

Schedule 1

Application for premises license review – Que Passa 64-65 High Street Banbury Oxon.

The Councils' Anti Social Behaviour Team first received complaints alleging excessive noise from the premises of Que Pasa 64-65 High Street Banbury Oxon on 14 January 2008. The complaint alleged that amplified music from the premises could be heard within the complainants dwelling and that in addition noise from customers using the rear garden of the premises was also audible within the dwelling at a level which was causing disturbance.

These allegations were investigated and officers from the Anti Social Behaviour Team formed the opinion that the noise constituted a statutory nuisance. Accordingly an abatement notice was served on the licensees of the premises Martsons Plc. The Abatement Notice was served on 18 March 2008. Notice of appeal was given on behalf of Marstons but following a period of negotiation the Council and Marstons agreed a form of words acceptable to both parties. A copy of the agreed abatement notice is produced as exhibit RL 1.

Whilst the legal discussion was taking place over the content and form of the abatement notice the Anti Social Behaviour Team were in discussions with the Marstons Area Manager for the Que Pasa brand. Through this channel a series of agreed measures were put in place which were designed to overcome the problems presented by noise within the premises and by noise escaping from the premises. These measures were as follows:

- Access to the rear garden area of the premises was restricted such that customers had to pass through a sound check lobby to reach the outside area.
- The two speakers located closest to the rear doors to the premises were turned off.
- The levels of sub bass and overall volume of the sound amplification system within the premises were to be reduced.
- All amplification equipment settings were to be set and maintained by the premises management .

During the course of further enquiries following the implementation of this agreement evidence was obtained which suggested that the set amplification levels were not being used by one of the premises resident DJs. This led to the likely offender being dismissed by the company and the following additional sound control measures being put in place:

- A copy of the agreed amplifier settings were to be displayed next to the DJs equipment and a copy provided to the Council. I produce a copy of this document as exhibit RL 2.
- The amplification equipment was locked away from unauthorised access.

At the time these discussions were taking place the feasibility of providing sound insulation to parts of the premises was also discussed but as of 16 May 2008 the original complainant indicated their satisfaction with the current sound levels from the premises this option was not pursued.

It must be stressed that these arrangements were made by informal agreement and were not subsequently put forward for inclusion in the operating schedule which formed part of the premises license.

On 24 September 2008 we again received information alleging that there was excessive noise coming from the Que Passa premises. The substance of the allegations were similar to those received early in the year in that bass noise from the premises was intruding into a nearby dwelling and noise from customers using the rear garden of the premises was also causing disturbance.

During the course of our investigations the agreed settings for the premises sound amplification were checked and at the time of our visit were found to be as per the schedule. During the course of this visit it was noted that customers were still gaining access to the rear garden area via the twin fire exit doors at the rear of the premises rather than via the door way fitted with the sound check lobby and one of the self closing devices to the sound check lobby was defective.

The allegations were investigated by installing calibrated sound recording equipment in the customers' premises between 17 October 2008 and 28 October 2008. These recording exercises produced evidence of noise disturbance within the customers' dwelling on both occasions and I produce copies of these recordings as exhibit RL3.

The licensees have been advised of our concerns at Area Manager Level and I am advised that they exploring ways of dealing with the issues arising from the use of the premises rear garden.

In the light of the information above the request for a review of the premises license may seem premature however I would argue that there are sound reasons for doing so.

Firstly there is evidence of ongoing disturbance due to noise from the premises. Secondly the control measures put in place in response to the first noise complaint investigation rely heavily on a human input in that in order to ensure that sound does not escape from doors being left open at the rear of the premises a human input by way of policing by door staff is required. Equally the use of agreed settings for sound equipment relies on a degree of control being exercised by the premises manager and there is an opportunity for these levels to be overridden even if the control regime is being vigilant. Unfortunately it is not possible to control the amount of noise made by customers by the use of a volume control and indeed the well meaning interventions of door staff in an attempt to ask noisy individuals to behave can be counter productive.

The purpose of this review application is to invite the licensing committee to consider varying the operating schedule of the premises in order to design out the 'human' elements of the current and proposed sound control programme such that the premises can continue to operate without causing disturbance to the occupants of nearby dwellings. With this in mind the committee may wish to consider a requirement to carry out sound insulation to the structure of the premises and the imposition of a curfew on the rear garden of the premises which would address the issues of sound break out through open doors and the disturbance caused by customers using this area of the premises in the late evening and early hours of the morning.

