

Cheltenham Borough Council

Licensing Sub Committee

Licensing Act 2003:

Determination of an application for a review of a premises licence

Masala Bites, 22-24 Albion Street, Cheltenham (ref 16/01026/PRMR)

Report of the Licensing Officer

1. Introduction

1.1 Section 51 of the Licensing Act 2003 (the Act) allows a responsible authority or any other person to apply at any time to the licensing authority to review a premises licence or club premises certificate. Any application for a review of a premises licence or club premises certificate must relate specifically to the premises in question and to one or more of the Act's licensing objectives, which are:

- the prevention of crime and disorder;
- public safety;
- the prevention of public nuisance; and
- the protection of children from harm.

1.2 An application was received on 29th June 2016 from Gloucestershire Constabulary to review the premises licence of Masala Bites, 22-24 Albion Street, Cheltenham. A copy of the application is included at **Appendix A**. The constabulary have indicated that their application for review relates to:

- the prevention of crime and disorder; and
- public safety.

1.3 Implications

1.3.1 Legal A sub committee is required to discharge its duty and determine an application with a view to promoting the licensing objectives. These objectives, which are set out in section 4(2) of the Licensing Act 2003, are: (a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm.

Contact officer: Fiona Samuda
Email: fiona.samuda@teWKesbury.gov.uk
Tel no: 01684 272062

2. Information relating to the premises licence

2.1 Licence holder: Mr Ahmed Shareef

2.2 Designated premises supervisor: Mr Abdul Mannan

2.3 Premises address: Masala Bites, 22-24 Albion Street, Cheltenham

2.4 Permitted licensable activities under the premises licence:

Sale/supply of alcohol	Sunday	12:00 - 22:30
Sale/supply of alcohol	Monday to Saturday	10:00 - 23:00

The sale of alcohol is authorised for consumption on the premises.

2.5 A copy of the premises licence is attached at **Appendix B**.

3. Consultation

3.1 When an application for review of a licence is made to the licensing authority a 28 day statutory consultation period commences. This involves a copy of the review application being served on each of the 'responsible authorities' designated in the Act. In addition there is a requirement for a public notice to be displayed at the premises for the duration of the statutory consultation period. This gives other people the opportunity to make representation.

At the end of the 28 day consultation period, a hearing must be held to determine the application.

3.2 Responsible authorities:

The following responsible authorities were consulted:

Environmental health authority – No representation made

Gloucestershire Constabulary – The applicant

Gloucestershire fire and rescue service – No representation made

Health and safety enforcing authority – No representation made

Authority with responsibility for planning – No representation made

Body with responsibility for the protection of children from harm – No representation made

Director of public health – No representation made

Trading Standards – No representation made

Each responsible authority received a full copy of the application for review.

3.3 Other people

No representations were received from other people.

4. Local Policy Considerations

4.1 The 2003 Act introduced a unified system of regulation through two types of licenses: personal licences and premises licences (club premises certificates for qualifying clubs). The Borough Council, as the licensing authority, is responsible for licensing all outlets in the borough that sell or supply alcohol, provide regulated entertainment or provide late night refreshment.

4.2 The system is underpinned by four objectives: i) the prevention of crime and disorder; ii) public safety; iii) the prevention of public nuisance; and, iv) the protection of children from harm. The licensing authority must promote these objectives in carrying out its functions.

4.3 The Council's adopted licensing policy statement (approved December 2015) includes the following:

i) Each of the four objectives is of equal importance and will be considered in relation to matters centred on the premises or within the control of the licensee and the effect which the operation of that business has on the vicinity. (Paragraph 1.18)

ii) Crime and Disorder

The promotion of the licensing objective to prevent crime and disorder, places a responsibility on licence holders to become key partners in promoting this objective. (3.10)

Applicants will be expected to demonstrate in their operating schedule that suitable and sufficient measures have been identified and will be implemented and maintained to reduce or prevent crime and disorder on and in the vicinity of their premises, relevant to the individual style and characteristics of their premises and events. (3.11)

When addressing the issue of crime and disorder, the applicant should demonstrate that those factors that impact on crime and disorder have been considered. These factors may include:

- a) Underage drinking;
- b) Drunkenness on premises;
- c) Public drunkenness;
- d) Drugs;
- e) Violent behaviour; and/or
- f) Anti-social behaviour. (3.12)

