

Fifth, 121 Princess Street, Manchester M1 7AG

[REDACTED]

Mon 28/06/2021 13:40

To: Premises Licensing <Premises.Licensing@manchester.gov.uk>

Cc: [REDACTED]

📎 7 attachments (1 MB)

237646 LOOH.DOC; 232876 LOOH.DOC; 121 Princess St survey works\_19082020.pdf; Agent of Change article.pdf; Miller Goodall Letter.pdf; Appeal Decision.pdf; Fwd: Re Objection to Licence Variation Application 5th Leisure;

Good afternoon – I refer to the application for Variation, which is due to be considered by the Licensing Sub-Committee on 5<sup>th</sup> July 2021.

In support of the application, please find the following attachments:-

1. Representations x2 from LOOH regarding Minor Variations submitted in June & September 2019;
2. Copy Report submitted by Miller Goodall dated 19<sup>th</sup> August 2020;
3. Copy article extracted from the Journal of Licensing – March 2021;
4. Copy letter dated 12<sup>th</sup> May 2021 – Miller Goodall;
5. Copy Planning (Appeal) Decision dated 24<sup>th</sup> May 2021;
6. Copy e-mail dated 18<sup>th</sup> June 2021 between the Proprietor and LOOH.

I would be grateful for the above to be added to the Agenda; perhaps you would be kind enough to forward a copy of the said Agenda, once finalised?

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



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**Licensing & Out of Hours Compliance Team - Representation**

Name	Gary Cook
Job Title	Neighbourhood Compliance Officer
Department	Licensing and Out of Hours Compliance Team
Address	Level 1, Town Hall Extension, Manchester, M60 2LA
Email Address	g.cook@manchester.gov.uk
Telephone Number	0161 234 1220

**Premise Details**

Application Ref No	237646
Name of Premises	Fifth
Address	121 Princess Street, Manchester, M1 7AN

**Representation**

Outline your representation regarding the above application below. This representation should describe the likely effect of the grant of the licence/certificate on the licensing objectives and on the vicinity of the premises.

The Licensing and Out of Hours Team (LOOH) have assessed the minor variation taking into account a number of factors, including the nature of the area in which the premises is located and any potential risk the granting of this minor variation could lead to a failure to uphold the Prevention of Public Nuisance licensing objective.

The application seeks to make internal changes to the layout of the basement floor of the premises with a schedule of general amendments attached to the application:

1. 2 Bar areas reduced / reconfigure and replaced with seating.
2. Information provided by Ian Bright Architects makes reference to the removal of the basement lift shaft, the current wall, door and removal of sound proofing which is stated as not providing "effective sound compartmentation."

Fifth is situated within the basement of 121 Princess Street with residential properties directly above and to the rear of the premises on Samuel Ogden Street. The premises is a late night venue with recorded music until 0400hrs and closing hours of 0430hrs. The Licensing and Out of Hours team (LOOH) have serious concerns that the proposed changes have the potential to impact on the Prevention of Public Nuisance Licensing objective. It is also in the opinion of the LOOH that the proposed changes are substantial and wouldn't warrant a minor variation but a full variation application.

LOOH have received a significant number of noise complaints from residents affected by noise emanating from Fifth dating back to 2006.

The applicant has provided limited information in support of the application, the information provided from the architect provides some detail regarding the intended removal of sound barriers, however LOOH have concerns that no

information has been provided detailing what will replace the existing sound barriers, or that robust sound testing has been undertaken to ensure that transference of noise through the structure of the building will be mitigated.

In accordance with Section 4 of the Minor Variation notes for guidance, it is advised that an applicant includes how these changes will not adversely impact on the Prevention of Public Nuisance licensing objective.

LOOH believe that the proposed changes are substantial and would ask that consideration is given to paragraph 8.62 of Section 182 guidance issued under the Licensing Act 2003. It should be noted that paragraph 8.62 of Section 182 guidance provides that:

Changes to layout should be referred to the full variation process if they could potentially have an adverse impact on the promotion of the licensing objectives, for example by:

- impeding the effective operation of a noise reduction measure such as an acoustic lobby.

With an extended history of noise complaints connected to this premises and due to the lack of information provided to how these changes will not adversely impact on the Prevention of Public Nuisance licensing objective, Licensing and Out of Hours recommend that the application is refused.

Recommendation:

Refuse Application



**Licensing & Out of Hours Compliance Team - Representation**

Name	Gary Cook
Job Title	Neighbourhood Compliance Officer
Department	Licensing and Out of Hours Compliance Team
Address	Level 1, Town Hall Extension, Manchester, M60 2LA
Email Address	g.cook@manchester.gov.uk
Telephone Number	0161 234 1220

**Premise Details**

Application Ref No	MAU232876
Name of Premises	Fifth
Address	121 Princess Street, Manchester, M1 7AN

**Representation**

Outline your representation regarding the above application below. This representation should describe the likely effect of the grant of the licence/certificate on the licensing objectives and on the vicinity of the premises.

The application seeks to make internal changes to the layout on the basement and mezzanine floors of the premises and includes a proposed updated plan attached to the application.

The proposed changes within the bunker area of the basement include the relocation of a DJ booth from the mezzanine floor to the basement floor, with the removal of the mezzanine flooring where the DJ booth is currently situated.

Also proposed within the bunker area are amendments to the shape of the bar with the addition of a seating area. Movement of internal walls, doors being expanded to form wider openings and removal of existing double doors in the bunker.

The proposed changes within the "CLUB" area include amendments to the bar area, with the removal of store rooms, internal walls and a goods lift shaft to incorporate a new seating area. The movement of a DJ Booth near the Granby Row exits which include alterations to the layout of internal walls.

