

LICENSING SUB-COMMITTEE

Minutes of the meeting held at 2.00 pm on 11 December 2018

Present:

Councillor Nicholas Bennett J.P. (Chairman)
Councillors Tony Owen and Pauline Tunnicliffe

Also Present:

7 APPOINTMENT OF CHAIRMAN FOR THE MEETING

Councillor Nicholas Bennett JP was appointed Chairman for the Committee.

8 DECLARATIONS OF INTEREST

There were no declarations of interest.

9 REVIEW OF THE PREMISES LICENCE AT TWO TEN, 210 HIGH STREET, BECKENHAM, BR3 1EN

Revoke the Premises Licence.

Details of the full decision are set out in the following minutes relating to the meeting.

Policy Guidance.

The Council's Statement of Licensing Policy 2016 -2021 states that the Licensing Authority has instructed its officers to adopt a zero tolerance approach to criminal offences and breaches of licence conditions committed in licensed premises in the Borough. The matters that may be investigated following complaints or concerns include breach of licence conditions.

The Statement of Licensing Policy also provides that there should be a clear separation of the planning and building control functions and the licensing regimes. Licensing applications should not be a re-run of the planning application process. The Licensing Authority will not grant an application for a new Premises Licence or Club Premises Certificate unless it is satisfied that all relevant planning permissions are in place where necessary.

Guidance issued under section 182 of the Licensing Act 2003, paragraph 11.20 indicates that in deciding which of the powers available on a Review for them to use, licensing authorities should so far as possible seek to establish the causes of the concerns which the representations identify. The remedial action should generally be directed at these causes and should always be no more than a necessary and proportionate response.

Judicial authority (*Bassetlaw DC v Worksop Magistrates Court*) confirms that in a Review involving criminal activity, wider considerations come into play, and the furtherance of the licensing objectives concerning the prevention of crime. Deterrence is an appropriate consideration for the licensing authority on such a review.

The premises under review was subject to the Beckenham Town Centre special policy on cumulative impact. The Council's Statement of Licensing Policy 2016-2021 states "it would be the Licensing Authority's intention to refuse to grant new premises/club licences or variations, unless the application is such that the grant of the licence would have no further detrimental impact on the area and the promotion of the licensing objectives".

Current Government guidance (April 2018) states at paragraph 14.36 "while a large night club or high capacity public house might add to problems of cumulative impact, a small restaurant or theatre may not. If the licensing authority decides that an application should be refused, it will still need to show that the grant of the application would undermine the promotion of one of the licensing objectives and that appropriate conditions would be ineffective in preventing the problems involved".

Paragraph 14.38 states that "Special policies can also not be used to justify rejecting applications to vary an existing licence or certificate except where those modifications are directly relevant to the policy (as would be the case with an application to vary a licence with a view to increasing the capacity limits of the premises) and are strictly appropriate for the promotion of the licensing objectives".

Background information

The premises licence was obtained in November 2016 and the venue opened in December 2016.

The premises were formerly in retail use. The planning authority was notified of an intention to use the site as a restaurant pursuant to Class D Part 4 of the Town and Country Planning (General Permitted Development)(England) Order 2015. The use accordingly had planning permission for a continuous period of up to two years. The operators of the business constructed a boundary fence and an awning with the intention of using the rear area as part of the business and in particular for the smoking by customers of shisha tobacco.

Although the frontage of the premises is to the commercial High Street, to the rear is an access road which in turn abuts the rear gardens and the rear elevations, including bedrooms, to residential properties in The Drive, Beckenham.

The premises licence as originally granted was however restricted to the ground floor internal area only. The premises licence conditions include the following:

These premises will operate as a restaurant. The sale of alcohol must be ancillary to the supply/consumption of food and will only be sold or supplied by waiter or waitress service under the following circumstances:

- To those who are seated and are waiting for a substantial table meal
- To those who are taking or have taken a substantial table meal.
- There is to be no vertical drinking anywhere on the premises.

Conditions were also imposed regarding, CCTV, staff training and risk assessment, sale of alcohol and measures to deal with Noise.

Over the Christmas/New Year 2017 period, the venue ran on TENS, so that the whole venue could be utilised. The police did not object to these as the applicant stipulated that he would comply with his licence conditions during the TENS.

