

London Borough of Merton



Licensing Act 2003 Notice of Determination

Date of issue of this notice: 27 October 2021

Subject: Mirs Rooster Limited, 117 London Road, Morden, SM4 5HP

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 Authority received an application from Mirs Rooster Ltd for a new premises licence for 'Mirs Rooster' a premises located at 117 London Road, Morden, SM4 5HP.

The application sought the following Licensable Activities and hours:

- The provision of Late Night Refreshment
Monday to Sunday from 23:00 to 04:00 the following day

Opening Hours:

Monday to Sunday 11:00 to 04:00 the following day.

A covering letter provided with the application stated that the restaurant would close at 23:00 each day, with a takeaway-only or delivery service provided from 23:00 to 04:00.

3 representations were received in relation to the application from the Metropolitan Police, a ward Councillor and a local resident. Some correspondence had been submitted by the Applicant in response to the Metropolitan Police's suggested conditions.

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 and have regard to the London Borough of Merton Council'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, the supporting agenda papers and the oral evidence submitted at the hearing by those parties present.

The Licensing Officer confirmed that the closing time of another premises in the area (Morden Fish and Kebabs) had been confirmed as 02:00am 7 days a week.

The Applicant was not present at the meeting.

Avril O'Brien presented her representation submitted on behalf of the Metropolitan Police:

- The Metropolitan Police had attempted to correspond with the Applicant to discuss possible conditions. However Ms O'Brien stated this had been met with resistance from the Applicant's representative.
- A representation was submitted by the Metropolitan Police as, Ms O'Brien stated it was clear they would not reach agreement on the conditions.
- The Police requested that the application be rejected in its' entirety to promote the licensing objectives of the Prevention of Crime and Disorder and Public Nuisance.

In response to questions from Interested Parties and the members of the Licensing Sub-Committee, Ms O'Brien responded as follows:

- The Police had been made aware of anti-social behaviour and drug-taking in the area near or close to the premises, as well as loitering delivery drivers and public urination.
- The 2am terminal hour suggested by the Police had been suggested to attempt to find a reasonable agreement between the Police and the Applicant.

Councillor Peter Southgate presented his representation:

- Whilst 02:00 was suggested as a terminal hour because it coincided with the closing time for another premises Morden Fish and Kebabs that was at the other end of London Road in Morden near to the Tube and Bus station, there were a number of reasons for seeing that terminal hour in a different light. 1) The other premises was close to the tube and when an all-night tube service and all night buses had been running one could see the logic of allowing them to stay open to this hour to provide food to those returning from elsewhere. 2) Morden Fish and Kebabs does not have residential accommodation nearby as it is located in an area of the town which is largely commercial premises which are not occupied in the early hours just by the Tube and Bus station.
- The proposal from Mirs Rooster is located near to residential accommodation, with flats above and behind the premises. Councillor Southgate noted that there were a number of families with children living within these flats.
- Councillor Southgate expressed concern that this would lead to persons congregating outside the premises in the early hours as there would be nowhere else open at that time.

Sivasambo Parimelalghan spoke to his representation:

- Mr Parimelalghan had been resident in the property above the premises for 33 years and the noise and fumes from the extractor fan would only stop at midnight, an hour after the premises stops trading. This was preventing Mr Parimelalghan and his family from sleeping. Mr Parimelalghan noted that on the same presumption that it would take an hour for any noise to stop, if the Premises Licence were granted, this would mean a 4am terminal hour, which would result in disturbance until 5am.

The Licensing Officer stated that the extractor fan issue would usually be dealt with under other legislation, namely section 80 of the Environmental Protection Act 1980 by the Noise Pollution team, with the ultimate sanction of a Noise Abatement Notice and potentially prosecution. The Licensing Officer was not sure whether this noise was a private or public nuisance.

The Legal Officer advised that the premises would be able to trade without a Premises Licence until 23.00 as only Late Night Refreshment required a Premises Licence for the period from 23.00 to 05.00 each day for the sale of hot food only. Therefore, the Licensing Sub-Committee was considering the application for the Licensable Activity of Late Night Refreshment from 23.00 to 04.00. Opening Hours are not Licensable Activities, although the opening hours sought from 11.00, could be recorded.

In closing, PC O'Brien of the Metropolitan Police requested the application be refused to promote the Licensing Objectives. This was echoed by Councillor Southgate and Mr Parimelalghan. Mr Parimelalghan stated that there were already issues with public nuisance in the area including drug taking, littering and urination.

The Chair reminded all present that the Licensing Sub-Committee would read through the application again and carefully consider all the evidence before making a decision.

The Decision of the Licensing Sub-Committee

- The Licensing Sub-Committee decided to refuse the application in its' entirety.

Reasons

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

- 1) The Licensing Sub-Committee noted that the premises was located in Morden town's London Road, which involves flats above the parade of shops (often with more than one flat per premises) and so is a highly residential area. The area immediately outside the premises involves anti-social behaviour and public nuisance as referenced within the statements by the Metropolitan Police and Mr Parimelalghan.
- 2) Whilst the drug-taking in the vicinity of the premises was as far as the Police were aware un-associated with the premises, the Licensing Sub-Committee were concerned to attract or prolong such activities with late night take-away or delivery drivers outside the premises.
- 3) The Licensing Sub-Committee did not feel there were any conditions which could be imposed which would mitigate the issues which had been raised by the representations.
- 4) Delivery drivers for other premises already loitered in the area and the Licensing Sub-Committee did not wish to further add to this issue of cumulative impact.

Legal Advice to the Licensing Sub-Committee

The Legal Advisor to the Licensing Sub-Committee referred to relevant case law whilst the Licensing Sub-Committee were in deliberations and these were applied during decision-making. These being:

Daniel Thwaites Plc v Wirral Borough Magistrates' Court 2008 - Councillors made their decision based on the proper evidence provided aided by some local knowledge.

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.