



NORWICH
City Council

NORWICH CITY COUNCIL

NOTICE OF DETERMINATION

Date of Hearing: 13 January 2021 at 13.15hrs. Hearing held remotely under SI 2020 / 392

Application for review of a premises licence under the Licensing Act 2003

Address: Three Diamonds, 82 Upper Giles Street, Norwich, NR2 1LT

Applicant: Richard Divey, Public Protection Officer (Norwich City Council)

Members of the Licensing Sub-Committee: Councillor Ian Stutely (Chair), Councillor Jacob Huntley and Councillor Nanette Youssef.

Other persons attending committee: Michelle Bartram (Licensing Officer, Norfolk Constabulary); Police Constable Spinks (Norfolk Constabulary Safer Neighbourhood Policing Team); Mr Xhaferrllari (Director of Durres Foods Ltd and Designated Premises Supervisor of Three Diamonds); June Clarke (Licensing Consultant); Tony Clarke (Licensing Consultant); Tiffany Bentley Public Protection (Licensing) Team Leader (Norwich City Council), Lucy Palmer Democratic Team Leader (Norwich City Council); Sarah Moss, Solicitor, nplaw.

DETERMINATION

1. There were no apologies or declarations of interest.
2. The Chair of the Sub-Committee (Councillor Ian Stutely) confirmed to those present that with reference to Regulation 14 of the Licensing Act 2003 (Hearings) Regulations 2005 the public would be excluded from viewing the police bodycam footage as this contained video footage from which individuals and their personal information could be identified and could also relate to action taken or to be taken in connection with the prevention, investigation or prosecution of crime. Consequently, the public interest in excluding the public outweighed the public interest in that part of the hearing taking place in public. The live streaming of the hearing would be stopped before viewing of the bodycam footage and resumed after viewing was concluded; those viewing the footage would join a separate meeting specifically for that purpose, re-joining the main meeting when the viewing of the footage was concluded.
3. The Chair also confirmed that exemption of Appendix F of the Agenda papers would be maintained, Legal Advisor to the Sub-Committee, Sarah Moss,

confirming that the materials were considered to fall within categories 1, 2 and 7 of 'Exempt Information' listed in schedule 12A of the Local Government Act 1972.

4. The Public Protection (Licensing) Team Leader, Tiffany Bentley, presented the report. She also confirmed that the plan at page 25 of 46 submitted as part of a minor variation application on 2 December 2020 was not coloured, but that the two licensable areas at the front and back of the premises had not changed in size or location from the plan submitted with the original licence application.
5. At the start of the meeting, Ms Moss made the Sub-Committee aware of the amended Health Protection (Coronavirus, Restrictions) (England)(No.4) Regulations 2020 (in force on 5 November 2020), S15 of which required the person carrying on a restricted business (including restaurants, bars and public houses) to close any premises or part of premises in which food or drink are provided for consumption on those premises and cease providing food or drink for consumption on its premises.
6. The Sub-Committee was also made aware of amended Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place)(England) Regulations 2020 (in force 24 September 2020) requiring the wearing of masks in a relevant place (including restaurants, bars and public houses) and the updated version of the HM Government Guidance, 'Keeping Workers and Customers Safe in Covid-19 in Restaurants, Pubs, Bars and Takeaway Services', issued on 11th May 2020 and updated regularly, including on 9th November 2020. The above legislation and guidance had been issued to address the sharp rise in cases of coronavirus, which had already resulted in a significant number of deaths nationwide.
7. In addition, the Sub-Committee was also reminded of S136 of the Licensing Act 2003 and the criminal offence of carrying on or attempting to carry on a licensable activity on or from premises otherwise than under or in accordance with an authorisation.
8. Ms Moss advised the Sub-Committee in response to a question posed by the Chair, Ian Stutely, that although the licensing objective of the prevention of crime and disorder had been cited in Mr Divey's and the police's representations as the ground for the review application, it would be reasonable for the Sub-Committee to also consider the licensing objective of public safety. This was on the basis that the sole purpose of the coronavirus legislation (which Mr Divey and the police were alleging had been breached) was to protect public safety and promotion of the public safety licensing objective was therefore obviously of extreme importance.

