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