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| **Licensing Act 2003****East Devon District Council****Licensing & Enforcement Sub-committee****Premises Licence****Decision – Mickey’s Beach Bar & Restaurant and Café Patisserie Glacerie****Unit 1, Sideshore, Queens Drive, Exmouth, EX8 2GD** **23 April 2021** |  EDDC  Logo_RGB 2009 |

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|  | We have carefully considered the application for a new premises licence with a view to deciding whether the application promotes the licensing objectives, as required by the Licensing Act 2003. We have also had regard to Government Guidance, the Council’s own Licensing Policy, and the Human Rights Act 1998 in making this decision. |
|  | We have considered the relevant representations that all parties made at the hearing on 21 April 2021 and the written representations and other documentation put before this sub-committee.  |
|  | We have considered the particular locality of the premises on Exmouth seafront forming part of the Sideshore development, and its physical relationship with other residential and commercial properties in the vicinity. |
|  | We consider it relevant that there are no outstanding issues raised by Responsible Authorities. The Environmental Health Service made a representation but, following discussion with the Applicant, conditions have been agreed such that they do not consider the prevention of public nuisance licensing objective will be undermined. From this we have concluded that Environmental Health do not consider that there will be a significant problem arising from noise generated at the premises, if the application is granted. This was confirmed at the hearing.   |
|  | Before the application was formally submitted, the Applicant engaged with Police Licensing and agreed to conditions which were included in the Operating Schedule. On that basis, no representation was made by the Police.  |
|  | There was no representation from the Council’s Planning & Countryside Service. A number of the representations made by Interested Parties related to the planning history of the site, the type of operation sought and expected through the planning process, potential impacts on flora and fauna, potential increases in traffic, and the car parking provision in the area. Reference was also made to the Council’s Licensing Policy which states that the continued preservation and protection of coastal, seafront areas and locations will be an ongoing consideration (Policy, 5.6.4). We attach little weight to these representations. The Government Guidance states that the planning and licensing regimes involve consideration of different (albeit related) matters. Licensing committees are not bound by decisions made by a planning committee and vice versa (14.64). We have had regard to the continued preservation and protection of coastal, seafront areas, but that can only be relevant if within the scope of the licensing objectives. The Planning & Countryside Service has not raised any of the above issues as applied to the licensing objectives.  |
|  | The Applicant’s case at the hearing was presented by Mr. Pinwell (Ashfords). In summary and as relevant he stated that: * The Officer Report is full and comprehensive.
* The Applicant, Maer Beach Limited, has extensive experience of operating licensed venues, is a highly regarded brand, and has made significant investment into the premises.
* Acoustically, the premises have been designed to minimize noise nuisance, facing the sea, and with a high degree of noise attenuation. It is appreciated that the premises are in a sensitive location. An expert has been engaged who has agreed background noise levels and undertaken tests of the sound system with Environmental Health officers. A series of conditions have been agreed.
* As to hours, a number of representations state that if the hours are the same as at Ocean at the Esplanade, there would not be a problem. In reality, the hours sought here are a modest increase on those granted at Ocean.

Whilst we note what is said as to the hours at Ocean, we have considered this application on its own merits (Policy, 5.3.1). No precedent was set by the hours granted at Ocean, just as no precedent will be set by any hours granted on this application.* Since the licence at Ocean was granted, the provisions of the Live Music Act 2012 have come into effect which deregulate the provision of live and recorded music on licensed premises.

As confirmed at the hearing, the effect of the deregulatory provisions of the Live Music Act 2012 is that between 0800hrs and 2300hrs, the performance of live music (for up to 500 people) or the playing of recorded music, - whether amplified or not - on premises which are authorised and open for the sale of alcohol for consumption on the premises, is not something which is considered regulated entertainment (Licensing Act 2003, Schedule 1, para. 12A, and s.177A)* There was no actual evidence to approve different hours.

