

Memorandum

To:	Licensing and Public Protection Team	From	:	Mr Karl Martin
c.c		Contact	:	
c.c.		Ext	:	01803 208025
c.c		My Ref	:	1ZV SRU 259072
.		Your Ref	:	
For the attention of:		Date	:	22 ND October 2020
Gary O'Shea, Principle Licensing Officer				

Subject: Review Application - Rock Garden, 40-44 Swan Street, Torquay.

1. The Review application submitted by residents is the second Review hearing requested since the premises opened in 2014. The first Review in November 2014 and the current application both relate to noise nuisance emanating from the beer garden. Therefore the 2014 review is relevant to the current application and documentation can be accessed here:-

<https://www.torbay.gov.uk/DemocraticServices/mgAi.aspx?ID=14592#mgDocuments>

2. For convenience please see Appendix 1 of this report for a copy of Karl Martins representation for the 2014 hearing. The document details the history of the premises, reference to planning applications and the noise nuisance experienced by local residents at that time.

Chronology December 2014 to September 2020

3. In December 2014 the Authority accepted the argument put forward by the owners legal counsel that in effect the review hearing had remedied the nuisance. Therefore the noise abatement notice was considered by the Authority as complied with and would not pursue further enforcement. The Environmental Protection Act 1990 does not offer a formal route to withdrawn notices so in effect the notice stood until transfer of the company from 'Halix Ltd' to 'Rock Garden Ltd' in December 2019. Currently the premises is not subject a noise abatement notice.
4. Between November 2014 and July 2020 no further noise complaints received by the Authority (please see point 8).
5. In April 2017 Mr Walsh requested a meeting to discuss the potential for the beer garden operating hours to be extended from 21:00 until 23:00. There had not been any recorded noise complaints for nearly 3 years and therefore reasonable to conclude the review hearing in 2014 had succeeded.

Mr Walsh argued the business has fundamental changed from a predominately wet pub to a food led establishment in conjunction with noise abatement measures. (Further checks were made with Police Licensing who confirmed the premises had low reported crime and disorder and have no concerns about the management of the premises).

The use of Temporary Events Notices was discussed and Mr Walsh was warned TENS are useful to determine if noise levels can be managed without causing nuisance but the opposite is also true and may prove the review hearing in 2014 was the right outcome.

In May 2017 Mr Walsh submitted eight TEN notifications. No objections to the TENS was lodged by either the Public Protection Officer or the Police Licensing Officer. For eight weeks from June to August bank holiday the beer garden remained open until 22:00pm on a Friday and Saturday evening. Please see Appendix 2 for further details.

A 'Gentleman's agreement' offered furthered reassurance as Mr Walsh agreed he would not use any remaining TENS if noise complaints were received regardless of validity.

No complaints or enquires received by any resident during the summer of 2017

6. The Government introduced TENS into the Licensing Act 2003 to make provision for small scale one off events, or situations where Premises Licences do not meet the needs of a particular function on a particular night. However it is common practice to use TENS as a 'test bed' for a particular licensable activity to evaluate the risk of undermine the licensing objectives. The approach, though not formally recognised in Torbay Councils Licensing Statement of principles, is common place and encouraged in situations where doubt remains. Useful in situations where it is anticipated a minor or full variation application may lead to representation.
7. In April 2018 during a meeting with Mr Walsh he proposed he would like to submit an application to vary the beer garden operational times. However, it was recommended to use TENS to build confidence among Responsible Authorities and residents. Mr Walsh agreed and submitted 10 TENS beginning with May bank holiday lasting until the August Bank Holiday.

No objections to the TENS was lodged by either the Public Protection Officer or Police Licensing.

8. In May 2018 a resident contacted the Authority and lodge a complaint about the use of TENS to extend the timing of the beer garden. A complaint about noise levels was logged but no further supporting information was provided. The complainant did not make any further contact with the Authority.
9. Mr Walsh submitted three further TENS in the summer of 2019. No complaints received by the Authority.
10. In November 2019 during a meeting with Mr Walsh he informed the Authority that he was purchasing the lease for the business. Part of his business plan to improve growth included the beer garden to remain open until 11:00pm to allow customers to consume food and alcohol.
11. On the 22nd November 2019 Mr Walsh submitted a minor variation application to remove the 9pm time limit on the beer garden and replaced it with 11pm. Site notices were placed by the application and with no objections from Responsible Authorities or Interested parties the application was granted on the 9th December 2019.
12. On the 20th March 2020 Rock Garden was closed by order of the Government.
13. July the 4th 2020 Rock Garden could re-open.
14. 11th July 2020 the first recording using the Councils Noise app logged a by a complainant.

15. Three separate complainants representing two households used the noise app from the 11th July 2020. Approx. 80% of complaints logged on a Thursday, Friday and Saturday. Overall approx. 70% of complaints logged before 9:00pm.
16. Mr Walsh was informed in mid-August that continued complaints were being made to the Authority regarding noise nuisance from the beer garden and that the complainants wished to seek a review of the licence.
17. A meeting was brokered between the complainants and Dave Walsh on Friday the 28th August 2020.

The three complainants of which two are the applicants for the Review application argued the noise nuisance has never been resolved but they tolerated it in line with the outcome of the 2014 Review.

