

APPLICATION FOR PAVEMENT CAFE LICENCE

Purpose of Report

1. To invite Members to consider an application for a Pavement Cafe Licence in the light of an objections from a neighbouring business

Information and Analysis

2. The schedule attached to this report gives details of an application for a Pavement Café Licence.
3. Members are requested to determine the application and give reasons for their decision.

Legal Implications

4. The Borough Solicitor, in accordance with the Council's approved procedures, has considered this report. There are no issues which the Borough Solicitor considers need to be brought to the specific attention of Members, other than those highlighted in the report.

Human Rights Act

5. When considering matters relating to the grant, revocation, renewal or refusal of licences and the placing of conditions on licences, the Committee must consider whether the decision affects an individual, group or company's Human Rights as set out in the Convention and if it does, whether the interference with those rights is permissible by reason of the justifications set out in the Convention. In addition consideration must be given to whether the interference is proportionate

Section 17 of the Crime and Disorder Act 1998

6. The contents of this report have been considered in the context of the requirements placed on the Council by Section 17 of the Crime and Disorder Act 1998, namely, the duty on the Council to exercise its functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area

Recommendation

7. Members are requested to determine the attached application for a pavement café licence report and give reasons for their decision.

Richard Alty
Director of Services for Place

Background Papers

- (i) The Highways Act 1980
- (ii) The Local Government (Miscellaneous Provisions) Act 1982
- (iii) The Darlington Borough Council Guide to the Licensing of Pavement Cafes

Appendices

Appendix 1 Application for a Pavement Café Licence – The Tap & Spile Public house
99 Bondgate, Darlington, DL3 7JY

Pam Ross : Extension 2647

**LICENSING COMMITTEE
2 JULY 2013**

APPLICATION FOR A PAVEMENT CAFE LICENCE

APPLICANT: GEORGE MAXWELL **REF NO:**
SOWERBY + D & G PUB **DL13/00750/PAVEM**
COMPANY

PREMISES: TAP AND SPILE PUBLIC HOUSE
99 BONDGATE, DARLINGTON, DL3 7JY

PROPOSED HOURS 08.30 – 21.00 Every Day (ALL YEAR ROUND)

Notification to Consultees:

Chief Constable	Environmental Health Manager
Chief Fire Officer	Highways
Planning Manager	Darlington Association on Disability

LEGISLATION

The licensing of pavement cafes is regulated by the Highways Act 1980 (the 1980 Act). Section 115E of the 1980 Act permits the Council to issue Pavement Café Licences for areas of the public highway.

Section 115A(7) of the 1980 Act states that “frontagers” means: “the owners and occupiers of any premises adjoining the part of the highway on, in or over which an object or structure would be placed or on which facilities for recreation or refreshment or both, have been, are being or would be provided; but frontagers have an interest under this Part of this Act only in proposals to place objects or structures or provide operate facilities wholly or partly **between their premises and the centre of the highway.**”

Section 115E (3) of the 1980 Act prohibits a council from granting such permission unless the consent of frontagers with such an interest is obtained; however consent must be not be unreasonably withheld.

Section 115F of the 1980 Act permits the Council to require payment for, and place conditions on, any grant of licence.

Section 115G of the 1980Act requires that a council shall not exercise its power or grant a permission until they have taken into consideration all representations made to them in connection with the proposal.

Section 115J of the 1980 Act states that it may be reasonable for consent (as detailed in Section 115(E) to be given for a specified period of time or subject to the payment of a reasonable sum. The section also states that consent is to be treated as

unreasonably withheld if the Council has served a notice asking for consent and a response of either consent or refusal to give consent is not received within 28 days.

