

## Licensing Act 2003 Notice of Determination

**Date of issue of this notice:** 2 December 2016

**Subject:** Chimichanga, 80 The Broadway, SW19 1RH

Having considered relevant applications, notices and representations together with any other relevant information submitted to any Hearing held on this matter the Licensing Authority has made the determination set out in Annex A. Reasons for the determination are also set out in Annex A.

Parties to hearings have the right to appeal against decisions of the Licensing Authority. These rights are set out in Schedule 5 of the Licensing Act 2003 and Chapter 12 of the Amended Guidance issued by the Home Secretary (March 2015). Chapter 12 of the guidance is attached as Annex B to this notice.

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**Useful documents:**

**Licensing Act 2003**

<http://www.hmso.gov.uk/acts/acts2003/20030017.htm>

**Guidance issued by the Home Secretary**

<http://www.homeoffice.gov.uk/>

**Regulations issued by the Secretary of State for Culture, Media and Sport**

[http://www.culture.gov.uk/alcohol\\_and\\_entertainment/lic\\_act\\_reg.htm](http://www.culture.gov.uk/alcohol_and_entertainment/lic_act_reg.htm)

**Merton's Statement of Licensing policy**

<http://www.merton.gov.uk/licensing/>

# Annex A

## Determination

Prezzo Limited currently t/a "Chimichanga" at, 80 The Broadway, SW19 1RH sought a variation of their Premises Licence to replace their licensing plan to include a holding bar area on their premises and to amend Condition 3 of Annex 3 to allow this area to sell alcohol without a table meal condition. Following Responsible Authority representations, especially those of the Metropolitan Police Licensing Officer PC Russ Stevens, the application was modified to still operate with a table meal ultimately being consumed by the customer, but with customers waiting in this area before sitting down.

The variation application was granted as follows:

- The licensing plan is replaced with licensing plan 146-LO3, as annexed to the application.
- The applicant's proposed revised Condition 3 of Annex 3 was (with a small amendment by the Licensing Sub-Committee) amended on the Premises Licence to read:

"Intoxicating liquor shall not be sold or supplied on the premises otherwise than to persons taken substantial table meals there and for consumption by such a person as an ancillary to his meal".

In addition, the following conditions, suggested by the Metropolitan Police were added to the Premises Licence (with amendment to item 1 by the Licensing Sub-Committee):

1. Alcohol may be supplied and consumed by persons waiting for a table prior to their meal in the bar area, shaded red on the plans, up to 22.00.
2. The premises will operate a "Challenge 25" policy whereby any person attempting to buy alcohol who appears to be under 25 will be asked for photographic ID to prove their age. The recommended forms of ID that will be accepted are passports, driving licences with a photograph, photographic military ID or proof of age cards bearing the 'PASS' mark hologram.
3. Suitable and sufficient signage advertising the "Challenge 25" policy will be displayed in prominent locations in the premises.
4. All staff will be trained to ask customers to leave quietly in the evening when necessary.
5. There shall be appropriate signage at the premises requesting customers to leave quietly.

The following conditions, sought by LB Merton Public Health are to be added to the licence:

1. No super-strength beer, lagers or ciders, or spirit mixtures of 6.5% ABV (alcohol by volume) or above shall be sold at the premises.
2. A proof of age policy such as Challenge 25 shall be operated at the premises whereby any individual suspected to be under age will be required to provide a recognised form of photographic identification.

## Reasons

The Licensing Sub-Committee carefully considered the representations contained in the agenda papers and those submitted to it in the meeting. The Licensing Sub-Committee decided that to promote the licensing objectives it would allow the variation of the plans and vary the condition sought on table meals and the supply of alcohol in the 'holding bar'.

The Licensing Sub-Committee had regard to Merton's Statement of Licensing Policy, and in particular to section 7. Section 7 deals with cumulative impact. The Cumulative Impact policy applies applied to these premises as it is located within the Wimbledon Town Centre Cumulative Impact Zone.

The Licensing Sub-Committee "look to the police as the main source of advice on crime and disorder" (Guidance 2.1) and took considerable guidance from the representation of the Metropolitan Police Licensing officer, who explained the particular issues with the preponderance of late night premises in this area . The Licensing Sub-Committee was particularly advised that the premises should have conditions that prevent it looking like a bar (i.e. to maintain the status quo) to avoid attracting a drinks only clientele, should have conditions that prevent it operating so that it becomes a source of customers to other nearby premise as Chimichanga closes and those other premises continue to be open later, and should prevent means to allow customers to use the premises as a way of 'pre-loading' whether before or after a minimal meal. The operational aim or model of the premises did not seek this (especially with the change to the new brand of "MEXlco"), but customers could take such an approach.

The Licensing Sub-Committee agreed that the revision to Condition 3 in Annex 3, together with the other additional conditions imposed would address the concerns raised.

