

LICENSING AND APPEALS SUB-COMMITTEE 6th February 2012
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*PART 1 – PUBLIC DOCUMENT	AGENDA ITEM No.
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LICENSING ACT 2003

**APPLICATION BY GREENE KING RETAILING LIMITED
FOR THE VARIATION OF A PREMISES LICENCE IN RESPECT OF
THE ORANGE TREE, NORTON ROAD, BALDOCK, HERTFORDSHIRE, SG7 5AW.**

REPORT OF THE SENIOR LICENSING & ENFORCEMENT OFFICER

1. BACKGROUND

- 1.1 The existing premises licence was granted by North Hertfordshire District Council on 25th August 2005, following a Licensing and Appeals Sub-Committee hearing. A copy of the licence is enclosed as follows:

2. APPLICATION

2.1 The application is for the variation of a premises licence under Section 34 of the Licensing Act 2003.

2.2 A copy of the application is enclosed as follows:

2.3 As the variation proposes additional licensable activities, amendments to the existing licensable activities, the removal of existing licence conditions and the variation of the existing licence plan, a summary of the proposed variation is enclosed as follows:

3. APPLICATION PROCESS

- 3.1 On 15th December 2011, Greene King Retailing Limited made an application for the variation of a Premises Licence.
- 3.2 The Applicant served copies of this application to the Police Authority and the other Responsible Authorities
- 3.3 A public notice was displayed on the premises in accordance with the requirements of the Licensing Act 2003 and was exhibited for a period of not less than twenty-eight (28) days.
- 3.4 A newspaper advertisement was placed in The Comet dated 22nd December 2011 in accordance with the Act.

4. REPRESENTATIONS

- 4.1 No representation was received from Hertfordshire Constabulary.
- 4.2 Following discussions during the application period between the Applicant and North Hertfordshire District Council's Environmental Protection Officer, the Applicant agreed to incorporate some additional operating schedule conditions as part of the application. As a result of these amendments North Hertfordshire District Council's Environmental Protection Officer was satisfied that the application would not adversely impact on the licensing objectives and made no representation.
- 4.3 The agreed amendments to the application are enclosed as follows:

- 4.4 The amendments made as a result of the discussions between the Applicant and the Council's Environmental Protection Officer have been voluntarily included within the application's operating schedule by the Applicant. The Sub-Committee do not need to consider whether or not to impose these conditions, therefore, and should read them as part of the original application when considering the representations. If the Sub-Committee deem it necessary based on the representations and the verbal submissions at the hearing, however, the operating schedule conditions could be amended, added to or removed at the Sub-Committee's discretion.
- 4.5 No representations were received from any other Responsible Authority.
- 4.6 Twenty-eight (28) representations were received from Interested Parties.
- 4.7 The Council's Scheme of Delegation in respect of the Licensing Act 2003 requires the Licensing Officer to determine whether a representation is relevant as specified by the Act.
- 4.8 One representation has been deemed 'not relevant' by the Senior Licensing & Enforcement Officer as it was received outside of the prescribed consultation period.
- 4.9 One representation has been deemed 'not relevant' by the Senior Licensing & Enforcement Officer as it contained no address and so the Officer was unable to determine whether or not the Interested Party lived in the vicinity of the premises.
- 4.10 Five representations were deemed 'not relevant' as the authors did not qualify as Interested Parties by virtue of not living in the vicinity of the premises.
- 4.11 None of the representations deemed 'not relevant' by the Senior Licensing & Enforcement Officer have been included in this report as they cannot be considered by the Sub-Committee.
- 4.12 The remaining twenty-one (21) representations were deemed to be relevant by the Senior Licensing & Enforcement Officer.
- 4.13 In respect of the 'relevant representations', section 4.7 of this report still applies to the specific content of each individual representation. Where representations include paragraphs that are not relevant to the Licensing Act 2003, these paragraphs have been clearly marked as 'not relevant' by the Senior Licensing & Enforcement Officer and should not be considered as part of the determination process. Interested Parties must not refer to these paragraphs in any oral presentation at the hearing.
- 4.14 The majority of the representations were received by email. In order that the Interested Parties' email addresses and other personal information is not disclosed, only the content of the email has been reproduced as part of this report. The content has been reproduced as an exact copy of the email content received.
- 4.15 The relevant representations from Interested Parties are enclosed as follows:

- 4.16 The Applicant has been served with a copy of all representations.
- 4.17 The Applicant and the Interested Parties have been invited to attend the hearing to present their respective cases. They have been advised that they may be legally represented and of the Committee Hearing procedure.
- 4.18 Whilst the Applicant has the opportunity to address the Sub-Committee and state his/her case without having to provide it in advance in writing, The Licensing Act 2003 (Hearings) Regulations 2005 still apply. Any documentation that the Applicant wishes to be presented to the Sub-Committee must be circulated to all parties in advance of the hearing, otherwise it would require all party consent to be disclosed during the hearing.
- 4.19 The Applicant has advised that he/she wishes the Sub-Committee to be provided with copies of supporting representations received by the licensing authority in response to the consultation. These representations were deemed 'not relevant' by the licensing authority by virtue of the authors not residing within the vicinity of the premises, however, the Applicant is entitled to submit them as documentation supporting the application.
- 4.20 In determining what weight to apportion to this documentation, the Sub-Committee may wish to consider that the comments made in this additional documentation are made by persons supporting the application not by Interested Parties.
- 4.21 A copy of the supporting documentation has been provided in advance for circulation to all parties and is enclosed as follows:

5. OBSERVATIONS

- 5.1 In determining this application, the Sub-Committee must have regard to the representations and take such steps, as it considers necessary for the promotion of the Licensing Objectives.
- 5.2 In making its decision, the Licensing and Appeals Sub-Committee must act with a view to promoting the Licensing Objectives. It must also have regard to the Licensing Authority's Statement of Licensing Policy and National Guidance.
- 5.3 The Licensing and Appeals Sub-Committee has the following options when issuing the Decision Notice:
- i) Grant the application in whole or in part;
 - ii) Modify, add to, or omit conditions of the licence; or
 - iii) Refuse the application in whole or in part.

6. LICENSING POLICY CONSIDERATIONS

- 6.1 The following paragraphs from the Council's Statement of Licensing Policy 2011 may be relevant to this application. This section does not prevent the Sub-Committee from considering other paragraphs of the Statement of Licensing Policy where they deem it appropriate.

5.1

Each licence application will be decided by reference to this Policy, the National Guidance issued by the Secretary of State, relevant legislation and to the individual circumstances of the particular application. The Council may depart from the Policy where the individual circumstances of any application merit such a decision in the interests of the promotion of the Licensing Objectives. Full reasons will be given for decisions taken by the Council when undertaking its licensing functions.

5.6

The Council acknowledges that the licensing process can only seek to control measures within the direct control of the licensee and 'in the vicinity' of the premises. The Council does not consider that the term 'vicinity' can be generically defined and will consider its definition relative to the specific circumstances of each application. Generally, to be considered to be 'in the vicinity' of a premises, an interested party will need to demonstrate a causal link between the problems or likely problems caused at the premises, or in the immediate vicinity of the premises, in relation to the Licensing Objectives. For example, an interested party may be able to hear music from the premises within their property or they may see patrons leaving the premises and causing a nuisance immediately outside the premises.

