

ADDENDUM

Licensing and Appeals Sub-Committee

Wednesday 9th May 2012

Application by Tesco Stores Ltd for the grant of a premises licence in respect of premises known as Tesco, Lyon Court, Walsworth Road, Hitchin, SG4 9SP

1. Introduction

- 1.1 As stated in paragraphs 7.3 and 7.4 of the Report of the Senior Licensing and Enforcement Officer, after distribution of that report a revised version of the Statutory Guidance was due to be published on 25th April 2012 to take account of recent changes to legislation which effect the licensing regime.
- 1.2 The revised Guidance was published on 25th April 2012 and this addendum contains paragraphs of the Guidance that may be relevant to this application. Extracts from the Statutory Guidance have been included to assist all parties to the hearing, including the Sub-Committee. It must be stressed that these extracts are not exhaustive and consideration should be based on the full documents. It is for the Sub-Committee to determine what weight to apportion to the additional information contained within this addendum.
- 1.3 Due to the revision of the Guidance, the paragraph references included within the Licensing Officer comments in section 8 of the original report need amending. Although the paragraph numbers have changed, the content of the paragraphs remain unchanged in the new Guidance and therefore no changes are required to the Licensing Officer comments.
- (i) reference to 'paragraph 2.33' becomes 'paragraph 2.34'
(report paragraph 8.2)
 - (ii) reference to 'paragraph 2.38' becomes 'paragraph 2.39'
(report paragraph 8.3)

2. Additional information

Nearby Premises

- 2.1 A request was made to the Senior Licensing and Enforcement Officer by the Sub-Committee for information on the licensed hours of premises licensed to sell alcohol for consumption off site within a half mile radius of the proposed Tesco store.
- 2.2 The Senior Licensing and Enforcement Officer wrote to the applicant and all interested parties advising of this request on 24th April 2012, asking whether they had any objection to the provision of the requested information and, if so, to advise the Licensing Authority by Wednesday 2nd May 2012.

- 2.3 No objections to this request were received from any party to the hearing, therefore a summary of licence information is provided below.
- 2.4 Eleven (11) premises licensed to sell alcohol for consumption off the premises have been identified within an approximate half mile radius of the application site.
- 2.5 It should be noted that these locations vary significantly in their character, ranging from predominately retail areas to predominately residential areas; additionally they range from small retail units to purpose-built supermarkets.
- 2.6 The premises have a variety of conditions attached to their licences to regulate the behaviour of patrons visiting the premises. These conditions have been “...tailored to the individual type, location and characteristics of the premises...” (Guidance paragraph 1.16)
- 2.7 To summarise the usual hours (excluding bank holidays) contained within Section M (Sale of Alcohol) of the eleven (11) licences:
- (i) The earliest hour on a weekday is 06:00hrs (2 premises), the majority of premises are 08:00hrs (9 premises);
 - (ii) The earliest hour on a Saturday is 06:00hrs (2 premises), the majority of premises are 08:00hrs (9 premises);
 - (iii) The earliest hour on a Sunday is 06:00hrs (2 premises), the majority of premises are 10:00hrs (7 premises);
 - (iv) The latest hour on a weekday (excluding Friday) is 23:00hrs (9 premises);
 - (v) The latest hour on a Friday and Saturday is midnight (1 premises), the majority of premises are 23:00hrs (8 premises);
 - (vi) The latest hour on a Sunday is 23:00hrs (2 premises), the majority of premises are 22:30hrs (7 premises);

2.8 It is perhaps interesting to note that the standard permitted hours for off licences under the Licensing Act 1964 (now repealed) were:

Monday to Saturday	08:00hrs – 23:00hrs
Sunday	10:00hrs – 22:30hrs

which is clearly reflected in the summary set out above. Of the eleven (11) premises identified, six (6) hold premises licences converted from the old licensing regime upon the implementation of the Licensing Act 2003.

2.9 Some Licensing Authorities have introduced “zoning” which means the setting of fixed trading hours for all premises within a designated area. The Council’s Statement of Licensing Policy states:

6.5
The Council has no intention to introduce the zoning of licensing hours. Experience in other areas has shown that this can lead to significant movement of people across boundaries in search of premises opening later and places greater pressure on town

centres than is necessary. In addition, the Council recognises that zoning of licensing hours would undermine the principle of determining each application on its own merits.