Representation of Richard Divey

9. The Sub-Committee heard from Richard Divey, Public Protection Officer for Norwich City Council. He and PC Spinks had attended the premises on 10th November 2020 following reports of noise nuisance received from the public and that persons had been seen congregating at the rear of the property. They attended at around 12.50 in the afternoon and found three persons smoking outside the rear entrance. On entering the rear restaurant area of the premises via the rear door, they found it operating and a number of persons inside consuming food and drink, including alcohol. He and PC Spinks asked those present several times who was in charge. Mr Xhaferrllari, later established to be the company director of Durres Foods Ltd (the licence holder), came forward, identifying himself to be the person in charge. Following discussion with Mr Xhaferrllari, it appeared that the Designated Premises Supervisor (DPS), Mr Choudury, had indicated that he no longer wanted to hold this position and it was unclear, therefore, whether on the day of the inspection the DPS was aware of the sale or display of alcohol at the premises. The layout of the premises had also changed since the original grant of the premises, but no application to vary the licence to reflect this had been made at the time.
10. Mr Divey conceded that the issues with the DPS and plan had since been resolved and that a CCTV licence condition had also been agreed with the police. However, the breach of legislation in force at the time was extremely serious and clearly undermined the prevention of crime and disorder licensing objective in his opinion. Mr Divey suggested that the licence holder had failed in its responsibility to promote this licensing objective under paragraph 20.2 of the Council's Statement of Licensing Policy. He also suggested that the licence holder's deliberate breach of the legislation in force (resulting in the public being placed at risk) was so serious that it should be considered to be on the same level of seriousness as the offences listed under paragraph 20.3 of the Licensing Policy and also paragraph 11.27 of the S182 Statutory Guidance. In addition, the licence holder had clearly failed in providing effective and responsible management of the premises, listed as a control measure for the prevention of crime and disorder under paragraph 20.4. Consequently, revocation of the licence was requested.
11. In response to questions submitted by June Clarke, on behalf of the licence holder, as to evidence that a licensable activity had been taking place at the time of the visit, Mr Divey responded that he had not seen monetary transactions taking place or money exchanging hands. However, it was clear to him that the premises had been set up for trading and was doing so. There were alcoholic drinks on the table and being consumed, which appeared to have been provided by the premises, and alcohol was on display. In addition, there had been a woman located behind the bar and it would be 'perverse' to suggest that she was not there to sell alcohol.
12. In response to Ms Clarke's suggestion that a private function had been taking place, rather than a licensable activity, Mr Divey stated that the persons present had been seated at separate tables and wouldn't have left the premises so

quickly if they had been taking part in a private function. He confirmed that he hadn't known who the persons were and didn't ask, he had simply asked who was in charge and at that point people had started leaving the premises by all available exits.

13. Clarifying the position with regard to the DPS, Mr Divey stated that Mr Choudury had been listed as being in charge, but had made an attempt to resign. However, because he had made a mistake on the paperwork, the resignation had not taken place. He conceded that a DPS authorisation was in place on the 10th November, however, Mr Divey did not accept that Mr Choudury knew about the sale or display of alcohol.

Police Constable Spinks

14. The Sub-Committee heard from Police Constable Spinks from the Norfolk Constabulary's Community Safer Neighbourhood Policing Team. He confirmed Mr Divey's account of their visit and confirmed that on arrival at the premises they had asked who was in charge and that everyone had started immediately leaving by all exits, including doors marked 'staff'. Most people left immediately on Mr Divey's and PC Spink's arrival and by the end of their visit 20 minutes later, no one remained except Mr Xhaferrllari and his brother.
15. In response to questions from Michelle Bartram, Licensing Officer for Norfolk Constabulary, PC Spinks stated that it was not clear from the front of the premises that any activity was taking place as it appeared closed up. However, 3 persons were found at the rear of the premises smoking. Inside there appeared to be no social distancing taking place and no face coverings were being worn. Mr Xhaferrllari also didn't seem to be aware of any capacity restrictions in terms of fire safety and was not able to provide a fire risk assessment when asked for it by PC Spinks.

Representation of Michelle Bartram on behalf of the Norfolk Constabulary

16. The Sub-Committee heard from Michelle Bartram, Licensing Officer for Norfolk Constabulary. She confirmed that Durres Foods Ltd had only held a premises licence since November 2019 and Mr Xhaferrllari may be inexperienced, particularly in DPS matters. However, the restrictions in place from 5th November 2020 had been highly publicised and there had been great public and national knowledge of them. Many local operators had been working very hard to comply with them and were living in fear of falling short of compliance with the coronavirus legislation.
17. Since 10th November, the licence holder had applied to vary the licence and submitted a revised plan reflecting the change in layout. Mr Xhaferrllari had applied to be the DPS, which application had not been objected to by the police and he was now responsible for the day-to-day running of the premises. A condition had been added to the licence requiring CCTV to be in operation and

recordings to be stored for 28 days, such footage to be made available to the police or licensing authority on request. Mr Xhaferrllari had applied for a number of Temporary Event Notices and police had inspected the premises on New Years Eve and found it to be fully closed in accordance with the restrictions in place at the time. There had been no calls to the police regarding complaints of disorder. A £1000 fixed penalty notice had been paid by the licence holder in relation to the criminal offence of the premises being open on 10th November 2020 in breach of coronavirus legislation in force at the time (this being separate to the administration of the licensing function under the Licensing Act 2003).