5.9

The Council will carry out its licensing functions in the promotion of the Licensing Objectives and, in addition, will support the stated aims of the Act which are as follows:

- (i) the necessary protection of local residents, whose lives can be blighted by disturbance and anti-social behaviour associated with the behaviour of some people visiting places of entertainment;*

- (ii) *the introduction of better and more proportionate regulation to give businesses greater freedom and flexibility to meet their customers' expectations;*
- (iii) *greater choice for consumers, including tourists, about where, when and how they spend their leisure time;*
- (iv) *the encouragement of more family friendly premises where younger children can be free to go with the family;*
- (v) *the further development within communities of our rich culture of live music, dancing and theatre , both in rural areas and in our towns; and*
- (vi) *the regeneration of areas that need the increased investment and employment opportunities that a thriving and safe night-time economy can bring.*

9 *Prevention of Public Nuisance*

9.1

Licensed premises may have significant potential to impact adversely on communities through public nuisances that arise from their operation. The Council interprets 'public nuisance' in its widest sense and takes it to include such things as noise, light, odour, litter and anti-social behaviour, where these matters impact on those living, working or otherwise engaged in activities in the vicinity of a particular premises. Ordinarily, the Council's Environmental Protection Team, in their role as a responsible authority, would take the lead in respect of nuisance issues.

9.2

Where there is evidence of public nuisance and its powers are engaged the Council may impose conditions on licences to prevent unnecessary Public Nuisance to local residents. The conditions may include, but are not limited to:

- (i) *sound proofing requirements;*
- (ii) *keeping doors and windows closed after a specific time;*
- (iii) *restrictions on times when music or other licensable activities may take place;*
- (iv) *technical restrictions on sound levels at the premises, by the use of sound limiting devices;*
- (v) *limiting the hours of regulated entertainment;*
- (vi) *limiting the hours of open-air entertainment and the use of outdoor areas, gardens, patios, and smoking shelters; or*
- (vii) *requiring the display of signs both inside and outside the premises reminding customers to leave the premises quietly and to respect the rights of nearby residents.*

9.3

The following examples of control measures are given to assist applicants when preparing their Operating Schedules, having regard to their particular type of premises and/or activities. These are not exhaustive but include:

- (i) *effective and responsible management of the premises;*
- (ii) *appropriate instruction, training and supervision of those employed or engaged to prevent incidents of Public Nuisance;*
- (iii) *adoption of best practice guidance such as the Good Practice Guide on the Control of Noise from Pubs and Clubs, produced by the Institute of Acoustics; Safer Clubbing and the National Alcohol Harm Reduction Strategy Toolkit, or Code of Practice for Outdoor Events produced by the Noise Council;*

- (iv) *fully assess the potential for public nuisance on the locality. This may involve a competent noise consultant undertaking a detailed noise survey/assessment of the premises, etc;*
- (v) *management of arrangements for the collection and disposal of litter; and*
- (vi) *effective ventilation / extract systems.*

The Council encourages applicants to seek early engagement with the Environmental Protection Team when preparing an operating schedule.

9.4

Conditions relating to noise nuisance will normally concern steps necessary to control the levels of noise emanating from premises. The Council are aware of the need to avoid unnecessary or disproportionate measures that could deter valuable community activities such as live music. Conditions that are likely to be a significant financial burden may be avoided for smaller venues and community premises, where it is appropriate to do so.

9.5

The Council recognises that conditions relating to noise nuisance may not be necessary in certain circumstances where the provisions of the Environmental Protection Act 1990, the Noise Act 1996, or the Clean Neighbourhoods and Environment Act 2005 adequately protect those living in the vicinity of the premises. That said, the approach of the Council will be one of prevention and will consider each application on its own merits.

12.2

Conditions will only be imposed when they are necessary for the promotion of the Licensing Objectives and will focus upon matters within the control of the individual licensee such as the premises, places or events being used for licensable activities. Conditions are likely to be focused towards the direct impact of those activities on persons living, working or otherwise engaged in activities in the vicinity.

12.7

The Council, based on the legislation and existing licensing case law, interpret Section O of the application, hours premises open to the public, as part of the operating schedule. These hours, therefore, form conditions of the licence operating schedule and restrict the hours during which members of the public can be on the licensed premises irrespective of whether licensable activities are taking place. Applicants are advised to consider any necessary 'drinking-up time' or wind-down period at the end of normal licensable activities when completing this section of the application.

14.1

The Council recognises the need to encourage and promote live music, dancing and theatre for the wider cultural benefit of the community.

