

Cheltenham Borough Council

Licensing Committee – 4 March 2016

Transfer and Renewal of Sex Establishment Venue Licence

Report of the Licensing Team Leader

1. Executive Summary

- 1.1 Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 (“the Act”), as amended by section 27 of the Policing and Crime Act 2009, allows applicants to apply for, renew, vary and/or transfer a Sexual Entertainment Venue (“SEV”) licence where they wish to offer “relevant entertainment” (as defined at paragraph 2.3 of the report) on a frequent basis (as defined at paragraph 2.4 of the report).
- 1.2 In this case, an application for the transfer and renewal of a SEV licence was received on 11 January 2016 from Mr Massimo Salatino in respect of the premises located at 12-14 Bath Road, Cheltenham. The SEV licence was formerly held by Bath Road Property Limited. That company was dissolved on 1 December 2015.
- 1.3 A copy of the application form is attached at **Appendix A**. A copy of the premises layout is attached at **Appendix B**, a location map at **Appendix C** and a copy of the current licence at **Appendix D**.
- 1.4 The applicant has not applied to change any of the terms or hours of the existing licence.

2. Implications

How does the decision contribute to the council's Corporate Priorities?

- Cheltenham's natural and built environment is enhanced and protected.
- Communities feel safe and are safe.
- Our residents enjoy a strong sense of community and are involved in resolving local issues.

Legal

Any applicant, who is refused the renewal of a licence, may, within 21 days of being notified of the refusal, appeal to the local magistrates' court.

However, the right to appeal does not apply where the licence was refused on the grounds that:

- the number of sexual entertainment venues in the area exceeds the number which the authority considers is appropriate
- the grant of the licence would be inappropriate considering the character of the area, the nature of other premises in the area, or the premises themselves

Contact officer: Vikki Fennell
E-mail: vikki.fennell@teWKesbury.gov.uk
Tel no: 01684 272015

2. Background

- 2.1 On 1 October 2010, full Council approved the adoption of the amended provision of Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 to take effect in the borough on 1 December 2010.
- 2.2 Since the adoption, any premises that want to offer “relevant entertainment” on a frequent basis can only do so by obtaining a SEV licence.
- 2.3 Relevant entertainment is defined as any live performance or any live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).
- 2.4 Under the Act premises can provide relevant entertainment on an infrequent basis without the need for a SEV licence. An infrequent basis is defined under the Act as no relevant entertainment has been provided on more than 11 occasions within a 12 month period and no such occasion has begun within a period of one month beginning with the end of the previous occasion, and no such occasion has lasted longer than 24 hours. Any premises which wish to offer relevant entertainment more frequently are required to apply for a SEV licence.

3. Consultation

- 3.1 The applicant has advertised the application in accordance with the statutory requirements set out in Schedule 3 of the Act.

Consultation – Objections

- 3.2 In determining the application, Members must have due regard to any observations made by the Chief Officer of the Police and any other comments made by anybody else.
- 3.3 Members are to note in particular that any objection must relate to either the mandatory or discretionary grounds for refusal set out below.
- 3.4 Objections made on moral grounds or values are not relevant to either the mandatory or discretionary grounds for refusal and should therefore not be considered relevant.

Consultation – Chief Officer of Police

- 3.5 No objection or comments were received from the Chief Officer of Police for Gloucestershire Constabulary.

Consultation – Other Persons

- 3.6 Five representations were received in relation to this application from local residents and ward councillors. These are enclosed as background papers.
- 3.7 A summary of the salient issues raised by the objectors is below. Members are to note that the intention of the summary below is to identify the salient issues raised by the objectors. Members should read the accompanying background papers to ensure you are aware of all the issues raised by the objectors.
- **Policy** – The premises in question are situated in an area which, under the council’s current adopted policy, is deemed unsuitable for the licensing of sexual entertainment venues.

- **Character of the relevant locality** – The operation of the premises as a SEV is inappropriate given the character of the locality in that it is situated near a public park, places sensitive for religious purposes, places that provide lunch clubs for the elderly and activities for children, a nursery, a theatre, local businesses and other leisure facilities used by families.

