

# Cheltenham Borough Council

## Licensing Sub Committee – 4<sup>th</sup> November 2020

### Licensing Act 2003: Determination of Application for a Premises Licence

For the Basement, No. 2 Crescent Terrace, Cheltenham. GL50 3PE

Case Officer: Jason Kirkwood - Senior Licensing Officer

#### **Introduction**

1. The Licensing Act 2003 (the 2003 Act) introduced a unified system of regulation through four types of authorisation to permit licensable activity:-
  - The premises licence,
  - The club premises certificates for qualifying clubs,
  - Temporary Event Notices and
  - The personal licence.
2. Licensable activity is defined under the 2003 Act as the following:-
  - The sale by retail or the supply of alcohol,
  - Regulated entertainment (recorded and live music, performance of a play, exhibition of a film, etc)
  - Late night refreshment (food or drink supplied above ambient temperature between the hours of 23:00 and 05:00).
3. Since the implementation of the 2003 Act, Central Government has issued Statutory Guidance (the Guidance) to provide more comprehensive and detailed advice on this legislation. It was last updated on 6 April 2018. The licensing authority must have regard to the Guidance when determining this application.
4. The Guidance is binding on Cheltenham Borough Council acting in its capacity as a licensing authority under the 2003 Act. However, the licensing authority may depart from it, if it has good reason to do so. Departure from this Guidance could give rise to an appeal or judicial review, and so clear reasons must be referenced in such instances.
5. The 2003 Act requires that a council must formulate and publish a statement of its licensing policy. This will explain the manner in which the licensing authority will carry out its responsibilities under the 2003 Act. The licensing authority may depart from the Statement of Licensing Policy (the Policy), but must give good reason(s) where it chooses to do so.
6. The Guidance and Policy are both referenced: through elements of this report, through a summary of the most relevant extracts from each attached as appendices and by way of weblinks to both documents.

#### **Background**

7. The Borough Council, as the licensing authority, is responsible for authorising all venues/ events in the borough where licensable activities take place.

8. The legislation provides a clear focus on the promotion of four statutory objectives which must be considered when licensing functions are undertaken.
9. The system is built upon four licensing objectives:
  - The prevention of crime and disorder;
  - Public safety;
  - The prevention of public nuisance; and,
  - The protection of children from harm.
10. The licensing authority must promote these objectives in carrying out its functions.
11. Each objective is of equal importance. There are no other statutory licensing aims or objectives, although other aims and objectives may be pursued through local policy.
12. Where an application is made to the licensing authority, the default position is that the application will be granted, as applied for, unless relevant representations (objections) are received. If relevant representations are received, a hearing must be held to consider the application, in light of the objections and/ or any support for it.
13. An objection against an application must refer to the promotion of one or more of the licensing objectives to be considered as a relevant representation, and must be made by a Responsible Authority or an 'Other Person'.
14. Responsible Authorities: - The 2003 Act identifies 10 responsible authorities that act as statutory consultees for applications for premises licences. All of these consultees are served with a copy of the application and have the opportunity to object or make comment:-
  - The relevant Licensing Authority,
  - The Chief Officer of Police
  - The local Fire and Rescue Authority
  - The relevant health and safety enforcing authority
  - The local authority with responsibility for environmental health
  - The local Planning Authority
  - The relevant body with responsibility for the protection of children
  - The relevant Public Health Authority
  - Trading Standards
  - Home Office Immigration Enforcement (on behalf of the Secretary of State).
15. Other Persons - The 2003 Act allows any individual, body or business to make representations to the licensing authority regarding an application for a premises licence, where their comments relate to the promotion of the licensing objectives.
16. Mediation - In some cases, mediation by the licensing authority has the potential to find a satisfactory conclusion for all parties, and a hearing may be dispensed with, if all parties agree. *This work is seen as very unlikely to be successful and so will not be undertaken.*

## **Policy Considerations**

17. Core Hours for Licensable Activities - As set down in the Policy the council will avoid arbitrary restrictions on licensing hours that undermine the principles of flexibility and consideration of each application is on its own merit.

18. However, the council believes that licensable activities carried on within the core hours set out below will generally not have a harmful impact on the licensing objectives, address the concerns raised by local residents and businesses and are usually less likely to attract representations.

19. Furthermore, earlier closing will result in less alcohol consumption and drunkenness and would also be consistent with the ability to get crowds dispersed from the town centre.

