

Agenda Item No:

Licence Reference **WK/201106582 & LN/020080421**

Report To: **LICENSING SUB COMMITTEE**

Date: **5TH SEPTEMBER 2011**

Report Title: **Licensing Act 2003 - Application is made by for the review of the premises licence in respect of Richard Phillips Restaurant at Chapel Down, Chapel Down Vineyard, Smallhythe Road, Smallhythe, Tenterden, Kent, TN30 7NG on the grounds of the prevention of public nuisance and the prevention of crime and disorder.**

Report Author: Licensing Manager



Summary:

The report advises Members of a licence application under the provisions of the Licensing Act 2003.

Application type: **Application is made for the review of the premises licence under the provisions of section 51 to the Licensing Act 2003**

Applicant: **Mr John Craig OBE**

Premises: **Richard Phillips Restaurant at Chapel Down, Chapel Down Vineyard, Smallhythe Road, Smallhythe, Tenterden, Kent, TN30 7NG**

To advise elected members of a valid 'Application for a Review of a Premises Licence' under Section 51 of the Licensing Act 2003 has been received and a hearing and determination is required under Section 52(2) of the Act.

Key Decision: NO

Affected Wards: Rolvenden & Tenterden West Ward

Recommendations: **That the Licensing Sub-Committee recommended to make a determination, at the conclusion of the Hearing, as required by Regulation 26(2) of the Licensing Act (Hearings) Regulations 2005.**

Policy Overview: The decision is to be made with regard to the Licensing Act 2003, Secretary of State's Guidance issued under Section 182 of the Act and the Council's Statement of Licensing Policy. Where the decision departs from the Policy or Guidance the departure must be directed solely at the attainment of the licensing objectives, and such departure must be supported by clear and cogent reasons.

Financial Implications: There are no specific financial implications arising from this application. However additional costs may be incurred should the matter go to appeal.

Other Material Implications: **HUMAN RIGHTS:** In considering this application the Sub Committee will balance the competing Human Rights of the various parties including the right to respect for private and family life, the protection of property and the right to a fair hearing.

LEGAL: Under the Licensing Act 2003 the Council has a duty to exercise licensing control of relevant premises and this includes determinations for applications to review.

Exemption Clauses: Not applicable

Background Papers: None

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Purpose of the Report

1. The report advises Members of a review application under the provisions of the Licensing Act 2003.

Application type: **Application is made for a review of a premises licence**

Applicant: **Mr John Craig OBE**

Premises: **Richard Phillips Restaurant at Chapel Down, Chapel Down Vineyard, Smallhythe Road, Smallhythe, Tenterden, Kent, TN30 7NG**

Issue to be Decided

2. Members are asked to consider an application to review a premises licence received under the provisions of section 51 of the Licensing Act 2003

Background

3. The Licensing Act 2003, which consolidated six licensing regimes in a single statute and which replaced the previous controls on the sale of alcohol under the provisions of the Licensing Act 1964, introduced the concept of the 'premises licence'.
4. A premises licence is required for any venue where any 'licensable activity' is carried on. Such activities include the sale or supply of alcohol, the provision of regulated entertainment and the provision of late night refreshment etc.
5. All pubs, nightclubs, private members clubs, off licences, cinemas, theatres, restaurants and late night takeaways, etc require a licence if a licensable activity is carried on.
6. The government included a very clear presumption in favour of businesses in the Licensing Act 2003 since the Act requires that any application should be granted on the terms on which it is applied for, unless any valid representation is made.
7. Where representations are made, the Act suggests that the Licensing Authority can apply a 'light touch' regulation.
8. This approach is 'balanced' in the Act by provisions which permit a premises licence to be reviewed by the Licensing Authority, upon receipt of a valid application for review from an interested party or responsible authority.

9. An application for the review of a premises licence must be circulated to the responsible authorities to give them the opportunity to make representations. (Police, Fire Service, Environmental Health – Pollution Control & Health & Safety, Trading Standards, Social Services and the Planning Department).
10. Where an application for a review has been accepted by the Licensing Authority the Act requires that a notice is displayed on the premises, in a position where it can be seen from the outside of the premises, stating that an application to review the premises licence has been made. A notice must also be displayed at the Council's offices and on its website.
11. Members of the public or businesses who live or operate in the vicinity of the premises to which the review application relates is situated, or their representatives, can also make representations, which can be considered as part of the review.
12. Representations are only valid where they relate to one of the four licensing objectives, namely:
 - a) the prevention of public nuisance
 - b) the prevention of crime and disorder
 - c) ensuring public safety
 - d) protection of children from harm
13. The review application must be considered in the light of the four licensing objectives, the Guidance issued by the Secretary of State and Ashford Borough Council's Statement of Licensing Policy.

