

WANDSWORTH BOROUGH COUNCIL

LICENSING COMMITTEE – 3RD APRIL 2007

Report by the Head of Environmental Services and Community Safety in his capacity as Chief Licensing Officer on the consultation paper issued by the Department for Culture Media and Sports on revised Guidance made under Section 182 of the Licensing Act 2003.

SUMMARY

The Licensing Act came into force on the 24th November 2005. Under section 182(1) the Secretary of State must issue guidance to licensing authorities on the discharge of their functions under the Act and section 182 (3) gives him power to revise the guidance from time to time. The Guidance was first issued in July 2004 and on the 1st December 2005 the Secretary of State for Culture, Media and Sport announced the Government's intention to conduct a two phase review of the Guidance. The first phase was limited to clarifying uncontroversial issues raised with the Government during the transitional period and the second phase was designed to be a full review of the Guidance. The Council's response to the first phase was set out in Paper No. 06-348.

The Government has now issued a consultation document seeking the views of Licensing Authorities on proposed changes to the statutory Guidance. This forms the second phase of the review which addresses two main areas; substantive policy issues and the format and style of the Guidance document. The consultation document advises of the proposed changes to the Guidance and seeks responses to each. Licensing Authorities also have the ability to suggest changes outside those proposed by Government but there is no scope to change primary or secondary legislation. Set out in the report are comments from Wandsworth on changes that would ease the burden on the licensing system and the Government has asked consultees to submit their responses by the 11th April 2007

GLOSSARY

DCMS	Department for Culture Media and Sport
The Act	The Licensing Act 2003
DPS	Designated Premises Supervisor

1. **Recommendation.** The Licensing Committee are recommended to confirm the response set out in paragraphs 9 – 22 of this report as the Council's response to the Government's consultation document on revised Guidance made under Section 182 of the Licensing Act 2003.

Licensing Act 2003 Consultation on Guidance

2. **Introduction.** The Licensing Act 2003 came into force on the 24th November 2005. Section 182(1) of the Act states 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 guidance from time to time.
3. The Guidance is intended to aid licensing authorities in carrying out their functions under the 2003 Act and to ensure consistent and fair application of licensing powers by licensing authorities. Section 4(3) (b) of the Act provides that, in carrying out its licensing function, a licensing authority must have regard to this Guidance. The Guidance is referred to in all reports produced by the Chief Licensing Officer in respect of applications for new and varied licences under the Licensing Act 2003.
4. The Guidance was first issued in July 2004. On the 1st December 2005 the Secretary of State for Culture, Media and Sport announced the Government's intention to conduct a two phase review of the Guidance. The first phase was limited to clarifying uncontroversial issues raised with Government during the transitional period. This was reported to the Committee in Paper No. 06-348 in April 2007. The second phase was designed to be a full review of the Guidance and this consultation document is the subject of this report.
5. **Phase One review.** The scope of the initial review focussed on providing clarification of, and additions to, the existing Guidance in areas where there was broad consensus amongst stakeholders, consolidated advice given during transition and corrected simple factual errors. This stage involved dialogue with stakeholders but did not involve full consultation. Supplementary Guidance came into force on the 22nd June 2006.
6. **Full review of the Guidance.** The full review of the Guidance is aimed at addressing two areas, substantive policy issues and the format and style of the Guidance document.
7. The DCMS issued a consultation document on the proposals for change to the Guidance in January 2007 with responses to be sent to them by the 11th April 2007. In considering any revision to the Guidance it must be noted that the Government does not intend to amend primary legislation or regulations and hence they will not take into account any responses which deal with matters that can only be addressed through primary or secondary legislation. A copy of the Consultation document and the proposed new Guidance has been lodged in the Members room.
8. **Consultation - Substantive issues.**
9. **Definition of 'in the vicinity'**
The legislation states that an interested party must either live or be a person involved in business "in the vicinity" of premises seeking a premises licence or club premises certificate, or be a body representing a person living or involved in business "in the vicinity". Vicinity is not defined in the Act or regulations. The Guidance suggest some factors which licensing authorities should consider in deciding vicinity as follows 'for example, whether the individual's residence or business is likely to be directly affected by disorder and disturbance occurring or potentially occurring on those premises or immediately outside those premises'. The Guidance states that 'it is expected that the decision will be approached with common sense and individuals living and working in the neighbourhood or area immediately surrounding the premises will be able to make representations'. The DCMS has considered whether to expand on the factors that the

licensing authority might consider when deciding vicinity but have decided that the Guidance should remain unchanged to give the maximum local flexibility.