Fifth is situated within the basement of 121 Princess Street with residential properties directly above. The premises is a late night venue with recorded music until 0400hrs and closing hours of 0430hrs. Licensing and Out of Hours (LOOH) have serious concerns that the proposed changes have the potential to impact on the Public Nuisance Licensing objective. It is also in the opinion of the Licensing and Out of Hours team that the proposed changes are substantial and wouldn't warrant a minor variation but a full variation application.

LOOH have received a significant amount of noise complaints from residents affected by noise emanating from Fifth dating back to 2006. On Tuesday 20<sup>th</sup> March 2019, [REDACTED]

██████████ in response to a complaint reporting loud music emanating from the premises Fifth. Officers carried out an assessment within the complainant's property and observed excessive loud music and penetrating bass. As a consequence a statutory nuisance was witnessed and subsequently abatement notices under Section 80 of the Environmental Protection Act 1990 were served upon the Premises Licence Holder, 5th Leisure Limited and the Designated Premises Supervisor Mr. Daniel James Johnston.

Whilst the applicant has provided some information in support of the application this is limited to the proposed changes to a DJ booth. No mention is made to any of the other proposed changes to the internal layout. In accordance with Section 4 of the Minor Variation notes for guidance, it is advised that an applicant includes how these changes will not adversely impact on the Prevention of Public Nuisance licensing objective.

LOOH feel that the proposed changes are substantial and would ask that consideration is given to paragraph 8.62 of Section 182 guidance issued under the Licensing Act 2003.

With an existing abatement notice in force and for the aforementioned reasons LOOH recommend that the application is refused.

Recommendation:

Refuse Application

5<sup>th</sup> Leisure Limited  
Oakland House,  
21 Hope Carr Road,  
Leigh,  
Lancashire  
WN7 3ET

19<sup>th</sup> August 2020

FAO: As per email distribution

**Re: 121 Princess Street, Manchester – Nightclub Noise Level Surveys**

This letter provides the results of a series of 3no noise survey measurements in a first floor apartment [REDACTED] in the Dwell student accommodation at 121 Princess Street. The purpose of the measurements was to determine whether 1) internal layout changes and 2) removal of acoustic mitigation that was not part of the ‘approved scheme’ for the new apartments above, have changed the sound insulation performance between the basement nightclub uses and the first floor apartments. It was considered necessary to carry out these confirmatory measurements prior to the scheduled witnessed testing in the Dwell apartments, due to take place on 28 August 2020.

The test dates and internal nightclub conditions are summarised in table 1.

**Table 1: Test dates and associated internal conditions**

Test no	Date	Nightclub condition	Description
1	26/11/2019	Baseline	Existing layout (pre-covid shutdown)
2	29/06/2020	Opening up	Partial removal of mezzanine floor and non-acoustic stud partitions. Removal of separating wall between Main Club and Bunker.
3	12/08/2020	Removal of mitigation	Lift shaft enclosure; column linings, and; speaker isolating gantry removed.

Results

**Test 1 - Baseline**

The baseline noise level measurements are shown in Table 2.

**Table 2: Test 1 survey levels**

**Test 1 (Baseline)**

**Main club & Bunker**

Location	Source/Receiver	LAeq,T	Leq,T,63Hz	Leq,T,125Hz
Main club and Bunker (sweep)	Source	102.0	117.3	109.6
Main club (sweep)	Source	104.1	120.0	112.9
Bunker (sweep)	Source	99.7	111.4	102.4
1F Apartment (sweep middle)	Receiver	36.3	58.2	50.6
1F Apartment (sweep façade)	Receiver	37.1	59.3	50.9
1F Apartment P1 (static)	Receiver	41.1	64.0	54.8
1F Apartment P2 (static)	Receiver	35.8	60.2	50.1
1F Apartment P3 (static)	Receiver	36.8	61.7	44.0
P1 - P3 average (static)	Receiver	38.5	62.2	51.5
		Criteria ≤	47	41
		sweep exceedance	11.2	9.6
		static exceedance	15.2	10.5
		max. exceedance	17.0	13.8

**Test 2 - Opening Up**

The noise level measurements undertaken after the opening up works are shown in Table 3.

**Table 3: Test 2 survey levels**

**Test 2 (Opening Up)**

**Main club & Bunker**

Location	Source/Receiver	LAeq,T	Leq,T,63Hz	Leq,T,125Hz
Main club and Bunker (sweep)	Source	102.0	118.2	111.2
Main club and Bunker (sweep)	Source	100.7	117.3	109.7
Main club and Bunker (sweep)	Source	99.6	115.5	108.1
Main club and Bunker (sweep)	Source	101.5	118.3	110.9
log avg.	Source	101.0	117.4	110.1
diff. Test 1	Source	-1.0	+0.1	+0.5
1F Apartment (sweep middle)	Receiver	40.2	60.1	53.9
1F Apartment P1 (static)	Receiver	36.0	58.6	49.3
1F Apartment P2 (static)	Receiver	42.0	60.9	52.6
1F Apartment P3 (static)	Receiver	39.7	60.4	53.0
1F Apartment P4 (static)	Receiver	40.0	61.1	54.2
1F Apartment P5 (static)	Receiver	37.3	60.9	51.0
P1 - P5 average (static)	Receiver	39.5	60.5	52.3
		Criteria ≤	47	41
		sweep exceedance (normalized)	13.0	12.5
		sweep change from baseline	+1.8	+2.9
		static exceedance (normalized)	13.4	10.8
		static change from baseline	-1.8	+0.3
		max. exceedance (normalized)	14.0	12.8
		max. exceedance change from baseline	-3.0	-1.0
		<b>mean average change from baseline</b>	<b>-1.0</b>	<b>+0.7</b>

The results of test 2 show that the average change from baseline noise levels in 1F is negligible (-1 dB at 63 Hz and +0.7 dB at 125 Hz). These relatively small changes are within the tolerance of variation expected due to separate test undertakings. The results indicate that internal works undertaken to open up the basement have had no significant effect on the sound insulation provided to the first floor apartments.

