

London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 3 December 2018

Subject: 37-39 Upper Green East, Mitcham, CR4 2PF

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 (March 2015). 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 3357

Fax: 020 8545 3226 (**Please telephone 020 8545 3616 to notify faxes sent**)

Email: democratic.services@merton.gov.uk

Useful documents:

Licensing Act 2003

<http://www.hmsso.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 Jyothis Joseph for a new Premises Licence at 37-39 Upper Green East Mitcham to permit the licensable activity of the supply of alcohol (off sales only) from 07.00 to 01.00 Monday to Friday 07:00-02:00 Saturday to Sunday with premises opening hours of 24 hours a day Monday to Sunday. The Applicant advised prior to the Licensing Sub-Committee meeting that following the representations from the Metropolitan Police and other interested parties, the hours for sale of alcohol and the premises opening hours had both been amended to 08:00 to 23:00 Monday to Sunday.

Representations were received against the application from the Metropolitan Police, Public Health, one ward Councillor and three local residents. The premises was located within the Mitcham Cumulative Impact Zone and was subject to the Cumulative Impact Policy contained in the Council's Statement of Licensing Policy. The Cumulative Impact Policy required the applicant to overcome the rebuttable presumption that required refusal unless the applicant could show that there will be no increase in cumulative impact.

In reaching its decision, the Licensing Sub-Committee had to promote the Licensing Objectives, make a decision that was appropriate and proportionate, that complied with the Licensing Act 2003 and its regulations and the licensing objectives, had regard to the current Home Office Section 182 Guidance, as well as to LB Merton's Statement of Licensing Policy, and complied with any parameters provided by relevant case law.

The application was refused.

Reasons

The Licensing Sub-Committee carefully considered the application, its supporting papers, the supplementary agenda, the Representations contained in the agenda papers and the oral evidence submitted at the hearing by the parties in attendance.

Mr Shankar P Sivashankar, the agent for the applicant, stated that:

- a) The Applicant had proposed a number of additional conditions following receipt of the representations. These were contained within the supplemental agenda but included a reduction in the hours applied for on both sale of alcohol and premises opening hours and the removal of self-service for beers and spirits. The Applicant felt this would give staff more control over who alcohol was sold to. The Applicant felt the conditions offered would not have been accepted by many operators and demonstrated that the applicant was a responsible operator.
- b) The Applicant Mr Joseph was a very experienced manager and DPS and had previously worked for Tesco and managed other stores including one in Brixton.
- c) The Applicant was confident that the operation with the conditions proposed would not add to cumulative impact.
- d) Mr Joseph stated that he himself did not drink and did not wish to encourage others to drink but having made an investment in the premises wished to be able to sell alcohol alongside the other products in the store. Mr Joseph had been at the premises for two months, which currently traded without a Premises Licence.
- e) The Applicant would be changing the name of the premises to 'Mitcham Central' (having set up a new trading company called Mitcham Central Limited) and was paying to run the premises from its owner, Ronak Patel, with a one year potentially extendable contract.
- f) The current owner of the premises had owned the premises for over 20 years but it was represented that he had no say in the day to day operation; this was represented that this was solely the responsibility of the Applicant Mr Joseph.
- g) The Applicant had run premises previously that were open 24/7 and had on the agents' advice, given the applicant's experience, applied for the maximum hours in the original application.
- h) The Applicant was a responsible operator and the owner of the premises had a previous good history of 19 years prior to the issues this year which had led to a request for a Review by the Metropolitan Police and resulted in his decision to Surrender the Premises Licence before the Review Application could take place. It was proposed that the Applicant would be at the premises every day and the Police would be aware of who the DPS was at the premises which had not been the case previously.
- i) The Applicant's agent stated that if issues were to occur, the Premises Licence could be reviewed as had happened previously this year when issues had been raised and that the Police could visit to check on the premises at any time.

