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| LICENSING AND APPEALS SUB-COMMITTEE 28th 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 ILHAMI GURBUZ FOR THE VARIATION OF A PREMISES
LICENCE IN RESPECT OF ALI BABA, 110 BANCROFT, HITCHIN,
HERTFORDSHIRE, SG5 1NB.**

1. BACKGROUND

- 1.1 The existing premises licence was granted by North Hertfordshire District Council during the transitional period on 27th August 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 5th October 2012, Ilhami Gurbuz 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 Advertiser on 10th October 2012 in accordance with the Act.

4. REPRESENTATIONS

- 4.1 A representation was received from Hertfordshire Constabulary and is enclosed as follows:

- 4.2 No representations were received from any other Responsible Authority.
- 4.3 No representations were received from Other Persons (previously known as Interested Parties).
- 4.4 The Council's Scheme of Delegation in respect of the Licensing Act 2003 requires the Senior Licensing and Enforcement 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.
- 4.5 The Applicant has been served with a copy of the representation.
- 4.6 The Applicant and Hertfordshire Constabulary 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 appropriate 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 promoting the licensing objectives. Full reasons will be given for decisions taken by the Council when undertaking its licensing function.

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.*

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 (October 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

Each application must be considered on its own merits and in accordance with the licensing authority's statement of licensing policy; for example, if the application falls within the scope of a cumulative impact policy. 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.

2.1 (bold type included in the Guidance)

Licensing authorities should look to the police as the main source of advice on crime and disorder. They should also seek to involve the local Community Safety Partnership (CSP).

2.2 (bold type included in the Guidance)

In the exercise of their functions, licensing authorities should seek to co-operate with the Security Industry Authority ("SIA") as far as possible and consider adding relevant conditions to licences where appropriate. The SIA also plays an important role in preventing crime and disorder by ensuring that door supervisors are properly licensed and, in

partnership with police and other agencies, that security companies are not being used as fronts for serious and organised criminal activity. This may include making specific enquiries or visiting premises through intelligence led operations in conjunction with the police, local authorities and other partner agencies. Similarly, the provision of requirements for door supervisors may be appropriate to ensure that people who are drunk, drug dealers or people carrying firearms do not enter the premises and ensuring that the police are kept informed.

2.3 (bold type included in the Guidance)

Conditions should be targeted on deterrence and preventing crime and disorder. For example, where there is good reason to suppose that disorder may take place, the presence of closed-circuit television (CCTV) cameras both inside and immediately outside the premises can actively deter disorder, nuisance, anti-social behaviour and crime generally. Some licence holders may wish to have cameras on their premises for the prevention of crime directed against the business itself, its staff, or its customers. But any condition may require a broader approach, and it may be appropriate to ensure that the precise location of cameras is set out on plans to ensure that certain areas are properly covered and there is no subsequent dispute over the terms of the condition.

2.22 (bold type included in the Guidance)

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 mid-evening 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.

9.12

In their role as a responsible authority, the police are an essential source of advice and information on the impact and potential impact of licensable activities, particularly on the crime and disorder objective. The police have a key role in managing the night-time economy and should have good working relationships with those operating in their local area. The police should be the licensing authority's main source of advice on matters relating to the promotion of the crime and disorder licensing objective, but may also be able to make relevant representations with regards to the other licensing objectives if they have evidence to support such representations. The licensing authority should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives. However, it remains incumbent on the police to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing.

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.

10.11

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 on 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.

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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 (and subsequently re-issued in October 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.

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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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