### Test 3 – Removal of Mitigation

The noise level measurements undertaken after the removal of the mitigation within the nightclub are shown in Table 4.

**Table 4: Test 3 survey levels**

<b>Test 3 (Removal of Mitigation)</b>				
<b>Main club &amp; Bunker</b>				
<b>Location</b>	<b>Source/Receiver</b>	<b>L<sub>Aeq,T</sub></b>	<b>Leq,T,63Hz</b>	<b>Leq,T,125Hz</b>
Main club and Bunker (main sweep)	Source	103.3	117.8	117.0
Main club and Bunker (bunker sweep)	Source	100.6	118.9	110.9
log avg.	Source	102.2	118.4	115.0
diff. Test 1	Source	0.2	1.1	5.3
1F Apartment (sweep middle)	Receiver	43.1	65.6	58.7
1F Apartment (sweep façade)	Receiver	43.2	67.9	57.8
1F Apartment sweep average	Receiver	43.2	66.9	58.3
		Criteria ≤	47	41
		sweep exceedance (normalized)	18.8	11.9
		sweep change from baseline	+7.6	+2.3
		static exceedance (normalized)	-	-
		static change from baseline	-	-
		max. exceedance (normalized)	19.8	12.3
		max. exceedance change from baseline	+2.8	-1.5
		<b>mean average change from baseline</b>	<b>+5.2</b>	<b>+0.4</b>

The results of test 3 show that the average change from baseline noise levels in 1F has increased in the 63 Hz octave band (+5.2 dB), but has not changed significantly in the 125 Hz octave band. Unfortunately spot measurements were not undertaken during Test 3; however it is likely given the nature of spot measurements that higher maximum exceedances may have been measured using this method (as well as lower levels), because sweep measurements are inherently an averaging procedure. This would increase the average change from baseline further than indicated. It is likely that the removal of the mitigation works has resulted in an increase in low frequency noise levels in 1F. This would be in keeping with the Peak Acoustics statement that the nightclub mitigation works did reduce noise levels in the apartments – though they did not report any figures to clarify the extent of such change.

Yours sincerely

[Redacted Signature]

[Redacted Name]

[Redacted Title]

For and on behalf of Miller Goodall Ltd.



# The agent of change tiger bites

Councils are increasingly rejecting development proposals that would probably have threatened the future operation of hospitality venues, as **Sarah Clover** explains

The agent of change principle is starting to bite. The concept (reinforced in the National Planning Policy Framework in para 182 in 2012) is designed to address the situation where new residential development is proposed near to hospitality venues and night-time economy sources of noise. Any resulting conflict between incoming residents and established noise-makers has typically been played out in enforcement proceedings many years later. The agent of change principle was intended to front-load the debate and mediate the outcome before it ever happens, and it is being seen, in one case after another, to be doing exactly that, with some surprising results in favour of licensed venues. The three examples considered below are instructive.

## Wallingford Corn Exchange

In an appeal decision on 8 January 2021, the planning inspector upheld the refusal of South Oxfordshire District Council to grant planning permission. The developer sought to demolish parts of the building next door to the Corn Exchange in Wallingford, which is a charity volunteer-run theatre and cinema, in order to build eight flats. Both buildings were listed, but the effect of the development upon the heritage assets and the conservation area came second to the inspector's conclusions about the effect upon the living conditions of future occupants of the flats from noise and disturbance. And here, the inspector's key concern was whether potential future complaints from the proposed flats would jeopardise use of the Corn Exchange.

The council has policies in its local plan which seek to avoid adverse effects from sources of pollution, including noise, and requires that development should be appropriate for its location and offer realistic potential for appropriate mitigation of any effects.

The inspector noted that para 180 of the NPPF is also clear that developments should mitigate and reduce to a minimum the potential adverse impacts arising from noise from new development to avoid noise giving rise to significant adverse impacts on health and quality of life.

The inspector noted:

*46. Paragraph 182 also makes clear that decisions should integrate effectively with existing businesses and where the operation of an existing business could have a significant adverse effect on new development, the applicant (or 'agent of change') should provide suitable mitigation before the development is completed.*

*47. Planning Practice Guidance (PPG) sets out further detailed guidance, including relating to the agent of change principle. This includes taking into account current activities, but also those activities that businesses or other facilities are permitted to carry out, even if they are not occurring at the time of the application being made. The agent of change will also need to define clearly the mitigation being proposed to address any potential significant adverse effects that are identified. Adopting this approach may not prevent all complaints from the new residents/users about noise or other effects, but can help to achieve a satisfactory living or working environment, and help to mitigate the risk of a statutory nuisance being found.*

The inspector noted in particular that noise can constitute a statutory nuisance under the Environmental Protection Act 1990 and other relevant law. This includes noise affecting balconies and garden, where people are not shielded by any acoustic attenuation built into the fabric of their homes.

She said:

*50. Taking the above together, noise effects can be significant, causing harm to human health and wellbeing and can constitute a statutory nuisance which would necessitate enforcement action. It is therefore critical to assess the effects of noise and disturbance upon future occupants of the proposed development and the implications for the future use of the Corn Exchange.*

She was very careful to consider the situation of the Corn Exchange as a volunteer-run venue and an important community facility for Wallingford. It opened in 1978 as a 175-seat theatre and has won awards for its regeneration, for its work as an extensive voluntary organisation and

for promoting economic prosperity. It has a diverse offer, including pantomime, musicals and dramas. It is also used by other groups and professional shows, including ballet performances, bands, touring productions, stand-up comedy, local school performances and more.

