

EAST AYRSHIRE LICENSING BOARD

Minute of the Meeting of East Ayrshire Licensing Board, held within the Council Chambers, East Ayrshire Council Headquarters, London Road, Kilmarnock and digitally through Microsoft Teams, on Tuesday 23 May 2023 at 10am.

SEDERUNT: Councillor Drew Filson (Chair), Councillor Stephen Canning, Councillor Elaine Cowan, Councillor June Kyle and Councillor Kevin McGregor.

ATTENDING: Stuart McCall (Depute Clerk to the Licensing Board), Mr Ian Hiles (Licensing Standards Officer), Ms Carolyn McEwan (Licensing Standards Officer) Mrs Patricia Duncan and Mrs Alison Hewitson (Licensing Board Administrators).

APOLOGIES: Councillor Graham Barton, Councillor William Crawford, Councillor Lillian Jones, Councillor Claire Leitch and Councillor David Richardson.

1. SEDERUNT

Noted.

2. DECLARATIONS OF INTEREST

There were no declarations of interest intimated by the Board Members.

3. MINUTE OF MEETING

The Minute of the meeting of East Ayrshire Licensing Board held on 25 April 2023 was approved and noted.

4. APPLICATIONS CONSIDERED UNDER DELEGATED AUTHORITY

The Depute Clerk reported on the applications discharged under delegated authority between 19 April and 15 May 2023, namely:-

Minor Variation	:	5
S33 Transfer of Premises Licence	:	1
S34 Transfer of Premises Licence	:	1
Grant of Personal Licence	:	9
Grant of Small Lotteries Registration	:	3
Automatic Entitlement to Gaming Machine	:	1
Extended Hours	:	3
Occasional Licences	:	50

The Depute Clerk reported that of the 50 Occasional Licences granted, 9 were granted to Club premises, 22 to Personal Licence holders, 9 to Premises Licence holders and 10 to Voluntary Organisations.

It was noted that, as of the date of the report, there were 995 Personal Licences in force, an increase of 10 from the last report and 292 Premises Licences in force, no change from the last report.

5. APPLICATIONS

Applications considered under the Licensing (Scotland) Act 2005 – See Appendix I.

6. PREMISES LICENCE REVIEW

Continuation of premises licence review hearing for premises known as Portmann Hotel, 42 Portland Road, Kilmarnock following receipt of a Premises Licence Review Application in terms of Section 36(3)(b) of the Licensing (Scotland) Act 2005.

The Depute Clerk reminded Members that this was a continuation of the premises licence review hearing, which was first before the Board on 23 August 2022. At that time it was agreed to continue the Review application for a maximum period of six months to enable the proprietors to continue with measures to be put into place to address noise nuisance from the premises. It was also agreed that Environmental Health Officers would assist the proprietors in setting the noise limiter, once it was received, and monitor the premises along with LSOs to ascertain whether the noise issues had been addressed.

Mr David Gordon and Mrs Claire Gordon were present to speak in support of the premises licence review application.

Mr MacIver, Solicitor, was present, representing the premises licence holder, Oxford Hotels & Inns Management, together with Paul Cowan, new tenant of the premises.

Mr Gordon submitted that, since August 2022 there had been some improvement, however, even with the noise limiter installed, noise from the premises remained an issue. He continued that using staff as a control measure was not enough as, when the door to the premises opened, there was noise. He advised that, even when functions were held at the front of the premises, while the song could not be heard, the deep base noise could be heard. He accepted that the noise limiter had assisted in reducing noise, but that this was not consistent.

Mr Gordon referred to the beer garden of the premises, advising that the capacity of the beer garden had previously been restricted to 60, however an additional means of escape had been formed which had increased the capacity to 220, increasing the potential for noise. He commented that the speed in which the licence holder had dealt with the additional means of escape, which had been formed quickly and would allow more customers, differed from the speed in which the noise issues had been addressed. Mr Gordon noted that the licence holders had instructed a Solicitor to represent them at the meeting.

