

Merton Council
Licensing Sub-Committee
6 May 2020
Notice of Determination

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London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 14 May 2020

Subject: BRS Brothers, 256 London Road, Mitcham, CR4 3HD

Having considered relevant applications, notices and representations together with any other relevant information submitted to any Hearing held on this matter the Licensing Authority has made the determination set out in Annex A. Reasons for the determination are also set out in Annex A.

Parties to hearings have the right to appeal against decisions of the Licensing Authority. These rights are set out in Schedule 5 of the Licensing Act 2003 and Chapter 12 of the Amended Guidance issued by the Home Secretary (April 2018). Chapter 12 of the guidance is attached as Annex B to this notice.

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Useful documents:

Licensing Act 2003

<http://www.hmso.gov.uk/acts/acts2003/20030017.htm>

Guidance issued by the Home Secretary

<http://www.homeoffice.gov.uk/>

Regulations issued by the Secretary of State for Culture, Media and Sport

http://www.culture.gov.uk/alcohol_and_entertainment/lic_act_reg.htm

Merton's Statement of Licensing policy

<http://www.merton.gov.uk/licensing>

Annex A

Determination

The Licensing Sub-Committee considered an application by Mr Surjit Ram Chopra for a new premises licence for the premises known as “BRS Brothers” located at 256 London Road, Mitcham, CR4 3HD

The application sought a Premises Licence to authorise the licensable activity of the supply of alcohol (off sales only) with the same opening hours of 08.00 to 23.00 Monday to Sunday.

One representation was received objecting to the application from the Metropolitan Police. The premises was located within the Mitcham Cumulative Impact Zone and was subject to the Cumulative Impact Policy contained in section 7 of the Council's Statement of Licensing Policy. It required the applicant to overcome the rebuttable presumption as outlined in 7.8 of the Council's Licensing Policy that required refusal of any application for a new Premise Licence unless the applicant could show that there will be no increase in cumulative impact as a result of the grant of the application.

In reaching its decision, the Licensing Sub-Committee had to promote the Licensing Objectives especially in this case the prevention of Crime and Disorder and the prevention of public nuisance, make a decision that was appropriate and proportionate, comply with the Licensing Act 2003 and its regulations, have regard to the current Home Office Section 182 Guidance and LB Merton's Statement of Licensing Policy, and comply with any relevant case law.

The application was refused.

Licensing Sub-Committee Hearing

The Licensing Sub-Committee looked carefully at the application, its supporting papers, the Police Representation contained in the agenda papers and the oral evidence submitted at the hearing by all parties.

Mr Panchal, the applicant's representative, stated that:

- The Applicant has experience in the retail trade industry having worked in a restaurant for 5 years, which he had managed for 3 years.
- The Applicant understood the concerns of the Police and had provided a list of proposed conditions within the application.
- The Applicant was willing to reduce the hours sought in the application by amending the terminal hour to 8.00pm (from 11.00pm) and the start time to 10am (from 08.00am). The applicant was willing to insert further more focused street drinking conditions including 'a minimum purchase would be 4 cans of beer or cider be sold per customer' (to assist with the problem of street drinkers buying single cans), 'no 5cl/10cl miniatures shall be sold from the premises', 'no multipacks shall be sold in the premises' and that there would be 'no sale of beer or ciders which were above 6% ABV'.
- The Applicant proposed a number of conditions to manage the off-licence operation in the operating schedule to the application. These included proposed conditions such as having a staff training manual at the premises, having a refusals register, having an incident book, having appropriate signage and adopting the Challenge 25 scheme, having a notice requesting customers leave the premises quietly, and having CCTV throughout the premises.
- The Applicant believed that with the additional conditions and amendments proposed they would be robustly promoting the Licensing Objectives.

The Legal Advisor to the Licensing Sub-Committee invited the applicant's representative to address the cumulative impact policy, as it had not been addressed, which resulted in the above street drinking conditions being proposed.

Following questions from the Metropolitan Police and the Licensing Sub-Committee, the applicant's representative responded that:

- 1) Refusal of the sale of alcohol to customers who are drunk would be included within staff training and the premises would comply with the law in that respect. PC Stevens was surprised that it was mentioned and included as it was a criminal offence in its own right to sell alcohol to someone who is drunk not something that you condition.
- 2) The premises has been trading for 34 years as a stationers and newsagents, having previously been a WH Smith, although it had now also added a counter providing mobile phone accessories and servicing.
- 3) The application for a Premises Licence for the off-sale of alcohol would allow the premises to continue trading selling alcohol with its usual newspapers. It was unclear whether other convenience good would be provided with the sales of alcohol. The Applicant's representative was clear that the application would increase footfall to the store.

