

London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 23 January 2017

Subject: Rejection of License Application for Akwaba Cheri's Mini Market, 45 Upper Green East, Mitcham, CR4 2PF

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

Merton's Statement of Licensing policy

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

Annex A

Determination

The Licensing Sub-Committee considered an application for a Premises Licence by Mr Koffi Emmanuel N'Guessan for "Akwaba Cheri's Mini Market" at 45 Upper Green East, Mitcham. The application was for the Retail Sale of Alcohol (to be consumed off the premises) for 10.00 - 23.00 Mondays to Sundays, with opening hours of 09.00 – 23.00 Mondays to Sundays.

In reaching its decision, the Licensing Sub-Committee has to promote the Licensing Objectives, make a decision that was appropriate and proportionate, that complied with the Licensing Act 2003 and its regulations, had regard to the current Home Office Section 182 Guidance, as well as to LB Merton's Statement of Licensing Policy, and complied with parameters provided by relevant case law.

The application was refused.

Reasons

The Licensing Sub-Committee considered the evidence of all parties and in particular the verbal evidence given by the Applicant at the Meeting. The application was rejected on the basis of the evidence provided.

The Licensing Sub-Committee did not consider that the Applicant overcame the 'rebuttable presumption' under the Cumulative Impact Policy contained in the Council's Statement of Licensing policy applicable to the CIZ in Mitcham for 'Off Licence' premises only. The Policy provides a presumption within it that new applications shall not be granted, unless the applicant can discharge the reverse burden in establishing that they will not add to the cumulative impact, The Licensing Sub-Committee were not able to ascertain the 'proper evidence' within the undocumented evidence put forward by the Applicant during the meeting in support of his application (Thwaites applied).

As there were Police and Public Health Representations against the application, the Licensing Sub-Committee had to consider the application pursuant to LB Merton's Cumulative Impact Policy, contained within the Statement of Licensing Policy, issued on 6 January 2016. The Policy imposes a 'rebuttable presumption' that all off-licence applications located within the Mitcham Cumulative Impact Zone shall be refused unless there are exceptional circumstances that allow grant on the basis that there will not be added cumulative impact if the Premises Licence were granted. The Licensing Sub-Committee acknowledged that paragraph 7.10 of the Council's Statement of Licensing Policy allows for exceptions where the application will not cause cumulative impact.

The Licensing Sub-Committee did not consider that this was a truly exceptional application, and were especially concerned by the applicant trading by himself and not being able to cope with multiple customers, the premises being located in the heart of the Mitcham CIZ, and that such a Premises Licence would result in increased provision of off sales in this area, that had been specifically identified as a hotspot for street drinking, in the data that supported the imposition of the Mitcham street drinking CIZ.

The Licensing Sub-Committee noted representations from Public Health, Metropolitan Police stated that the addition of any further supplies of alcohol in the area would contribute to the issues already prevalent in the area in relation to street drinking. The type of clientele that would use this premises has a material part to the play in the decision, and the Licensing Sub-Committee were concerned in that regard and were also concerned at the management of the premises, such that the Licensing Sub-Committee was of the view that this premises would have an adverse impact on the area (Brewdog applied). In reaching its decision, the Licensing Sub-Committee did consider the alternative of limiting the ABV to 5% (as suggested by the Applicant) and limiting the alcoholic drinks to Afro / Caribbean centric drinks only, but was still concerned at the ability of the applicant to manage customers and the premises. The concerns of the Police Licensing Officer were such that the Licensing Sub-Committee rejected grant (applying para 1.8, 2.1, and 9.12 of the Home Office Guidance).

The Licensing Sub-Committee found that there would be increased cumulative impact arising from the premises, if the Premises Licence were granted.

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.