In making their decision, regard should be given to the levels of crime and disorder in and around the venue, the level of compliance with conditions on existing licences and any available evidence on crime and disorder issues. (3.13)

iii) Public Safety

The council in its role as licensing authority must try to ensure the safety of people visiting and working in licensed premises. The council will need to be satisfied that measures to promote public safety including risk assessments, setting safe capacities and adequate means of escape are put in place and maintained, if not adequately provided for by other regulatory regimes. (3.16)

Consideration should be given to whether:

- a) appropriate and satisfactory general and technical risk assessments, management procedures and certificates have been made available to the relevant responsible authority and to the council, that demonstrate that the public will be safe within and in the vicinity of the premises;
- b) the premises already has a licence or a fire certificate that specifies the maximum number of people that can attend it or be present and, if not, whether a risk assessment has been undertaken to assess the maximum number of people in terms of capacity in various parts of the premises, so that they can be operated safely and can be evacuated safely in the event of an emergency;
- c) there are procedures proposed to record and limit the number of people on the premises with opportunities for going outside and readmission;
- d) patrons can arrive at and depart from the premises safely;
- e) music, dance and performance venues will use equipment or special effects that may affect public safety (i.e. moving equipment, pyrotechnics, strobe lights, smoke machines);
- f) there are defined responsibilities and procedures for medical and other emergencies and for calling the emergency services; and/or
- g) the levels of compliance with conditions on existing licences relating to public safety. (3.17)

The council seeks to encourage the use of toughened glassware and polycarbonate where appropriate in licensed premises. Where a relevant representation is received the council will consider imposing a condition prohibiting the sale of alcohol in annealed glass containers and require the use of polycarbonate or other safer alternatives in order to promote public safety in licensed venues. (3.18)

iv) Management of Licensed Premises

A critical element of the proper control of licensable activity and a premises where such activity is provided is good management of those activities and the premises generally. (6.17)

The council will encourage everybody involved in providing or are involved in licensable activities, to consider what skills and competencies are appropriate in the safe delivery of regulated activities and secure these. This applies to managers, musicians, door staff, bar staff, performers and contractors as well as everyone associated with the activities. (6.18)

Good management also extends to the appropriate advertising of events and premises users and licensees are expected to control advertising content as part of their role. (6.19)

The council undertakes proactive risk based inspections of all licensed premises to ensure that they are managed properly. Premises that consistently fail inspections may be subject to a licence review or other enforcement action. (6.20)

Within all licensed premises, whether or not alcohol is to be sold, the council will expect there to be proper management arrangements in place which will ensure that there is an appropriate number of responsible, trained/instructed persons at the premises to ensure the proper management of the premises and of the activities taking place, as well as adherence to all statutory duties and the terms and conditions of the premises' licence. (6.25)

v) Where relevant representations have been made, [the council] will take the following matters into consideration when making a decision. These are not a definitive list and other matters may be considered:

- a) Operating schedules - demonstration of compliance with management standards to support each of the licensing objectives.
- b) Proximity to residential accommodation - the likelihood of the operation to have an adverse impact on the peace and quiet of local residents.
- c) Potential noise and nuisance from people leaving and entering the premises.
- d) Ability to demonstrate that systems in place to ensure timely dispersal of customers away from residential areas.
- e) Use of external areas for carrying out the licensable activities and potential noise impact on local residents.
- f) Proposed hours of the licensing activities and general opening times for the public – The use of winding down periods to enable more efficient dispersal.
- g) Type of use – alcohol led premises such as pubs, bars and nightclubs, off licenses and hot food take away premises are more likely to be associated with crime and disorder and public nuisance than other premises such as seated restaurants, theatres, cinemas and other cultural activities.
- h) Availability of public transport to assist in the timely dispersal of customers from the vicinity and to ensure safe travel home.
- i) The potential for contamination of the street environment through increased litter and other pollution of the streets by customers. (6.42)

The hours of existing licensed premises will remain unchanged unless there are good reasons, based on the licensing objectives, for restricting these hours, and then they can be changed by a licensing sub-committee following a review of the premises licence. (6.43)

Where there is evidence that the licensing objectives are being compromised or are likely to be compromised, the council will consider imposing appropriate restrictions on a licence. This may include, although not limited to, restricting the hours for licensable activities, restricting the sale of alcoholic beverages over a specified limit of alcohol by volume and/or of specified quantities. (6.68)

vi) Enforcement

In terms of regulation, our aim is to target those premises which are causing problems within our communities whilst supporting well managed premises and community activities, which provide worthwhile opportunities for the enjoyment of leisure time without having a negative impact. Premises associated with disorder, threaten public safety, generate public nuisance, or threaten the wellbeing of our children will be targeted for enforcement action. (9.1)