6.6

With regards to shops, stores and supermarkets that provide sales of alcohol for consumption off the premises, the Council would normally expect to grant the sale of alcohol at any time the premises is open to the public, unless representations give good reason to restrict the hours in relation to the Licensing Objectives.

- 2.10 **The Sub-Committee should consider very carefully the weight to be attached to the additional information on nearby premises set out at paragraphs 2.4 to 2.8 above and are reminded that all applications are to be considered on their individual merits as emphasised in the Council's Statement of Licensing Policy and the Statutory Guidance.**
- 2.11 As with all evidence placed before the Sub-Committee, it is for the Sub-Committee to decide what weight to apportion with due regard to the Council's Statement of Licensing Policy and the Statutory Guidance.

Planning Application

- 2.12 The applicant has recently applied to vary its planning permission at the proposed store to amend the opening hours to those requested as part of the licence application. That application was refused and planning permission for the proposed store currently allows the following opening hours:

"The public opening hours of the shop unit hereby permitted shall be limited to between 07.00 to 23.00 pm Mondays to Saturdays and to between 08.00 am and 21.00 pm on Sundays and Bank Holidays"

- 2.13 The revised Guidance issued on 25th April 2012 makes specific reference to the inter-relationship between the different statutory functions of Licensing and Planning as follows:

9.38

Licensing authorities are best placed to determine what actions are appropriate for the promotion of the licensing objectives in their areas. All licensing determinations should be considered on a case-by-case basis. They should take into account any representations or objections that have been received from responsible authorities or other persons, and representations made by the applicant or premises user as the case may be.

9.41

Where businesses have indicated, when applying for a licence under the 2003 Act, that they have also applied for planning permission or that they intend to do so, licensing committees and officers should consider discussion with their planning counterparts prior to determination with the aim of agreeing mutually acceptable operating hours and scheme designs.

- 2.14 The Sub-Committee should determine the licensing application on its own merits with regard to the Council's Statement of Licensing Policy and the Statutory Guidance. The Sub-Committee's discretion as to what decision to reach is not fettered by the planning decision, however, the Sub-Committee may have regard to it. It is for the Sub-Committee to determine what weight to apportion to the opening hours set out at 2.12 above as currently permitted by the existing planning permission. All parties to the hearing are reminded

that the two statutory functions of Licensing and Planning have different considerations which must be taken into account when applications are received.

3. Extracts from Amended Statutory Guidance issued 25th April 2012

3.1 The following paragraphs from the Statutory Guidance may be relevant to this application. This section does not prevent the Sub-Committee from considering other paragraphs of the Statutory Guidance where they deem it appropriate.

1.16

Each application must be considered on its own merits and in accordance with the licensing authority's statement of licensing policy where, for example, its effect on cumulative impact is relevant. Conditions attached to licences and certificates must be tailored to the individual type, location 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 appropriate for the promotion of the licensing objectives in an individual case.

1.17

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

2.34

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 other persons living and working in the area of the licensed premises.

2.35

Conditions relating to noise nuisance will normally concern steps appropriate 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, or more sophisticated measures like the installation of acoustic curtains or rubber speaker mounts. Any conditions appropriate to promote the prevention of public nuisance should be tailored to the type, nature and characteristics of the specific premises. Licensing authorities should be aware of the need to avoid inappropriate 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.

2.36

As with all conditions, those relating to noise nuisance may not be appropriate 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 area 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 appropriate.

2.39

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. However, premises should have adequate dispersal policies (where appropriate) in place to ensure that customers leave the premises promptly and with minimal disruption to those in the surrounding area.

2.40

Beyond the immediate area surrounding the premises, these are matters for personal responsibility of individuals under the law. An individual who engages in anti-social behaviour is accountable in their own right. However, it would be perfectly reasonable for a licensing authority to impose a condition, following relevant representations, that requires the licence holder or club to place signs at the exits from the building encouraging patrons to be quiet until they leave the area and to respect the rights of people living nearby to a peaceful night.

10.8

Conditions should be appropriate, proportionate and justifiable in meeting the licensing objectives. They should be written in a prescriptive format and be readily understood and enforceable.

10.12

The licensing authority may not impose any conditions unless its discretion has been engaged following receipt of relevant representations and it is satisfied as a result of a hearing (unless all parties agree a hearing is not necessary) that it is appropriate to impose conditions to promote one or more of the four licensing objectives.

10.13

It is possible that, in certain cases, where there are other legislative provisions which are relevant and must be observed by the applicant, no additional conditions are appropriate to promote the licensing objectives.