The Metropolitan Police, however, subsequently applied for the Review of Premises Licence at Two Ten, alleging the DPS's failure to comply with the conditions of the premises licence, since the 6th January 2017. This was contrary to the prevention of crime and disorder, the prevention of public nuisance and the prevention of children from harm licensing objectives.

The review was held on 26th April 2017. The full reasons and findings of the review were attached to the papers for the current meeting. Evidence was given by the police as to a number of breaches of the condition. These related to the provision of a working CCTV system, of breaches of premises opening hours, the awning in the garden being closed when shisha smoking was taking place in breach of the smoke free laws and the provision of a desert bar in the garden with alcohol displayed behind it. The Police had served a section 19 closure notice for the latter and for vertical drinking in the garden. The police also explained they had spent a considerable amount of time explaining to the owners the conditions on the premises licence and the need to comply with all the conditions. Since the 6th January 2017, the police had visited the premises seven times to warn Mr Sadat about his persistent failure (including the unauthorised sales of alcohol) to comply with the terms of the premises licence.

Ms Jean Bywater, Health & Safety Inspector on behalf of LBB put forward her grounds for supporting the application. She explained that the premises contained an external area to the rear which had been converted with four decking walls and a canopy roof and as such was classed as substantially enclosed for the purpose of Section 2 Part 1 of the Health Act 2006. The premises was also "smoke free" as defined in Section 2 of Part 1 of the Health Act 2006.

For the purpose of the Act no account was taken of the canopy roof being open as it was capable of being closed. The area was classed as substantially enclosed whether the roof canopy is open or not. She submitted that the owners of the premises continued to provide shisha, which is a tobacco product for the purpose of Section 1 Part 1 of the Health Act 2006 which is being smoked in a substantially enclosed area at the rear of the premises. She stated that she witnessed the activity herself during her visit to the premises with the Police on 18th March 2017.

Environmental Protection Officer, Sarah Brewer put forward submissions in support of the review application. She stated that the Public Health Nuisance Team had received a number of complaints from local residents regarding music emanating from the rear garden. She explained that in January 2017 a noise abatement notice was served on the premises. However since the notice was issued there had been further noise complaints. Ms Brewer stated that a colleague attended two properties on 4th March 2017 at approximately 22.10pm. She explained that the music could be heard from the residents' bedrooms and over the background noise of traffic. With the exception of the last few weekends they had received about 2-3 complaints every weekend.

Representations in support of the review application were put forward by Mr Lee Harvey on behalf of the London Fire Brigade. He highlighted the background concerning why he visited the premises. He stated that the LFEPA received a copy of the licensing application for a variation of the licence premises which included the proposal to operate from the first floor.

He stated that the Authority's inspectors had previously carried out an inspection of the premises. During the inspection, it was noted that some fire safety matters required attention to reduce the risk of fire and/or reasonably ensure the safety of people using the premises. The hazards related to the open stair case and open kitchen. In addition, the furthest point on the first floor to the nearest exit was deemed to be unsuitable.

Mr Harvey referred to his letter to Mr Sadat which provided advice and guidance on fire safety matters. He stated that Mr Sadat had not provided a fire risk assessment and as such it was very difficult to provide comprehensive advice. He further stated that Mr Sadat did not appear to have building regulation consent, which would have identified safety issues. The onus was on the responsible person. However, if the business was not using the upper floor other than for a bit of storage that would have been fine.

In all the circumstances, the Sub-Committee considered that the suspension of the licence for 3 months and the removal of the DPS were necessary and proportionate in order to promote the licensing objective in this case. There was also an application to vary the licence and the Sub-Committee decided to adjourn that for a period of up to 8 weeks.

The adjourned application to vary the licence was eventually heard on 10th August 2017. The full decision is attached to the papers for the current review.

The Applicant advised that during the period of suspension, earnest attempts had been made to address the points raised in the review hearing. In respect of issues of public nuisance, a noise limiter for the external areas had now been fitted and sealed to the satisfaction of the public health team. Measures had been introduced to address the concerns of the fire officer. Signage had been installed at the premises and the CCTV system had been upgraded so that the requirements of the police could be met although at the date of the review hearing, a final inspection by the police was still awaited. To address smoking restrictions in public areas, part of the cover for the garden area had been permanently removed.

