

LICENSING AND SAFETY COMMITTEE

20 MARCH 2007

LICENSING ACT 2003 – CONSULTATION ON REVISED GUIDANCE

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1. INTRODUCTION

- 1.1 The purpose of this report is to ask the Licensing and Safety Committee to consider the Government consultation paper on the revised guidance to the Licensing Act 2003 and to agree a response.

2. DECISION ISSUES

- 2.1 The committee has delegated powers to determine this matter.

3. BACKGROUND

- 3.1 The Licensing Act 2003 came into force on 24 November 2005. It replaced six existing licensing regimes concerning the sale and supply of alcohol, public entertainment, theatres, cinemas, night cafes and late night refreshment with a unified system of regulation.
- 3.2 Section 182(1) of the Act provides that the Secretary of State must issue Guidance to licensing authorities on the discharge of their functions under the Act. Section 182(3) of the Act gives the Secretary of State power to revise the licensing guidance from time to time.
- 3.3 The Guidance is intended to aid licensing authorities in carrying out their functions under the 2003 Act and to ensure the spread of best practice, ensuring consistent application of licensing powers by licensing authorities and promoting fairness, equal treatment and proportionality. Section 4(3)(b) of the Act provides that, in carrying out its licensing functions, a licensing authority must have regard to Guidance issued by the Secretary of State under section 182 of the Act.

- 3.4 The Guidance was first issued and disseminated to licensing authorities in July 2004. On 1 December 2005, the Secretary of State for Culture, Media and Sport publicly announced the Government's intention to conduct a two phase review of the Guidance: an initial phase limited to clarifying uncontentious issues that had been raised with the Government during the Act's transitional period; and a full review culminating in the publication of full, revised Guidance.
- 3.5 The Government now seeks views on the draft revised Guidance. In considering any revision of the current Guidance, it is important to understand that the Guidance cannot be used to attempt to amend the primary legislation or regulations made under the 2003 Act. Consultees should therefore recognise that the Government will be unable to take account of responses which deal with matters that can only be addressed through primary or secondary legislation.
- 3.6 A copy of the DCMS consultation document and questions seeking a response is attached at Appendix A.
- 3.7 Appropriate relevant extracts from the full revised guidance are attached at Appendix B.

4. LICENSING MANAGER'S COMMENTS

4.1 Officers have examined the consultation document at Appendix A and listed below are suggested responses to the questions for Members to consider:

4.2 Question 1: Do you agree that the current Guidance on vicinity should remain unchanged?

Response: Yes, particularly as the Government's aim is to give licensing authorities as much latitude as possible in determining vicinity according to local factors, leaving the courts as the ultimate arbiter in disputed cases.

4.3 Question 2: If not, what factors do you think should be considered and why?

Not applicable

4.4 Question 3: Do you agree that the current Guidance on incidental music should be amended to expand on the factors that licensing authorities might wish to consider in determining what is incidental?

Response: Yes, but the council should be able to take into account all of the factors mentioned in paragraph 3.21 of the revised guidance (See Appendix B).

4.5 Question 4: If not, please explain why and outline any alternative.

Not applicable.

4.6 Question 5: Do you agree that the current Guidance on cumulative impact policies should remain unchanged?

Response: Yes. The council notes that there is nothing in the current guidance to prevent special policies being established, for areas other than town and city centres. Although the current guidance states that it would not “normally” be justifiable to adopt a special policy for off sales, it is implicit that this may be justified in exceptional circumstances. There must be an evidential basis for a special policy to be adopted.

4.7 Question 6: If not, what amendments do you think should be made, and why?

Not applicable

4.8 Question 7: Do you agree that the pools of conditions in Annexes D-H should be:

Option 1: Removed from the current Guidance, but consider establishing an alternative central source of good practice advice? Or

Option 2: Retained and updated/expanded as necessary.

Response: Option 2 is preferred as the council is of the view that licensing authorities and responsible authorities need a central source of advice and guidance on the application of and terms of conditions (particularly those conditions which are regarded as good or best practice) and this encourages a consistent approach across authorities. The Annexes should therefore be retained but would need to be updated and expanded as necessary by further and possibly regular supplements to the Guidance.

4.9 Question 8: Do you think that there are any other options that should be considered?

Response: No.

4.10 Question 9: Do you think that, if retained, there is a risk that the pools of conditions may increasingly be considered exhaustive and therefore inhibit the promotion of innovative conditions by the police, other responsible authorities and interested parties to address emerging problems? If so, why?

