

London Borough of Merton

Licensing Act 2003 Notice of Determination

Date of issue of this notice: 21 August 2024

Subject: Taste Harmony, 8 Monmouth Close, CR4 1XS

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 (April 2018). Chapter 12 of the guidance is attached as Annex B to this notice.

For enquiries about this matter please contact

Democratic Services
Civic Centre
London Road
Morden
Surrey
SM4 5DX

Telephone: 020 8545 3616

Email: democratic.services@merton.gov.uk

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 Authority received an application from Taste Harmony Limited for a new Premises Licence for its premises at 8 Monmouth Close, CR4 1XS

The applicant applied:

- for the provision of late night refreshment to take place indoors, Monday to Sunday from 23:00 to 05:00 the next morning. The opening hours are stated in the application as Monday to Sunday 06:00 to 23:00.
- The provision of late night refreshment hours were later revised to Monday to Sunday from 23:00 to 02:00 the next morning.

The Premises Licence was refused, as detailed below in this notice.

Licensing Sub-Committee Hearing

The Licensing Sub-Committee looked carefully at the application, the agenda papers and the oral evidence submitted at the hearing by the parties present.

The applicant set out their application, noting in particular the arrangements in place to stagger deliveries to reduce impact on neighbours and the arrangements for delivery drivers to congregate away from the premises. The applicant also highlighted that they had been operating in Birmingham for some time and were an experienced business.

In response to questions it was confirmed that:

- The handover of orders to delivery drivers will take place away from the premises by or in a bus stop and there would not be music played in the kitchen late at night, so as not to disturb neighbours.
- This would be the applicants first operation in London, they currently have a business in Birmingham
- Food would be prepared onsite in the flat in this residential block of flats during the day and warmed up by microwave when ordered later in the day/evening. So the applicant believed there would not be cooking noise/smells emanating from the property late at night.
- Once the all the food is sold that has been prepared during the day, the applicant would remove their service from the ordering menu on the app, so that they will not be cooking up extra batches. Any left over food will be sold on the 'Too Good To Go' app.
- There is a McDonalds nearby where delivery drivers/riders tend to congregate. It is not expected that delivery drivers/riders will congregate in large numbers near this premises
- The application had been advertised locally as required and there had not been any questions or concerns raised directly with the applicant
- The collection point is on the road near a bus stop close to the premises
- The business is not running yet, the applicant is waiting for the outcome of the licensing decision

The Licensing Sub-Committee also heard from the Merton Council Noise and Nuisance Technical Officer, who raised the following concerns:

- The Noise team had concerns about the plans to operate in what is a private flat within a block of flats, i.e. a highly residential area, until late at night. This would involve noise from the kitchen and the comings and goings of staff/delivery drivers, and noise from their interactions which would have a significant impact. A commercial kitchen is not the same as a domestic arrangement.
- The applicant has not offered or provided a noise report which would detail how they would deal with noise issues resulting from operations at the premises, or how they would effectively avoid adverse impact on neighbours. There appear to be no noise attenuating measures at the premises.
- A noise management plan acts as a 'failsafe' that allows operators to go through their activities in detail and implement mechanisms to mitigate against disturbance.
- There were no details in the application about how the operator would manage congregation of drivers or customers outside the premises, and no associated risk assessment to explain how incidents might be handled.
- There were wider environmental concerns, with no operational breakdown explaining when tasks such as cleaning would take place.
- There was no light management plan, or details of how complaints to the business could be made or how they might be handled.
- The application did not demonstrate that a proper consideration of public nuisance had been given.

In response to questions it was confirmed that:

- A noise management plan does not cover decibel levels, it would lay out how a business would deal with issues arising, though BS4142 does give advice on acceptable noise limits

The licensing officer highlighted to the Licensing Sub-Committee that the applicant had mentioned the exclusive use of Uber Eats for delivery, but also that the Uber Eats system allowed for business to do their own deliveries too, and that any condition restricting delivery providers would need to take this into account to avoid conflicting conditions which would also need to be appropriate, proportionate and promote the licensing objectives.

In closing, the Noise and Nuisance Technical Officer asked the Licensing Sub-Committee that if they were minded to grant the license, to consider whether they could condition a noise management plan as part of the Premises Licence permitting Late Night Refreshment only.

The Applicant acknowledged the concerns that the Licensing Sub-Committee might have about a new concept, running this kind of business in a residential area, but Taste Harmony were happy to demonstrate their commitment to being a good operator, they had offered a range of conditions covering waste, operation hours and use of UberEats only for delivery, they have a track record of running a successful business, in Birmingham. Finally they requested the Licensing Sub-Committee

considered the application on its pro-active measures and the legal protection available for any issues in the future.

The Decision of the Licensing Sub-Committee

The Licensing Sub-Committee decided to refuse the application.

