

**LICENSING SUB COMMITTEE**

**DATE OF HEARING: 1 APRIL 2019 / 10:30AM**

**DETERMINATION OF A NEW PREMISES LICENCE APPLICATION FOR SPELT, 42 BROOK STREET, BAMPPTON, DEVON, EX16 9LY**

**Cabinet Member(s):** Cllr Colin Slade (Community Well Being)

**Responsible Officer:** Simon Newcombe, Group Manager for Public Health and Regulatory Services

**Reason for Report:**

An application has been received for a New Premises Licence for Spelt, 42 Brook Street, Bampton, Devon, EX16 9LY. As representations have been received, Mid Devon District Council, as the Licensing Authority, is obliged to hold a hearing to determine the application.

**Recommendation:**

That this application be decided in accordance with the licensing objectives.

**Relationship to Corporate Plan:** N/A

**Financial Implications:** The potential cost of defending an appeal in the courts.

**Legal Implications:** If there is an appeal against the decision the Council could find itself bearing the costs.

**Risk Assessment:** If the decision is not reasonably and lawfully made it could be overturned on appeal to the Magistrates' Court.

**Equality Impact Assessment:** No equality issues identified for this report.

**Consultation carried out with:** The process of applying for these licences is prescribed by regulations made under the Licensing Act 2003. The applicant must copy their applications to the "Responsible Authorities" consisting of the Police, Fire Service, Weights and Measures, body responsible for Health and Safety (Environmental Health), Environmental Health for nuisance, the Planning Authority, the Licensing Authority, the local Director of Public Health, the body responsible for Child Protection and the Home Office. If the application is submitted online the Licensing Authority must forward it to all Responsible Authorities.

Although not a requirement under the Licensing Act, this Council also notifies the relevant town or parish council for where the premises are located.

Applicants are also obliged to advertise their applications in two ways – on the premises and in a local newspaper.

## 1.0 THE APPLICATION FOR A PREMISES LICENCE

1.1 The application for a New Premises Licence for Spelt, 42 Brook Street, Bampton, Devon, EX16 9LY was submitted by Paul and Donna Berry. The submitted form can be seen as **Annex 1** and the relevant plans are attached as **Annex 2**.

1.2 The application form asks the applicant to provide a general description of the premises. In this case, the following information has been provided:

*‘Small restaurant/ bistro selling tapas style food, breakfast, lunch and dinner with alcoholic and non- alcoholic beverages. A selection of quality products including alcohol will also be for sale off the premises.*

*There will be seating for approximately 30 – 32 people.*

*We are experienced premises operators and will have best practice measures in place to ensure we uphold the licensing objectives.*

*The 1<sup>st</sup> floor flat shown on the plan is not connected to the premises’.*

1.3 In summary, the following has been applied for:

Licensable Activity	Indoors / Outdoors	Days	Times
Live Music	Indoors	Mon – Sun	12:00 – 23:00
Recorded Music	Indoors	Mon – Sun	12:00 – 23:00
Supply of Alcohol	For consumption ON and OFF the premises	Mon – Sun	09:00 – 23:30
Opening Hours	N/A	Mon – Sun	08:00 – 00:00

- 1.4 In addition to these standard times, the application also requests the following non-standard timings for entertainment:

Dates	Requested times
During the week of Bampton Fair (Mon – Sun)	Until 00:00
Christmas Eve	Until 00:00
New Year’s Eve	De-regulated

- 1.5 It must be noted that many activities that previously required a licence are no longer themselves licensable under the Licensing Act (assuming specific requirements are met) (see <https://www.gov.uk/guidance/entertainment-licensing-changes-under-the-live-music-act> for more information). For example, and relevant to this application, Live Music and Recorded Music are considered ‘de-regulated’ between 08:00 – 23:00, if they take place on premises licensed for the supply of alcohol for consumption ON the premises; and in the presence of less than 500 people. This has the additional impact of ‘disapplying’ any conditions on a premises licence that are specifically linked to ‘de-regulated’ activities.

- 1.6 The practical implication of this de-regulation is that premises need not apply for a licence to provide Live Music and Recorded Music, assuming the application also includes the supply of alcohol for consumption ON the premises and there will be less than 500 people on site (as is the case with this application). Furthermore, as it is not considered licensable, it means that any specific representations relating to such activities are not considered relevant. This is discussed in more detail in Section 4 of this report.

NOTE: This application also includes the provision of Live and Recorded Music beyond 23:00 on certain occasions. Representations relating to this are considered relevant as they do not meet the criteria for any of the de-regulations.