Once licensed, it is essential that premises are maintained and operated so as to ensure the continued promotion of the licensing objectives and compliance with the specific requirements of the Act. (9.2)

The council will monitor compliance with the licensing objectives through a programme of inspection visits. The proactive inspection visits are risk based so that those premises that are at a higher risk of adversely affecting the licensing objectives are more frequently inspected. (9.3)

The council will also establish enforcement protocols with the police and other enforcement agencies to ensure efficient and targeted joint enforcement is undertaken on a regular basis. (9.4)

This does not prevent action being taken by any individual authority at any time should offences become apparent. (9.5)

The council will take in to account its adopted corporate enforcement policy when deciding what appropriate action to take. (9.6)

vii) Reviews

At any stage, following the grant of a premises licence, a responsible authority, or other person, may ask the council to review the licence because of a matter arising at the premises in connection with any of the four licensing objectives. (9.7)

In every case, the application for review must relate to particular premises for which a licence is in existence and must be relevant to the promotion of the licensing objectives. (9.8)

5. National Guidance

5.1 Guidance has been issued by the Home Office under Section 182 of The Licensing Act 2003. The guidance was last revised in March 2015. Relevant extracts from the statutory guidance are below, but the full guidance document is available for members to read at www.gov.uk.

i) Purpose

This Guidance is provided to licensing authorities in relation to the carrying out of their functions under the 2003 Act. It also provides information to magistrates' courts hearing appeals against licensing decisions and has been made widely available for the benefit of those who run licensed premises, their legal advisers and the general public. It is a key medium for promoting best practice, ensuring consistent application of licensing powers across England and Wales and for promoting fairness, equal treatment and proportionality. (Paragraph 1.7)

The police remain key enforcers of licensing law. This Guidance does not bind police officers who, within the parameters of their force orders and the law, remain operationally independent. However, this Guidance is provided to support and assist police officers in interpreting and implementing the 2003 Act in the promotion of the four licensing objectives. (1.8)

ii) Legal status

Section 4 of the 2003 Act provides that, in carrying out its functions, a licensing authority must 'have regard to' guidance issued by the Secretary of State under section 182. This Guidance is therefore binding on all licensing authorities to that extent. However, this Guidance cannot anticipate every possible scenario or set of circumstances that may arise and, as long as licensing authorities have properly understood this Guidance, they may depart from it if they have good reason to do so and can provide full reasons. Departure from this Guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken. (1.9)

Nothing in this Guidance should be taken as indicating that any requirement of licensing law or any other law may be overridden (including the obligations placed on any public authorities under human rights legislation). This Guidance does not in any way replace the statutory provisions of the 2003 Act or add to its scope and licensing authorities should note that interpretation of the 2003 Act is a matter for the courts. Licensing authorities and others using this Guidance must take their own professional and legal advice about its implementation. (1.10)

iii) The review process

The proceedings set out in the 2003 Act for reviewing premises licences and club premises certificates represent a key protection for the community where problems associated with the licensing objectives occur after the grant or variation of a premises licence or club premises certificate. (11.1)

At any stage, following the grant of a premises licence or club premises certificate, a responsible authority, or any other person, may ask the licensing authority to review the licence or certificate because of a matter arising at the premises in connection with any of the four licensing objectives. (11.2)

In every case, any application for a review must relate to particular premises in respect of which there is a premises licence or club premises certificate and must be relevant to the promotion of one or more of the licensing objectives. Following the grant or variation of a licence or certificate, a complaint regarding a general issue in the local area relating to the licensing objectives, such as a general (crime and disorder) situation in a town centre, should generally not be regarded as a relevant representation unless it can be positively tied or linked by a causal connection to particular premises, which would allow for a proper review of the licence or certificate. For instance, a geographic cluster of complaints, including along transport routes related to an individual public house and its closing time, could give grounds for a review of an existing licence as well as direct incidents of crime and disorder around a particular public house. (11.7)

Representations must be made in writing and may be amplified at the subsequent hearing or may stand in their own right. Additional representations which do not amount to an amplification of the original representation may not be made at the hearing. Representations may be made electronically, provided the licensing authority agrees and the applicant submits a subsequent hard copy, unless the licensing authority waives this requirement. (11.9)

Where authorised persons and responsible authorities have concerns about problems identified at premises, it is good practice for them to give licence holders early warning of their concerns and the need for improvement, and where possible they should advise the licence or certificate holder of the steps they need to take to address those concerns. A failure by the holder to respond to such warnings is expected to lead to a decision to apply for a review. Co-operation at a local level in promoting the licensing objectives should be encouraged and reviews should not be used to undermine this co-operation. (11.10)

iv) Powers of a licensing authority on the determination of a review

The 2003 Act provides a range of powers for the licensing authority which it may exercise on determining a review where it considers them appropriate for the promotion of the licensing objectives. (11.16)