14.2

Only necessary, proportionate and reasonable licensing conditions will be imposed on relevant licences so as not to discourage the promotion of entertainment. Conditions will relate to the promotion of the Licensing Objectives.

14.3

The Council will ordinarily avoid any measure which deters live music, dancing and theatre by imposing indirect costs of a substantial nature (for

example, noise limiting devices for smaller or community premises). The Council acknowledges, however, that on occasions the imposition of necessary conditions with cost implications may be the only alternative to refusing an application where there is sufficient evidence in relation to the Licensing Objectives.

16.6

Where an application for a licence under the Licensing Act 2003 is received and there are no details within section N adult entertainment, or a comment such as 'none' is entered, a licensing condition consistent with this part of the operating schedule would be imposed on the licence as follows:

No adult entertainment will be permitted on this premises unless under the authorisation of a Sexual Entertainment Venue licence.

7. RELEVANT EXTRACTS OF STATUTORY GUIDANCE

- 7.1 The following paragraphs from the Guidance issued by the Home Office under section 182 of the Licensing Act 2003 (October 2010) may be relevant to this application. This section does not prevent the Sub-Committee from considering other paragraphs of the Guidance where they deem it appropriate.

1.15

Each application must be considered on its own merits and any conditions attached to licences and certificates must be tailored to the individual style and characteristics of the premises and events concerned. This is essential to avoid the imposition of disproportionate and overly burdensome conditions on premises where there is no need for such conditions. Standardised conditions should be avoided and indeed, may be unlawful where they cannot be shown to be necessary for the promotion of the licensing objectives in any individual case.

1.16

The licensing authority should only impose conditions on a premises licence or club premises certificate which are necessary and proportionate for the promotion of the licensing objectives. If other existing law already places certain statutory responsibilities on an employer or operator of premises, it cannot be necessary to impose the same or similar duties on the premises licence holder or club. It is only where additional and supplementary measures are necessary to promote the licensing objectives that necessary, proportionate conditions will need to be attached to a licence.

1.32

Licensing authorities need to be aware of new powers that will be available to local authorities under sections 40 and 41 of the Anti Social Behaviour Act 2003. The Act provides that if the noise from any licensed premises is causing a public nuisance, an authorised environmental health officer would have the power to issue a closure order effective for up to 24 hours. Under this provision, it is for the Chief Executive of the local authority to delegate their power to environmental health officers within their authority. If after receiving a closure order the premises remain open, the person responsible may upon summary conviction receive a fine of up to £20,000 or imprisonment for a term not exceeding three months, or both. This complements the police powers under Part 8 of the 2003 Act to close licensed premises for temporary periods.

2.1

The steps any licence holder or club might take to prevent crime and disorder are as varied as the premises or clubs where licensable activities may be carried on. Licensing authorities should therefore look to the police as the main source of advice on these matters. They should also seek to involve the local CDRP, as recommended in paragraph 1.21 of this Guidance.

2.4

The essential purpose of the licence or certificate in this context is to regulate behaviour on premises and access to them where this relates to licensable activities and the licensing objectives. Conditions attached to licences cannot seek to manage the behaviour of customers once they are beyond the direct management of the licence holder and their staff or agents, but can directly impact on the behaviour of customers on, or in the immediate vicinity of, the premises as they seek to enter or leave.

2.32

The 2003 Act requires licensing authorities (following receipt of relevant representations) and responsible authorities, through representations, to make judgements about what constitutes public nuisance and what is necessary to prevent it in terms of conditions attached to specific premises licences and club premises certificates. It is therefore important that in considering the promotion of this licensing objective, licensing authorities and responsible authorities focus on impacts of the licensable activities at the specific premises on persons living and working (including doing business) in the vicinity that are disproportionate and unreasonable. The issues will mainly concern noise nuisance, light pollution, noxious smells and litter.