Table 1: Core Hours for Licensable Activities

Type of premises	Commencement hour no earlier than	Terminal hour no later than
Off licence	09:00	23:00
Restaurant	10:00	01:00
Theatres, cinemas and other performance venues	10:00	00:00
Pubs/ bars/ nightclubs	<b>Town centre 10:00</b>	<b>03:00</b>
	Local neighbourhood areas 10:00	00:00
Takeaways	N/a	N/a

20. As set down in Appendix D of the Policy, **the location for the venue** is defined as a 'town centre' location.

21. Where relevant representations have been made, the sub - committee will take the following matters into consideration when making a decision, as per the Policy. 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

## **The Determination of an Application**

22. Where relevant representations have been received and mediation is unsuccessful or not viable, then the licensing authority's discretion will be engaged. It will convene a hearing by a sub – committee of the Licensing Committee to consider the application and representations.

23. Responsible authorities and/or other persons in relation to an application may attend the hearing, with adequate notice, to amplify and clarify their relevant comments. They may not add to their original representation once the objection period has closed.

24. The applicant may also attend the hearing to assist the authority in considering the application.

25. The hearing should focus on the steps considered appropriate to promote the particular licensing objective or objectives that have given rise the representations and not stray into undisputed areas.

26. The sub – committee should determine the application with a view to promoting the licensing objectives in the overall interests of the local community. The licensing authority must give appropriate weight to:-

- The Statutory Guidance - the current version is available to view [here](#) (the most relevant extracts to this case are attached at **Appendix 5** of this report).
- The Cheltenham Borough Council Statement of Licensing Policy – the current version is available to view [here](#) (the most relevant extracts are attached at **Appendix 6** of this report).
- The representations (including supporting information) presented by the parties. (Attached at **Appendix 3**).
- The steps that are appropriate to promote the licensing objectives.

## **The Application for Festival House**

Case number: 20/01041/PRMA

Applicant: Epicuria London Ltd

Licence type – premises licence

Name of business: Veenoo

Address: Basement, No. 2 Crescent Terrace, Cheltenham. GL50 3PE

27. A sub - committee is required to discharge its duty and determine this application with a view to promoting the licensing objectives. This is because relevant representations have been made against the application.
28. The application is attached at **Appendix 1 a** and details the hours sought for licensable activity to take place. It includes the steps the applicant would take to promote the licensing objectives at Section M if the application is granted. **Appendix 1 b** contains further information: confirmation of 2 amendments to the application (based on feedback from the Senior Licensing Officer and the Police), some background on the plans for the venue from the applicant and details from the Fire Authority regarding fire safety concerns that had been raised by an objector.

Please note further the following points of clarification to clear up certain anomalies:-

*As discussed earlier. I have amended your application to reflect non - standard timings for December and New Year's Eve of an additional hour for licensable activities and closing time. I have added late night refreshment to your application until your closing time and I have added 30 minutes drinking up time to your closing time, all as discussed.*

29. The application was set out for consultation on 17<sup>th</sup> August 2020 and was deemed as duly made at that point. The close of the objection period was specified as 14<sup>th</sup> September 2020. The application was sent electronically to all responsible authorities, available to view online on the council's website and public notice of the application was given by way of site notice.
30. The application was accompanied by a plan of the premises, which is attached at **Appendix 2**. The location of the proposed venue is shown by way of area maps highlighting No 2 Crescent Terrace at **Appendix 4**.
31. However, the application was not properly advertised, as the newspaper notice was not placed with the prescribed period.
32. *Concern was raised during the first consultation period, that the site notice was not visible later on in that consultation period. The tenant of the premises confirmed that in the last weekend of that period the notice had fallen down and was found on the floor of the premises. At that time the notice was displayed on the inside of the basement window only.*
33. The consultation period was restarted and a further 28 days consultation was provided. The site notice was posted again at the premises and the newspaper notice was published. That consultation process was stated as ending on 14<sup>th</sup> October 2020.
34. The second time the site notice was placed at the premises, it was on display in the window of the basement premises and visible from the pavement. However, it was agreed by the tenant of the property to place a second copy of the notice on the railings at ground level in a protective covering. This copy of the notice was only displayed whilst the café in the basement was open. The Senior Licensing Officer determined this was an appropriate means to ensure local residents and businesses were most effectively informed of the application. This was agreed, as it was felt that the notice being displayed in the window of the basement was legally sufficient, but the additional notice would better inform the community of the application in practical terms.

## Relevant Representations

35. During the objection period there was one relevant representation received from a responsible authority, namely the Environmental Health Team at Cheltenham Borough Council. Their comments are attached at **Appendix 3 a**.

