

LICENSING AND APPEALS SUB-COMMITTEE
17th AUGUST 2018

***PART 1 – PUBLIC DOCUMENT**

AGENDA ITEM No.

LICENSING ACT 2003

**NOTIFICATION BY DAVID ADENIREGUN OF A STANDARD TEMPORARY
EVENT NOTICE IN RESPECT OF THE RED HART, 28-29 BUCKLERSBURY,
HITCHIN, HERTFORDSHIRE, SG5 1BG.**

REPORT OF THE LICENSING OFFICER

1. BACKGROUND

- 1.1 The premises currently holds a premises licence which is attached as Appendix A.

2. TEMPORARY EVENT NOTICE APPLICATIONS

- 2.1 The notification is for a standard temporary event notices under section 100 of the Licensing Act 2003.
- 2.2 The notification is for the sale of alcohol, provision of regulated entertainment and provision of late night refreshment between the 25th- 27th August 2018.
- 2.3 The notification is attached as Appendix B.

3. NOTIFICATION PROCESS

- 3.1 On 4th August 2018, David Adeniregun submitted a notification for a standard temporary event notice.
- 3.2 David Adeniregun made his application electronically. North Hertfordshire District Council served copies of the notification to Hertfordshire Constabulary and NHDC Environmental Protection. There is no requirement to serve copies on any other responsible authority.
- 3.3 There is no requirement for public advertising of the notifications and members of the public may not submit representations.

4. REPRESENTATIONS

- 4.1 Hertfordshire Constabulary and NHDC Environmental Protection have the ability to object to the notifications if they consider that they would undermine one or more of the licensing objectives.
- 4.2 Objection Notices must be received by the licensing authority no later than the end of the third working day following the day the notification is given.

- 4.3 On the 09 August 201, NHDC Environmental Protection issued an Objection Notice under section 104 of the Licensing Act 2003 in respect of the notification. A copy of the Objection Notice is attached as Appendix C.
- 4.4 David Adeniregun has been served with a copy of the Objection Notices as part of this report.
- 4.5 David Adeniregun and NHDC Environmental Protection 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 whether or not to issue a Counter Notice for each notification, the sub-committee must have regard to the Objection Notices and take such steps as it considers appropriate for the promotion of the licensing objectives.

5.2 The Licensing and Appeals Sub-Committee has the following options when issuing the Decision Notice:

- i) Approve the notification as made;
- ii) Refuse the notification and issue a Counter Notice preventing the notification from taking effect; or
- iii) Approve the notification and impose one or more of the conditions in existence on the current premises licence relating to the premises.

5.3 The sub-committee can only impose conditions on the notification if section 106A(2) of the Licensing Act 2003 is satisfied, which states:

106(2) The relevant licensing authority may impose one or more conditions on a standard temporary event notice if:

- (a) the authority considers it appropriate for the promotion of the licensing objectives to do so,*
- (b) the conditions are also imposed on a premises licence or club premises certificate that has effect in respect of the same premises, or any part of the same premises, as the temporary event notice, and*
- (c) the conditions would not be inconsistent with the carrying out of the licensable activities under the temporary event notice.*

5.4 The licensing authority must:

- (a) in a case where it decides not to give a Counter Notice under section 105 of the Licensing Act 2003, gives the premises user, Hertfordshire Constabulary and NHDC Environmental Protection notice of the decision;
- (b) in a case where it decides to issue a Counter Notice under Section 105 of the Licensing Act 2003, give the premises user, Hertfordshire Constabulary and NHDC Environmental Protection a Counter Notice and a notice stating the reasons for the decision; or
- (c) in a case where it decides not to give a Counter Notice under section 105 of the Licensing Act 2003 but impose conditions from an existing premises licence for the same premises under Section 106A of the

Licensing Act 2003, give the premises user, Hertfordshire Constabulary and NHDC Environmental Protection notice of the decision and a separate statement setting out the conditions.