The licensed SEV detracts from the character and appeal of the local area and could harm efforts to restore Bath Road / The Strand.

Following the licensing of the SEV, women “flooded” the town promoting nude dancing, to the detriment of the town’s character.

- **Discomfort and intimidation** – The operation of the premises has caused people to feel uncomfortable working or using premises nearby and when walking past the venue.
- **Demand** – The closure of the premises shortly after last year’s Gold Cup race week indicates a lack of demand for such premises in the town and the premises should therefore be used for other purposes.

- 3.8 The Environmental Health Department and Gloucestershire Fire and Rescue have both made comments relating to the physical condition of the premises, which are also included as background papers.

4. Policy Considerations

- 4.1 The council’s adopted policy statement in relation to the regulation and control of SEV’s was adopted by full Council on 13 October 2014 and this policy statement sets out the council’s guidance, application procedure, terms and conditions relating to the regulation of SEVs.
- 4.2 Below (para. 4.3 – 4.17) are relevant extracts from the policy to highlight relevant issued to Members. However, Members should read these in conjunction with the policy document for completeness and contextual understanding.

Renewal of a Licence (Section 8)

- 4.3 The Council will determine renewal applications on individual merits taking into account the facts of the application and any objections received. Opposed applications will be referred to the Council’s licensing committee for determination. The Courts have confirmed that Councils are entitled to look afresh at renewal applications and, accordingly, it is open to the Council to refuse to renew a licence even where there has been no change in the character of the relevant locality, or in the use to which any premises in the locality are put. (para 8.3)

Transfer of Licence (Section 9)

- 4.4 A person may apply for the transfer of a licence at any time.

The process of applying for the transfer of a licence is the same as that for applying for an initial grant except that a plan of the premises is not required.

Determination (Section 10)

Mandatory Grounds for Refusal

- 4.5 A licence *cannot* be granted:

- a) to any person under the age of 18 years;

- b) to any person who is for the time being disqualified due to the person having had a previous licence revoked in the area of the appropriate authority within the last 12 months;
- c) to any person, other than a body corporate, who is not resident in an EEA State or was not so resident throughout the period of six months immediately preceding the date when the application made; or
- d) to a body corporate which is not incorporated in an EEA State; or
- e) to any person who has, within a period of 12 months immediately preceding the date when the application was made, been refused that grant or renewal of a licence for the premises, vehicle, vessel or stall in respect of which the application is made, unless the refusal has been reversed on appeal.

Discretionary Grounds for Refusal

4.6 A licence *may* be refused where:

- a) the applicant is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reason;
- b) if the licence were to be granted, renewed or transferred the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant, renewal or transfer of such a licence if he made the application himself;
- c) the number of SEVs in the relevant locality at the time the application is made is equal to or exceeds the number which the Council consider is appropriate for that locality (nil may be an appropriate number for these purposes);
- d) the grant or renewal of the licence would be inappropriate, having regard:-
 - to the character of the relevant locality; and/or
 - to the use to which any premises in the vicinity are put; and/or
 - to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.

Location of Premises (Section 11)

- 4.7 In deciding the appropriate number of premises to be licensed, the Council must consider the character of the relevant locality and what is the appropriate number of SEVs for the relevant locality. The number can be 'nil'.
- 4.8 Cheltenham is a relatively small urban borough that is predominantly residential in nature. The Council has already resolved that it is inappropriate to licence SEVs in or in the vicinity of, amongst others, residential areas. It is the Council's policy therefore that there is no locality outside of the adopted Central Shopping Area in which it would be appropriate to license a SEV. Accordingly the appropriate number of SEVs for outside of the adopted Central Shopping Area is nil.
- 4.9 The Council recognises however that the Central Shopping Area offers a more unique situation in as much as it has a much wider mix on offer, particularly in the night time economy and it may therefore be appropriate to consider applications for SEVs in the area. The Council has therefore resolved that it will not set a limit on the number of permitted SEVs in the adopted Central Shopping Area providing those premises are not near properties with sensitive uses or in sensitive locations.

