

LICENSING AND APPEALS SUB-COMMITTEE 13th November 2012
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*PART 1 – PUBLIC DOCUMENT	AGENDA ITEM No.
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REPORT OF THE SENIOR LICENSING AND ENFORCEMENT OFFICER

LICENSING ACT 2003

APPLICATION BY MARSTON'S PLC FOR THE VARIATION OF A PREMISES LICENCE IN RESPECT OF THE QUE PASA, 31 MARKET PLACE, HITCHIN, HERTFORDSHIRE, SG5 1DY.

1. BACKGROUND

- 1.1 The existing premises licence was granted by North Hertfordshire District Council during the transitional period on 19th September 2005.

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 The licensable activities and hours applied for are as follows:

3. APPLICATION PROCESS

- 3.1 On 21st September 2012, Marston's PLC made an application for the variation of a Premises Licence.
- 3.2 The Applicants served copies of this application to Hertfordshire Constabulary 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. A newspaper advertisement was placed in The Hitchin Comet on 27th September 2012 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 Hertfordshire Constabulary, the Applicant agreed to incorporate an additional operating schedule conditions as part of the application. As a result of this amendment Hertfordshire Constabulary were satisfied that the application would not adversely impact on the licensing objectives and made no representation.
- 4.3 The agreed amendment to the application are enclosed as follows:

- 4.4 The amendment made as a result of the discussions between the Applicant and Hertfordshire Constabulary has 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 this condition, therefore, and should read it as part of the original application when considering the representation. If the Sub-Committee deem it necessary based on the representation 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 One representation was received from Other Persons (previously known as Interested Parties) and is enclosed as follows:

- 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. The Senior Licensing and Enforcement Officer has deemed the representation relevant, the Sub-Committee must determine how much weight to apportion to it.
- 4.8 The Applicant has been served with a copy of the representation.
- 4.9 The Applicant and the Other Person 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.

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

The Council recognises that 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 activities concerned. This is essential to avoid the imposition of disproportionate and overly burdensome conditions on premises. Standardised conditions must be avoided and will only be lawful where they are deemed necessary to promote the licensing objectives in response to relevant representations.

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 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

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 (April 2012) 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.

1.17

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 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 appropriate to promote the licensing objectives that there will be a requirement for appropriate, proportionate conditions to be attached.

2.1

The steps which any licence holder or club might take to prevent crime and disorder are as varied as the premises or clubs where licensable activities take place. 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 Community Safety Partnership (CSP).

2.33

The 2003 Act enables licensing authorities and responsible authorities, through representations, to consider what constitutes public nuisance and what is appropriate 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 the effect of the licensable activities at the specific premises on persons living and working (including those carrying on business) in the area around the premises which may be disproportionate and unreasonable. The issues will mainly concern noise nuisance, light pollution, noxious smells and litter.

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 licensed premises.

2.35

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 appropriate 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 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 maybe appropriate.

2.37

Where applications have given rise to representations, any 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 immediately surrounding the premises may also prove appropriate to address any disturbance anticipated as customers enter and leave.

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 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 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.

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.

10.20

The Government acknowledges that different licensing strategies may be appropriate for the promotion of the licensing objectives in different areas. The 2003 Act gives the licensing authority power to make decisions regarding licensed opening hours as part of the implementation of its licensing policy statement and licensing authorities are best placed to make decisions about appropriate opening hours in their areas based in their local knowledge and in consultation with responsible authorities. However, licensing authorities must always consider each application and must not impose predetermined licensed opening hours, without giving individual consideration to the merits of each application.

10.21

Where there are objections to an application to extend the hours during which licensable activities are to be carried on and the licensing authority

determines that this would undermine the licensing objectives, it may reject the application or grant it with appropriate conditions and/or different hours from those requested.

13.32

The absence of a special policy does not prevent any responsible authority or other person making representations on an application for the grant or variation of a licence on the grounds that the premises will give rise to a negative cumulative impact on one or more of the licensing objectives.

[Note: North Hertfordshire District Council does not have a special policy in relation to cumulative impact as part of its Statement of Licensing Policy]

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 As paragraph 2.34 of the Guidance confirms, public nuisance under the Licensing Act 2003 has a wide interpretation and it is for the Sub-Committee to determine, based on the evidence, whether they consider these issues to be a public nuisance.
- 8.3 The Guidance states at paragraph 2.39 that conditions relating to public nuisance beyond the vicinity of the premises are not appropriate and the Council's Statement of Licensing Policy supports that view. Conditions that it would be either impracticable or impossible for the licence holder to control would clearly be inappropriate.
- 8.4 That said, if behaviour beyond the premises can be clearly linked to a premises and it is causing a public nuisance, it is wrong to say that the Licensing Act 2003 cannot address this. Whilst conditions may well be inappropriate, if the evidence deems it necessary, times and/or activities under the licence could be restricted or, indeed, the application could be refused.
- 8.5 The recent magistrates court case of *Kouttis v London Borough of Enfield*, 9th September 2011 considered this issue.
- 8.6 In a summary of the case provided by the Institute of Licensing it is reported that District Judge Daber considered an appeal against a decision of the local authority to restrict the hours of musical entertainment of a public house to mitigate the noise from patrons as they left the premises in response to representations from local residents. The appellant relied on the sections of the Guidance that state that "beyond the vicinity of 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" (para 2.39). It was also suggested that, given that certain residents were not disturbed, this did not amount to public nuisance within the meaning of para 2.34 of the Guidance as approved by Burton J in the Hope and Glory case.
- 8.7 The District Judge held that there was ample evidence of public nuisance, and that section 4 of the Act gave the licensing authority a positive duty to deal with it proportionately. In this case, no less interventionist way of dealing with the nuisance had been suggested. He held that not only was the

authority not wrong, but that it was in fact right to reduce the hours as it had. The appeal was therefore dismissed.

- 8.8 As this was a decision of the Magistrates Court it would not be binding on other courts, however, it could be considered as persuasive.
- 8.9 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.
- 8.10 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.
- 8.11 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.

- 8.12 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.
- 8.13 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.

9. CONTACT OFFICERS

- 9.1 Steve Cobb
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