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Merton Council

Licensing Sub-Committee

5 August 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: 12 August 2022

Subject: The Sultan, 78 Norman Road, SW19 1BT

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 Ms Fiona Read, Father Graham Piper and Ms Sally McCutcheon for a Review of the Premises Licence for The Sultan, at 78 Norman Road, SW19 1BT. The application sought a Review of the Licensable Activities relating to the use of the former carpark adjacent to the pub as an outdoor drinking area.

31 representations were received in relation to the application from local residents, patrons of the Sultan and Hopback Brewery, the brewery owners of the Sultan.

In reaching its decision, the Licensing Sub-Committee had to promote the Licensing Objectives, make a decision that was appropriate and proportionate, comply with the Licensing Act 2003 and its regulations, have regard to the current Home Office Section 182 Guidance, have regard to the London Borough of Merton Council's Statement of Licensing Policy, and comply with any relevant case law.

The Licensing Sub-Committee decided to apply some conditions to the Premises Licence.

Licensing Sub-Committee Hearing

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

The Licensing Manager gave a brief overview of the Application.

Ms Sally McCutcheon and Father Graham Piper presented their submissions on the application:

- The application sought to remove the recently installed table/benches from the former car park area, adjacent to The Sultan;
- It was not intended to revoke the Premises Licence of the pub as a whole, only to limit the new outdoor seating;
- There had not been consultation with neighbours before the installation of the seating;
- The pub already has a beer garden and seating on Denburgh Road, historically seating on Norman Road is not thought to have been permitted by the local planning authority, there is no objection to the pre-existing outdoor seating to the rear or side of the pub;
- It was suggested that planning applications for previous developments at the site have required a certain number of parking spaces as a condition of development, and the land registry indicates that no new permanent structures are permitted within 10m of the road;
- It is noted that patrons of the pub are not disturbed by the noise generated in the outside seating on the Norman Road side of the pub, but they have chosen to be there and to enjoy that environment, whereas the neighbours have not chosen to have the noise from the seating area intrude on the quiet enjoyment of their homes.

Cllr Kirsten Galea informed the Licensing Sub-Committee of the following

- It is acknowledged that the pub in general is a sedate venue, a terrific facility but the additional seating has caused anxiety and disturbance for residents, and it is likely to become more popular and noisier as a result;
- The residential area around the pub had been a very quiet area, so the new outdoor area was heard that much more than it would normally be;
- It is obvious that the new seating area would have an impact and it is disappointing that there was no consultation prior to the installation

In response to questions the applicants reiterated that the application was focused on the new area, and that they had not been disturbed by the existing external seating in other areas. They were aware that a public meeting had been offered, but believed that this meeting had been taken off the table by the brewery. While there were occasions when vehicles were parked between the seating area and their homes, this was not constant. They had enclosed a statement from a previous landlady who had told them that seating in that area had not be permitted previously. The applicants were not acoustic experts and their enquiries had not established an acceptable limit for noise, but their own readings had shown that there was a four-times increase in noise, when the tables were in use, inside their homes. These problems had not existed when the space was solely used as a parking area. The applicants are not speaking for all residents in the area, but their own experience is significant, neighbours whose homes are not overlooked by the

seating area or in direct line are less impacted than those who are. The applicants understood that the seating was to be a permanent fixture.

Cllr Galea confirmed that she had raised members enquiries, and was waiting to hear if an authorisation from the Planning Team was required for a change of use in the land.

Alison Freezer, company secretary of the Premises Licence Holder and Gary Robinson, DPS, presented to the Licensing Sub-Committee and raised the following points:

- When the complaints about noise were first received, Alison visited the pub to investigate but did not find the noise significant and believed the perception to be enhanced due to the generally quiet nature of the area;
- The car parking area was not being used by customers, and this is why she believed the dispute was perhaps linked to the loss of parking;
- The benches are intended to allow their customers to enjoy the good weather, as this corner is a sun trap, and the voluntary 9.30pm end of service in the area has been guided by the time of the sun setting;
- While the seats will remain in situ, they intend to cover them and take them out of use once summer ends;
- The external seating protects the business against pandemics or restrictions in the future.

In response to questions, Alison Freezer confirmed that they had asked complainants to direct their enquiries to the brewery as they were concerned about the welfare of the landlord in handling anonymous letters and phone calls. 7 anonymous calls had been received along with three letters. They are happy to meet with residents now, and to consider installing more substantial planters to baffle the noise. They were concerned about restrictions on times of service, cementing their voluntary offer of 9.30pm as any breaches, not of their own making, could still lead to prosecution and/or loss of their Premises Licence. They were reluctant to put a time or condition on when summer ended and they would stop using the outside area as that would be dependent on the weather and temperature outside.

In closing the Licensee raised the following point:

- If this is a matter of public nuisance, it has to affect the community as a whole, as there hasn't been a significant increase in noise.
- The Brewery's aim is to provide a safe environment for all their customers, some of whom are still anxious about Covid, which is still within the community.

The applicants, in closing, made the following points

- They are pleased to have had the opportunity to air their views;
- The pub has been successful for many years without using this space;
- More planting would not solve the problem;
- there was fencing around some areas and noise still penetrated to neighbours, while it may assist with privacy, it would not necessarily assist with noise;

- The 9.30pm cut off does not alleviate the many hours of nuisance from noon at weekends;
- It's not a surprise that residents not directly facing the area are unaffected;
- While the impact is not constant, it is daily, and it has a notable impact on the ability of the applicants to enjoy their homes;
- The brewery have not offered a solution and sought to downplay and challenge the reasons for the application;
- The applicants requested the Licensing Sub-Committee apply a restriction and remove the tables

The Chair announced that the Licensing Sub-Committee would retire to closed session and make their decision.

The Decision of the Licensing Sub-Committee

The Licensing Sub-Committee decided not to reduce hours or amend the conditions as sought in the application but would apply the following conditions to the Premises Licence:

- 1) The Premises Licence Holder should hold a quarterly meeting with the community to talk about issues that have arisen;
- 2) Notices should be installed around the area to remind patrons that they are in a residential area and noise should be kept down;
- 3) A phone number to allow residents to contact the DPS should be provided, so that incidents can be addressed as they are occurring

It is recommended that the Premises Licence Holder take steps to baffle noise and address privacy issues, such as with a high trellis between planters, so that plants can climb and create a baffling barrier for noise.

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

- a) The Licensing Sub-Committee had to make a decision that promoted the Licensing Objectives and that was appropriate and proportionate.
- b) The Licensing Sub-Committee acknowledged the specific impact the new seating area had on the applicants, but did not feel that the increased noise met the threshold for a general public nuisance. The Licensing Sub-Committee acknowledged that this would be disappointing to the applicants, but had applied restrictions and made recommendations that aimed to address the issues raised.
- c) There are other regimes, such as Planning Enforcement, which may be explored by the applicants to address other concerns beyond the remit of the Licensing Sub-Committee

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.