ENVIRONMENTAL PROTECTION ACT 1990, section 80

Abatement Notice in respect of Noise Nuisance

To: The Company Secretary, Marstons Plc Marstons House Brewery Road Wolverhampton WV1 4JT

TAKE NOTICE that under the provisions of the Environmental Protection Act 1990 the **CHERWELL DISTRICT COUNCIL** being satisfied of the likely occurrence of noise amounting to a statutory nuisance under section 79(1)(g) of that Act at Que Pasa 64-65 High Street Banbury Oxfordshire

within the district of the said Council arising from the playing of amplified music within your premises.

HEREBY REQUIRE YOU as the owner of the premises from which the noise is or would be emitted forthwith from the service of this notice, to abate the same and also

HEREBY PROHIBIT the occurrence of the same and for that purpose require you to: Devise and implement a sound management plan to prevent noise escaping from the premises at such levels and on such occasions as would constitute a statutory nuisance under section 79(1)(g) within nearby private dwellings.

IN the event of an appeal this notice shall be suspended until the appeal has been abandoned or decided by the Court.

IF without reasonable excuse you contravene or fail to comply with any requirement of this notice you will be guilty of an offence under section 80(4) of the Environmental Protection Act 1990 and on summary conviction will be liable to a fine not exceeding level 5 on the Standard Scale**, together with a further fine of an amount equal to one-tenth of that level for each day on which the offence continues after conviction. A person who commits an offence on industrial, trade or business premises will be liable on summary conviction to a fine not exceeding £20,000.

The Council may also take proceedings in the High Court for securing the abatement, prohibition or restriction of the nuisance. Further, if you fail to execute all or any of the works in accordance with this notice, the Council may execute the works and recover from you the necessary expenditure incurred.

DATED 25th day of June

2008.

P. H. Leather
Signed *pp. AsB Manager* (Under delegated authority)
Head of Safer Communities and Community Development

Cherwell District Council
Bodicote House
Bodicote
Banbury
Oxfordshire
OX15 4AA

NB The person served with this notice may appeal against the notice to a magistrates' court within twenty-one days beginning with the date of service of the notice. See notes attached.

** Currently £5,000, subject to alteration by Order

- I. The Statutory Nuisance (Appeals) Regulations 1995 provide as follows:

APPEALS UNDER SECTION 80(3) of the ENVIRONMENTAL PROTECTION ACT 1990
("the 1990 Act")

2.

- (1) The provisions of these regulations apply in relation to an appeal brought by any person under section 80(3) of the 1990 Act against an abatement notice served upon him by a local authority.
- (2) The grounds on which a person served with such a notice may appeal under section 80(3) are any one or more of the following grounds that are appropriate in the circumstances of the particular case: -
- (a) that the abatement notice is not justified by section 80 of the 1990 Act;
 - (b) that there has been some informality, defect or error in, or in connection with, the abatement notice or in connection with any copy of the abatement notice served under section 80A(3);
 - (c) that the authority have refused unreasonably to accept compliance with alternative requirements, or that the requirements of the abatement notice are otherwise unreasonable in character or extent, or are unnecessary;
 - (d) that the time, or, where more than one time is specified, any of the times within which the requirements of the abatement notice are to be complied with is not reasonably sufficient for the purpose;
 - (e) where the nuisance to which the notice relates -
 - (i) is a nuisance falling within section 79(1)(a),(d),(e),(f) or (g) of the 1990 Act and arises on industrial, trade or business premises, or
 - (ii) is a nuisance falling within section 79(1)(b) of the 1990 Act and the smoke is emitted from a chimney;
 - (iii) is a nuisance falling within section 79(1)(ga)(a) of the 1990 Act and is noise emitted from or caused by a vehicle, machinery or equipment being used of industrial, trade or business purposes;that the best practicable means were used to prevent, or to counteract the effects of, the nuisance.
 - (f) that, in the case of a nuisance under section 79(1)(g) or (ga) of the 1990 Act, the requirements imposed by the abatement notice by virtue of section 80(1)(a) of that Act are more onerous than the requirements for the time being in force, in relation to the noise to which the notice relates, of: -
 - (i) any notice served under section 60 or 66 of the Control of Pollution Act 1974 ("the 1974 Act"), or
 - (ii) any consent given under section 61 or 65 of the 1974 Act, or
 - (iii) any determination made under section 67 of the 1974 Act;
 - (g) that, in the case of a nuisance under section 79(1)(ga) of the 1990 Act the requirements imposed by the abatement notice by virtue of section 80(1)(c) of the Act are more onerous than the requirements for the time being in force in relation to the noise to which the notice relates, of any condition of a consent given under paragraph 1 of Schedule 2 to the 1993 Act.
 - (h) that the abatement notice should have been served on some person instead of the appellant, being:-
 - (i) the person responsible for the nuisance, or
 - (ii) in the case of a nuisance arising from any defect of a structural character, the owner of the premises, or
 - (iii) in the case where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred, the owner or occupier of the premises;
 - (iv) the person responsible for the vehicle machinery or equipment;
 - (i) that the abatement notice might lawfully have been served on some person instead of the appellant being:-
 - (i) in the case where the appellant is the owner of the premises, the occupier of the premises, or