Application for a review received

14. Mr John Craig OBE, an interested party who lives in the vicinity of the Richard Phillips Restaurant has submitted an application for a review of the premises licence held by Kentish Dining Rooms Ltd, Tottingham Barn, 352 Rochester Road, Maidstone, Kent for the premises known as Richard Phillips Restaurant at Chapel Down, Chapel Down Vineyard, Smallhythe Road, Smallhythe, Tenterden, Kent, TN30 7NG.
15. The application was correctly submitted by Hallett & Co, acting on behalf of Mr Craig, on 15th July 2011 and can be found (with supporting documents), in Appendix A.
16. The application for the review relates to the prevention of public nuisance and prevention of crime and disorder licensing objectives.
17. All applications for the review of a premises licence require the applicant to state the grounds for the review. Mr Craig has provided the following information:
 - a) This application for a review of the premises licence is based upon the need to resolve ongoing problems associated with excessive noise emitted from events held outside the restaurant in a marquee.

- b) The problems arose in the summer of 2010 and the noise has affected Mr Craig during the daytime and evening. The noise takes the form of amplified music and speech from events in the marquee, from the people attending the event and from people leaving the events.
- c) Mr Craig has engaged the services of an acoustic consultant, Matthew Lawrence (MRL Acoustics) and has enclosed both his summary findings and the detailed technical report.
- d) Mr Craig states that the licence holders have failed to ensure that live music events are of a low level amplification and that staff fail to regularly monitor noise levels at outdoor events to prevent public nuisance, despite these being conditions attached to the premises licence. He states that the level of control over noise generation is evidently inadequate and the conditions of the licence need considerable modification to ensure the relevant licensing objectives are upheld.
- e) Mr Craig believes that a marquee without sound proofing and situated in close proximity to residents premises is clearly going to create a public nuisance.

18. In addition to Mr Craig, 14 other residents in Smallhythe, from 10 houses have submitted representations in support of the application for a review (Appendix B). The concerns of the residents living in the vicinity of the premises are that they have experienced noise nuisance from music played at the premises (particularly the bass/low frequency sound) and from the voices of those attending events and some have raised concerns about the noise from people leaving the premises.

19. A map showing the location of the residents that have made representations is included in Appendix C.

20. Mrs Mitchell lives approximately 700m from the premises, but her representation is considered within the vicinity as she has been affected by the noise. Mrs Mitchell has provided two separate representations and while these are counted as one, both copies are included as the content differs slightly. A separate map is included to indicate the location of her house in relation to Richard Phillips Restaurant.

21. In addition to the residents who have supported the review hearing, the Environmental Control Officer (Mrs Butler) has submitted a representation on the prevention of public nuisance licensing objective. Her representation (Appendix D) contains a history of Ashford Borough Council's Environmental Protection Department's involvement with the premises, following noise complaints in October 2010.

22. The Officer's representation includes communication with staff from the premises, observations from officers on enforcement visits, noise level measurements and her conclusion that a statutory noise nuisance was proven at the premises. Mrs Butler ventures that the conditions on the current premises licence are insufficient to support the objective of the prevention of public nuisance.

23. Three letters in support of Richard Phillips's Restaurant have been received from the CEO of Chapel Down, the CEO of Visit Kent and the CEO of Locate in Kent.

Copies of these letters are in Appendix E These letters support the restaurant as an important attraction and as a local employer.

24. Stephen Thomas, acting on behalf of Kentish Dining Rooms Ltd has submitted information in support of the premises (Appendix F). The first contains a statement from the Director of Kentish Dining Rooms and the designated premises supervisor, Mr Richard Phillips. This sets out the background to events being held at the premises, the steps that have been taken since he became aware of neighbours' concerns and suggested conditions that may minimise the public nuisance.
25. The second contains a statement from Mr Alan Saunders, an acoustic consultant. This contains details of the steps taken to minimise the noise and measurements of noise levels. Mr Saunders also suggests a number of conditions that will offer the residents protection from noise nuisance. Mr Saunders also raises questions regarding the noise report provided by MRL Acoustics, engaged by Mr Craig.
26. Lastly there is a statement from Mr Gary Beach, the Group Manager, who it is proposed will undertake a fulltime role at the restaurant in the future and who has been present at some of the events held in the outside area.
27. The Licensing Authority has accepted the application for a review as valid.
28. Following acceptance of the application for a review, the notice which is required to be displayed, was displayed, at the premises of Richard Phillips Restaurant at Chapel Down, Chapel Down Vineyard, Smallhythe Road, Smallhythe, Tenterden, Kent, TN30 7NG and at the offices of the Council in Tannery Lane and on the Council's website. These notices were checked throughout the consultation period.
29. The Licensing Authority has complied with the requirements of Section 51 (3)(b) and (d) of the Licensing Act 2003 by advertising the Application for a Review and inviting Representations. A copy of the Public Notice is appended as Appendix G.