Since this is an application for a new premises licence, the approach which we have applied is to consider the likely effect of the grant of the licence on the promotion of the licensing objectives. This involves an evaluation of the representations so that a judgment can be made about risk (Policy, 5.2.3, 5.3.6). In response to questions, Mr. Pinwell confirmed (as relevant): * It was unlikely the full hours sought (0200hrs plus 30min) would be used in the early days of the week and that was not the intention. However, flexibility was sought, and this would be a commercial concern.
* When the outside event space was in use, portable toilets would be available for use (having regard to the need to avoid children having to access the Bar & Restaurant).
* The tent / marquee would be used for all regulated entertainment in the outside event space. Outside of the period 1 April – 30 October, there would be no furniture in this area and it would not be used for licensable activities.
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|  | There were 77 representations made by Interested Parties, all of whom objected to a greater or lesser extent to the grant of the licence as sought. We noted that the large majority of the representations do not object to the grant of a licence, but a key concern was the hours sought by the Applicant and the likely effect on the prevention of public nuisance. A number of Interested Parties addressed the hearing: Jane Ashton, David Buller, Cllor Poor (Exmouth Town Council), Daphne Currier, Cllor Olley Davey, Simon Davidson (TARA), Martin Heslop (on behalf of a number of residents), Ron Metcalfe, Peter Tweedie, Michele Ward, Martin Warren, John Sealey, Mary Nash, and Carol Metcalfe. A wide range of issues were raised, including: * In making a judgement about risk, the Council’s policy says that a key purpose of the licensing function is not to respond to crime and disorder, nuisance or public harm once it has happened but to make an informed assessment of the risk of such things occurring if a licence is granted and to take such steps as it considers appropriate to prevent or minimise such risks (Policy, 5.3.6).

We consider that this part of the policy should be read with its stated objective to help balance the sometimes conflicting needs of licensees and residents (Policy Foreword), and the wish to facilitate well run and managed premises with licence holders displaying sensitivity to the impact of the premises on local residents (Policy, 3.2.4). * Concerns as to the use of polycarbonates outside and the fact they are not biodegradable.

We note that the use of polycarbonates in the outside event space is a condition sought by the Police to prevent crime and disorder, that the outside event space will be supervised at all times when it is open for the sale of alcohol, and a condition can be imposed to prevent litter leaving the premises. * Concerns that patrons may be tempted to swim in the sea, which is very dangerous.

We are aware that the licensing function is not seen as a mechanism for controlling behaviour by individuals once they are beyond the direct control of the licence holder (Policy, 6.2). It would be disproportionate to require the premises to patrol the areas outside of the licensed area, which can be managed through other strategies. However, a condition requiring signage to be displayed at the premises warning of these dangers would be appropriate under the public safety objective. * Concerns that the balance between the impact on residential amenity and the commercial interests of the premises has not been struck appropriately. In particular, at later hours there are existing issues with noise and disturbance for residents on Trefusis Terrace and other roads in the vicinity of the premises. That patrons arriving and leaving the premises will inevitably cause some disturbance and many will also do so by foot, especially in the early hours when residents can expect to have a quieter environment. Car doors slamming, late night conversations, and people walking in groups to and from the premises will cause disturbance.
* Concerns that there is already anti-social behaviour in the area which the operation of the premises will exacerbate.

Whilst we do note those concerns, we are also aware that securing the delivery of the licensing objectives should not be seen as a “cure all” for solving all problems in the community which can be tackled through partnership with other agencies (Policy, 3.1.7). * The interests of the premises should be balanced against the right of residents to respect for private and family life under Article 8 of the Convention.

We note that the Licensing Act 2003 was passed after the Human Rights Act 1998, and can be taken to have been compliant with the Convention when it was passed. Article 8 is a qualified right. Interference can be justified where in accordance with the law, necessary in a democratic society in the interests of the economic well-being of the country, and the protections of the rights and freedoms of others. A balance between the competing interests here is written into the Act (and the Council’s Policy), and backed by the availability of a review procedure if concerns are actually realised in the future. We do not consider that our decision would lead to an unjustifiable interference with Article 8 rights. * There has been no mediation led by the Council and this has created a flaw in the process.