## 2.0 THE LICENSING OBJECTIVES

- 2.1 All applicants are required to set out in their application the steps they intend to take to promote the four licensing objectives. These are:

- The prevention of crime and disorder
- Public Safety

- The prevention of public nuisance
- The protection of children from harm

2.2 The applicant has offered conditions as part of the application and these can be seen in Section M of the application (**Annex 1**).

### **3.0 RESPONSIBLE AUTHORITIES**

3.1 Responsible Authorities under the Licensing Act are notified of all new Premises Licence applications. The onus is on each Responsible Authority to determine when they have appropriate grounds to make a representation.

3.2 The Responsible Authorities are:

- Police
- Fire Service
- Environmental Health (nuisance and health and safety)
- Licensing Authority
- Planning Authority
- Health and Safety Executive
- Weights and Measures
- The body responsible for Child Protection
- The local Director of Public Health
- Home Office

3.3 No representation was received from any Responsible Authority concerning this application.

### **4.0 OTHER PERSONS AND ADDITIONAL COMMENTS**

4.1 The Licensing Act allows 'Other Persons' to make representations provided they are relevant and not considered frivolous or vexatious. To be relevant, a representation must relate to the likely effect of the grant of a licence on the promotion of one or more of the licensing objectives. S182 Guidance states that '*... representations should relate to the impact of licensable activities carried on from premises on the objectives*' (Paragraph 9.4).

4.2 In this case, the Licensing Authority has received TWO representations. These are attached as **Annex 3** and **4**.

4.3 In summary, the following points have been raised in the representations that have been received. Where considered appropriate, the Licensing Officer has provided additional information in relation to relevance.

#### Live and Recorded Music and potential public nuisance (relevant to Annex 4)

- 4.4 As stated in Paragraph 1.5 and 1.6 of this report, Live and Recorded Music are not considered licensable in certain circumstances. In this case, it is the Licensing Officers view that between 12:00 and 23:00 (Monday – Sunday) these activities can be provided at the premises in a manner that does not require a licence (i.e. it is considered ‘de-regulated’). This is because:
- it would place between 8AM and 11PM; and
  - it would take place at an alcohol on-licensed premises; and
  - the audience would be no more than 500 people
- 4.5 In practical terms, this means that the applicant need not have included them in the application. Regardless of this, the Licensing Officer believes that representations that relate to these specific activities are not relevant and should not therefore be considered by the Sub-Committee. S182 Guidance provides some relevant information and states that ‘... *representations should relate to the impact of licensable activities carried on from premises on the objectives*’ (Paragraph 9.4). The music in this case would not be considered a licensable activity.
- 4.6 For information purposes, the fact that the activities would not be considered licensable does not mean that subsequent issues or nuisance cannot be addressed under the Licensing Act. Interested Parties should be aware that any licence which benefits from such exemptions or de-regulations can be reviewed, and on review the activities can be treated as regulated entertainment. This means, for example, that conditions can then be applied, if considered appropriate.
- 4.7 The application does include a request for Live and Recorded Music beyond 23:00 on some specific occasions (i.e. Bampton Fair, Christmas Eve and New Year’s Eve). These ‘extensions’ are considered licensable and therefore representations are relevant, in so far as they apply to these occasions. For Members information, this means that any conditions relating to Live and Recorded Music placed on the licence would not have effect between 12:00 – 23:00, but would have effect should the premises provide these activities after 23:00.

#### Noise from customers departing and potential public nuisance (relevant to Annex 3)

- 4.8 The application form does not propose any conditions to address this and it has been raised as a potential issue in one of the representations received. This potential issue is a relevant consideration for the Sub-Committee.

#### Potential consequences to parking in local area (relevant to Annex 3)

- 4.9 The representation states that parking can be an issue in the area, especially when another licensed premises holds an event. It also raises a safety issue concerning children, who then have to walk longer distances when it is not possible to park

where they would prefer. Finally, it also states that there is a potential issue with the security of a van which cannot be parked nearby.