Section 115J goes on to state that any question whether consent is unreasonably withheld or is given subject to reasonable conditions shall be referred to an independent arbitrator. He can, if he considers consent has been unreasonably withheld but conditions could be placed which would make it reasonable to give consent, direct that consent may be deemed subject to those conditions. The expenses and remuneration of the arbitrator must be paid by the council seeking the consent. In 2008 when the Council last made enquiries in respect of a different premise application this cost was in excess of £1000

Section 115K deals with any failure to comply with terms of the licence and permits the Council to serve a notice requiring remedy of the breach. If this notice is not complied with the Council may take the steps themselves and recover reasonable expenses. The standard conditions attached to pavement café licences granted by Darlington Borough Council are appended at **Appendix 1A**

BACKGROUND

On 10 May 2005 an application was properly made for a Pavement Cafe Licence in respect of the pavement fronting the Tap and Spile Public House, 99 Bondgate, Darlington. Following the consultation process, no objections were received and a Pavement Café Licence was granted for the following hours:

10.30 – 22.00	Monday – Saturday (1 May – 31 August)
12.00 – 22.00	Sunday (1 May – 31 August)
12.00 – 21.00	Every Day (1 September – 30 April)

On 16 May 2006 an application was made to renew the Pavement Cafe Licence on the same terms and conditions as the original grant of licence. No objections were received and the licence was granted

On 23 February 2007 an application was made to renew and vary the hours of the Pavement Cafe Licence. No objections were received and the licence was granted for the following hours:

11.00 – 22.00	Monday – Saturday (1 May – 31 August)
12.00 – 22.00	Sunday (1 May – 31 August)
11.00 – 21.30	Monday – Saturday (1 September – 30 April)
12.00 – 21.30	Sunday (1 September – 30 April)

On 17 March 2008 an application was made to renew and vary the hours of the Pavement Café Licence. No objections were received and a Pavement Café Licence was granted until 31 March 2009 for the hours: 12.00 – 22.00 Every Day (1 May – 31 August)

On 10 March 2009 an application was made to renew the Pavement Cafe Licence. It was unclear from the plan submitted with the application whether barriers would be provided to contain the pavement café area therefore the Applicant was asked to clarify

this. On 27 May 2009 a revised plan was submitted showing barriers and also showing a change in the layout of the pavement café. The plan showed a reduction in the number of tables from seven to four, however, the size of the tables shown were larger than those shown on the previous year's plan. As a result of the consultation exercise, objections were received from the Council's Highways Department, Darlington Association on Disability (DAD) and the proprietor of the Old Yard Tapas Bar, a neighbouring business. In addition, (although not a formal consultee) the Town Centre Manager also expressed concern at the application.

On 25 June 2009 Members of the Licensing Committee decided to refuse the application on the following grounds;

- It was obvious to Members from the evidence they had heard and also the photographs provided by the Police that many of the licence conditions had not been complied with – these included patrons standing in the pavement café area, the lack of provision of any food or menus, bottles and glassware being used in the pavement café area and rowdy behaviour from patrons.
- Members did not believe that any constructive proposals had been put forward to address the issues of concern.
- Members advised that the purpose of pavement cafes was to create a family friendly culture rather than an extension of the current drinking provision.

Members did however make it clear that their refusal was in respect of the application for 2009 only. They encouraged the applicant to consult with all interested parties in the future to try to reach a compromise that would be acceptable to all and, should they so wish, to submit a further application in the future with detailed proposals of how they would ensure total compliance with the requirements of such a licence. Members also determined that any further application was to be referred to the Licensing committee for a final decision.

Applications were not made for the years 2010 to 2012.

THE NEW APPLICATION

On 08 May 2013 an application for a Pavement Café Licence was received from Mr Sowerby and D & G Pub Company. Following a full consultation exercise a concern was originally expressed by DAD in respect of lack of clarity in the plan in respect of street furniture, walkways etc . This has resulted in an amended plan being submitted to clarify the issues raised by DAD and DAD has now withdrawn its objection to this application

The Applicant has indicated that he has not obtain the consent of his neighbour Mr Turnbull, from the Tapas Bar because he was aware that Mr Turnbull was going to object to this application

On 03 June 2013 a representation was received from Mr Peter Turnbull of The Tapas Bar, which is located next door to the Tap & Spile. In summary he reminds Members of the requirement to obtain the consent of neighbouring frontagers and documents a series of incidents that he states has occurred in 2012 and 2013 at the premises. The representation has been reproduced in full at **Appendix 1B**