Given the large number of representations and range of issues raised, the Licensing Authority took a reasonable decision not to initiate mediation as it was unlikely that agreement would be reached. That has not precluded any Interested Party from seeking to mediate with the Applicant if they so wished, and there is nothing which requires the Council to initiate mediation. It can be noted that discussion and mediation has in fact taken place and has been effective between the Applicant and the Police and Environmental Health Service. We do not consider there has been any flaw in the Council’s process. Overall, we are mindful of the concerns raised by Interested Parties as to the low level nuisance and disturbance which is likely to be caused to residents in the area by people frequenting the premises, particularly when they leave, given the hours sought which will extend to 0230hrs. A degree of disturbance to local residents may well occur for some period after that, especially given the numbers of patrons which the premises could hold. This is a sensitive location. We attach significant weight to these concerns.  |
|  | Alice Gill was present on behalf of the Environmental Health Service. She explained the conditions which had been agreed with the Applicant and answered questions from the Committee and Interested Parties. In particular, she confirmed that: * On the basis of the conditions agreed at p.141 of the Agenda, Environmental Health were satisfied that the public nuisance objective would not be undermined based on noise generated at the premises.
* The opening of two windows, both facing the sea, on the first floor glazed restaurant area was something taken into account in the acoustic report.
* A background monitoring location had been agreed with the Applicant (p.161, 240m from the premises), as well as 3 monitoring locations for assessments when the premises was operational (p.140).
* The Environmental Health Service was not seeking an inaudibility condition and was aware of the Council’s Policy at p.65 (top) which refers to concerns as to their precision.

We attach significant weight to the Environmental Health Service’s position, since it is the responsible authority dealing with public nuisance. However, we note that the focus of its mitigation is on noise generated at the premises (i.e. from patrons and music when on the premises). That does not address the very real concerns raised by residents as to disturbance once patrons have left the premises in the early hours.  |
|  | We have carefully considered the operating schedule put forward by the Applicant and the likely impact of granting the application. We consider that concerns raised as to crime and disorder, public safety, and the protection of children from harm can be met by appropriate and proportionate conditions which are enclosed with this decision (List of Conditions). Whilst we note that the Applicant has stated in its Operating Schedule that noise or vibration from the premises will be maintained at a level that will not be audible at the façade of any neighbouring noise sensitive premises (p.32(d)), we do not consider that a condition in that form would be sufficiently precise or enforceable. The Council’s Policy (p.65 – top) makes the point that inaudibility conditions have faced criticism in the courts as to their lack of precision. Instead, Environmental Health Services have in this case agreed appropriate and proportionate conditions which derive from widely accepted standards.  |
|  | We are aware that the review mechanism under the Licensing Act 2003 provides a key protection for Interested Parties if concerns raised as to the effects of the grant of a licence do in fact materialize. Premises which do not operate in an acceptable way in terms of the licensing objectives may in extreme cases have their licence revoked by the Licensing Authority if a review application is brought, properly evidenced, and justified. At the same time, we have regard to the Council’s Licensing Policy which states that a key purpose of the licensing function is not to respond to the issues once they have happened, but to make an informed assessment at this stage and take such steps as appropriate to prevent or minimize such risks (Policy, 5.3.6).  |
|  | As to the prevention of public nuisance, we consider that appropriate and proportionate conditions can be imposed which meet some of the concerns raised by Interested Parties. These are contained on the attached List of Conditions. As to the outside event space, we note that licensable activities are only applied for this area between 1 April and 31 October each year, and that the Applicant has stated that in order to hold regulated entertainment indoors (as applied for), a tent / marquee will be used. We also agree that the conditions agreed with Environmental Health Services will meet the concern as to noise generated at the premises. These measures are imposed as conditions, whilst noting the deregulatory effect of the Live Music Act 2012 (referred to above). The Applicant’s commitment to comply with these measures is welcomed and noted. If those commitments are not followed through in practice, the review mechanism will be an available option to all concerned. Importantly, having evaluated all of the representations, and as a matter of judgment, we consider that it would be appropriate and proportionate at this stage to limit the hours of operation sought so as to prevent public nuisance. That is because we share the key concern raised by a number of Interested Parties as to the likelihood of disturbance to residents in the vicinity of the premises by patrons arriving and (in particular) leaving in the early hours of the morning, with the hours as sought. The Council’s policy provides that public nuisance can include low-level nuisance affecting a few people living locally (Policy, 16.1). We note the particular locality here, where there are a number of residential properties in the vicinity of the premises (the nearest being 240m away); the size and scale of the premises, with a 150 seater first floor restaurant and 102 seater ground floor bar, as well as the availability for use of the outside event space between April and October; the likelihood that large numbers of people may frequent the premises by foot; that in any event, car door slamming and engine revving can cause a nuisance in the early hours; that once beyond the control of the Applicant, there is realistically little it can do to prevent noise and disturbance to residents from patrons; and that in the early hours of the morning, residents can reasonably expect a quieter noise environment. As to hours in the early part of the week, the Applicant’s intention not to use the full hours was noted (albeit it is acknowledged that there is no requirement for an applicant to demonstrate a need for hours). We consider that the Applicant’s stated need for flexibility could be addressed by the Applicant making applications for Temporary Event Notices. The Committee has therefore sought to balance the competing interests in this application by restricting the hours of operation as set out below, with a view to promoting the licensing objective of preventing public nuisance.  |
|  | For the above reasons, we grant the premises licence as follows: |
|  | The extent of the areas within which the various licensable activities will be permitted is as indicated on the key to the Applicant’s plan at Appendix B of the Agenda (p.40). This identifies 3 separate areas: (1) The Bar & Restaurant and Café building(2) The external terraces to the Bar & Restaurant and Café building (one at ground floor level, and one at first floor level)(3) the outside event space (in purple) |
|  | Permitted hours for the various licensable activities will be as set out in Appendix A subject to:1. Amendments proposed by the Applicant relating to the outside event space and clarified at the hearing, namely:

