



● ● ● cornerstone

● ● ● barristers

NORTHAMPTON BOROUGH COUNCIL LICENSING TRAINING

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The programme



- Part 1: Introduction to licensing regimes
- Part 2: Licensing Act overview
- Part 3: Summary of process
- Part 4: National guidance and local policy
- Part 5: Premises licensing in action
- Part 6: Brief overview of review powers
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INTRODUCTION TO LICENSING REGIMES

Licensing Act 2003



- Licensable activities:
 - Sale of alcohol
 - Late night refreshment
 - Regulated entertainment



- Objectives of regime:
 - Prevention of public nuisance
 - Prevention of crime and disorder
 - Protection of children from harm
 - Public safety

Gambling Act 2005



- The Act regulates:
 - Harder forms of gambling: betting offices, bingo clubs, casinos, adult gaming centres, licensed family entertainment centres.
 - Lower order gambling, including low stake/prize gaming machines in pubs, family entertainment centres permits, small society lotteries etc.



- For harder gambling, there must be:
 - Operating licence, granted by Gambling Commission.
 - Personal licensees in key posts.
 - Premises licence, granted by licensing authority.



- Objectives of regime:
 - Preventing gambling being a source of / associated with crime and disorder
 - Fairness and openness
 - Protecting children / vulnerable from being harmed or exploited by gambling

Taxis



- Hackney carriages (can wait and ranks and be hailed)
 - Drivers licences
 - Vehicle licences
- Private hire
 - Drivers licences
 - Vehicle licences
 - Operators licences

Objectives of regime



- Safe vehicles
- Safe / trustworthy drivers

Sex establishments



- Sex shops
- Sex cinemas
- Sexual entertainment venues



- Objectives of regime
 - Suitable licensees, proprietors and managers.
 - Number of premises per locality
 - Character of locality
 - Neighbouring uses
 - Layout, character, condition of premises
- Conditions might include customer / dancer welfare.



PART 2

LICENSING ACT OVERVIEW

The language of licensing



- Licensing authority
- Licensing objectives
- Licensable activities
- Authorisations:
 - Premises licence
 - Club premises certificate
 - Temporary event notice
- Operating schedule
- Designated premises supervisor (DPS)
- Personal licence
- Responsible authorities
- Other persons
- Reviews

Licensing authority



- The licensing authority is the local authority
- The full Council sets the policy of the authority
- All other functions are dealt with by the:
 - Licensing Committee (Committee of 10-15 councillors)
 - Licensing Sub-Committees (who handle most of the contentious hearings)
 - Officers (who deal with administrative and non-contentious matters)

The purpose of the system: licensing objectives



The objectives:

1. Prevention of crime and disorder
2. Public safety
3. Prevention of public nuisance
4. Protection of children from harm

The importance of the objectives



- A licensing authority must carry out its functions with a view to promoting the licensing objectives.
- If it acts for any other purposes, it acts unlawfully.
- Representations made to the authority on any other grounds will be disregarded.
- Therefore, a decision which is made not for the purpose of promoting the licensing objectives, but for political or party political reasons, is unlawful.

What needs an authorisation?



Licensable activities. These are:

- Sale/supply of alcohol
- Regulated entertainment (e.g. music, dance, films, plays, indoor sports)
- Late night refreshment (hot food/drink after 11p.m.)

What kinds of authorisation are there?



- Premises licence – the main form of licence under the Act. (Pubs, nightclubs, cinemas, theatres, indoor sporting arenas, restaurants, takeaways, off-licences etc)
- Club premises certificate (for members' clubs)
- Temporary event notices (for temporary events or extensions to existing authorisations)

The special treatment of alcohol



- For premises licences for sale of alcohol (e.g. in pubs and restaurants). There needs to be:
 - A premises licence
 - A designated premises supervisor on the licence
 - Each sale must be made or authorised by personal licensees.

Lighter touch for low risk premises



- Members' clubs receive "club premises certificates". No personal licensee or DPS is necessary
- Community premises (e.g. church halls), selling alcohol. Premises licence is held by management committee. No personal licence or DPS is necessary.
- Non-alcohol premises, e.g. a takeaway, needs a premises licence. No personal licensee or DPS is necessary.
- Music before 11 p.m. does not generally require a licence.

A democratic process



- The system is driven by representations by:
 - Responsible authorities (statutory agencies)
 - Other persons (local politicians, residents and businesses)
- Without their involvement the system is a rubber stamp.