The Applicant asked that a slightly reduced application of the original variation application be considered by the Sub-Committee in substitution of the original application, as it was hoped this would address some of the concerns raised in the original objections. An amended plan of the area to be licenced to include the first floor and the rear garden area was also submitted but it was clarified that the application did not include a roof terrace on the first floor.

The applicant asked that shisha customers be allowed to purchase and consume alcohol without food if they so choose to do. The premises would nevertheless remain as a high quality restaurant, no vertical drinking would occur and it would remain a seated, table serviced area alongside the rest of the venue. In response to an enquiry as to the percentage of customers who would attend for shisha smoking, only some 20% or '30 people' was described as 'about right'.

Members concluded that the requests for live music, recorded music and films were ones that could be permitted without harm to the licencing objectives. A more limited extension of the hours permitted than applied for could be allowed on Friday and Saturday nights (until 01.00 hours the following day) but given the track record of the business so far, the existing hours should remain for the remaining days of the week when residents may anticipate a higher degree of peace and quiet.

Conditions requiring a noise limiting device to all external regulated entertainment were imposed and an existing condition amended to allow the ground floor, first floor and external garden area (but not the first floor terrace) to be used as a restaurant. The Sub-Committee made clear that the condition restricting use of the premises to a restaurant would remain in force and it would not be possible for customers who wished to smoke tobacco (shisha or otherwise) to do so if they were not taking or had taken a substantial table meal.

The Current Review

The application for a review was made by the Lead Licensing Officer on 15th October 2018 on the crime and disorder and protection of children from harm objectives. Three witness statements were provided in support of the application following complaints that on 11th May 2018 an independent group

of 4 spent £223.83 of which only £19 was food related; that on 13th June 2018 3 persons visited between 22.00 and 01.00 hours during which they had 2 shisha and lots of alcohol but no food and finally on 21st July 2018, a couple visited for a short while and only drank alcohol with no food being taken

As a result of the complaints on 4th September 2018, an application for a RIPA authorisation was made for directed surveillance of the premises. On 15th September 2018 a Trading Standards Officer attended the premises. Although entry was not made the implied discussion with the manager was that drink and shisha would be available later if they could return. On 28th September 2018 two Council staff, aged 21 and 22 respectively visited the premises at approximately 20.30 hours and stayed until midnight. During the entire time no food was taken or insisted upon. The bill for the evening was £95 for alcohol service alone. The girls were not challenged for age at any time during the visit.

The following representations were also received. The Council's planning officer advised that on 25th September 2018, a Planning Inspector issued a decision concerning 4 planning appeals for the refusal of planning permission for restaurant use and the issue of an enforcement notice concerning the construction of the boundary fence and an awning to the rear garden. The Inspector noted that the two year time limit for the temporary planning permission under the permitted development order had expired.

Although she considered that a scheme of acoustic treatment and limitation of hours could overcome objections regarding the living conditions of nearby residents, she nevertheless refused permission for the continuation of the restaurant use and an expansion of it to the first floor. She concluded that the restaurant did not complement the retail function of the main Beckenham shopping area and would undermine the Council's objective, as planning authority, of maintaining the vitality and viability of the shopping area and primary shopping frontage.

Regarding the external seating, fencing and awning to the rear garden area, the Inspector concluded that the outdoor seating had the potential to create undue harm to the occupiers of residential properties (including those along The Drive by reason of noise and disturbance). This could be controlled by conditions. The fencing and canvass roofing, however, did not preserve or enhance the mixed use character or appearance of the conservation area, appeared alien and out of keeping with its setting and was visually dominant. Any benefits to the applicant were outweighed by this harm and the retention of this structure was refused.

The Council's Environment Health division advised that its database highlighted over 150 entries in respect of the Two-Ten premises dating back to December 2016. The majority of complaints related to noise complaints from residents within the Two-Ten environs. It had been necessary to serve two abatement notices under the provisions of the Environmental Protection Act section 80. The first Abatement Notice was served on 6th January 2017. The second abatement notice was served on 27th June 2018. The notice was

served in respect of loud noise from patrons arising from the use of the rear courtyard and prohibits use by patrons of this area between the hours of 23.00 and 07.00. Both abatement notices remained in force.

