Magistrates' Court. There had been no formal or recorded complaints against the premises under the old or the new regime as the justices acknowledged in their Reasons. The residents who gave evidence were fearful of problems if the extended hours were allowed in the summer. The Chairman of the Conservation Society, who gave oral evidence, spoke of people urinating in the gardens and a problem with litter. It appears from the statement filed by the Chairman of the Bench for these judicial review proceedings that evidence was also given of interference with machinery on nearby Diamond Farm. The justices' Reasons make no reference at all to these matters. As to the statements of the "Witnesses of the Appellant", they say simply that they have read and considered them but attached little or no weight to them.

[11] The justices and their legal advisor have filed a considerable amount of material in response to the judicial review proceedings, in all 31 closely typed pages. These comprise their Response to the Claim, statements from Alistair Beere (who was the chairman of the bench), Mary Woodhouse (another of the bench) and Stephen Pickstock (the legal advisor), and what is said in the index to be a document by Mr Beere from which he prepared his statement. There was limited argument before me as to the status of these documents and the weight that I should give to them. It was not submitted that I should decline to have *any* regard to them although I think it is fair to say that it was common ground between the parties, rightly in my view, that I should concentrate principally on the Reasons. It is established by authorities such as *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302, 95 LGR 119, [1996] 2 FCR 208 that the court can admit evidence to elucidate or, exceptionally, correct or add to the reasons given by the decision maker at the time of the decision but that it should be very cautious about doing so. The function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. In the circumstances, I have read carefully what the magistrates have provided but approached its role in the judicial review proceedings cautiously.

THE BROAD NATURE OF THE CLAIM IN RELATION TO THE LICENSING DECISION

[12] The Claimant argues that the Magistrates' Court decision is unlawful for a number of reasons. It is argued that the decision was not in line with the philosophy of the Licensing Act 2003 ("the Act") and imposed restrictions on the Claimant's operation which were not necessary to promote the licensing objectives set out in that Act, that it was based on speculation rather than evidence, that it took into account irrelevant considerations and failed to take into account proper considerations, and that it was a decision to which no properly directed Magistrates' Court could have come on the evidence. In so far as the court imposed conditions as to the time at which the premises must close, it is submitted that this was not a matter which can be regulated under the Act. It is further argued that the magistrates failed to give adequate reasons for their decision.

THE LEGAL BACKGROUND

[13] The Licensing Act 2003 was intended to provide a "more efficient" "more responsive" and "flexible" system of licensing which did not interfere unnecessarily. It aimed to give business greater freedom and flexibility to meet the expectations of customers and to provide greater choice for consumers whilst protecting local residents from disturbance and anti-social behaviour.

[14] Note 12 of the explanatory notes to the Act gives an indication of the approach to be taken under the Act. It reads:

"12 In contrast to the existing law, the Act does not prescribe the days or the opening hours when alcohol may be sold by retail for consumption on or off premises. Nor does it specify when other licensable activities may be carried on.

Instead, the Applicant for a premises licence or a club premises certificate will be able to choose the days and the hours during which they wish to be authorised to carry on licensable activities at the premises for which a licence is sought. The licence will be granted on those terms unless, following the making of representations to the licensing authority, the authority considers it necessary to reject the application or vary those terms for the purpose of promoting the licensing objectives."

[15] Section 1 of the Act provides:

"S1(1) For the purposes of this Act the following are licensable activities -

- (a) the sale by retail of alcohol,
- (b) [clubs]
- (c) the provision of regulated entertainment, and
- (d) the provision of late night refreshment."

[16] To carry on a licensable activity, a premises licence granted under Pt 3 of the Act is generally required, s 2. Application for a premises licence must be made to the relevant licensing authority, s 17(1).

[17] By virtue of s 4, the licensing authority must carry out all its functions under the Act (including its functions in relation to determining an application for a premises licence or an application for a variation of a premises licence) with a view to promoting the "licensing objectives". These are set out in s 4 as follows:

"S4(2) The licensing objectives are -

- (a) the prevention of crime and disorder;
- (b) public safety;
- (c) the prevention of public nuisance; and
- (d) the protection of children from harm."

[18] In carrying out its licensing functions, by virtue of s 4(3) the licensing authority must also have regard to its licensing statement published under s 5 and any guidance issued by the Secretary of State under s 182.