Importance of conditions

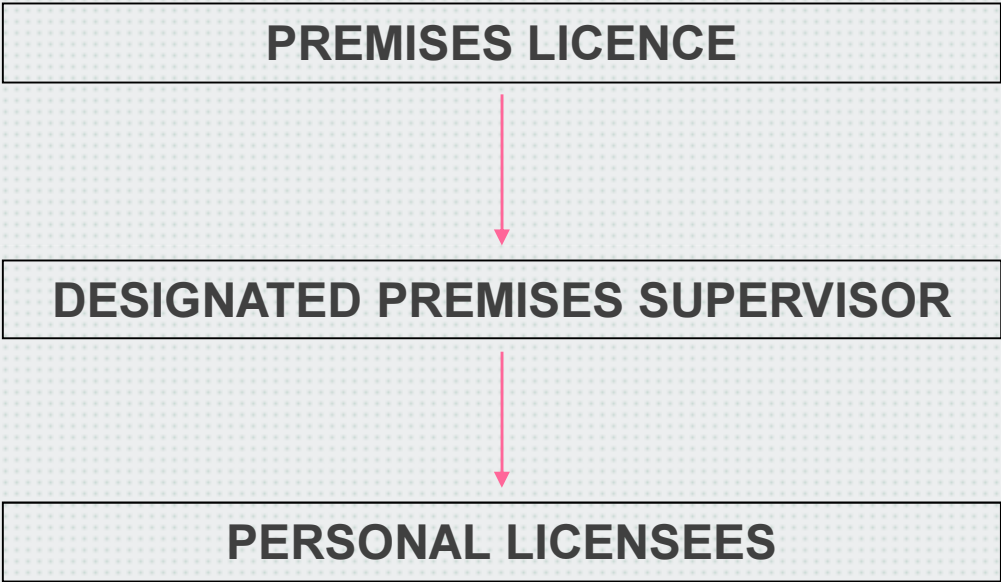


- Conditions play a crucial role in setting management standards and operational limits for premises, so as to promote the licensing objectives.
- They can come onto licences in 3 ways:
 - Because they are offered in the operating schedule.
 - Because they are imposed by the authority following receipt of relevant representations.
 - Because they are mandatory conditions.
- It is important that authorities structure the system to improve the chance that appropriate conditions come to be imposed.



PART 3: THE PROCESS: A QUICK SUMMARY

Alcohol retailers: licensing structure



Premises licensing: brief summary



Application with operating schedule

If no objections, grant on the terms in operating schedule

Objections (relevant representations) can be made by responsible authorities or other persons
(Reps by other persons can be discarded if frivolous, vexatious or repetitious)

Notice of hearing

Hearing

The authority must grant the application except to the extent appropriate to promote the licensing objectives

Personal licences: brief summary



1. Mandatory condition on alcohol licences: every sale to be made or authorised by personal licensee.
2. Personal licence applicants must have a licensing qualification.
3. Where applicant has relevant criminal record, authority must notify police.
4. Police may then object if satisfied that licence would undermine crime prevention objective.
5. Authority must then hold hearing and grant the licence unless satisfied that rejection is appropriate for promotion of crime prevention objective.
6. The personal licence is fully portable.

Designated premises supervisors: brief summary



1. Mandatory condition on alcohol licences: no supply of alcohol where no DPS.
2. The DPS must hold a personal licence.
3. Premises licence applicant nominates proposed DPS.
4. Only the police may object to the DPS, and then only on crime prevention grounds.
5. Where there has been an objection, following a hearing the authority may refuse to accept the DPS if this is appropriate to promote the crime prevention objective.
6. The DPS is the single point of management focus at the premises, although he does not need to be there the whole time.
7. He ought to be in day to day control.



PART 4: NATIONAL GUIDANCE AND LOCAL POLICY

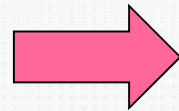


- National Guidance is published by the Secretary of State under s 182 Licensing Act 2003.
- Licensing policies are published by the licensing authority under s 5 Licensing Act 2003. Licensing authorities must have regard to National Guidance and local policy in making their decisions

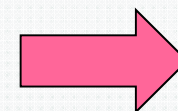
Relationship of objectives, guidance and policy



National
Guidance



Local
Policy



Licensing
objectives



- National Guidance and local policy are the signposts
- The licensing objectives are the destination. I.e. they are the paramount consideration.
- It is local policy which tells you how the objectives are to be achieved **locally**.
- **Therefore, local policy can depart from national guidance for good reason, e.g. if to do so does not undermine licensing objectives.**

Strategies on policies



Councillors can play a strong role in formulation of licensing policy. E.g.

- What is the vision for the town centre?
- What approach is taken to hours?
- What management standards are required?
- Is a restraint policy appropriate (location, hours, stress)?



PART 5: PREMISES LICENSING IN ACTION

The applicant



- Applicant may be a company or an individual(s)

The application



Application form sets out:

- The relevant licensable activities (alcohol, music and dance, film, theatre, late night refreshment etc)
- Hours
- Closing times
- Adult entertainment?
- Identity of DPS where alcohol is to be sold
- Steps proposed to promote the licensing objectives.

Notice of application



Application is:

- Posted on premises
- Advertised in local press.

NB nothing prevents authorities giving extra statutory notification, e.g. to councillors or resident groups or circulating within radius of premises

But if extra-statutory notification is undertaken, it must be done properly, or the decision may be quashed: R (Albert Court Residents Association) v Westminster City Council (2010).