18. However, the police did support the review application as it was clear that a serious criminal offence had taken place, which had placed staff and those attending the premises at risk of contracting the virus. The review would give the Committee the opportunity to decide whether the Committee felt that the licence holder was capable of complying with the law in the future and whether the subsequently agreed licence conditions would be a suitable control measure going forward.

June Clarke

19. The Sub-Committee heard from June Clarke, Licensing Consultant, on behalf of the premises licence holder who she referred to as Mr Xhaferrllari in her presentation to the Committee. She stated that Mr Xhaferrllari had taken over the premises lease in October 2019 (Norwich City Council being the landlord). The premises licence had then been transferred to Durres Foods Ltd, the original licence having been previously granted in 2005 with no conditions as it was not a high-risk premises.
20. After taking on the premises in 2019, Mr Xhaferrllari had made arrangements to take on a manager who was to be the DPS and a chef was organised to come from Greece. He had redecorated the premises with his brother and installed CCTV. Although the premises were nearly ready in February 2020, they had never been opened and the front of the premises was still being worked on. In actual fact, Mr Xhaferrllari had not recognised area B on the plan (the rear of the restaurant) as a dining area as it had been principally used for storage purposes and only the front of the restaurant had been used for formal dining. While waiting to formally open the premises for business, he decided to open the rear area for family and friends; the front of the restaurant was to be used for customers. However, with the arrival of the coronavirus, he lost his new manager and his new chef said that he wouldn't be coming as arranged.
21. Ms Clarke stated that since October 2019, Mr Xhaferrllari had never opened or traded from the front of the premises and it had not in any case been possible to do so, since he had no chef. He had only opened the rear of the premises from October 2019 for friends and family. The front of the premises was able to

accommodate around 50 seated persons, the rear was able to accommodate around 40 seated.

22. The situation on 10th November 2020 was that Mr Xhaferrllari was holding a private gathering to commemorate the death of an uncle (*which in the Council's understanding was thus alleged to be a commemorative event held in accordance with 'Exception 11' of Regulation 11, an exception to the general prohibition on indoor gatherings of two or more persons*). He had been asked to do so by a family friend and had agreed. Friends and family were helping out on the day due to the bereavement (Mr Xhaferrllari confirming that the woman behind the bar was his girlfriend). The gathering was supposed to have been restricted to 10 people, but more people than this turned up on the day. Those present had mostly consumed soft drinks and no sales of alcohol had taken place. In fact, out of four tables, only one table had had an alcoholic beverage on it. The woman behind the bar was there because rules stated no one else was allowed to approach the bar. The police could have asked to inspect the till but didn't and if they had, they would have found no sales on there. The 21 cases of Budweiser stacked outside the cooking area were going out of date and were to be picked up by a friend (and she suggested were therefore not on display) (*Mr Xhaferrllari provided the name of the purchaser to the Chair by the 'private chat' facility*).
23. A DPS had been registered at the premises at the time of the inspection on 10th November and Mr Xhaferrllari had now been authorised to be the current DPS, although he had never used his authorisation as the premises had never been opened to the public or traded.
24. With regard to wearing face masks, there was no requirement to do so when persons were seated to eat and drink, although it was conceded that Mr Xhaferrllari should have insisted that persons wore masks when standing up. However, Mr Xhaferrllari wasn't able to force anyone to wear a mask and also wasn't in a position to be able to ask the reason why someone wasn't wearing a mask (eg for a medical exemption), for fear of being fined if he did so. Tables had been placed at around 10 feet apart from each other and the doors and there was no need to social distance if people were back-to-back.
25. In addition, Mr Xhaferrllari had monitored the persons who had attended his event and no one had caught so much as a cold.
26. Since 10th November 2020, Mr Xhaferrllari had done everything requested of him in that he had gained a personal licence and applied to be the DPS. He had also made an application to make a minor variation to the licence and submitted a revised plan to reflect the change in layout of the premises in that a bar had been moved from one side to the other (*Mr Divey clarifying that this was the case, but also that a bar had been created in the front room which hadn't previously been there. Tony Clarke confirming that the incident on 10th November had taken place before the plans had had the opportunity to be changed, but that Mr*

Xhaferrllari had asked him to make the necessary changes to the plan). He had agreed to a CCTV condition to be added to the licence and obtained a fire safety inspection. He had also paid a fine of £1000 in relation to the incident on 10th November 2020, although a solicitor had advised him to appeal it on the basis that only a Court could issue a fine under coronavirus legislation. However, he had paid it to avoid any further trouble. Mr Xhaferrllari had proved that he could act responsibly by his applications for TENs and not opening on New Years Eve.

