

London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 27 May 2021

Subject: Counter Notices Following Police Objection to Temporary Event Notices:
Underbelly Ltd, Event Site 5, Wimbledon Park, Home Park Road, SW19 7HX

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.

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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 Authority received notice from Mr Woodhead on behalf of Underbelly Ltd by way of 4 standard Temporary Event Notices (TENs) to take place at Event Site 5, Wimbledon Park, Home Park Road, SW19 7HX which required consideration under section 105 of the Licensing Act 2003. The TENs gave notice that they would allow the licensable activity of the retail sale of alcohol and provision of regulated entertainment pursuant to section 100A of the Licensing Act 2003 as follows:

12.00 - 22.00 Thursday 27th May 2021 to Sunday 31st May inclusive
12.00 - 22.00 Thursday 3rd June 2021 to Sunday 6th June inclusive
12.00 – 22.00 Thursday 10th June 2021 to Sunday 13th June inclusive
12.00 – 22.00 Thursday 17th June 2021 to Sunday 20th June inclusive

The Metropolitan Police issued Objection Notices against the Temporary Event Notices under section 104 and 105 of the Licensing Act 2003 requiring a hearing before the Licensing Sub-Committee to consider the objection notice and whether it was appropriate for the promotion of the licensing objectives to issue Counter Notices to prevent the events from taking place.

The Licensing Sub-Committee considered that it was appropriate in order to promote the Licensing Objectives of the Prevention of Crime and Disorder, Public Safety and the Prevention of Public Nuisance, and having regard to the Police Objection Notice, to give Underbelly Limited Counter Notices under section 105 of the Licensing Act 2003.

Therefore, the events do not have authority to proceed as provided under the Licensing Act 2003.

Licensing Sub-Committee Hearing

The Licensing Sub-Committee looked carefully at the TENs, the supporting papers and the Objection Notice received from the Metropolitan Police contained in the Agenda papers and the oral evidence submitted at the hearing by all parties present.

The Licensing Officer advised that 5 Temporary Event Notice (TEN) applications had been received, stating that the event proposed would be a repeat of the same event which had taken place in the same location during August 2020. The Metropolitan Police had objected to all 5 TENs and as the first TEN was for 20th – 23rd May 2021, a Counter Notice was issued where the TEN was a late TEN.

Daniel Wand, representing the Metropolitan Police advised that:

- The Metropolitan Police were concerned that under a TEN the maximum number of persons including staff on site must be a maximum of 499 persons and that over a series of weekends during a post-covid lockdown period the event had the potential to attract a greater number of people than this allowed limit.

- The Metropolitan Police were concerned that this type of event would be more suitably managed by a ticketing system and that the organisers would not be able to sufficiently manage demand without a ticket system in place. It was noted that the application had suggested a clicker system to manage attendance numbers however the Police were concerned about the effectiveness of this method.
- The Metropolitan Police had concerns over the perimeter of the event site being secured by a rope with posts and that this would not prevent unauthorised access to the event.
- The Metropolitan Police queried how the queueing system would be organised and felt that the 1-in-1-out system that would be in place, once the attendance limit was reached, would lead to persons gathering at the entrance and this could in turn lead to crime and disorder and anti-social behaviour.
- The proposed event included off-sales of alcohol; the concern of the Metropolitan Police was that individuals would enter, purchase alcohol and then take this off-site into the park to consume which could lead to congregating in and around the venue or even further afield.
- The proposed security of 2 SIA security guards was not, the Police felt, sufficient to cope with 499 persons (or potentially more) on the site and it would be expected that this would be a greater number particularly in the afternoon towards the evening time. The absence of body-worn cameras on these personnel was also a concern, as this would be a necessary addition to ensure the effectiveness of the security at the event.
- The access to toilets at the events was insufficient and would see attendees leaving the venue to use the public toilets within the park which would contribute to the difficulty in organisers managing the number of attendees at the events and could lead to those gathering by way of queueing outside the venue to get back in.
- The CCTV that had been agreed at the venue was limited to a retention period of 7 days which was insufficient to allow the Police to investigate incidents reported after this period in the way they usually would be.
- The Police were concerned that the application for a time-limited premises licence was withdrawn and that whilst there was time to apply again for one, TENs were submitted instead. The Police were concerned that this was potentially a circumvention of procedure which would have allowed for greater scrutiny and proper enforcement by the Metropolitan Police or Environmental Health or other authorities under other regimes, rather than TENs which can only be opposed by the Metropolitan Police and Environmental Health rather than all the Responsible Authorities and has input from local residents.

In response to questions, PC Belinda Loizou responded that the Police had not received any complaints in relation to crime and disorder for the 2020 event that ended at 20.30 each day. The Police had concerns relating to the extended hours applied for as part of the 2021 application of 22.00 each day, compared to the 2020 event hours.

Ed Bartlam, Director Underbelly Ltd presented the proposal:

- Underbelly runs a large number of events including Christmas events in London, events on the Southbank, pop-up theatres in Marble Arch, a number of pop-ups at the Edinburgh Fringe Festival and other events for Local Authorities and the Scottish Government and created well run, well managed

culturally important events and festivals for people of all ages. A lot of the events are non-ticketed and the company are experienced in working in an environment with a transient audience. These events are managed with robust collaboration with Local Authorities and robust stewarding.

