London Borough of Merton

Licensing Act 2003
Notice of Determination

Date of issue of this notice: 11 May 2017

Subject: Sharon's Off License, 311-313 Mitcham Road, Tooting, SW17 9JQ

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 variation of the Premises Licence held by JS Supermarkets Ltd for “Sharon’s Off License” at 311-313 Mitcham Road, Tooting, SW17 9JQ.

The application was for the extension of opening hours and the Retail Sale of Alcohol (off sales only) from 08.00 - 02.00 Mondays to Sundays (instead of 08.00 - 23.00 Mondays to Saturdays and 10.00 - 22.30 Sundays on the existing Premises Licence).

A representation was received from Councillor Linda Kirby against the application. The premises was located with the Mitcham Cumulative Impact Zone and was subject to the Cumulative Impact Policy contained in the Council’s Licensing Policy. It required the applicant to overcome the rebuttable presumption that required refusal unless the applicant can show that there will be no increase in cumulative impact.

In reaching its decision, the Licensing Sub-Committee had 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 refused the application for the following reasons:

1) The premises is in the Cumulative Impact Zone. By permitting the sale of alcohol until 2am, that will lead to drinkers resorting to the premises as a destination to buy alcohol later in the evening and early morning to continue drinking. That would result in an increase in cumulative impact, not withstanding that the applicant is a responsible operator.

2) The Licensing Sub-Committee considered the case of Brewdog relied on suggesting that the drinks to be provided were for the Sri Lankan or Asian community, but on the evidence before the Licensing Sub-Committee the premises and the sales did not warrant the application of the Brewdog 'exemption'. The drinks offered were non-specialist and covered the whole spectrum of alcohol sales.

3) The proposed condition for alcohol sales to be limited to 6% ABV included an exemption for premium products to not be covered by such a condition. This concerned the Licensing Sub-Committee in respect of its enforceability and the overall thinking behind the application. Whilst premium products could be agreed with the Police, that may be seen as abrogating the Licensing Sub-Committee and Licensing Authority's authority. It was also open to exploitation.

4) The Cumulative Impact Policy (CIP) applicable to this premises and its surrounding area included extensive evidence of the proliferation of off license premises and its consequential effect in generating street drinking and on-going drinking at home. The CIP Policy at section 7 of the Council's Licensing Policy explains:

> "7.8 It will be for applicants to show in their operating schedules that their proposals will not add to the cumulative impact already being experienced. Failure to provide such information to the Council is likely to result in a refusal of the application if the matter proceeds to a hearing before the Licensing Sub-Committee…The effect of the cumulative impact policy is to create a rebuttable presumption that applications for new premises licences or club premises certificates or variations that are likely to add to the existing cumulative impact will normally be refused, following relevant representations, unless the applicant can demonstrate that there will be no negative cumulative impact on one or more of the licensing objectives. However, the process allows applicants to rebut the presumption of refusal in their applications, and to make the case before a Licensing Sub-Committee why their application should be granted as an exception to our cumulative impact policy. Where an application engages the special policy the burden of proof lies on the applicant to rebut the presumption.
> 7.10 This special policy is not absolute. The circumstances of each application will be considered on its own individual merits. Where the applicant can demonstrate that their proposed operation will have no negative impact on any of the licensing objectives then it is possible for licences and certificates to be granted. As a consequence of the presumption that underpins the special policy applications must directly address the underlying reasons for this policy in order to demonstrate why an exception should be made in any particular case. Following receipt of representations in respect of a new application for, or a

variation of, a licence or certificate, the Licensing Authority will consider whether it would be justified in departing from its special policy in the light of the individual circumstances of the case. Notwithstanding the significance of the special policy the Licensing Sub-Committee must give reasons for any decision to refuse or grant an application….. This list is not intended to be an exhaustive or prescriptive list of when exceptions may be found as each case will be determined on its individual merits. There are other factors that might contribute to an application being considered as an exception, such as the licensable activities sought, the hours of operation, management standards applied or to be applied to the operation inside and outside of the premises, including door supervision, acoustic controls, CCTV coverage inside and outside the premises, smoking controls, safe capacities, management of exterior spaces, and neighbour considerations."

It was noted that the Applicant's representative took issue with the quality of the Licensing Policy, but did not address any specific shortcomings (Sainsburys case). The CIP Policy at section 7 of the Council's Licensing Policy was supported by Police evidence of the effect of the proliferation of street drinking from the number of off licence premises located within the Borough. It was mentioned that the premises was located on the border with the London Borough of Wandsworth Council, which has no CIP. However, its policy refers to:

"interested parties and responsible authorities may still make representations on new or variation of premises licence applications on the grounds that the premises will give rise to a negative cumulative impact on one or more of the licensing objectives" (5.2)

This means that cumulative impact would still be considered if the premises were located on the other side of the road, if the matter were being considered by the London Borough of Wandsworth Council.

5) Councillor Kirby's representation, though brief, still requires the applicant to overcome the rebuttable presumption, as it was accepted as a relevant representation by Licensing Officers. The Applicant's submission and paperwork did not address the proper evidence required to overcome the CIP and the Licensing Sub-Committee could not grant the application in the absence of such proper evidence. It was not for the Licensing Authority or the Licensing Sub-Committee to provide evidence to support the rebuttable presumption, not least as it was located within the evidence supporting the imposition of the Merton CIP (Thwaites Case).

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.

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