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Your ref:

Our ref:

Date: 26th August 2008

Dear Sir

LICENSING ACT 2003

CONSULTATION ON PROPOSALS TO INTRODUCE A SIMPLIFIED PROCESS FOR MINOR VARIATIONS TO PREMISES LICENCES & CLUB PREMISES CERTIFICATES

This letter is the response of the Council of the London Borough of Newham in relation to section 2 of the consultation document issued on the 4th August 2008 by the Department for Culture, Media and Sport.

This Council is strongly opposed to the proposals for 'minor variations' as set out in the said section 2 of the consultation document. We consider that the proposals are imprecise, seriously flawed, and circumvent the philosophy and intent of the Licensing Act 2003. We are particularly concerned that the proposals can be perceived generally as devices to: -

- delegate the role and responsibilities of the elected members of the Council sitting on the Licensing Committee/Sub-Committees to junior officer level (i.e. Licensing Officers), and
- to circumvent the normal statutory rights of interested parties (e.g. residents) and responsible authorities to be aware of variation applications and make representations.

The only parts of the proposals that we are happy to accept are:

- Small alterations to the layout of a premises, as set out in numbers 8.41 and 8.42 of the Draft Guidance, and
- Licence Conditions as set out in as set out in numbers 8.51 to 8.55 of the Draft Guidance.

Our reasons for our opposition to the rest of the proposals are:

1. The proposals are so imprecise and flawed that we believe if they were to be implemented that they will become a potential breeding ground for legal action (e.g. Judicial Reviews) against Licensing Authorities, and will also lead to public discontent and lack of confidence in the licensing regime.
2. If enacted the proposals would mean that practically every variation that does not involve the sale/supply of alcohol can be classified as coming under the proposed minor variation procedure.(e.g. variations to include adult entertainment such as lap dancing,

will become 'minor' variations). We believe that this is completely wrong, and can be perceived as a means by whereby the licensing trade can attempt to increase their licensable activities, hours of operation etc, without residents being aware and being able to object.

3. The proposals will bring in fundamental and adverse implications to the role of the Licensing Committee/Licensing Sub-Committees set up under the Act, in that their powers of decision are recommended to be delegated to Licensing Officers. We believe that the proposals can be perceived as an attempt to adversely circumvent and seriously weaken the Licensing Committee/Licensing Sub-Committees statutory role and responsibilities, and thus lead to serious loss of public confidence in the licensing regime.
4. The Licensing Act introduced a regime of licensing, whereby the Licensing Authority and Licensing Officers had to remain impartial with regard to the processing of applications and the procedure was to be regarded as purely a simple administrative function (numbers 9.1 and 9.3 of the current S182 Guidance). This is further reinforced in the Act by the fact that the Licensing Authority is not a responsible authority for the purposes of making representations or seeking review of licences (unlike their role under the Gambling Act 2005). It is implicit in the Licensing Act and the current s182 Guidance that the Licensing Authority and Licensing Officers have no statutory or other role to play in the assessment of applications in relation to the licensing objectives – such responsibilities lie with the responsible authorities. The only time that the powers of the Licensing Authority are engaged is if representations are made against an application.

The proposals will seriously change the statutory role and function of 'Licensing Officers' and make them solely responsible for

- (i) licensing objective assessments under the minor variation procedure (this is made quite clear in no 8.36 of the document),
- (ii) assessing and determining whether licence conditions offered by applicants are sufficient and satisfactory to address the licensing objectives, and
- (iii) determining minor variation applications (i.e. deciding whether an application should be refused or granted).

This is clearly contrary to the intention and spirit of the Licensing Act 2003, the current Guidance and Regulations, and poses serious questions as to the new direction that the licensing regime is being taken.

5. Whilst the proposals may be 'streamlined' and 'cost efficient' for the licensed trade, the converse is true for Licensing Authorities. We do not accept the costs and the proposed fee of £70 in the consultation document accurately reflect the costs to this Council of the proposed new minor variation regime. Whilst Officer/administration time and cost are dealt with in our reply to Question 2 of the consultation document, there are several other substantial costs that will be incurred by this Council. These additional costs if not addressed by the Government will have to be recovered from the ratepayers of Newham. The additional costs include:
 - The review of the Council's existing Licensing Policy as a result the fundamental changes brought about by the proposed minor variation procedure. This Council last reviewed its Policy in 2007 and issued a new Policy in accordance with the Act in January 2008. Therefore the only reason for the review and the substantial costs incurred will be solely as the result of the proposals being enacted.
 - The cost of training Licensing Officers to become fully competent in their new responsibilities under the Act (e.g. to achieve qualifications in acoustics so that they can assess the acoustic properties of premises and the suitability of noise reduction conditions offered by applicants).

