
**CONSULTATION DOCUMENT:
REVIEW OF CONDITIONS AND POLICIES RELATING
TO PAVEMENT CAFÉ LICENCES**

Purpose of the Report

1. To consult with Members in respect of the proposed revision of the current Policies and Conditions relating to the licensing of Pavement Cafes and to invite Members to support the amendments to the Council's Pavement Café Policy.

Background

2. The Highways Act 1980 regulates the licensing of Pavement Cafés. (The 1980 Act) Section 115E (1) permits the Council to consent to issue Pavement Café Licences for areas of the public highway enabling businesses to offer facilities for customers to enjoy refreshments al fresco.
3. The licensing regime regulates the siting and extent of Pavement Cafés and each application is subject to consultation with the Police, Fire Service, Highways, Planning Services and Environmental Health and DAD.
4. Current Policy is based upon on decisions made by Members in 2000 following a pilot scheme around the Market Square in 1999. On 13 March 2000, the Community Protection Committee approved the introduction of a Pavement Café licensing scheme and a guidance document that contained the standard conditions applied to such licences. A copy of the current Policy and Conditions is attached at Appendix 1.
5. Whilst the provision of pavement cafes is encouraged, it is important that they are properly administered and managed to ensure that they meet the high standards expected in Darlington town centre. They should not obstruct the highway or create a hazard for pedestrians, especially for blind, partially sighted and other disabled people
6. In response to concerns expressed by some members of the trade and DAD about the management and appearance of some Pavement Cafés, officers have revisited the existing policy and conditions and have identified a need to extend the scope of the policy and conditions to provide clarification to applicants and licence holders, and to ensure that pavement cafes sited within the borough operate in a safe and consistent manner.
7. In addition, a revised fee structure is proposed which changes the fee from a flat rate application fee to a sliding scale dependent on the number of chairs which is considered fairer.
8. The consultation process was commenced with existing licence holders, Durham Police, Durham Fire Authority, and Darlington Association on Disability and within the Council, Highways, Environmental Health, Trading Standards, Markets and Events on 29 October 013 and concluded on 29 November 2013.

9. Following receipt of comments from one licence holder and stakeholders, the policy was amended. A copy of the comments and officers response from the licence holder is attached at Appendix 2 and a copy of the comments from stakeholders and officers response is attached at Appendix 3. A copy of the Proposed Policy and Conditions is attached at Appendix 4.
10. At the time of writing this report there were 17 pavement cafés licensed

Referral to Council

11. As Members are aware, only full Council can approve policy matters. The amended Policy will therefore be placed before Council for consideration on 20 March 2014

Recommendations

12. Members are invited to:
 - a) Note the contents of this report.
 - b) Support the proposals for new and/or amended conditions as detailed in Appendix 4 to this report.
 - c) Confirm that all other policies and conditions as detailed in the current pavement café licensing policy document be rescinded

Background Papers

The Highways Act 1980 Section 115E

The Current Guide to the Licensing of Pavement Cafes (Revised 28 September 2011)

The Council's Pavement Café Policy 2009

Appendices

- 1 Current Policy and Conditions
- 2 Trade comments and officer responses
- 3 Other stakeholders comments and officer responses
- 4 Proposed Policy and Conditions

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CURRENT POLICY AND CONDITIONS ATTACHED TO PAVEMENT CAFES

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)

STANDARD CONDITIONS FOR PAVEMENT CAFÉ LICENCES

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.

RESPONSE FROM CONSULTATION WITH CURRENT LICENCE HOLDERS

Only one licence holder responded to the consultation. His comments are detailed below:

Comment	The licence holder expressed concern at the proposed condition which required that tables and chairs be stored within the premises when the pavement café was not in use, as not all licensed premises have storage facilities or a lock up within their premises to enable them to do this, he has stated that a more flexible approach is needed.
Officer Response	The proposed Policy has been amended and no longer specifies that furniture has to be stored inside the premises, providing it is not stored on the highway once the pavement café has closed
Rationale	The licence holder's comment is reasonable, as not all premises may have sufficient room to store furniture within the premises. However, if furniture is left on the highway, it could potentially be used as a weapon in instances where disturbance may occur. Apart from this, it looks unsightly and spoils the amenity of the area. Where it should be stored away from the highway is however not an issue for the Council
Comment	The licence holder stated that clarification is needed with regards to the 2 metre space between the carriageway and the front of the pavement café to allow pedestrians to pass by safely.
Officer Response	The Policy has been amended to clarify that a minimum distance of 2.0 metres between the edge of the pavement café and the edge of any adjacent carriageway or vehicle route shall be maintained (with the exception of Skinnergate which is unable to accommodate this distance). If the pavement café is on a street with a high pedestrian usage this minimum may be increased to 2.75 metres. An absolute minimum clear width of 2.0 metre is required from any single point of obstruction e.g. bollard.
Rationale	Where street furniture impedes the free passage of pedestrians, this should not obstruct the highway or create a hazard for pedestrians, especially for blind, partially sighted and other disabled people
Comment	The licence holder stated that the existing 30 minute limit to remove the furniture is unrealistic.as he will be expected to remove all of his equipment, (90 covers), within the same time limit as an operator with 8 covers .He has also expressed the view that his patrons would not wish to see his staff clearing away around them
Officer Response	The 30 minute limit to clear the pavement café has been removed and the policy amended to offer maximum permitted hours. This will allow operators to manage their pavement café within this time frame.
Rationale	In order to ensure a level playing field for all pavement cafes, the maximum permitted hours has been increased to 08.00 hours and 22.30 hours, Monday to Sunday where there are no objections. The additional 30 minutes has been incorporated into the maximum permitted hours however the operator will be expected to commence dismantling the pavement café in sufficient time to

ensure that the maximum terminal hour is not breached.

Maximum hours of operation ensure that each licence holder has to manage the café within that period. No matter when the trading hours were concluded, licence holders would be faced with this problem. All public houses and restaurants have maximum trading hours and have to operate them within that period of time.

Comment The licence holder sought clarification in respect of the requirement that no protrusion from the post bases can project onto the highway at any point. i.e. past the vertical boundary of the screens

Officer Response The Policy has been amended to remove this restriction.

Rationale Following a check of current pavement cafes operating in the town (apart from the market square) it was found that vast majority of pavement cafes are defined with barriers that are held in place by posts attached to a round or oblong base. This base provides stability to the barrier preventing them from being pushed over without difficulty. A check of companies providing barriers and posts all use a combination of these bases, so it would be unreasonable to continue with this requirement.

Comment The licence holder asked whether pavement cafes should be required to provide accessible disabled toilets within the pavement café premise.

Officer Response DAD were consulted prior to the Policy being reviewed and again in the consultation process. No specific requirement was highlighted by DAD. This question was put directly to DAD who advised that several businesses, which also enjoy a pavement café licence, have wheelchair accessible toilets within their premises. There are a small number of premises that are inaccessible to a wheelchair user which have a pavement café licence though a pavement café enables a wheelchair user to sit outside with friends in the café area. DAD have advised that "There is no point installing a wheelchair accessible toilet in a building that isn't wheelchair accessible"

Rationale Many restaurants and public houses in Darlington were built prior to any building controls in relation to disability accessibility legislation. As such, providing they don't change their planning status where "a change of use" is required, they are not obliged to provide facilities to enable a disabled person to use their premises.

Under disability law (Equality Act) disabled people have a right to sue if they have been discriminated against, however, if a wheelchair user can't get in a pub or restaurant there is no legal recourse at present as the Act is about the service not the property. A service provider who runs a non- accessible pub can make a reasonable adjustment by giving the wheelchair user an alternative service by serving him outside.

Comment The Licence holder stated that permitting wine bottles to be allowed in the pavement café area is confusing when other bottles are not permitted

Officer Response Permitted receptacles that may be used in the pavement café are glasses made of toughened or tempered safety glass, polycarbonate or plastic or paper cups. The policy has been amended to permit that in the case of wine alone;

the opened bottle may remain on the table or be decanted into a polycarbonate wine container. A condition has been added that requires staff to remove empty wine bottles immediately.

Rationale Glass drinking vessels are not permitted to be used in a pavement café but where a customer has purchased an expensive bottle of wine they would expect that bottle to be opened at the table and not arrive decanted. If the premises wish to decant wine served outside they may do so

Comment The Licence holder claimed that the condition requiring two thirds of the pavement café to be smoke free is unworkable and unsustainable. He stated he had not received one complaint from non-smokers regarding other customers smoking outside in their vicinity within the pavement café area.

