

Licensing Committee

on

6 December 2005Report 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 Counsel's Opinion about the relationship between Decisions under the Licensing Act 2003 and Town Planning Controls

2. Recommendations

- 2.1 That Members note and accept the advice in Counsel's Opinion attached as Appendix 3 to this report.
- 2.2 That Members provisionally approve for statutory consultation the proposed revisions 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 agree the commencement of the statutory consultation referred to in paragraph 2.2 above.
- 2.4 That, Members agree to apply the Statement of Licensing Policy in the light of Counsel's advice when making decisions at Licensing Sub-Committee hearings during the period before the formal adoption of the proposed revisions referred to in paragraph 2.2 above.
- 2.5 That Members agree not to impose conditions that would leave the hours of operation for licensable activities to be determined by the Planning Authority or by Planning Controls when making decisions at Licensing Sub-Committee hearings.

Report Authorised by:

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3 Executive Summary

3.1 The report attaches a recent Counsel's Opinion which advises 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. The General Purposes Committee will be asked to authorise statutory consultations on the proposed changes to the Council's Statement of Licensing Policy.

4 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.

5 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 dated 21 October 2005 (iii) 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" which is set out in Appendix 1 to this report. 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 has not seemed the appropriate course of action on the facts, Members have been reluctant to enforce the Statement of Licensing Policy strictly by refusing to consider the application or by restricting applicants for Premises Licences to the opening hours currently allowed by the Planning Permission.
- 6.4 In certain instances where the Operating Schedule submitted with the Licence application has sought hours in excess of the Planning Permission, a condition has been imposed on the Licence to the effect that
- “the hours permitted by this licence shall not exceed the hours permitted by Planning Controls for the time being in force”.
- 6.5 The effect of this is to prevent the premises from opening later than the Planning hours before Planning Permission for extended hours is obtained. But, once that Planning Permission is obtained, there would be no need for the owner to make a further Licensing application for the same extended hours.
- 6.6 There have 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.
- 6.7 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. It has to be said that others involved with Licensing have in the past expressed different views but the Legal Service now believes that Philip Kolvin is correct and that his view would be upheld by the Courts.

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. Paragraph numbers have been added for ease of reference.
- 7.2 The main thrust of the Opinion is in paragraph (4). Counsel states 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 explains, 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 gives 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 advises, at paragraphs (4) and (8) of his Opinion, that the Councils' Statement of Licensing Policy (SLP) 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 points out the inaccuracy of Paragraph 8.1 of the SLP. This has arisen because of a recent amendment to the 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 change in Planning law, are set out in Appendix 2.

8.3 The current SLP 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 SLP under review during the three-year period and make such revisions as it thinks appropriate.

8.4 Before any revision to the SLP is adopted the Council must go through the extensive statutory consultation exercise followed before the initial adoption of the SLP in January. This will include consultation with representatives of local businesses and residents, representatives of the licensed trade and personal licence holders, the Police and the Fire Authority.

8.5 Under the relevant legislation and the Council's Constitution this review is a “non-executive” function and therefore authorisation for the review must be given by the General Purposes Committee followed by formal adoption of the revised SLP by full Council.

8.6 Under the Licensing Act 2003, the Licensing Authority must “have regard” to its SLP when making decisions on applications. This means that the Licensing Authority can depart from parts of its SLP if there is good reason to do so, for example Counsel's Opinion accepted by the Licensing Committee. In the interim, until the formal adoption of the proposed revisions to the SLP, it is recommended that Members on the Licensing Sub-Committees should apply paragraphs 8.1 and 8.2 in the light of Counsel's advice.

9 Conditions

- 9.1 In paragraph (9) of his Opinion, Counsel advises against imposing conditions of the kind mentioned in paragraph 6.4 of this report i.e. “the hours permitted by this licence shall not exceed the hours permitted by Planning Controls for the time being in force”. The reason for this is because the Licensing Authority should make its own decision on the hours rather than leaving the matter to the Planning Authority.
- 9.2 If a premises licence is granted for hours extending beyond those allowed by the Planning Authority, it would still be unlawful for the owner to open during those extended hours. But in this situation enforcement action would have to be taken by the Planning Authority.
- 9.3 Counsel points out that in these circumstances the Licensing Authority could still attach an informative to a premises licence to the effect that the applicant would still need to obtain Planning Permission to operate for the extended hours granted by the Licence.

10 Recommendations

- 10.1 That Members note and accept the advice set out in Counsel’s Opinion attached as Appendix 3 to this report.
- 10.2 That Members provisionally approve for statutory consultation the proposed revisions 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 agree the commencement of this statutory consultation.
- 10.4 That Members agree to apply the Statement of Licensing Policy in the light of Counsel’s advice when making decisions at Licensing Sub-Committee hearings during the period before the formal adoption of the proposed revisions.
- 10.5 That Members agree not to impose conditions that would leave the hours of operation of licensable activities to be determined by the Planning Authority or by Planning Controls when making decisions at Licensing Sub-Committee hearings.

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 The 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 dated 21 October 2005.