She took great note of the specification of the Corn Exchange's PA system and cinema-sound system, as well as the types of systems imported for use in live music or theatrical shows, and all the attendant acoustic musical noise as well, such as from drum kits.

There were no restrictions on the operations of the Corn Exchange, either in planning terms or in its premises licence under the Licensing Act 2003. The permitted hours extended to midnight through the week and to 01:00 at weekends, with no specific restrictions on noise levels.

There had been no record of noise complaints, and although the occupants of the flat above the Corn Exchange provided evidence to the inspector that noise levels from performances are audible on the roof terrace, they were prepared to accept the limited disturbance it caused them. There were no objections to the grant of permission from the environmental health department of the council.

The importance of the Corn Exchange to the local community in terms of its social and economic benefits was a key issue, and was largely agreed between parties. The inspector said: "It follows therefore that its use should not be prejudiced by the proposed development because of noise and disturbance."

Detailed noise assessments took place at the Corn Exchange and the appeal site. There was significant debate between the acoustic experts about the accuracy and implications of the noise readings, with argument as to what the "typical" and "exceptional" or "occasional" operating conditions were. The inspector noted:

*60. However, broad agreement was reached in terms of the noise disturbance primarily arising from the lower frequency octave bands. In addition, it was agreed that internal design criteria for music noise levels in the proposed units to be achieved are 40 dB L<sub>zeq</sub>, 1min in the 63Hz octave band and 30 dB L<sub>zeq</sub>, 1min in the 125Hz octave band with a relaxation of 5 dB for non-habitable rooms.*

The inspector found that due to the juxtaposition of the Corn Exchange and the proposed flats, noise effects on future occupants would be likely to be as a result of structure-borne transmission through the wall of the proposed development.

Acoustic enhancements were proposed as part of the revised layout design and internal room layouts sought to minimise habitable rooms along the flanking wall where possible. However, the inspector was not persuaded that the technical detail provided within the mitigation strategy, as reflected in the plans, could realistically be achieved at the site, and even on the appellant's more favourable noise measurements and assumptions, she was not persuaded that the mitigation was realistic.

The appellants proposed a Grampian condition, which would prohibit development until suitable noise mitigation had been secured, and they were prepared to accept the associated risk. But the inspector was not happy with that either because she said that there were so many unknowns, even at the time of the inquiry, that she could not be confident that conditions in the future could resolve the problems.

She said:

*68. Overall, based on the above, there would be a significant risk of harm to future occupants from noise due to uncertainties around the effects and mitigation which could not reasonably be conditioned.*

The inspector noted that the operations at the Corn Exchange as an important community asset are unrestricted, and that this was even in the context that some noise and disturbance effects were already experienced in the locality, as evidenced in the flat above. It is interesting that there was no comment or criticism about that. Developers will sometimes argue that there should be licence limitations on the premises to avoid noise breakout. This was the case in *Crosby Homes (Special Projects) Limited v Birmingham City Council & The Nightingale Club*, Birmingham Magistrates' Court [District Judge Zara, 2008]. The district judge was not persuaded by the developer in that case, in similar circumstances, that any controls should be imposed upon the night club.

The inspector said she had "considerable concern as to the effects on future occupants of the development from structure-borne noise and there is significant doubt as to whether the effects can be realistically mitigated."

Her conclusion is particularly notable:

*76. Adopting a precautionary approach, I therefore consider that there is a significant risk of harm to future occupants from noise and disturbance and thus the development would not provide satisfactory living conditions. Accordingly, the development could also compromise the Corn Exchange as an established*

## Agent of change tiger bites

*entertainment venue as there could be significant potential for future residents to complain in light of my findings". [Emphasis added.]*

It is important to note that the Corn Exchange was separately represented at the inquiry under Rule 6 of the Inquiries Procedure Rules. This intervention by venues can be crucial to ensure that the venue's interests are properly protected.

### 1000 Trades

This situation was mirrored in the case of 1000 Trades, a live music venue in the Jewellery Quarter in Birmingham, in 2019. The venue's operator also instructed specialist counsel to represent them at a planning inquiry and to invoke the agent of change principle to resist the conversion of the office block next door to them into residential development. The council had historically confirmed prior approval for permitted development from office to residential at this site prior to 2016; this was at a time before the changes to permitted development required assessment of noise impact. The developer failed to implement in time and was required to seek prior approval again, post the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016. Local planning authorities were given the power under the Amendment Order 2016 to consider noise impacts concerning any permitted development.

When the developer re-applied, the council refused prior approval, and the developer appealed. At appeal, the developer claimed that their proposed mitigation works would protect their future residents, as well as the operation of the local licensed businesses. They claimed that the sound insulation would be adequate, and that, although the windows to the flats were intended to be openable, that residents would be sensible and keep them closed during times of high noise output from their musical neighbours.

The inspector disagreed. In his decision letter, he stated:

*The mitigation proposed is compromised by its reliance on the actions of a third party, namely the future occupiers, which is beyond the control of either the appellant (the developer seeking to build the flats) or the council, and, consequently, the proposal would not suitably address the effect of noise from nearby commercial premises on the future occupiers of the proposed development.*

This was entirely in line with the representations made on behalf of 1000 Trades which stated: "It is impossible to imagine a more catastrophic impact upon our business than moving from being the home of events like Birmingham Jazz

to closure. 1000 Trades is at risk of this outcome if the noise mitigation measures proposed in this appeal – a risk that we feel abstract modelling undertaken by consultants cannot adequately mitigate, given the propensity for 'real world' factors to intervene."