Where no relevant representations



Authority must grant licence subject only to:

- Conditions consistent with operating schedule
- Mandatory conditions:
 - Every sale made or authorised by personal licensee
 - No DPS no sale
 - Door supervisors to be registered
 - Admission to films in accordance with BBFC classification
 - Mandatory code of conduct

Relevant representations



A relevant representation is one which is:

1. Made by
 - Responsible authorities
 - Other persons
2. Made in time.
3. About the likely effect of the licence on the licensing objectives.
4. In case of “other person”, not frivolous, vexatious or repetitious.

Responsible authorities



- Police
- Fire and rescue
- Health and safety authority
- Licensing authority
- Public health
- Planning authority
- Environmental health authority
- Child protection authority
- Trading standards

Time



28 days

Late representations are inadmissible: Albert Court.

Relevance



- The representation must be about the likely effect of the grant of the licence on the promotion of the licensing objectives.
- Therefore it must:
 - Relate to the licensing objectives.
 - Explain how **this** operation in **this** place at **this** time will harm the licensing objectives.
- Otherwise it will be discounted.

The effect of relevant representations



- A relevant representation triggers:
 - A hearing
 - Licensing authority discretion

The importance of representations



- If no representations are made:
 - The licensing authority has no discretion
 - The licensing authority must grant the licence as asked even if the applicant has suggested no conditions whatsoever.
- To trigger a hearing and a discretion, responsible authorities or other persons must make representations.

Pre-hearing procedures



- Hearing to be held within 20 days of last day for representations
- Notice of hearing will go out at least 10 days before hearing, including:
 - Procedure to be followed
 - Particular points on which authority wishes clarification
 - Consequences of non-attendance
 - Rights to be heard
- Authority may dispense with hearing if all parties agree.

Hearing procedures



- Hearing is to take form of discussion led by the authority
- Cross-examination not allowed unless authority considers it necessary
- Parties to be given equal maximum time

Evidence at hearing



Parties are entitled to:

- Address the authority
- Question other parties, with permission
- Give further information on points specified in notice of hearing

Parties are not entitled to give evidence which is irrelevant to:

- the application or their representations
- the promotion of the licensing objectives.

Timing of evidence



- Authority may take into account documentary or other information supplied **before** the hearing
- Authority may only take account of such information produced **at** the hearing with the consent of all other parties. (It is unlikely that consent will be given)

Exercise of powers



- The authority may only interfere with the operating schedule if it considers it appropriate in order to promote the licensing objectives.
- If it does interfere, then it must do so proportionately.
- In general, that means that:
 - Conditions should be tailored to the individual circumstances
 - Authorities should be alive to the burdens/costs conditions impose.
 - If a lesser step can safely be taken, it should be.
- However, the job is preventive. E.g. the authority can and must **promote the prevention** of crime and disorder.

Powers



- Add to conditions proposed in operating schedule
- Amend such conditions
- Exclude a licensable activity
- Refuse to specify a person as DPS (where police have objected to DPS)
- Reject the application

Notification of decision



- The decision may be given immediately or within 5 working days.
- It must be accompanied by reasons.

The mandatory conditions



- Whether the licence is granted with or without objection, the authority must attach the mandatory conditions to the licence

Mandatory conditions



1. No sale where no DPS or where DPS does not hold personal licence.
2. Every sale of alcohol must be made or authorised by a personal licensee.
3. Admission to be filmed in accordance with age classification of BBFC or licensing authority.
4. Where licence requires door supervision, supervisors to be SIA-licensed.
5. Compliance with mandatory code

Mandatory code



1. Irresponsible promotions (e.g. drink all you can for £10, or drink all you can within limited time) banned
2. Dentist's chair banned
3. Free tap water
4. Age verification policy
5. Smaller measures (1/2 pint for beer, 25 or 35 ml for spirits and 125 ml for wine)
6. Ban on selling below duty + VAT

Mandatory code



- Enforcement of mandatory code conditions will be by licensing authorities, trading standards authorities and the police.
- However, some of the drafting of the conditions is complex and problematic.
- It is more likely that breach of conditions will be enforced informally and through review applications, rather than prosecution.

Appeal



- Time for appeal: 21 days from notification. (Most authorities state in decision letter that the letter = notification.)
- Applicant may appeal against refusal or imposition of conditions
- Interested party / responsible authority may appeal against grant or conditions imposed (or not imposed)
- Where applicant appeals, court has discretion to add interested party / responsible authority as a party to the appeal
- Case on appeal is heard afresh, but court will only interfere if it considers that authority's decision is **wrong**.
- Court may make such costs order as it thinks fit

The golden thread



Operator reads policy before completing operating schedule.
Operator suggests conditions to comply with policy.



Interested party benchmarks application against policy, making any representations based on non-compliance with policy.



Licensing officer makes recommendations to committee based on contents of policy / highlights relevant parts of policy.



Licensing sub-committee makes decision based on policy, using criteria in the policy to formulate conditions.