- 5.5 Any notice issued by the licensing authority under sections 105 or 106A of the Licensing Act 2003 must be given in the prescribed format and no later than twenty-four hours prior to the commencement of the event period stated in the notification.
- 5.6 There is a right of appeal available to all parties to the hearing which is detailed in Schedule 5 Part 3 Paragraph 16 which states:

- 16 (1) *This paragraph applies where—*
- (a) *a standard temporary event notice is given under section 100, and*
 - (b) *a relevant person gives an objection notice in accordance with section 104(2).*
- (2) *Where the relevant licensing authority gives a counter notice under section 105(3), the premises user may appeal against that decision.*
- (3) *Where that authority decides not to give such a counter notice, the relevant person may appeal against that decision.*
- (4) *An appeal under this paragraph must be made to a magistrates' court.*
- (5) *An appeal under this paragraph must be commenced by notice of appeal given by the appellant to the designated officer for the magistrates' court within the period of 21 days beginning with the day on which the appellant was notified by the licensing authority of the decision appealed against.*
- (6) *But no appeal may be brought later than five working days before the day on which the event period specified in the temporary event notice begins.*
- (7) *On an appeal under sub-paragraph (3), the premises user is to be the respondent in addition to the licensing authority.*
- (8) *In this paragraph—*
"objection notice" has the same meaning as in section 104;
"relevant licensing authority" has the meaning given in section 99;
and
"relevant person" has the meaning given in section 99A.

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.

D13.3

The vast majority of these events will not present any problems, for example special occasions in a pub or community hall or charitable fundraising events. A temporary event notice is a light-touch approach to these events and the Council expects that representations will only be made in exceptional circumstances where compelling evidence exists of the effect or likely effect on the licensing objectives.

D13.4

That said, the Council does not expect licence holders to utilise temporary event notifications as a method of avoiding restrictions imposed on an authorisation by way of conditions. The Council is aware that existing licence conditions can be transposed onto a temporary event notice where a Licensing Sub-Committee deem it appropriate based on any relevant representations.

D13.5

The Council acknowledges that licensed premises can, and often do, enter into informal arrangements with the police in order to ensure that the crime and disorder objective is met. Whilst a temporary event notice giver may offer conditions and/or commitments to mitigate any concerns arising from notification, the Council is aware that they cannot be imposed on the temporary event notice and are not enforceable.

D13.8

For events of national significance, for example a sporting world cup, the Council encourages co-operation between licence holders and the police in order to ensure the licensing objectives are met. Voluntary agreements to employ additional door staff or to use plastic drinking vessels are two such examples. Where a police objection to a temporary event notice has been received in such circumstances, the Council is likely to issue a Counter Notice preventing the event from taking place where voluntary agreements have been sought by the police but not entered into by the applicant.

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 2017 version) 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 and the determination should be based upon consideration of the full document.

The licensing objectives are:

- *The prevention of crime and disorder;*
- *Public safety;*
- *The prevention of public nuisance; and*
- *The protection of children from harm.*

1.4

Each objective is of equal importance. There are no other statutory licensing objectives, so that the promotion of the four objectives is a paramount consideration at all times.

1.5

However, the legislation also supports a number of other key aims and purposes. These are vitally important and should be principal aims for everyone involved in the licensing work.

They include:

- *Protecting the public and local residents from crime, anti-social behaviour and noise nuisance caused by irresponsible licensed premises;*
- *Giving the Police and the Licensing Authorities the powers they need to effectively manage and police the night-time economy and take action against those premises that are causing problems;*

2.1

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).

7.5

If a TEN is sent electronically via GOV.UK or the licensing authority's own facilities, the licensing authority must notify the Police and EHA as soon as possible and no later than the first working day after the TEN is given.

7.6

The Police or EHA ("relevant persons" for the purposes of TENs) may intervene to prevent such an event taking place by sending an objection to the licensing authority, which the licensing authority must consider on the basis of the statutory licensing objectives and decide whether the event should go ahead. A relevant person may also intervene by agreeing a modification of the proposed arrangements directly with the TENs user (see paragraph 7.36). If a relevant person sends an objection, this may result in the licensing authority imposing conditions on a TEN but only where the venue at which the event is to be held has an existing premises licence or club premises certificate. When giving a TEN, the premises user should consider the promotion of the four licensing objectives. The licensing authority may only otherwise intervene if the statutory permitted limits on TENs would be exceeded (see paragraphs 7.15-7.22).