Relevant premises history

30. The premises is situated just off Smallhythe Road in a small hamlet, in an area of Outstanding Natural Beauty, within the Chapel Down Winery.
31. There are two premises licences in existence for the Winery. English Wines Group Plc has a licence for the ground floor of the building (the Winery) and the outside area. This licence has not been reviewed and is not up for consideration.
32. Kentish Dining Rooms Ltd has a premises licence for the first floor of the building (the restaurant) and the outside area. It is this premises licence for Richard Phillips Restaurant that is being reviewed and specifically it is events held outside the building in a marquee which have given rise to the review.
33. The premises licence for the Richard Phillips Restaurant was applied for by Stephen Law on the behalf of his client in April 2008. Following no representations from interested parties or responsible authorities, the premises licence was granted on 16th May 2008.

34. The premises licence, as in Appendix H, permits the following activities:

Alcohol Sales (on and off the premises)		Regulated Entertainment (indoors and outdoors)		Late Night Refreshment (indoors and outdoors)	
Sunday	08:00 - 02:00	Sunday	08:00 - 01:00	Sunday	23:00 - 02:00
Monday	08:00 - 02:00	Monday	08:00 - 01:00	Monday	23:00 - 02:00
Tuesday	08:00 - 02:00	Tuesday	08:00 - 01:00	Tuesday	23:00 - 02:00
Wednesday	08:00 - 02:00	Wednesday	08:00 - 01:00	Wednesday	23:00 - 02:00
Thursday	08:00 - 02:00	Thursday	08:00 - 01:00	Thursday	23:00 - 02:00
Friday	08:00 - 02:00	Friday	08:00 - 01:00	Friday	23:00 - 02:00
Saturday	08:00 - 02:00	Saturday	08:00 - 01:00	Saturday	23:00 - 02:00

35. There is an extension until 02:00 on New Year's Eve for regulated entertainment (music, dancing, etc) and no live or recorded music is permitted outside after midnight.

36. It is the view of the Licensing Authority that events held in marquees constitute events held "outside" and subsequently regulated entertainment held in the marquee is considered to take place "outside" and therefore required to cease by midnight.

37. Complaints of loud music were initially received by the Licensing Authority in October 2010, when it was stated by a neighbour of the premises that weddings had started in 2008, but they were generally 'low key' events with music played at low level and finishing in the afternoon. However in 2010 it was felt that the events had been weekly, generally with very loud music and with the volume turned up at 23.00. The complainant stated he had not been notified of events and the music was audible in his property. When asked why he had not alerted us earlier he stated that he was now concerned as it is so frequent/loud.

38. The Licensing Manager contacted the Event Organiser for Richard Phillips at Chapel Down in October 2010 informing her of the complaints and the requirement to notify residents of events held outside as a condition on the premises licence. She responded that there were no further events until 2011 and that a letter was sent out at the beginning of 2010 to notify local residents of the events planned for the year. The restaurant had received some queries from some of the recipients arising from these letters, which confirmed the claim the letters were sent, but possibly not all local residents were notified.

39. The Event Organiser stated that a letter would be sent out in 2011, which would ask for feedback on the previous year's events. She stated that the restaurant had received a complaint from a nearby resident and they had turned the music down at that time. The Event Organiser was reminded of the conditions on the premises licence and informed that monitoring of events would take place in 2011.

40. It is understood that the operators of the restaurant invited local residents to a meeting prior to the first event in April 2011 to discuss the operation of events in the outside area and specifically the marquee.
41. From May 2011 complaints regarding noise generated from events held at Chapel Down under the management of the Richard Phillips Restaurant continued. Visits were made to the surrounding area by Environmental Control Officers and the Licensing Manager in June and July.
42. Following complaints and observations by officers and the apparent failure of the premises licence holders or their staff to resolve the noise issues, the Environmental Control Team reviewed the case and a Noise Abatement Notice was issued on 27th July 2011 (Copy of Notice is contained in Appendix I).