Response: We agree that there should be no prescriptive definition of 'in the vicinity' and licensing authorities should have discretion to allow representations from a wider area as they see necessary. This would then allow a wider area to be defined, if necessary, as a ward or even wider area when the premises in question attracts large numbers of patrons and there are issues about dispersal late at night causing nuisance to residents outside the immediate area of the premises. As well as this it would be helpful to see some additional examples possibly derived from challenges that licensing authorities have faced at Magistrates Court (whilst accepting that these do not form a legal precedent).

10. Incidental music. The provision of live or recorded music is not regarded as the provision of regulated entertainment if it is 'incidental' to some other activity which is not itself entertainment or entertainment facilities requiring a licence. The Guidance gives advice on some of the factors that should be taken into account when determining whether music can be considered incidental e.g. music would be incidental if played at a level that does not predominate over other activities such as a juke box played in a pub at moderate levels or music incidental to stand up comedy. The DCMS has recommended that the current guidance on incidental music be expanded by removing the reference to volume and replace with 'in considering whether or not, against a background of the other activities taking place, the addition of music will create the potential to undermine the four licensing objectives of the Act'. Other factors affecting the decision might include whether the music is the main reason for attending the premises, is the music advertised as the main attraction and/or does the volume of the music disrupt or predominate over other activities?
11. Conversely factors which would not normally be relevant include, the number of musicians e.g. an orchestra may provide incidental music at a large exhibition, whether musicians are paid, whether the performance is pre-arranged and whether a charge is made for admission to the premises.'

Response: In general the proposed amendment seems sensible, expanding the guidance while retaining local flexibility to deal with the unexpected. However, we would urge that the reference to the volume of music is not removed as a consideration as it is the Council's view that this could be significant in reaching a decision. In addition, we would strongly recommend that the amended should read 'Is the music advertised as the main or a principal attraction.' It is our view that a live show of a popular band would be licensable even if that formed part of another entertainment such as a fair or charitable event. To keep the wording as proposed would be unnecessarily restrictive.

12. Cumulative impact policies. Cumulative impact is not mentioned in the Act or in Regulations. The Guidance defines it as 'the potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area'. The Guidance goes on to provide further guidance on the creation and limitation of cumulative impact policies. Following representations on seeing special policies being applied to areas other than town centres, and widening the scope to off-sales the DCMS has considered whether to amend the Guidance.

Response: It is disappointing to note that the request for the guidance to be amended with respect to off sales premises has been rejected. There has been an increase in demand for

licences for off sales premises in this Borough which could well impact on the licensing objectives in an area if unchecked. Whilst each individual application may well be acceptable, the cumulative impact could be detrimental to the area. Whilst accepting that the Guidance does not preclude special policies for off sales premises it sees it as exceptional. The development of cumulative impact policies is, in any event difficult, and it does not assist to have such negative Guidance in respect of off sales premises.

13. Conditions. Chapter 7 of the Guidance provided general advice on conditions which may be attached to licences and Annexes D-F provide pools of conditions which could be applied for the promotion of each of the four licensing objectives and in theatres, cinemas, concert halls and similar places where these are appropriate and necessary. The DCMS are seeking views on whether the inclusion of such a pool of conditions discouraged licensing authorities and responsible authorities from developing other innovative conditions and encouraged duplication of other statutory requirements. Alternatively they are asking whether a central source of advice and guidance on terms and conditions would encourage a consistent approach across licensing authorities which could be updated and amended as necessary.

Response: This authority wishes the Annexes to be retained. Neither the Licensing Committee, South Western Magistrates Court nor responsible authorities have felt bound by the conditions in the Guidance if another condition is more relevant to the particular application. However, the published pool of conditions assists applicants when drawing up their operating schedules and do promote consistency. It is acknowledged that they may become outdated and hence we would support the setting up of a body (or indeed asking an existing cross party body such as the Institute of Licensing) to regularly review the pool of conditions.