[19] Section 182 obliges the Secretary of State to issue guidance to licensing authorities on the discharge of their functions under the Act. Guidance was issued in July 2004 ("the Guidance"). It was updated in June 2007 but it is the original guidance that is relevant in this case. In any event, none of the changes made are material to the issues I have to determine.

[20] The Foreword says that the Guidance:

"is intended to aid licensing authorities in carrying out their functions under the 2003 Act and to ensure the spread of best practice and greater consistency of approach. This does not mean we are intent on eroding local discretion. On

the contrary, the legislation is fundamentally based on local decision-making informed by local knowledge and local people. Our intention is to encourage and improve good operating practice, promote partnership and to drive out unjustified inconsistencies and poor practice."

[21] As the Guidance says in para 1.7, it does not replace the statutory provisions of the Act or add to its scope. Paragraph 2.3 says:

"Among other things, section 4 of the 2003 Act provides that in carrying out its functions a licensing authority must have regard to guidance issued by the Secretary of State under section 182. The requirement is therefore binding on all licensing authorities to that extent. However, it is recognised that the Guidance cannot anticipate every possible scenario or set of circumstances that may arise and so long as the Guidance has been properly and carefully understood and considered, licensing authorities may depart from it if they have reason to do so. When doing so, licensing authorities will need to give full reasons for their actions. Departure from the Guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken."

[22] An application to the licensing authority for a premises licence must be accompanied by an operating schedule in the prescribed form including a statement of the matters set out in s 17(4) which are as follows:

- "(a) the relevant licensable activities,

- (b) the times during which it is proposed that the relevant licensable activities are to take place,

- (c) any other times during which it is proposed that the premises are to be open to the public,

- (d) where the Applicant wishes the licence to have effect for a limited period, that period,

- (e) where the relevant licensable activities include the supply of alcohol, prescribed information in respect of the individual whom the Applicant wishes to have specified in the premises licence as the premises supervisor,

- (f) where the relevant licensable activities include the supply of alcohol, whether the supplies are proposed to be for consumption on the premises or off the premises, or both,

- (g) the steps which it is proposed to take to promote the licensing objectives,

- (h) such other matters as may be prescribed."

[23] Section 18 deals with the determination of an application for a premises licence. Section 35 deals in very similar terms with the determination of an application to vary a premises licence. It will be sufficient only to set out here the provisions of s 18.

[24] Section 18(2) provides that, subject to sub-s (3), the authority must grant the licence in accordance with the application subject only to:

- "(a) such conditions as are consistent with the operating schedule accompanying the application, and

- (b) any conditions which must under section 19, 20 or 21 be included in the licence."

[25] Section 19 deals with premises licences which authorise the supply of alcohol. Such licences must include certain conditions ensuring that every supply of alcohol is made or authorised by a person who holds a personal licence and that no supply of alcohol is made when there is no properly licensed designated premises supervisor. Sections 20 and 21 are not relevant to this claim.

[26] Section 18(3) provides that where relevant representations are made, the authority has certain specified obligations. In so far as is relevant to this appeal "relevant representations" are defined in s 18(6) as follows:

"(6) For the purposes of this section, 'relevant representations' means representations which -

(a) are about the likely effect of the grant of the premises licence on the promotion of the licensing objectives,

(b) meet the requirements of sub-section (7),

(c) . . ."

[27] Sub-section (7) provides:

"(7) The requirements of this subsection are -

(a) that the representations were made by an interested party or responsible authority within the period prescribed under section 17(5)(c),

(b) that they have not been withdrawn, and

(c) in the case of representations made by an interested party (who is not also a responsible authority), that they are not, in the opinion of the relevant licensing authority, frivolous or vexatious."

[28] Where relevant representations are made, the authority must hold a hearing to consider them unless the authority, the Applicant and each person who has made representations agrees that a hearing is unnecessary. By virtue of s 18(3)(b), the authority must also "(b) having regard to the representations, take such of the steps mentioned in sub-section (4) (if any) as it considers necessary for the promotion of the licensing objectives."

