

Merton Council
Licensing Sub-Committee
2 March 2023
Supplementary agenda

5 Notice of Determination

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London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 9 March 2023

Subject: WH Smith, Station Approach, Wimbledon, SW19 7NL

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.

For enquiries about this matter please contact

Democratic Services
Civic Centre
London Road
Morden
Surrey
SM4 5DX

Telephone: 020 8545 3616

Email: democratic.services@merton.gov.uk

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 Authority received an application from WH Smith Retail Holdings Ltd for a new Premises Licence for Station Approach, Wimbledon, SW19 7NL. The application sought the following Licensable Activities and hours:

- the supply of alcohol for consumption off the premises, Monday to Friday from 6am to 9pm; Saturday from 8am to 9pm and Sunday from 8am to 9pm

2 representations were received in relation to the application from local residents and a Ward Councillor.

Agreement was reached on a number of conditions with both the Metropolitan Police and the Council's Trading Standards Officer, who therefore withdrew their representations prior to the Licensing Sub-Committee meeting.

The applicant amended their application to the following

- the supply of alcohol for consumption off the premises, Monday to Saturday from 7am to 9pm and Sunday 8am to 9pm

As the applicant is not able to increase hours beyond the initial application, the Licensing Sub-Committee considered the following:

- the supply of alcohol for consumption off the premises, Monday to Friday from 7am to 9pm, Saturday from 8am to 9pm and Sunday from 8am to 9pm.

In reaching its decision, the Licensing Sub-Committee had to promote the Licensing Objectives, 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, have regard to the London Borough of Merton Council's Statement of Licensing Policy, and comply with any relevant case law.

The Application was **granted** with the conditions offered in the application's Operating Schedule, the conditions agreed with the Metropolitan Police and the Council's Trading Standards Officer and additional conditions imposed by the Licensing Sub-Committee as follows:

- WH Smith conduct a risk assessment on staffing levels at a minimum of 2 members of staff in the store during peak periods.
- No more than 4 cans or bottles per customer be sold before 12 noon on Saturday and Sunday

Licensing Sub-Committee Hearing

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

The Licensing Manager gave a brief overview of the Application.

The Applicant, presented their submissions on the application, noting that

- WH Smith has 40 licensed premises, with a limited range of branded household names, sold at a higher price point.
- Stores are well supported by head office, with regular compliance visits from area managers and twice yearly regional business manager visits.
- Store within travel hubs have a close relationship with the British Transport Police and with the station manager
- WH Smith have offered extensive conditions with regard to staff training, which have been agreed with the Trading Standards Officer
- WH Smith already sell a range of age restricted products and staff are familiar with age verification
- The tills, including self service tills, require staff to perform age verification on scanning age restricted products
- No WH Smith stores with licenses for alcohol have been subject to regulatory enforcement action or licence review.
- The hours applied for at this site are more restricted than stores selling alcohol in the area.

In response to questions from interested parties and the Sub-Committee, the Applicant confirmed that:

- The store would be visited by the area manager at least monthly, and the regional manager at least six monthly. The premises would not be single-manned at all times, staffing levels would be set according the business need.
- WH Smith have been adding alcohol off sales since 2012, and now 40 licenced units exist across the country
- The mix of items sold at the Wimbledon site is not dissimilar to other stores which now sell alcohol
- 25% of sales at the Wimbledon store are currently for age-restricted products such as tobacco
- If the provision of alcohol is not a success at this location, it won't affect the long term plans for the store, but they will remove the products that aren't selling and supply alternative items, and this has been done at other locations
- If the application is successful, a DPS, who will also be a store manager holding a personal licence, will be added.
- There will normally be a staff member on the shop floor, except for brief moments when in the stockroom.
- Spirits will only be sold from behind the counter and they will have security tags
- The store will not sell superstrength beers or ciders
- The alcohol area is directly opposite the tills and both are covered by CCTV, as well as the access points to the store.

- Alcohol is not a significant category in losses to shoplifting. The overall loss-levels at Wimbledon are proportionately low at the Wimbledon store and this is not expected to change with the introduction of alcohol sales.

The interested parties raised the following concerns:

- That the Wimbledon location combines a significant volume of schoolchildren passing through the area and an issue of street drinkers.
- That there is already a lot of alcohol for sale in the area, and this will therefore add to the cumulative impact
- That the Licence could pass on to the next tenants of the site, who may not have WH Smith's experience, and the local residents may not have any input into the transfer of the licence.
- That the store is not planned to be sufficiently staffed to prevent theft of the alcohol and therefore the knock-on effects of that to the wider issues of prevention of crime and safeguarding of children

The Chair announced that the Licensing Sub-Committee would retire to closed session and make their decision.