27. Mr Xhaferrllari had suffered financially as a result of the coronavirus pandemic. He had not been entitled to the government business support funding and was maintaining his business through crowdfunding. He had had to sell his car to pay the rent and had also had to pay the £1000 fine.

28. Ms Clarke concluded by stating that it would be excessive and onerous to revoke the licence.

Questions to Ms Clarke/Mr Xhaferrllari

29. In response to questioning from Ms Bartram, Ms Clarke stated that the reason why Mr Xhaferrllari had not mentioned the commemorative event at the time of inspection on 10th November was that he had been terrified and hadn't known what to say. Ms Clarke submitted that an automatic reaction from foreigners on encountering anyone in a uniform was often to run away.

30. With regard to whether there had been any form of written communication planning the commemorative event, the sub-committee heard from Mr Xhaferrllari that the guests had been related to each other and from the Albanian community. The uncle had died in Albania and the event had been agreed with certain friends and family over a takeaway coffee from a shop on Dereham Road, Norwich. He was not 100% sure that he had anything in writing (eg text message or similar).

31. In relation to whether Mr Xhaferrllari had been at all concerned about holding the event in any way, either because of police intervention or fear of the virus, or the need to keep people apart, Mr Xhaferrllari responded that he couldn't have told people to have kept apart as they were attending out of respect. He had originally considered holding the event at his own house but because there would be more than 10 people attending, the restaurant would be a better venue. The event was due to have finished around an hour after the police visit.

32. Legal advisor to the Sub-Committee, Sarah Moss, asked Mr Xhaferrllari if he could explain to the Committee what precautions he had taken for holding the commemorative event in accordance with Regulation 14 of The Health Protection (Coronavirus, Restrictions)(England)(No.4) Regulations. Ms Moss read out the relevant Regulation to the Committee, which required anyone holding a commemorative event in accordance with Exception 11 to carry out a risk assessment which would satisfy the requirements of regulation 3 of the

Management of Health and Safety at Work Regulations 1999 and to take all reasonable measures to limit the risk of transmission of the coronavirus taking into account the risk assessment and any guidance issued by the government relevant to the gathering. Mr Xhaferrllari stated that he had carried out a risk assessment and put in place the required measures. In response to further questioning by the Chair, he confirmed that the results of his risk assessment had not been recorded in writing (Ms Moss advising the Committee that under the relevant Health & Safety legislation he would only be legally required to do this if he had 5 employees or more, although it would always be good practice to record any risk assessment in writing, regardless).

33. The sub-committee heard further from Mr Divey at this point that 16 people had attended the premises and there were a further three people outside, smoking. The reason for the visit had been reports received from two separate persons by various methods that they had been disturbed by noise and gatherings outside the premises. The Council had been requested to go and inspect the premises.
34. If the persons present at the premises had been there for a single gathering, he would have expected food to have been served for all persons at one time, rather than to persons individually. He had observed at the time that some persons had finished their food and were chatting, some had just been served with food and others hadn't even started. Meals continued to be served while he was there. In addition, there were glasses on the tables, which smelt very strongly of spirit alcohol.
35. Mr Divey confirmed that he hadn't taken much notice of the till, but that it had certainly been turned on, with a green light showing. Not one person was wearing a mask, even those that were standing or serving food. He also confirmed that if the licence was not being used (ie the licensable activity was not taking place), then no alcohol should have been on display as this would suggest it was being displayed for sale (ie at a private function, alcohol should be covered up to make clear that it is not available for sale).
36. Responding to a question posed by Councillor Huntley, Ms Clarke stated that the 'monitoring' that Mr Xhaferrllari had carried out in relation to his guests after the event had been checking whether they felt ok, which they had. Councillor Huntley stated in response that it had been shown that a large proportion of people can contract the virus but don't know they have as they don't have any symptoms (ie they are asymptomatic). However, they can still transmit the virus to others. The Chair (Councillor Stutely) added that while it was not being suggested that the event held on 10th November amounted to a 'super-spreader event', nonetheless it was relevant to consider the potential risk to the public, rather than whether anyone had or hadn't contracted the virus as a result of the event being held.
37. Mr Xhaferrllari confirmed in response to questioning by Councillor Youssef and the Chair that he hadn't been wearing a mask as he had been sitting down at the

event but that he normally did when in the public or in shops. However, due to a previous brain tumour, he sometimes felt paranoid when wearing one and had difficulties breathing.