4.10 It is the view of the Licensing Officer that these concerns are not relevant under the Licensing Act and therefore should not be considered by the Sub-Committee. This is for the following reasons:

- The provision of parking in this area is not something that the applicant can control. Any person may park in the surrounding area and ultimately, they may do so regardless of whether or not the premises have a licence.
- The Public Safety licensing objective relates to the safety of those using the relevant premises. S182 Guidance (Paragraph 2.7) states that *'Licence holders have a responsibility to ensure the safety of those using their premises, as a part of their duties under the 2003 Act. This concerns the safety of people using the relevant premises rather than public health which is addressed in other legislation'*. The applicant cannot therefore influence or control general road safety issues in this case.
- The security of the van is also not something that the applicant can control. Although the representation does not suggest that it would be customers of the premises that are of concern, it must be noted that *'licensing law is not the primary mechanism for the general control of nuisance and anti-social behaviour by individuals once they are away from the licensed premises and, therefore, beyond the direct control of the individual, club or business holding the licence, certificate or authorisation concerned'* (S182 Guidance, Paragraph 14.13).

#### Potential conditions

4.11 If any Interested Party wishes to propose a potential condition (or conditions) that they believe could address any of the relevant issues raised, then they are encouraged to do so by emailing [licensing@middevon.gov.uk](mailto:licensing@middevon.gov.uk) OR alternatively, suggesting them at the hearing for discussion.

4.12 In order to assist and promote discussion about conditions, this Council have created a 'pool' of conditions and this document can be viewed here: <https://www.middevon.gov.uk/media/346400/appendix-c-pool-of-conditions.pdf>. It is important to note, however, that these conditions are being provided as examples only and alternative wording may be offered based on the merits of this specific application.

#### Withdrawn representation

4.13 For Members information, a third representation was received during the relevant 28 day period. Following successful discussions between the applicant and Interested Party, this representation has now been withdrawn. If Members wish to see paperwork confirming this it will be available at the hearing.

## 5.0 LICENSING POLICY

- 5.1 The Licensing Act requires the Council as the Licensing Authority to formally adopt a policy setting out how it will deal with its duties under the Act. That policy must be reviewed every five years and this Council's policy came into force on 7 January 2019. The policy must be referred to in its entirety, but in order to assist those reading this report and at the hearing, the following sections are highlighted:
- 5.2 *When determining a licence application, the overriding principle adopted by this authority will be that each application will be determined on its merits. The authority will have regard to any guidance issued by the Home Office, this Statement of Licensing Policy and any measures it deems necessary to promote the licensing objectives. The authority may depart from the guidelines in this Policy if it has justifiable and compelling reasons to do so. The authority will give reasons for any such departure from policy. (Paragraph 6.3)*
- 5.3 *Since the introduction of the Act, the authority's experience is that the vast majority of complaints about licensed premises are caused by public nuisance, in particular excessive noise from live and recorded music and disturbance caused by customers congregating outside licensed premises. The authority will expect applicants to have particular regard to these issues and, if considered appropriate, to include in their Operating Schedules adequate and effective steps to control noise and disturbance from their premises. (Paragraph 6.6)*
- 5.4 *When determining an application, the authority will consider all relevant evidence, both oral and written, provided by parties to a hearing. Evidence which is irrelevant will be disregarded. The authority encourages applicants and persons making representations to attend hearings so that they can give evidence. Where an individual fails to attend the hearing, the authority will consider their application or representation but may attach less weight to it. (Paragraph 6.7)*
- 5.5 *It should be noted that, when determining an application, the authority is making a judgment about risk. 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. (Paragraph 6.8)*
- 5.6 *Licence conditions will be tailored to the individual application and only those considered appropriate to meet the licensing objectives will be imposed. Licence conditions will not be imposed where other regulatory regimes provide sufficient protection, for example Health and safety at work, fire safety legislation etc. (Paragraph 6.9)*
- 5.7 *The Licensing Authority will also take into account when making its decision that licensing law is not the primary mechanism for the general control of nuisance and anti-social behaviour, especially once individuals have left licensed premises and are*

*therefore beyond the direct control of licensees. However, when making a decision, the authority will focus on the direct impact of the activities taking place on the licensed premises on members of the public living, working or engaged in normal activity in the area concerned. (Paragraph 6.10)*

5.9 *In reaching a decision on whether or not to grant a licence, the Licensing Authority, if relevant representations are made, may take account of any non-compliance with other statutory requirements brought to its attention, if these undermine the licensing objectives. This is because any non-compliance with other statutory requirements may demonstrate that the premises are unsuitable for the activities proposed, or that the management of the premises is not adequate to protect the public from harm or nuisance. (Paragraph 6.14)*

5.10 *Conditions are crucial in setting the parameters within which premises can lawfully operate. Any contravention of a condition on a premises licence or club premises certificate is a criminal offence so it is essential that conditions are worded clearly, precisely and unambiguously. In addition, conditions must:*

