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Merton Council

Licensing Sub-Committee

27 June 2022

Supplementary agenda

5 Notice of Determination

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London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 30 June 2022

Subject: CMYK, 105-109 The Broadway, London, SW19 1QG

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 Sub-Committee considered an application by the Metropolitan Police for a Review of the Premises Licence of “CMYK” at 105-109 The Broadway, Wimbledon, London SW19 1QG.

In discharging its functions in respect of this Review, the Licensing Sub-Committee had to take such steps to promote the Licensing Objectives, have regard to the Home Office Guidance and/or the Council’s Statement of Licensing Policy, and apply relevant case law, whilst taking such steps that are appropriate and proportionate, pursuant to section 52 of the Licensing Act 2003.

In determining the review, the steps available to the Licensing Sub-Committee were as follows:

- To modify the conditions of the Premises Licence
- To exclude a licensable activity from the scope of the Premises Licence
- To remove the designated premises supervisor
- To suspend the Premises Licence for a period not exceeding three months
- To revoke the Premises Licence.

The Licensing Sub-Committee decided to modify the hours for Licensable Activities and impose further conditions on the Premises Licence held by Webbs Leisure Ltd for the premises “CMYK” at 105-109 The Broadway, Wimbledon, London SW19 1QG. The reasons for this decision can be found at the end of this notice.

Licensing Sub-Committee Hearing

The Licensing Sub-Committee looked carefully at the application, its' supporting papers, the Representations contained in the agenda papers and the oral evidence submitted at the hearing by all parties present.

Flora Curtis, barrister representing the Applicant (the Metropolitan Police), advised that Police officers had attended CMYK on numerous occasions since April 2021 for incidents including assault and sexual assault involving both patrons and members of staff. The Review Application referred to serious or concerning incidents including on Friday 24th June 2022 at 00:34hrs (assault), Sunday 12th June 2022 at 01.30 (sexual assault), Sunday 17th April 2022 at 01:00hrs (GBH), Friday 15th April 2022 at 23:45hrs (GBH), Friday 15th April 2022 at 01:45hrs (assault), Saturday 26th March 2022 at 02:30hrs (sexual assault), Saturday 12th March 2022 at 22:13hrs (assault/GBH), Saturday 27th February 2022 at 02:20hrs (ejection/police attendance), Monday 21st February 2022 (intoxicated customer taken to hospital), Sunday 20th February 2022 at 01:20hrs (assault), and Saturday 05th February 2022 at 03:00hrs (3 sexual assaults).

Although the Metropolitan Police had worked with the venue to improve training and taken them through the Home Office Step Programme to help them improve the situation, any improvements following engagement appeared to be temporary. Although the venue had undergone a change in management, and a change in security provider, incidents continued and a number were under current investigation. There was a Police concern that there was a lack of clarity over whether the new management was in any way related to the previous management. The requested course of action was intended to prevent the closure of an LGBTQI+ venue and to help make it a safer space.

Graham Hopkins, representing the Premises Licence Holder, spoke to provide some background of the Premises and to respond to the Review application:

- The loss of CMYK would remove another gay friendly venue from the area, the loss of such a venue could be indirect discrimination, of particular concern during Pride month.
- He suggested that the Police claim to have serious concerns about the venue, but had not sought a Summary or Expedited Review to close the venue. The impact of reducing the hours will have the same impact, that is to cause the premises to close or affect its income, as most of the customers arrive after 12pm.
- He suggested that of the ten incidents over the last year which the Police say they weren't called to (that the Police relied on to show concerns with management of the premises), only related to one or two incidents, where the rest involved the Police being called by staff at the venue, which he said meant it was a responsible venue. One or two incidents where the Police were not called is not indicative of an ongoing problem.
- It is accepted that the previous security company were not good enough, other than the incidents reported on 12th and 24th June, there have been no problems at the venue. The 12th June incident was dealt with by door staff, with the suspect detained by them and the Police called. This is good work by the door staff, rather than a point for concern. The 24th June incident involved a member

of the public who had been refused entry, the incident took place outside the venue.

- Following the sexual assault on 12th June, agency staff at the venue are now required to be DBS checked.
- The new venue manager has taken steps to look after intoxicated customers, including moving them to the front lobby, where water is provided, they are no longer served alcohol, and taxis are called on their behalf where necessary. The smoking area has been relocated from the front of the venue and monitored by CCTV and a door supervisor or the DPS. Drinks are not allowed outside.
- Although CMYK is a gay-friendly venue, straight customers are allowed to attend. However, there have been issues around large groups of straight males, who are now no longer allowed entrance and invited to return at another time. Intoxicated people are not allowed entrance.
- FOI requests to both the Metropolitan Police and to Merton Council about reported incidents have resulted in a lack of response from the Police and a the response from Merton Council, confirmed no complaints had been reported to the Licensing Team about the premises at the Council over the last 2 years (it did not address other complaints that may have been made to other depts in the Council).
- The complaint from the local resident submitted to the Licensing Sub-Committee is not substantiated by the authorities or other residents, as also shown by the lack of complaints recorded by Merton Council. No noise abatement notice has been served, nevertheless, the venue has stopped playing music in the front lobby area after 11pm.
- The new manager, Mr Webb has over 15 years experience as a chef and venue manager in New York and Charing Cross Hospital. The new DPS, Mr Satirou is related to the previous DPS, but has over 40 years experience in the trade. The previous DPS is no longer an employee.
- There has only been one incident recorded between Sunday and Thursday, it would not be proportionate or appropriate to close the venue early on those nights.
- The majority of LGBTQI+ customers arrive after midnight, including at the weekend, and closing the venue at midnight of Fridays and Saturdays would call into question the viability of the venue and impact on the gay community in South London.

