

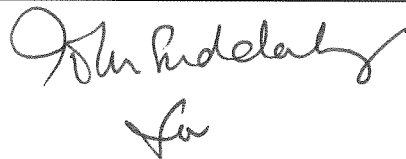
Licensing Committee**on****31 October 2006**Report Title: **Licensing Decisions and the Relationship to Town Planning Controls**Forward Plan reference number (if applicable): **N/A**Report of: **Head of Legal Services**Wards(s) affected: **All**Report for: **Non-Key Decisions****1. Purpose**

- 1.1 To report to Members of the Committee on the outcome of consultation about the relationship between decisions under the Licensing Act 2003 and Town Planning Controls and to recommend amendments to the Statement of Licensing Policy

2. Recommendations

- 2.1 That Members note the outcome of the stakeholder consultation described in paragraphs 9.1 to 9.4 of this report.
- 2.2 That Members approve the proposed amendments to paragraphs 8.1 and 8.2 of the Council's Statement of Licensing Policy, as set out in Appendix 2 to this report.
- 2.3 That Members request the General Purposes Committee to recommend to the full Council the adoption of the amendments set out in Appendix 2

Report Authorised by:

**Davina Fiore, Head of Legal Services and Monitoring Officer**Contact Officer: **Terence Mitchison, Senior Project Lawyer, Corporate**
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2 Executive Summary

3.1 This report describes the outcome of a statutory stakeholder consultation about proposed changes to the Council's Statement of Licensing Policy. Officers had previously obtained Counsel's Opinion which advised that the Licensing Committee and Sub-Committees must always reach their own view at hearings when determining hours, activities or conditions. Although the Licensing bodies should give appropriate weight to relevant Planning decisions, the Licensing decision cannot be "tied" to Planning controls. There were no responses to the consultation but there are clear and compelling legal reasons for asking full Council via the General Purposes to make the appropriate amendments to Council's Statement of Licensing Policy.

3 Reasons for any change in policy or for new policy development (if applicable)

4.1 Receipt of Counsel's Opinion and the possibility of legal challenge on these issues.

4 Local Government (Access to Information) Act 1985

5.1 The following background papers were used in the preparation of this report:

(i) the Council's Statement of Licensing Policy (ii) the Opinion of Philip Kolvin (iii) the report to the Licensing Committee on 6 December 2005 (iv) the Legal Service file on this matter.

6 Background

6.1 The Council's Statement of Licensing Policy contains a section (no. 8) on "Planning". This is set out in Appendix 1 to this report which is the text of the existing Statement of Licensing Policy. The paragraph that has given rise to the main concern is 8.2 which states:

"All premises that apply for a licence must have planning permission for the intended use and hours of operation or be deemed "lawful" for the purposes of planning control. The Licensing Authority will not consider a new application or variation of conditions if permitted licensable activities on the premises would constitute an unlawful planning use or if the hours of operation sought exceed those authorised by the planning permission."

6.2 Applications for new licences, or variations of hours, come before Licensing Sub-Committees when there are objections (technically called "relevant representations"). In many cases the applicant owns premises which have Planning Permission for opening hours less extensive than the hours sought in the Licensing application. In some cases the applicant is in the process of applying for Planning Permission to extend the hours to match those sought in the Premises Licence.

6.3 Where this seemed the appropriate course of action on the facts, Members were often reluctant to enforce the Statement of Licensing Policy strictly. In many cases premises

licence applications have been granted for hours exceeding those permitted by the Planning Permission but subject to an “informative” that the applicant must obtain the extension of hours from the Planning Authority before the premises can trade lawfully during those hours.

6.4 There have in the past been complaints from some quarters that the Council's Statement of Licensing Policy has not been strictly enforced with regard to Planning Control. From an opposing point of view, many applicants and their representatives have questioned the legality of the Council's policy here.

6.5 In order to resolve the uncertainty the Head of Legal Services, at the request of the Assistant Director Enforcement, obtained Counsel's Opinion from Philip Kolvin a barrister with a reputation as a leading practitioner in the Licensing area and the Chairman of the Institute of Licensing.