[29] Section 18(4) provides:

"(4) The steps are -

(a) to grant the licence subject to -

(i) the conditions mentioned in sub-section (2)(a) modified to such extent as the authority considers necessary for the promotion of the licensing objectives, and

(ii) any condition which must under section 19, 20 or 21 be included in the licence;

(b) to exclude from the scope of the licence any of the licensable activities to which the application relates;

(c) to refuse to specify a person in the licence as the premises supervisor;

(d) to reject the application."

[30] Conditions are modified for the purposes of sub-s (4)(a)(i) if any of them is altered or omitted or any new condition is added.

[31] During the currency of a premises licence, by virtue of s 51, an interested party (broadly speaking, a local resident or business) or a responsible authority (police, fire, environmental health etc) may apply to the relevant licensing authority for a review of the licence on a ground which is relevant to one or more of the licensing objectives. By virtue of s 52, a hearing must be held to consider the application and any relevant representations and the authority must take such steps from a specified list as it considers necessary for the promotion of the licensing objective. The steps range from modifying the conditions of the licence to suspending it or revoking it completely.

[32] The Act makes provision in Pt 5 for "permitted temporary activity" which, loosely speaking, is a form of ad hoc licensing to cover licensable activities which are not covered by a more general licence. The system involves proper notification of an event to the licensing authority and the police. Provided the applicable number of temporary event notices has not been exceeded and the police do not intervene, the event is automatically permitted. Temporary event notices can only be given in respect of any particular premises 12 times in a calendar year and the period for which each event lasts must not exceed 96 hours.

[33] Section 181 provides for appeals to be made against decisions of the licensing authority to a Magistrates' Court which is, of course, how the decisions in relation to which judicial review is sought in this case came to be made.

THE DETAIL OF THE CLAIM

[34] The Claimant submits that in making its decision to allow the appeal in relation to the premises licence, the Magistrates' Court failed in a number of respects to take account of the changes that the new licensing regime has made and failed to adopt the approach required by the Act. It is further submitted that the magistrates failed properly to consider and take into account the Guidance.

[35] There is no doubt that the Guidance is relevant in the magistrates' decision making. As I have set out above, s 4(3) requires the licensing authority to "have regard" to the Guidance. By extension, so must a Magistrates' Court dealing with an appeal from a decision of the licensing authority. The Guidance says:

"10.8 In hearing an appeal against any decision made by a licensing authority, the Magistrates' Court concerned will have regard to that licensing authority's statement of licensing policy and this Guidance. However, the court would be entitled to depart from either the statement of licensing policy or this Guidance if it considered it is justified to do so because of the individual circumstances of any case."

[36] Mr Pickup submits that although the Guidance is not binding and local variation is expressly permitted, it should not be departed from unless there is good reason to do so.

[37] Mr Flood for the First Interested Party submits that the Guidance simply serves to provide information for the magistrates and provided that they have had regard to it, that is sufficient. He also points out that, in

some respects (as is clear from the wording of the Guidance), the Guidance is a statement of Government belief rather than proved fact. Inviting attention to the judgment of Beatson J in *J D Weatherspoon plc v Guildford Borough Council* [2006] EWHC 815 (Admin), [2007] 1 All ER 400, [2006] LGR 767, he identifies that different policy elements in the Guidance may pull in different directions in a particular case, flexibility and customer choice potentially conflicting with the need to prevent crime and disorder. He submits that provided that the magistrates consult the Guidance, they do not need to use it as "a decision making matrix that the deciding Court has to sequentially address in making its decision in the manner it would if considering a section of a statute".

[38] There is no doubt that regard must be had to the Guidance by the magistrates but that its force is less than that of a statute. That is common ground between the parties. The Guidance contains advice of varying degrees of specificity. At one end of the spectrum, it reinforces the general philosophy and approach of the Act. However, it also provides firm advice on particular issues, an example being what could almost be described as a prohibition on local authorities seeking to engineer staggered closing times by setting quotas for particular closing times. I accept that any individual licensing decision may give rise to a need to balance conflicting factors which are included in the Guidance and that in resolving this conflict, a licensing authority or Magistrates' Court may justifiably give less weight to some parts of the Guidance and more to others. As the Guidance itself says, it may also depart from the Guidance if particular features of the individual case require that. What a licensing authority or Magistrates' Court is not entitled to do is simply to *ignore* the Guidance or fail to give it any weight, whether because it does not agree with the Government's policy or its methods of regulating licensable activities or for any other reason. Furthermore, when a Magistrates' Court is entitled to depart from the Guidance and justifiably does so, it must, in my view, give proper reasons for so doing. As para 2.3 of the Guidance says in relation to the need for licensing authorities to give reasons:

"When [departing from the Guidance], licensing authorities will need to give full reasons for their actions. Departure from the Guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken."