2.33

Public nuisance is given a statutory meaning in many pieces of legislation. It is however not narrowly defined in the 2003 Act and retains its broad common law meaning. It is important to remember that the prevention of public nuisance could therefore include low-level nuisance perhaps affecting a few people living locally as well as major disturbance affecting the whole community. It may also include in appropriate circumstances the reduction of the living and working amenity and environment of interested parties (as defined in the 2003 Act) in the vicinity of licensed premises.

2.34

Conditions relating to noise nuisance will normally concern steps necessary to control the levels of noise emanating from premises. This might be achieved by a simple measure such as ensuring that doors and windows are kept closed after a particular time in the evening to more sophisticated measures like the installation of acoustic curtains or rubber speaker mounts. Any conditions necessary to promote the prevention of public nuisance should be tailored to the style and characteristics of the specific premises. Licensing authorities should be aware of the need to avoid unnecessary or disproportionate measures that could deter events that are valuable to the community, such as live music. Noise limiters, for example, are very expensive to purchase and install and are likely to be a considerable burden for smaller venues.

2.35

As with all conditions, it will be clear that conditions relating to noise nuisance may not be necessary in certain circumstances where the provisions of the Environmental Protection Act 1990, the Noise Act 1996, or the Clean

Neighbourhoods and Environment Act 2005 adequately protect those living in the vicinity of the premises. But as stated earlier in this Guidance, the approach of licensing authorities and responsible authorities should be one of prevention and when their powers are engaged, licensing authorities should be aware of the fact that other legislation may not adequately cover concerns raised in relevant representations and additional conditions may be necessary.

2.36

Where applications have given rise to representations, any necessary and appropriate conditions should normally focus on the most sensitive periods. For example, music noise from premises usually occurs from midevening until either late evening or early morning when residents in adjacent properties may be attempting to go to sleep or are sleeping. In certain circumstances, conditions relating to noise in the immediate vicinity of the premises may also prove necessary to address any disturbance anticipated as customers enter and leave.

2.37

Measures to control light pollution will also require careful thought. Bright lighting outside premises considered necessary to prevent crime and disorder may itself give rise to light pollution for some neighbours. Applicants, licensing authorities and responsible authorities will need to balance these issues.

2.38

In the context of preventing public nuisance, it is again essential that conditions are focused on measures within the direct control of the licence holder or club. Conditions relating to public nuisance caused by the anti-social behaviour of customers once they are beyond the control of the licence holder, club or premises management cannot be justified and will not serve to promote the licensing objectives.

10.4

Under former licensing regimes, the courts have made clear that it is particularly important that conditions which are imprecise or difficult for a licence holder to observe should be avoided. Failure to comply with any conditions attached to a licence or certificate is a criminal offence, which on conviction would be punishable by a fine of up to £20,000 or up to six months imprisonment or both.

10.11

The licensing authority may not impose any conditions unless its discretion has been engaged following receipt of relevant representations and it has been satisfied at a hearing of the necessity to impose conditions. It may then only impose conditions that are necessary to promote one or more of the four licensing objectives. Such conditions must also be expressed in unequivocal and unambiguous terms to avoid legal dispute.

10.12

It is perfectly possible that in certain cases, because the test is one of necessity, where there are other legislative provisions which are relevant and must be observed by the applicant, no additional conditions at all are needed to promote the licensing objectives.

10.13

The Act requires that licensing conditions should be tailored to the size, style,

characteristics and activities taking place at the premises concerned. This rules out standardised conditions which ignore these individual aspects. It is important that conditions are proportionate and properly recognise significant differences between venues. For example, charities, community groups, voluntary groups, churches, schools and hospitals which host smaller events and festivals will not usually be pursuing these events commercially with a view to profit and will inevitably operate within limited resources.

10.15

Licensing authorities should only impose conditions which are necessary and proportionate for the promotion for the licensing objectives. If other existing law already places certain statutory responsibilities on an employer or operator of premises, it cannot be necessary to impose the same or similar duties. For example, employers and self-employed people are required by the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) to assess the risks to their workers and any others (including members of the public visiting the premises) who may be affected by their business and identify measures needed to avoid or control risks. Conditions enforcing these requirements are therefore unnecessary.