On 23rd June 2018 a Council Environmental Health Officer witnessed a breach of the first abatement notice, between the hours of 22.40 and 23.56, together with statutory nuisance from loud patrons leading to the service of the second notice. On 14th July 2018, between 00.13 and 00.43 hours an additional breach of the first notice was observed in respect of loud music. A further breach was observed on the 15th July 2018. On the 18th July 2018 the Council wrote to the premises advising of the breaches of the Abatement Notice and giving an opportunity for the matters to be dealt with by simple caution. On 25th September 2018 Mr Sadat returned to the Council a signed copy of the simple caution by hand in respect of these three offences.

There was also a concern regarding breaches of condition 23 which required a noise limiting device for all external regulated entertainment. Throughout the months of May to July 2018 it was necessary for Environmental Services to write repeatedly. The issue of the noise limiter not functioning was first identified during a site visit with the DPS present on 26th April 2018. This was reiterated by letter on 9th May 2018. However it was not until 24th July 2018 before suitable arrangements were put in place to comply with condition 23.

A further representation was received from the Public Protection Division of the Trading Standards section. The document advised that a letter dated 13th March 2017 had been sent to the premises concerning the supply of shisha and the legal requirements. On 25th May 2018 Trading Standards had received a complaint from the police about Two Ten serving alcohol to people who were underage, but it was not possible to follow these up. A reference was also made to the witness statement dated 11th May 2018 when the witness observed that it started to drizzle at around 10.30pm so the staff rolled out a roof cover which came out from the right of the garden and attached to the wall on the left of the garden. This meant everyone was covered by a cloth roof. It was felt the proprietors were fully aware they were committing an offence but continued to do so for monetary gain.

A number of local residents had written supporting the review application. Those in support of the review submitted their own evidence including a diary record from January to July 2018. A report from Aulos Acoustic was also submitted. The report advised "The bar-restaurant outside courtyard generates high music and speech noise levels of exacerbating character and in underlying conditions which would be quiet. The effect on inside and outside noise climate is substantial and obtrusive. The impact of the music and speech is considered and assessed to represent an Unacceptable Adverse Effect". Mr and Mrs Austin were sufficiently concerned to be represented by their solicitor.

Some patrons had written in support of the business. Some patrons completed a proforma and others wrote individual letters. They stated that they visited the premises to eat food that the premises were operated as a

restaurant and they had not seen any underage sales of alcohol. Some letters were critical of the attention that had been given to the business by the authorities.

Representations at the Review hearing

The DPS, Ms Gosrani indicated that she was aware of the realities of the situation. She was endeavouring to build up a business to provide a solid future for her family. She was a member of the community and not an outsider. In response to a question from Councillor Tunnicliffe, Ms Gosrani indicated that shisha was still part of the trading model going forward and there would be an outside smoking area to accommodate this.

Counsel for the business advised that there would be a sea change going forward. With reference to the use of the premises, the 2 year permitted development permission for use as a restaurant had come to an end and as of yesterday, the business had not been running. A revised planning application had been submitted for a mixed Class A1/Class A3 use to overcome the Inspector's concerns. The planning enforcement notice was being complied with and all the fencing and awning to the rear garden was being removed. This should reduce the number of complaints from residents at the back of the building.

The other director of the business, Mr Sadat had resigned his position in November and would no longer have a role in the business. To strengthen the management, a lady with more experience had been brought in. While the chefs remained, other individuals had also been brought in. The DPS, Ms Reena Gosrani was in sole charge. She would bring in her sister to assist in management. Going forward any problems in the past would not be continued.

The review application alleged that two of the licensing conditions have been breached, namely the Crime and Disorder and the Protection of Children from harm. It is difficult to challenge the witness statements given that the proceedings are not adversarial. The Sub-Committee was asked to factor in the limited nature of any possible challenge. Members were also asked to factor in the statements made in support of the business at Appendix G of the hearing papers.

With reference to the Challenge 25 breach, the Environmental Health Officers had a lack of experience of a test purchase operation, the statements were in a proforma style and there was evidence that they gave the impression that food would be ordered. Also the officers appeared to the business to look older than they were. There was a subjective assessment involved.