- The event that had taken place in 2020 was part of 3 small, low impact street food festivals in Wimbledon Park, Southbank and Victoria Park in Tower Hamlets. These events had never exceeded a limit of 450 people and were well received, providing a safe and socially distanced family environment. The organisers were keen to bring it back in 2021 after the success of the events in 2020.
- The organisers had agreed to bring back the event to Merton but move to a different location within the park due to works taking place on the lake. A time limited Premises Licence was therefore applied for to cover the event taking place on the old bowling green and draft conditions were agreed with the Metropolitan Police. Subsequently, the Council advised that this location was no longer available and the event was moved back to the previous site from 2020. The organisers then felt that they would be unable to apply for a new time-limited Premises Licence in the 37 days remaining prior to the proposed start time of the event. Therefore they agreed with the Licensing Authority that this was unrealistic and submitted TENs as this had worked during 2020 and they thought would be appropriate for the same event in 2021.
- All events are well managed and safe and the 2020 event operated successfully with no complaints and operated in line with the Licensing Objectives.
- A number of draft conditions for the withdrawn Premises Licence application were noted including the site having CCTV, music would be played at a level so that no one must speak loudly to be heard (i.e. ambient music so as not to draw a crowd), security staff levels would flex when necessary taking into account the day of the week and weather, no loud performances after 8pm and music at a level so that it is not heard outside of the site. Whilst conditions cannot be attached to TENs, the organiser would expect to attach these conditions to the commercial agreement with the London Borough of Merton.
- In 21 years of operating, the organisers have never not gone through with their undertakings and had never previously had an application go to a Licensing Sub-Committee.
- The organiser stated that they categorically confirmed that there had been no attempt to get around regulatory rules and that they had wanted to run on a Premises Licence application but had been unable to, due to circumstances beyond their control.
- The 2020 event had also taken place in a post-covid lockdown period when the weather had been good and the event hadn't drawn a sizeable crowd but a family friendly, transient audience. The event was small and low impact with market stalls and a bandstand stage which the organisers felt would benefit the local community.
- The stewarding levels proposed within the Event Management Plan were a base level and the organisers would expect this level to flex up during busy periods or when the weather was good. There were sufficient staff available through their contractor to provide this.
- There had not been any significant issues with queues at the 2020 event in relation to the toilets.

- The entrance gate is patrolled and stewarded and there had been no issues in 2020.
- The organisers would be happy to consider the use of body-worn cameras and to look at this proposal with their security staff provider.
- The perimeter was secured with a rope and post in 2020 and was proposed this year as whilst it was possible to put up a perimeter fence it was felt that this was not as attractive and not in-keeping with the environment and the event.

In response to questions, Mr Woodhead advised that the security provision for each week was decided weekly on a Monday for the upcoming weekend and the company would then confirm that staff requested had been booked. This proposed level could be increased the day before the event if required.

CCTV equipment could record up to 28 days and therefore this could be used.

In response to further questions, Mr Woodhead and Mr Bartlam advised that there was no proposed music after 8pm and the later hours applied for would allow for an increase in dispersal time. Mr Bartlam was willing to consider certain days of the week having shorter hours but believed there wouldn't be any adverse impact with the later hours.

The event was covid-secure in 2020 and there were a number of measures included within the event management plan including hand sanitiser and track and trace.

The site would have a dedicated cleaning time who would clean the site and litter pick. A dedicated waste team who pick up rubbish every day and split this into recycling, food, glass and general waste with a daily sweep within the area and outside. A meeting took place between the organisers and the London Borough of Merton greenspaces team the week prior to the Licensing Sub-Committee meeting and the greenspaces team had been satisfied with the measures proposed.

The Decision of the Licensing Sub-Committee

The Licensing Sub-Committee gave the following reasons under Section 105 (3)(b) for their decision:

- 1) A Temporary Event Notice does not allow for conditions to be imposed or hours to be reduced and therefore there were no additional controls that could be put in place by the Licensing Sub-Committee to mitigate concerns raised by the Metropolitan Police.
- 2) The 2020 event had taken place with a terminal hour of 20.30 whereas in 2021 this had been extended to 22.00 – the potential crime and disorder or public nuisance from those remaining in the area after 22.00 to continue drinking etc or from those dispersing late at night leaving at 22.00 or after 22.00 were a concern for the Licensing Sub-Committee.
- 3) Noise from music or persons attending possibly loitering around the park was a concern.
- 4) SIA security staff and supervision and management thereof – should issues occur on the day of the event there did not appear to be a way to increase the provision on the day, only the day before or day after.

- 5) Paragraph 2.1 of the Home Office section 182 guidance states “Licensing authorities should look to the police as the main source of advice on crime and disorder.” The views of the Police therefore must be considered by the Licensing Sub-Committee.
- 6) There is a different approach to the Covid-pandemic now than there was in August 2020 and attendees would not, it was thought, be as measured in their behaviour as they were in 2020.
- 7) The Licensing Sub-Committee did accept Underbelly’s good track record. However the Licensing Sub-Committee had to make a decision as to whether Counter Notices should be issued based on whether it would be appropriate for the promotion of the Licensing Objectives.

Counter Notices were therefore regrettably issued by the Licensing Sub-Committee against each of the 4 Temporary Event Notices.

The Licensing Sub-Committee was especially concerned about the extension of the hours from 20.30 to 22.00. This does not mean that the Licensing Sub-Committee may not allow the events if they were to be to the same hours as the 2020 event. The Licensing Sub-Committee could not bind a future The Licensing Sub-Committee.

The Licensing Sub-Committee also noted that there are controls and conditions permitted in a Premises Licence whereas there are no conditions that can be imposed on a TEN for this Event site. A Premises Licence would be preferable.

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.