The Decision of the Licensing Sub-Committee

The Licensing Sub-Committee decided to grant the application with the following conditions imposed:

1. The premises shall install and maintain a comprehensive CCTV system as per the minimum requirements of the Merton Police Licensing Team. All entry and exit points will be covered enabling frontal identification of every person entering in any light condition. The CCTV system shall continually record whilst the premises is open for licensable activities and during all times when customers remain on the premises. All recordings shall be stored for a minimum period of 31 days with date and timestamping. Viewing of recordings shall be made available immediately upon the request of Police or authorised officer throughout the entire 31 day period.
2. A staff member from the premises who is conversant with the operation of the CCTV system shall be on the premises at all times when the premises is open. This staff member must be able to provide a Police or authorised council officer copies of recent CCTV images or data with the absolute minimum of delay when requested.
3. During the hours of operation of the premises, the licence holder shall ensure sufficient measures are in place to remove and prevent litter or waste arising or accumulating from customers in the area immediately outside the premises, and that this area shall be swept and or washed, and litter and sweepings collected and stored in accordance with the approved refuse storage arrangements by close of business.

4. All sales of alcohol for consumption off the premises shall be in sealed containers only and shall not be consumed on the premises.
5. Alcohol products of beer, lager and cider sold on the premises will be no more than 7% ABV (Alcohol By Volume). The restriction shall not apply in respect of specialist branded premium priced products, for example craft ales, local or micro-brewery specialist products, boxed gifts or national celebratory/commemorative beer, lager or cider with alcohol content of 7% ABV or greater.
6. No miniature bottles of spirits of 5cl or below shall be sold from the premises unless part of a gift pack.
7. No more than 10% of the sales area shall be used at any one time for the sale, exposure for sale, or display of alcohol.
8. Save for spirit mixers, any spirits will only be displayed for sale from behind the servery counter.
9. Prominent signage indicating the permitted hours for the sale of alcohol shall be displayed so as to be visible before entering the premises, where alcohol is on public display, and at the point of sale.
10. A record shall be kept detailing all refused sales of alcohol. The record should include the date and time of the refused sale and the name of the member of staff who refused the sale. The record shall be immediately available for inspection at the premises by the police or an authorised officer of the Council at all times whilst the premises is open.
11. All tills shall automatically prompt staff to ask for age verification identification when presented with an alcohol sale.
12. A Challenge 25 proof of age scheme shall be operated at the premises where the only acceptable forms of identification are recognised photographic identification cards, such as a driving licence, passport or proof of age card with the PASS Hologram.
13. Notices shall be prominently displayed at all exits requesting patrons to respect the needs of local residents and businesses and leave the area quietly.
14. The Premises Licence Holder shall ensure that all staff employed at the premises whose duties include the sale or supply of alcohol shall undertake and complete a relevant programme of internal training prior to them being authorised to sell or supply alcohol. The premises licence guidance manual will be the basis of alcohol sales training. Records of the training programme shall be maintained and made available to authorised officers upon request.

15. As soon as possible, the premises shall join the local Pubwatch or other local crime reduction scheme approved by the police, and local radio scheme if available.
16. The Premises Licence Holder will liaise/write with the Local Police & appropriate support organisations as agreed with the council from time to time to ban named persons from using the shop to buy alcohol and would request photographs of banned persons so all premises staff are made aware who are banned persons. These records would be kept confidential.
17. An incident log shall be kept at the premises and made available on request to Metropolitan Police, the Licensing Authority or other Responsible Authorities. It must be completed within 24 hours of the incident and will record the following;
 - (a) All crimes reported to the venue.
 - (b) All ejections of patrons.
 - (c) All complaints received concerning crime and disorder.
 - (d) Any incidents of disorder.
 - (e) All seizures of drugs or offensive weapons.
 - (f) Any faults in the CCTV system.
 - (g) Any visit by a relevant authority in relation to service
18. An effective visual (and/or aural) reminder shall be in place at all points of sale to ensure staff undertake appropriate age checks on potential sales of alcohol (and any other age-restricted product).
19. All staff that undertake the sale or supply of alcohol (and any other age-restricted product) shall receive appropriate refresher training in relation to undertaking appropriate age checks on such, at least every six months.
20. WH Smith conduct a risk assessment on staffing levels at a minimum of 2 members of staff in the store during peak periods.
21. No more than 4 cans or bottles per customer be sold before 12 noon on Saturday and Sunday

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

- a) The Licensing Sub-Committee had to make a decision that promoted the Licensing Objectives and that was appropriate and proportionate. The conditions imposed addressed those concerns.
- b) The Licensing Sub-Committee considered stricter conditions, on sales of single cans and licensing hours, but determined that those agreed in advance with Responsible Authorities and as suggested during the hearing were appropriate, proportionate and sufficient.
- c) This was a small store, with a long history of operating at the site without incident.

- d) WH Smith have a good record in operating licensed premises, with no licences reviewed or regulatory action taken.
- e) The volume of alcohol to be sold was expected to be low (less than 4% of baskets), at low ABVs and at higher than average price points.
- f) The additional conditions applied by the Licensing Sub-Committee sought to reflect the stated intentions of the applicant and address the concerns of neighbouring residents.
- g) The Police and Trading Standards Officer agreed the conditions, with no ongoing concerns, their input assisted the Licensing Sub-Committee in reaching their decision. Under the Guidance, the Police remain key enforcers of licensing law.
- h) The concerns of the interested parties were not supported by sufficient evidence to meet the threshold for the Sub-Committee to consider a risk of a significant increase in Cumulative Impact (Thwaites)
- i) The license is subject to normal review procedures, should concerns arise.

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.