This is a theme to which the Guidance returns repeatedly and is a principle which must be applicable to a Magistrates' Court hearing an appeal as it is to a licensing authority dealing with an application in the first instance. I agree with Mr Flood for the First Interested Party that the magistrates did not need to work slavishly through the Guidance in articulating their decision but they did need to give full reasons for their decision overall and full reasons for departing from the Guidance if they considered it proper so to do.

[39] In this case, Mr Pickup submits that proper attention to the Guidance would have helped the magistrates to come to a correct and reasonable decision and that they have failed to adhere to it without proper reason and failed to carry out their licensing function in accordance with the Act.

[40] The foundation of the Claimant's argument is that the Act expects licensable activities to be restricted only where that is *necessary* to promote the four licensing objectives set out in s 4(2). There can be no debate about that. It is clearly established by the Act and confirmed in the Guidance. For example, in the Act, s 18(3)(b), dealing with the determination of an application for a premises licence, provides that where relevant representations are made the licensing authority must "take such of the steps mentioned in sub-s (4) (if any) as it considers necessary for the promotion of the licensing objectives" (the steps in sub-s (4) include the grant of the licence subject to conditions). Section 34(3)(b), dealing with the determination of an application to vary a premises licence, is in similar terms. The Guidance repeatedly refers, in a number of different contexts, to the principle that regulatory action should only be taken where it is *necessary* to promote the licensing objectives. In particular, it clearly indicates that conditions should not be attached to premises licences unless they are necessary to promote the licensing objectives, see for example para 7.5 and also para 7.17 which includes this passage:

"Licensing authorities should therefore ensure that any conditions they impose are only those which are necessary for the promotion of the licensing objectives, which means that they must not go further than what is needed for that

purpose."

[41] The Guidance also refers a number of times to the need for regulation to be "proportionate". This is not a term contained in the Act but if a regulatory provision is to satisfy the hurdle of being "necessary", it must in my view be confined to that which is "proportionate" and one can understand why the Guidance spells this out.

[42] Mr Pickup submits, and I accept, that the Act anticipates that a "light touch bureaucracy" (a phrase used in para 5.99 of the Guidance) will be applied to the grant and variation of premises licences. He submits that this means that unless there is evidence that extended hours will adversely affect one of the licensing objectives, the hours should be granted. A prime example of this arises when an application for a premises licence is made and there are no relevant representations made about it. In those circumstances, s 18(2) obliges the licensing authority to grant the licence and it can only impose conditions which are consistent with the operating schedule submitted by the Applicant. Mr Pickup says that such a light touch is made possible, as the Guidance itself says, by providing a review mechanism under the Act by which to deal with concerns relating to the licensing objectives which arise following the grant of a licence in respect of individual premises. He invites attention also to the existence of other provisions outside the ambit of the Act which provide remedies for noise, for example the issue of a noise abatement notice or the closure of noisy premises under the Anti-Social Behaviour Act 2003. The Guidance makes clear that the existence of other legislative provisions is relevant and may, in some cases, obviate the need for any further conditions to be imposed on a licence. Paragraph 7.18 from the section of the Guidance dealing with attaching conditions to licences is an illustration of this approach:

"7.18 It is perfectly possible that in certain cases, because the test is one of necessity, where there are other legislative provisions which are relevant and must be observed by the Applicant, no additional conditions at all are needed to promote the licensing objectives."

[43] The Guidance includes a section dealing with hours of trading which the Claimant submits further exemplifies the philosophy of the Act. It begins with para 6.1 which reads "This Chapter provides guidance on good practice in respect of any condition imposed on a premises licence or club premises certificate in respect of hours of trading or supply."

[44] It continues:

"6.5 The Government strongly believes that fixed and artificially early closing times promote, in the case of the sale or supply of alcohol for consumption on the premises, rapid binge drinking close to closing times; and are a key cause of disorder and disturbance when large numbers of customers are required to leave premises simultaneously. This creates excessive pressures at places where fast food is sold or public or private transport is provided. This in turn produces friction and gives rise to disorder and peaks of noise and other nuisance behaviour. It is therefore important that licensing authorities recognise these problems when addressing issues such as the hours at which premises should be used to carry on the provision of licensable activities to the public.