10.14

The 2003 Act requires that licensing conditions should be tailored to the size, type, location and characteristics and activities taking place at the premises concerned. Conditions should be determined on a case-by-case basis and standardised conditions which ignore these individual aspects should be avoided.

10.15

Licensing authorities and other responsible authorities should be alive to the indirect costs that can arise because of conditions. These could be a deterrent to holding events that are valuable to the community or for the funding of good and important causes. Licensing authorities should therefore ensure that any conditions they impose are only those which are appropriate for the promotion of the licensing objectives. Consideration should also be given to wider issues such as conditions already in place that address the potential negative impact on the promotion of the licensing objectives and the track record of the business. The physical safety of those attending such events should remain a primary objective.

10.16

If other existing law already places certain statutory responsibilities on an employer or operator of premises, it cannot be appropriate to impose the same or similar duties as conditions.

10.22

Shops, stores and supermarkets should normally be free to provide sales of alcohol for consumption off the premises at any times when the retail outlet is open for shopping unless there are good reasons, based on the licensing objectives, for restricting those hours.

4. Basis on which to determine the application

- 4.1 The previous Statutory Guidance first issued in July 2004 and subsequently updated, most recently in October 2010, specifically required Licensing Sub-Committees to ensure that their decisions were based on measures that were 'necessary' for the promotion of the licensing objectives. This placed a burden on the Licensing Authority to demonstrate that no lesser steps would satisfy the promotion of the licensing objectives and any conditions imposed on a licence would only be those necessary for the promotion of the licensing objectives with no opportunity to go any further.
- 4.2 The revised Statutory Guidance issued on 25th April 2012 has amended the 'necessary' test to one of 'appropriate'. This has changed the threshold which Licensing Authorities must consider when determining applications by requiring that they make decisions which are 'appropriate' for the promotion of the licensing objectives.
- 4.3 The Guidance explains 'appropriate' as:

9.39

The authority's determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve.

9.40

Determination of whether an action or step is appropriate for the promotion of the licensing objectives requires an assessment of what action or step would be suitable to achieve that end. Whilst this does not therefore require a licensing authority to decide that no lesser step will achieve the aim, the authority should aim to consider the potential burden that the condition would impose on the premises licence holder (such as the financial burden due to restrictions on licensable activities) as well as the potential benefit in terms of the promotion of the licensing objectives. However, it is imperative that the authority ensures that the factors which form the basis of its determination are limited to consideration of the promotion of the objectives and nothing outside those parameters. As with the consideration of licence variations, the licensing authority should consider wider issues such as other conditions already in place to mitigate potential negative impact on the promotion of the licensing objectives and the track record of the business. Further advice on determining what is appropriate when imposing conditions on a licence or certificate is provided in Chapter 10. The licensing authority is expected to come to its determination based on an assessment of the evidence on both the risks and benefits either for or against making the determination.

- 4.4 It is anticipated that, in due course, case law will provide clarity on the meaning of 'appropriate' as referred to in paragraphs 9.39 and 9.40 of the Guidance. The Sub-Committee is therefore advised to give 'appropriate' its

ordinary meaning, as expanded upon by paragraph 9.40 of the Guidance, subject to the over-riding requirement on all Local Authority decisions of reasonableness.

- 4.5 This approach, of allowing the courts to provide clarity, is reflected in the following paragraphs of the Guidance:

1.9

Section 4 of the 2003 Act provides that, in carrying out its functions, a licensing authority must 'have regard to' guidance issued by the Secretary of State under section 182. The requirement is therefore binding on all licensing authorities to that extent. However, the guidance cannot anticipate every possible scenario or set of circumstances that may arise and, as long as licensing authorities have properly understood the Guidance, they may depart from it if they have reason to do so as long as they are able to provide full reasons. Departure from the Guidance could give rise to an appeal or judicial review, and the reasons given will then be a key consideration for the courts when considering the lawfulness and merits of any decision taken.

1.10

Nothing in this Guidance should be taken as indicating that any requirement of licensing law or any other law may be overridden (including the obligations placed on any public authorities under human rights legislation). The Guidance does not in any way replace the statutory provisions of the 2003 Act or add to its scope and licensing authorities should note that interpretation of the 2003 Act is a matter for the courts. Licensing authorities and others using the Guidance must take their own professional and legal advice about its implementation.