The Depute Clerk assured Mr Gordon that there would be no disadvantage to him by having no legal representation, as he could assist with any procedural issues Mr Gordon may have.

Mr Gordon thanked the Depute Clerk and Environmental Health Officers for the assistance they had provided to date.

Mr Gilchrist, Environmental Health Officer advised that, following the Licensing hearing on 23 August 2022 it was agreed that a noise limiter would be put in place, a staff rota would be in place to ensure windows were closed and an air conditioning unit would be placed in the conservatory. It was also agreed that Environmental Health Officers would arranged to visit Mr Gordon's property once the noise limiter arrived to set the limits.

Mr Gilchrist reported that on 6 September 2022 Officers from Environmental Health visited the Portmann Hotel, together with Mr Rooney and the installer of the noise limiter. Mrs Gordon also was present. The installer spoke through how the noise limiter, which had been purchased is a Formula Sound AVC2D, worked and Officers witnessed it in operation. At this point Officers went to Mr Gordon's property while another colleague stayed in the Portmann and noise levels were set to a level which was deemed would not be a statutory nuisance.

Mr Gilchrist advised that during this visit it was noted that the background noise levels were too high and it was agreed that further night time noise visits would take place to confirm whether the noise levels that had been set were correct.

Mr Gilchrist submitted that on 10 December 2022, Officers from Environmental Health visited Mr Gordon's property and took noise measurements from 9pm until 12 midnight. During this time Officers did not deem the noise to be a statutory nuisance with most of the levels not above 33db (A), which is below the current WHO guidelines. If noise levels were kept at this level or below then there would be no statutory nuisance, however on the odd occasion, when people were out at the back of the premises, which generating noise, but this only occurred three times during the visit and the customers were not out outside for a long period of time.

Mr Gilchrist continued that on 17 December 2022, Officers from Environmental Health visited Mr Gordons's property and took noise measurements from 9pm until 12 midnight. The noise levels were notably higher this time with more incidences of people congregating to the rear and leaving the door open for longer periods, which occurred 7 times during the visit. At this time Officers deemed that the noise to be a statutory nuisance with noise levels of between 35db (A) and 37db (A), which is above the WHO guidelines of 35db (A) before 2300 hours and 30db (A) after 2300 hours. Officers were also able to identify the songs being played.

Mr Gilchrist reported that shortly after midnight, Environmental Health Officers visited the Portman to discover that the DJ was packing away his equipment along with the noise limiter. The manager of the premises (Megan

Robb) was advised that the level of noise had been unacceptable compared to the visit on 10 December 2022. The manager did not have any explanation as to why the noise levels were different. The DJ did advise that he was the same DJ playing both nights with the same playlist and nothing had been altered. Officers advised the manager that there appeared to be less control of people going in and out the rear door, which was causing the noise levels to be excessive.

Mr Gilchrist advised that he made contact with Mr. Rooney on 22 December 2022 with a brief synopsis of the two visits and asked him to call back. Mr Gilchrist advised that a report from Mr Gordon was received on Monday 26 December 2022 regarding a deep base noise from the function suite, which had been audible over his TV from 8pm until going to bed around 11pm. The noise had continued on to approximately midnight, however Mr Gordon had been woken up at 2am with a base noise. At this time the lights were on within the Portman Hotel and noise seemed to be coming from the front of the building.

Mr Gilchrist submitted that a further report was received from Mr. Gordon regarding a deep base noise from the function suite of the premises, which was audible over his TV, from 8pm until midnight on Saturday 31 December 2022.

Mr Gilchrist advised that, after returning to the office after the Christmas holidays, a voice mail had been received from Mr. Rooney requesting a call back to discuss noise issues. Mr Gilchrist returned the call on 24 January 2023 and left a message for Mr Rooney, however no return call has been received.