Reasons

The Licensing Sub-Committee carefully considered the evidence presented in the agenda papers and the submissions made to the Licensing Sub-Committee at the meeting (Thwaites case applied).

The applicant had not demonstrated to the Licensing Sub-Committee that the proposed operation would not cause public nuisance or risk public safety or result in crime & disorder. To grant such an application would not see the Licensing Sub-Committee promote the Licensing Objectives.

The Licensing Sub-Committee considered that there was a lack of proposed controls or proposed conditions to ensure that the impact of operations and deliveries on neighbours would not have a cumulative impact on those residents (immediate neighbours or other residents of the flats) or would result in public nuisance to residents. It was also unclear how the proposed operation would be controlled by the applicant not least the method of collection in or around a bus stop, which was a cause for significant concern both in relation to that.

The Licensing Sub-Committee were concerned about the arrangements for the handing over of orders to delivery drivers on a highway by or in a bus stop, particularly during inclement weather and whether or not the operator would be able to operate as described without noticeable disturbance and disruption to neighbours. If collections from the premises would cause a public nuisance with the collections by delivery drivers, the proposed alternative of taking collections to the highway/bus stop, would still see the door opening and closing regularly so as to cause noise and disturbance.

The Licensing Sub-Committee were not satisfied that the further proposal of staggering of deliveries would provide the mitigation assumed by the applicant.

The Licensing Sub-Committee were also concerned about the promotion of the licensing objectives. The proposed collection point posed a risk to crime and disorder, public nuisance and public safety, and the applicant had not provided sufficient detail or evidence of appropriate consideration of these objectives in their application. This presented unmitigated risks to both the operator, their staff and members of the public.

The Licensing Sub-Committee gave consideration to whether there were appropriate and proportionate conditions that could be applied to allow a Premises Licence to be granted to prevent the significant impact of operations on the immediate neighbours. However it was determined that on balance, there were no conditions that could persuade the Licensing Sub-Committee to grant the application, despite their wanting to support a fledgling business, where they were required to promote the Licensing Objectives.

In reaching its decision the Licensing Sub-Committee were provided advice by the Legal Advisor. The Licensing Sub-Committee considered Thwaites, Luminar Leisure, Blackwood, Somerfield / Bristol cases.

Daniel Thwaites v Wirral Borough Magistrates' Court (2008):

- The Licensing Sub-Committee cannot apply restrictions “just in case” something goes wrong; it must only control what is “needed”;
- Decisions must not be based on “speculation” or “unjustified fears” but on evidence, which needs to be “*real evidence*” and possibly reasonable inference, even from hearsay;
- The Thwaites case simply expects the Committee to weigh up the relevant weight of evidence from parties including the residents or Responsible Authorities, in reaching a decision.

Luminar Leisure Ltd (Appellant) v Wakefield Magistrates' Court (Respondent) & Brooke Leisure Ltd, Classic Properties Ltd, Wakefield MDC (Interested Party) (2008):

What happens outside a premises may impact on what happens inside the premises. It may be proportionate to refuse a premises licence where evidence suggests that the application may have a negative effect on crime and disorder in areas beyond the licensee's control.

R (on the application of Blackwood) v Birmingham Magistrates, Birmingham City Council & Mitchells & Butler Leisure Retail Ltd (2006)

The Licensing Sub-Committee was reminded that planning concerns are a matter for the Local Planning Authority rather than (a Licensing Authority or) the Licensing Sub-Committee.

R (on the application of Bristol City Council) v Bristol Magistrates' Court [2009] (Somerfield)

Licence conditions must not duplicate other legislation or regulation unless it can be shown in the particular case that such conditions are for some specific reason both [appropriate] and proportionate.

Annex B

Extract from the Amended Guidance issued by the Home Secretary under Section 182 of the Licensing Act 2003 (April 2018).

13. Appeals

13.1 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

13.2 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.

13.3 An appeal has to be commenced by the appellant giving 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.

13.4 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, the Home Office (Immigration Enforcement), 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.

13.5 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.

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

13.7 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.

All parties should be aware that the court may make an order for one party to pay another party's costs.

On any appeal, the court is not entitled to consider whether the licence holder should have been convicted of an immigration offence or been required to pay an immigration penalty, or whether they should have been granted by the Home Office permission to be in the UK. This is because separate rights exist to appeal these matters or to have an immigration decision administratively reviewed.

Licensing policy statements and Section 182 guidance

13.8 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.

13.9 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

13.10 It is important that a licensing authority gives 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.

13.11 It is important that licensing authorities also provide all parties who were party to the original hearing, but not involved directly in the appeal, with clear reasons for any subsequent decisions where appeals are settled out of court. Local residents in particular, who have attended a hearing where the decision was subject to an appeal, are likely to expect the final determination to be made by a court.

Implementing the determination of the magistrates' courts

13.12 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

13.13 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.

13.1 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.

This page is intentionally left blank