Officer Response Pavement cafes are not intended to be used as an outdoor smoking area, though it is appreciated that customers may wish to smoke after they have enjoyed a meal and there is provision to enable that within the policy.

Rationale Cigarette smoking is the greatest single cause of illness and premature death in the UK. From the 1 July 2007, smoking was prohibited in enclosed public places. The current percentage of the public who smoke is between 13-20%, with up to 80% of the public being non-smokers. This rationale was applied to the policy in relation to the percentage of the pavement café where smoking would be permitted

Comment The Licence holder objected to the requirement that the area of approximately 5 metres around the site is to be kept clear and in particular to any requirement that he may have to remove litter that was not generated by his café.

Officer Response There is nothing in the Policy that would require a pavement café licence holder to remove litter, which was not from their pavement café from any part of the highway.

Rationale The policy requires that the licence holder ensures that litter from the pavement café is removed and not permitted to be blown onto the highway and to also remove any litter that has blown from their café onto the highway and to provide a suitable litterbin within the café area.

Comment The Licence holder objected to the removal of the 30 minutes drinking up time.

Officer Response The policy has been amended to increase the maximum hours of operation of all pavement cafes in the borough and to bring the policy in line with the provisions of the Licensing Act 2003 which does not provide any drinking up time. The policy must apply equally to all premises throughout the borough and noise from café patrons could be disturbing to other residents.

Rationale The Licensing Act 2003 removed the drinking up time in all public houses and clubs in England, so premises have not had that benefit since 2005. Such premises have managed their business to accommodate the removal of the drinking up period successfully and without any harm to their business

Comment The Licence holder suggested that the differential operational hours *(i.e. winter and summer) be removed.

Officer The differential in the hours was historical. The policy has been amended in light of these comments to remove the differential between Summer and

Response	Winter hours and permit a year round maximum number of hours of operation.
Rationale	It is sensible that where the weather permits, customers may wish to sit outside later into the night. The degree to which the pavement café may use the extended hours will be largely dependent upon these factors as well as the licence holder providing lighting and/or heating facilities.

RESPONSE FROM CONSULTATION WITH OTHER STAKEHOLDERS

DARLINGTON ASSOCIATION ON DISABILITY

Stakeholder Comment	Clarification is required regarding unimpeded pedestrian routes being maintained which are adjacent to the premises – in some instances, a walkway cannot be adjacent.
Officer Response	The policy has been amended as follows <i>“In considering the above matters, the standard guidance will be that a licence will only be issued if an unimpeded pedestrian route can be maintained at all times. The route shall ensure that all pedestrians and particularly those with a disability can maintain their normal path where feasible. All applications will be considered on their own merits.”</i>
Rationale	As each case would be considered on their own merits following consultation with all stakeholders there would be no undue prejudice in respect of any application. Providing all stakeholders were content with the arrangements a licence could be issued. Where satisfactory arrangements cannot be agreed the matter would be referred to the Council’s Licensing Committee for consideration.
Stakeholder Comment	Plans to be submitted with applications for renewal of licence should contain all the information that is required when an application for grant is made.
Officer Response	Section 16 of the Policy requires that each application for the grant or renewal of a licence will be accompanied by a plan to the same specification and it has been specified that where a plan is not accurate or contain all of the required information and measurements then the application will be rejected
Rationale	This has been a problem in past applications and had been addressed within this proposed policy.
Stakeholder Comment	There is concern that where a new licence is granted which is to be adjacent to an existing licensed pavement café that the unobstructed route between the carriageway and the front of the combined pavement cafés might not be acceptable owing to the route being too long.
Officer Response	Following receipt of this comment, further clarification was sought from the Highways Section and the policy amended to allow for further consideration. That each case will be considered on its merits.
Rationale	This will permit officers to ascertain if the combined length of one or more pavement cafes obstruct the highway or create a hazard for pedestrians, especially for blind, partially sighted and other disabled people. The policy also states that “The expanse of the pavement café must not conflict with any access or dropped crossings that are required for free passage of normal road users”
Stakeholder Comment	Ash trays provided in the pavement café should be the type that prevents ash blowing around (Spanish style with water in the bottom) to prevent ash blowing into food.
Officer	The Policy has been amended to provide that wind proof ashtrays are provided