THE APPLICANT'S RESPONSE

Although there has not been a direct response from the Applicant in respect of the representations detailed above there has been a letter of complaint received on 14 June 2013 from the manager of the Tap & Spile Public House in respect of the Tapas Bar. The letter alleges that the Tapas Bar has breached the conditions of its Pavement Café licence by permitting the pavement café furniture to remain outside as late as midnight; that patrons from the Tapas bar also consume alcohol outside of the specified areas for food and alcohol consumption and that drinks to be consumed in the pavement café area are served in glass rather than plastic containers. Two photographs have been submitted to support the complaint which has been reproduced in full at **Appendix 1C**. Officers have investigated the complaint, have established that the "glass" is polycarbonate but have also warned Mr Turnbull about the breach of his conditions in relation to leaving his furniture out after his pavement café has closed. Given the nature of the application and the objection Officers deemed it was relevant to include such information in this report as it provides an indication of the relationship between the two businesses

ADDITIONAL INFORMATION

In light of the nature of Mr Turnbull's representation officers have checked the position of express consent with the council's legal section. Officers from that section have advised that for express consent to be required the frontage would have to be affected by the placing of the structure etc. between his own frontage and the highway, rather than a structure adjacent to his own frontage. It is therefore clear that because Mr Turnbull's frontage is adjacent to the Tap & Spile it is not affected in this way. He is however entitled to make a representation which the Council must consider in accordance with Section 115G of the 1980 Act but the council is not bound by Mr Turnbull failing to give his express consent.

The Tap and Spile Public House is licensed in accordance with the Licensing Act 2003 for the sale of alcohol for consumption on and off the premises and the provision of regulated entertainment between the hours of 10.00 – 02.00 every day and for the provision of late night refreshment between the hours of 23.00 – 02.30 every day. The Premises Licence Holder is Mr Sowerby.

MEMBERS' OPTIONS

Members options are as follows:

1. Grant the application subject to the standard pavement cafe conditions,
2. Place any additional conditions on the licence that Members consider are necessary to address any concerns,
3. Reject all or part of the application.

Members are reminded that there is no right of appeal to the Magistrates or County Court in relation to this matter. Members will however, be aware that dissatisfied parties may elect to seek a judicial review of the Council's decision.

Richard Alty
Director of Services for Place

Contact Officer: Pam Ross Ext 2647

For admin use only:

Date of Committee: 02 July 2013

Sub Committee Decision:

Grant/Refuse/additional conditions

Reasons:

STANDARD POLICIES & CONDITIONS FOR PAVEMENT CAFÉ LICENCES

POLICIES

- a Licences shall be issued for a maximum period of one year
- b Application fees shall not be refunded should the application be unsuccessful
- c On certain event days the pavement café may be required to close. Should this be required a notification will be sent from the Council's Public Events Safety Advisory Group (PESAG) advising of the times and reason for the closure)

CONDITIONS

Creating a Boundary

- 1 The boundary and layout of the pavement café as defined by the plan attached to the Licence shall be adhered to at all times. A copy of the licence with this plan must be displayed at the premises at all times
- 2 All activity associated with the pavement café shall be within the boundary including tables, chairs, menu boards, advertising etc
- 3 The boundary of the pavement café shall be marked by a physical barrier, the design and dimensions of which must be agreed, in writing, by the Council
- 4 A minimum of 2.0 metres should normally be available between the edge of the pavement café and the edge of any adjacent carriageway or vehicle route although the Council may waive this requirement in certain locations e.g. Skinnergate. If it is proposed that the pavement café will have a pedestrian route passing through it, then that route should be as straight as possible and free from obstruction
- 5 Emergency routes from adjacent buildings and the applicant's premises should not be obstructed by the pavement café
- 6 No permanent obstruction shall be allowed in the footways within the pavement café area that may cause a safety hazard to users of the public highway. The use of Advertisement Boards is prohibited

Managing the Pavement Café

- 7 The maximum permitted hours of operation will be between 8.30 am and 9.00 pm with a drinking up period of 30 minutes (between May – August, the maximum hours will be 8.30 am until 10.00 pm)
- 8 The licensee must take out Public Liability insurance cover for the pavement café and shall indemnify the Council against all claims in respect of injury, damage or

loss arising out of the granting of permission, (eg damage to the highway or highway furniture) to a minimum value of £5,000,000 unless such claims arise out of the Council's own negligence