- *be appropriate, reasonable and proportionate*
- *be enforceable*
- *not duplicate other statutory requirements*
- *be relevant to the particular type, location and character of the premises concerned*
- *not be standardised*
- *should be justifiable and capable of being met*
- *not replicate offences set out in the Act or in other legislation*
- *be written in a prescriptive format (Paragraph 6.22)*

5.11 *The Authority will pay particular attention to the effect (or potential effect) of licensable activities on those living, working or otherwise engaged in the area concerned and, where relevant representations are received, may attach conditions if it considers it appropriate for the promotion of the licensing objectives. (Paragraph 6.27)*

5.12 *Conditions attached by the Authority to Premises Licences and Club premises certificates will relate to matters falling within the control of individual licensees. It is recognised that the licensing function cannot be a mechanism for the control of disorderly behaviour by individuals once they are beyond the direct control of the licence holder. However, the Licensing Authority and Responsible Authorities may*



*take action where it can be established that there is a clear linkage between disorderly behaviour and a specific premises. (Paragraph 6.28)*

5.13 *The Authority will not impose inappropriate or over-burdensome conditions on licences. The Authority may, however, if its discretion is engaged, impose conditions where existing legislation does not provide adequate controls and additional measures are considered to be appropriate for the promotion of the licensing objectives. (Paragraph 6.29)*

5.14 *When determining the appropriate set of conditions the Licensing Authority will focus primarily on the individual style of the premises and the licensable activities proposed. Consideration should also be given to the following:*

- *The size, nature and style of operation*
- *Whether the premises is part of a multiple operator's chain and therefore more likely to have an operating schedule that is tried and tested*
- *The cumulative effect of conditions in terms of cost and practical implementation*
- *The likely cost of the condition(s) for the operator*
- *Whether a simpler or better way of dealing with a perceived problem could be found*
- *Whether there is an actual risk of undermining an objective, as opposed to a conceivable risk. In the latter case, there is no need for the condition*
- *Whether the condition will be enforceable, if it is not specific or could be considered subjective it may not be enforceable. (Paragraph 6.30)*

#### Prevention of public nuisance

5.15 *Public nuisance is not narrowly defined in the 2003 Act and retains its broad common law meaning. It may include issues around nuisance, noise, disturbance, light pollution, noxious smells, vermin and pest infestations and accumulations of rubbish and litter. (Paragraph 8.16)*

5.16 *The Licensing Authority recommends that applicants and licensees apply a higher standard of control to minimise the potential for any public nuisance that may arise from their operation of the premises where:*

- *They are located in a residential or noise sensitive area*
- *They have or are proposing extended open hours (Paragraph 8.17)*

5.17 *The Licensing Authority recognises that beyond the immediate vicinity of the premises the control that a licence holder can exert over its customers diminishes and*

*individuals who engage in anti-social behaviour are accountable in their own right. The licensing regime is not a mechanism for the general control of nuisance and anti-social behaviour by individuals once they are beyond the direct control of the licence holder. (Paragraph 8.18)*

- 5.18 Members must have regard to the policy when making their decision and copies will be available at the hearing.

## **6.0 GOVERNMENT GUIDANCE**

- 6.1 Members are also obliged to have regard to the Guidance produced under S.182 of the Licensing Act 2003. The relevant version for this application was published in April 2018 and a full copy will be available at the hearing. It includes the following information:

- 6.2 *Conditions relating to noise nuisance will usually concern steps appropriate to control the levels of noise emanating from premises. This might be achieved by a simple measure such as ensuring that doors and windows are kept closed after a particular time, or persons are not permitted in garden areas of the premises after a certain time. More sophisticated measures like the installation of acoustic curtains or rubber speaker mounts to mitigate sound escape from the premises may be appropriate. However, conditions in relation to live or recorded music may not be enforceable in circumstances where the entertainment activity itself is not licensable (see chapter 16). Any conditions appropriate to promote the prevention of public nuisance should be tailored to the type, nature and characteristics of the specific premises and its licensable activities. Licensing authorities should avoid inappropriate or disproportionate measures that could deter events that are valuable to the community, such as live music. Noise limiters, for example, are expensive to purchase and install and are likely to be a considerable burden for smaller venues. (Paragraph 2.17 of S182 Guidance)*

- 6.3 *Where applications have given rise to representations, any appropriate conditions should normally focus on the most sensitive periods. For example, the most sensitive period for people being disturbed by unreasonably loud music is at night and into the early morning when residents in adjacent properties may be attempting to go to sleep or are sleeping. This is why there is still a need for a licence for performances of live music between 11 pm and 8 am. In certain circumstances, conditions relating to noise emanating from the premises may also be appropriate to address any disturbance anticipated as customers enter and leave. (Paragraph 2.19 of S182 Guidance)*