Mr Gilchrist submitted that, despite efforts by Officers, which involved numerous visits to the premises, it had not been possible to reach a satisfactory conclusion to this matter, which has in turn led to a Premises License Review being sought. He advised that Officers from Environmental Health had witnessed noise nuisance from the premises on 23 July 2022, 6 August 2022, 10 December and 17 December 2022 and noted, with disappointment, that the licence holder was still not willing to seek advice and guidance from an Acoustic Noise Consultant; registered with the Institute of Acoustics (IOA), as recommended. He continued that the noise nuisance witnessed on the aforementioned dates, along with noise from the beer garden, more so in the summer months, would create a cumulative effect of various noise sources that would adversely affect Mr and Mrs Gordon's property. Using staff as a control measure is not 100 percent guaranteed, as was evident from both visits in December, therefore, this control measure is not robust enough. He stated that the burden is on the licensee to generate solutions for the issue and not for Environmental Health Officers, who have put considerable efforts to ensuring a satisfactory solution.

Mr Gilchrist concluded that, if Environmental Health were to serve a statutory abatement notice and it was not complied with, the matter would be referred to the Procurator Fiscal and it would take time for the case to be called, which would not benefit Mr and Mrs Gordon. In Mr Gilchrist's opinion, the premises manager had not been able to demonstrate sufficient control to prevent noise nuisance from the premises.

Mrs McEwan reported on the Licensing Standards involvement since hearing on 23 August 2022. She submitted that Mr Gordon had contacted the Licensing Section on 27 February 2023, requesting confirmation of the beer garden capacity and requesting that Officers ensure that the Portmann comply with the maximum capacity set. He sought an assurance that the capacity within the beer garden would not be exceeded, particularly during the Easter weekend which, he advised, had been a particularly challenging time in the past. Mr Gordon requested that the Licence Holder be reminded of their responsibilities with regard to noise nuisance from both customers and music over the Easter weekend.

Mr Gordon was advised that the capacity for the whole of the premises, including the beer garden, and as detailed on the Operating Plan was 220. It was explained that initially the capacity of the beer garden had been restricted to 60 persons owing to there only being one means of escape, however, the addition of a further means of escape being formed within the beer garden had increased the capacity figure from 60 to a possible 225. It should be noted that the total overall capacity for the whole of the premises is restricted to 220.

Mrs McEwan advised that a joint visit by Licensing and Police Scotland was carried out on 2 March 2023. Ross Parker identified himself as being in charge of the premises and advised that an application for variation would be forthcoming to change the manager from Megan Robb to himself.

The issue of noise nuisance, particularly over the Easter weekend, was discussed with Mr Parker. He advised that there would be entertainment, consisting of a D.J. and live singers, on Easter Sunday from 12 Midday until 9pm within the conservatory area, and that the D.J. equipment and speakers would be set up within the main building of the hotel, and not in the conservatory itself, as had been the case during previous events. He advised that from 9pm the entertainment would then be moved into the main bar area and that there would be stewards in place to ensure that doors and windows within the conservatory remained closed during the event, with customers vacating the premises through the exit door in the hall to gain access to the beer garden. He advised that this would be a ticketed event with 200 tickets being available for sale. He advised that the noise limiter would be in operation and that he would personally be monitoring noise levels from outwith the premises.

Mrs McEwan submitted that on receiving notification that there was a new tenant within the premises, Officers visited on 31 March 2022 and met with the new tenant Mr Paul Cowan. Mr Cowan advised that he was aware of the ongoing noise issue and the forthcoming Hearing. In relation to the Easter weekend celebrations, he advised that there were 220 tickets available for sale and that on entry customers would have their hand stamped to ensure that only those who had tickets could gain entry. He advised that staff would be operating a clicker system as customers entered and left the premises. He confirmed that Door Stewards would be in attendance throughout the event and that the D.J. would move into the main bar area at 9pm. She reported that Mr Cowan advised that Ross Parker, whom Officers had spoken with during a previous visit, would be in attendance during the Easter celebrations. As Mr

Parker would appear to be the person responsible for managing the premises, guidance was provided to Mr Cowan in respect of varying the current Premises Manager, the application requiring to be lodged by the Licence Holder Oxford Hotels and Inns Management.

