

# Cheltenham Borough Council

## "Miscellaneous" Licensing Sub-committee – 1 February 2023

### Local Government (Miscellaneous Provisions) Act 1982

### Application for a new Sexual Entertainment Venue Licence

### European Events Consultants Ltd.

### Report of the Licensing Team Leader

#### 1. Summary and recommendation

- 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 on a frequent basis.
- 1.2 In this case an application for a new SEV licence was submitted on 13 December 2022 for Under the Prom at 109 Promenade, Cheltenham, Gloucestershire. GL50 1NW
- 1.3 The application is for Relevant Activities for the following dates and times during the 2023 Festival:-

Hours to be applied for:

Cheltenham Festival in March 2023 dates to be confirmed in writing 1 month prior to the event to the Council and Police (estimated to be 13th,14th,15th, 16th and 17th March 2023) 5 days only with hours to be:

Monday 8pm until 5am the day following

Tuesday 6pm to 5am the day following

Wednesday 6pm to 5am the day following

Thursday 6pm to 5am the day following

Friday 6pm to 5am the day following

This includes the amendment of standard condition number 1:-

#### **Disapplication of Standard Condition 1**

The applicant wishes to disapply Standard Condition 1 which reads : “ The premises shall only permit adult entertainment between the hours of 20:00 and 04:00 hours the following morning as determined by the licensing committee.

1.4 A copy of the application form is attached at **Appendix 1** (along various documents at Appendix 1 a – o), the premises layout and various documents related to the layout **Appendix 2 a (licence plan), b (bird’s eye view of rear temporary structure), c (layout plan for external area), d (front elevation) and e (rear elevation)** and a location map **Appendix 3**.

1.5 The applicant has also requested to disapply standard condition number 6:-

**Removal of Standard Condition 6**

As part of the new Sexual Entertainment Licence the applicant also wishes to disapply standard condition 6 regarding advertisements, solicitations and displays which reads as follows:

“6. There shall not be displayed outside the premises, in the immediate vicinity, or elsewhere with the Town and advertisements that indicate or suggest that any form of Relevant Entertainment takes place on the premises. This includes the display of any advertisement, word, letter, model, sign, light, placard, board, notice, device, representation, drawing, writing or any matter or thing (where illuminated or not) including any of the following ways;

- a. by means of personal solicitation in the locality of the licensed premises
- b. by means of leafletting in the locality
- c. by means of externally displayed advertisement (such as on billboards or posters) in any parts of the Council’s administrative area
- d. by means of cruising vehicles or use of any other form of solicitation to invite people into the premises.”

The reason for the disapplication of this condition is permit a vehicle to transport clientele to and from the venue at all times and for staff to be permitted to give out leaflets for the courtesy bus in the Town.

To be replaced with the following:-

*There shall not be displayed outside the premises, in the immediate vicinity, or elsewhere within the Town any advertisements that indicate or suggest that any form of Relevant Entertainment takes place on the premises. This includes the display of any advertisement, word, letter, model, sign, light, placard, board, notice, device, representation, drawing, writing or any matter or thing (where illuminated or not) by means of externally displayed advertisement (such as on billboards or posters) within the councils administrative area.*

*1. The Applicant is allowed to solicit individuals to attend the premises during the hours the licence is in operation, provided that no solicitation takes place to anyone who appears to be under the age of 25.*

*2. The Applicant is allowed to operate a courtesy vehicle to transport dancers and clientele to and from the venue at all times. Further to be allowed to advertise, including by way of leaflets, the courtesy vehicle at all times during the permitted licence hours. No music will be played that can be heard from outside the vehicle. The use of the name ‘Eroticats’ is permitted.”*

## 1.5 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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## 2. Background

2.1 On 1 October 2014, Council approved the adoption of the amended provision of Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 to take effect in the borough on 1 December 2010.

2.2 Since the adoption, any premises that want to offer “relevant entertainment” on a frequent basis can only do so by obtaining a SEV licence.

2.3 Relevant entertainment is defined as any live performance or any live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).