PC Russ Stevens, Police Licensing Officer stated that:

- The Premises is located within the Mitcham Cumulative Impact Zone and therefore subject to the Cumulative Impact Policy (CIP) within the Council's

Statement of Licensing Policy. It directs the Licensing Sub-Committee to refuse such applications unless it can be shown that there will be no cumulative impact from the grant of such an application. This CIP relates specifically to 'off sales' of alcohol from these type of premises, put in place to deal with an ongoing, well document serious issue with anti-social behaviour and crime and disorder mostly associated with the purchase of and consumption of alcohol in and around Mitcham Town Centre and by street or problem drinkers in this area.

- The Premises is located within 50m of the Mitcham Clock Tower which is an area frequently used by congregating street drinkers, who are able to purchase alcohol from any of the 10 shops located within 300m. The Police Licensing Officer noted that not all street drinkers are drunk when they purchase the alcohol. However, they will go and sit by Mitcham clock tower, consume their purchases and become drunk, leaving rubbish, bottles and bags in the surrounding area, whilst being abusive and involved in Anti-Social Behaviour associated with consuming or procuring their drink.
- There are regular reports of anti-social behaviour such as urination, littering and verbal abuse. The Police outlined in their representation the large number of incidents of crime which have occurred in the vicinity in the preceding 12 months including the serious crimes of shoplifting, robbery and assault.
- It was the view of the Police that Mitcham Town Centre could not cope with another premises selling alcohol and that it did not matter how responsible an operator was or the conditions imposed. This was because they would still be providing problem and street drinkers with another location from which to purchase alcohol, which could do nothing other than cause further cumulative impact.
- The reduction of hours proposed would not have any effect on approach of street drinkers even where they predominantly became a problem during the afternoons.
- In passing, the Police Licensing Officer noted that there had been no prior-consultation with him by the applicant prior to the submission of the application.

In response to questions from the Applicant and the Licensing Sub-Committee, the Metropolitan Police responded that:

- 1) The Police noted that the Applicant was willing to have a condition relating to the ABV of beer and cider, but it did not necessarily address the cumulative impact issues.
- 2) The Police noted that the Applicant was willing to sign up to a responsible retailer scheme. However the Police had found this scheme to be ineffective and unenforceable. It had been trialled in Mitcham and had failed. Whilst traders signed up to it, as soon as one did not comply with part of it, the other retailers then ignored it and the scheme broke down into non-compliance. It was as a result that the Police led and sought the imposition of the CIP for Mitcham off-licences. The Police did not believe there were any conditions, which could be added to the Premises Licence, to mitigate the effect of the impact that another premises selling alcohol in the area would have.
- 3) In passing, the Police were concerned why a premises selling predominantly stationery would want to sell alcohol, especially where it trader in mobile accessories or newspapers.

In closing, the Applicant added that newsagents require alcohol sales to survive and that this was the way forward for similar premises.

Decision of the Licensing Sub-Committee

The Licensing Sub-Committee decided to refuse the Premises Licence application.

The Licensing Sub-Committee gave the following reasons for their decision:

- a) The Sub-Committee considered paragraph 7.8 of the Council's Licensing Policy, which states "*..... The effect of the cumulative impact policy is to create a rebuttable presumption that applications for new premises licences or club premises certificates or variations that are likely to add to the existing cumulative impact will normally be refused, following relevant representations, unless the applicant can demonstrate that there will be no negative cumulative impact on one or more of the licensing objectives.*" The conditions proposed by the Applicant and potentially available for imposition by the Licensing Sub-Committee could not overcome this rebuttable presumption and found that the proposed operation in the location proposed would add to cumulative impact. The Licensing Sub-Committee considered that the Premises Licence, if granted, would lead to an increase in cumulative impact in Mitcham Town Centre and specifically in relation to problem or street drinkers.
- b) The Licensing Sub-Committee had made their decision on promoting the Licensing Objectives and not on the type of operation or the financial risk to the trader in not being granted a Premises Licence.
- c) The Police evidence was stark and extremely concerning in terms of the crime and disorder and anti-social behaviour in the immediate area and with street drinkers around Mitcham clock tower, located approximately 50m from the premises.
- d) The Police stated and that the area was highly saturated with premises and there were already 10 premises licensed to sell alcohol located within 300m of the premises.

The applicant had not demonstrated to the Licensing Sub-Committee's satisfaction that another premises selling alcohol for consumption off the premises would not have a negative cumulative impact on the licensing objectives of the prevention of crime and disorder and the prevention of public nuisance such that it would be justified from departing from its Special Policy. Locating this shop in this proposed location available to those living or congregating in this area even with the conditions offered, did not provide the Licensing Sub-Committee with sufficient assurance that this premises would not add to the cumulative impact already being experienced.

Annex B

Extract from the Amended Guidance issued by the Home Secretary under Section 182 of the Licensing Act 2003 (April 2018).

13. Appeals

13.1 This chapter provides advice about entitlements to appeal in connection with various decisions made by a licensing authority under the provisions of the 2003 Act. Entitlements to appeal for parties aggrieved by decisions of the licensing authority are set out in Schedule 5 to the 2003 Act.