Mrs McEwan concluded that at the date of the Report, no application to vary the Manager had been lodged, however a variation application had been received the day prior to the Board meeting.

Mr Maciver advised Members that, since the last meeting, there had been a change in the tenant of the premises and introduced Paul Cowan as the new lease holder.

Addressing the measures to be put in place, which were agreed at the meeting on 23 August, Mr Maciver reported that the noise limiter had been installed, that a portable air conditioning unit had been purchased and that, when a function was taking place, a staff member would be on duty at the door to ensure that the door remained closed and ensure the behaviour of customers.

Mr Maciver submitted that since March this year between 12 and 16 functions had taken place within the premises and that verbal complains that been received in respect of only 2 of these events. One complaint had been received on 11 March 2023 when a 21st birthday party was taking place and another complaint received on 23 April 2023 when a birthday party was taking place for a 10 year old, between 2pm and 4pm. Mr Maciver continued that the premises were operating well and that Mr Cowan was aware of the background.

In Mr Maciver's opinion a fundamental point was that the licensed premises had been in existence for some considerable time, were well known in Kilmarnock and were well utilised, however the property owned by Mr and Mrs Gordon was only 4 or 5 years old. He submitted that if a person purchased a house next to licensed premises, it must accept that there will be some noise.

Mr Maciver referred to the steps that had been taken to alleviate noise from the premises and to the fact that there had been an improvement. He pointed out that the premises had other neighbouring properties, however Mr and Mrs Gordon were the only complainers. He submitted that the premises had operated for many years and moved that no action be taken.

Mr Maciver reminded Members that, if there were to be any problems with the operation of the premises in the future, the matter could be brought back before the Board.

Referring to the air conditioning unit, Mrs Gordon advised that, two weeks ago, the windows and door to the premises had been opened. Mrs Gordon advised that on 8 May 2023 she had been awaked by noise and had telephoned at 2am to complain. As there had been no response, she had telephoned Police Scotland at 2.30am. She advised that Police officers arrived at 3am and stated that the matter would be passed to Licensing.

The Depute Clerk asked if Mrs Gordon could hear music at 2.30am. Mrs Gordon confirm that she could hear music at 2.30am. Mrs Gordon advised that she did call to complain on every occasion and that base music could be heard from the premises.

Mr Gordon agreed that there had been a reduction in the number of complaints made, however this was due to the pending review hearing. He then enquired as to whether the door to the rear of the premises was a fire door, pointing out that a fire door should be alarmed. He then asked if the noise limited was in operation at all functions, held at both the front and the rear of the premises as, although there had been some improvement, noise did still occur.

Mr Maciver advised that the door to the rear of the premises was not a fire door. He had no knowledge of the complaint made on 8 May regarding noise from music played at 2.30am, however pointed out that enquiries made in respect of a previous complaint found that the noise was not from the premises but from a house party.

Mr Maciver advised that the noise limiter was only used in the rear function suite as the complaints were in respect of noise at the rear of the premises. He continued that functions had been taking place to the front of the premises for years with no complaints.

Mr Maciver submitted that his clients had gone a long way to improving the premises and to keeping noise to a minimum. To expect no noise from licensed premises was unrealistic.

Mr Gordon referred Members to the Environmental Health Officer's report and to the fact that noise had been witnessed by the Environmental Health Officers.

Councillor Cowan asked why the licence holders had not followed the Environmental Health Officer's recommendation and sought the advice of an Acoustic Noise Consultant.

Mr Maciver advised that obtaining the advice of an Acoustic Noise Consultant would be very expensive that that his clients could not afford to pay these costs.

