

Cheltenham Borough Council

"Miscellaneous" Licensing Sub-committee – 6 November 2019

Local Government (Miscellaneous Provisions) Act 1982

Application for renewal of Sexual Entertainment Venue Licence (19/02708/SEXR)

Red Apple Associates Ltd.

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 3.3 of the report) on a frequent basis (as defined at paragraph 3.4 of the report).
- 1.2 In this case, an application was received on 10 September 2019 from Red Apple Associates Ltd for the renewal of the annual SEV licence in respect of the premises known as Two Pigs, located at Church Street, Cheltenham GL50 3HA:

Festival Trails Day

25/01/20 – 26/01/20 8pm – 5am

Cheltenham Gold Cup

09/03/20 – 15/03/20 8pm – 5am

The April Meeting

15/04/19 – 17/04/20 8pm – 5am

The Show Case

Dates TBC 8pm – 5am

The November Meeting

Dates TBC 8pm – 5am

The International

Dates TBC 8pm – 5am

New Year's Day

01/01/21 – 02/01/21 8pm – 5am

- 1.3 The existing SEV licence (ref 19/01978/SEXR) expires on 10 January 2020 and this renewal, if successful, will take effect for 12 months from 11 January 2020.

- 1.4 A redacted copy of the application form is attached at **Appendix A**, a copy of the premises layout is attached at **Appendix B**, the location map attached at **Appendix C** and the wider plan of the central shopping area is at **Appendix D**. A copy of the existing licence is attached at **Appendix E** along with the conditions applicable to the licence.

2. Implications

Legal Any applicant who is refused 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.

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3. Background

- 3.1 On 1 October 2010, 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.
- 3.2 Since the adoption, any premises that want to offer “relevant entertainment” on a frequent basis can only do so by obtaining a SEV licence.
- 3.3 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).
- 3.4 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 follows: 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 wishing to offer relevant entertainment more frequently are required to apply for a SEV licence.

4. Consultation

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

Consultation – Objections

- 4.2 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.

- 4.3 Members are to note in particular that any objection must relate to both or either of the mandatory or discretionary grounds for refusal set out below.
- 4.4 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

- 4.5 The Police did not object or make any comments in relation to the application.

Consultation – Other Persons

- 4.6 In relation to this application the licensing authority received 14 objections. One objection was accompanied by a petition with 178 signatures.
- 4.7 These are attached to **Appendix F** of this report.

5. Policy Considerations

- 5.1 The council’s adopted policy statement in relation to the regulation and control of SEVs was adopted by 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.
- 5.2 Below (para. 5.3 – 5.16) are relevant extracts from the policy to highlight relevant issues to Members. However, Members should read these in conjunction with the policy document for completeness and contextual understanding.
- 5.3 The Council does not take any moral stand in adopting this policy. 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.

Determination (Section 10)

Mandatory Grounds for Refusal

- 5.4 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

- 5.5 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)

- 5.6 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'.
- 5.7 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.
- 5.8 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.
- 5.9 A copy of the plan showing the Central Shopping Area is attached at **Appendix D**.

Properties with sensitive uses or in sensitive locations

- 5.10 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)

- 5.11 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.
- 5.12 Any person can object to an application provided that the objection is relevant to the discretionary grounds for refusal of a licence.
- 5.13 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.
- 5.14 Objectors must give notice of their objection in writing, stating the general terms of the objection.
- 5.15 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.
- 5.16 Objections may only be made within the period of 28 days following the date on which the application was made to the Council.

6. National Guidance (March 2010)

- 6.1 The Government has issued non-statutory guidance to aid local authorities carrying out their functions under Schedule 3, as amended by section 27.
- 6.2 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.
- 6.3 Below (para. 6.4 – 6.14) 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

- 6.4 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)
- 6.5 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

- 6.6 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)
- 6.7 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)
- 6.8 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

- 6.9 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)
- 6.10 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)
- 6.11 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)
- 6.12 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

- 6.13 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

6.14 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)

7. Probity in Licensing (relevant extracts)

7.1 Cheltenham Borough Council’s Licensing Committee operates in a quasi-judicial way in determining contentious licensing applications and related matters.