Central to these "real world" factors are how noise would have been experienced by occupants of the flats. If the planning system had allowed the flats to go ahead, 1000 Trades would have faced the perpetual risk of noise complaints, potentially leading to the licence being revoked and disastrous interference with the business, probably leading to closure.

### Flapper and Firkin

A slightly different but related issue was considered in a planning inquiry which was resolved on 2 September 2020, concerning the Flapper and Firkin, a pub and live music venue on Kingston Row in Birmingham. The venue had closed, and the council had refused to grant planning permission to the developer to convert it into 27 flats.

The inspector looked at various issues, including listed buildings and heritage assets, highway safety and the character and appearance of the area. None of these issues would have justified refusal, and the only issue which concerned him was the provision of community facilities, in particular live music venues. It is notable in this case that the premises were not even in current use - the premises had closed at the start of 2020 when the lease expired. This was not Covid related. None of this prevented the need to protect the building, and specifically its use as a live music venue.

The premises are situated on the canal, near to the city centre and while there are office buildings close by, the predominant use in the immediate vicinity is residential. So the character of the area already had a pronounced residential element to it, but this was not enough to undermine the protection afforded to the premises.

The music venue operated from a lower-ground-floor bar of the building and was exclusively used for live music. It had a capacity of 120 people with performances mainly taking place on Friday and Saturday nights. Prior to its closure, it functioned on a business model of the tenant operator working in association with band promoters, with a focus on amplified hard rock music.

Birmingham City Council's Development Plan contains planning policies which support the city's existing tourist and cultural facilities. The policies protect and promote smaller-scale venues and attractions that are an important part of creating a diverse offer. Policies also support a

diverse range of facilities and uses, including community uses and cultural facilities, and they require new residential development to be sympathetic to cultural assets, amongst other considerations.

Not all local authority development plans will have such specific policies protecting community and cultural venues, and this is something which should be considered. Specific and integrated policies which link with the licensing and environmental protection regimes are part of the "joined up thinking" which is strongly advocated. See for example, the s 182 Guidance para 14.65 which advises:

*Proper integration be assured by licensing committees, where appropriate, providing regular reports to the planning committee.*

This inspector in this case also noted that para 92 of the National Planning Policy Framework similarly supports community facilities and guards against the unnecessary loss of valued facilities and services, particularly where this would reduce the community's ability to meet its day-to-day needs.

The appellant's main justification for the loss of the music venue was the number of alternative similar facilities. The appellant submitted evidence from surveyors highlighting the alternative premises for the presentation of live music in order to make the case that the loss of the appeal property would not be unreasonably detrimental. The reports identified premises located throughout Birmingham, recognising that the visiting public to such premises will not be restricted to local residents.

The inspector pointed out, however, that it was unclear whether those venues would actually be able to accommodate what would be displaced live music performances that would have taken place at the appeal property. The inspector was not persuaded that there would be sufficient music venues if the Flapper was lost to a different use. If the venue was not deemed, in effect, "surplus" to the provision of music venues, then its loss would be detrimental to such community facilities as it would limit their range. This was an important observation by the inspector that music venues are not interchangeable – it is not just a numbers game.

There was an argument as to whether the premises were viable anyway. The appellant did not claim that the Flapper, when it was trading, was struggling financially. The inspector was less interested in the market and economic arguments

about the premises than in considerations of its value to the community and whether its loss was acceptable in principle. He was concerned that, once lost, it would be difficult to retrieve, and he considered that the policies were not so much about the protection of facilities on an individual case by case basis, but more about the protection and promotion of smaller-scale venues and guarding against unnecessary loss. He said "a strong level of protection is afforded", and that it was ultimately a matter for the decision maker.

The inspector also had to consider what planning benefits the proposed development of residential flats would offer, and he found that there were benefits, including the increase of housing provision and a contribution towards the Government's objective of significantly boosting the supply of homes, as well as aiding housing mix and balanced communities, and other benefits as well. These were not insignificant matters, and they had to be weighed in the balance, but they were not enough to overcome the single harm identified - namely loss of the venue itself. The inspector said:

*48. In relation to the harm that arises, this concerns the provision of community facilities and, in particular live music venues. It would result in the loss of what can be considered to be a valued community facility. The venues for live music performances would be diminished and the evidence is not of a sufficient strength to demonstrate that such a loss can be satisfactorily justified. This attracts significant weight in my decision and counts against the proposal. Set against this would be the benefits that I have set out. The weight to be attached to the benefit to housing land supply would be moderate. All other benefits carry limited weight. In taking these considerations together, the harm would not be outweighed by the benefits.*

### Conclusion

Other similar cases are currently under consideration, and the trend emerging is that councils are getting bolder in refusing residential development in circumstances where music and other licensed community facilities would be negatively impacted, even where more housing would be of benefit. The agent of change tiger is turning out to have teeth after all.