Legal advice was given to the Licensing Sub-Committee on the following:

- That there was a need for proper evidence (Thwaites) in reaching their decision that was applicable to the premises;
- That certain conditions proposed that may be covered by other legislative regimes, should be dealt with elsewhere (Sommerfield).
- That meals had long been defined as a minimum as being a sandwich or burger.
- That the concept of a Licensing Act 1964 supper hours certificate, with alcohol ancillary to food was being considered here.

## **Annex B**

### **Extract from the Amended Guidance issued by the Home Secretary under Section 182 of the Licensing Act 2003 (June 2014).**

#### **12.Appeals**

12.1 This chapter provides advice about entitlements to appeal in connection with various decisions made by a licensing authority under the provisions of the 2003 Act. Entitlements to appeal for parties aggrieved by decisions of the licensing authority are set out in Schedule 5 to the 2003 Act.

#### **GENERAL**

12.2 With the exception of appeals in relation to closure orders, an appeal may be made to any magistrates' court in England or Wales but it is expected that applicants would bring an appeal in a magistrates' court in the area in which they or the premises are situated.

12.3 An appeal has to be commenced by the appellant giving of a notice of appeal to the designated officer for the magistrates' court within a period of 21 days beginning with the day on which the appellant was notified by the licensing authority of the decision which is being appealed.

12.4 The licensing authority will always be a respondent to the appeal, but in cases where a favourable decision has been made for an applicant, licence holder, club or premises user against the representations of a responsible authority or any other person, or the objections of the chief officer of police or local authority exercising environmental health functions, the holder of the premises or personal licence or club premises certificate or the person who gave an interim authority notice or the premises user will also be a respondent to the appeal, and the person who made the relevant representation or gave the objection will be the appellants.

12.5 Where an appeal has been made against a decision of the licensing authority, the licensing authority will in all cases be the respondent to the appeal and may call as a witness a responsible authority or any other person who made representations against the application, if it chooses to do so. For this reason, the licensing authority should consider keeping responsible authorities and others informed of developments in relation to appeals to allow them to consider their position. Provided the court considers it appropriate, the licensing authority may also call as witnesses any individual or body that they feel might assist their response to an appeal.

12.6 The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both.

12.7 On determining an appeal, the court may:

- dismiss the appeal;
- substitute for the decision appealed against any other decision which could have been made by the licensing authority; or

- remit the case to the licensing authority to dispose of it in accordance with the direction of the court and make such order as to costs as it thinks fit.

## **LICENSING POLICY STATEMENTS AND SECTION 182 GUIDANCE**

12.8 In hearing an appeal against any decision made by a licensing authority, the magistrates' court will have regard to that licensing authority's statement of licensing policy and this Guidance. However, the court would be entitled to depart from either the statement of licensing policy or this Guidance if it considered it was justified to do so because of the individual circumstances of any case. In other words, while the court will normally consider the matter as if it were "standing in the shoes" of the licensing authority, it would be entitled to find that the licensing authority should have departed from its own policy or the Guidance because the particular circumstances would have justified such a decision.

12.9 In addition, the court is entitled to disregard any part of a licensing policy statement or this Guidance that it holds to be ultra vires the 2003 Act and therefore unlawful. The normal course for challenging a statement of licensing policy or this Guidance should be by way of judicial review, but where it is submitted to an appellate court that a statement of policy is itself ultra vires the 2003 Act and this has a direct bearing on the case before it, it would be inappropriate for the court, on accepting such a submission, to compound the original error by relying on that part of the statement of licensing policy affected.

## **GIVING REASONS FOR DECISIONS**

12.10 It is important that a licensing authority should give comprehensive reasons for its decisions in anticipation of any appeals. Failure to give adequate reasons could itself give rise to grounds for an appeal. It is particularly important that reasons should also address the extent to which the decision has been made with regard to the licensing authority's statement of policy and this Guidance. Reasons should be promulgated to all the parties of any process which might give rise to an appeal under the terms of the 2003 Act.

## **IMPLEMENTING THE DETERMINATION OF THE MAGISTRATES' COURTS**

12.11 As soon as the decision of the magistrates' court has been promulgated, licensing authorities should implement it without delay. Any attempt to delay implementation will only bring the appeal system into disrepute. Standing orders should therefore be in place that on receipt of the decision, appropriate action should be taken immediately unless ordered by the magistrates' court or a higher court to suspend such action (for example, as a result of an on-going judicial review). Except in the case of closure orders, the 2003 Act does not provide for a further appeal against the decision of the magistrates' courts and normal rules of challenging decisions of magistrates' courts will apply.

## **PROVISIONAL STATEMENTS**

12.12 To avoid confusion, it should be noted that a right of appeal only exists in respect of the terms of a provisional statement that is issued rather than one that is refused. This is because the 2003 Act does not empower a licensing authority to refuse to issue a provisional statement. After receiving and considering relevant representations, the licensing authority may only indicate, as part of the statement, that it would consider certain steps to be appropriate for the promotion of the licensing objectives when, and if, an application were made for a premises licence following the issuing of the provisional statement. Accordingly, the applicant or any person who has made relevant representations may appeal against the terms of the statement issued.