38. The Chair requested why, if it would have exonerated him from wrongdoing, Mr Xhaferrllari had not offered the CCTV recording taken at the time of the event. Mr Xhaferrllari responded that he was new to the business and hadn't known what to do and didn't know all the rules. However, if he was told what to do, he would do everything required of him. He did not have a copy of the CCTV footage now as he hadn't made a copy and the incident was now over three months ago.

Bodycam footage of PC Spinks

39. The Committee was shown the bodycam footage taken by PC Spinks (*shown below the line in accordance with the Committee's decision at paragraph 2 above. Live streaming ceased and those viewing the bodycam video footage joined a separate meeting to view this*).
40. (*Following viewing of the bodycam footage, live streaming resumed and all parties rejoined the main meeting*). Commenting on the bodycam footage, the Chair noted that there didn't appear to be any usage of masks (Mr Xhaferrllari confirming that there was a package of masks in the entrance lobby to the rear restaurant). The Chair also noted that it had been put to Mr Xhaferrllari in the conversation between himself, Mr Divey and PC Spinks that he had been selling alcohol and that he hadn't denied it at any point. He had also had ample opportunity to state that he was holding a commemorative event and hadn't done so. The Chair put these points to Mr Xhaferrllari who responded that his English language was not very good and that he didn't understand most things being said to him.
41. Ms Clarke submitted that the audio had been poor on the bodycam and that she still maintained that a commemorative event had been taking place for someone who had died in Albania. Her opinion was that the police had been aggressive on entering the premises and that people had been intimidated into leaving the premises quickly. Mr Xhaferrllari had then been accused of not having a licence, which he clearly did. She had observed only one alcoholic drink on a table, the rest of the drinks being coffee and she did not accept that alcohol had been displayed 'in a criminal manner'.
42. Sections of the bodycam footage were shown again to the Committee and it was established by all present at the hearing that there were 15 seated persons (excluding the infant in the carrycot who was not counted) and 3 persons outside (confirmed by Mr Xhaferrllari as attendees of the commemorative event), bringing the number of visible persons at the premises to 18, plus Mr Xhaferrllari and any other members of staff.

43. Mr Divey confirmed that there had been hand sanitiser and masks in the lobby area, as well as social distancing yellow stickers on the floor of the rear restaurant (Mr Xhaferllari confirming that they had been placed there on 9 November to comply with his event risk assessment findings).
44. In response to further questioning by the Chair with regard to why Mr Divey and PC Spinks had attended the premises in the first place, Mr Divey confirmed again that it was in response to two separate reports of noise disturbance. Mr Xhaferllari stated that any noise would have been due to refurbishment works at the premises. Mr Divey read out one of complaints he had received. Ms Clarke objected to this, claiming that this amounted to additional information and under Regulations 18 and 19 of The Licensing Act 2003 (Hearings) Regulations 2005, discussions during the hearing should only relate to the information submitted under the original representation.
45. Before closing the hearing, the Chair requested any closing comments from Mr Xhaferllari. He stated that the 10th November event had been a 'one-off' incident and that he hadn't done anything wrong on purpose. He stated that he really needed help on this, he was extremely stressed and didn't know what to do.
46. The Chair closed the hearing and the Committee retired to consider their determination in private.

DECISION OF THE LICENSING SUB-COMMITTEE

47. The Sub-Committee decided unanimously to revoke the premises licence. This decision was given in a short-form statement and it was stated that full reasoning for the Sub-Committee's decision would be given within 5 working days.

REASONS FOR THE COMMITTEE'S DECISION (FULL REASONING)

48. In coming to its decision, the Committee bore in mind throughout its duty to take such steps as were appropriate and proportionate to promote the licensing objectives. It considered that the licensing objective of public safety had been engaged in addition to the licensing objective of the prevention of crime and disorder, in that the primary purpose of the Coronavirus legislation was to protect public health through measures designed to prevent transmission of the virus which had already been responsible for a significant number of deaths nationwide.
49. The Committee took careful note of the representations put forward by all parties, with significant weight being given to the bodycam evidence of PC Spinks, as well as representations and evidence put forward by Richard Divey, PC Spinks, June Clarke and Mr Xhaferllari himself.

50. The Committee also had regard to the Statutory Guidance published under S182 of the Licensing Act 2003, with particular reference to paragraphs 11.19 – 11.23, as well as the Council's own licensing policy.

51. Taking the above into account, the Committee's findings were as follows:

Relevant legislation and guidance

52. Legislation was in place on 10 November 2020 (Health Protection (Coronavirus, Restrictions) (England)(No.4) Regulations 2020) prohibiting restricted businesses (restaurants, bars and public houses) from opening the whole or part of their premises where food or drink were provided for consumption on those premises and prohibiting food and drink from being provided for consumption on those premises.