6.6 The aim through the promotion of the licensing objectives should be to reduce the potential for concentrations and achieve a slower dispersal of people from licensed premises through longer opening times. Arbitrary restrictions that would undermine the principle of flexibility should therefore be avoided. We will monitor the impact of the 2003 Act on crime and disorder and the other licensing objectives. If necessary in the light of these findings, we will introduce further legislation with the consent of Parliament to strengthen or alter any provisions."

[45] The Claimant submits that in imposing shorter hours than it requested for the supply of alcohol and for entertainment, the magistrates went beyond that which was necessary for these premises and failed to take into account that, as the Guidance explains, longer opening times would in fact reduce the potential for problems arising from licensed premises whereas curtailing operations could run counter to the licensing

objectives.

[46] The magistrates' Reasons record their acceptance that there had been no reported complaint in regard to public nuisance and that the extended hours had operated without any incidents. The magistrates also record in the Reasons, as I have already said, that they had attached little or no weight to the statements from witnesses of the Appellant. Nothing is said about difficulties mentioned in evidence by the witnesses. As it was clearly incumbent on the magistrates at least to advert in broad terms to those matters that they took into account, it is fair to conclude in the circumstances that they proceeded upon the basis that there was no reliable evidence of actual problems linked to the premises either under the old licence or under the new revised licence. This was in line with the oral evidence of Police Sergeant Yehya (as recorded in the rather truncated notes of the legal advisor):

"1. reported incident for the site. No other incidents or complaints have been received. There are none in my file. There are no incidents we can directly link to the Saughall Hotel since previously open. There have been incidents locally but not linked to these premises."

[47] To judge by the Reasons therefore, what led the magistrates to impose restricted hours of operation was their forecast as to what would occur in the future in association with the premises, notwithstanding the absence of reliable evidence of past problems. The First Interested Party observes that the manager of the premises had given evidence that he intended in the summer to "make hay while the sun shines" and submits, correctly in my view, that the magistrates were entitled to take this apparent change of emphasis into account. However, Mr Flood further submits that the evidence of what had happened in the winter months was therefore of "little evidential value" in determining what was likely to happen in the future and I cannot wholly agree with him about this. Undoubtedly the fact that the Claimant intended in future to make more use of the extended hours reduced the value of the premises' past record as a predictor of the future but it could not, in my view, be completely discarded by the magistrates. They still had to take into account that there had been extended hours for some months without apparent problems.

[48] It is plain that the magistrates' particular concern was "migration" rather than problems generated by those coming directly to the premises for their evening out. Under the heading "The Four Licensing Objectives", they say that they accept that there have been no formal or recorded complaints against the premises "but feel that because of the concept of migration that public nuisance and crime and disorder would be an inevitable consequence of leaving the hours as granted by the Local Authority". Under the heading "Migration/Zoning" they begin:

"The Saughall Hotel due to its location and the fact that a number of license premises in the surrounding area have reduced hours to that of the Saughall Hotel we believe that as a consequence of this would be that customers would migrate from these premises to the Saughall Hotel. [sic]"

and end:

"We appreciate that the extended hours have been in operation for several months without any incidents but have taken into consideration this was during the Winter months and inevitable numbers will increase in the Summer causing nuisance/criminality."

[49] They reiterate their concern under the heading "Nuisance (Existing/Anticipated)" saying that they "feel that public nuisance will be inevitable".

[50] The Claimant complains that the magistrates' treatment of the issue of "migration" was fundamentally flawed on a number of grounds.

[51] Firstly, it submits that there was no evidence on which the magistrates could find that customers *would* come to the premises when other premises in the vicinity closed or cause trouble and their concerns were no more than inappropriate speculation. The Claimant's position was that there was no evidence of migration to their premises. There were no recorded complaints of any kind about the premises let alone specifically about migration. Ms Lesley Spencer who lives opposite the premises and is the Secretary of the Saughall Massie Conservation Society gave evidence of her fear that customers would migrate but said that she did not think there had been any migration.