- 6.4 *Beyond the immediate area surrounding the premises, these are matters for the personal responsibility of individuals under the law. An individual who engages in anti-social 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. (Paragraph 2.21 of S182 Guidance)*

6.5 *Conditions on a premises licence or club premises certificate are important in setting the parameters within which premises can lawfully operate. The use of wording such as “must”, “shall” and “will” is encouraged. Licence conditions:*

- *must be appropriate for the promotion of the licensing objectives;*
- *must be precise and enforceable;*
- *must be unambiguous and clear in what they intend to achieve;*
- *should not duplicate other statutory requirements or other duties or responsibilities placed on the employer by other legislation;*
- *must be tailored to the individual type, location and characteristics of the premises and events concerned;*
- *should not be standardised and may be unlawful when it cannot be demonstrated that they are appropriate for the promotion of the licensing objectives in an individual case;*
- *should not replicate offences set out in the 2003 Act or other legislation;*
- *should be proportionate, justifiable and be capable of being met;*
- *cannot seek to manage the behaviour of customers once they are beyond the direct management of the licence holder and their staff, but may impact on the behaviour of customers in the immediate vicinity of the premises or as they enter or leave; and*
- *should be written in a prescriptive format. (Paragraph 1.16 of S182 Guidance)*

6.6 *Conditions include any limitations or restrictions attached to a licence or certificate and essentially are the steps or actions that the holder of the premises licence or the club premises certificate will be required to take or refrain from taking in relation to the carrying on of licensable activities at the premises in question. Failure to comply with any condition attached to a licence or certificate is a criminal offence, which on conviction is punishable by an unlimited fine or up to six months’ imprisonment. The courts have made clear that it is particularly important that conditions which are imprecise or difficult for a licence holder to observe should be avoided. (Paragraph 10.2 of S182 Guidance)*

## **7.0 DETERMINATION**

7.1 *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. (Paragraph 9.37 of S182 Guidance)*

7.2 *In determining the application with a view to promoting the licensing objectives in the overall interests of the local community, the licensing authority must give appropriate weight to:*

- *the steps that are appropriate to promote the licensing objectives;*
- *the representations (including supporting information) presented by all the parties;*
- *this Guidance;*
- *its own statement of licensing policy. (Paragraph 9.38 of S182 Guidance)*

7.3 *Licensing authorities are best placed to determine what actions are appropriate for the promotion of the licensing objectives in their areas. All licensing determinations should be considered on a case-by-case basis. They should take into account any representations or objections that have been received from responsible authorities or other persons, and representations made by the applicant or premises user as the case may be. (Paragraph 9.42 of S182 Guidance)*

7.4 *The authority's determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve. (Paragraph 9.43 of S182 Guidance)*

7.5 *Determination of whether an action or step is appropriate for the promotion of the licensing objectives requires an assessment of what action or step would be suitable to achieve that end. While this does not therefore require a licensing authority to decide that no lesser step will achieve the aim, the authority should aim to consider the potential burden that the condition would impose on the premises licence holder (such as the financial burden due to restrictions on licensable activities) as well as the potential benefit in terms of the promotion of the licensing objectives. However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters... (Paragraph 9.44 of S182 Guidance)*

7.6 The Sub-Committee have the following options:

- Granting the licence as applied for
- Granting the licence subject to appropriate modifications necessary for the promotion of the licensing objectives
- Excluding from the scope of the licence any of the licensable activities to which the application relates
- Refusing to specify a Designated Premises Supervisor

- Rejecting the application
- 7.7 Reasons must be given for the decision and they must set out the matters taken into consideration and why such a decision was arrived at.
- 7.8 Members have five working days from the conclusion of the hearing to make a decision.
- 7.9 An adopted procedure for Hearings is available as **Annex 5**. This should help guide all parties through the hearing process.

## **8.0 APPEAL**

- 8.1 If any party (i.e. applicant or 'other person') is dissatisfied with the decision made then they have the right of appeal to the Magistrates' Court within 21 days of formal notification of the decision.

### **ANNEXS TO THIS REPORT**

Annex 1	Copy of the Premises Licence application
Annex 2	Copy of the plans
Annex 3	Representation (1)
Annex 4	Representation (2)
Annex 5	Procedure for hearings

### **Contact(s) for more information:**

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**Circulation of the Report:** Legal / Regulatory Sub-Committee / Applicant / Interested Parties