In response to questions from the Parties present and the Licensing Sub-Committee, Mr Hopkins confirmed that daily incident reports confirming the number of ejections and refusals of entry are submitted to the Police. The venue is part of Town Link, so they know if a potential customer has been ejected from another venue and can be refused entry to CMYK as well. Staff have undergone training to spot nuisance or hazardous behaviour and they are working with door staff to ensure that access is not granted to people who are already drunk. The venue is working to achieve a happy and homely atmosphere inside, and alongside security, the DPS patrols the venue to ensure this is the case. 75% of their customers arrive after midnight, a proportion of which are gay staff from other venues who close earlier than CMYK.

In response to further questions, the venue manager confirmed that when the downstairs area is open, 2 security staff are in that area, in addition to four staff upstairs, 2 on the front door, 1 on the back door monitoring the smoking area and the

DPS. The manager has only been in place for 5 weeks, so could not speak to the historical relationship with the Police, but is eager to have a good relationship with them. The Manager reiterated that all agency staff are DBS checked.

Mr Hopkins confirmed that there is no connection between Mr Webb and the previous owner.

The Licensing Officer clarified that the FOI request submitted was very specific and while complaints had not been made to the Licensing Team, that did not mean that complaints had not been made at all. While the local resident who had made a representation was not present, his statement and correspondence was included in the pack for the Licensing Sub-Committee's consideration.

Graham Hopkins, summing up for CMYK stated:

- The positive changes in management and door supervisors have led to a reduction in incidents and the venue is heading in the right direction.
- There has only been one incident between a Sunday and Thursday, it would not be appropriate or proportionate to reduce hours on those days.
- The changes in management and security mean that there is no longer a need to change the hours on Fridays and Saturdays which allow the business to remain viable.

Flora Curtis spoke to make closing statements for the Applicant:

- The representative for the venue has sought to undermine the seriousness of the incidents that have taken place on the basis that the Police have not sought stronger sanctions.
- There is a long history of criminal conduct due to the intoxication of customers.
- The premises management have not done enough to demonstrate that incidents won't occur in the premises or outside it.
- The Police still want to see a restriction of opening hours and the introduction of polycarbonates.

Decision of the Licensing Sub-Committee

The Licensing Sub-Committee decided to modify the conditions of the Premises Licence as follows:

1. Modification of Licensable Activities hours: The opening hours for Friday and Saturday night be restricted to 00.00 midnight for Licensable Activities and 00.30 for closure of the venue. No change to the Sunday to Thursday hours.
2. Modification of the Conditions as follows:
 - a. All agency staff to be vetted before attending the venue for work.
 - b. Polycarbonates to be introduced throughout the venue for all drinks.
 - c. Increase the security at the rear entrance by 1 SIA door supervisor.

The Licensing Sub-Committee gave the following reasons for their decision:

1. There is concerning evidence of persistent serious incidents occurring at this venue, which have not been adequately addressed or dealt with. The case of *Daniel Thwaites v Wirral Borough Magistrates' Court (2008)* applied.
2. Despite the steps taken, including the removal of the DPS, replacement of the premises' security company, and transfer of Premises License from Tasoo Limited to Webbs Leisure Limited, incidents have continued, including failures of security, and the arrest of a member of staff, which indicate that the Prevention of Crime and Disorder and Public Safety Licensing Objective is being undermined. It was noted that the incidents appeared to occur more on weekends than on weekdays.
3. The atmosphere at the venue has not changed sufficiently, and the venue has not suggested further actions, such as an increase of SIA in the bar areas or other security and safety measures to address the level of intoxication and prevent such incidents set out above from occurring.
4. The representatives of the venue have sought to undermine the seriousness of the incidents during the hearing, including the ongoing consequences for injured customers or staff for example an incident where a customer required dental replacement work to the tune of £2000 per tooth and continues to suffer ongoing migraines as a result of an assault at this venue.
5. The Licensing Sub-Committee does not consider that the decision to make these changes constitutes an infringement of or non-compliance with the public sector equality duty under section 149 of the Equalities Act 2010, or involves any discrimination either directly or indirectly. The case of *R (on the application of Bristol City Council) v Bristol Magistrates' Court [2009] (Sommerfield)* considered.

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.

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