General

13.2 With the exception of appeals in relation to closure orders, an appeal may be made to any magistrates' court in England or Wales but it is expected that applicants would bring an appeal in a magistrates' court in the area in which they or the premises are situated.

13.3 An appeal has to be commenced by the appellant giving a notice of appeal to the designated officer for the magistrates' court within a period of 21 days beginning with the day on which the appellant was notified by the licensing authority of the decision which is being appealed.

13.4 The licensing authority will always be a respondent to the appeal, but in cases where a favourable decision has been made for an applicant, licence holder, club or premises user against the representations of a responsible authority or any other person, or the objections of the chief officer of police, the Home Office (Immigration Enforcement), or local authority exercising environmental health functions, the holder of the premises or personal licence or club premises certificate or the person who gave an interim authority notice or the premises user will also be a respondent to the appeal, and the person who made the relevant representation or gave the objection will be the appellants.

13.5 Where an appeal has been made against a decision of the licensing authority, the licensing authority will in all cases be the respondent to the appeal and may call as a witness a responsible authority or any other person who made representations against the application, if it chooses to do so. For this reason, the licensing authority should consider keeping responsible authorities and others informed of developments in relation to appeals to allow them to consider their position. Provided the court considers it appropriate, the licensing authority may also call as witnesses any individual or body that they feel might assist their response to an appeal.

13.6 The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both.

13.7 On determining an appeal, the court may:

- dismiss the appeal;
- substitute for the decision appealed against any other decision which could have been made by the licensing authority; or

- remit the case to the licensing authority to dispose of it in accordance with the direction of the court and make such order as to costs as it thinks fit.

All parties should be aware that the court may make an order for one party to pay another party's costs.

On any appeal, the court is not entitled to consider whether the licence holder should have been convicted of an immigration offence or been required to pay an immigration penalty, or whether they should have been granted by the Home Office permission to be in the UK. This is because separate rights exist to appeal these matters or to have an immigration decision administratively reviewed.

Licensing policy statements and Section 182 guidance

13.8 In hearing an appeal against any decision made by a licensing authority, the magistrates' court will have regard to that licensing authority's statement of licensing policy and this Guidance. However, the court would be entitled to depart from either the statement of licensing policy or this Guidance if it considered it was justified to do so because of the individual circumstances of any case. In other words, while the court will normally consider the matter as if it were "standing in the shoes" of the licensing authority, it would be entitled to find that the licensing authority should have departed from its own policy or the Guidance because the particular circumstances would have justified such a decision.

13.9 In addition, the court is entitled to disregard any part of a licensing policy statement or this Guidance that it holds to be ultra vires the 2003 Act and therefore unlawful. The normal course for challenging a statement of licensing policy or this Guidance should be by way of judicial review, but where it is submitted to an appellate court that a statement of policy is itself ultra vires the 2003 Act and this has a direct bearing on the case before it, it would be inappropriate for the court, on accepting such a submission, to compound the original error by relying on that part of the statement of licensing policy affected.

Giving reasons for decisions

13.10 It is important that a licensing authority gives comprehensive reasons for its decisions in anticipation of any appeals. Failure to give adequate reasons could itself give rise to grounds for an appeal. It is particularly important that reasons should also address the extent to which the decision has been made with regard to the licensing authority's statement of policy and this Guidance. Reasons should be promulgated to all the parties of any process which might give rise to an appeal under the terms of the 2003 Act.

13.11 It is important that licensing authorities also provide all parties who were party to the original hearing, but not involved directly in the appeal, with clear reasons for any subsequent decisions where appeals are settled out of court. Local residents in particular, who have attended a hearing where the decision was subject to an appeal, are likely to expect the final determination to be made by a court.

Implementing the determination of the magistrates' courts

13.12 As soon as the decision of the magistrates' court has been promulgated, licensing authorities should implement it without delay. Any attempt to delay implementation will only bring the appeal system into disrepute. Standing orders should therefore be in place that on receipt of the decision, appropriate action should be taken immediately unless ordered by the magistrates' court or a higher court to suspend such action (for example, as a result of an on-going judicial review). Except in the case of closure orders, the 2003 Act does not provide for a further appeal against the decision of the magistrates' courts and normal rules of challenging decisions of magistrates' courts will apply.

Provisional statements

13.13 To avoid confusion, it should be noted that a right of appeal only exists in respect of the terms of a provisional statement that is issued rather than one that is refused. This is because the 2003 Act does not empower a licensing authority to refuse to issue a provisional statement. After receiving and considering relevant representations, the licensing authority may only indicate, as part of the statement, that it would consider certain steps to be appropriate for the promotion of the licensing objectives when, and if, an application were made for a premises licence following the issuing of the provisional statement. Accordingly, the applicant or any person who has made relevant representations may appeal against the terms of the statement issued.

13.1 This chapter provides advice about entitlements to appeal in connection with various decisions made by a licensing authority under the provisions of the 2003 Act. Entitlements to appeal for parties aggrieved by decisions of the licensing authority are set out in Schedule 5 to the 2003 Act.