53. The same piece of legislation also provided an exception to the general prohibition of gatherings of more than two persons indoors. Exception 11 of Regulation 11 allowed no more than 15 persons to gather for a commemorative event on premises other than a private dwelling, in order to celebrate the life of a deceased person, provided that the organiser carried out a risk assessment for that event and put in place the required precautions to limit the risk of transmission of the coronavirus, in accordance with both the risk assessment findings and government guidance. Members agreed that appropriate social distancing and the wearing of face masks for all persons would have been part of this government guidance.

54. Legislation was also in place requiring those entering or remaining in a relevant place (restaurants, bars and public houses) to wear a face mask, including employees Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place)(England) Regulations 2020. Members agreed that face masks could be removed if a person was eating or drinking but that they would need to be worn if a person was standing or moving around a premises.

55. Breaches of the above legislation were likely to have been criminal offences.

Findings of Fact - Premises operating and trading in a usual manner

56. Richard Divey and PC Spinks had visited the premises on 10th November 2020 in response to two separate reports received by Norwich City Council (by various methods) from the time period of 2nd September 2020. The reports complained of noise disturbance by people coming and going from the premises and requested that a visit to the premises be made because of concerns that the covid legislation was not being adhered to. This suggested to Members that the incident of 10th November 2020 had not been an isolated incident, although no weight or consideration was given by Members to the contents of a complaint read out by Richard Divey towards the conclusion of the hearing.

57. Having viewed the bodycam footage of PC Spinks, Members were of the strong opinion that the premises had been operating and trading in a usual manner on 10th November 2020:

- i. Following Richard Divey's and PC Spink's arrival at the premises, persons eating and drinking in the restaurant had quickly exited the premises, including through doors marked as 'staff only'. This suggested some measure of unease on the part of those present, as if they were aware that they were engaging in unlawful activity.
- ii. Persons present were dressed casually.
- iii. The television on the wall was showing a pop music video at a loud volume (the volume needing to be turned down to allow a conversation with Richard Divey and PC Spinks to take place).
- iv. A game of cards was taking place at one of the tables in the restaurant.
- v. Although no money was observed to have changed hands and the bodycam footage did not show the till in operation, the positioning of the woman behind the bar as she leant forward to speak to PC Spinks (close to the till in the corner) suggested that she was stationed there to take money and serve the alcoholic drinks located behind the bar. Members also noted that Richard Divey had given evidence to the effect that he observed there was a green light on the till, although this could not be observed from the bodycam footage.
- vi. Persons in the restaurant were seated in various group sizes (two's, three's and larger groups) at different tables around the restaurant (ie different social groups and not because of social distancing measures). This suggested to Members that those present at the restaurant had visited in individual groups for the purpose of buying food and drink, rather than as a collective group for a private function.
- vii. This suggestion was further supported by the fact that food and drink had already been consumed at some tables and other tables were still waiting for food to be served. This gave the impression to Members that the premises was trading as a restaurant and cooking and serving separate table orders, particularly when it was considered that premises of this size was likely to have been able to accommodate up to 90 covers and could easily have accommodated 15 people's food requirements at once.
- viii. Members also noted the presence of food condiments on each of the tables, suggesting an operating restaurant. It was also observed by Members that the provision of condiments on tables was not advisable because of the risk of virus transmission between patrons and this was not responsible conduct on the part of the licence holder/manager.
- ix. At one point in the footage, Members noted a person clearing one of the tables in the background, removing the condiments and dirty crockery, as if working in a trading restaurant.

Further Committee observations from bodycam evidence

58. Members also observed the following from the bodycam evidence:

- i. A prolonged conversation had taken place between Mr Xhaferrllari and Richard Divey and PC Spinks. However, despite having had ample opportunity to do so, Mr Xhaferrllari had failed to explain at any point that he was holding a commemorative event, which Members found highly unusual.
- ii. Members rejected Ms Clarke's contention that the reason Mr Xhaferrllari had failed to state that he had been holding a commemorative event had been down to the fact that 'he was terrified' and 'didn't know what to do' on seeing someone in uniform. Mr Xhaferrllari's demeanour on camera had appeared calm, he had not appeared at all distressed and he had greeted the police officer in a jovial manner on his arrival. Members were also struck by Mr Xhaferrllari's apparent indifferent attitude towards the persons questioning him, noting that he shrugged his shoulders on several occasions rather than giving direct answers.
- iii. Members also rejected Mr Xhaferrllari's assertion that his spoken English was poor, noting that he appeared to respond to Richard Divey's and PC Spink's questions without hesitation and had not appeared to be struggling with language difficulties (he had also appeared to deal well with questions put to him during the course of the hearing).
- iv. No one eating and drinking in the restaurant had explained at any time during Mr Divey's and PC Spink's visit to the premises that they were attending a commemorative event, which again seemed implausible if that had been the case. Again, there had been ample opportunity for one of those persons to do so.