The Metropolitan Police Borough Licensing Officer, PC Russ Stevens, objected to the application and sought refusal of the application due to the previous recent history of the premises and the saturation in the area of off licence premises pursuant to the Cumulative Impact Policy that applies to Mitcham town centre. PC Stevens made the following representations:

- 1) PC Stevens advised that the original application made no attempt to address the Cumulative Impact Policy and there had been no control measures provided in the original operating schedule. Although some had been subsequently offered, these were not sufficient and it was not clear why these had not been applied for as part of the original application given the previous known history of the premises and the location of the premises.
- 2) The Police remained concerned due to proliferation of off-licence premises in the location of the premises, which was a saturated area (there were 12 other off licence premises within 300m of this premises including three supermarkets). The Police and other authorities had identified a significant problem with street drinkers in the area and the proliferation of off-licence premises within the Mitcham area of the Borough. The issue was well documented and there had already been the imposition of the Mitcham Town Centre Cumulative Impact Zone (CIZ) specifically for off sales and an application for a Public Space Protection Order (to deal specifically with Street Drinkers). Police have issued CPNs (Community Protection Notices) and seized alcohol regularly to try to manage the issue. However, drinkers were able to go and re-stock if their alcohol was confiscated due to the number of premises selling alcohol in the immediate vicinity. The premises was located on the edge of the Town Centre, would be the closest off licence to the Three Kings Pond, which had seating around it, near to the clocktower, which had seating nearby whilst there was a bus stop directly outside the premises. All of these areas were known problem areas and were areas where street drinkers loiter and congregate. PC Stevens noted that the issues relating to street drinkers in the area occurred throughout the day and peaked during the afternoon. Other issues arose late at night.
- 3) PC Stevens advised that the proposed condition to label products to identify the premises they came from would assist the Police with evidence but only after the event and would not help prevent issues. The proposed condition relating to stout and Guinness would also not address the issues as these were generally not the drinks mainly bought by street drinkers.
- 4) The Police had noted, and it had also been referred to in the representation received by Ms Cooper, that following the surrender of the off-sales for alcohol Premises Licence at this premises earlier in the year, the issues in the vicinity relating to street drinkers had declined "to a massive extent", with which he agreed. PC Stevens advised that whilst it was still a major issue in the area, when their supply was removed the issues would improve. It was PC Stevens' believe that if the premises were granted a Premises Licence to sell alcohol it would contribute to the issues and another retailer selling alcohol in the area would add to cumulative impact.
- 5) Whilst the licence applied for was for a different operator, it would effectively be reinstating the original licence and the premises still had the same owner. The Police had no reason or evidence to believe it would be run any better should this new application be granted. Should this applicant leave for any reason, the business would remain licenced and could revert to management by Mr Patel.
- 6) PC Stevens stated that the proposed conditions were not sufficient to prevent a proportionate increase in crime and disorder or anti-social behaviour based on the location.

Natalie Lovell, speaking on her representation on behalf of Public Health made the following representations:

- 1) Local data showed that there were serious issues with alcohol and crime and violence in the post code of the area where the premises was located. The ward where the premises is located had a higher admission ratio of hospital stays for alcohol-related harm than the figure for Merton and that for London.
- 2) The representation received from Ms Cooper showed that if availability of alcohol is reduced in an area then it can help improve the lives of those within that area.
- 3) The grant of the Premises Licence would pose a risk to the Health and Wellbeing of the Merton population.

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

- 1) There was insufficient separation between this current Applicant and the Owner in view of the previous narrative.
- 2) There was demonstrable evidence that the previous surrender of the licence had reduced crime and disorder in the vicinity of the premises.
- 3) There were currently 12 premises nearby providing off-sales of alcohol and significant issues with street drinking at the cross outside/near to the premises.
- 4) There were issues with the proposed conditions and with the enforceability of these conditions.
- 5) In the circumstances, the Licensing Sub-Committee could not consider a suitable exception to the Cumulative Impact Policy that applied to this premises.

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.