

SUBJECT: Approach to Licensing Appeals

LEAD OFFICER: Mike Parsons Director of Corporate Services

LEAD MEMBER: Chair of Licensing Committee

KEY DECISION REFERENCE NUMBER: N/A.

RECOMMENDATIONS:

1) That all Appeals to Magistrate Courts be notified to residents associations only and by email wherever possible.

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2) That Subject to the power to settle proceedings already vested in the Head of Civic and Legal Services, the operational conduct of litigation on Licensing matters be delegated jointly to Head of Planning and Public Protection and to the Head of civic and Legal Services

1. EXECUTIVE SUMMARY AND PURPOSE OF REPORT

To report to Licensing committee on the outcomes of licensing Appeals to Magistrates Court. To explain what lessons have been learned as part of this process. To seek policy directions about how to deal with appeals in the future in the light of legal advice appended

2 DETAILS

Following decisions of the Licensing Sub-Committees a number of appeals were lodged. The details are set out in the appendix. In summary 7 appeals were made by the Licensees and 4 appeals were made by interested parties.

2.2 The outcome of the appeals are also set out in the appendix

2.3 Where an appeal is lodged the Council is usually named as Respondent in the Court papers. Where an appeal is lodged by the Licensee against the decision of the Council only the Council is named as Respondent in Court papers. The interested parties (residents) who objected to the application before Committee are not named as Respondents, in the Court papers.

2.4 When an appeal is lodged by residents (as interested parties), the Council and the Licensee are both named as Respondents in Court papers. The other interested parties are not named as either Applicants or Respondents in the Court papers.

2.5 Where someone is named as a party in the Court papers they have obligations as follows:-

- (1) To consider whether to participate
- (2) To consider whether to be represented or not at the preliminary and final

hearings

- (3) To potentially incur responsibility for the costs of the successful parties appeal
- (4) To call witnesses and disclose documents
- (5) To have judgement made against them or in their favour

2.6 Legal Services currently treats the Licensing Team as the Client. Accordingly the Licensing Team decides on the defence strategy and whether a case should be settled or not. This puts both Legal Services and Licensing Team in a position where they may potentially have to make a decision at odds with the decision of the Licensing Sub-Committee. The solution to this could be :-

- (a) Seek views of the Licensing Sub-Committee which made the original decision
- (b) Seek view of Licensing Committee
- (C) Delegate decision to Licensing Team (Head of Planning and Public Protection)
- (d) Delegate to the Head of Civic & Legal Services

2.7 Licensing Sub Committee

The Licensing Sub-Committees are not authorised to conduct litigation but only to hear determinations. In any case the Sub-Committees can only make a decision in a meeting. Accordingly a meeting would have to be called giving five clear days notice. At the meeting a motion excluding the public would have to be moved. This process is not efficient for conducting fast moving litigation. However referring the matter back to members may not be practicable as one of the options available to the Magistrates is to send the matter back for a rehearing by the Sub committee and thus risk contamination of Committee members.

2.8 Licensing Committee

The Licensing Committee can only make a decision as a quorate Committee. It would have to be called giving five clear days notice and a motion excluding the public moved. This is not an efficient way of conducting litigation. More importantly, if the matter was to come back to the Council for a re-hearing all the Members of the Committee would have to disqualify themselves from sitting.

2.9 Delegation to Officers

It may be appropriate to delegate the conduct of litigation to an officer as client but with safeguards for issues involving matters of high policy, subject to the power vested in the Chief Legal officer to settle litigation.

2.10 Process of Conducting Litigation – the issues

Where an appeal is lodged by anyone the nature of the rules means that interested parties may not be notified of the new proceedings. In this situation should the Council

- (a) Apply for all interested parties to be made parties to the proceedings? or
- (b) Merely notify all the interested parties of the appeal?