7.28

If the licensing authority receives an objection notice from the Police or EHA that is not withdrawn, it must (in the case of a standard TEN only) hold a hearing to consider the objection (unless all parties agree that this is unnecessary). The licensing committee may decide to allow the licensable activities to go ahead as stated in the notice. If the notice is in connection with licensable activities at licensed premises, the licensing authority may also impose one or more of the existing licence conditions on the TEN (insofar as such conditions are not inconsistent with the event) if it considers that this is appropriate for the promotion of the licensing objectives. If the authority decides to impose conditions, it must give notice to the premises user which includes a statement of conditions (a "notice (statement of conditions)") and provide a copy to each relevant party. Alternatively, it can decide that the event would undermine the licensing objectives and should not take place. In this case, the licensing authority must give a counter notice.

7.29

Premises users are not required to be on the premises during the event authorised by the TEN, but they will remain liable to prosecution for certain offences that may be committed at the premises during the period covered by it. These include, for example, the offences of the sale of alcohol to a person who is drunk; persistently selling alcohol to children and allowing disorderly conduct on licensed premises.

7.32

The system of permitted temporary activities gives police and EHAs the opportunity to consider whether they should object to a TEN on the basis of any of the licensing objectives.

7.33

If the Police or EHA believe that allowing the premises to be used in accordance with the TEN will undermine the licensing objectives, they must give the premises user and the Licensing Authority an objection notice. The objection notice must be given within the period of three working days following the day on which they received the TEN.

7.34

Where a standard TEN was given, the Licensing Authority must consider the objection at a hearing before a counter notice can be issued. At the hearing, the Police, EHA and the premises user may make representations to the Licensing Authority. Following the hearing, the Licensing Authority may decide to impose conditions which already apply to an existing premises licence or club premises certificate at the venue, or issue a counter notice to prevent the event going ahead. As noted above, there is no scope for hearings in respect of late TENs and if objections are raised by the Police or EHA in relation to a late TEN, the notice will be invalid and the event will not go ahead.

7.36

As noted above, the police or EHA (as "relevant persons") may contact the premises user to discuss their objections and try to come to an agreement which will allow the proposed licensable activities to proceed. The TEN can be modified (for example, by changing the details of the parts of the premises that are to be used for the event, the description of the nature of the intended activities or their duration). The other relevant person has to agree for the modification to be made. There is no scope under the 2003 Act for the modification of a late TEN.

7.37

The 2003 Act provides that only the Licensing Authority can impose conditions to a TEN from the existing conditions on the premises licence or club premises certificate at the venue. The Licensing Authority can only do so:

- If the Police or the EHA have objected to the TEN;*
- If that objection has not been withdrawn;*
- If there is a licence or certificate in relation to at least a part of the premises in respect of which the TEN is given;*
- And if the Licensing Authority considers it appropriate for the promotion of the licensing objectives to impose one or more conditions.*

7.38

This decision is one for the Licensing Authority alone, regardless of the premises user's views or willingness to accept conditions. The conditions must be notified to the premises user on the form prescribed by regulations.

7.39

Section 105 of the 2003 Act is clear that a Licensing Authority must hold a hearing to consider any objections from the Police or EHA unless all the parties agree that a hearing is not necessary. If the parties agree that hearing is not necessary and the

Licensing Authority decides not to give a counter notice on the basis of the objection, it may impose existing conditions on the TEN.

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 regard 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.

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 25th April 2012 and subsequently amended in October 2012, June 2013, March 2015, April 2017 and April 2018 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:

9.43

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.

9.44

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'.

Case Law

8.8 As paragraph 2.15 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.

- 8.9 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.
- 8.10 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.
- 8.11 The magistrates court case of *Koultis v London Borough of Enfield*, 9th September 2011 considered this issue.
- 8.12 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.
- 8.13 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.
- 8.14 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. Appendices

- 9.1 Appendix A Premises Licence
9.2 Appendix B Application form for TEN
9.3 Appendix C NHDC Environmental Protection representation

10. CONTACT OFFICERS

- 10.1 Hannah Sweetman.
Licensing Officer
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