- 4.10 A copy of the plan showing the adopted Central Shopping Area is attached at **Appendix E**.

Properties with sensitive uses or in sensitive locations

- 4.11 In considering if the grant, renewal or variation of the licence would be inappropriate, having regard to the character of the relevant locality or to the use to which any premises in the vicinity are put, the Council shall consider, inter alia, whether the grant of the application would be appropriate, having regard to:
- a) The fact that the premises are sited in a residential area;
 - b) Whether the premises are sited near shops used by or directed at families or children, or on frontages frequently passed by the same;
 - c) Whether the premises are sited near properties which are sensitive for religious purposes e.g. churches, mosques, temples; and/or
 - d) Whether the premises are sited near premises or areas which are sensitive because they are frequented by children, young persons or families, including but not limited to educational establishments, leisure facilities such as parks, libraries or swimming pools, markets and covered markets.

Objections (Section 13)

- 4.12 When considering an application for the grant, renewal, variation or transfer of a SEV licence the Council will have regard to any observations submitted to it by the Chief Officer of Police and any objections that have been received from anyone else within the statutory consultation period.
- 4.13 Any person can object to an application provided that the objection is relevant to the discretionary grounds for refusal of a licence.
- 4.14 Objections should not be made on moral grounds or values and the Council will not consider objections that are not relevant to the grounds mentioned above.
- 4.15 Objectors must give notice of their objection in writing, stating the general terms of the objection.
- 4.16 Where the Council receives notice of any objection it will, before considering the application, give notice in writing of the general terms of the objection to the applicant. However, the Council shall not without the consent of the person making the objection reveal their name or address to the applicant.
- 4.17 Objections may only be made within the period of 28 days following the date on which the application was made to the Council.

5. National Guidance (March 2010)

- 5.1 The Government has issued non-statutory guidance to aid local authorities carrying out their functions under Schedule 3, as amended by section 27.
- 5.2 Although it is non-statutory guidance, local authorities are encouraged to have regard to the guidance when exercising their functions (although there is no statutory requirement to do so) in order to promote best practice and consistency across England and Wales.
- 5.3 Below (para. 5.4 – 5.14) are relevant extracts from the policy to highlight relevant issued to Members. However, Members should read these in conjunction with the guidance document for completeness and contextual understanding.

Meaning of Sexual Entertainment Venue

- 5.4 Paragraph 2A of Schedule 3 as inserted by section 27 sets out the meaning of a ‘sexual entertainment venue’ and ‘relevant entertainment’ for the purposes of these provisions. A sexual entertainment venue is defined as “any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer.” (para 2.1)
- 5.5 The meaning of ‘relevant entertainment’ is “any live performance or live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of an audience (whether by verbal or other means).” An audience can consist of just one person (e.g. where the entertainment takes place in private booths). (para 2.2)

Refusal of a Licence

- 5.6 When considering an application for the grant, renewal or transfer of a licence the appropriate authority should have regard to any observations submitted to it by the chief officer of police and any objections that they have received from anyone else within 28 days of the application. Any person can object to an application but the objection should be relevant to the grounds set out in paragraph 12 for refusing a licence. Objections should not be based on moral grounds/values and local authorities should not consider objections that are not relevant to the grounds set out in paragraph 12. Objectors must give notice of their objection in writing, stating the general terms of the objection. (para. 3.23)
- 5.7 When determining a licence application, the local authority must have regard to any rights the applicant may have under Article 10 (right to freedom of expression) and Article 1, Protocol 1 (protection of property) of the European Convention on Human Rights. (para. 3.30)
- 5.8 The Provision of Services Regulations 2009 amended Schedule 3 to the 1982 Act to state that, if having considered an application for the grant, renewal or transfer of a licence, the appropriate authority decides to refuse it on one or more of the above grounds, it must provide the applicant with reasons for the decision in writing. (para. 3.31)