- 9 All furniture used in the pavement café shall be of high quality and approved by the Council (amended from wood and metal).
- 10 If the area of the pavement café is in direct sun between 12 noon and 3.00 pm parasols should be included as part of the design to protect customers from excessive ultra violet radiation
- 11 Only patrons seated at tables shall be served or permitted within the pavement café
- 12 Patrons shall be offered the choice to purchase both food and drink at the Pavement Café and menus shall be prominently displayed showing availability and price of food and drinks served
- 13 If the outside area is not licensed in accordance with the Licensing Act 2003, patrons should be asked to order food and drink from inside of the premises. The order can then be served to them by a waitress/waiter
- 14 The licensee shall keep the area within the boundaries clean and litter free. Any litter that escapes from the inside of the licensed area to the outside of the area shall be collected by the Licensee
- 15 Suitable litter/refuse bin(s) shall be provided within the pavement café area at all times of operation. The Licensee shall be responsible for disposing of all waste produced at the pavement café
- 16 The Licensee shall ensure tables are immediately cleared when customers have finished eating to minimise attraction of birds and flying insects
- 17 The playing of amplified music shall not be permitted within the pavement café area
- 18 The Licensee shall be responsible for the conduct of people, both patrons and employees, within the pavement café area. Unruly or rowdy behaviour must not be tolerated
- 19 At the end of each trading session the entire pavement café area shall be cleaned
20. All furniture must be removed from the pavement café and stored safely and securely, away from the highway when the pavement café is not operational

Service

- 21 Standard types of crockery ie china cups and saucers as used within the premises may also be used within the pavement café
- 22 Alcoholic and soft drinks to be consumed outside of the premises or within the pavement cafe must be served in plastic glasses or paper cups.

REPRESENTATION

Representor: Mr Peter Turnbull, Premises licence Holder - Tapas Bar

Further to the application submitted by The Tap n Spile, 99 Bondgate, Darlington dated 8th May 2013, to obtain a pavement café license. On behalf of Lion Head Properties Ltd owners of The Tapas Bar number 98 Bondgate, Darlington being the property neighbour to 99 Bondgate and the interested frontager to the applicant, object to the granting of the application.

LEGISLATION

The licensing of pavement cafes is regulated by the Highways Act 1980 (the 1980 Act). Section 115C and Section 115E of the 1980 Act permits the Council to issue Pavement café licenses for areas of the public highway. Section 115 (3) (copy attached see Appendix 1) prohibits a council from granting such permission unless the express consent of frontagers with an interest is obtained.

With regard to the Pavement Café License Application form, section 7 – **CONSENT** (see **Appendix 2**) - refers to the letters of consent required from business neighbours i.e 'Have you

the express consent of your business neighbour to this application'? Our company has not been consulted or asked for consent with regard to this recent current application. It is stated in

paragraph 2.5. Darlington Borough Council Pavement Café Licensing Document: - 'Before making an application consult with your neighbours about your proposals' (see **Appendix 3**). Under the terms of the Highways Act 1980 Darlington Borough Council cannot grant a licence unless by the express consent of interested frontagers who may be materially affected by the proposal. This would include anyone who may consider that they are affected financially, visually, audibly etc. Unfortunately we would be materially affected in all these areas and others.

The well documented events leading to the refusal to grant a pavement café license in 2009 included anti-social behaviour by a large group of males, the majority with their shirts off, some obviously underage. During a five hour period there was continuous disorder with many stood up outside of the licensed area, drinking from bottles, swearing, shouting, and often being abusive to passers by? Obviously drunk, they continued to get served all day. It was truly an afternoon from hell and most of our customers left, unable and unwilling to put up with the intimidation. That snap shot was a regular occurrence at the time over a lengthy period, which resulted in a drastic loss of business for us and a damaged reputation of being a safe and friendly environment to frequent.