**Sarah Clover**

*Barrister, Kings Chambers*



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## Appeal Decision

Hearing Held on 21 January 2020 and 29 April 2021

Site visit made on 5 May 2021

**by Thomas Hatfield BA (Hons) MA MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 24<sup>th</sup> May 2021**

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### **Appeal Ref: APP/B4215/W/19/3232722** **121 Princess Street, Manchester, M1 7AG**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of approval subject to conditions.
- The appeal is made by Beech Holdings (Manchester) Limited against the decision of Manchester City Council.
- The application Ref 121754/JO/2018, dated 2 November 2018, was approved on 7 June 2019 and approval was granted subject to conditions.
- The development permitted is prior notification of change of use from offices (Class B1) for change of use to 126 apartments (use class C3) comprising 100 studios, 25 x 1 bed, and 1 x 2 bed.
- The condition in dispute is No 2 which states that:
  - (2) (a) *Within 4 weeks of the date of this decision, a scheme for acoustically insulating the residential dwellings hereby permitted against any actual or potential sources of noise from any commercial/industrial premises in the vicinity of the development (including in particular entertainment noise from the lawful operation of the nightclub in the basement of the premises and the potential entertainment noise from the permitted use of the currently-vacant ground floor of the premises) shall be submitted to the local planning authority in writing for its written approval. The scheme shall:
    - (i) provide details of the acoustic insulation already installed in the development,
    - (ii) demonstrate whether and, if so, how the acoustic insulation installed in the development achieves the following noise criteria in respect of all apartments hereby permitted:
      - Bedrooms (night time - 23.00 - 07.00): 30 dB LAeq (individual noise events shall not exceed 45 dB L<sub>Amax,F</sub> by more than 15 times)
      - Living Rooms (daytime - 07.00 - 23.00) 35 dB LAeq
      - Gardens, balconies and terraces (daytime) 55 dB LAeq
      - in respect of the entertainment noise from the basement and ground floor premises, noise levels in the 63Hz and 125Hz octave centre frequency bands do not exceed 47dB and 41dB, respectively in habitable rooms, measured at 5 minute intervals over both the daytime and night time periods set out above.
    - (iii) where the existing acoustic insulation does not achieve all of the noise criteria stated above, the scheme must provide details of the further acoustic insulation to be provided or other measures to be taken and shall demonstrate that the further insulation or measures would achieve compliance with each of the noise criteria specified above. The scheme must also specify a timetable for the carrying out of such further measures;
    - (iv) Where additional works or measures are required, the scheme shall include for the local planning authority's approval details of the sound testing and other steps which will be taken to ascertain whether the works or measures have achieved*

*compliance with the criteria set out in part (a) of this condition and which will form part of the verification report referred to below.*

*Where further acoustic insulation or other measures are required and set out in the scheme, that further insulation shall be installed and/or those measures shall be taken within the timescale approved by the local planning authority.*

*(b) Within 4 weeks of the completion of the further insulation works or other measures detailed in the approved scheme for acoustic insulation, a further report (the "verification report") shall be submitted to the local planning authority for approval. The verification report must accord with the details approved by the local planning authority and must demonstrate:*

*(i) That the further acoustic insulation or other measures have been installed or taken, that they have been tested and whether they achieve the internal noise criteria set out above, and*

*(ii) If the verification report does not demonstrate that the noise criteria specified above can be met, the report shall include details of the further works or measures to be taken ("the remedial works") to achieve compliance with the noise criteria specified above, together with a timetable for their carrying out. The remedial works shall be carried out in accordance with the approved timetable and the requirements of part (b) of this condition shall apply to the remedial works and any subsequent requirement for further remedial works.*

*(c) The acoustic insulation and any other measures forming part of the approved scheme or schemes and any verification report shall be retained in situ for as long as the use hereby permitted continues.*

*(d) In the event that the developer fails to comply with any of its obligations under this condition, then the occupation of any apartment hereby permitted shall cease within 4 weeks of the local planning authority confirming in writing that such a failure has occurred and no apartment shall be re-occupied until the local planning authority has confirmed in writing that any failure to comply with this condition has been remedied.*

- The reason given for the condition is:

*(2) To secure a reduction in noise from commercial and entertainment sources in order to protect residents from noise disturbance pursuant to Core Strategy Policies DM1 and SP1 and saved UPD Policy DC26.*

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## **Decision**

1. The appeal is allowed and approval Ref 121754/JO/2018 for prior notification of change of use from offices (Class B1) for change of use to 126 apartments (use class C3) comprising 100 studios, 25 x 1 bed, and 1 x 2 bed at 121 Princess Street, Manchester, M1 7AG granted on 7 June 2019 by Manchester City Council, is varied by deleting condition 2 and substituting for it the condition set out in the attached schedule.

## **Preliminary Matters**

2. A structural survey and a programme of noise testing were jointly commissioned during the course of the appeal. The structural survey found that the installed noise mitigation scheme differed significantly in its design from the one that had previously been approved<sup>1</sup> by the Council.
3. A series of legal and technical submissions were made by the parties in the appeal submissions. However, prior to the reconvened hearing, the appellant

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<sup>1</sup> Ref CDN/17/0080



withdrew its contention that I had no jurisdiction to hear the appeal, and its challenge to the imposition of condition 2 in principle. I have therefore not considered these matters in any further detail.

### **Background and Main Issue**

4. Prior approval<sup>2</sup> to convert the appeal building to apartments under Schedule 2, Part 3, Class O of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) was granted on 22 November 2016, subject to conditions. Condition 3 of that approval required a scheme of acoustic insulation to be submitted and approved by the Council and installed prior to the occupation of the development. Subsequently, the Council approved an application<sup>3</sup> under s73A of the Town and Country Planning Act 1990 (as amended) to vary Condition 3 to the original Class O consent, to which the disputed condition is attached.
5. The appeal seeks to alter a number of elements of the condition. In that context, the main issue is whether the disputed condition is reasonable and necessary having regard to the living conditions of occupiers of the development, and the operation of existing businesses.