Response	at each table where smoking is permitted.
Rationale	Windproof ashtrays can be provided at a little extra cost to the business, in addition, the requirement to empty the ashtray whenever the table was cleared or customers left would resolve this concern
Stakeholder Comment	Clarification is required in the wording to read that DAD will be consulted on each application for the grant of a licence.
Officer Response	Policy has been amended, providing clarification that DAD will be consulted on each application for the grant of a licence
Rationale	This provides greater clarity
Stakeholder Comment	DAD should be consulted on each application for renewal of licence so that DAD can comment if a licence holder has not conducted itself properly DAD might wish to make an objection
Officer Response	<p>Consultation with all stakeholders is only necessary where there is an application for the grant of a licence or where there is an application to vary the licence.</p> <p>If a licence holder has not operated in accordance with the licence, then any issues must be dealt with in a timely manner. It would be unfair to penalise a licence holder for misconduct that may have taken place months previously.</p>
Rationale	If the licence is to be renewed as previously agreed then there should no necessity to consult with all stakeholders. Provision is made within the Policy to ensure full consultation where there is any variation to the licence other than a transfer of licence holder.

HIGHWAYS

Stakeholder Comment	It would be preferable if the plan submitted with the application is dimensional and contains problem areas such as pinch points width and length
Officer Response	The policy has been amended to ensure that plans are required to be dimensional with pinch points and accurate width and depths shown
Rationale	It is vital that officers and stakeholders are fully cognizant of the exact details of any proposed pavement café layout to ensure that, if granted, the layout will not obstruct the highway or create a hazard for pedestrians, especially for blind, partially sighted and other disabled people

ENVIRONMENTAL HEALTH

Stakeholder Comment	Rather than requiring a parasol at each table if the pavement café is in direct sun between the hours of 12:00 and 15:00 hours it would be acceptable if every table had a parasol available but it doesn't have to be at the table or up unless the customer requires it to be.
Officer Response	The Policy has been amended to provide that a parasol shall be available for use for each table if a customer requests one

Rationale	This will ensure that each table could have a parasol if so required
Stakeholder Comment	The proposed policy permits the playing of unamplified music in the pavement café. There are concerns with regard to noise disturbance for local residents particularly if there is more than one pavement café playing unamplified music directly near another café.
Officer Response	The policy has been amended to prohibit the playing of live or recorded music for the entertainment of customers using the external area, in order to prevent public nuisance to nearby residents and adjacent premises and cafes.
Rationale	In order to prevent any potential for noise disturbance for local residents this provision has been removed.

LEGAL SERVICES

Stakeholder Comment	Clarification is required to reflect that a fine in relation to the obstruction of the highway can only be levied by a Magistrates Court following legal proceedings.
Officer Response	The Policy has been amended to remove any ambiguity and now reflects that fines can only be levied by a Magistrate.

TRADING STANDARDS

Stakeholder Comment	Should the pavement café have a policy with regards to the use of e-cigarettes, restricting them to smoking areas only.
Officer Response	E-cigarettes are not classed as cigarettes as they do not burn tobacco or produce smoke, however, the Policy has been amended to provide advice to licence holders that they may wish to consider their own policy in relation to their usage in the pavement café.
Rationale	Although licence holders may wish to control the use of cigarettes in the pavement café, and regard e-cigarettes as not promoting a good role model to children or not projecting a clean and 'healthy' image for their premises, as they are not classed as cigarettes their use within a pavement café is the responsibility of the licence holder.

PROPOSED PAVEMENT CAFE POLICY AND CONDITIONS MARCH 2014

Policies

1. Licences shall be granted for a maximum of one year and shall expire on 31 March each year
2. Application Fees are payable in advance and shall not be refunded if application is unsuccessful
3. All licences shall be issued in accordance with the Policy in Relation to Pavement Café Licences revised March 2014.