On appeal, magistrates use policy as a starting point.



PART 6: BRIEF OVERVIEW OF REVIEW POWERS

Review



- Any person or a responsible authority may bring application for review
- Following application, notice is given to responsible authorities
- Application is advertised
- Any person / responsible authorities may then join in by making representations within 28 days

Striking out applications



Applications by “any persons” will be struck out if they are:

- Irrelevant to the licensing objectives
- Frivolous or vexatious
- Repetitious, in that they are identical or substantially similar to representation made on previous review or application and a reasonable period has not elapsed.

Striking out representations



Representations by any persons will be struck out if they are:

- Not made by a person who qualifies as an interested party
- Irrelevant to the licensing objectives
- Frivolous or vexatious
- Repetitious.

Pre-hearing procedures



- Hearing to be held within 20 days of last date for representations
- Notice of hearing 10 working days before hearing

The hearing



- Similar procedures to premises licence applications

Exercise of powers



- The authority may only interfere with the licence if it considers it appropriate in order to promote the licensing objectives.
- If it does interfere, then it must do so proportionately, i.e. to the minimum appropriate to achieve the promotion of the objectives in the individual case.
- In the case of crime, it may act to deter others, but generally, the role is regulatory, i.e. to prevent recurrence.
- However, the job is preventive. E.g. the authority can and must **promote** the **prevention** of crime and disorder.

Powers



The authority can:

- Modify conditions of licence
- Exclude a licensable activity
- Remove DPS
- Suspend licence for up to 3 months
- Revoke licence

The sanction only “bites” after 21 days or, if there is an appeal, when appeal is withdrawn or determined.



OTHER REVIEW PROCEDURES

Summary review



- Police may bring summary review of alcohol premises in case of serious crime and/or disorder. One incident suffices.
- Authority must consider interim measures within 48 hours: the modification of licence conditions, cessation of alcohol sales, removal of DPS, suspension of licence.
- Licensee can apply to vary interim measures.
- Review to be completed within 28 days of application
- Responsible authorities and other persons may participate
- Authority may: amend conditions of licence, exclude alcohol sales from licence, remove DPS, suspend for up to 3 months, revoke licence.
- The appeal decision does not bite immediately (as above). There is dispute whether interim steps bite pending appeal.

Review following closure



- Police / local authority may serve closure notice closing premises immediately in the case of disorder or nuisance
- Notice is for 24 hours extendable to 48 hours
- Within 48 hours of closure notice, magistrates court must decide whether to issue a closure order for up to 3 months.
- Authority must then review the licence and reach a decision within 28 days of notification of magistrates' decision
- Authority may take any steps available to it on review

Appeals



- All parties may appeal
- Powers etc as above



PART 7: PERSONAL LICENCES

Personal Licences



- Personal licences authorise an individual to supply alcohol
- Premises licences will contain a mandatory condition that no alcohol is to be supplied on the premises without being authorised by a personal licence holder
- All DPS's must hold a personal licence

Personal Licences



New Applications

- Made to the Licensing Authority for the area in which the applicant usually lives (“ordinarily resident”)
- The following documents need to be submitted with the application:
 - Application form
 - Fee
 - Endorsed photograph
 - Evidence of licensing qualification
 - Criminal Records check

Personal Licences



The Licensing Authority **must grant** the licence if the applicant:

- is over 18
- possesses a relevant licensing qualification
- has not had a licence forfeited in the last five years; and
- has had no convictions for relevant offences including foreign offences

Licence is valid unless / until forfeited on conviction for a relevant offence.

Discretion to refuse



- Where relevant offences, police may object on crime prevention grounds
- Licensing authority may then refuse

Personal Licences



The personal licence must:-

- Specify the name and address of the holder
- Identify the Licensing Authority that granted it
- Record each relevant offence and foreign offence stating the date of each conviction and the sentence imposed

Personal Licences



Revocation or suspension of personal licence

- Where a personal licence holder is convicted of a relevant offence the court may order the revocation of the licence or suspend the licence for a maximum period of 6 months



PART 8: CLUB PREMISES CERTIFICATES

Club premises



- Qualifying members' clubs
- Lighter touch regulation
- No personal licence holder
- No designated premises supervisor



PART 9: TEMPORARY EVENT NOTICES

Temporary event notices



- Permit alcohol sales, music, dancing, etc.
- Maximum annually:
 - 12 events per premises
 - 21 days per premises maximum
 - 168 hours per event
 - 499 people maximum at a time
- Procedures:
 - Standard TENS
 - Minimum 10 working days prior to event
 - Objection only by police and environmental health authority
 - Objection leads to hearing
 - Late TENS
 - 5 -9 working days prior to event
- Objection by police or environmental health operates as veto

Using a temporary event notice



- An extra hour on the pub licence for a party
- An extra licensable activity, e.g. a disco in a bar
- An unlicensed venue, e.g. a beer tent at a fair



PART 10: DOOR SUPERVISORS

Door Supervisors



- Separate licensing regime
- Private Security Industry Act 2001
- Security Industry Authority (SIA)
- Condition on premises licence that door supervisors have to be licensed
- Approved contractor scheme (voluntary)



PART 11: EVIDENCE AND INFERENCE

Purpose



- This part examines:
 - The meaning of the term “evidence” in licensing hearings under the Licensing Act 2003.
 - The kind of material needed to underpin inferences by Licensing Sub-Committees of potential harm to the licensing objectives.