[52] Apart from their own local knowledge, the only material on which the magistrates could possibly have formed their views about migration was what Police Sergeant Yehya said in evidence. According to the legal advisor's notes, whilst being cross-examined by Mr Kirwan, the sergeant gave evidence about the other licensed premises operating in the vicinity (which I have seen marked on a local map and which were within walking distance of the premises) and their closing hours and said that there were three assaults each week at one of the premises. The legal advisor records that he also said:

"We have staggered closing. This could cause problems it has the potential to cause difficulties in the area. I have a list of considerations but none would rank as high as crime, not even noise. No complaints have been made to me even regarding noise. One concern was dispersal. We gave people one hour to disperse and therefore reduced from 2.00am to 1.00am. 1.00am closing at 2. 280 people leaving premises. Other premises subject to high levels of crime *migration not an issue.*" [my italics]

[53] I appreciate that this evidence acknowledged that staggered closing *could* cause problems but, had migration been a significant issue as opposed to a mere possibility, one can, I think, assume that the police would have made representations on that score, particularly given that they had plainly considered the impact of trading hours specifically and *had* initially objected to the even longer hours originally proposed by the Claimant. It is noteworthy that even when they were in opposition to the plans, it was never on the basis of migration of disruptive characters from other licensed premises and always simply on the basis of late noise from ordinary customers of the premises dispersing. The absence of police objections before either the licensing authority or the Magistrates' Court seems to have surprised the magistrates who said so in their Reasons, commenting "We were surprised that the Police originally objected to the application but withdrew that objection after a slight variation of the terms." In so saying, they convey, in my view, not only their surprise about the Police approach but also their disagreement with it.

[54] It was not open to the magistrates, in my view, to elevate what Sergeant Yehya said in the witness box to evidence that a problem with migration could reasonably be expected, nor do they say anything in their reasons which suggests that they did rely on his evidence in this way. The only concerns about migration were therefore the magistrates' own with perhaps some fears expressed by local residents though not on the basis of firm historical examples of migration to the premises.

[55] It is clear from the Guidance that drawing on local knowledge, at least the local knowledge of local licensing authorities, is an important feature of the Act's approach. There can be little doubt that local magistrates are also entitled to take into account their own knowledge but, in my judgment, they must measure their own views against the evidence presented to them. In some cases, the evidence will require them to adjust their own impression. This is particularly likely to be so where it is given by a responsible authority such as the police. They must also scrutinise their own anxieties about matters such as noise and other types of public nuisance particularly carefully if the responsible authorities raise no objections on these grounds. These magistrates did recognise the absence of police objections which caused them surprise and they chose to differ from the police in reliance on their own views. The Claimant submits that in so doing they departed into the realms of impermissible speculation not only in concluding that there would be migration but also in concluding that in this case it would generate nuisance and disorder. The First Interested Party is correct in submitting that the Guidance accepts a link between migration and a potential breach of the licensing objectives but it is also clear from the Guidance that each case must be decided on its individual facts so the magistrates could not simply assume that if people came from other premises, there would be

trouble.

[56] The Claimant complains that the magistrates' treatment of the migration issue also flies in the face of the Guidance because firstly it was an improper attempt to implement zoning and secondly it ignored the general principle of longer opening hours.

[57] Zoning is the setting of fixed trading hours within a designated area so that all the pubs in a given area have similar trading hours. The problem created by it, as demonstrated by experience in Scotland, is that people move across zoning boundaries in search of pubs opening later and that causes disorder and disturbance. The Guidance says, at para 6.8:

"The licensing authority should consider restricting the hours of trading only where this is necessary because of the potential impact on the promotion of the licensing objectives from fixed and artificially-early closing times."

It stresses that above all, licensing authorities should not fix predetermined closing times for particular areas.

[58] I am not convinced that the magistrates' limiting of the Claimant's operational hours can properly be described as implementing zoning which, in my view, is a term that is more appropriate to describe a general policy imposed by a licensing authority for a defined area than an individual decision of this type, albeit made with reference to the opening hours of other premises in the vicinity and having the effect of imposing the same hours as those premises.