The licensing authority may decide that the review does not require it to take any further steps appropriate to promote the licensing objectives. In addition, there is nothing to prevent a licensing authority issuing an informal warning to the licence holder and/or to recommend improvement within a particular period of time. It is expected that licensing authorities will regard such informal warnings as an important mechanism for ensuring that the licensing objectives are effectively promoted and that warnings should be issued in writing to the licence holder. (11.17)

However, where responsible authorities such as the police or environmental health officers have already issued warnings requiring improvement – either orally or in writing – that have failed as part of their own stepped approach to address concerns, licensing authorities should not merely repeat that approach and should take this into account when considering what further action is appropriate. (11.18)

Where the licensing authority considers that action under its statutory powers is appropriate, it may take any of the following steps:

- modify the conditions of the premises licence (which includes adding new conditions or any alteration or omission of an existing condition), for example, by reducing the hours of opening or by requiring door supervisors at particular times;
- exclude a licensable activity from the scope of the licence, for example, to exclude the performance of live music or playing of recorded music (where it is not within the incidental live and recorded music exemption);
- remove the designated premises supervisor, for example, because they consider that the problems are the result of poor management;
- suspend the licence for a period not exceeding three months;
- revoke the licence. (11.19)

In deciding which of these powers to invoke, it is expected that licensing authorities should so far as possible seek to establish the cause or causes of the concerns that the representations identify. The remedial action taken should generally be directed at these causes and should always be no more than an appropriate and proportionate response to address the causes of concern that instigated the review. (11.20)

For example, licensing authorities should be alive to the possibility that the removal and replacement of the designated premises supervisor may be sufficient to remedy a

problem where the cause of the identified problem directly relates to poor management decisions made by that individual. (11.21)

Equally, it may emerge that poor management is a direct reflection of poor company practice or policy and the mere removal of the designated premises supervisor may be an inadequate response to the problems presented. Indeed, where subsequent review hearings are generated by representations, it should be rare merely to remove a succession of designated premises supervisors as this would be a clear indication of deeper problems that impact upon the licensing objectives. (11.22)

Licensing authorities should also note that modifications of conditions and exclusions of licensable activities may be imposed either permanently or for a temporary period of up to three months. Temporary changes or suspension of the licence for up to three months could impact on the business holding the licence financially and would only be expected to be pursued as an appropriate means of promoting the licensing objectives. So, for instance, a licence could be suspended for a weekend as a means of deterring the holder from allowing the problems that gave rise to the review to happen again. However, it will always be important that any detrimental financial impact that may result from a licensing authority's decision is appropriate and proportionate to the promotion of the licensing objectives. But 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. (11.23)

v) Reviews arising in connection with crime

A number of reviews may arise in connection with crime that is not directly connected with licensable activities. For example, reviews may arise because of drugs problems at the premises; money laundering by criminal gangs, the sale of contraband or stolen goods, the sale of firearms, or the sexual exploitation of children. Licensing authorities do not have the power to judge the criminality or otherwise of any issue. This is a matter for the courts. The licensing authority's role when determining such a review is not therefore to establish the guilt or innocence of any individual but to ensure the promotion of the crime prevention objective. (11.24)

Reviews are part of the regulatory process introduced by the 2003 Act and they are not part of criminal law and procedure. There is, therefore, no reason why representations giving rise to a review of a premises licence need be delayed pending the outcome of any criminal proceedings. Some reviews will arise after the conviction in the criminal courts of certain individuals, but not all. In any case, it is for the licensing authority to determine whether the problems associated with the alleged crimes are taking place on the premises and affecting the promotion of the licensing objectives. Where a review follows a conviction, it would also not be for the licensing authority to attempt to go beyond any finding by the courts, which should be treated as a matter of undisputed evidence before them. (11.25)

Where the licensing authority is conducting a review on the grounds that the premises have been used for criminal purposes, its role is solely to determine what steps should be taken in connection with the premises licence, for the promotion of the crime prevention objective. It is important to recognise that certain criminal activity or associated problems may be taking place or have taken place despite the best efforts of the licence holder and the staff working at the premises and despite full compliance with the conditions attached to the licence. In such circumstances, the licensing authority is still empowered to take any appropriate steps to remedy the problems. The licensing authority's duty is to take steps with a view to the promotion of the licensing objectives

in the interests of the wider community and not those of the individual licence holder. (11.26)