Further Committee conclusions

59. Members were unconvinced by Mr Xhaferrllari's assertion that the commemorative event had been arranged by means of informal discussion over a takeaway coffee, given the amount of people involved. Mr Xhaferrllari had been unable to produce any written communication by way of a text message, email or social media post (either from himself or from attendees) confirming the details of the event taking place, attendees, timings and food menus, which might have been expected as part of the planning of a commemorative event. Members also noted that no physical or written evidence had since been presented by any of Mr Xhaferrllari's friends or family to corroborate Mr Xhaferrllari's assertion that a commemorative event had been held on 10th November.

60. Members noted that no tangible evidence had been submitted by Mr Xhaferrllari to support his contention that a commemorative event had taken place on 10th November, other than verbal assertions in mitigation. As no tangible evidence had been offered to suggest that a serious breach of coronavirus legislation had not taken place, it was reasonable to assume that no such evidence existed and that the premises were open and trading as suggested by the bodycam evidence and as claimed by Mr Divey and PC Spinks.
61. Members noted that if Mr Xhaferrllari had wished to prove at any time prior to the hearing that his premises had not been open for trading and providing food and drink for consumption on the premises, he could have done so at any time by providing CCTV footage from his premises.
62. The commemorative event exemption under the legislation allowed for a gathering of 15 persons, not including the organiser/manager. Mr Xhaferrllari had confirmed that he was in charge at the time of the event. 15 seated persons were observed on the bodycam footage (disregarding the infant in the carrycot) and 3 persons outside had been confirmed by Mr Xhaferrllari to also have been part of the group apparently attending the event, bringing the total to 18 persons plus the manager and any staff. Members concluded that even if a commemorative event had been in operation (which they did not accept), the number of persons present exceeded the maximum allowable, thus breaching the coronavirus legislation. Members were of the opinion that a responsible manager would have turned excess persons away on safety grounds, rather than risk breaching coronavirus legislation and consequently the health of his guests and the wider community.
63. With regard to whether a risk assessment had been carried out in relation to the alleged commemorative event, Members were not convinced that Mr Xhaferrllari had been aware of his obligation to carry one out under Regulation 14, or that if one had been carried out, that it had taken into account the particular requirements of the alleged commemorative event, as required under the coronavirus legislation. Although hand sanitiser was present in the entrance lobby (and apparently also face masks, although these could not be seen on the bodycam footage) and there were yellow 'social distancing' stickers on the floor, the generic nature of these measures did not necessarily prove that a risk assessment had been carried out for this particular alleged commemorative event. Mr Xhaferrllari had not been able to produce any evidence of having carried out a risk assessment for the event, other than his verbal assertion that he had done so.
64. Significant discussion had taken place both on 10th November and at the review hearing regarding whether a Designated Premises Supervisor had been in place on 10th November 2020. Mr Xhaferrllari's response had largely been that he was still unfamiliar with licensing requirements and coronavirus legislation, having only been involved in the business for a year. However, this was inconsistent with Mr Xhaferrllari's assertion that he had carried out a risk assessment in preparation for holding the commemorative event and had complied with all

current government guidance. Members were of the opinion that either Mr Xhaferllari understood licensing and coronavirus legislation more fully than he had previously suggested, or had failed to carry out the risk assessment and other preparations required of him, either one of which did not suggest responsible behaviour on the part of Mr Xhaferllari.

65. Although Members had observed some social distancing with regard to the positioning of tables and seated persons within the restaurant from the bodycam footage, other persons seated within the restaurant and moving around the premises were clearly not adhering to social distancing requirements. In addition, not one person was observed to be wearing a mask within the premises, including those standing and moving around the premises. Members were of the opinion that a responsible and competent manager would have monitored and enforced both social distancing measures and the wearing of face coverings, to protect others' safety.
66. Members noted that Mr Xhaferllari had 'monitored' the health of those who had attended the restaurant on 10th November and as no one had fallen ill, had presumed that the virus had not been passed on. However, Mr Xhaferllari did not appear to have appreciated that a large proportion of people are asymptomatic and therefore capable of passing on the virus to others, even though they display no symptoms themselves. Members found this lack of appreciation worrying, as it demonstrated that Mr Xhaferllari had no real understanding of the virus and consequently the importance of preventative measures in preventing transmission.