The essence:



In essence:

- Licensing Sub-Committees may use their common sense to make judgments – i.e. inferences - about potential harm and what is appropriate to avoid it.
- In doing so, sub-committees may draw upon any material before them, including local knowledge, upon which it is rational to rely, regardless of whether it would qualify as “evidence” in a court.
- There is no case law suggesting the contrary.
- If, which is not the case, Thwaites suggested the contrary, it would be contrary to binding Court of Appeal authority.



The nature of decision-making under the Licensing Act 2003

The appropriateness test



- In contested applications, the authority may take such steps (if any) as are appropriate to promote the licensing objectives.
- A similar test applies for reviews.

A graded approach



- “If any” means that if steps are not appropriate they should not be taken.
- The human rights concept of proportionality prevents measures which are not reasonably required to achieve the desired.
- The common law concept of reasonableness has the same effect.
- E.g. if a potential problem can be overcome by using a condition, it should not be appropriate to refuse the licence.

Risk aversion



- Licensing decision-making is like risk assessment.
- The risk is identified and appropriate, proportionate steps are put in place to avoid it.

Summing it up....



- “Appropriate to promote” does not mean that if the step is not taken, then the feared outcome **will** occur.
- It simply means that taking the step is appropriate for promoting the regulatory goal.
- This conclusion is an important one in approaching the main question....



The main question



Upon what **material** may the authority conclude that a particular step is appropriate to promote the regulatory goal?

The administrative nature of licensing functions



- Licensing is administrative decision-making, not a court process.
- In general, such decision-making involves taking account of any material which it is rational to take into account and to give it the weight it deserves.
- Nothing in LA03 demands a different approach.

Fact finding v judgment



- Sometimes there will be primary **factual** issues to resolve:
 - Is the noise audible next door?
 - Was the licence condition breached?
- In deciding issues of fact, the Committee is not a criminal court. It does not need proof beyond reasonable doubt of any fact in issue.
- It finds facts on a balance of probabilities.



- But almost always, the case will come down to a value judgment:
- On the basis of what has been agreed and what we have found, what steps are appropriate to promote the licensing objectives?
- In some cases, all the facts are agreed, and the only question is what steps are appropriate.

Building blocks



- Every contested issue of fact and every judgment has to be underpinned by **something**.
- Let us term this “building blocks.”
- The question is whether the building blocks have to be made of material which would be allowed in a court of law.
- The answer has been supplied by the higher courts on many occasions.

R v Deputy Industrial Injuries Commissioner ex parte Moore (1965)



‘These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event, the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.’

(per Diplock LJ)

Kavanagh v Chief Constable of Devon and Cornwall (1974)



- The Court of Appeal applied **Moore** to licensing.
- Dealing with hearsay, it held:
 - Neither the decision-maker nor the appeal court is bound by the strict rules of evidence.
 - They can act on any material which appears useful in coming to a decision, regardless of whether it would be admissible in a court of law.
 - This includes their own knowledge.
 - They are not only entitled, but obliged to take into account all relevant matters.

McCool v Rushcliffe (1998)



“I conclude that, in reaching their respective decisions, the Borough Council and the justices were entitled to rely on any evidential material which might reasonably and properly influence the making of a responsible judgment in good faith on the question in issue. Some evidence such as gossip, speculation and unsubstantiated innuendo would be rightly disregarded. Other evidence, even if hearsay, might by its source, nature and inherent probability carry a greater degree of credibility. All would depend on the particular facts and circumstances.”

(per Lord Chief Justice Bingham)

The effect of the case law



- Licensing authorities are charged with evaluating and avoiding risk in the public interest.
- Councillors are not judges and do not pronounce guilt or innocence.
- The evaluation of risk is a value judgment, carried out for the protection of the public.
- To dismiss material from consideration because it would not be admissible in a court of law is to abandon common sense, wisdom and judgment, and to place the public at risk by ignoring material which may well be helpful.
- This would run counter to the very objectives of the licensing system.
- The courts have repeatedly recognised this and have given councillors full authority to use their common sense on such material as they consider relevant.

Is there any limit?



- The only limits upon what relevant material an administrative body may take into account are:
 - Relevance – it must be relevant to the licensing objectives.
 - Link to the application. E.g. if the application is to add an hour on the licence, the condition should not affect operations at some other hour.
 - Rationality – it must not be perverse to rely on it.
 - Fairness – if an authority intends to rely on material, e.g. its own knowledge – it must give the parties an opportunity to deal with it.