There is certain criminal activity that may arise in connection with licensed premises which should be treated particularly seriously. These are the use of the licensed premises:

- for the sale and distribution of drugs controlled under the Misuse of Drugs Act 1971 and the laundering of the proceeds of drugs crime;
- for the sale and distribution of illegal firearms;
- for the evasion of copyright in respect of pirated or unlicensed films and music, which does considerable damage to the industries affected;
- for prostitution or the sale of unlawful pornography;
- by organised groups of paedophiles to groom children;
- as the base for the organisation of criminal activity, particularly by gangs;
- for the organisation of racist activity or the promotion of racist attacks;
- for knowingly employing a person who is unlawfully in the UK or who cannot lawfully be employed as a result of a condition on that person's leave to enter;
- for unlawful gambling; and
- for the sale or storage of smuggled tobacco and alcohol. (11.27)

It is envisaged that licensing authorities, the police and other law enforcement agencies, which are responsible authorities, will use the review procedures effectively to deter such activities and crime. Where reviews arise and the licensing authority determines that the crime prevention objective is being undermined through the premises being used to further crimes, it is expected that revocation of the licence – even in the first instance – should be seriously considered. (11.28)

6. Licensing Comments

6.1 A plan of the location of the premises is attached at **Appendix C**.

6.2 A plan of the internal layout of the premises is attached at **Appendix D**.

6.3 Members will note that Home Office statutory guidance identifies certain criminal activities that should be treated particularly seriously when considering a review of a premises licence, one of which is "Knowingly employing a person who is unlawfully in the UK or who cannot be lawfully employed as a result of a condition on that person's leave to enter". Whilst licensing authorities must have regard to the guidance they are not bound by it and can depart from it if they can provide clear reasons for doing so.

6.4 In the constabulary's application for review, Members will note references to the following unlawful employment practices: wages paid to illegal workers off the record without tax or national insurance deductions; wages paid below the minimum wage; and the deliberate omission of information from an employer's end of year tax returns to HMRC. No specific evidence has been provided to demonstrate that these unlawful practices have taken place in this case, or that any action is being taken against the premises for such unlawful employment practices. These comments should therefore be taken in the context of examples of the sorts of practices that might take place in premises where people are employed illegally, rather than as evidence of practices that have specifically taken place in this case.

- 6.5 Members are advised that it is not always necessary for a criminal conviction to be secured in order for the crime and disorder licensing objective to be engaged. In a recent case (East Lindsey District Council v Abu Hanif T/A Zara's, 14th April 2016) the High Court Judge determined that a premises licence may be reviewed, and potentially revoked, where there is evidence of the commission of criminal offences but where a prosecution has not been brought. The case has been certified as appropriate for citation in future cases. Members are advised that this application should be determined on its individual merits and the facts in the cited case were not identical to this case. However the Judge's direction is relevant that where evidence exists of the commission of an offence, it is not necessary for a criminal prosecution to be brought in order to engage the crime and disorder licensing objective.
- 6.6 The question for the sub-committee is whether the operation of the premises is having an adverse impact on one or more of the licensing objectives:
- the prevention of crime and disorder;
 - public safety;
 - the prevention of public nuisance; and
 - the protection of children from harm
- and if so, whether it is appropriate for the sub-committee to engage its powers to promote those objectives.
- 6.7 The Committee must have regard to the representations made and the evidence it hears, and must take such of the following steps as it considers appropriate for the promotion of the licensing objectives. The committee may:
- modify the conditions of the premises licence;
 - exclude a licensable activity from the scope of the licence;
 - remove the designated premises supervisor;
 - suspend the licence for a period not exceeding three months;
 - revoke the licence.
- 6.8 In coming to its decision the sub committee must have regard to the statutory guidance and Cheltenham Borough Council's licensing policy statement, and must provide clear and comprehensive reasons for their decision. The decision of the sub committee carries with it the right of appeal to the Magistrates' Court.

Background Papers

Service records

Licensing Act 2003

Home Office guidance issued under s.182 of the Act (revised March 2015)

Cheltenham Borough Council Licensing Policy Statement

East Lindsey District Council v Abu Hanif T/A Zara's, 14th April 2016

Additional evidence provided by the applicant in support of the application: Immigration enforcement referral notice; Copies of officer notebook entries; Officer witness statements; Officer interview notes.

Report Author

Contact officer: Mr Philip Cooper

E-mail: licensing@cheltenham.gov.uk

Tel no: 01242 775200