Response: The council does not consider that there is a risk and indeed encourages relevant, legal, manageable and practical suggestions from responsible authorities and interested parties of conditions that will address emerging and changing problems. Clearly a common sense approach is needed here.

4.11 Question 10: Do you think that the pools of conditions have value in promoting consistency and/or best practice?

Response: Yes

4.12 Question 11: Do you agree that the current guidance on the role of ward councillors should be further clarified and expanded as proposed?

Response: Yes, the importance of observing the code of Code of Conduct for members is very important and the following proposals are agreed:

- further clarify the role of councillors in the licensing process and to indicate that where a member has a prejudicial interest in a matter which a member of the public would reasonably regard as so significant that it is likely to prejudice the member's judgement of the public interest, the member should, under the code of conduct for members, withdraw from a meeting at which that matter is discussed;
- advise that there is nothing to prevent licensing authorities notifying ward councillors of licensing applications as long as the information they provide is strictly neutral. All ward councillors are members of the licensing authority which in most cases is the full council and as such, there can be no legal objection to providing them with relevant information. The Guidance should also make it clear that this is not a legal requirement of the 2003 Act and authorities would have to bear any costs themselves.

4.13 Question 12: If not, please explain why and provide brief details of any alternative proposal.

Not applicable

4.14 Question 13: Do you agree with the proposed amendments to the guidance on authorisation of sale?

Response: Yes, that as proposed, the guidance should be amended further to:

- advise that written authorisation is recommended as it clearly demonstrates due diligence in the event of any review or prosecution; and
- clarify that this is not a legal requirement and that the Designated Premises Supervisor does not have to be on the premises at all times.

4.15 Question 14: If not, please explain why.

Not applicable

4.16 Question 15: Do you agree that the Guidance on variations should be amended as proposed?

Response: Yes - Section 34 of the Act allows the holder of a premises licence to apply for a variation of the licence. Paragraph 5.65 of the original Guidance used the expression 'major' variation as a means of describing all variations except those which relate to a change of name or address of someone named in the licence or specification of a designated premises supervisor. These two exceptions involve a simplified application process and a reduced fee.

The use of the expression "major variation" can be confusing as it implies the existence of a specific statutory procedure for 'minor' variations in addition to the two exceptions described above. The supplementary Guidance explains why the word 'major' is used in the Guidance, but the council's view is that this term is not helpful. More guidance is necessary on when it is appropriate to apply for a new licence as opposed to a variation.

The guidance should therefore be amended and expanded to:

- remove the term 'major variation';
- explain that the two exceptions outlined above are subject to a simplified application process;
- clarify when a new licence is required as opposed to a variation;
- clarify whether a variation is required for a voluntary and agreed reduction of operating hours

4.17 Question 16: If not, please explain why.

Not applicable

4.18 Question 17: Do you agree that the Guidance on evidence to support representations should remain unchanged?

Response: Yes, the council agrees that new applications will inevitably involve a degree of reasonable speculation about the likely impact of the licensable activities at the premises on the four licensing objectives. The Guidance already allows for the likely impact of a new premises where there is no history of noise and disturbance. It does not restrict the licensing authorities' discretion to give reasonable and appropriate weight to representations and evidence depending on the nature of the application. This is consistent with section 18(6)(a) of the Act which states that relevant representations are about the 'likely effect of the grant of the premises licence on the promotion of the licensing objectives'. Paragraph 5.68C of the current Guidance states that 'In determining the application.....the licensing authority must give appropriate weight to ...the representations (including supporting information) presented by all parties'. The council considers that any further advice/good practice on supporting representations with good evidence should be included in guidance for interested parties, rather than the statutory Guidance for licensing authorities.

4.19 Question 18: If not, please explain why.

Not applicable

4.20 Question 19: Do you agree that it would be useful to add guidance on how licensing authorities might manage concerns about potential intimidation of interested parties?

Response: Yes, the council notes that the Act requires any interested party making a representation to provide their name and address. It is understood that some licensing authorities have reported that in isolated cases, residents may be reluctant to make representations for fear of intimidation.

It is interesting to note that licensing authorities have taken different approaches to address this issue. For instance, some encourage the interested party to approach the relevant responsible authority (for example, environmental health officers) and ask them to make representations. This means that their name and address are not disclosed at any point in the process. In such cases, the responsible authority has to satisfy itself that representations are necessary and justified. Other authorities encourage residents to make their representations, but withhold their name and address from the

applicant, giving only details (such as street name) which are relevant to determination of the vicinity.

