

Committee: LICENSING COMMITTEE

Agenda Item

Date: 14 March 2011

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Title: Noise audibility conditions

**Author: Michael Perry Assistant Chief Executive –
Legal 01799 510416**

Item for decision

Summary

1. This report is prepared following a request from Cllr Perry to enable members to consider the ramifications arising from the case of R. (on behalf of Developing Retail Ltd) –v- South Hampshire Magistrates Court & Portsmouth City Council (“the Portsmouth case”).

Recommendations

2. Members determine whether any amendments should be considered to the licensing policy.

Background Papers

3. The following papers were referred to by the author in the preparation of this report and are available for inspection from the author of the report.

Lawtel summary of the Portsmouth case

Impact

- 4.

Communication/Consultation	If members wish to suggest an amendment to the licensing policy this would need to be the subject of consultation and if amended the adoption of a revised policy would need to be advertised.
Community Safety	None
Equalities	None
Finance	In the event that members resolve to consider amending the licensing policy modest advertising costs would be incurred which could be met from existing budget.
Health and Safety	None

Human Rights/Legal Implications	Human rights - Article 1 First Protocol European Convention of Human Rights gives every natural and legal person the right to peaceful enjoyment of their possessions. However the Convention permits the enforcement of laws to control the use of property in accordance with the public interest. The Licensing Act 2003 is considered compatible with the Convention in this respect. Legal implications are as set out in the body of this report.
Sustainability	None
Ward-specific impacts	None
Workforce/Workplace	None

Situation

5. Under the Licensing Act 2003 the licensing authority is obliged to promote the 4 licensing objectives, namely the prevention of crime and disorder; public safety; the prevention of public nuisance and the protection of children from harm.
6. The objective of the prevention of public nuisance is most frequently engaged when premises are providing regulated entertainment as noise from musical events can escape from licensed premises and cause a nuisance to others living or carrying on business in the vicinity.
7. The council’s environmental health department is a statutory consultee and as such is notified of all applications for licenses; club premises certificates and variations of either. Where environmental health officers consider that noise from premises could lead to a public nuisance they have made representations which have led to conditions being imposed on licenses to mitigate the effects of noise. Typically a condition that noise should not be clearly audible at the boundaries of noise sensitive properties has been imposed.
8. Such a condition was imposed on an application for a premises licence by English Heritage for Audley End. English Heritage had argued that no such condition was necessary but that if a noise limiting condition were to be imposed it should specify a maximum decibel level. There was however no evidence before the committee upon which an assessment could be made as to the maximum level of noise which would be acceptable. After the hearing before the committee English Heritage commissioned a noise survey which indicated an appropriate maximum level of noise in terms of decibels. It appealed against the committee’s decision and on appeal the magistrates

substituted a decibel limit for the condition imposed by members and awarded costs against the council in excess of £14000.00.

9. The council appealed against the costs decision by way of case stated (“the UDC case”). The council was successful with that appeal in terms of having the costs reduced by a substantial amount and after offsetting the costs of appeal (awarded to the council) against the balance of costs due to English Heritage both parties were in a “break even” situation. The decision in the case was helpful in that the judge effectively found that the onus was upon English Heritage to produce a noise survey if they wished to contend for a decibel limit. The judgement also appeared to give tacit support to a non-audibility condition in the absence of evidence as to what the appropriate decibel limit should be. This approach is consistent with government guidance which states that a condition may be imposed requiring the licensee to take measures to ensure that music will not be audible above background level at the nearest noise sensitive location.
10. Unfortunately the Portsmouth case has cast severe doubts upon the legality of such conditions. I have not been able to access a full transcript of the judgement and it may be one does not become available (not all cases are reported in full). However the summary I have seen is reasonably full. The condition imposed by South Hampshire Magistrates Court on appeal (by objectors) was that “all noise from the regulated entertainment at the premises should be inaudible 1 metre outside any noise sensitive premises”. Clare Montgomery QC sitting as a deputy high court judge held that the condition was so vague as to be unenforceable. She said that there was no clarity as to the premises or location intended to be protected and the meaning of “inaudible” was not clear. She further held that there had been evidence to justify a condition to protect local residents from noise, which could have been lawfully achieved by a condition that specified the particular nearby locations to be protected and described the decibel level of noise that was acceptable at those locations. The condition was quashed and the issue remitted to the magistrates' court to consider an alternative condition.
11. I have discussed this case with colleagues in environmental health. They have expressed concerns as what would be an acceptable level of noise depends very much upon ambient noise conditions. Thus a higher level of noise would be acceptable on a main road with heavy traffic passing than would be in a secluded location with little background noise. Environmental health officers have enquired whether a decibel level expressed in terms of “x decibels above ambient noise levels” would be acceptable, quoting by way of analogy the permitted noise levels under the Noise Act 1996. The permitted level for the purposes of that Act is expressed as 34 decibels where the underlying noise level does not exceed 24 decibels or 10 decibels above underlying noise levels in any other case.
12. In my view what the judge in the Portsmouth case was doing was seeking an absolute measure, not one which could vary depending on the background noise which can itself vary depending on a range of factors including the time of day. The Noise Act was enacted to provide a summary method of dealing with noise in extreme situations. It is not necessarily an appropriate way of

