

# Cheltenham Borough Council

## Miscellaneous Licensing Sub-Committee – 4<sup>th</sup> October 2023

### Local Government (Miscellaneous Provisions) Act 1982

#### Application for a variation to an existing Sexual Entertainment Venue Licence

#### European Events Consultants Ltd.

#### Report of the Licensing Team Leader

#### Case reference number: 23/01277/SEXA

#### 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 a variation application for an existing SEV licence was submitted on 14 August 2023 for Under the Prom at 109 Promenade, Cheltenham, Gloucestershire. GL50 1NW
- 1.3 The current licence runs from 7<sup>th</sup> February 2023 until 6<sup>th</sup> February 2024. The days and hours for the existing licence for Relevant Activities are the following:-

Cheltenham Festival in March 2023 13th,14th,15th, 16th and 17th March  
2023 5 days only:-

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

1.4 The applicant is requesting a variation to the days and hours as shown below:-

**Friday, Saturday and early hours of Sunday for the Cheltenham Racecourse November Meeting each year. Dates to be confirmed in writing 1 month prior to each Cheltenham Racecourse November Meeting event to the council and Police.**

**Friday of the November Meeting - 8pm - 5am the day following.**

**Saturday of the November Meeting - 8pm - 5am the day following.**

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 2014.

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 **It should be noted that under the law any 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 the following:-
- 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 It should be noted that officers had recently agreed to notify a local representative body - GRASAC (Gloucestershire Rape and Sexual Assault Centre) - that has had a great deal of dialogue with the council regarding SEV applications over the years, and did do so.
- 3.6 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.
- 3.7 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

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

#### Consultation – Other Persons

- 3.9 In relation to this application the licensing authority received 15 objections and 11 emails of support from residents and others during the statutory consultation period. Copies of these are attached at **ANNEX 1 and 2 respectively.**
- 3.10 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 **ANNEX 3** 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 but that the authority decided to grant the original application. It will be for the committee to determine whether they believe that the increase in the number of days for this venue is relevant in the context of that decision.

**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.

## 5. National Guidance (March 2010)

- 5.1 The Government has issued non-statutory guidance to aid local authorities carrying out their functions under Schedule 3, as amended by section 27.
- 5.2 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.
- 5.3 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

- 5.4 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)
- 5.5 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

- 5.6 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)

- 5.7 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)
- 5.8 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**

- 5.9 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)
- 5.10 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)
- 5.11 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)
- 5.12 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**

- 5.13 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

5.14 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)

### 6. Public Sector Equality Duty (PSED) (attached at ANNEX 4)

6.1 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.

6.2 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

6.3 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.

6.4 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.

6.5 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.

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

6.7 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.

6.8 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.

6.9 **High Court Decision - *THE KING (on the application of ) CDE and BOURNEMOUTH, CHRISTCHURCH AND POOLE COUNCIL [2023] EWHC 194 (Admin)***

6.10 In February 2023 the High Court considered a judicial review of the decision to adopt a new SEV policy. This case was stemmed from the following considerations (note - ground 3 does not seem relevant to the variation before Members):-

*The Claimant contends that the Defendant erred in that it failed to have regard to and/or conscientiously engage with these SEB concerns by dismissing them as amounting to "moralistic" objections which could not be considered in determining whether to adopt the Policy and the NCP in particular. In so doing, the Defendant is also said to have failed to comply with the Public Sector Equality Duty ("PSED") under s. 149 of the Equality Act 2010 ("the 2010 Act"). These two matters form the basis of Grounds 1 and 2 of the Claimant's challenge. ~~The Claimant further contends that the effect of the ARP is unlawfully to fetter the Defendant's discretion in respect of licensing decisions which Parliament has decreed should be reviewed on an annual basis. That is Ground 3.~~*

6.11 This case is referenced to ensure that Members consider the High Court decision as far as it would be relevant and appropriate to do so. The key points of focus would seem to be that the PSED, in the context of local authority decision making generally, must be given 'rigorous consideration' of the PSED based on a 'proper and conscientious focus on the statutory criteria'

6.12 The case can be found in full at - <https://www.bailii.org/ew/cases/EWHC/Admin/2023/194.html>

6.13 A summary and analysis of the case can be found here - <https://www.localgovernmentlawyer.co.uk/licensing/399-licensing-news/52893-high-court-judge-quashes-decision-to-introduce-no-cap-strip-club-licensing-policy>

## 7. Officer Comments

- 7.1 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.
- 7.2 In particular, the committee must bear in mind that its grounds for considering this application seem less restricted than for the grant of a new or renewal application. The legislation is silent on the grounds for consideration of a variation application, which is not helpful. However, one could assume that the grounds considered as relevant should relate to the statutory purpose of this legislation and promote public protection in line with the grounds for consideration of new and renewal application, in so far as they relate to an existing licence. Moreover, the committee should consider the Public Sector Equality Duty and ultimately act in the public interest.
- 7.3 The committee is 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. However, it must be cognisant of any relevant considerations in this respect in relation to the recent court case on the setting of SEV policy, although it should be noted that the case was not related to an application. Members should ensure that they only consider the elements of that case, as far as they believe they are relevant to the determination of a variation application.
- 7.4 Furthermore, the committee must be mindful of its Public Sector Equality Duty under the Equality Act 2010 in any event. The committee is reminded of this point in objections against the application and must consider this duty in respect of this application.
- 7.5 As mentioned previously this venue sits outside the council's Designated Permitted Area and was granted a licence. The council's policy is to not grant applications in this location and if the committee does decide to grant this variation it should give clear and cogent reasons for continuing to depart from that policy principle.
- 7.6 Having considered all the relevant matters, the committee must decide whether to:
- a) Grant the variation 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

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