### **Reasons**

6. The disputed condition requires a supplemental scheme of acoustic insulation to be submitted for approval within 4 weeks. At the hearing, the Council stated that this timescale was based on its Officer's experience in dealing with other schemes across the City. However, this case is unusual in that a supplemental scheme is to be retrospectively installed alongside an existing acoustic scheme within the building. It is therefore doubtful whether the current proposal is directly comparable to other schemes in Manchester.
7. At the hearing, the Appellant stated that they had sought specialist advice which indicated that further intrusive investigations of the building would be necessary before a supplemental scheme could be designed. In this regard, the jointly commissioned structural survey was not intended to explore the possibility of installing a new acoustic insulation scheme, and so I accept that further investigations are likely to be required. In my view, 4 weeks would be insufficient for these investigations to take place and for a supplemental scheme to be drawn up. The Appellant also stated that they had been advised that 16 weeks would be required for this to take place. Whilst Fifth Leisure suggested that this timescale be reduced to 12 weeks, that was not based on any detailed analysis. The specialist advice sought by the Appellant is not before me, and each of the options put forward are imperfectly evidenced. However, based on the information before me, I consider that a 16 week timescale is the most reasonable approach.
8. The disputed condition does not specify a timescale for installing the supplemental scheme, and it instead requires that a timescale be submitted for approval. This timescale will clearly depend on the nature of the proposed scheme and the works that are required in order to install it. In this regard, I do not consider that the condition should specify a timescale of 6 months for installation, as this would inevitably become the default position. In my view, any timescale should be the minimum necessary for that design.

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<sup>2</sup> Ref 114023/P3OPA/2016

<sup>3</sup> Ref 121754/JO/2018

9. The timescale for submitting the verification report is currently specified as being within 4 weeks of the completion of the supplemental scheme. At the hearing, the appellant confirmed that this would be achievable if co-operation from Fifth Leisure was forthcoming, although an extension to 8 weeks was requested in order to provide greater flexibility. In this regard, I note that Fifth Leisure has already co-operated on the joint testing that has taken place, and it is clearly in its interest to resolve matters as quickly as possible. Accordingly, I do not consider that this timescale should be extended.
10. The disputed condition requires the occupation of all apartments to cease within 4 weeks of the Council confirming in writing that a failure to comply with any part of the condition has occurred. The appellant suggested that this be amended so that it would apply only to those apartments that were not in compliance. This amendment would ensure that any sanction is proportionate and only applied to the affected apartments rather than to the whole scheme.
11. In its submissions, Fifth Leisure stated that the disputed condition should be amended to require all apartments to be vacated within 6 weeks, with re-occupation only permitted once the verification report is approved. In this regard, were the existing situation to continue for a significant period of time, then it could lead to an abatement notice being served on the nightclub, and / or a significant loss of earnings.
12. The existing situation is clearly unsatisfactory, as has been confirmed by the jointly commissioned noise testing. However, the amendment suggested by Fifth Leisure would have significant implications for the current occupiers of the apartments. In this regard, the existing tenancy agreements are not before me and it is unclear what, if any, re-housing arrangements exist. Whilst the disputed condition currently requires the apartments to be vacated within 4 weeks in the event of any non-compliance, that would only be triggered if the condition was not adhered to. In contrast, the proposed amendment would require the building to be vacated within 6 weeks, which could render the current occupiers homeless under all circumstances. This would be disproportionate in my view, particularly given that a middle position exists to compress the timescales proposed by the appellant so that the current situation is resolved promptly.
13. Separately, the Appellant suggested that the disputed condition be amended to allow for alternative timescales to be agreed with the Council. However, given the need to resolve the existing situation, I prefer the greater certainty provided by clear timescales.
14. During the course of the appeal, details of the acoustic insulation that had previously been installed were provided as part of the joint structural survey. Moreover, jointly commissioned noise testing in relation to the installed scheme of acoustic insulation was undertaken. Accordingly, it is unnecessary for the condition to require these matters to be revisited.
15. The disputed condition also specifies noise criteria in relation to gardens, balconies, and terraces. However, the appeal proposal does not contain any such features, and so this requirement is unnecessary.



**Conclusion**

16. For the reasons given above I conclude that the appeal should succeed. I will vary the approval by deleting the disputed condition and substituting another.

*Thomas Hatfield*

INSPECTOR

## Schedule of Conditions

- 2) (a) Within 16 weeks of the date of this decision, a supplemental scheme for acoustically insulating the residential dwellings hereby permitted against any actual or potential sources of noise from any existing commercial/industrial premises in the vicinity of the development (including in particular entertainment noise from the lawful operation of the nightclub in the basement of the premises and the potential entertainment noise from the permitted use of the currently-vacant ground floor of the premises) shall be submitted to the Local Planning Authority in writing for its written approval. The scheme shall:
- (i) demonstrate how the acoustic insulation to be installed in the development will achieve the following noise criteria in respect of all apartments hereby permitted:
    - Bedrooms (night time - 23.00 - 07.00): 30 dB LAeq (individual noise events shall not exceed 45 dB L<sub>Amax,F</sub> by more than 15 times)
    - Living Rooms (daytime - 07.00 - 23.00) 35 dB LAeq
    - in respect of the entertainment noise from the basement and ground floor premises, noise levels in the 63Hz and 125Hz octave centre frequency bands do not exceed 47dB and 41dB, respectively in habitable rooms, measured at 5 minute intervals over both the daytime and night time periods set out above;
  - (ii) include details of the sound testing and other steps which will be taken to ascertain whether the works or measures have achieved compliance with the criteria set out in part (a) of this condition and which will form part of the verification report referred to below;
  - (iii) specify a timetable for the carrying out of such measures.
- (b) The supplemental acoustic insulation scheme approved by the Local Planning Authority shall be installed in accordance with the approved timetable.
- (c) Within 4 weeks of the completion of the approved supplemental acoustic insulation scheme, a further report (the "verification report") shall be submitted to the Local Planning Authority for their written approval. The verification report must accord with the details approved by the Local Planning Authority and must demonstrate:
- (i) That the further acoustic insulation or other measures have been installed or taken, that they have been tested and whether they achieve the internal noise criteria set out above, and;
  - (ii) If the verification report does not demonstrate that the noise criteria specified above can be met, the report shall include details of the further works or measures to be taken ("the remedial works") to achieve compliance with the noise criteria specified above, together with a timetable for their carrying out. The remedial works shall be carried out in accordance with the approved

timetable and the requirements of part (c) of this condition shall apply to the remedial works and any subsequent requirement for further remedial works.