Although The Tap n Spile has not operated a pavement café since the revocation of their license, there have been a number of diary logged issues with regard to their customers during the last 15 months which has materially affected our premises. This has culminated in the most recent incident on Wednesday 29th May 2013, in which loud racist and EDL chanting could be heard coming from the Tap n Spile by

APPENDIX 1B (cont)

our customers who were in the back restaurant and toilet areas of our building. (Audio recording as part of Appendix 4) Although unsavoury enough within any licensed premises, the potential for this sort of behaviour to transfer onto the pavement within Darlington Town Centre is not the image that Darlington Borough Council is endeavouring to project as part of its café culture policy. (See **Appendix 4**)

As Licensed Premises operators we have a duty of care. Therefore, it is our company's responsibility to put the interest and safety of our customers and staff, first and foremost.

Having attended the original meetings to implement the pavement café project with Barry Pearson and Meryl Hanson of Darlington Borough Council in 2000, the vision was one of continental café culture within Darlington Town Centre, as opposed to the development of

pavement pubs. During historic discussions with Darlington Borough Council Highways Engineer, regarding applications without consent, it was clearly confirmed that with regard to the Highways Act 1980, the councils view, why a license would not be granted in such a case is that "Further changes could, therefore, only be carried out with the agreement of the interested frontagers and the facilitator, the town Centre Manager."

Therefore to re-iterate, under the legislation contained in the Highways Act 1980 and the terms of Darlington Borough Council Pavement Café Policy, Lion Head Properties Ltd owners of The Old Yard Tapas Bar as an interested frontager, would not give consent to such an application. Section 2.5 of Darlington Borough Council 'The Licensing of Pavement Cafes' (Revised 28 September 2011) states – **Under the terms of section 115E of the Highways Act 1980, Darlington Borough Council cannot grant a license unless it obtains the express consent of interested frontagers who may materially affected by the proposal. This would include anyone who may consider they are affected financially, visually, audibly etc. It is therefore, imperative that such consent is obtained prior to any application being made.**

As this is not the case, it is of our opinion the application is invalid. Please note that in the event of a hearing I am away on annual leave 21st – 28th June.

Yours sincerely P. Turnbull, Managing Director

Appendix 1

HIGHWAYS ACT 1980

Section 115C – Provision of recreation and refreshment facilities by councils

- (1) Subject to subsections (2) and (3) below, a council shall have power to provide, maintain and operate facilities for recreation or refreshment or both on a highway to which this Part of this Act applies.
- (2) A council may not exercise the powers conferred by this section on a walkway unless they have first obtained walkway consent.
- (3) Where subsection (4) below applies, a council may not exercise the powers conferred by this section unless they have first obtained the consent of the frontagers with an interest.

APPENDIX 1B (cont)

- (4) This subsection applies where the facilities are to be provided –
- (a) On a footpath; or
 - (b) On a bridleway; or
 - (c) On a footway in relation to which no pedestrian planning order or traffic order is in force.

HIGHWAYS ACT 1980

Section 115E – Execution of works and use of objects etc. by persons other than councils.

- (1) Subject to subsections (2) to (4) below, a council may grant a person permission—
- (a) to do on, in or over a highway to which this Part of this Act applies anything which the council could do on, in or over such a highway under section 115B(1) to (3) or 115C above; or
 - (b) to use objects or structures on, in or over a highway to which this Part of this Act applies—
 - (i) for a purpose which will result in the production of income;
 - (ii) for the purpose of providing a centre for advice or information; or
 - (iii) for the purpose of advertising.
- (2) A council may not grant a person permission under subsection (1)(a) above to place an object or structure on, in or over a highway to which this Part of this Act applies—
- (a) for a purpose which will result in the production of income; or
 - (b) for the purpose of providing a centre for advice or information, unless they have first obtained the consent of the frontagers with an interest—
 - (i) to the placing of the object or structure;
 - (ii) to the purpose for which it would be placed; and
 - (iii) to the proposed grant of permission.
- (3) A council may not grant a person permission to do anything which the council could only do under section 115C above unless they have first obtained the consent of the frontagers with an interest.
- (4) A council may not grant a person permission—
- (a) to carry out works on, in or over a walkway;
 - (b) to place an object or structure on, in or over a walkway; or
 - (c) to provide, maintain or operate facilities for recreation or refreshment or both on a walkway, unless they have first obtained walkway consent.