With reference to the statements regarding the visits giving rise to the complaint to the Council, the independence of those witnesses was not agreed. It was disputed that the business was not operating according to proper procedures. There was evidence in the 11th May 2018 statement that the business did challenge and required a meal to be taken. The responses

from patrons indicated that and the requirement for food to be taken and for challenge 25 were being complied with.

The complaints around noise would be addressed as the business goes forward. When considering the options available on a review, Members were asked to consider what was best for the community. Members were asked to give the business a further chance as it was taking steps that had been in the pipeline for some time.

Reasons for Decision

It was noted that the business, which had been running since November 2016, continued to generate a large number of complaints, both from the responsible authorities and from local residents. It also had been the subject of two applications for a formal review and also two abatement notices had been issued.

In respect of the current application for a review, evidence had been submitted of a breach on a number of occasions of the condition requiring the premises to be operated as a restaurant and that alcohol should only be supplied when a substantial table meal was being eaten. This allegation was made by a number of witnesses on several occasions and, on the balance of probability, we found this aspect of the review application to be made out.

The test purchase made by the Environmental Health Officers also indicated a breach of the condition requiring a challenge 25 policy. The Committee found this to be proven on the balance of probability test but on a single occasion only.

The representations submitted in support of the review from the Environmental Health Department indicated continuing problems in connection with nuisance. An abatement notice issued on 13th January 2017 required a reduction in the volume and base of music. There were three admitted breaches of this notice on 23rd June, 14th and 15th July 2018 that had been dealt with by simple caution. A further abatement notice was issued by the Council on 27th June 2018 in respect of the rear garden area.

It had become apparent that the noise limiter needed to be reset. The Committee found the business to be very slow in cooperating with the Environmental Officer in getting the limiter reset. Members noted the matter was raised over the months of May to July 2018 and clearly the purpose of condition 23 which required a review from time to time was not being met.

The Committee also noted the Trading Standards comment on the witness statement of 11th May 2018 that the awning had apparently been closed leading to a breach of the law relating to the use of tobacco in a public place.

The Committee considered the representations from the Planning Division. The Licensing Committee looked to the Licensing Objectives as set out in the Licensing Act 2003, to national guidance issued under that Act and to the

Council's Statement of Licensing Policy. The Planning Inspector, of course would make her determination in accordance with the Town and Country Planning legislation. The considerations for each were different and could lead to a different conclusion under each regime.

In the case of Two Ten, the planning processes had reached an advanced stage at appeal and under the planning rules, use as a restaurant, the permitted use under licensing, had been found to be unacceptable and is no longer being sought. A new model of a mixed Class A1/ Class A3 use is being applied for but its acceptability unknown.

The business itself since its formation had been the source of allegations of breach of condition which the Committee found to be continuing. There were also the admitted breaches of the first abatement notice. The business seems unwilling to forgo its trading model involving the smoking of shisha tobacco, which although in itself is not a licensable activity, to comply with the general law, is carried out by the patrons of the licensable parts of the business in the open rear garden close to residential properties.

The volume of social chat arising from use of the garden area has given rise to the service of a second statutory abatement notice and cannot be controlled by a noise limiter. Local residents have been at the end of their tether as evidenced by the commissioning of a professional noise survey. The Committee noted the assessment made in the report and were not satisfied that the proposed model of a mixed Class A1/Class A3 use would address nuisance issues arising from the use of the rear garden.

The Committee was not satisfied that the business had presented any new model or changes in practice that would reasonably bring about an improvement in the failings that had been identified.

Members considered all of the remedies available. The imposition of new conditions, the suspension of the licence and the removal of the DPS had all been tried. In spite of its poor history, the Council even allowed an extension of hours on Friday and Saturday night and of the licensed area in order to give the business a chance to operate within the parameters of its licence. All of this had been unsuccessful in securing compliance with licence conditions. For this reason the Committee concluded that revocation of the licence was the only option available. This was in pursuance of the crime and disorder objective (given the breaches of licence conditions and abatement notices) and prevention of prevention of nuisance objectives.

The Meeting ended at Time Not Specified

Chairman