(d) The acoustic insulation and any other measures forming part of the approved scheme or schemes and any verification report shall be retained in situ for as long as the use hereby permitted continues.

(e) If any obligations under this condition are not complied with in respect of the permitted apartments then the occupation of any apartment (or apartments) in respect of which there is non-compliance shall cease within 4 weeks of the Local Planning Authority confirming in writing that such a failure has occurred and no such apartment shall be re-occupied until the Local Planning Authority has confirmed in writing that any failure to comply with this condition has been remedied.

**APPEARANCES**

FOR THE APPELLANT:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

FOR THE LOCAL PLANNING AUTHORITY:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

FOR FIFTH LESIURE:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**DOCUMENTS SUBMITTED AT THE HEARING**

- 1 Fifth Leisure Response to Appellant’s Position Statement

## Chloe Tomlinson

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**From:** [REDACTED]  
**Sent:** 18 June 2021 19:12  
**To:** Anthony Horne  
**Subject:** Fwd: Re Objection to Licence Variation Application 5th Leisure

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Sent from my iPhone regards [REDACTED]

Begin forwarded message:

**From:** [REDACTED]  
**Date:** 18 June 2021 at 17:11:20 BST  
**To:** Gary Cook <gary.cook@manchester.gov.uk>  
**Subject:** Re: Re Objection to Licence Variation Application 5th Leisure

Hi,

The part of the report you were referring to is the removal of the mitigation works that Beech undertook in the club and resulted in increased levels, Robert Irvine requested this to be removed before sound testing for the planning appeal, section 3 results have no relevance to our layout changes so you must disregard and focus on section 2.

Regards [REDACTED]

Sent from my iPad

On 18 Jun 2021, at 16:08, Gary Cook <gary.cook@manchester.gov.uk> wrote:

Hello [REDACTED]

The report was attached to the below email, thank you.

Kind regards,  
Gary Cook

Licensing & Out of Hours Compliance - City Centre  
The Neighbourhoods Service  
Growth and Neighbourhoods Directorate

**Direct:** 0161 234 1220 | **Contact Centre:** 0161 234 5004

**Web:** [www.manchester.gov.uk](http://www.manchester.gov.uk)

**Postal Address:** Manchester City Council, PO Box 532, Town Hall, Manchester, M60 2LA

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**From:** [REDACTED]  
**Sent:** 09 June 2021 09:21  
**To:** Gary Cook <gary.cook@manchester.gov.uk>  
**Cc:** [REDACTED]  
**Subject:** FW: Re Objection to Licence Variation Application 5th Leisure

Morning Gary

Please see email below sent to [REDACTED] (Dwell/Centurion) for the attention of [REDACTED] from Centurion who has raised an objection to the planning variation. Also please could you respond to the email sent on 4.6.21 and also let me know if you've managed to look at dates and times for your visit to the club.

Many thanks

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** 09 June 2021 09:15  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** Re Objection to Licence Variation Application 5th Leisure

Good Morning [REDACTED]

We have received details of your objection to the licence variation application submitted by ourselves to Manchester City Council (application ref 258343/CT4). As it is seen as good practice in these situations to deal with any interested party concerns directly in the first instance, I will respond to each of your concerns in turn.

1. Alterations risk increasing the escape of noise from the premises into the apartments located above.  
We have never had any sound proofing insulation installed within the club premises to prevent noise transfer by either airborne or structural borne sound into the upper floors.
2. Removal of the mezzanine floor – concern regarding the risk of increasing the escape of noise to the apartments above.  
The attached report 121 Princess St Survey Works was sent to your solicitors Town Legal on the 28.8.2020 (see attached) and clearly shows that the sound testing carried out before and after the removal of the mezzanine floor would have no significant effect on the sound

insulation to the apartments on the first floor. This clearly addresses your concern on this major point.

3. The applicant has not liaised with us regarding the alterations Centurions' solicitors and [REDACTED] have been fully aware of the alterations since approx. August 2020, furthermore [REDACTED] met with [REDACTED], your structural engineer, and your acoustic representative on Thursday 20<sup>th</sup> May. All of whom accessed the basement and ground floor areas. We continue to be in contact with [REDACTED] and he has our full team contact details.
4. Escape of noise from the premises.  
During numerous visits over the years from Environmental Health Officers investigating noise complaints from residence of the apartments, we have never received any comments or concerns from the officers regarding street noise. The alterations would only serve to further reduce any potential noise escape by careful design.
  - i. Fire exit staircase to Granby Row shared with the upper floors will be improved by a wide sound blocked passage way with doors located further away from the staircase.
  - ii. Currently the main entrance door has a staircase leading directly to the centre of club. The new layout has incorporated an extended corridor formed with sound block partitioning leading to a set of additional doors into a quiet area of the club.
  - iii. Stairs from basement to ground floor will be enclosed, although this is not a noise problem area the amendment will further reduce noise from basement to ground floor.
  - iv. Two final exit doors from the mezzanine floor will be removed and sound block storerooms formed will reduce breakout through the previous doors.

These changes strengthen our commitment to fulfilling the our licencing objective of noise control.

We have also provided the council with a statement from our Acoustic Consultants (attached) as supporting expert evidence

I hope the above goes someway to allaying any concerns you may have regarding the alterations and our commitment to prevention of public nuisance.

In the next few weeks we will be submitting a full layout variation to the licencing department for the ground floor bar 'Downtown' to be opened in due course once plans are approved. The attached plans show the current licence plan and the proposed plan, and the application will be supported with an acoustic statement.

Kind regards

[REDACTED]

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