Appendix 2

Extract from Application Form for Pavement Café Licence: Section 7 – CONSENT

APPENDIX 1B (cont)

Have you the express consent of your business neighbours to this application?

YES/NO

Please Provide details of neighbouring businesses either side of your proposed Pavement Café.

(NB letters of express consent from neighbouring businesses will speed up the application process)

Appendix 3

Extract from Application Form for Pavement Café Licence:

Guidance Notes

2.5 Under the terms of Section 115E of the highways Act 1980, Darlington Borough Council cannot grant a licence unless it obtains the express consent of interested frontagers who may be materially affected by the proposal. This would include anyone who may consider they are affected financially, visually, audibly etc. It is therefore imperative that such consent is obtained prior to any application being made.

Appendix 4

Extracts of examples of diary logged issues

28th March 2012 –

Male customer from Tap n Spile stood drinking outside from bottle. He was standing over our screen, asked to move and informed him not allowed outside as no glass and they had no license. Eventually move back inside The Tap n Spile.

Incident 30th March 2012

I was on bar duty on Friday 30th March at The Tapas Bar. Our pavement café was also in operation. At approximately 4.35pm a group of five males sat in our pavement café area with pints of Fosters in branded glasses. As they were not our customers I went outside with the link radio and told them this area is for our customers. They said they had got the drinks from the Tap n Spile. It became apparent that two of the group were intoxicated. I again told them this area was for our customers only. Eventually they got up and then sat with their glasses on the planters outside the Tap n Spile. They remained drinking on the paved area outside the Tapa n Spile. After several minutes I sent one of my staff to inform the Tap n Spile they had a group of customers drinking outside.

At approximately 4.55pm the same group of males came into The Tapas Bar. Two of the group were obviously drunk. I refused service, stating I would be committing an offence if I served persons who were intoxicated. They became abusive and threatening towards me before eventually leaving. CCTV control was informed via phone as the radio link was not responding. They tracked the group down Bondgate. The events are recorded on our CCTV system and we have saved the images to disc.

4th September 2012

Two males walked in with drinks from The Tap n Spile asked to leave but refused. Radio contact with CCTV for Police attendance.

13th April 2013 – 12.30 – 1pm

Tap n Spile customers drinking on the pavement with glasses

6th May 2013 6.30pm

Group of males drinking on street with glasses.

29th May 2013 11pm – 11.45pm

Complaint from our restaurant customers regarding the loud racist chanting coming from the adjoining premises The Tap n Spile. On investigation this was coming from a group of apparently intoxicated males in The Tap n Spile, using abusive language and chanting EDL and racist slogans.

RESPONSE FROM TAP & SPILE

I would like to raise a concern of mine to you as the land lady of the Tap and Spile. It has come to my attention that on numerous occasions the management of the Tappas Bar have allowed their 'garden furniture' to remain at the front of the property and unattended also, sometimes as late as midnight.

My concern is that myself and my staff team have worked hard at lowering the levels of anti-social behaviour and alcohol related violence from inside the premises, to this end we have been largely successful. I worry that we are unable to regulate behaviour which occurs once people leave the Tap and Spile. It's reasonable to believe that some of the small percentage of the anti-social customers which potentially drink at the Tap and Spile could use the garden furniture as weapons and therefore this presents a clear and real risk both to myself, customers and the general public.

I would ask for strict enforcement of the regulations already in place for the management of the furniture and politely ask that this furniture is carefully put away following their use. I feel that this would satisfy current regulations and is within public interest.

This is one of many regulatory violations of The Tappas Bar. I would also like to bring your attention to my observation that the customers of The Tappas Bar are frequently permitted to consume alcoholic beverages outside of the specified areas for food and alcohol consumption.

I have also observed that again these customers are given glasses to consume drinks which I am sure you are aware should be replaced with plastic cups once leaving to be seated outside. Once again this compromises the safety of the public and creates further opportunity for potential anti-social behaviour to escalate and become less manageable and more serious.

Please find enclosed photographic evidence for my above comments and concerns, CCTV is also available if you should require this.