[59] What has more weight, however, is the Claimant's submission that the magistrates failed to give proper weight to the general principle of later opening hours and to the intention that the approach to licensing under the Act would be to grant the hours sought for the premises unless it was necessary to modify them in pursuit of the licensing objectives. The Reasons include a heading "Flexibility" under which the magistrates say simply "We have considered the concept of Flexibility." In so saying, they may be referring to the sort of flexibility to which reference is made, for example, in para 6.6 of the Guidance (see above) but their shorthand does not enable one to know to what conclusions their consideration of the concept led them in this case nor whether they had reliably in mind that the starting point should be that limitations should not be imposed upon the licence sought unless necessary to promote the licensing objectives rather than that the licensing authority or the court should form its own view of what was necessary for the premises and only grant that.

[60] The Claimant was seeking to have the freedom to open later on certain occasions when the trade justified it or, as the magistrates put it, "the application for extended hours was to allow *flexibility* to open later on certain occasions". As the First Interested Party would submit, the magistrates may have inferred from Mr Miller's comment about making hay that the premises would *often* be open late rather than this happening only infrequently in accordance with the picture presented to the licensing authority. If this was their inference, however, it is odd that they considered that the Claimant could deal with the position by applying for a temporary certificate because this would have allowed the premises to open later on only a limited number of occasions. They make no express finding in their Reasons as to the frequency on which they considered the Claimant intended to keep the premises open late. This was material not only to the degree of disturbance that might be caused generally by late opening but also specifically to the issue of whether there would be migration. It would seem unlikely that customers from nearby pubs would bother to walk or even drive to the Saughall Hotel in search of another drink at the end of their evenings unless the Saughall Hotel was open late sufficiently frequently to lead them to a reasonable expectation that their journey would be worthwhile.

[61] The magistrates' comment about the temporary certificate also seems to me to be an example of a

failure by them to adopt the lighter approach that the Act dictated and to allow flexibility to those operating licensed premises unless the licensing objectives required otherwise. Temporary certificates would be a cumbersome and restricted means of achieving flexibility, not responsive to the day to day fluctuations in business, only available a limited number of times, and not in line with the philosophy of the Act.

[62] There is no consideration in the magistrates' decision of whether the imposition of conditions to control noise or other nuisance (which were going to be imposed) would be sufficient to promote the licensing objectives without reducing the operating hours of the premises. Given that the Act dictates that only such steps as are necessary should be taken with regard to the variation of the terms of operation sought, such consideration was required.

MY OVERALL CONCLUSIONS

[63] It would be wrong, in my judgment, to say that the magistrates failed to take account of the licensing objectives. At the outset of their Reasons, they correctly identify those which are relevant. Similarly, as the First Interested Party submits, whilst they did not *articulate* that the curtailment of the hours sought was "necessary" to promote those objectives, it is implied in their decision that they did take this view and it can also be inferred from their comment that because of the concept of migration, public nuisance and crime and disorder would be "an inevitable consequence" of leaving the hours as granted by the Local Authority. However, in my view their approach to what was "necessary" was coloured by a failure to take proper account of the changed approach to licensing introduced by the Act. Had they had proper regard to the Act and the Guidance, they would have approached the matter with a greater reluctance to impose regulation and would have looked for real evidence that it was required in the circumstances of the case. Their conclusion that it was so required on the basis of a risk of migration from other premises in the vicinity was not one to which a properly directed bench could have come. The fact that the police did not oppose the hours sought on this basis should have weighed very heavily with them whereas, in fact, they appear to have dismissed the police view because it did not agree with their own. They should also have considered specifically the question of precisely how frequently the premises would be likely to be open late and made findings about it. They would then have been able to compare this to the winter opening pattern in relation to which they accepted there had been no complaints and draw proper conclusions as to the extent to which the summer months would be likely to differ from the winter picture. Having formed a clear view of how frequently late opening could be anticipated, they would also have been able to draw more reliable conclusions about the willingness of customers from further afield to migrate to Saughall Massie. They proceeded without proper evidence and gave their own views excessive weight and their resulting decision limited the hours of operation of the premises without it having been established that it was necessary to do so to promote the licensing objectives. In all the circumstances, their decision was unlawful and it must be quashed.