7.2 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.

7.3 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 proportionate, rational and reasoned
- Be made in a way that engenders public confidence

7.4 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.

7.5 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.

7.6 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.

8. Officer Comments

8.1. When determining an application for a sexual entertainment venue licence, the sub-committee must have regard to the relevant statutory provisions, the council’s adopted policy, the relevant

guidance issued by the Home Office and any objections or comments made by the Chief Officer of Police and other persons. No objections or comments were made by the Chief Officer of Police.

8.2 In relation to the objections made by other persons, a number of issues have been raised by objectors that require clarification:

8.2.1 **Equality** – A number of objectors have made reference to the fact that the presence of a SEV makes them feel uncomfortable and unwelcome. The Committee must be mindful of its Public Sector Equality Duty when discharging its licensing functions.

The licensing and regulation of SEVs often creates a tension between the statutory right to operate such a venue and equality issues relating to discrimination and objectification of primarily women.

The starting point for the council is the fact that it cannot take any moral stand in relation SEVs in recognition that Parliament has made it lawful to operate a sex establishment. This starting point however does not mean that the council is therefore bound by the primary legislation at the expense of other statutory requirements.

When determining individual applications, the council must have regard to its PSED taking into account the individual merits of each application.

With reference to the objections, equality issues that may be relevant include:

1. The need to ensure that any protected characteristic group is not more, or less, welcome than another;
2. The need to properly consider the fear of any protected characteristic group using and accessing public spaces, facilities and infrastructure;
3. The need to properly understand the relevant locality and the need to ensure, taking into account the relevant locality, any protected characteristic group's view is taken into account such as those relevant to religion or belief or race;

Some or all of these equality issues may be addressed through appropriate conditions and robust enforcement. Equally, the licensing process may also be an important tool to achieve the same outcome, for example, licence reviews and policy changes.

8.2.2 **Properties with sensitive uses or in sensitive locations** - A number of objectors have made reference to the fact that the Two Pigs is located near properties the council's licensing policy would deem sensitive (see 5.10).

The Committee should be mindful of this and assess the merits of the application against the relevant policy provisions.

Members are also to note that whilst historically the committee has deemed the location appropriate for the licensing of a SEV, the Committee is entitled to change your mind on reconsideration of the fact and circumstances (R (Alistair Thompson) v Oxford City Council v Spearmint Rhino Ventures (UK) Limited [2014] EWCA Civ 94). The Committee is therefore not necessarily bound by previous decisions however if there is no relevant change of circumstances, the Committee has to give their reasons for departing from the earlier decision.

8.2.3 **Evidence** – Some objectors have commented that they are in possession of anecdotal evidence of crime, alarm and distress caused by the Two Pigs during times when they operating as a SEV. Whilst the Committee is under duty to take into consideration comments by “other persons”

(para. 4), these comments must be relevant and credible. Members must be mindful of this when deciding the appropriate amount of weight to attach to these comments.

Of particular importance are any comments and evidence submitted by the Chief Officer of Police.

- 8.3 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.
- 8.4 In relation to this application, the premises are located within an area that the council has decided is appropriate for the consideration of applications for SEVs, providing those premises are not near properties with sensitive uses or in sensitive locations (see para. 5.10). The council has not set a limit on the number of SEVs that may be permitted inside this area.
- 8.5 Members are to note that the policy must not fetter the sub-committee's discretion to consider the individual circumstances and merits of the application but equally the sub-committee must not arbitrarily deviate from its policy without good reason.
- 8.6 The licensing sub-committee, in making its decision, should provide comprehensive reasons.
- 8.7 Having considered all the relevant matters, the committee must decide whether to:
 - a) Grant the application as applied for;
 - b) Grant the application subject to any additional terms, conditions and/or restrictions that are either specific to the licence or standard conditions; or
 - c) 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

Licensing Act 2003 Premises Licence ref 17/01580/PRMMV

Case Officer

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