- 2.11** In some appeals there is a large number of interested parties. Notifying all the interested parties may be possible but the Head of Civic & Legal Services would not want to take on any other obligation than this. This may be by letter or by email. The interested parties once notified would then decide what level of participation they wanted.
- 2.12** There are two levels of participation (a) as a party (b) as a witness
- 2.13** If any interested party offers to be a witness then it would be understood that the Council would retain responsibility for managing the litigation and therefore to decide which witnesses to call. Recent experience has shown that interested parties will insist that they be called as a witness because they want their day in court not because they would add anything to the Council's case. What is The Licensing Committee's guidance on this?
- 2.14** The interested party may choose to be named as a party in the proceedings. In which case the Council would have to decide whether there was any added value to the Council continuing to incur time and costs in fighting the case. The interested party may choose to fight the case with the Council being a paper party rather than a real party? What is the Licensing Committees guidance for officers on this issue.
- 2.15 Legal Advice**
Legal Advice has been obtained. The advice is attached in the appendix. The advice explains that "interested parties" who do not themselves appeal are not formally parties before the Court.
- 2.16** The Council's experience of the recent appeals has been that the process was paper intensive, time consuming and confusing because of gaps in legislation. Legal Services would prefer that no obligation is placed on Legal Services by committee to do no more than notify interested parties that an appeal has been lodged. This can be done on a page on the internet.

3. ALTERNATIVE OPTIONS

- 3.1** There are a number of options available. The first option is the legalistic approach. The Council as Respondent conducts the case and only involves residents as interested parties.
- 3.2** The second option is for the Council to apply to the Court for interested parties who express an interest to be named as Parties so that they can have the opportunity to present their own case.
- 3.3** Another option is for the Council having notified the parties to let proceedings go ahead but to take no active part when the issues between the Licensee and the interested parties present no policy implications.

4. FINANCIAL IMPLICATIONS

Any recommendations with resource implications will need to be assessed for their impact on the respective budget as Licensing committee has no budget of its own.

5. LEGAL IMPLICATIONS AND STATUTORY PROVISION

Advice from Counsel is attached

6. HUMAN RIGHTS AND EQUALITIES IMPLICATIONS

6.1 There is an argument that the Human Rights of residents (interested parties) is engaged and that they should be notified of appeals. If this was correct then the obligations lies with the Magistrate Court, to ensure that the Human Right of interested parties is observed and not the obligation of the Council.

6.2 The Council is gradually being asked to adopt a Community Leadership role. Although the extent of this role is yet to be defined, it could involve Ward Councillors notifying their ward through the Members website of matters involving their ward. To what extent Officers should also take on the role of notifying residents is for Committee to consider.

7. RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

None for the purposes of this report

8. CONSULTATION UNDERTAKEN

None for the purposes of this report

APPENDICES – The following appendices form part of this report:

- Appendix 1) Advice from Counsel
- Appendix 2) District Judge Decision
- Appendix 3) Table of appeals
- Appendix 4) Supplementary Advice from Counsel (to follow)

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**LICENSING COMMITTEE REPORT
MARCH 2006
APPENDIX 4 TABLE OF APPEALS**

TABLE OF LICENSING APPEALS

<u>Case Name</u>	<u>In Relation to</u>	<u>Date</u>	<u>Appellants Reasons of appeal</u>	<u>Outcome</u>
BarVest Ltd -v- LBM	Po Na Na	September 2005	Po Na Na appealing against refusal to extend hours	Heard in Magistrates Court. Appellants were granted the hours they applied for
Watershed Public House -v- LBM	Watershed	September 2005	Watershed - Julian Peterson appealing against refusal of extension of hours.	Out of Court settlement. Watershed was awarded the hours they applied for.
Caroline Maddock- Pengelly & S Collis -v- LBM	Brewery Tap Public House	October 2005	Residents appealed against the decision of the LA to award the Brewery Tap an extension of hours.	Appeal withdrawn
M Beresford -v- Hartfield Group Plc & LBM	Common Room	October 2005	Residents appealed against the decision of the LA to award the Common Room an extension of hours.	Appeal Withdrawn
The Lauriston Road and Wilberforce Way Residents Association -v- LBM & Spirit Group Ltd	Swan Public House	November 2005	Residents Associations appealed against the decision of the LA to award the Swan Public House	Appeal Withdrawn