7 Counsel's Opinion

7.1 Philip Kolvin's Opinion is attached as Appendix 3 to this report. The “Opinion” is in the form of an e-mailed letter to an officer in the Legal Service.

7.2 The main thrust of the Opinion is in paragraph (4). Counsel stated emphatically that Licensing Sub-Committees cannot refuse to consider a new application or variation on the basis that grant would be for hours or uses not authorised by planning control.

7.3 Legally, the only basis for the Licensing Authority having the power to refuse or restrict hours and activities set out in an Operating Schedule is that the Licensing Authority itself (not the Planning Authority) must consider this necessary for the promotion of the four national licensing objectives i.e. (i) prevention of crime and disorder, (ii) public safety, (iii) prevention of public nuisance, and (iv) protection of children from harm.

7.4 Counsel explained, at paragraph (7) of his Opinion, that in every case it is necessary for the Licensing Authority to arrive at its own view. The fact that Planning Permission covered the hours sought in an Operating Schedule should not automatically guarantee the grant of a Licence if, in the circumstances, this would be harmful to the licensing objectives. Nor should the absence of Planning Permission automatically result in refusal. In each case the Licensing Authority must consider the whole of the evidence before it at the hearing and reach its own conclusion on the merits.

7.5 The Licensing Authority may, and should, take into account any Planning decision that is relevant to the Licensing application and persuasive in the circumstances. Counsel gave the example, in his paragraph (6), of an Inspector's decision at a recent Planning Inquiry covering the same issue that comes before the Licensing Authority i.e. should the closing hour be limited to midnight to avoid nuisance. In such a case the Inspector's view must be given great weight by the Licensing Authority. Nonetheless, the Licensing Authority must reach its own conclusion on the totality of the evidence.

8 Revising the Statement of Licensing Policy

8.1 Counsel advised, at paragraphs (4) and (8) of his Opinion, that the Councils' Statement of Licensing Policy needs revision. The recommended changes are set out in Appendix 2 to this report. The critical sentence in paragraph 8.2 reads:

“The Licensing Authority will give appropriate weight to relevant Planning decisions and to the views of the Planning Authority on the compliance of the application with the licensing objectives.”

8.2 In paragraph (3) of his Opinion Counsel pointed out the inaccuracy of Paragraph 8.1 of the SLP. This has arisen because of an amendment to the Town Planning Use Classes Order. The effect of this is that changes of use from a restaurant to a public house or to a hot food takeaway all now require Planning Permission. The necessary changes, reflecting the changes in Planning law, are set out in Appendix 2.

8.3 The current Statement of Licensing Policy adopted in January 2005 has a three-year maximum life before it must be wholly re-considered and re-adopted. The Council must keep its Statement of Licensing Policy under review during the three-year period and make such revisions as it thinks appropriate.

8.4 Counsel's Opinion was reported to the meeting of this Committee on 6 December 2005. Members agreed to apply Counsel's advice when making decisions at Licensing Sub-Committee hearings so that the Statement of Licensing Policy has not been strictly enforced in the period leading up to this report. Under the Licensing Act 2003, the Licensing Authority must “have regard” to its Statement of Licensing Policy when making decisions on applications. This means that the Licensing Authority can depart from any part of its Statement of Licensing Policy if there is good reason to do so, for example Counsel's Opinion accepted by the Licensing Committee.

9 Consultation on Proposed Amendments to the Statement of Licensing Policy

9.1 Before any revision to the Statement of Licensing Policy is formally adopted, there is a legal requirement for an extensive consultation with stakeholders involving the same persons and bodies as were consulted before the original adoption of the Statement of Licensing Policy in January 2005. This should include consultation with representatives of local businesses and residents, representatives of the licensed trade and personal licence holders, the Police and the Fire Authority.

9.2 Unfortunately, this consultation was delayed by the Council Elections and pressure of other urgent work within the Licensing Service. It was eventually undertaken at the end of July with a time limit for comments by 1 September. Because there are no representative bodies in Haringey for holders of premises or personal licences, it has been necessary to consult each individual licensed business. In addition, representative community bodies and local residents associations were consulted as well as the Police and Fire Authority. The consultation letter is attached as Appendix 4 to this report.