- There will inevitably be increased costs involved in dealing with local enquiries, complaints and for any resulting enforcement costs where there is a reduction in local input into the licensing process.

With regard to the questions in section 2 of the consultation document, we would without prejudice to the above matters) respond as follows:

QUESTION 1

NO: The draft Order does not reflect the proposed minor variation process described in section 2, Chapter 1 of the Consultation document. In addition, we have identified the following problems with the draft Order:

- The proposed Order is so imprecise and flawed, that there is the likelihood of legal action (e.g. judicial reviews) and other action being taken against Licensing Authorities in connection with the Order. In addition the content of the Order, as drafted, imposes unnecessary and adverse cost and resource implications on Licensing Authorities.
- 41A, B & C, 86A, B & C: No definition of 'minor variation' anywhere in the order. Without such definition in the Order it is not possible for us to legally interpret the meaning of these words or decide whether the application can be classified as being 'minor'.
- 41A(3)(b) and 86A(3)(b): No definition of 'vary substantially'. Without such definition in the Order it is not possible for us to legally interpret the meaning of these words or reject an application on the grounds that the application is to 'vary substantially' the premises.
- 41A(3)(d)(i) and (ii), and 86A(3)(d)(i) and (ii): These two subsections are contradictory to each other. Does the Order exclude the sale of alcohol at any time of the day as in subsection (i) or just the sale of alcohol at any time between 11pm and 7am as in subsection (ii)? It would seem to us that subsection (ii) is unnecessary.
- 41B(5) and 86B(5): The period of 10 working days is too short, taking into account that a Licensing Officer has to make an assessment of the premises under the licensing objectives, liaise with responsible authorities etc, draft and liaise with the Legal Dept. on the required formal legal notice [under s41(C)]. Enquires of some of the responsible authorities (including the Newham Division of the Metropolitan Police and Environmental Health) concerning the proposed time limits have revealed that they would not be able to carry out the necessary assessments and respond to the Licensing Officer within the proposed time limit. We strongly recommend that the period is increased to at least 20 working days.
- When the Licensing Authority is unable because of circumstances outside of its control (see above bullet point) to make a determination within the time limit, the Order does not address whether or not the application is deemed refused, granted or pending. It is essential that the Order be amended so that it is clear what the statutory position is in such circumstances.
- 41C(1) and (2), and 86C(1) and (2): As the proposed new Order does not apparently tie in with the relevant sections of the Licensing Act 2003 (Premises licences and club premises certificates) Regulations 2005, it would appear that :
 - There is no statutory requirement for a formal licence to be issued reflecting the variation, and the grant is by way of a 'notice'. Is the notice to read in conjunction with the original licence or does the notice completely replace the original licence. The order must make the position clear.

- Upon the grant of the minor variation, the Licensing Authority does not have any statutory power to impose any conditions consistent to those offered by the applicant on the application form. Power to impose such conditions must be made in the Order.
- The form of the 'notice' should be set out in the Order.
- 41C(4): The form of the 'notice' should be set out in the Order
- 41C(5): Bearing in mind the Governments intention that Licensing Authorities should delegate the decision for rejection to Licensing Officers, the contents of this subsection clearly leaves the Licensing Authority open to legal challenge (i.e. judicial review) on grounds that the Licensing Officer has not given comprehensive reasons in the 'statement'. The subsection should be amended so that the Licensing Authority only has to state what licensing objectives it feels will be affected and not the reasons behind its decision.

Question 2

NO: We consider the draft Guidance to be ineffective in view of the deficiencies in the draft Order. However we would comment on the Guidance as follows:

- 8.36. The Government should clarify its recommendation in the second sentence by giving guidance on when the decision making process should not be given to Licensing Officers (i.e. in what circumstances it would not be normal for the decision making process to be delegated to a Licensing Officer). Without adequate guidance, this Council must reserve its rights to consider that the proper body for the decision process for all minor variation applications is the Licensing Committee/Sub-Committee.
- 8.38 The limit of 10 working days is impractical (see paragraph 6 of Q1 above) e.g. takes no account of having to obtain comments from responsible authorities, the extra time etc that the Licensing Authority will have to take in assessing and deciding the application and seeking legal advice (i.e. on the wording of the required 'statement' of 'reasons'). We are of the opinion that the proposed work involved in the process will be more extensive and time consuming for a Licensing Officer than if they were to deal with an ordinary section 34 variation.
- 8.44. The draft Order does not make any provision for the issue of a licence following the grant of a minor variation application (just the issue of a 'notice'), nor does it make any provision for imposing licence conditions put forward by the applicant. Therefore we cannot see how the Licensing Officer can take any account of proposed licence conditions in their consideration of the application.
- 8.45 We can not see how the Government can expect Licensing Officers to become experts on specialist subjects that are rightly the responsibility of the expert responsible authorities (i.e. it should not be for Licensing Officers to determine whether 'any noise reduction conditions volunteered by the applicant' are suitable, this is the proper role of the Environment Health as a responsible authority under the Act).
- 8.46. We are extremely concerned that the minor variation procedure would enable applicants to apply for variations to include adult entertainment such as 'lap dancing' and that if sufficient and suitable conditions were offered, the Licensing Officer would have no option but to grant the application. We believe that all contentious applications should be the subject of the normal s34 variation procedure (including public notices of

the application) irrespective of whether the applicants have submitted sufficient and suitable conditions.

- o 8.47. We do not consider that it is the right and proper role of the Licensing Officer to consider the factors. The proper and rightful role for the assessment of the factors should lie with the responsible authorities and ultimately with the Licensing Committee/Sub-Committee.
- o 8.49. Our comments are the same as in 8.47 above/

Question 3

NO: The proposed statutory time period does not take into account the increased amount of work and responsibilities that the proposals will place on Licensing Officers, and is also a completely inadequate time period for the obtaining of 'comments' from responsible authorities. Therefore it is highly likely that due to the undue legislative burden placed on us by the proposals and our obligations with regard to the licensing objectives that we will not be able to comprehensively deal with the applications within the time period. As not being able to deal with the applications within the time periods is the making of the Government and not this Council, we require that if a Council cannot determine an application within the time period, that the application be automatically deemed refused and that there be no statutory or other comeback on the Council for such automatic refusal.

Question 4

TOO LOW: The figure of £70 is too low (except for variations made in accordance with numbers 8.41, 8.42 and 8.51 to 8.55 of the Draft Guidance). We strongly contest the total time of 2 hours stated in section 4.3 of the consultation document. It is not possible for a Licensing Officer to deal with an application within 0.25 hours, bearing in mind all the assessments (including possible visits to the premises and the vicinity of the premises)and other work (e.g. liaising with up to 8 responsible authorities etc), that he/she would have to do under the draft Guidance and Order. The proposed fee should therefore cover the work undertaken by the Council and we would recommend that the proposed fee be no less than the total shown below:

1.75 hours of administrative time at £32.12/hr =	£56.21
2.00 hours of professional (licensing officer) time at £68.85/hr =	<u>£137.70</u>
	TOTAL = <u>£193.01</u>

The figure also does not take into account the substantial additional costs that the Council will have to incur in connection with the proposals (e.g. review of Licensing Policy, training of Licensing Officers) which we have referred to previously in this response. The cost of providing a comprehensive licensing service both to local businesses and to local residents who may be affected by the activities of such businesses already exceeds the total fee income from the applications received. Any action taken to reduce the overall fee income will inevitably have an adverse effect on the ability of Newham to ensure that the objectives of the Licensing Act 2003 are met.

QUESTION 5

YES, except for the following: -

- The 'Part 4 Operating Schedule' includes a tick box for the 'Sale by retail of alcohol', this is likely to cause confusion to applicants e.g. believe that can apply for increase in the hours or for alcohol to be added to their licence, despite the application notes. We would recommend that the 'Sale by retail of alcohol' is amended to 'Reduction in the hours for the sale/supply of alcohol and/or imposition of new licence conditions relating to the

sale/supply of alcohol'. This would prevent confusion and the Council having to reject invalid applications.

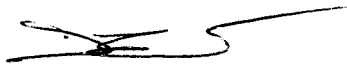
Question 6

NO, the form does not provide sufficient information

- We are extremely concerned that there is no specific section concerning the provision of adult entertainment/services on the application form. We would strongly recommend that section N of the s34 variation application form be inserted into the proposed minor variation application form.

Finally, we would like to say how pleased we are that the Government has apparently recognised the adverse impact and implications caused by the sale/supply of alcohol between the hours of 11pm and 7am. However, it would be beneficial if the Government could extend that recognition and those hours to the rest of its s182 Guidance.

Yours Faithfully



D Grant
Licensing Manager