14. Role of Councillors in the licensing process. The Guidance currently advises that Councillors may represent an interested party or make representations as an interested party themselves if they reside in the vicinity of a licensed premises (as long as they do not participate in the decision making process). However this is subject to the code of conduct for local authority members which provide that a councillor who has a prejudicial interest in a matter must withdraw from the meeting where the item is being considered. The DCMS has recommended that the Guidance should be amended to further clarify the role of Councillors in the licensing process and to expand on the concept of prejudicial interest. It also advises that there is nothing to prevent licensing authorities notifying ward councillors of licensing applications provided that the information they provide is strictly neutral. The Guidance will make it clear that this is not a legal requirement and hence authorities will have to bear this cost themselves.

Response: This Authority agrees that the current guidance on the role of ward Councillors should be further clarified and expanded but this must take into account any changes arising out of the amendments to the rules on prejudicial interest, currently under consultation. However, the proposed alteration to the wording of the Guidance does not clarify the situation. It is unclear whether a ward Councillor, where not representing an interested party, can make representation in their own right as a resident in the vicinity or whether they can make a representation on behalf of their ward constituents, whether or not individual resident representations have been received. If it is the latter, does the ward Councillor have to live in the vicinity of the premises? It is the Council's view that as Ward Councillors are representatives of the local community, and

are aware of local concerns, they should be allowed to speak at licensing hearings for premises within their ward and not be prevented from representing these views at hearings. It is accepted that they should not be allowed to vote on premises in their own wards.

The consultation document indicates that the guidance will be altered to clarify the position regarding notification to councillors of new applications. This is indeed the case; however the clarification regarding the fact that this cannot be borne by the licence fee has not been included.

15. Role of Designated Premises Supervisor and Personal Licence Holder. Paragraph 4.18 of the Guidance relates to the role of the Designated Premises Supervisor (DPS). Amongst other matters it advises that neither the DPS nor, indeed, any personal licence holder need be on the premises all of the time but may authorise others to sell alcohol, either verbally or in writing. The DCMS is now recommending that the Guidance be amended to:-
- (a) advise that written authorisation is recommended, as it clearly demonstrates due diligence in the event of any review or prosecution whilst clarifying that this is not a legal requirement; and
 - (b) further suggests that neither the DPS nor a personal licence holder needs to be on the premises at all times while expanding on the responsibilities of the DPS and personal licence holder, whether or not they are on the premises.

Response: The expansion of the section on the role of the DPS and personal licence holders is welcomed although, without statutory authority, it remains to be seen whether the Courts uphold the general recommendation that authorisations should be in writing. Documented training records of staff (other than personal licence holders) may equally suffice although not actually an overt act of authorisation. It is the Council's view that authorisations should always be in writing and should in fact be a mandatory requirement.

There has been a considerable amount of discussion as to whether a DPS may have enforcement action taken against them should a member of staff e.g. sell alcohol to a child. The Guidance seems to imply that they, or another Personal Licence holder, retain responsibility for ensuring compliance with the Licensing Act 2003. However, this may not be the case. Further clarification on this matter would be welcome.

16. Variations. Section 34 of the Act allows the holder of the premises licence to apply for a variation of their licence. The original Guidance introduced the word 'major' as a means of describing all variations other than those relating to the change of name or address of someone named in the licence or specification of a designated premises supervisor. The word major was not thought to be helpful as it raised the expectation that there were minor variations and hence it is proposed that this term be removed. There has also been considerable confusion as to when a variation application should be made or when a new application should be made. The DCMS have recommended a tightening of the guidance relating to this matter.

Response: Whilst welcoming the removal of the word 'major' and the expanding of the guidance relating to applications to change name or address or DPS, the remainder of the proposed amendments do not address licensing officers concerns.

The examples of when a new premises licence would be required are very poor and do not address the fundamental question of whether a new or variation application should be made when a refit of a premises is carried out. Whilst there is no provision in the legislation for plans to be provided in the case of a variation application, most applicants would be happy to provide one where they are seeking to alter the internal layout of the premises. A variation application in such circumstances would be less confusing for interested parties as they would be clear that the application was not for a brand new business and that the hours and licensable activities were not changing whilst still allowing the opportunity for representation to be made. New applications are seen as such, i.e. that it will be a new business with unknown ownership and style.

