

Merton Council
Licensing Sub-Committee
12 June 2017
Supplementary agenda

6 Notice of Determination

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London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 14 June 2017

Subject: 323-323A London Road, Mitcham, CR4 4BE

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 by Mr Krzysztof Kaczmarczyk & Mr Pawel Puzelko for a new Premises Licence for 323-323A London Road, Mitcham, CR4 4BE to permit the licensable activity of the supply of alcohol (off sales only) with opening hours both from 08.00 to 22.00 Mondays to Sundays .

Representations were received against the application from the Metropolitan Police, London Borough of Merton Public Health Department and Councillor Linda Kirby. The premises was located within 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 could 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 and the licensing objectives, had regard to the current Home Office Section 182 Guidance, as well as to LB Merton's Statement of Licensing Policy, and complied with any parameters provided by relevant case law.

The application was refused.

Reasons

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

Mr Gover, the applicant's representative stated that:

- a) the applicants had similar Premises Licences in Exeter, Exmouth, and Torquay and were responsible retailers that had been trading for at least 3 years, although no evidence supporting that was presented;
- b) The proposed operation be distinguished from current premises within the area of Mitcham where this premises was located;
- c) The conditions proposed were further than the usual conditions that would address issues connected with street drinkers;
- d) The proposed operation would involve specialist Polish food and drinks and would involve quality in its fixtures and fittings.

The Metropolitan Police Borough Licensing Officer, PC Russ Stevens, objected to the application and sought the refusal of the application due to the saturation in the area of similar premises pursuant to the Cumulative Impact Policy for Mitcham and made the following representations:

- 1) The applicant was not aware of the CIP when PC Stevens met with him;
- 2) The plans were in Polish and were not compliant with Reg 23 of The Licensing Act 2003 (Premises licences and club premises certificates) Regulations 2005;
- 3) The Police and other authorities had identified a significant problem with street drinkers and the proliferation of off licence premises within the Mitcham area of the Borough and especially in the immediate area around this premises. There had already been the imposition of the Mitcham Town Centre Cumulative Impact Zone (CIZ) (relating solely to Off-Licences), the imposition of the Controlled Drinking Zone (CDZ) (prohibiting drinking alcohol in public with seizure powers), an application had been submitted for a Public Space Protection Order (to deal specifically with Street Drinkers) and the use of Responsible Retailers Agreements (to self-regulate the sale of high strength beers and ciders). However, the self-regulation had not seen breaches that could change conditions, the fee for Minor Variations resulted in a refusal to engage with self-imposing conditions to address street drinking or the wide availability of off sales of alcohol).
- 4) The current Saturation of licensed premises in the immediate vicinity of the premises was a cause for great concern and if added to would result in increased cumulative impact. It involved the following:
 - a. 323 London Road is next door to The Job Centre and Benefits Agency at 321 London Road,
 - b. is at one end of a small parade of shops, with a smaller parade of similar shops immediately opposite.
 - c. There is an existing Off-Licence at 333 London Road (5 doors away),
 - d. There is an existing Off-Licence at opposite at 384 London Road.
 - e. There is a William Hill Bookmakers only 6 doors away at 335 London Road.
 - f. The pavement outside is exceptionally wide and accommodates a Bus Stop and Shelter.

- g. immediately opposite the premises is a very busy car wash that employs a number of hand car washers. Employees and friends are often seen drinking from cans of beer at the car wash, and complaints have previously been received about staff urinating in the street

These conditions alone combine to create an attractive area for street drinkers to congregate.

- 5) Street drinkers were being pushed out of Mitcham town centre, through the different initiatives that had been adopted, which meant that this premises was proposed in an area that would be attracting street drinkers or those resorting to this area to purchase alcohol, as opposed to those purchasing alcohol ancillary to food purchases.
- 6) It was the Police view that they need to cut off the supply of alcohol to street drinkers especially, where this was specifically a problem in this area.

The Council's Public Health team objected to the application and sought the refusal of the application due to the saturation in the area of similar premises pursuant to the Cumulative Impact Police for Mitcham and made the following representations:

- 1) There were 7 schools located relatively nearby the premises;
- 2) The conditions offered assisted on the issues, but could not address the underlying issue of a street drinking problem in this area;

The premises licence application being considered was not addressing how it overcame the rebuttable presumption. No proper evidence was presented to do so.

The Brewdog exception, sought by the applicants, that the premises would only provide Polish food and drinks to their community did not comply with the analysis required in the Brewdog case. The Police concern did not involve a simple increase in footfall and their concerns were a rational reason to refuse. The evidence provided indicated that the proposed operation was not one that would involve discerning customers or customers that would not cause any increase in cumulative impact. The applicants aim of providing Polish customers with food and alcohol, the pricing involved (including that conditions 3 and 4 clearly indicated that lower priced sales were the operational model involved), and together with locating this shop in this proposed location available to those living in this area, did not provide the Licensing Sub-Committee with sufficient assurance that this premises would not add to cumulative impact. The concern was that the type of clientele that would be attracted to this premises for alcohol purchases were the same as those already operating in the area, notwithstanding their track record elsewhere. For that reason, the Licensing Sub-Committee was concerned their clientele will have any adverse impact on the area here.

In view of the presentations by the Metropolitan Police and Public Health about the Cumulative Impact on the area, the Committee considered that if the premises traded with a licence they would add to the Cumulative Impact and the licence was therefore refused.

The Licensing Sub-Committee gave the following reasons for refusal:

- 1) The area has the worst record in the Borough in terms of Public Health and Street Drinking.
- 2) There is already clear evidence of street drinking opposite the premises and in areas nearby.

- 3) There is a saturation of licensed premises in the immediate vicinity.
- 4) Polish alcohol is already freely sold across London.
- 5) The conditions offered would not address the Cumulative Impact.
- 6) The applicant did not offer sufficient details of their clientele or conditions particular to their clientele to address concerns about Cumulative Impact.
- 7) The Committee noted comments made regarding the premises in Torquay, but though that Mitcham Town Centre was a very different area in terms of clientele and operations than the tourist orientated Torquay and therefore this was not comparable.

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.