

# London Borough of Merton



## Licensing Act 2003 Notice of Determination

**Date of issue of this notice:** 26 September 2023

**Subject:** Café La Lavella, 63 London Road, Morden, SM4 5HT

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](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 Ana Maria Mitrofan for a new Premises Licence for Café La Lavella at 63 London Road, Morden, SM4 5HT.

The applicant applied for:

- The sale by retail of alcohol (on and off sales):  
Monday to Sunday 11:00 to 23:00 and
- opening hours:  
Monday to Sunday 08:00 to 00:00

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 LB Merton's Statement of Licensing Policy, and comply with any relevant case law.

The Premises Licence application was refused, as detailed below in this Decision Notice.

## Licensing Sub-Committee Hearing

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

Mr Mahir Kilic, for the applicant, set out the application and noted that there had been no objections from local residents. Mr Kilic also highlighted that the representations received from Responsible Authorities particularly focused on the previous licensee and events that had taken place under their management of the premises. While an event had taken place in May without a TEN or licence in place, Mr Constantin Mitrofan and the applicant believed that the revocation of the previous Premises Licence was under appeal, and the TEN had been approved, as advised by a previous agent acting on their behalf and was therefore operating under the impression that they were doing so legally. Nevertheless Mr Kilic represented that the event had been a private party, as he said alcohol was not on sale to individual guests and was purchased by the host of the party. The applicant had been advised not to host further private parties. Until the visit on 6 June 2023, Mr Constantin Mitrofan and the applicant were unaware that the appeal against the Revocation of the Premises Licence had not been processed and that was why alcohol had been on display, on sale, and stored at the premises. These items had now all been removed from the premises. It was submitted that there had been no breaches since this time, and no complaints about the premises, whilst it traded as a restaurant, where no Premises Licence was required.

Mr Kilic reminded the Licensing Sub-Committee that this application was made by Mrs Mitrofan, not Mr Mitrofan, who had undergone comprehensive training along with all staff at the premises. Mrs Mitrofan held a Personal Licence, issued by a local authority, which Mr Kilic submitted made her a fit and proper person to hold a

Premises Licence. Mr Kilic submitted Mrs Mitrofan was not responsible for her husband's failings while he was managing the business.

In response to questions Mr Kilic confirmed:

- He had only received correspondence that morning that showed the owners of Café La Lavella believed their premises licence revocation was under appeal, as the correspondence was critical to a pending case against the previous licencing consultant, he was unable to share publicly.
- There was no evidence to show that Café La Lavella had sold alcohol to the persons attending the party which proceeded after the Counter Notice was issued against the TEN.
- If the application is refused, witnesses will be brought to the appeal hearing to corroborate the accounts given.
- Before the previous Premises Licence was revoked, the applicant was working under the direction of her husband, this application is for her, while the business is owned by both husband and wife, Mrs Mitrofan will be managing the business.
- Mrs Mitrofan's personal licence was issued three or four weeks ago, she has also completed training in health and safety, conflict management, and sale of alcohol.
- There will not be further private hires and a condition had been offered to that effect.
- They are not requesting longer hours of operation.
- It is not reasonable to put the onus on the applicant to be aware of the status of their Premises Licence when they employed someone to do this for them, they believed they were operating correctly until the visit on 6 June.
- Although the ownership of the premises is unchanged, Mrs Mitrofan is the new manager.
- The previous Premises Licence holder is not a criminal, has not been on trial and is allowed to work at the premises, will be under the supervision of his wife and will work in the kitchen and back areas, not at front of house.
- All staff members took online licensing training through St Peter's College.
- No prosecution has been brought against the owners for sale of alcohol for the period up until 6 June 2023.
- If the licence is granted, the owners will return the alcohol to the premises, but customers will also be able to bring their own alcohol.

When asked if Mrs Mitrofan was present during the fireworks incident that contributed to the Revocation of the previous Premises Licence, Mr Mitrofan answered on her behalf. It was confirmed that she was present.