36. The Environmental Protection Team has concerns about the application, in relation to potential public nuisance, and would recommend refusal of it on the basis of the hours sought. However, they offer steps that they believe would mitigate their concerns to a sufficient extent to allow the licensable activities to take place without the potential for public nuisance. Members should consider these steps when determining the application. The applicant was not able to agree to the amendments suggested at the time of writing this report, as the limits on the venue would affect the viability of the venue on economic grounds. Although the council has a many faceted role in supporting businesses, this is not a statutory ground for determining the application. The statutory guidance provides some assistance, particular at 9.44:-

*Determination of whether an action or step is appropriate for the promotion of the licensing objectives requires an assessment of what action or step would be suitable to achieve that end. While this does not therefore require a licensing authority to decide that no lesser step will achieve the aim, the authority should aim to consider the potential burden that the condition would impose on the premises licence holder (such as the financial burden due to restrictions on licensable activities) as well as the potential benefit in terms of the promotion of the licensing objectives. However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters. As with the consideration of licence variations, the licensing authority should consider wider issues such as other conditions already in place to mitigate potential negative impact on the promotion of the licensing objectives and the track record of the business.*

37. The Police had made comments on the application but their concerns were satisfied by the applicant agreeing to add measures to their Operating Schedule. They are no longer considered a party to this application for those reasons, as the applicant has agreed to their recommendations.

38. However, four relevant representations were received from local residents that is to say 'Other Persons'. Their objections are attached at **Appendix 3 b, c, d, e**.

39. For completeness, all relevant communications with each objector have been included, where appropriate.

40. *It should be noted that the representation from Environmental Health and one representation from an Other Person were received the second time the giving of the application was advertised.*

## Hearing

41. It is clear that Government has a clear priority for the justice system, council meetings generally and regulatory functions to continue to be maintained, as far as practicable, notwithstanding the challenges faced by society through the measures introduced to tackle COVID – 19.

42. The council is currently delivering many council meetings 'virtually', whereby the applicants/ public/ councillors can view and/ or take part in meetings through online conference facilities. We will use those same facilities to ensure access to this hearing,

the right for all parties to be heard and provide transparency about the decision making process. All parties will be able to take part through those means and are welcome to participate 'virtually' as they normally would if the meeting was held in person.

43. In any event, the council appreciates that not all parties will want to 'attend' the meeting, but it understands that they will want their views to be considered. If a party is not able to attend the hearing, this will not undermine the consideration of their written submission relating to an application.
44. *It is worth bearing in mind that normal practice at hearings involves parties not repeating the points that have already been made to the sub – committee on the day. Furthermore, the sub – committee will consider all written representations in any event, and the hearing itself is the opportunity for parties to only 'amplify and clarify' the points they have already made in writing.*

### **Case Officer Comments**

45. Members are asked to consider the application and the following points, which seem pertinent to the case:-
1. Members are asked to determine whether the controls put in place by the applicant (an as subsequently amended) are sufficient to mitigate any justified concerns about the application, in light of the evidence and/ or reasoning put forward by the objectors with reference to this specific proposal.
  2. All parties should note that the Live Music Act 2012 allows premises licensed for the sale of alcohol for consumption on the premises to provide live and recorded music between 08:00 – 23:00 hours daily (*whilst the premises concerned is open for the sale of alcohol for consumption on the premises*). Therefore, conditions relating to those activities are only in force outside of those hours.
  3. Concern was raised about matters related to fire safety at the venue. These concerns were passed to the Fire Authority, who made enquiries related to the concerns raised. The Fire Authority have confirmed that they are satisfied with the information provided to them by the applicant. In light of this information, Members should disregard these concerns as the Fire Authority have considered them and are satisfied with the response from the applicant. The Fire Authority have their own robust powers to respond to fire safety concerns and do not usually use the application process for a premises licence to resolve them.
  4. This application has drawn a relatively small number of objections compared to the most contentious dealt with by the Authority. However, it is clear that those that have objected have significant concerns, Members must and will ensure that they focus their determination of this particular application, by considering the potential adverse impacts on the promotion of the licensing objectives by sifting and weighting the evidence and reasoning put forward by the objectors.
  5. The location of this proposed venue has been used as a late night entertainment venue previously. However, at that time the neighbouring property at number 1 was not residential. The nature of that business would appear fundamentally different to the one in this application and therefore no evidence will be presented about that operation.
  6. The proposed venue is sited near to and next to residential property, whilst also being near to a number of late night licensed premises. The premises is located in an area of mixed use with residential property, a transport hub and daytime and licensed businesses nearby.