2.4 Under the Act premises can provide relevant entertainment on an infrequent basis without the need for a SEV licence. An infrequent basis is defined under the Act as no relevant entertainment has been provided on more than 11 occasions within a 12 month period and no such occasion has begun within a period of one month beginning with the end of the previous occasion, and no such occasion has lasted longer than 24 hours. Any premises wishing to offer relevant entertainment more frequently are required to apply for a SEV licence.

## 3. Consultation

3.1 An applicant for a Sex Establishment Licence must give notice of their application in accordance with the requirements set out in schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982. The advertising requirements are:

3.1.1 Publishing an advertisement in a local newspaper circulating in the appropriate authority’s area, not be later than 7 days after the date of the application; and

3.1.2 Where the application is in respect of premises, notice of it shall in addition be displayed for 21 days beginning with the date of the application on or near the premises and in a place where the notice can conveniently be read by the public.

3.2 Schedule 3, paragraph 10(15) of the Local Government (Miscellaneous Provisions) Act 1982 states:

“Any person objecting to an application for the grant, renewal or transfer of a licence under this Schedule shall give notice in writing of his objection to the appropriate authority, stating in general terms the grounds of the objection, **not later than 28 days after the date of the application.**” [Emphasis Added]

3.3 The applicant has advertised the application in accordance with the statutory requirements set out above.

3.4 In determining the application, Members must have due regard to any observations made by the Chief Officer of the Police and any other comments made by anybody else.

3.5 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.

3.6 Objections made on moral grounds or values are not relevant to either the mandatory or discretionary grounds for refusal and should therefore not be considered relevant.

#### **Consultation – Chief Officer of Police**

3.7 The Chief Officer of Police did not raise any objections in relation to this application.

#### **Consultation – Other Persons**

3.8 In relation to this application the licensing authority received 8 objections and 59 emails of support from residents and others during the statutory consultation period. Copies of these are attached in **Appendix 4**.

3.9 There is no discretion for the authority to extend the statutory deadline for consultation therefore, the objections received outside the statutory deadline for comments has not been included in this report.

### **4. Policy Considerations**

4.1 The authority’s adopted policy statement in relation to the regulation and control of SEVs was adopted by Full Council on 29 July 2020, and this policy statement sets out the authority’s guidance, application procedure, terms and conditions relating to the regulation of SEVs.

4.2 Below (para. 4.4 – 4.15) 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.

4.3 As a regulatory matter, the authority does not take any moral stand in adopting this policy. The authority 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 authority’s role as the Licensing Authority to administer the licensing regime in accordance with the law.

## **Determination (Section 11)**

### **Mandatory Grounds for Refusal**

4.4 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;
- d) to a body corporate which is not incorporated in an EEA State; or
- e) to any person who has, within a period of 12 months immediately preceding the date when the application was made, been refused that grant or renewal of a licence for the premises, vehicle, vessel or stall in respect of which the application is made, unless the refusal has been reversed on appeal.

### **Discretionary Grounds for Refusal**

4.5 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:
  - 1) to the character of the relevant locality; and/or
  - 2) to the use to which any premises in the vicinity are put; and/or
  - 3) 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 12)**

4.6 In deciding the appropriate number of premises to be licensed, the authority must consider the character of the relevant locality and what is the appropriate number of SEVs for the relevant locality. The number can be 'nil'.

- 4.7 Cheltenham is a relatively small urban borough that is predominantly residential in nature. The authority has already resolved that it is inappropriate to licence SEVs in or in the vicinity of, amongst others, residential areas. It is the authority's policy therefore that there is no locality outside of the Designated Permitted Area (shown on **Appendix 5** attached) in which it would be appropriate to license a SEV. Accordingly the appropriate number of SEVs for outside of the Designated Permitted Area is nil.
- 4.8 The authority recognise however that the Designated Permitted Area offers a more varied 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 authority has therefore resolved that it will not set a limit on the number of permitted SEVs in the Designated Permitted Area providing those premises are not near properties with sensitive uses or in sensitive locations.
- 4.9 **It must be noted that this venue is situated outside of that area. If the committee were to be minded to grant the application where it is outside of that area, it should give cogent reasons for such a decision where it is against the council's stated policy.**

#### **Properties with sensitive uses or in sensitive locations**

- 4.10 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 authority shall consider, amongst other things, 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; 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.