[64] I have said little so far about what appears in the magistrates' response for the judicial review proceedings. The various documents comprising the response did nothing to allay my concerns about the magistrates' decision. Indeed quite a lot of what was said reinforced my view that the magistrates had largely ignored the evidence and imposed their own views. They refer in their response to incidents about which the residents had given evidence and to the residents not having complained formally for various reasons, for example because it was Christmas or because there was thought to be no point. If the magistrates considered these matters to be relevant, it was incumbent on them to say so clearly in their reasons whereas they there recorded their acceptance that there had been no formal or recorded complaints, that the extended hours had been in operation for several months without incidents and that they had attached little or no weight to the statements of the witnesses of the Appellant. They also refer extensively in their response to their thoughts on migration, including that people may come from further afield than the pubs in the vicinity in cars. Particularly concerning is that they refer repeatedly to a perceived issue over police resources which is not something that, as far as I can see, had been raised by Sergeant Yehya or explored with him in evidence. Mr Beere says in his statement for example, ". . . there is also the question of Police resources and

their ability to effectively police this area especially at weekends with already stretched resources being deployed in Hoylake."

[65] Reference is made in the response documents to the court feeling that the Brewery's proposed opening hours contradicted the acceptable activities of a family pub and that the Saughall Hotel is "a village pub and not a night spot in the centre of town". For the court to take matters such as this into account seems to me to be an interference with the commercial freedom of the premises of a type that was not permissible under the Act unless it was necessary to promote the licensing objectives. I appreciate that the magistrates' response seems to suggest that they feared that a different type of customer was being courted or would invite themselves once it got too late for families but this does not seem to have been founded on anything that was given in evidence so was really not much more than speculation.

[66] Mr Beere's statement ends with a reference to the Brewery wanting to make hay while the sun shines, of which he says, "I believe that this statement was indicative of the Brewery's attitude to local residents and to the general management of the premises." Given that problems with or in the vicinity of the premises had been almost non-existent and that the magistrates had not seen fit to make reference in their Reasons to any difficulties caused by the Hotel, it is hard to see how this belief could be justified but it does perhaps exemplify the approach of the magistrates.

[67] I have considered quite separately the argument as to whether the hours of opening can be regulated as part of the licensing of premises as opposed to the hours during which licensable activities take place. It was suggested during argument that there was no power to regulate the time by which people must leave the premises. I cannot agree with this. Clearly keeping premises open (as opposed to providing entertainment or supplying alcohol there) is not a licensable activity as such. However, the operating schedule which must be supplied with an application for a premises licence must include a statement of the matters set out in s 17(4) and these include not only the times when it is proposed that the licensable activities are to take place but also "any other times during which it is proposed that the premises are to be open to the public". On a new grant of a premises licence, where there are no representations the licensing authority has to grant the application subject only to such conditions as are consistent with the operating schedule. I see no reason why, if it is necessary to promote the licensing objectives, these conditions should not include a provision requiring the premises to be shut by the time that is specified in the operating schedule. If representations are made and the licensing authority ultimately grants the application, it can depart from the terms set out in the operating schedule when imposing conditions in so far as this is necessary for the promotion of the licensing objectives. It must follow that it can impose an earlier time for the premises to be locked up than the Applicant wished and specified in its operating schedule. It is important to keep in mind in this regard that the role of the licensing authority and, if there is an appeal, the court, has two dimensions: the fundamental task is to license activities which require a licence and the associated task is to consider what, if any, conditions are imposed on the Applicant to ensure the promotion of the licensing objectives. A requirement that the premises close at a particular time seems to me to be a condition just like any other, such as keeping doors and windows closed to prevent noise. I see no reason why a condition of closing up the premises at a particular time should not therefore be imposed where controlling the hours of the licensable activities on the premises (and such other conditions as may be imposed) is not sufficient to promote the licensing objectives.

THE COSTS ARGUMENT

[68] In the light of my conclusion that the magistrates' decision is unlawful and therefore must be quashed, it is not appropriate for me to consider the arguments in relation to their costs order further. The Appellants had given an undertaking to the Licensing Authority that they would not seek costs against the Licensing Authority and they sought the entirety of their costs of the appeal from the Claimant. The magistrates granted that order and the Claimant submits that that was not an order that was open to them. Whatever the merits of that argument, the magistrates' order in relation to costs cannot now stand. The basic foundation for the

order for costs was that the appeal had succeeded and the Claimant had lost. That position has now been overturned and the costs order must go along with the magistrates' main decision. The magistrates would have had no reason to grant costs against the Claimant if the appeal had been dismissed.

Appeal dismissed.

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