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News: Proving a negative can be very difficult, if not impossible

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Author/Solicitor: Jonathan Smith

You may have recently seen that Brighton City Council's refusal to grant a Premises Licence for Sainsbury's on North Street in Brighton, was upheld by the Magistrates Court. A spokesman for the Council said that the Magistrates had taken into account the wider issue of street drinking and what happens to the alcohol when it leaves the Premises, something licensees have no control over.

The Statement of Licensing Policy published by Brighton and Hove City Council states that applications for New Premises Licences, or variations, which are likely to add to the existing Cumulative Impact will be refused, unless the applicant can show that their application will have no negative Cumulative Impact. It goes on to say that: 'off licences also come within this policy as they can contribute to problems of street drinking, proxy purchasing, dispersal issues, pre loading and excessive drinking and related order'. As an aside, the Council are now consulting over extending this policy by almost two thirds the size of the existing area.

Despite Sainsbury's offering additional conditions at the appeal, the appeal was still dismissed because the Court felt that Sainsbury's had still failed to show that the grant of the Premises Licence would not have an adverse effect on crime and disorder and public nuisance in the Cumulative Impact Area, and also on the grounds of protecting children from harm.

There was another interesting development on this appeal because evidence was given by the City Council's Director of Public Health and, whilst the author wasn't there,

presumably this was about the effect on the health of the general public as a consequence of drinking alcohol. With the introduction of the Primary Care Trust or Local Health Boards as Responsible Authorities and the distinct possibility in the future of a Public Health Licensing objective, the influence of health professionals will become more prevalent.

The question therefore centres on how any applicant, within this particular Cumulative Impact Policy area, or indeed any other such area, is going to satisfy the 'conditions' set out at paragraph 13.29 of the National Guidance, which is found in many Statement of Licensing Policies?. This paragraph suggests that it is for an applicant to demonstrate 'in their operating schedule' that there will be no negative cumulative impact on one or more of the licensing objectives as a result of the grant of a new Premises Licence or a variation to the hours on a Premises Licence.

Recently we had a client who was in the unusual (but fortunate) position that they had traded for 14 months with the additional hours before the decision was reversed in the High Court. Many operators apply for Temporary Event Notices to test the water for a much more limited period and with a more limited capacity.

If Premises have never traded at all, or never traded for the additional hours then how is it possible to demonstrate 'in an operating schedule' that there will be no negative cumulative impact when you have nothing to hang your hat on? You are seeking to prove a negative without any evidence and, if this is the case, many Police forces will simply make the point that the new licence or additional hours will, by definition, mean people staying longer, drinking more and therefore more crime and disorder. It is therefore very difficult as an operator to demonstrate that there will be no negative cumulative impact because you have never been given the opportunity to trade for those additional hours.

Additional measures can be offered in operating schedules, but how can operators demonstrate that there will be no increase in crime and disorder or public nuisance when they have either never traded from the site or not traded the additional hours?

Why does the Guidance say that the applicant has to demonstrate 'in their operating schedule' that there will be no negative cumulative impact? It is open for any applicant to demonstrate, other than by evidence simply being in the operating schedule, that there will be no adverse impact, much as we did in our recent case, through the production of statistical information provided by the Police showing there had been no increase in crime and disorder during the 14 months our client had traded for the additional hour. Had we not had this information we would simply have been relying upon the operating schedule and the Police would have said that we had failed to demonstrate in our operating

schedule that we will have no negative cumulative impact on the licensing objectives. Of course we would have no evidence to prove otherwise.

Most operators will not be in such a fortuitous position and will simply have to try and rely upon their operating schedule and an element of crystal ball gazing. But with the political climate as it is at the moment, with the proposed changes being made to the Licensing Act 2003 so that any action taken by a Licensing Committee, will only have to be 'appropriate' rather than 'necessary' along with the fact that any evidence given by the Police will have to be accepted unless proved irrelevant, the situation is not going to get any easier for applicants who are in areas covered by Cumulative Impact Policies.

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Nottingham (0115) 953 8500

London - (020) 7936 5869

subscribers@popall.co.uk

twitter.com/popall