Relevant Locality

- 5.9 Paragraph 12(3)(c) and 12(3)(d) of Schedule 3 allow appropriate authorities to refuse applications on grounds related to an assessment of the “relevant locality”. A licence can be refused if either, at the time the application is determined, the number of sex establishments, or sex establishments of a particular kind, in the relevant locality is equal to or exceeds the number that the authority considers appropriate for that locality; or that a sex establishment would be inappropriate having regard to the character of the relevant locality, the use to which any premises in the vicinity are put or the layout, character or condition of the premises. Nil may be the appropriate number. (para. 3.32)
- 5.10 Schedule 3 to the 1982 Act does not define “relevant locality” further than to say that:
- a. in relation to premises, it is the locality where they are situated; and
 - b. in relation to a vehicle, vessel or stall, any locality where it is desired to use it as a sex establishment. (para. 3.33)
- 5.11 Clearly, the decision regarding what constitutes the ‘relevant locality’ is a matter for the appropriate authority. However, such questions must be decided on the facts of the individual application. (para. 3.34)

- 5.12 Therefore, it is reasonable and potentially useful to future applicants, for a local authority to decide in advance of receiving any applications that certain areas are, or are not, appropriate locations for a sex establishment or a particular number of sex establishments. Nevertheless, all applications must be considered on their individual merits. (para. 3.35)

Licence Conditions

- 5.13 Once the appropriate authority has decided to grant a licence they are able to impose terms, conditions and restrictions on that licence, either in the form of conditions specific to the individual licence under paragraph 8 of Schedule 3 or standard conditions applicable to all sex establishments, or particular types of sex establishments, prescribed by regulations made by the appropriate authority under paragraph 13 of Schedule 3. (para. 3.39)

The Services Directive

- 5.14 Schedule 3 to the 1982 Act constitutes an authorisation scheme under Article 9 of the EU Services Directive 2006/123/EC (“the Directive”) which was implemented in the UK by the Provision of Services Regulations 2009 (“2009 Regulations”), which came into force on 28th December 2009. Local authorities must ensure they comply with the Regulations when applying the licensing provisions in Schedule 3. (para. 3.53)

6. Probity in Licensing (Relevant extracts)

- 6.1 Cheltenham Borough Council’s Licensing Committee operates in a quasi-judicial way in determining contentious licensing applications, policy issues and related matters.
- 6.2 The decisions that the Committee makes are significant and weighty. The Committee operates, for the most part, under its extensive delegated powers and it, rather than any other part of the council, actually makes the decisions. The decisions can have a considerable effect on the value of premises or other capital assets, on the amenities of people living near licensed premises and on the lives of applicants. Furthermore if the Committee makes a wrong or irrational decision this may mean that the council will face substantial costs if there is a successful appeal against the decision or if the decision is the subject of a legal challenge from an aggrieved third party.
- 6.3 Some licensing legislation specifies procedures to be followed but in all cases human rights and natural justice considerations dictate that the Committee adheres to the following principles in that decisions must:
- Be made on the individual merits of a case.
 - Have regard to all relevant national and local guidance.
 - Be made impartially and in good faith.
 - Be made by the body that receives all the relevant information and evidence.
 - Relate to the issue or question placed before the committee.
 - Be based only on consideration of relevant and material matters.
 - Be rational and reasoned.
 - Be made in a way that does not give rise to public suspicion or mistrust.
- 6.4 Licensing Committee Members must vote in the best interests of the Borough as a whole and must not vote on the basis of local ward interests that may be contrary to a balanced licensing assessment in the light of the evidence before the members and wider policies and guidance.
- 6.5 Licensing applications must be determined on the basis of the documents and information that have been formally submitted and where all parties have had a proper opportunity to consider them.

- 6.6 Members must read and carefully consider the content of the circulated report before the meeting and they must have regard to its contents in reaching their decisions.
- 6.7 Where Members propose to make a decision contrary to the officer recommendation, clear licensing reasons must be established and these must be seconded and minuted.