			an extension of hours.	
Youngs & Co Brewery Plc -v- LBM	Crooked Billet Public House	November 2005	Appeal brought by Youngs Brewery as LA refused to grant a variation to the premises licence and refused to grant an extension of hours	Preliminary issue – Was the appeal lodged in the time limit of 21 days? Magistrates held that the appeal was out of time.
Youngs & Co Brewery Plc -v- LBM	Hand in Hand Public House	November 2005	Appeal brought by Youngs Brewery as LA refused to grant a variation to the premises licence and refused to grant an extension of hours	Preliminary issue – Was the appeal lodged in the time limit of 21 days. Magistrates held appeal was out of time.
Youngs & Co Brewery Plc -v- LBM	Rose & Crown Public House	November 2005	Appeal brought by Youngs Brewery as LA refused to grant a variation to the premises licence and refused to grant an extension of hours	Preliminary issue – Was the appeal lodged in the time limit of 21 days. Magistrates held appeal was out of time.
Youngs & Co Brewery Plc -v- LBM	Dog & Fox Public House	November 2005	Appeal brought by Youngs Brewery as LA refused to grant a variation to the premises licence and	Preliminary issue – Was the appeal lodged in the time limit of 21 days. Magistrates held appeal was out of

			refused to grant an extension of hours	time.
Clayton & Docx - v – LBM & Giovanni Agozzino	Zero Quattro Bar/ restaurant	November 2005	Residents appealed against the decision of the LA to award Zero Quattro an extension of hours.	This case is in the process of being settled.

IN THE MATTER OF PROPOSED APPEALS
PURSUANT TO THE LICENSING ACT 2003

OPINION

1. I am instructed on behalf of the London Borough of Merton and I have been asked to advise as to role of my client as licensing authority in appeals from decisions to grant or refuse applications for licences and permissions under the Licensing Act 2003.

Appeals procedure

2. The rights of appeal to the relevant Magistrates Court are set out in Schedule 5 to the 2003 Act. This schedule covers all the various types of permissions which the licensing authority can grant. The most notable procedural provisions are the requirement for notification of the decision to be in writing and the strict time limit on filing a notice of appeal with the Magistrates Court, that is within 21 days of the day upon which notice of the decision is given.
3. Although the position is not completely clear, it appears that the “day upon which notice of the decision is given” is the day upon which the process of causing delivery is complete (2003 Act s.184), whether by actually delivering by hand or leaving it in the applicant’s premises, or by posting the notice. There are clearly occasions when the written notice will

be given after an oral hearing at which the decision was pronounced; having regard to the lack of authority as I would suggest until the point is determined by a superior Court, a notice of appeal must be served within 21 days of the oral hearing.

4. There is no second tier of appeals provided for in the 2003 Act, but falling back to general principles, it is clear that the decision of the Magistrates Court on appeal could be challenged by way of case stated. Further, judicial review of the Magistrates Court decision could be available to an aggrieved party. It does not appear likely that the actual decision of the licensing committee would be judicially reviewed given the existence of the appeals procedure but the existence of an appeals procedure does not wholly preclude a successful judicial review.

Parties to an appeal

5. Whether taking an active part or not, the licensing authority will be named as a Respondent to any appeal.

Parties to an appeal when an application is granted

6. Where an applicant has received a favourable decision, contrary to the representations of a relevant party or responsible authority, the objecting party or authority can appeal the decision and will be named as the Appellant.

7. The successful applicant will be named as a Respondent to the appeal in addition to the licensing authority.

Parties to an appeal when an application is refused

8. Where an applicant receives an unfavourable decision and appeals, the local authority will be the sole Respondent. There is no provision for the responsible authority or relevant objector to be named as a Respondent and thereby take part in the appeal.