Guidance is also required as to what level of refit would need a new or variation application. Would the re-positioning of fridges or a reduction of the area in a store used for the sale of alcohol require a new or variation application? Would an off-licence moving alcohol from one shelf to another or a pub reducing the length of the bar warrant a full application? Licensing authorities are currently dealing with the above examples differently. Some will simply replace existing plans with new plans where the changes are deemed minor in nature, others will ask for a variation application while others a new application in the same circumstances.

It is in the interest of licensing authorities to encourage premises licence holders to notify them of minor variations of layout. These often do not have an impact on the licensing objectives but it is seen essential that licensing plans are accurate. Fees and advertising costs for new or variation applications will mean that small business are unlikely to inform licensing authorities of such changes. The light touch approach to enforcement could mean that such alterations will not be picked up unless something has gone wrong.

In view of the above it is recommended that the Guidance be amended to allow licensing authorities the discretion to accept amended plans only in the case of minor alterations and that more significant alterations could be subject to a variation application if plans are provided. This discretion should allow licensing authorities to require plans and a variation application in cases where, although apparently only including minor alterations, could result in a significant change in the operation of the premises.

17. Nature of evidence required to support representation. Currently interested parties are not required by law to provide supporting evidence for representations and, in the case of new premises, this may not be possible. Concerns have been expressed to the DCMS that conditions may be imposed without the necessary evidence to support them. Suggestions have also been made that the Guidance should contain guidelines to licensing committee members on deciding on the weight to be given to representations of various kinds. The DCMS have considered the current Guidance and do not propose to make amendments.

Response: We support the recommendation that the Guidance should remain unchanged. Licensing committee members have now obtained considerable experience on hearing contested applications and are, normally, advised by a legal representative. Any party aggrieved by a decision may appeal. Further guidance on deciding on the weight to be given to representations is, therefore, felt to be unnecessary.

18. Representations: Disclosure of names and addresses. The Act requires any interested party making a representation to provide their name and address. Licensing authorities have reported that in isolated cases residents may be reluctant to make representations for fear of intimidation. Licensing authorities have taken different approaches to this. The DCMS are seeking views on whether the Guidance should be amended to give examples of strategies to deal with isolated cases of intimidation or whether this is an area in which no particular approach should be promoted.

Response: We support the suggested amendments to the Guidance giving examples of strategies to deal with the exceptional and isolated circumstances where interested parties have justifiable reasons to think that the release of their personal details could leave them open to intimidation or violence. The examples for dealing with such eventualities are advisory only and do not preclude a licensing authority from taking an alternative action.

19. Control of nuisance/crime and disorder outside licensed premises. The DCMS have reviewed the Guidance on the control of nuisance and crime and disorder outside licensed premises and propose that it be amended to better explain the legal responsibilities 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.

Response: We would support amendments to the Guidance to better explain the legal responsibilities 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. However, we do not think that proposed amendments shown in paragraph 1.23 of the amended guidance provide a better explanation of these matters. The amendments do not address the responsibility of licensees for taking reasonable measures to control drinking outside the premises, either on the street or in a beer garden neither does it emphasize the need for any conditions to be within the capability of the premises licence holder and not to be aspirational. The proposed wording indicates that conditions covering this area can only be imposed following review. In fact conditions could be imposed in respect of new or variation applications if relevant representations so indicate.

20. Paragraphs on longer hours. Concerns have been expressed that the Guidance has a presumption in favour of longer hours. The DCMS are proposing that the paragraphs on longer hours should be re-drafted to reflect The Secretary of State's letter of the 30th September 2005 to all licensing authorities which emphasised that the Act contains no presumption for longer hours but that the four licensing objectives are the paramount concern in determining any application.

Response: This Authority welcomes the amendment to the Guidance to say that there is no general presumption in favour of lengthening licensing hours and the four licensing objectives should be paramount considerations at all times.

21. Police Powers to Close Premises. The Act limits the statutory Guidance to guidance to licensing authorities about the carrying on of their licensing functions under the Act. Chapter 11 of the Guidance gives advice to the police on the operation of closure powers under Part 8 of the Licensing Act 2003. It is proposed that this chapter be removed as it does not sit well with statutory guidance to licensing authorities. Instead specific advice will be produced by the Home Office and ACPO dealing with problems at licensed premises

which will be disseminated to all police forces.

