

Cheltenham Borough Council

Licensing Sub Committee – 22nd June 2021

Licensing Act 2003: Determination of Application for a Premises Licence

For 87 Salisbury Avenue, Cheltenham. GL51 3DA

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 has not be undertaken for this case.*

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	Town centre 10:00	03:00
	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 'local neighbourhood area' location. It should be noted that the opening time is in conflict with this part of the policy but the closing time is in accord with it.

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: 21/00363/PRMA

Applicant: Mr Dinesh Palinda Weerasinghe Mudiyansele

Licence type – premises licence

Name of business: Previously Snips and Curls was located at the premises

Address: 87 Salisbury Avenue, Cheltenham. GL51 3DA

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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 relevant details of the application are attached at **Appendix 1**, including 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.
29. The application was set out for consultation on 4th May 2021 and was deemed as duly made at that point. However, the close of the objection period was specified as 2nd June 2021 on the public notices. 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 the premises at **Appendix 4**.

Relevant Representations

31. During the objection period there was one relevant representation received from a responsible authority, namely the Police.
32. However, the concerns of the Police have been fully satisfied by the applicant agreeing to amend their Operating Schedule as provided below:-

Prevention of crime and disorder

a) *A CCTV system will be in operation at the premises and recorded images shall be retained for a minimum period of 14 days. The CCTV system shall be maintained in good working order, shall record at all times the premises are open. CCTV images will be provided to the police and other responsible authorities as soon as practicable.*

b) *Spirits shall only be displayed behind the staff counter.*

Public safety

a) *A register of refusals of alcohol will be maintained at the premises. The register will be made available for inspection by the Police and other responsible authority.*

b) *A decision will be made by licensee to review safety of staff over weekend evening shifts.*

The prevention of public nuisance

a) *An incident register will be maintained at the premises and staff will log all challenges and refusals under the "challenge 25" policy. This log will be made available to the authorities on request.*

The protection of children from harm

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a) *The premises will adopt a 'Challenge 25' policy. This means that if a customer purchasing alcohol appears to be under the age of 25, they will be asked for proof of their age, to prove that they are 18 years or older. Posters will be on display advising customers of the 'Challenge 25' policy. The only forms of identification that will be accepted at the premises are a passport, UK photo-card driving licences, military ID & cards bearing the 'PASS' hologram.*

33. If Members are minded to grant the application these amendments to the Operating Schedule should be reflected as conditions of licence.

34. However, **30** relevant representations were received from local residents and Ward/ Parish councillors that is to say 'Other Persons'. Their objections are attached at **Appendix 3**.

35. For completeness, relevant communications with each objector has been included, where appropriate.

Hearing

36. 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.

37. The council has been delivering council meetings 'virtually', whereby the applicants/ public/ councillors can view and/ or take part in meetings through online conference facilities. **However, the government now requires all such meetings to return to 'in person meetings'**. Therefore this meeting will take place at the council offices, but any person can still view the proceedings on the Council's YouTube channel through a live stream of the meeting.

38. 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.

39. *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.*

40. The hearing is supposed to take place within 20 working days of the close of the objection period. For a number of reasons, that deadline has been missed, namely Licensing team workload, appointment of the new Licensing Committee being confirmed following the recent elections and due to the number of objections received for this case. However, it is not felt that any party is prejudiced by the giving of less notice in this case, although the Chair of the sub – committee can confirm this on the day of the hearing.

Case Officer Comments

41. Members are asked to consider the application and the following points, which seem pertinent to the case:-

1. Members are asked to ensure that they focus their deliberations around the promotion of the licensing objectives and consider the reasoning and evidence put forward - solely with relevance to the promotion of the four licensing objectives.
2. A number of representation have raised the 'needs' of the area (in terms of not needing such a service i.e. alcohol by way of off sale) and the fact that a premises in the vicinity already supplies alcohol – Members must not take these factors into account in making their decision as they are not relevant under the 2003 Act. If they were to do so, they would be acting ultra vires (that is to say beyond their legal powers and open to legal challenge).
3. They should consider whether the steps laid out in the Operating Schedule (as amended following the Police representation) are sufficient to mitigate any justified concerns about the application, with reference to this specific proposal.
4. 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, but they must ensure that they relate to the evidence/ reasoning that they consider relevant and to which they have attached weight.
5. 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.

42. 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.

43. 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.

44. 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

45. 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.

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

- **Grant the application with mandatory conditions and those offered in the application only (as subsequently amended), 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.**

47. 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.

48. 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.

49. 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

50. 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.

51. 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.

Background Papers

Various appendices

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