Taking part in the appeals procedures

9. Where an appeal is brought by a responsible authority or relevant objector, against the successful application, the conduct of their appeal is a matter for them.
10. Save where there is a particular legal issue, such as compliance with lawful procedure at the hearing of the application or legality of the interpretation of the local authorities general position or procedures, the local authority will have little or no part to play in an appeal by a responsible authority or relevant objector.
11. If the local authority has an interest in establishing the legality or otherwise of their procedures or policies, it is at least arguable that the local authority should defend its procedures rather than leave it to the applicant to defend the procedures under which the

application was granted.

12. It may be that the local authority's role in respect of appeals against the grant of licences will be enhanced in the case of second appeals by way of case stated or judicial review.
13. Where an appeal is brought by the applicant to challenge an unfavourable decision by the licensing authority, the local authority would appear to have complete discretion as to the response to that appeal.
14. If an application is declined by reference to more than one objector, for example the police and local residents, the local authority can decide to support the decision to decline on the grounds set out by the police but decline to advance the objection of the residents. Similarly, where an application is declined with reference to the licencing objectives of preventing public nuisance and protecting children the local authority can decide not to rely on public nuisance, but to oppose the appeal by reference to the protection of children objective.
15. It is not unreasonable to suggest that the local authority can, in appropriate circumstances and contrary to the objections of responsible authorities and relevant objectors, refuse to oppose an appeal. The local authority may also compromise an appeal without a hearing in discussions or by accepting undertakings from the applicant as to conditions or conduct; this might be done notwithstanding that the responsible authority or objector might not believe that the undertaking from the applicant would be complied with or would meet their

objections.

16. Although the 2003 Act does not give a voice to the objectors in appeals by applicants, the decision making process which gives rise to the local authority's response to an appeal is likely to be reviewable by anyone with the appropriate locus standi under the judicial review procedures.
17. Further, by excluding the responsible authorities and relevant objectors when an applicant appeals against the refusal of an application, the legislation would appear to be contrary to Article 6 of the European Convention on Human Rights. At the date hereof this potential incompatibility has not been investigated by the Courts.
18. Should those instructing me require any further assistance or have any queries regarding this advice they should contact me in chambers.

Jeremy Garrood

5 Paper Buildings

Dated this 9th day of February 2006

IN THE MATTER OF PROPOSED APPEALS
PURSUANT TO THE LICENSING ACT 2003

OPINION

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IN THE HORSEFERRY ROAD MAGISTRATES' COURT

Ruling of District Judge Purdy 11th November 2005

LUCAS – v – WESTMINSTER CITY COUNCIL

**RE CANDY BAR
4 CARLISLE STREET
W1**

PRELIMINARY RULING RE PARTIES TO APPEAL

1. On a date yet to be fixed an appeal is to be heard against a decision of WESTMINSTER CITY COUNCIL's licensing sub committee dated 5th July 2005. The appeal relates to a refusal by the sub committee to vary The Candy Bar's existing licence to extend its operating hours. This appeal is governed by The LICENSING ACT 2003 and will be determined de novo and on its merits in due course. For the present I am required to determine who may be a party to the hearing before this court. In essence not only the Appellant (i.e. Candy Bar) who commenced the appeal by way of complaint dated 15th July 2005 and WESTMINSTER CITY COUNCIL but three additional parties whom, it is accepted, made "relevant representation" per S.18 and were treated as "interested parties" per S.13 LICENSING ACT 2003.
2. The Appellant and WESTMINSTER CITY COUNCIL. say no one save an Appellant and the Council have locus here. Three others disagree being a resident Alice Dugdale, The Dean Street Residents' Association and The Soho Society. None of those three accept the "offer" of being called as witnesses by WESTMINSTER CITY COUNCIL each saying they had a right to appear as a party totally independent of anyone else before the sub committee and wish to do so here. Each accepts that if a party, unlike a witness for another, that privilege is coupled with a possible risk as to costs. In short, politely but clearly, they expressed in argument a distrust of WESTMINSTER CITY COUNCIL. to advance issues they feel are relevant and if so advanced to do so in a manner they feel is most effective. They wish to be heard as parties and nothing less.
3. The law on appeals is set out in S.181 and Schedule 5 LICENSING ACT 2003. There is no dispute as to who can commence an appeal. Notwithstanding their joint stance against the three proposed parties, both the Appellant and WESTMINSTER CITY COUNCIL accept Schedule 5 is unequivocal in permitting any one or all three of the other interested parties commencing an appeal. Immediately a curious point is thereby highlighted. If such parties can commence an appeal why, especially as the hearing here is de novo (afresh) can they not respond?