determining how premises are managed on a day to day basis. It is also worth bearing in mind that the existence of a condition under the Licensing Act 2003 would not inhibit officers from using the Noise Act powers should the need arise. I do not believe therefore that the fact that the Secretary of State has given a flexible basis for dealing with matters under the Noise Act is supportive of a similar type of condition to be imposed on licenses.

13. In terms of precedent comments made by the judge in the UDC case were obiter dicta as the judge was concerned with the issue of costs, not the validity of our condition. High court decisions are not necessarily binding on other high court judges but they are extremely persuasive. It is unusual for a high court judge to decide a point in a different way to a colleague. If that were to happen there would be 2 conflicting authorities and in the absence of an appeal a third judge dealing with the same issue would be free to decide between them. Once a majority of decisions has gone in a particular direction that should establish a precedent unless a fourth judge could be persuaded that the majority was so obviously wrong that the majority view could not prevail (a highly unlikely event) or the matter was determined by the Court of Appeal. Whilst my opinion is that the judge in Portsmouth was wrong I would not want the council to be involved in litigation seeking to establish that and would therefore recommend proceeding on the basis that she was right.
14. Colleagues in environmental health state that because of the variation in ambient noise levels it is necessary to establish what those levels are in order to fix a decibel limit for the acceptable level of noise. This can only be done by means of a noise survey. Based on the UDC case it would not be for the council to bear the costs of such a survey. However the council cannot require the applicant/licence holder to provide one. What the council could do is to lay out in its licensing policy circumstances in which the licensing committee would find a noise survey useful and what the likely approach of the committee would be if such a survey were not forthcoming.
15. If members are minded to take such an approach the following may be considered as a new paragraph 5.7 to the licensing policy "Applicants for licenses which include regulated entertainment will be aware of the potential of such entertainment to cause a public nuisance by reason of noise from the premises. If representations are made or a review is called for the Authority may consider imposing a condition to the effect that the licensee shall take measures to ensure that music will not exceed a prescribed decibel limit at the boundaries of certain properties or within a location described in the condition. What may be an acceptable level of noise may vary from location to location or depending on the time of day as perception of noise from a particular source is affected by background noise levels. Directions given under the Noise Act 1996 provide that the permitted level for the purposes of that Act is 34 decibels where the underlying noise level does not exceed 24 decibels or 10 decibels above underlying noise levels in any other case. In the event that representations are received and the Authority concludes that a noise limiting condition is required the starting point for such a condition would be 34 decibels. If an applicant wishes to contend that a higher limit is appropriate then the Authority would expect the applicant to provide a noise survey to support such a contention.

16. With regard to existing premises with non-audibility conditions the enforceability of these is now in question. In the event that premises subject to such a condition were found to be breaching that condition I would recommend that rather than embark on a prosecution (which may well fail because the condition is held to be void for uncertainty) the appropriate course of action would be for an application to be made for a review of the licence to enable a Portsmouth compliant condition to be added to the licence.

Risk Analysis

17.

Risk	Likelihood	Impact	Mitigating actions
Challenges are received to the council's current form of non-audibility condition	4 – one such challenge has already been received (the UDC case) and as practitioners grow familiar with the Portsmouth case more are likely to follow	3 – if the council ignores the Portsmouth case enforcement of non-audibility conditions will be impossible and if challenged by way of an appeal against such a condition on a new application or review it is likely the council would be penalised in costs	Members have regard to the Portsmouth case and adopt a strategy to work within the parameters set out by it. Such a strategy could include an amendment to the licensing policy or the imposition of alternative conditions to combat noise nuisance.

- 1 = Little or no risk or impact
- 2 = Some risk or impact – action may be necessary.
- 3 = Significant risk or impact – action required
- 4 = Near certainty of risk occurring, catastrophic effect or failure of project.