10.17

Further, the Act does not affect the continued use of inspection and enforcement powers conferred by other legislation; for example, the powers of an environmental health officer in relation to statutory nuisance under the Environmental Protection Act 1990.

10.18

However, these general duties will not always adequately address specific issues that arise on the premises in connection with, for example, certain types of entertainment. It is only where additional and supplementary measures are necessary to promote the licensing objectives that conditions will need to be attached to a licence.

10.20

However, there is no general presumption in favour of lengthening licensing hours and the four licensing objectives should be paramount considerations at all times. Where there are objections to an application and the committee believes that changing the licensing hours would undermine the licensing objectives, they may reject the application or grant it with appropriate conditions and/or different hours from those requested.

8. LICENSING OFFICER COMMENTS

- 8.1 The comments within this section of the report are provided by the Senior Licensing and Enforcement Officer to assist the Sub-Committee with the interpretation of the Act, the Guidance and existing case law. It is for the Sub-Committee to determine what weight they attach to this advice.
- 8.2 Paragraph 2.33 of the Section 182 Guidance, as quoted in section 7 of this report, gives a wide definition of 'public nuisance'. The case of *R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates Court [2009] EWHC 1996 (Admin)* considered the meaning of public nuisance in relation to the Licensing Act 2003. Burton J considered established public nuisance cases and ruled that 'public nuisance' is a question of fact, namely whether there is effect on a sufficiently large number of members of the public or whether such effect was sufficiently widespread or indiscriminate:

"It simply needs to be sufficiently widespread and sufficiently indiscriminate to amount to something more than private nuisance."

Burton J further stated that paragraph 2.33 of the Section 182 Guidance is not wrong in law as:

"...it is made quite plain that the nuisance could vary in its effect"

8.3 It is for the Sub-Committee to determine, therefore, based on the evidence provided and the individual circumstances of the application, what they deem to constitute a 'public nuisance' in this particular case.

8.4 The Applicant wishes to remove an existing condition relating to the capacity of the premises and states in the application that this is a matter covered by other legislation.

8.5 The Statutory Guidance clearly states at paragraph 1.16:

".....If other existing law already places certain statutory responsibilities on an employer or operator of a premises, it cannot be necessary to impose the same or similar duties on the premises licence holder or club....."

8.6 From 1st October 2006, the Regulatory Reform (Fire Safety) Order 2005 ("the Fire Safety Order") replaced previous fire safety legislation. Article 43 of the Fire Safety Order states that any conditions imposed by a licensing authority that relate to any requirements or prohibitions that could be imposed by the Fire Safety Order automatically cease to have effect.

8.7 It is clear, therefore, by virtue of paragraph 1.16 of the Statutory Guidance and article 43 of the Fire Safety Order that licensing authorities should not impose any conditions on a premises licence that relate to fire safety issues, including capacity figures. Indeed, the Fire Officer has already written to the Applicant and the licensing authority stating that the new capacity limit for the premises under the Fire Safety Order once the extension has been built will be one hundred and fifty (150) persons.

8.8 The existing capacity condition, however, is included on the premises licence under the section relating to "the prevention of crime and disorder". Capacity conditions that are deemed necessary to prevent crime and disorder are not precluded by the Licensing Act 2003 nor are deemed automatically cancelled or precluded by virtue of the Fire Safety Order.

8.9 In considering whether or not to remove the existing capacity condition, therefore, the Sub-Committee should consider whether or not they believe a capacity condition is necessary for the prevention of crime and disorder. If deemed necessary, the existing condition should remain subject to any amendment the Sub-Committee deem necessary.

8.10 If the Sub-Committee do not deem a capacity condition necessary for the prevention of crime and disorder, the existing capacity condition should be removed.

9. CONTACT OFFICERS

9.1 Steve Cobb
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