Mr Walsh argued he has been operating the beer garden beyond 9pm under TENS without complaints for three summers in a row and suggested he will examine further ways to improve the situation.

One of the residents proposed a cooling off period of two weeks where they would work with Mr Walsh. It was agreed they would contact Mr Walsh on occasions where the noise was creating a nuisance as this would enable Mr Walsh to investigate further arrangements to mitigate nuisance.

18. Sunday 23RD August Officers visited and inspected the beer garden at Rock Garden at approximately 22:10. An SIA door steward was present and directing customers to lower their voices where appropriate. The recently installed dB meter was observed and appeared to assist management when further intervention may be required. Around 10-15 customers were using the garden at the time of the visit and Officers did not have cause for concern and credited Mr Walsh for his management of the area.
19. Following the meeting with Mr Walsh and the complainants further noise app recording where submitted:-
 - Sunday 23rd August
 - Monday 31st August
 - Friday 4th September
 - Friday 11th September
 - Saturday 12th September (after 9pm)
 - Saturday 19th September (after 9pm)
20. Review application received and accepted by the Licensing Authority on the 24th September 2020.
21. 25th September 2020 Government regulations require licenced premises to close at 22:00

Considerations and recommendations for the Licensing Sub-Committee

22. The Responsible Authority supports Mr Walsh's assertion that the 2014 review forced the business to change direction and develop a brand based around food and grassroots entertainment. This has been evidenced by direct observation of Officers and is reflected by Rock Gardens own online presence:- <https://www.rockgardentorquay.co.uk/restaurant-torquay> and <https://www.facebook.com/rockgardentorquay/>

This change of direction has been an important consideration in any decisions to overturn the 9pm limit imposed by the review in 2014.

23. Mr Walsh since 2014 has continued to engaged with Responsibility Authorities and seek advice, including from independent noise consultants in decisions or ideas about the beer garden. For example in February 2020 he discussed proposals for a limited number of live music events to take place in the garden both with the Authority and his noise consultant. He listened to the advice and decided to not explore this idea any further.

24. The Responsible Authority has struggled with the available evidence to determine if statutory nuisance is occurring under the Environmental Protection Act 1990 and if the Licensing Objective 'the Prevention of Public Nuisance' is being undermined for the following reasons:-

- Noise levels not what they were in 2014. In part due to the clientele the business attracts and its reputation as a predominately food led business but significantly because Mr Walsh learned from 2014 and continues to demonstrate a high level of due diligence towards managing outside spaces.
- No noise complaints received during the 42 occasions the beer garden operated until 10:00pm under TENS.
- Numerous late night visits to Rock Garden since 2014 has not raised any concerns about poor management or noise nuisance.
- The nearest residential dwellings have submitted representations supporting the business and confirm a nuisance is not present.
- To what degree has Covid restrictions played a part in the sudden increase in noise complaints.

Between July and early October 2020 the Government has encouraged the use of outdoors spaces to facilitate social distancing based on the understanding a virus is harder to spread outdoors.

Rock Garden is quite unique as a Torquay town centre premises because of the large beer garden. Encouraged by the Government Mr Walsh has used the beer Garden to ensure his premises can be covid secure. It has been noted by Officers, Premises that excel at social distancing measures greatly increase the confidence of the public and benefit from a dramatic upturn in business. Rock Garden is one of those premises to benefit.

This has beyond all doubt increased the numbers of customers using the beer garden over a similar trading period and will affect the measurable and indeed tolerable noise levels. However a pandemic is not normal life and it reasonably forcible once covid restrictions are no longer necessary the use of the beer garden will return to a pre-covid state.

25. The review applicants have submitted conclusive evidence of noise emanating from the beer garden. Voices are audible in their homes and it is understandably that up to 12 hours a day of this type of intrusion would have unwanted and detrimental effect on their own right to peaceful enjoyment.

The noise nuisance in 2014 was unacceptable and effected a wide range of nearby residential properties. In 2020 the Responsible Authority cannot within the framework of the Environmental Protection Act 1990 or the Licensing Act 2003 determine if the

threshold of nuisance is breached when environmental factors are examined for the following reasons.

- Rock Garden is situated in the established late night economy area where there is an expectation of elevated 'reasonably' noise from licensed premises.
- Lack of complaints or representation from the nearest residential dwellings.
- Mr Walsh noise abatement procedures may offer a Best Practicable Means defence.
- Patrons using the beer garden are not behaving unreasonable.
- Due to the location and the built environment unwanted noise cannot be removed. Numerous options have been explored. The only option is to cease use of the beer garden completely.
- Reported nuisance is not occurring during the sensitive night time hours of 11:00pm-7am.
- Reported nuisance is not as frequent or intense and effecting a wider audience as it has in the past.
- The Covid pandemic and subsequent Government restrictions have distorted the general view of nuisance and the ability for the Responsible Authorities to assess the Review application that is both fair and reasonable to residents and the business operator.

26. At the time of writing this report negotiations continue with Mr Walsh to explore what further measures can be put forward to reduce unwanted noise disturbing the applicants.

27. Ahead of the Review hearing Officers final recommendations will be circulated for consideration by Members of the Licensing Sub-Committee.



Karl Martin
Public Protection Officer
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Community Safety
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