Options

General

43. Members attention is drawn to the following matters:
 - a) All applications are to be considered on their merits as well as against the relevant policy and statutory framework.
 - b) Due regard should be given to the provisions of the Human Rights Act 1998, Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000 and Section 17 of the Crime and Disorder Act 1998.
 - c) The various options put forward within this report are suggested on the basis of:
 - a) information contained within the application form;
 - b) the responsible authority representation and
 - c) on those measures currently in existence.
 - d) Section 4 of the 2003 Act sets out the general duties of licensing authorities stating that "A licensing authority must carry out its functions under this Act with a view to promoting the licensing objectives. The licensing objectives are ... (c) the prevention of public nuisance."
 - e) Public nuisance is given a statutory meaning in many pieces of legislation. It is however not narrowly defined in the 2003 Act and retains its broad common law meaning for the Act's purposes. The prevention of public nuisance could therefore include low-level nuisance perhaps affecting a few people living locally as well as major disturbance affecting the whole community. It may also include in appropriate circumstances the reduction of the living and working amenity and environment of interested parties (as defined in the 2003 Act) in the vicinity of licensed premises.
 - f) In the context of preventing public nuisance, it is essential that conditions are focused on measures within the direct control of the licence holder. Conditions relating to public nuisance caused by the anti-social behaviour of customers once they are beyond the control of the licence holder, or premises

management cannot be justified and will not serve to promote the licensing objectives in relation to the licensing activities carried on at the premises. Beyond the vicinity of the premises, these are matters for personal responsibility of individuals under the law.

- g) The Guidance states “the conditions that are necessary for the promotion of the licensing objectives should emerge initially from a prospective licensee’s risk assessment which should be undertaken by applicants or clubs before making their application for a premises licence or club premises certificate. This would be translated into the steps recorded in the operating schedule or club operating schedule that it is proposed to take to promote the licensing objectives.”
- h) It is therefore perhaps useful to look at the conditions on the current premises licence and see whether they have been adhered to and whether additional conditions may be necessary to promote the prevention of public nuisance.
- i) If members, after considering the evidence in front of them and having listened to all parties come to the conclusion that the lack of management is a significant contributing factor, then they may wish to consider conditions that are not influenced by management competence, the restriction or the removal of a licensable activity.
- j) Members are also referred to Ashford Borough Council’s Statement of Licensing Policy. The following paragraphs are relevant to this application:

Para 14

The use of any licensed premises or places may be subject to planning controls. There are several key differences between licensing and planning control. Licensing is concerned with the fitness of the operator and detailed issues concerning the operation and management of the premises that are not addressed by the planning process, which relates to the use of the premises.

Para 15

There is no legal basis for a licensing authority to refuse a licence application because it does not have the relevant planning permission.

Para 69.

The Licensing Authority will primarily focus on the direct impact of the activities taking place at licensed premises on those attending the premises and members of the public living, working or otherwise engaged in normal activity in the vicinity concerned.

Para 89.

Licensed premises have a significant potential to adversely impact on communities through public nuisances that arise from their operation. The Licensing Authority wishes to proactively maintain and protect the conditions of residents and other businesses from the potential consequence of the operation of licensed premises whilst recognising the valuable cultural, social and business importance that such premises provide. The benefits of licensable activities will need to be carefully balanced with the impact of such activities on neighbourhoods and the individuals living, working or active within them.

Hearings Regulations

44. Regulations governing hearings under the Licensing Act 2003 have been made by the Secretary of State.
45. The Licensing Authority has provided all parties with the information required in the Regulations to the 2003 Act including:
- a copy of the Notice of Hearing;
 - the rights of a party provided in Regulations 15 and 16;
 - the consequences if a party does not attend or is not represented at the hearing
 - the procedure to be followed at the hearing.

Appeals

46. The Licensing Act 2003 Section 181 and Schedule 5 makes provision for appeals to be made by the applicant; the holder of the premises licence and those making representations against decisions of the Licensing Authority to the Magistrates' Court.

Recommendations

47. That members carefully consider the application for review and take such steps as detailed in paragraph 50 below that the Sub-Committee consider necessary for the promotion of the Licensing Objectives.

Decision options

48. The options available to members are set out in paragraph 50 below. If members believe steps should be taken to promote the prevention of public nuisance they may wish to consider the following conditions:
- a) The playing of amplified music or speech in outside areas of the premises is not permitted.
 - b) No licensable activity to be permitted in areas outside the restaurant building.
 - c) Restricting the playing of amplified music in outside areas to certain days and/or times.
 - d) Restricting the permitted hours for the sale of alcohol in outside areas.
 - e) Restricting the opening hours of the premises when members of the public may be on the premises.
 - f) The Licence Holder to install sound proofing of any outside structures to a standard agreed by the Divisional Environmental Health Officer.