Mr Graham, for the Met Police, set out the police position on the application. There was a long history of activity in ignoring to the licencing objectives, as set out in detail in the Metropolitan Police Representation, including the following:

- 4 September 22, there was fighting that began inside the premises and spilled out onto the street.
- 24 February, officers attended the premises at 00.40 well after the licenced hours when live music was playing and drinks were being served. The video of the firework incident had been shown at the Review hearing in May, which showed a

young girl present at the premises at 00.20. The fireworks represented both a health and safety issue as well as a nuisance for local residents. It was clear that a disco was being hosted at the premises which cctv footage shows continued until 6am.

- In March, the premises was open after hours with music and alcohol provided.
- 22 April, the premises was open after hours.

Mrs Mitrofan was present and involved in the operation of the premises during this time period.

After the Revocation of the the Premises Licence took place, a TEN was applied for and a counternotice was issued prohibiting the event if it involved Licensable Activities. The event went ahead regardless. The applicant says that alcohol was not supplied, but no evidence of this has been provided, and on the balance of probabilities, given the history of the venue, the Police do not find this credible and invite the Licensing Sub-Committee to find the same.

It stretches credulity that Mr Mitrofan and the applicant continued to display and sell Efes beer after 2 June 2023. It is their responsibility to ensure they are operating legally. They have not provided any evidence to the Licensing Sub-Committee to show that they had reason to believe that they were properly authorised.

The management of the premises has not changed. It is simply a convenience to apply in Mrs Mitrofan's name for the Premises Licence - it remains a family business, with the same management in place. The Police do not have confidence that this is a new management of the premises. The owners have had numerous opportunities under the previous Premises Licence to demonstrate responsibility, but have failed to do so. This is not simply a case of training, it is not required to demonstrate knowledge of the rules of a Premises Licence to know that opening after hours is not allowed.

In response to questions, Mr Graham and PC O'Brien informed the Licensing Sub-Committee that

- During police visits to the premises, after hours, Mrs Mitrofan had been present and working behind the counter, she had a level of responsibility at the premises and was aware that the Police had concerns about the operation. She was present when officers explained the hours and conditions of former Premises Licence to Mr Mitrofan.
- The police had not stated that she was part of the management
- It was shown in the evidence pack used at the Review hearing that when fighting had occurred at the premises, neither staff nor management had called emergency services.
- PC O'Brien and colleagues had taken the stepped approach, recommended by the Home Office, with Café La Lavella. They had engaged on several occasions, had personally explained the Premises licence in detail and explained what was and was not allowed. All attempts had fallen on deaf ears.
- It is a matter of judgement for the Licensing Sub-Committee to determine whether or not the declared training of staff is sufficient. The Police have concerns that it has been suggested that Mrs Mitrofan did not have influence

over her husband during the previous Premises Licence, and yet he will remain part of the management of the business.

- It has been suggested that customers will continue to be able to bring their own alcohol to the premises, this will make it hard to control inebriation and is of further concern to the Police.

Mr Kilic informed the Licensing Sub-Committee that

- If the Premises Licence is granted, customers will no longer be allowed to bring their own alcohol.
- The applicant is content for a condition preventing use of the premises for private hire events to take place.
- The applicant is stating that licencing objectives will be promoted; the police are surmising that they won't based on past actions.

Mr Russ Stevens, a Licensing Officer representing the Council's Licensing Authority, presented to the Licensing Sub-Committee. Ignorance is not a defence, and yet it had become a theme with the owners of Café La Lavella. Mr Stevens had visited on 17 October 2022, to discuss breaches of the Premises Licence and the number of complaints received. Mr Mitrofan had presented as being unsure of the details of the Premises Licence. Mr Stevens spent a lot of time with him that day to go through the whole Premises Licence and to serve a formal warning letter. Again on 6 June 2023, when Mr Stevens visited following the event on 2 June 2023 for which a Counter Notice had been issued by the Licensing Sub-Committee prohibiting the TEN proceeding, Mr Mitrofan stated that he didn't know that his Premises Licence had been revoked or that the Counter Notice to the TEN had been issued, and had carried on as if in ignorance. Even though the staff behind the counter were informed, by Mr Stevens, that there was no Premises Licence to sell alcohol, they continued to do so. Even when asked to comment in this meeting, Mr Mitrofan has answered for his wife. The Licensing Authority has no confidence that Café La Lavella are able to sell alcohol responsibly or are able to comply with any conditions of a Premises Licence.