The council is of the view that a person making representations should justify the withholding of their name and address from the applicant. If it is not justified, their Ward Councillor could be approached with a view to representing their views

4.21 Question 20: If not, please explain why.

Not applicable

4.22 Question 21: Do you agree that guidance on the control of nuisance/crime and disorder outside licensed premises should be clarified/expanded as proposed?

Response: The council agrees that this guidance should be clarified/expanded as proposed and notes that it already allows for conditions to be imposed on licensees to promote the prevention of crime and disorder immediately outside the premises where this relates to licensable activities. In addition, there is nothing to prevent the police, licensing authorities and the licensing trade reaching voluntary agreements about best practice in areas where problems are likely to arise. Also, local authorities are already empowered by section 13 of the Criminal Justice and Police Act 2001 to make "designated public place orders" (DPPOs) to control the consumption of alcohol in a public place outside of licensed premises.

The council agrees it may be useful to explain better in the Guidance the legal responsibility on licensees to control areas in the immediate vicinity of their premises and state more explicitly that problems in the immediate vicinity can be improved through conditions. The wording of such conditions would need very careful consideration. Conditions cannot be aspirational and must be within the capability of the premises licence holder to avoid the commission of a criminal offence. For example, although a condition may require premises to adopt a particular dispersal policy, a licensee cannot force customers to abide by it.

4.23 Question 22: If not, please explain why.

Not applicable

4.24 Question 23: Do you agree that the Guidance on longer hours should be amended to reflect the Secretary of State's letter of 30 September 2005 and the current situation?

Response: Yes, it should be emphasized with more focus that the Act contains no presumption in favour of longer hours and that the four licensing objectives should be paramount in any consideration of a

licensing application. The amendment should also reflect the current position i.e. we are no longer in the process of moving from “fixed” to “longer hours”.

- 4.25 Question 24: If not, please explain why and outline any alternatives.

Not applicable

- 4.26 Question 25: Do you agree that Chapter 11, explaining police powers to close premises, should be removed from the Guidance and incorporated in specific and separate advice for police officers?

Response: it is agreed that Chapter 11 should be removed from the main guidance and incorporated in specific advice for police officers on dealing with problems at licensed premises to be developed with the Home Office and ACPO. However, the council also feels that whilst removal of Chapter 11 is prudent, the guidance should contain a “general overview” of police powers in this connection and this could be by way of an appendix.

- 4.27 Question 26: If you do not agree, please explain why.

Not applicable

- 4.28 Question 27: Do you agree that Chapters 12 (Sale and Supply of alcohol to children) and 14 (Other Offences) should be deleted from the Guidance?

Response: The council agrees that the information in these chapters is somewhat repetitious of the Act itself and should be removed in the existing format but that reference should be made to enforcement generally and the protocols etc involved. It would then be useful to have an appendix to the guidance listing all the relevant offences and the “prosecuting authority” for each one.

- 4.29 Question 28: If you do not agree, please explain why.

Not applicable

- 4.30 Question 29: Are you happy with the overall format of the revised Guidance?

Response: Yes

- 4.31 Question 30: If not, please explain why and what format you would prefer instead.

Not applicable

- 4.32 Question 31: Are there any other issues that you would like to see addressed in the revised Guidance? If yes, please specify.
It is noted that the Guidance cannot be used to amend the regulations accompanying the 2003 Licensing Act. However, the council will be making representations to the appropriate authority with regard to problems being encountered with the procedures for Temporary Event Notices, In particular the impractical timescales for the giving of notice and the subsequent period allowed for objections to be raised.

5. FINANCIAL IMPLICATIONS

- 5.1 There are no direct financial implications for Medway Council concerning this matter at present.

6. LEGAL IMPLICATIONS

- 6.1 The legal implications are set out in paragraphs 3.1 – 3.5 of the report.

7. RECOMMENDATION

- 7.1 That the committee give consideration to the Government consultation paper on the proposed revised guidance to the Licensing Act 2003 and agree the response to be forwarded to the DCMS.

8. BACKGROUND PAPERS

- 8.1 DCMS consultation paper on revised guidance (Appendix A)
8.2 Extracts from the revised guidance (Appendix B)

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