4. As a response to their stance both The Appellant and WESTMINSTER CITY COUNCIL submit the LICENSING ACT 2003 simply does not permit such a party to be joined as of right with leave or at all. The statute being silent on the issue must mean either by accident or design, the only construction I am permitted to make is that there is no provision and thus no entitlement. For the Appellant there was the submission schedule 5 paragraph 9 lists exhaustively who may be respondents. There was a degree of Pilate like hand wringing in submitting that perhaps this omission was an error but if so too bad, WESTMINSTER CITY COUNCIL goes further submitting there is no accidental omission. Parliament, mindful of a more lengthy hearing before the court, wanted to restrict the parties. I expressed surprise during argument that the workload and listing/hearing considerations of these courts would trouble Parliament. No authority from the Explanatory Notes, Hansard or elsewhere has been produced in support of the submission. Indeed touched as one is by such apparent concern it is not to be found elsewhere. By way of example no blushes have been spared for the Magistrates' Courts in the Criminal Justice Act 2003. I reject the latter submission as being, with all due respect, plainly wrong.
5. Without, I hope, discourtesy to Miss Dugdale or The Dean Street Residents' Association on the instant point I was helped most by submissions advanced by the Soho Society. A comprehensive written argument and powerful oral submissions have been advanced. Three broad points are submitted. First that Schedule 5, in particular paragraph 9 provides no more than a positive duty to be a respondent on certain parties but cannot be construed as to exclude as respondents previous "interested parties". They can commence an appeal and must be allowed to respond. Secondly if no implied construction on Schedule 5 LICENSING ACT 2003 can be argued one should exercise a discretion vested in the court pursuant to S.52 M.C.A. 1980 to permit, in fairness, joinder. Thirdly a Human Rights Act 1998 construction is contended. I observe that LICENSING ACT 2003 is said to be Human Rights compliant.
6. In my judgement the regime of LICENSING ACT 2003 must be construed as intending a wider range of parties beyond public undertakings and actual applicants for licences to be heard. Section 13 LICENSING ACT 2003 deals with the list of possible parties in three groups namely *authorised persons, interested parties and responsible authorities*. The statutory definitions ensure a protection from any opening of the floodgates concern. On appeal only those who not only asserted the status of "interested party" per S.13 (3) LICENSING ACT 2003 but were so treated before the subcommittee may feature in any appeal (see Schedule 5). All parties must and will be directed, by the Court, to address issues relevant to the licensing objectives in Section 4 LICENSING ACT 2003 and not some notional free for all on irrelevant issues. Thus any suggestion of totally unmanageable hearings cannot be sustained. Indeed these courts deal regularly with multihanded cases and the Family Proceedings Court, by way of example, frequently has numerous parties involved.

7. I find that the absence of express words dealing with "interested parties" who seek to respond to an appeal is, perhaps, unhelpful. A counsel of perfection would have been to include clear unequivocal wording. However, in my judgement I find Schedule 5 can quite properly be construed and must be, to imply without question that an "interested party" before the sub committee can, as of right, be a respondent. Such a party need not respond and may withdraw from further participation or actively become involved. Once making clear a desire to be a respondent then that is on equal terms with the local authority and subject to the same judicial case management directions/supervision before and during any appeal. Having so held I do not feel it necessary to rule on the two further contentions namely S.52 MCA or the Human Rights point. Accordingly I hold that any "interested party" who made "relevant representations" before a sub committee has, as of right, an entitlement to be a respondent to any appeal.