#### **Objections (Section 14)**

- 4.11 When considering an application for the grant, renewal, variation or transfer of a SEV licence the authority 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. Any person can object to an application provided that the objection is relevant to the discretionary grounds for refusal of a licence.
- 4.12 Objections should not be made on moral grounds or values and the authority will not consider objections that are not relevant to the grounds mentioned above.
- 4.13 Objectors must give notice of their objection in writing, stating the general terms of the objection.
- 4.14 Where the authority 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 authority shall not without the consent of the person making the objection reveal their name or address to the applicant.

4.15 Objections may only be made within the period of 28 days following the date on which the application was made to the authority.

## **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. Public Sector Equality Duty (PSED)

- 7.1 The PSED places a statutory duty on the council, in the exercise of its functions, to have due regard to the need to:
- a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

7.2 Protected characteristics are:

- a) age
- b) disability
- c) gender reassignment
- d) pregnancy and maternity
- e) race
- f) religion or belief
- g) sex
- h) sexual orientation

7.3 The licensing and regulation of SEVs does fall within the authority's PSED and therefore the authority must have regard to the matters listed above when, for example, setting policy and issuing licences.

7.4 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.

7.5 The starting point for the authority 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 authority is therefore bound by the primary legislation at the expense of other statutory requirements.

7.6 When setting policy or determining individual applications, the authority must have regard to its PSED taking into account the individual merits of each application.

7.7 Equality issues may be relevant to (not exhaustive):

- a) The need to protect performers from harassment and threat;
- b) The need to ensure that any protected characteristic group is not more, or less, welcome than another;
- c) The need to properly consider the fear of any protected characteristic group using and accessing public spaces, facilities and infrastructure;
- d) 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;
- e) The need to consider the views and experiences of people with disabilities as a protected characteristic group.

7.8 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. Officer Comments

8.1 When determining an application for a sexual entertainment venue licence, the committee must have regard to the relevant statutory provisions, the authority'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.

- 8.2 In particular, the committee must bear in mind that its grounds for refusal of this licence application is restricted to those specified under the statutory mandatory and discretionary grounds. For reference these are outlined at paragraphs 4.4 and 4.5 respectively. As such, the relevance of representations made in relation to this application must therefore also relate to either the statutory mandatory and discretionary grounds for refusal.
- 8.3 The committee is also reminded that the authority does not take any moral stand in relation to operation of sex establishments such as sexual entertainment venues because the authority 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 authority's role as the Licensing Authority to administer the licensing regime in accordance with the statutory provisions.
- 8.4 The committee must also be mindful of its Public Sector Equality Duty under the Equality Act 2010. The committee is reminded of this point in objections against the application and must consider this duty in respect of this application.
- 8.5 As mentioned previously this venue sits outside the council's Designated Permitted Area. The council's policy is not grant applications in such circumstances and if the committee does decide to grant this application clear and cogent reasons must be given to depart from the council's stated policy.
- 8.6 Finally, it should be noted that this case has presented some concerns about the use of the venue from the Environmental Health Team, in respect of noise. An email exchange is attached at **Appendix 6**, which highlights the concerns discussed.
- 8.7 The legislation covering the sale of alcohol and *regulated* entertainment specifically exempts the provision of live/ recorded music, which is considered as integral to providing *relevant* entertainment. Whilst the legislation discussing the licensing of venues providing relevant entertainment is silent on the potential impact of noise from live or recorded music on local residents or businesses.
- 8.8 As can be seen from the email exchange there is a potential solution for the Environmental Health Team to utilise should they feel it necessary to do so, if noise becomes an issue at the venue. However, there is no guidance from the legislation itself whether this issue could or should be considered in respect of 'the use to which any premises in the vicinity are put' or 'to the layout, character or condition of the premises..of which the application is made'.
- 8.9 It would seem disproportionate to refuse the application on the grounds of noise, where this concern relates to the use of the outside area in particular, but it may be appropriate to consider conditions to mitigate such concerns for use of the outside areas.
- 8.10 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.

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**Background Papers**

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

Cheltenham Borough Council Sexual Entertainment Venue Policy Statement adopted Full Council on 29 July 2020

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

**Case Officer**

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