7. Officer Comments

- 7.1 This is an application for both the transfer and the renewal of the SEV licence. As has been previously mentioned in this report, the current SEV licence holder is Bath Road Property Limited. However, since the company has been dissolved it is no longer a legal entity that can hold the licence and it was therefore necessary for the applicant, who was a director in the now dissolved company, to apply to transfer the licence. At the same time, they have also applied to renew the licence.
- 7.2 Both applications can be determined at the same time on the basis that the grounds for refusal are the same (para 4.5 & 4.6). Officers would however recommend that the committee deals with the suitability of the applicant in the first instance (4.6(a) & (b)) and, subject to that assessment, move on to deal with the relevant locality matters (4.6(c) & (d)). Both these relate to the discretionary grounds for refusal.
- 7.3 When determining an application for the renewal of an existing licence, the committee must also have regard to the relevant statutory provisions and any objections or comments made by the Chief Officer of Police and other persons and should have regard to the relevant guidance issued by the Home Office,
- 7.4 In relation to this application, 5 representations were received from local residents and local councillors. A number of issues have been raised by objectors that require clarification:
- a) **Moral objections** – Members are to note that moral objections cannot be considered relevant because the council recognises that Parliament has made it lawful to operate a sex establishment and that such businesses are a legitimate part of the retail and leisure industries. It is this council's role as the licensing authority to administer the licensing regime in accordance with the law.
- Furthermore moral objections do not relate to any of the specified grounds for refusal.
- b) **Parks and antisocial behaviour** – Members will note that one of the objections states that it is "well-documented" that such venues attract antisocial behaviour to public parks in the vicinity, but Members will also note that no evidence has been provided to support that assertion.
- Members are reminded that Gloucestershire Constabulary are a statutory consultee on applications for SEVs and have not objected to this application or provided evidence that the operation of the premises has been linked to antisocial behaviour or crime.
- c) **A lack of demand for such premises in Cheltenham** – Members will note that a lack of demand for sexual entertainment venues cannot be considered relevant as it is not related to any of the specified grounds for refusal as listed in paragraphs 4.3 and 4.4.
- 7.5 Comments relating to the physical condition of the building – as made by the Environmental Health Authority and the Fire and Rescue Service, included as background papers – can be considered relevant because it relates to one of the discretionary grounds for refusal (4.6(d)).

- 7.6 For Members' information, the council's licensing department has been advised that on condition that the SEV licence is in place, the venue will trade under the name Eroticats for March 2016 after which it will close for a total refit. This is relevant owing to the fact that two of the discretionary grounds for refusal relates to management competency therefore, if the premises will be managed by someone other than the applicant, Members should satisfy themselves of their competency and ability to operate such a licensed SEV.
- 7.7 The council's adopted policy on the licensing of SEVs defines areas that it considers appropriate for the licensing of SEVs and other areas in which it has resolved to adopt a zero limit.
- 7.8 In relation to this application, the premises in question is situated in the relevant locality deemed to be *inappropriate* under the policy for the licensing of SEVs. See **Appendix E** for reference.
- 7.9 This is an important point for the committee to consider because notwithstanding the policy position, paragraph 3(d) of schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 states that a licensing authority *may* refuse a licence application if "...the number of sex establishments in the relevant locality at the time the application is made is equal to or exceeds the number which the authority consider is appropriate for that locality".
- 7.10 Furthermore, notwithstanding the committee's decision in 2015 to grant the licence contrary to the council's policy, common law has dictated that licensing authorities are entitled to take "a fresh look" at an application and accordingly, it is open to it to refuse to renew a licence even where no change in the character of the relevant locality. The 2015 decision has therefore not set a precedent.
- 7.11 Members are to note that the policy must not fetter the committee's discretion to consider the individual circumstances and merits of the application but equally the committee must not arbitrarily deviate from its policy without good reason.
- 7.12 Having considered all the relevant matters, the committee must decide whether to:
- Grant the application as applied for;
 - Grant the application subject to any additional terms, conditions and/or restrictions that are either specific to the licence or standard conditions; or
 - Refuse the application.

Background Papers

Service records

Sexual Entertainment Venues: Guidance for England and Wales (March 2010)

Cheltenham Borough Council Sexual Entertainment Venue Policy Statement adopted October 2014

Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, as amended by section 27 of the Policing and Crime Act 2009

Contact Officer

Mr Louis Krog

E-mail: licensing@cheltenham.gov.uk

Tel no: 01242 775200