The evidence-free case

1. No factual contest



- A nightclub wants to open until 3 a.m. in a residential street.
- Residents object on grounds of risk of nuisance from departing customers.
- There is no further evidence than that.
- Local councillors may use their common sense and (if applicable) local knowledge to make a value judgment that shorter hours are appropriate and proportionate to promote the licensing objectives.
- I.e. they make an **inference** from the known facts.

2. Policy



- A policy may presume against particular applications, e.g. in cumulative impact areas.
- The effect of a presumption is that, absent evidence justifying a departure from the policy, the licence is to be refused.
- No further evidence is necessary to underpin a refusal.
- This is because the policy leads to an **inference** of risk of harm, unless the inference can be rebutted in an individual case.



Thwaites v Wirral Borough Magistrates Court

The myth of Thwaites



- Nothing in Thwaites affects what has been said above.
- The above Court of Appeal authorities were not cited.
- The Judge had no authority to depart from them anyway.
- In any case, the Judge did not purport to do so.
- The case was a decision on its facts.
- So what did Thwaites decide?

Facts



- Applicant sought longer hours.
- Police withdrew objection following negotiation.
- No EHO representations.
- Local residents objected.
- Licensing authority **granted** the application.
- Residents appealed.
- **By the time the appeal was heard, the premises had been trading to the contested hours for many months with no problems.**
- The magistrates however used their local knowledge to allow the appeal.

The judgment of Black J



Black J said that:

- magistrates could use their local knowledge, but should measure their views against the evidence presented to them;
- magistrates should have looked for “real evidence” that greater regulation was required.

Explanation of judgment



- Black J was obviously stating that the Justices' conclusions (inferences) were irrational in the light of:
 - lack of harm in past
 - responsible authorities were not suggesting there would be any harm.
- She was obviously **not** saying that Justices may not rely on own knowledge, or hearsay, or material which is inadmissible in a court of law.
- She was simply saying that it was not reasonable for the Justices to come to the conclusion they did on the material which had been presented.



Conclusion



- Licensing is not an exercise in shutting the stable door after the horse has bolted, but in identifying and taking appropriate and proportionate steps to avert risk.
- Such steps as are appropriate will usually arise as a matter of **inference** rather than **evidence**.



- Authorities may act on any material appearing to them to be relevant whether or not it would technically be admissible in a court of law.
- Nothing in the Licensing Act 2003 alters that position.
- Thwaites does not create an evidential threshold for regulatory action. It was a decision on its own facts.
- Authorities can, and should, continue to reach sensible decisions in the public interest.
- In doing so, they are making **inferences** as to what is appropriate and proportionate to avert risk in the individual case.



PART 12: STRATEGIES FOR COUNCILLORS

Strategies for councillors



1. Policies
2. Applications
3. Reviews

Strategies on policies



Councillors can play a strong role in formulation of licensing policy. E.g.

- What is the vision for the town centre?
- What approach is taken to hours?
- What management standards are required?
- What is the enforcement policy?
- Is a restraint policy necessary (location, hours, stress)?

Strategies on applications



1. Councillors can use their position to ensure that representations are made by their constituents, e.g. local residents and businesses, residents' associations and chambers of commerce.
2. Councillors can represent those who have objected at the hearing itself.
3. They can use their powers to object in their own right. It is recommended that they do so a) where they reasonably believe that the application should not be granted in its current form and b) when they believe that they can **add** to the representations being made. Obviously, objections should not be made for political motives.

Content of objection



1. The objection should explain why **this** proposal in **this** place at **these** hours will fail to promote the licensing objectives. (Therefore, the councillor must have read the whole of the application)
2. It should link the representation to the licensing objectives. E.g. “the application will fail to promote the crime prevention objective because...”
3. It should refer specifically to any parts of local licensing policy which bear on the application.
4. It should explain whether the objection would be met were the proposal to be revised (hours, conditions) and, if not, why not.
5. It should contribute relevant information, e.g. the proximity of residential areas or other sensitive uses, or a mounting problem of cumulative impact in the area.
6. It should avoid all contentious language and deal strictly with the issues.

Pre-hearing preparation



1. Councillors should note that information given for the first time at the hearing is likely to be disregarded.
2. It is good practice to compile a statement expanding on the representation with, e.g. any maps, photographs, correspondence, supportive letters etc. This should be paginated. Most authorities compile an officer's report to members. To ensure inclusion, this should be sent 7 days in advance.
3. Are you going to call witnesses? Ensure they can come.
4. Consider what, if any, concessions can be made.
5. Prepare any questions you intend to ask the other party.
6. You might be given time to sum up the case. Prepare to deliver your best points in bullet form. Why do you deserve to succeed? Why does the opposition not?

The hearing



The hearing proceeds as a discussion.

Do:

1. Put your points succinctly
2. Be fair to the other side
3. Be prepared to discuss.
4. Put your argument in the context of the authority's **powers**. E.g. it is not enough to say it is a bad application. You must be able to say that in order to promote the crime prevention objective it is appropriate to do more than require door supervision, and why.
5. Draw on contents of policy to make your points.