Standard Conditions

General

1. The maximum permitted hours of operation as stated on the attached licence shall not be exceeded without prior permission from the Council.
2. A copy of the licence and pavement café layout plan must be displayed at the premises at all times.
3. Food and non-alcoholic drinks must be available at all times when the pavement café is open
4. Smoking will be permissible within the pavement café provided the café is being used for the consumption of food and drink.
5. Where smoking is permitted, a minimum of two thirds of the pavement café area must be designated smoke free and a **“No Smoking”** sign placed on each table in this area.
6. Each table where smoking is permitted should be provided with an ashtray that must be emptied each time the table is cleared or vacated.
7. Posts, barriers tables and chairs shall not be placed upon the highway before the commencement of operational hours and shall be removed entirely before the end of the operational hours. The area shall be left clean and tidy and free of any rubbish.
8. Furniture stored within the premises should not at any time block a fire exit.
9. The use of advertisement boards is prohibited
10. The advertising of alcohol or cigarettes is prohibited
11. Barriers and parasols can advertise the name of the business only.
12. The café area must be supervised at all times whilst it is operational
13. No live or recorded music shall be played within any part of the Pavement Café.
14. Emergency routes from adjacent buildings and the applicant's premises shall not be obstructed by the pavement café
15. The licence holder shall not cause or permit any alterations to the highway surface.

16. The licence holder shall not assign, sub-let or part with his interest or possession of a licence.
17. The Council may suspend or terminate a licence if any of the conditions of the licence are breached.
18. A licence holder may terminate a licence at 21 days' notice by informing the Council in writing.
19. Authorised Officers of the Council and Police Officers shall have access to a pavement café at all reasonable times.
20. If requested by a police officer or an authorised officer of the Council, all items shall be removed from the highway. These items shall remain off the highway for as long as is required.

Management

21. The licence holder shall be responsible for the conduct of people, both patrons and employees, within the pavement café area.
22. Patrons shall not be permitted to remove food, drinks, crockery or any cutlery from the pavement café.
23. Only patrons seated at tables shall be served or permitted within the pavement café

Service

24. All tables must be cleared of all uneaten food, used crockery, cutlery etc. and properly cleaned of any spillage immediately they are vacated by customers.
25. No alcohol shall be sold or consumed within the designated Pavement Café area unless in compliance with any beverage licence.
26. Food must be prepared on the premises in an appropriate kitchen area.
27. Food and drink must not be stored or prepared outside the normal premises
28. All the food and drink that is consumed within the pavement café area must be ordered and purchased there.

Articles used in the Café

29. All furniture shall be of high quality constructed of wood or metal and approved by the Council.
30. Parasols shall be available for use at each table if the pavement café area is in direct sun between the hours of 12:00 to 15:00 hours, and a customer requests that a parasol be provided.
31. Parasols, when opened must not overhang the boundary of the pavement café and must remain closed in periods of high winds
32. All drinks shall be decanted from the bottle except when a customer has ordered a particular bottle of wine, in which case, the opened bottle may remain on the table or be decanted into a polycarbonate wine container. Staff shall ensure that empty wine bottles are removed from the pavement café immediately.

33. Permitted receptacles to be used within the pavement café are:-
- Glasses made of toughened or tempered safety glass
 - Glasses made of polycarbonate or plastic
 - Paper Cups
 - China cups, saucers and plates
 - Metal Cutlery
34. At least one children's high chair must be available for customers to use within the pavement café.
35. The use of barbecues, rotisseries, ice cream machines, drinks machines or any other equipment for the preparation and / or sale of food and drink for consumption on or off the premises will not be permitted within the pavement café area.

Boundary and Barriers

36. The entire pavement café (apart from entrances) shall be enclosed in its entirety with a suitable barrier, the design and dimensions of which must be agreed, in writing, by the Council. Space will be required for circulation and access within the enclosed area in addition to that for tables and equipment.
37. All activity associated with the pavement café shall be contained within the boundary including tables, chairs and other permitted equipment.
38. The agreed boundary and layout of the pavement café as defined by the plan attached to the Licence shall not be altered without the express permission of the Council.
39. Barriers must not be permanently fixed to the ground on a public highway.
40. Where access to the pavement café is not level, a suitable and stable ramp shall be provided at all times.
41. A minimum distance of 2.0 metres between the edge of the pavement café and the edge of any adjacent carriageway or vehicle route shall be maintained. If the pavement café is on a street with a high pedestrian usage this minimum may be increased to 2.75 metres.

Litter

42. The licence holder 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 licence holder
43. Suitable litter/refuse bin(s) shall be provided within the pavement café area at all times of operation. The licence holder shall be responsible for disposing of all waste produced at the pavement café

Insurance

44. The licence holder shall provide 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.

45. If for whatever period or reason a public liability insurance policy is not in force, the Council shall be deemed to have withdrawn this Licence for the period during which the said policy is not in force and the licence holder may be held liable for obstruction of the highway and prosecution under Section 137 of the Act.