7. All licensed premises have the capacity to cause an adverse impact on a locality. Ultimately, the question for Members will turn on whether the proposed venture can operate without an adverse and disproportionate impact on the local community, given the location and nature of the business. The sub – committee may decide to restrict the application to ensure that is the case, through the use of conditions, and should consider the Environmental Protection comments in this respect.
8. Members must balance the substance and relevance of the statutory guidance and local licensing policy, in respect of the competing arguments for and against the application. This premises is located in the town centre area for the purposes of ‘core hours’, but a number of considerations are listed that must be considered by Members.

46. Furthermore, all parties must recognize the following important considerations:-

- The decision making exercise is considered as an ‘administrative’ process in legal terms. However, there is potential for legal challenge against a decision, and where a party appeals, the decision making process is scrutinized. The licensing authority is bound by legislation and case law in how it carries out this function, and so must act accordingly.
- Members can only consider evidence/ reasoning presented, which is clearly related to the promotion of the licensing objectives and this specific proposal.

47. Finally, the case *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 is considered an important licensing case that was considered by the Court of Appeal in 2011. An extract from the conclusion provides some assistance for the sub – committee:-

41. *As Mr Matthias rightly submitted, the licensing function of a licensing authority is an administrative function. By contrast, the function of the district judge is a judicial function. The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires. (See the judgment of Lord Hoffmann in Alconbury at para 74.)*

**42. Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. Sometimes a licensing decision may involve narrower questions, such as whether noise, noxious smells or litter coming from premises amount to a public nuisance. Although such questions are in a sense questions of fact, they are not questions of the "heads or tails" variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. In any case, deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than a matter of pure fact.**

**43. The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the**

***decision. The fuller and clearer the reasons, the more force they are likely to carry.***

48. The last paragraph highlights in particular the statutory duty of the sub – committee to give clear written reasons for its decision. This allows all parties to an application to understand the eventual outcome in a meaningful way.

## **DECISION MAKING**

49. The sub – committee will consider thoroughly and diligently the representations and their relevance to the determination of this application. Members must limit their considerations of the objections to where they are specifically relevant to the application before them.

50. The licensing authority must determine the application and decide whether to:-

- **Grant the application with mandatory conditions and those offered in the application only, or**
- **Grant the application with mandatory conditions, those conditions offered in the application (amended or otherwise) and attach specific conditions to promote the licensing objectives - where it considers it appropriate. (This may include restricting the hours applied for in the application), or**
- **Refuse the application, as it considers it appropriate to promote the licensing objectives.**

51. Each application must be considered on its own merits and in accordance with the 2003 Act, the Guidance and the licensing authority's Statement of Licensing Policy.

52. If conditions are attached to the grant of a licence they must be tailored to the individual type, location and characteristics of the premises/ events concerned. This is essential to avoid the imposition of disproportionate and overly burdensome conditions on premises where there is no need for such conditions.

53. If any party to a hearing is aggrieved by the decision of the licensing authority (this means the applicant or any person/ organisation/ business that made a relevant representation), they may appeal to the Magistrates' Court. They must do so within 21 days of being notified of the decision in writing.

### **Licence conditions – general principles**

54. Conditions on a premises licence are important in setting the parameters within which premises can lawfully operate. The use of wording such as 'must', 'shall' and to a lesser extent 'will' is encouraged.

55. Licence conditions:-

- Must be appropriate for the promotion of the licensing objectives;
- Must be precise and enforceable;

- Must be unambiguous and clear in what they intend to achieve;
- Should not duplicate other statutory requirements or other duties or responsibilities placed on the employer by other legislation;
- Must be tailored to the individual type, location and characteristics of the premises and events concerned;
- Should not be standardised and may be unlawful when it cannot be demonstrated that they are appropriate for the promotion of the licensing objectives in an individual case;
- Should not replicate offences set out in the 2003 Act or other legislation;
- Should be proportionate, justifiable and be capable of being met, (for example, whilst beer glasses may be available in toughened glass, wine glasses may not);
- Cannot seek to manage the behaviour of customers once they are beyond the direct management of the licence holder and their staff, but may impact on the behaviour of customers in the immediate vicinity of the premises or as they enter or leave; and
- Should be written in a prescriptive format.

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Background Papers

Various appendices

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