Councillor Canning asked why the tenant of the premises had changed.

Mr Maciver advised that the licence holder remained the same, however the previous tenants had simply moved on and a new tenant was found.

The Depute Clerk explained that it was not unusual for companies to hold the premises licence, to enable them to have control over the licence, and to have various tenants during a period of time. When a new tenant is in place a variation application is usually lodged to change the designated premises manager (DPM).

Councillor Canning asked why the variation application to change the DPM was lodged only prior to the meeting.

Mr Maciver explained that the information had been passed to Oxford Hotels & Inns Management to enable to variation application to be submitted, however an error in the address had resulted in the delay in submitting the application.

The Chair asked for confirmation if any noise complaints had been received from other neighbouring properties and it was confirmed that no other complaints had been received.

There being no further questions, both parties were given the opportunity to sum up.

Referring to the fact that no other neighbour complaints had been received, Mr Gordon reminded Members that Environmental Health Officers had witnessed the noise levels and supported the claim of excessive noise. He reiterated that the licence holders' dealing with the additional means of escape within the beer garden to allow more customers, was much quicker than the speed in which the noise issues were being addressed.

Mr Gordon accepted that some noise could be expected when a house was next door to licensed premises, however expected the licence holder to follow the rules and comply with the Licensing Objectives.

Mr Maciver stated that he would have some sympathy should the matter be in reverse, whereby licensed premises were erected next to a house, however that was not the case here. He reiterated that the licensed premises had been in existence for some considerable time when Mr & Mrs Gordon's property had been purchased.

For the purpose of those Members who had joined the meeting via MS Teams, the Depute Clerk confirmed that there had been no IT issues and that all Members had heard both parties submissions.

The Board adjourned to consider the matter.

Upon returning the Chair noted that there had been some improvements, however moved that the Hearing be continued further to allow the Board to commission an Acoustic Noise Consultant to enable them to reach a more informed and robust decision. The Board agreed unanimously.

7. LICENSING POLICY STATEMENT

The Board thanked Elaine Caldw and Sally Amor for their presentation, delivered on behalf of NHS Ayrshire & Arran. Members agreed that the presentation was very informative and would be beneficial for all Elected Members of East Ayrshire Council. Ms Caldw and Ms Amor advised that they would be happy to deliver the presentation to all Elected Members

There being no further business, the meeting ended at 11.45am.

LICENSING (SCOTLAND) ACT 2005
APPLICATION FOR GRANT OF PROVISIONAL PREMISES LICENCE

Gary Cunningham

Olivia's Bar & Kitchen
12 Queen Street
Kilmarnock

Brief overview of nature of the business proposed to be carried on in the premises:-

Licensed hours applied for:-

On Sale

Sunday - Thursday : 11am - 12 Midnight

Friday & Saturday : 11am – 1am

The premises will be a restaurant, serving breakfast, brunch & dinner. It is intended to provide conference facilities, restaurant facilities, bar meals and to cater for receptions including weddings, funerals and birthdays and club/group meetings within the premises; and also to provide recorded music and live performances within the premises, all within and outwith the core hours. The premises may open from 9am to serve breakfast. The premises may remain open until 2am on 31 December each year.

Children aged 0 – 15 years will be permitted access to the premises, when accompanied by an adult, for the consumption of a meal, until 9pm, or to attend a private function, for the duration of the function.

Young persons aged 16 & 17 years will be permitted access to the premises, unaccompanied by an adult, for the consumption of a meal during the core hours, or to attend a private function, for the duration of the function.

The proposed occupant capacity of the premises is 120

Disabled access & facilities statement – there is direct access from the Main Street into the restaurant; tables are all accessible for disabled; we are in the process of designing larger text menus in order to aid any customers with sight issues; assistance dogs are welcome; unfortunately due to the layout of the building, there are no sanitary facilities available for disabled persons.