- (ii) in the case where the appellant is the occupier of the premises, the owner of the premises, and that it would have been equitable for it to have been so served;
- (j) that the abatement notice might lawfully have been served on some person in addition to the appellant, being:-
 - (i) a person also responsible for the nuisance,
 - (ii) a person who is also an owner of the premises, or
 - (iii) a person who is also an occupier of the premises,
 - (iv) a person who is also the person responsible for the vehicle, machinery or equipment, and that it would have been equitable for it to have been so served.
- (3) If and so far as an appeal is based on the ground of some informality, defect or error in, or in connection with, the abatement notice, or in connection with any copy of the notice served under section 80(A)(3), the court shall dismiss the appeal if it is satisfied that the informality, defect or error was not a material one.
- (4) Where the grounds upon which an appeal is brought include a ground specified in paragraph (2)(i) or (j) above, the appellant shall serve a copy of his notice of appeal on any other person referred to, and in the case of any appeal to which this regulation applies he may serve a copy of his notice of appeal on any other person referred to, and in the case of any appeal to which this regulation applies he may serve a copy of his notice appeal on any other person having an estate or interest in the premises, vehicle, machinery or equipment in question.
- (5) On the hearing of an appeal the court may:-
 - (a) quash the abatement notice to which the appeal relates, or
 - (b) vary the abatement notice in favour of the appellant, in such manner as it thinks fit, or
 - (c) dismiss the appeal;and an abatement notice that is varied under sub-paragraph (b) above shall be final and shall otherwise have effect, as so varied, as if it had been so made by the local authority.
- (6) Subject to paragraph (7) below, on the hearing of appeal the court may make such order as it thinks fit:-
 - (a) with respect to the person by whom any work is to be executed and the contribution to be made by any person towards the cost of the work, or
 - (b) as to the proportions in which any expenses which may become recoverable by the authority under Part III of the 1990 Act are to be borne by the appellant and by any other person.
- (7) In exercising its powers under paragraph (6) above, the court:-
 - (a) shall have regard, as between an owner and an occupier, to the terms and conditions, whether contractual or statutory, of any relevant tenancy and to the nature of the works required, and
 - (b) shall be satisfied, before it imposes any requirement thereunder on any person other than the appellant, that that person has received a copy of the notice of appeal in pursuance of paragraph (4) above.

SUSPENSION OF NOTICES

3.

- (1) Where:-
 - (a) an appeal is brought against an abatement notice served under section 80 or section 80A of the 1990 Act, and,
 - (b) either:-
 - (i) compliance with the abatement notice would involve any person in expenditure on carrying out of works before the hearing of the appeal, or
 - (ii) in the case of a nuisance under section 79(1)(g) or (ga) of the 1990 Act, the noise to which the abatement notice relates is noise caused in the course of the performance of some duty imposed by law on the appellant, and
 - (c) either paragraph (2) does not apply, or if it does apply but the requirements of paragraph (3) have not been met, the abatement notice shall be suspended until the appeal has been abandoned or decided by the court.

- (2) The paragraph applies where:-
 - (a) the nuisance to which the abatement notice relates:-
 - (i) is injurious to health, or
 - (ii) is likely to be of a limited duration such that suspension of the notice would render it of no practical effect, or
 - (b) the expenditure which would be incurred by any person in the carrying out of works in compliance with the abatement notice before any appeal has been decided would not be disproportionate to the public benefit to be expected in that period from such compliance.

- (3) Where paragraph (2) applies the abatement notice:-
 - (a) shall include a statement that paragraph (2) applies, and that as a consequence it shall have effect notwithstanding any appeal to a magistrates' court which has not been decided by the court, and
 - (b) shall include a statement as to which of the grounds set out in paragraph (2) apply.



Our Ref: DP/BAN/EHO

18th April 2008

Strictly Private & Confidential

The individual levels of each of the volume controls and settings which we have all agreed are as follows.

Front Bar (controls located on pillar by coffee machine)

Front = 4
Dance Floor = 7

Rear Bar (control located nr cupboard)

Front = 3
Middle = 5
Rear = 3

DJ Booth (focussing on mixer controls)

Level = 7
Low = 5 Max
Middle = 5 Max
High = 5 Max

Any member of staff or management who operates the system in excess of these agreed parameters will face disciplinary action.

Yours sincerely

Dave Price
Area Operations Manager
Que Pasa