Taking into account all of the above, The Sub-Committee concluded:

67. At the time of Richard Divey's and PC Spink's visit to the premises on 10th November 2020, the premises had been open (ie trading) and that food and drink (including alcohol) was being consumed on the premises, in breach of coronavirus legislation in force. This amounted to a criminal offence.
68. Face coverings were not being used at the premises, in contravention of face coverings legislation in force. This amounted to a criminal offence. In addition, social distancing measures were not being adhered to, contrary to government guidance.
69. The Committee considered that Mr Xhaferllari, as director of the licence holder and the person in charge of the premises on 10th November 2020 had been the direct cause of the criminal activity identified on 10th November. He had failed to take his responsibilities seriously and had shown a blatant disregard for both the coronavirus legislation and for public safety in the wider community as a whole. This undermined the licensing objectives of the prevention of crime and disorder and public safety.

70. In attempting to argue that a commemorative event was taking place on the premises and that it was not open for business, Mr Xhaferrllari had demonstrated himself as lacking in integrity as well as showing a cavalier attitude towards the safety of others in the community. The Committee therefore had no confidence in his ability to properly manage the premises going forward either as the director of the company holding the premises licence and having overall management of the premises, or as a designated premises supervisor.
71. The Committee noted its duty to uphold and promote the licensing objectives and also that deterrence could be properly considered in the determination of licence reviews. It also noted S182 of the Statutory Guidance at paragraph 11.23 which states that, *'where premises are found to be trading irresponsibly, the licensing authority should not hesitate, where appropriate to do so, to take tough action to tackle the problems at the premises and, where other measures are deemed insufficient, to revoke the licence'*. It also considered that because of the seriousness of the risk to public health (the sole reason behind the coronavirus legislation) together with the number of deaths already recorded as a result of the virus, Mr Xhaferrllari's criminal offence of non-compliance with the coronavirus legislation was as serious as the crimes listed at paragraph 11.27, indicating that revocation of the licence should be seriously considered.
72. Mr Xhaferrllari's expression of remorse and financial position, including payment of a £1000 fine was taken into account, but the Committee noted that in relation to upholding the licensing objectives including the prevention of crime and disorder licensing objective, its duty was to protect the interests of the wider community rather than the licence holder.
73. The Committee looked at the option of suspending the licence as an alternative to revocation, but concluded that the blatant nature of the licence holder's / Mr Xhaferrllari's behaviour did not make this a suitable option, particularly as Members had no confidence or trust in his ability to properly manage the premises in the interests of the wider community even after the suspension was lifted. Members were also of the opinion that suspension of the licence would not adequately reflect the seriousness of the offences or act as a sufficient deterrent to other operators inclined to act in the same way.
74. The Committee also considered that there were no conditions which it could sensibly add to the premises licence, which could materially change the issues previously experienced. Nor would excluding the licensable activity assist at all in the promotion of the prevention of crime and disorder or public safety licensing objectives. The condition already added to the licence by the police was noted, but it was not believed that this would affect much in terms of how the premises would run in the future (CCTV had already been in operation on 10th November, but had not prevented criminal activity taking place or promoted public safety). Members respected the submissions of Ms Bartram on behalf of the police with regard to action already taken by the licence holder and the condition added to the licence. However, the Committee was of the opinion that the police's remit

was restricted to the prevention of crime and disorder licensing objective, but that the Committee was under a duty to also consider the promotion of public safety and it would be negligent of them if it did not do so.

75. In addition, nothing would be achieved by removing Mr Xhaferrllari as Designated Premises Supervisor as the issues were symptomatic of deeper management issues, which would still be present with Mr Xhaferrllari as company director of the licence holder.

76. Accordingly, the Committee determined that revocation of the licence was a proportionate and appropriate step for the Committee to take in promoting the licensing objectives of the prevention of crime and disorder and public safety.

77. This decision was based on the observations and conclusions in paragraphs 44-72. No consideration had been given to discussion during the hearing as to the existence or otherwise of a designated premises supervisor, nor to possible offences under The Licensing Act 2003 regarding the sale/display of alcohol.

RIGHT OF A PARTY TO APPEAL AGAINST THE DECISION OF THE LICENSING SUB-COMMITTEE

All parties are advised that there is a right of appeal to the Magistrates' Court against the Licensing Authority's decision within 21 days of receipt of this written notification of this determination. An appeal may be made against that decision by—

- (a) the applicant for the review,
- (b) the holder of the premises licence, or
- (c) any other person who made relevant representations in relation to the application.

Dated 20 January 2021



Signed Councillor Ian Stutely
(Chair, Licensing Sub-Committee)