- g) The designated premises supervisor to be changed within a stated time period.
- h) Regulated entertainment shall be restricted to the inside of the restaurant building and inside the marquee. There shall be no external speakers and no external music provision outside the marquee.
- i) In relation to the marquee, regulated entertainment shall not be provided until a Noise Management Plan including maintenance and monitoring of agreed noise levels and noise mitigation measures has been submitted to the Licensing Authority and agreed in writing by the Divisional Environmental Health Officer.
- j) The approved Noise Management Plan should be complied with at all times when the marquee is in use.
- k) Music noise associated with the use of the marquee, which takes place between the hours of 23:00 and 09:00 should be controlled to such a level that music should not be audible within Spots House (closest residential property) with windows opened for ventilation.
- l) Whilst music is being played, the DPS or another appointed member of staff shall check periodically that noise levels are acceptable. Such monitoring shall be carried out at the boundary of the premises to ensure that local residents are not likely to be disturbed. A written record shall be kept of all monitoring and made available to the Licensing Authority upon request.
- m) The Licence Holder to ensure prominent, clear notices are displayed at all exits in the marquee requesting customers to respect the needs of local residents, to leave the premises and the area quietly. Where appropriate, an announcement in similar terms shall be made over the internal public address system.
- n) No live music to be permitted. Any recorded music in the marquee shall be played only through the in house PA system and by the in house DJ only. A noise limiting device shall be permanently installed, maintained and used on the in house PA system. The device shall be set to a level so as to minimise the impact on local residents, to the satisfaction of the Divisional Environmental Health Officer.
- o) The Licence Holder to ensure that all doors and windows in the marquee that are capable of being opened to the outside, shall be kept closed whilst the premises are in use for the purposes of regulated entertainment consisting amplified music, except for access and egress.
- p) Any air conditioning systems or cooking extraction systems used in connection with the marquee shall be turned off when not in use.
- q) The Licence Holder to ensure that all bottle disposal and rubbish removal from the wedding venue either inside or outside the marquee, will not take place between 22:00 and 09:00.

- r) The Licence Holder to ensure that parking on days when wedding events are being held in the marquee shall be restricted. No parking will be permitted on the boundary with Spots House (to be defined on plan).

Legal options open to members

49. The Licensing Act 2003 at section 52(3) requires that the Licensing Authority must, having regard to the application and any relevant representations, take such steps mentioned in subsection (4) (if any) as it considers necessary for the promotion of the licensing objectives.

50. Section 52(4) states:

“The steps are –

- a) To modify the conditions of the licence;*
- b) To exclude the licensable activity from the scope of the licence;*
- c) To remove the designated premises supervisor;*
- d) To suspend the licence for a period not exceeding three months;*
- e) To revoke the licence;*

and for this purpose the conditions of the licence are modified if any of them is altered or omitted, or any new condition added.”

51. If members decide to take the steps referred to in (a) or (b) above, it may provide that the modification or exclusion is to have effect for only such period (not exceeding three months) as it may specify.

52. The Licensing Act 2003 at section 52(11) states that:

“A determination under this section does not have effect –

- a) until the end of the period given for appealing against the decision, or*
- b) if the decision is appealed against, until the appeal is disposed of.”*

Consultation

53. All relevant parties have followed the consultation procedures required under the Licensing Act 2003. The decision should be made with regard to the Secretary of State's Guidance and the Council's Statement of Licensing Policy under the Licensing Act 2003. Where the decision departs from either the Guidance or the policy clear and cogent reasons must be given.

Human Rights

57. While all Convention Rights must be considered, those which are of particular relevance to the application are:

- Article 8 - Right to respect for private and family life
- Article 1 of the First Protocol - Protection of Property
- Article 10 – Freedom of Expression

The full text of each Article is given in the attached Appendix J.

Handling

58. The timings for handling the application are set out in the Licensing Act 2003 and related regulations.

Conclusion

59. Members must ensure that the application is considered on its merits, as well as against the relevant guidance, policy and statutory framework

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Appendix A: Application to review with supporting evidence

Appendix B: Representations in support of the review from interested parties

Appendix C: Map of the area

Appendix D: Representations in support of the review from the Environmental Control Officer.

Appendix E: Representations in support of the Licence Holder

Appendix F: Supporting Statements from DPS, Acoustic Consultant and Group Manager

Appendix G: Notice of review displayed at the premises, Civic Centre and Council's website

Appendix H: Richard Phillips Restaurant premises licence

Appendix I: Abatement Notice in respect of noise nuisance

Appendix J: Human Rights

APPENDIX I - HUMAN RIGHTS

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 1 of the First Protocol

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws, as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 10

3. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
4. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.