

<b>LICENSING AND APPEALS SUB-COMMITTEE</b> <b>19<sup>th</sup> October 2015</b>
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<b>*PART 1 – PUBLIC DOCUMENT</b>	<b>AGENDA ITEM No.</b>
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**REPORT OF THE LICENSING OFFICER**

**LICENSING ACT 2003**

**APPLICATION BY JD Wetherspoon PLC FOR THE VARIATION OF A PREMISES LICENCE IN RESPECT OF Angel Vaults, 5 Sun Street, Hitchin, HERTFORDSHIRE, SG5 1AE.**

**1. BACKGROUND**

- 1.1 The existing premises licence was granted by North Hertfordshire District Council, following a Licensing Sub-Committee hearing, on 8<sup>th</sup> April 2015. The Designated Premises Supervisor (DPS) was subsequently varied on the 27<sup>th</sup> January 2015.

A copy of the premises 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 21<sup>st</sup> August 2015, JD Wetherspoon 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 Comet in accordance with the Act.
- 3.4 An email enquiry was sent to the applicant's agent from the Licensing Officer on the 21<sup>st</sup> August 2015 as to the licensable hours being sought for the variation application.
- 3.5 The Applicants agent confirmed in an email of the 25<sup>th</sup> August 2015 that the variation hours being sought for the proposed outside bar server was to be 09:00-21:00hrs, in line with the current opening hours for the garden area.
- 3.6 Copies of this correspondence can be found below:

#### **4. REPRESENTATIONS**

- 4.1 No representation were received from Hertfordshire Constabulary.
- 4.2 No representations were received from any other Responsible Authority.
- 4.3 2 representations were received from Other Persons. Unfortunately, the representation from a Mr Scrace could not be considered on this occasion as he did not know as to the nature of the variation being sought. Advice was given to Mr Scrace on the 18<sup>th</sup> September 2015 as to the application, with an offer to submit further representation, but no further comments were received from him.
- 4.4 The representation from the other interested party, which was considered valid, is enclosed below:

- 4.5 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.
- 4.6 Where representations include paragraphs that are not relevant to the Licensing Act 2003, these paragraphs have been clearly crossed through and marked as 'not relevant' by the Licensing Officer and should not be considered as part of the determination process. Other Persons must not refer to these paragraphs in any oral presentation at the hearing.
- 4.7 The Licensing Officer determined that the representations were relevant; it is for the Sub-Committee to determine what weight to apportion to the representation.
- 4.8 The Applicant has been served with a copy of the representation as part of this report.
- 4.9 The Applicant and other persons 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.

### **3.2**

*The Council as a duty under the Act to carry out its functions and responsibilities with a view to promoting the 'Licensing Objectives which are as follows:*

- (i) The prevention of crime and disorder (see section 7);*
- (ii) Public safety (see section 8);*
- (iii) The prevention of public nuisance (see section 9); and*
- (iv) The protection of children from harm (see section 10).*

### 3.3

*Each licensing objective has equal importance and are of paramount consideration at all times.*

### 4.4

*When determining applications the Council will have regard to this Statement of Licensing Policy, relevant legislation and any Guidance issued. If relevant representations are made, the Licensing and Appeals Committee or its Sub-Committee, will balance its decision against all other factors for and against the application.*

### 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 generally 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.*

## 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 (March 2015) 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.*

### 1.19

*While licence conditions should not duplicate other statutory provisions, licensing authorities and licensees should be mindful of requirements and responsibilities placed on them by other legislation. Legislation which may be relevant includes:*

- *The Gambling Act 2005*
- *The Environmental Protection Act 1990*
- *The Noise Act 1996*
- *The Clean Neighbourhoods and Environmental Act 2005*
- *The Regulatory Reform (Fire Safety) Order 2005*
- *The Health and Safety at Work etc Act 1974*
- *The Equality Act 2010*

### 2.14

*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.*

### 2.15

*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 may 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. Public nuisance may also arise as a result of the adverse effects of artificial light, dust, odour and insects or where its effect is prejudicial to health.*

2.17

*As with all conditions, those relating to noise nuisance may not be appropriate in certain circumstances where provisions in other legislation 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.*

2.18

*Where applications have given rise to representations, any appropriate conditions should normally focus on the most sensitive periods. For example, the most sensitive period for people being disturbed by unreasonably loud music is at night and into the early morning when residents in adjacent properties may be attempting to go to sleep or are sleeping. This is why there is still a need for a licence for performances of live music between 11 pm and 8 am. In certain circumstances, conditions relating to noise emanating from the premises may also be appropriate to address any disturbance anticipated as customers enter and leave.*

10.13

*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 about the hours during which premises can conduct licensable activities as part of the implementation of its licensing policy statement. 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.*

10.14

*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.*

10.15

*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.*

## **8. LICENSING OFFICER COMMENTS**

- 8.1 The comments within this section of the report are provided by the Licensing 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.



## Definition of 'appropriate'

- 8.2 The previous Statutory Guidance first issued in July 2004 and subsequently updated up until March 2015, 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.
- 8.3 The revised Statutory Guidance issued on 25<sup>th</sup> April 2012 and subsequently amended in October 2012, June 2013 and March 2015 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.
- 8.4 The Guidance explains 'appropriate' as:

### 9.42

*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.*

### 9.43

*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.*

- 8.5 It is anticipated that, in due course, case law will provide clarity on the meaning of 'appropriate' as referred to in paragraphs 9.42 and 9.43 of the Guidance. The Sub-Committee is therefore advised to give 'appropriate' its ordinary meaning, as expanded upon by paragraph 9.43 of the Guidance, subject to the over-riding requirement on all local authority decisions of reasonableness.
- 8.6 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.*

- 8.7 The Sub-Committee should also be aware that their decision must be proportionate to the evidence received in respect of the application and representation. Proportionality is a key factor in assisting with the definition of 'appropriate'.

### **NHDC Statement of Licensing Policy**

- 8.8 The council's statement of Licensing Policy was adopted on 11<sup>th</sup> November 2010 since which there have been several changes to legislation and re-issued Guidance. Whilst the Policy still remains fit for purpose in that its intentions are clear, it does contain reference to some terminology that no longer applies.

- (i) vicinity

the restriction to the consideration of representations within the vicinity of a premises has since been removed; representations now only need to demonstrate an impact on the licensing objectives specific to the person making the representation.

- (ii) necessary

amended to 'appropriate'

- (iii) interested parties

amended to 'other persons'

### **Case Law**

- 8.9 As paragraph 2.14 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.

- 8.10 The Guidance states at paragraph 2.20 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.
- 8.11 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.
- 8.12 The magistrates court case of *Kouttis v London Borough of Enfield, 9th September 2011* considered this issue.
- 8.13 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 2.38). It was also suggested that, given that certain residents were not disturbed, this did not amount to public nuisance within the meaning of para 2.33 of the Guidance as approved by Burton J in the Hope and Glory case.
- 8.14 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.
- 8.15 As this was a decision of the Magistrates Court it would not be binding on other courts, however, it could be considered as persuasive.

## **9. CONTACT OFFICERS**

- 9.1 Heather Morris  
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