The application includes a condition that states that if the premises remains open after hours, customers will not have access to alcohol. The Licensing Authority is concerned that this is an indication that the owners/managers are preparing to stay open later and for the council to prove when/whether they are in breach of the licencing conditions. The Licensing Authority has no confidence in the new management, and does not recognise it as new management, and are convinced that if a Premises Licence is granted, we will return to the previous problems with the venue.

In response to questions, Mr Stevens confirmed:

- The applicant had submitted the TEN, but no information has otherwise been submitted to demonstrate that Ana Maria Mitrofan is now managing the premises.
- The premises remains in Constantin Mitrofan's ownership and management. Neither Mr or Mrs Mitrofan has provided evidence of the alleged private event.

- The Licensing Authority would only be satisfied by a completely new management of the premises that does not involve either Ana Maria or Constantin Mitrofan, either as DPS or Premises Licence holder.

Mr Andrew Pickup, a Environmental Health Manager representing for the Council's Noise and Nuisance Team presented to the Licensing Sub-Committee. He noted that the applicant was closely related to the previous Premises Licence holder, and was not satisfied that there had been a sufficient change in management of the premises. The event for which a Counter Notice for the TEN was given by the Licensing Sub-Committee went ahead and operated outside of licencing hours. The premises is not in new ownership and the authority expects to deal with the same issues again.

In closing, Mr Graham, for the Metropolitan Police, highlighted that concerns remained about the poor management of the premises with total disregard for the terms of the Premises Licence, particularly in regard to licencing hours. The Counter Notice to the TEN had been ignored and he invited the Licensing Sub-Committee to find that it was not credible to claim that no alcohol had been supplied or sold. The Police also invited the Licensing Sub-Committee to find that Mrs Mitrofan had been involved in the operation of the premises, had been working, and note that neither Mr or Mrs Mitrofan or any staff called emergency services when there was disorder. If the Premises Licence were to be granted, the Police fear that they would be back before the Licensing Sub-Committee for a Review seeking Revocation of the Premises Licence for further breach.

In closing, Mr Kilic highlighted that there had been much discussion about the past. This was a new application, and each application should be taken on its own merits. The applications was not for music, entertainment or dancing. The applicant should not be punished for the mistakes her husband had made in the past. The Responsible Authorities had not provided any evidence that she was involved in managing the premises while her husband held the previous Premises Licence.

Mr Kilic said there has been little said about the applicant. The failings of her husband as manager of the premises were not in dispute and he had lost his Premises Licence as a result of that. Ana Maria Mitrofan has a Personal Licence, she does not have a criminal record, and we have offered a further condition to not hold private parties at this venue. It is requested that the Premises Licence is issued with the offered conditions.

### **The Decision of the Licensing Sub-Committee**

The Licensing Sub-Committee decided to deny the application

### **Reasons**

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

- 1) The Applicant had not demonstrated she was responsible enough to manage the premises independently of the previous Premises Licence holder. The Licensing Sub-Committee noted that when asked a question, Mr Mitrofan answered in

place of the Applicant. The Licensing Sub-Committee had not heard from the applicant at any time in the hearing even when directly engaged.

- 2) The Licensing Sub-Committee were satisfied that the Applicant had been present during previous breaches and had not supplied evidence to support the view that the Licencing Objectives could or would be upheld in the future. The concerns of the Responsible Authorities were reasonable and shared by the Licensing Sub-Committee.
- 3) The proposed conditions were not sufficient to satisfy the Licensing Sub-Committee that the Licencing Objectives would be upheld.

The case of Daniel Thwaites v Wirral Borough Magistrates' Court (2008) applied.

## **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.