9.3 Although there were several questions put to the Licensing Service on receipt of the letter, there were no formal comments or representations on the proposed amendments to the Statement of Licensing Policy.

9.4 The advice from Counsel is very clear on the need for the proposed amendments and, in the absence of any formal objections, officers are recommending that they be adopted.

10 Recommendations

- 10.1 That Members note the outcome of the stakeholder consultation described in paragraphs 9.1 to 9.4 of this report.
- 10.2 That Members approve the proposed amendments to paragraphs 8.1 and 8.2 of the Council's Statement of Licensing Policy, as set out in Appendix 2 to this report.
- 10.3 That Members request the General Purposes Committee to recommend to the full Council the adoption of the amendments set out in Appendix 2

11 Comments of the Director of Finance

- 11.1 There are no specific financial implications.

12 Comments of the Head of Legal Services

- 12.1 Under the relevant legislation and the Council's Constitution the amendment of the Statement of Licensing Policy is a "non-executive" function. Therefore the adoption of the amendments must be authorised by full Council on the recommendation of the General Purposes Committee. The other legal implications are set out in the body of the report.

13 Equalities Implications

- 13.1 There are no specific equalities implications

14 Use of Appendices / Tables / Photographs

- 14.1 Appendix 1 to this report is the existing text of paragraphs 8.1. and 8.2 of the Council's Statement of Licensing Policy
- 14.2 Appendix 2 to this report shows the proposed revisions to the Statement of Licensing Policy
- 14.3 Appendix 3 to this report is the Opinion of Philip Kolvin
- 14.4 Appendix 4 is the consultation letter sent to representatives of local businesses and residents, existing licence holders, the Police and the Fire Authority.

APPENDIX I

EXISTING STATEMENT OF LICENSING POLICY

8.0 Planning

- 8.1 Planning permission is usually required for the establishment of new premises and change of use of premises. Uses that are relevant to licensed premises are set out in the Town and Country Planning (Use Class) Order 1987 (as amended) and include:
- a retail shop, licensed for the sale of liquor for example (A1);
 - food and drink sold and consumed on the premises or where hot food is sold for consumption off the premises, including restaurants and bars (A3);
 - assembly and leisure uses, including cinemas, concert halls, dance halls and indoor/outdoor sports and recreation (D2); and
 - various "sui generis" uses which do not fall within a use class such as theatres.
- 8.2 All premises that apply for a licence must have planning permission for the intended use and hours of operation or be deemed "lawful" for the purposes of planning control. The Licensing Authority will not consider a new application or variation of conditions if permitted licensable activities on the premises would constitute an unlawful planning use or if the hours of operation sought exceed those authorised by the planning permission. The Licensing Authority will consider a degree of flexibility in this when dealing with applications for provisional statements, which applies to premises still to be constructed or altered for licensing purposes.

APPENDIX 2

PROPOSED REVISIONS TO STATEMENT OF LICENSING POLICY

[the words proposed for deletion are shown struck through and the words proposed for addition or insertion are shown in italics and underlined]

8.0 Planning

- 8.1 Planning permission is usually required for the establishment of new premises and change of use of premises. Uses that are relevant to licensed premises are set out in the Town and Country Planning (Use Class) Order 1987 (as amended) and include:
- (a) a retail shop, licensed for the sale of liquor for example (A1);
 - (b) food and drink sold and consumed on the premises ~~or where hot food is sold for consumption off the premises, including restaurants and bars~~ (A3);
 - (c) public house, wine bar or other drinking establishment (A4);
 - (d) hot food sold for consumption off the premises (A5);
 - (e) assembly and leisure uses, including cinemas, concert halls, dance halls and indoor/outdoor sports and recreation (D2); and
 - (f) various "sui generis" uses which do not fall within a use class such as theatres.
- 8.2 All premises that apply for a licence ~~must have~~ will be encouraged to obtain planning permission for the intended use and hours of operation ~~or be~~ if not already deemed "lawful" for the purposes of planning control. The Licensing Authority will give appropriate weight to relevant Planning decisions and to the views of the Planning Authority on the compliance of the application with the licensing objectives. ~~not consider a new application or variation of conditions if permitted licensable activities on the premises would constitute an unlawful planning use or if the hours of operation sought exceed those authorised by the planning permission. The Licensing Authority will consider a degree of flexibility in this when dealing with applications for provisional statements, which applies to premises still to be constructed or altered for licensing purposes.~~

APPENDIX 3

OPINION OF PHILIP KOLVIN

Dear Benita

(1) Since I am out of Chambers next week, I hope that this short e-mailed reply will suffice. A longer opinion would not contain more, or different, legal views.