Response: We agree that Chapter 11 should be removed from the Guidance. However, it is requested that any specific advice drawn up by the Home Office and ACPO should be made available to licensing officers and Environmental Health Officers for their information.

22. Sale and supply of alcohol to children and other offences. Chapter 12 of the current Guidance describes offences relating to the sale and supply of alcohol to children while Chapter 14 describes other offences under the Act. The DCMS are seeking to delete these Chapters from the statutory Guidance as they feel that the information in the Guidance is repetitious of the content of the Act and that it is inappropriate for the Government to give guidance on the issue of prosecution.

Response: In general terms we would accept that the description of offences within the Guidance is a duplication of the legislation and that it is not for Government to give advice regarding prosecution. However, there is some merit in having the possible offences included somewhere in the Guidance for example as has been done for offences relating to the sale and supply of alcohol to children, new paragraph 2.49.

23. Format. The format of the Guidance has been substantially revised with the aim of making it more user-friendly, concise and easy to navigate. The key changes are:-

- (a) A new foreword by the Secretary of State;
- (b) A new introductory chapter setting out the aims and principles of the legislation;
- (c) A new chapter on the four licensing objectives incorporating much of the information originally included in Chapter 7, Conditions;
- (d) The original Chapter 5 (Premises Licences) split into five new chapters for ease of reference; and
- (e) The original Chapter 3 on Statement of Licensing Policy moved to the back of the document to reflect the fact that licensing authorities need to read the previous chapters before determining their licensing policy.

*Response: The change to the format of the Guidance is welcomed. On a small point, we think that new paragraphs 4.19 – 4.28 relating to designated premises supervisors should have its own chapter in the Guidance (new paragraph 5)
We would strongly urge the publication of the amended Guidance in loose leaf form printed on recycled paper. In this way alterations can be made to sections of the Guidance (e.g. the Annexes) without the need to re-publish the whole document.*

24. Other Issues. The DCMS are asking whether there are any other issues that should be addressed in the revised Guidance.

Response: We would welcome an expansion of the section dealing with vehicles (new paragraphs 5.20 and 5.21) to cover party limousines and buses, where the sale takes place before or after travel in the vehicle. We have also been approached by a person who wishes to sell alcohol from a vehicle that is travelling around (like an ice cream van) and guidance on this would be appreciated. Further guidance on internet sales where alcohol is imported direct from another country to a customer would also be welcomed. Whilst it is recognised that the Guidance cannot cover every eventuality, the above issues are

current and not localised in nature.

The smoking legislation will come into effect in July of this year. This could have an impact on the licensing objectives, most notably on the prevention of public nuisance objective but also, potentially, on the public safety and prevention of crime and disorder objectives. Previously the Guidance indicated that smoking was not a matter for licensing authorities. We would seek an amendment to the Guidance to indicate that the flouting of smoking legislation could be a grounds for review of a licence having regard to the prevention of crime and disorder licensing objective. In addition, we would seek guidance on whether the use of a pub garden for purposes of smoking which results in nuisance to adjoining residents could be grounds for review.

Finally we would request that either in the chapter on Reviews or the chapter on Appeals. Guidance is given on when the decision of the licensing committee takes effect – immediately or following 21 days or when any appeal has been decided.

P. J. COPELAND
Head of Environmental Services and Community Safety
(as Chief Licensing Officer)

Reed House,
Frogmore Complex,
London,
SW18.

22nd March 2007

Background papers

The following background papers were used in the preparation of this report.

1. Guidance Issued under section 182 of the Licensing Act and Guidance to Police Officers on the Operation of closure powers in Part 8 of the licensing Act 2003. This consultation document is available on the DCMS website at http://www.culture.gov.uk/Reference_library/Publications/archive_2004/guidance_issued_under_section_182_of_the_licensing_act_2003.htm

All reports to Overview and Scrutiny Committees, regulatory and other committees, the Executive and the full Council can be viewed on the Council's website (www.wandsworth.gov.uk/moderngov) unless the report was published before May 2001, in which case the committee secretary ([REDACTED]) can supply a copy.