Don't:

1. Argue with the chair
2. Berate the opposition
3. Make any bad points. Discard all but your best.
4. Try to dominate the discussion. Your turn will come!

Appeal



- While a councillor could in theory appeal or appear on an appeal, it is not recommended that s/he should do so.
- There is a personal costs risk attached to the exercise.
- If no other interested party or responsible authority considers an appeal worthwhile, an appeal brought just by a councillor does not stand high prospects of success.

Strategies on reviews



- Reviews are only one means of achieving regulatory goals.
- Others include prosecution, fixed penalty notice, abatement notice, planning enforcement notice, controlled drinking zone, dispersal powers, drink banning orders, test purchasing, closure powers.
- Positive powers include Purple Flag and Best Bar None.
- Therefore, ask **is review the best means?**
- Find out beforehand whether the application will be supported by interested parties and responsible authorities.

Dangers of review applications



- If a poor review is brought, it may rule out a later, meritorious, review as repetitious
- The review itself may be struck out as frivolous or irrelevant
- An application by a councillor which is not supported by local residents may carry little weight
- If it has no evidential support, it is likely to fail

Alternative review strategies



- Speak to local groups re. their right to apply for review
- Represent local people or groups in their review
- Make representations on reviews brought by others, including reviews following closure and summary reviews
- Speak to responsible authorities re. their exercise / non-exercise of powers.

Contents of review application



1. The application should explain why this operation is failing to promote the licensing objectives.
2. It should, so far as possible, be based on evidence, although hearsay evidence (“I am told that....”) is admissible.
3. Submissions should be linked to the licensing objectives. E.g. “the opening hours are causing a public nuisance because customers are walking immediately under the bedroom windows at 2 a.m., often shouting or screaming.”
4. It should refer specifically to any parts of local licensing policy which bear on the application.
5. It should explain whether the complaint would be alleviated were the proposal to be revised (hours, conditions) and, if not, why not.
6. It should contribute relevant information, e.g. the proximity of residential areas or other sensitive uses, or a mounting problem of cumulative impact in the area.
7. It should avoid all contentious language and deal strictly with the issues.
8. Ideally, it should state what result the councillor wishes to achieve.

Pre-hearing preparation



1. Councillors should note that information given for the first time at the hearing is likely to be disregarded.
2. It is good practice to compile a statement expanding on the application with, e.g. any maps, photographs, correspondence, supportive letters etc. This should be paginated. Most authorities compile an officer's report to members. To ensure inclusion, this should be sent 7 days in advance.
3. Are you going to call witnesses? Ensure they can come.
4. Consider what, if any, concessions can be made.
5. Prepare any questions you intend to ask the other party.
6. You might be given time to sum up the case. Prepare to deliver your best points in bullet form. Why do you deserve to succeed? Why does the opposition not?
7. The licensee may ask to meet you to discuss your application. It is tactically unwise to refuse. You might even resolve the matter through negotiation.

The hearing



The hearing proceeds as a discussion.

Do:

1. Put your points succinctly
2. Be fair to the other side
3. Be prepared to discuss.
4. Put your argument in the context of the authority's powers. E.g. it is not enough to say that the premises are badly run. You must be able to say that in order to prevent public nuisance, it is appropriate to curtail the hours, and why.
5. Draw on contents of policy to make your points.

Don't:

1. Argue with the chair
2. Berate the opposition
3. Make any bad points. Discard all but your best.
4. Try to dominate the discussion. Your turn will come!

Appeal



- While a councillor could in theory appeal or appear on an appeal, it is not recommended that s/he should do so.
- There is a personal costs risk attached to the exercise.
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PART 13: COUNCILLORS AS DECISION-MAKERS: LICENSING SUB-COMMITTEE HEARINGS

Principle 1: The Committee sets the procedure



- Committee hearing, not a Court of law.
- Within the scope of the regulations, Committee to set and control its own procedure.
- Proviso: procedure to be fair and offer an equal opportunity to all parties to present their case.

Principle 2: Remember the purpose of the procedure



- To enable those with a right to appear to advance their point of view and to test the case of their opponents; and
- To assist the Committee to gather evidence and understand the relevant issues.
- If procedural issue arises, basic purposes to be kept in mind.
- Within the boundaries of fairness, needless formality is to be avoided.

Principle 3: Establish the ground rules



- Establish at outset, to:
 - Avoid conflict later.
 - Facilitate the smooth running of the hearing.
 - Tell parties what to expect.
- E.g.
 - Order of presentation and closing submissions.
 - Dealing with conditions proposed by the parties.
 - Maximum time for presentation.
- This should have been set out in procedure notes sent to parties in advance.



- Chair to indicate:
 - Members have read papers and understand issues.
 - Therefore points do not require repetition.
 - Where multiple parties, preferable for spokesman to be appointed: repetition to be avoided.