(2) Your statement of licensing policy does not accurately represent the law in relation to the relevance of planning control. You have power to interfere with the contents of an operating schedule (e.g. by refusing a licence or attaching conditions) only if both the following are satisfied, namely, a) there has been a relevant representation and b) if it is necessary to promote the licensing objectives. If there is no relevant representation, you must grant as asked, subject of course to the mandatory conditions. This is regardless of whether planning consent is in place or not.

(3) Whereas paragraph 8.1 of your policy was once an accurate statement of the law, it no longer is, since a recent amendment to the Use Classes Order has created Classes A3, A4 and A5 to distinguish pubs, restaurants and takeaways.

(4) Paragraph 8.2 needs revision. You cannot refuse to **consider** a new application or variation on the basis that grant would be for hours or uses unauthorized by planning control. The legal reason for that is that the only basis to interfere is that interference is necessary to promote the licensing objectives. The practical reason is that planning control is a matter for the planning authority, who will decide whether a use is an offending one and whether to enforce against it.

(5) Thank you for sending me the extract from Hyde. Whereas under the old law, licensing authorities did have policies saying that planning permission had to be obtained first, the legal basis for such an approach was never entirely clear, and any legal basis has been removed by the Licensing Act 2003, which limits the discretion of licensing authorities to interfere, as I have indicated.

(6) What, then, is the role of planning? It is simply that the absence of planning consent **might** go to the question of whether refusal is necessary to promote the licensing objectives. Imagine that there had been a planning inquiry which had specifically considered the question of hours and an Inspector had concluded, after hearing evidence, that the terminal hour should be limited to midnight to avoid nuisance. The licensing authority may find that persuasive if precisely the same issue arose before them. There is authority for that in the shape of *R v Manchester Crown Court ex parte Dransfield* [2001] LLR 556, in which Glidewell LJ stated: "... it is clear that [the inspector's] view or conclusion must be given great weight by the local [licensing] authority, and by the Crown Court on appeal, and there would have to be good reason for rejecting that view or conclusion..."

(7) But in every case it is still necessary for the licensing authority to arrive at its own view. The fact that the premises have the requisite consent does not guarantee a licence if the evidence shows that a grant would be harmful, although weight would be attached to the view of the planning authority or inspector on the issue. Nor is the absence of consent a guarantee of refusal. Each case is to be determined on its merits. The role of planning is to bring its own expertise to bear on the issue, in the same way as health and safety or police departments may bring their expertise to bear on the issue, by putting information or evidence before the sub-committee to help it decide whether interference is necessary in order to promote the licensing objectives.

(8) Thus, while your policy can say that premises need planning consent or a lawful planning use in order to operate, and that the licensing authority will give weight, where relevant, to the views of the planning authority on the compliance of the application with the licensing objectives, you cannot in your policy make planning consent a prerequisite to grant.

(9) There is no harm in attaching an informative to the licence explaining that the licence does not constitute a consent under any other regime and that it is necessary for the licensee to obtain any other consents which may be necessary for the lawful operation of the premises. It would not be proper, whether by informative or condition, to make a statement to the effect that the operating hours are limited to those permitted under planning control. I.e. where there have been relevant representations you should grant such hours as you believe are consistent with the licensing objectives, regardless of whether those hours are consistent with those lawful under planning legislation. But there is nothing wrong with informing the applicant that he may still need consents under other legislation to operate the licensed hours.