Licensable activities are only applied for in the outside event space for the period between 1 April and 31 October inclusive. As applied for, all regulated entertainment (live and recorded music) can only take place indoors. A tent / marquee will be erected within the outside event space for that purpose. Live or recorded music will cease at 2300hrs. The outside event space will be vacated by midnight. 1. Amendments to the permitted hours for the Bar & Restaurant and Café building as follows:

Sale of alcohol for consumption ON the premises:Sunday to Wednesday: 1100 – 0000hrs Thursday to Saturday: 1100 – 0100hrs Live music (indoors): Monday to Sunday: 1200 – 2300hrs Recorded music (indoors): Sunday to Wednesday: 0700 – 0000hrsThursday to Saturday: 0700 – 0100hrs Late Night Refreshment (indoors):Sunday to Wednesday: 2300 – 0000hrsThursday to Saturday: 2300 – 0100hrs Opening hours:Sunday to Wednesday: 0700 – 0030hrsThursday to Saturday: 0700 – 0130hrs 1. Amendments to the permitted hours for use of the two external terraces to the Bar & Restaurant and Café building (one at ground floor and one at first level):

Monday to Sunday: 0700 – 0000hrs |
|  | The conditions will be as shown on the enclosed List of Conditions.  |
| 1. **Designated Premises Supervisor**
 | The Designated Premises Supervisor will be Clare Horne, of 17 Higher Street, Cullompton, Devon, EX15 1AJ.  |
| 1. **Mandatory conditions**
 | The mandatory condition (s) required by sections 19 of the Licensing Act 2003 will also be imposed |

Under the provisions of section 181 and schedule 5 of the Licensing Act 2003 there is a right of appeal against the decision of the Licensing Sub-Committee if you are aggrieved at the outcome. This right of appeal extends to the Applicant in the case of a refusal or restrictions on the licence, or the imposition of conditions to the licence. The right of appeal also extends to persons who have made representations where the licence has been granted, or that relevant conditions have not been imposed upon the licence. Full details of all the rights of appeal can be found within Schedule 5 of the Act.

Any appeal should be made to the Magistrates’ Court, The Court House, Heavitree Road, Exeter, Devon, EX1 2LS within 21 days from the date of notification of the decision. You must contact the Magistrates’ Court to establish the formal procedure for the appeal.