The Depute Clerk advised that these premises had a lengthy history as restaurant type premises, going back to the 1980s. He explained that the premises licence had been revoked a few years ago, due to non payment of the annual premises licence fee, and had recently traded without a licence.

The Depute Clerk advised that the Scottish Fire & Rescue Service had commented in respect of two matters within the premises, which Mr Cunningham had been made aware of and accepted:-

- 1. As there would only be one effective means of escape from the first floor, as the other could not be guaranteed at all material times, the occupancy to the first floor should be restricted to maximum 60 persons.**

2. In addition to the portable firefighting appliances already in place, it is recommended that a 'Wet Chemical' and a Carbon Dioxide fire extinguisher be available for use in the kitchen which has a deep fat fryer appliance risk.

The Depute Clerk concluded that no objections had been received in respect of the application.

Gary Cunningham appeared before the Board to speak in support of the application.

Mr Cunningham submitted that he had approximately 20 years' experience in the licensed trade, operating Shooters Pool & Sports Bar, Kilmarnock and previously operating Bar Luca in Kilmarnock. He explained that Olivia's Bar & Kitchen would operate as a restaurant from 9am until 11am and would have a function room on the first floor of the premises.

The Board agreed unanimously to grant the provisional licence.

LICENSING (SCOTLAND) ACT 2005

APPLICATION FOR GRANT OF PROVISIONAL PREMISES LICENCE

McLaren's Nurseries Ltd.

The Farm Shop
McLaren's Nurseries
Lochlibo Road
Uplawmoor

Brief overview of nature of the business proposed to be carried on in the premises:-

Licensed Hours applied for
Sunday – Saturday

Off Sale
10am – 4.30pm

The premises is a farm shop within the grounds of McLaren's Nurseries.

Recorded music may be played within the premises both within and outwith the core hours. The sale of plants, shrubs & other associated goods; the sale of groceries (specialist); demonstrations of garden equipment etc.; plant information sessions; tastings and product launches may also take place within the premises.

The proposed alcohol display area will be 5.39m².

Disabled access and facilities :- Access into the premises is on one level with some raised areas; door access suitable for wheelchair access; Staff trained for fire evacuations, including disabled customers; adequate parking; layout of premises allows for ease of movement for wheelchairs; assistance dogs welcome.

The Depute Clerk advised that these premises were just within East Ayrshire and close to the boundary with East Renfrew. He reminded Members that an application for the grant of a premises licence had previously been considered and refused by the Board on 8 February 2022 for these premises, but that this decision should have no bearing on the consideration of this application.

The Depute Clerk pointed out that the proposed alcohol display area would be 5.39m² and that no objections or representations had been received in respect of the application.

The Chair advised that he had carried out a site inspection of the premises, together with Mr Hiles, LSO, and that the proposed alcohol display was a small refrigerated area within the Farm Shop. He advised that the family run business had operated for 50 years and stocked local produce.

Mr Brian McMahon, Agent for McLaren's Nurseries Ltd., appeared to speak in support of the application, together with Matthew McGowan, proposed premises manager.

Mr McMahon submitted that McLaren's Nurseries were a family run business with three generations working there. He advised that the premises delivered plants across the whole of Scotland and that plants would always be the main focus of the business. He explained advised that, should the licence be granted, no alcohol with a high caffeine content would be offered and that it was intended to stock alcohol such as craft beers, wines, etc., which would complement the provision of local produce and foodstuffs sold within the Farm Shop.

Addressing over provision, Mr McMahon noted that the Board were currently reviewing their Statement of Licensing Policy. He submitted that the alcohol display area within the premises would be a very small area and that the hours sought were shorter hours than would be permitted by policy. He concluded that staff would be trained beyond what was expected, that any customer would have to travel to the premises by car and that, due to the location of the premises there would be no public nuisance. Mr McMahon moved that the provisional premises licence be granted.

The Board agreed unanimously to grant the provisional licence.