(10) You have raised the issue of XXXXX, where the operator may need a planning consent that he does not have. For the reasons just given, that is no bar to the licensing application proceeding, and you must determine it having regard to what is necessary to promote the licensing objective. The absence of planning consent may or may not be material to that issue, but it cannot and should not justify a failure to determine the application at all.

(11) You have also raised the question of what happens when standard objections are made regarding hours in particular areas, by reference to XXX, XXX and XXX. Because of the volume of applications, and also because some statutory and non-statutory organizations have policies of their own, standard objections have been lodged. But the approach of the licensing authority is to determine each application on its merits, having regard to the statement of licensing policy and national guidance.

(12) Finally on this issue, you note that XXXX has appealed a refusal where the hours applied for exceeded those permitted by the planning authority. It will be up to you to justify this refusal. It would not, in my view, be sufficient merely to call the licensing officer to explain what had happened before the sub-committee. You should call officers from planning / licensing and/or environmental control to explain why it is necessary to curtail the hours in order to promote the licensing objectives. I note that environmental control officers did not object to the application, so this narrows your choice down to planning (who are a must) and licensing. I note that there were some local residents and also a Neighbourhood Watch representative. If they are helpful, you should call them too. I see that the sub-committee's attention was drawn to the policy regarding planning. You will need to make it clear on appeal that you are defending the appeal on the merits, and not asking the magistrates to dismiss the appeal on the basis that that part of the licensing policy precludes a determination on the merits.

(13) On the ancillary issue – corkage. You are right that licensing control attaches to sale of alcohol, not to charges for removing the cork from alcohol purchased elsewhere, or to consumption of such alcohol. Since alcohol is not being sold, the activity is not licensable.

I hope this is helpful.

Regards

Philip Kolvin

APPENDIX 4

Enforcement Service
LICENSING
Civic Centre, High Road, Wood Green, London
N22 8LE
Tel: 020 8489 0000 Fax: 020 8489 5554
Minicom: 020 8489 5549

Your Ref
Our Ref: **ES/ENF/DDB**
Contact: **Ms D Barrett**
020 8489 5103

Date: 28th July 2006

**For a large print copy contact 020 8489
5103**

LICENSING ACT 2003

REVISIONS TO STATEMENT OF LICENSING POLICY

Dear Sir/ Madam

REVISION OF THE HARINGEY COUNCIL STATEMENT OF LICENSING POLICY RELATIONSHIP BETWEEN LICENSING APPLICATIONS AND PLANNING CONTROLS

Haringey Council as Licensing Authority under the Licensing Act 2003 is proposing to make revisions to its Statement of Licensing Policy. The changes would be in paragraphs 8.1 and 8.2 of the Policy Statement which deal with the relationship between premises licences (including club premises certificates) and planning controls.

An extract from the relevant part of the Policy Statement is attached. Those words in the text that are proposed for deletion are shown struck through and those words proposed for addition or insertion are shown in italics and underlined.

The Council has received legal advice that paragraphs 8.1 and 8.2 should be amended as shown.

The proposed changes to paragraph 8.1 simply reflect new categories of "Use Class" added to the Town and Country Planning (Use Classes) Order 1987 in an Amendment Order in 2005.

The proposed changes in paragraph 8.2 reflect legal advice that the Licensing Authority cannot refuse to consider a licence application where the activities and hours applied for would amount to a breach of planning control. While applicants would still be encouraged to obtain the necessary planning consent

(and may be subject to enforcement action by the Local Planning Authority if they do not), the planning status of the premises should not in itself be decisive for licence application purposes. The Licensing Authority would give appropriate weight to relevant planning decisions and the views of the Local Planning Authority. However, the Licensing Authority would reach its own conclusions on the merits in terms of the statutory licensing objectives.

Haringey Council is now consulting representative bodies and statutory authorities on the attached proposals to revise the Statement of Licensing Policy. If you wish your comments to be taken into account when the Council reaches its final decision, please send them in writing to Ms Daliah Barrett at the Licensing Service, Civic Centre, High Road, Wood Green, London N22 8LE to be received no later than 1st September 2006.

Yours faithfully,

DALIAH BARRETT
LEAD LICENSING OFFICER

Interim Director **Andrew Travers**
Assistant Director Enforcement **Robin Payne**