Principle 4: The Committee may accept hearsay evidence



- Hearsay evidence is when a witness gives evidence of something they did not see or hear, but were only told about. For example:
 - My neighbour says they were kept up all night.
 - My son saw under-18s being served.
 - The newspaper reported there was a fight.
 - I got a letter from a local resident which said they could hear the bass beat from the amplifier.
- The Committee is entitled to listen to hearsay evidence, although the weight it attaches to such evidence may be less given that it cannot be tested by cross-examination.
- Therefore, the Committee may accept a petition, which amounts to the written views of the signatories, subject to the proviso that only limited weight can be attached to it, because the individual views will not have been tested before it.

Principle 5: Evidence is any material which persuades



- The requirement for evidential basis means no more than that decision must be based on material which enables an inference to be drawn regarding future risk.
- It is not necessary that there be evidence, as understood by a criminal court, that a particular harm would on balance occur.
- The true boundary is:
 - rationality (sanity) and
 - fairness (applicant to be given a chance to answer the case against him).
- For example, evidence might include local knowledge such as general experience of problems in the town centre, provided that the intention to rely on it is disclosed to the parties so that they can make submissions about it.

Principle 6: Late objections inadmissible



- This is the law.

Principle 7: New information excluded



- The Committee cannot receive new documentary or other information at the hearing without the consent of all parties, which is unlikely to be given.
- Parties should have been encouraged to submit their material well in advance so that it can be included as an appendix in the agenda papers.

Principle 8: The Committee should ensure fair treatment of witnesses



- Protect witnesses from being berated or interrupted.
- Require the witness to answer the actual question and prevent them from straying from the point.

Principle 9: The Committee should ensure a level playing field



- Maximum times to be enforced.
- Party B entitled to reply to submission by Party A.
- If Committee questions a witness, other parties entitled to ask questions arising.

Principle 10: The Committee may oil the wheels



- Committee may cut through issues:
 - Is point x really contested?
 - Committee has heard and understood the point.
 - Point has been dealt with.
 - Would a condition not deal with this?
 - Do you want to add to what witness abc has said?

Principle 11: The Committee may investigate



- The Committee has the right to ask questions. It follows that it may demand answers.
- It is entitled to probe the information it has been given.
- Questions such as what, when, where, how and why are legitimate.
- Questions such as “I find it hard to believe that...” are inadvisable.

Principle 12: The Committee should be pro-active with conditions



- Ask for draft conditions for use **if** the Committee is minded to grant the application.
- Check whether issue is over principle or wording or both.
- Make clear that this is to save time and narrow the issues: there has been no pre-judgment.
- Invite comment on proposed conditions before imposing them.
- Do not impose conditions unless it is appropriate and proportionate to do so.
- Avoid duplication: if the obligation is adequately covered by a different statutory regime, it is unlikely to be appropriate to condition it.
- Always consider whether objections may be overcome by conditions.

Principle 13: Do not express view re. merits before giving decision



- Duty to behave impartially.
- Do not make up mind until end.
- Do not appear to do so.
- Do not discuss merits with press or residents.

Principle 14: The Committee should rely on its legal adviser as to matters of law



- Including:
 - Interpretation of the Licensing Act 2003.
 - Other statutory provisions creating legal duties, such as section 17 of the Crime and Disorder Act 1998 (duty to do all it reasonably can to prevent crime and disorder) and Human Rights Act 1998.
 - Admissibility of evidence.
 - Rules of procedure, under Regulations / common law fairness.
 - Lawfulness / enforceability of conditions
- Advice to be given, or repeated, in open session and parties' comments invited.

Principle 15: The Committee should draft thorough reasons



- Parties have a legal right to know why they have won or lost.
- Badly drafted reasons weaken case on appeal.
- Reasons should:
 - Refer to every relevant representation.
 - Start with the policy.
 - State the extent to which it has taken account of Guidance and policy
 - When deciding in accordance with policy, explain why it has not considered a departure justified.
 - When deciding contrary to policy, explain the basis and reason for the departure.
 - When refusing in whole or in part, or attaching further conditions, state both that it considered it appropriate to do so in order to promote one or more specified licensing objectives and why this was so.
 - Committee may use legal adviser in helping it to draft its reasons, but the reasons must be the Committee's.
- Do not invite licensing officers to retire with Committee.

The model licensing committee member



- Discusses the case with no-one
- Checks in with Monitoring Officer if there is a risk of appearance of bias or predetermination.
- Pre-reads the papers
- Listens
- Asks relevant questions
- Avoids expressing any opinion on the merits of the application or the witnesses
- Consults the legal advisor on the law
- Produces reasons which explain why a party has won/lost and which will withstand scrutiny on appeal

General principles of decision-making



- All authorities have local codes of conduct based on the Nolan principles of:
 - Selflessness.
 - Integrity.
 - Objectivity.
 - Accountability.
 - Openness.
 - Honesty
 - Leadership
- All decisions should be taken in accordance with such principles.



QUESTIONS?