

Perceived inconsistency between planning and licensing controls – Briefing Paper.

Introduction

An issue has been raised regarding the imposition of different limitations on the hours of opening of premises through the licensing and planning regimes.

Whilst there is some overlap of the regimes, they are regulated through different statutes and this can sometimes result in different outcomes due to the different matters which may be taken into consideration in reaching decisions under these regimes. However, it is understandable that when two services of the Council reach different decisions on the same premises, members of the public can perceive this as inconsistent decision making and this paper seeks to highlight the reasons why the same premises may be required to close at different times by the planning and licensing teams.

Planning

Development is controlled under the Planning Acts and usually planning permission is required if a material change of use of the building is proposed.

When a planning application is received for property to be used for example as a restaurant, pub, take away shop, etc. local people are consulted before a decision is taken on the application. In many cases the public will express concern that the new business will cause a nuisance for people living in the vicinity.

Planning guidance states clearly that a planning application should not be refused if it is possible to make it acceptable through the imposition of conditions. In some cases applications are permitted with conditions restricting business closing times as this could address issues relating to late night disturbance.

Planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise. This means that the planning authority can consider a wide range of factors including: highway safety, residential amenity, ecology and design.

Once planning permission is granted it is not normally possible to revisit the decision and impose tighter controls. One exception to this might be if another planning application for development of a different nature is proposed, for example to change a restaurant to a bar.

Licensing

Licensing control is exercised under the Licensing Act 2003. This Act introduced an integrated licensing regime that resulted in the previously separate licensing regimes including music and dancing, the sale of alcohol, etc. all being subjected to the same laws and policies, with the licensing of the sale of alcohol passing over from the magistrates to district and borough councils.

At the transition stage of the Act, all premises licensed with the magistrates had a legal right to keep the same hours and conditions under the new Licensing Act. Many of the hours and conditions issued by the magistrates were not consistent with planning requirements. Conversely, many of the older establishments had few planning restrictions, yet were obliged to close earlier under the licensing laws.

As a result of the introduction of the Licensing Act 2003, the Council inherited a system of terms and conditions often contradicting planning permissions. This is not to say that this was legally irregular in any way but simply demonstrates that the Licensing Act 2003 did not change any principles in this respect.

Section 182 of the Licensing Act 2003, obliges Councils to have regard to and follow statutory guidance issued by the Home Office which requires:

“That planning, building control and licensing regimes will be properly separated to avoid duplication and inefficiency. The planning and licensing regimes involve consideration of different (albeit related) matters. Licensing committees are not bound by decisions made by a planning committee, and vice versa.”

“There are circumstances when as a condition of planning permission, a terminal hour has been set for the use of premises for commercial purposes.

Where these hours are different to the licensing hours, the applicant must observe the earlier closing time. Premises operating in breach of their planning permission would be liable to prosecution under planning law. Proper integration should be assured by licensing committees, where appropriate, providing regular reports to the planning committee.”

The latest version of the S182 Guidance comments at 9.45, *“Where businesses have indicated, when applying for a licence under the 2003 Act, that they have also applied for planning permission or that they intend to do so, licensing committees and officers should consider discussion with their planning counterparts prior to determination with the aim of agreeing mutually acceptable operating hours and scheme designs.”*

The Licensing Act 2003 provides that a Licensing Committee may sub-delegate the exercise of its functions to a sub-committee made up of three people called a Licensing Panel.

When granting a licence, the Council must follow the guidelines in the relevant acts and these are different to of the guidelines for Planning. In the case of the Licensing Act, every decision must be taken having regard to the promotion of the four licensing objectives set out in the Act, which are:-

- the prevention of crime and disorder
- public safety
- the prevention of public nuisance
- the protection of children from harm

There is a further important difference between planning and licensing which is that unlike a planning application, if no relevant representations (i.e. representations relating to the licensing objectives) are received by a licensing authority during the consultation period then the licensing authority must grant the licence as applied for together with such conditions as are consistent with the operating schedule submitted by the applicant and mandatory conditions if appropriate. It is only if relevant representations are received that the application will be determined by the licensing panel and the statutory guidance issued to licensing authorities by the government is very clear on how licensing authorities should approach that duty:

The licensing authority “may then only impose conditions that are appropriate to promote one or more of the four licensing objectives.”

The Act is clear that decisions must not duplicate restrictions imposed by other statutes. Therefore, a decision based on the desire for the Licence to be consistent with planning laws would be legally unsafe.

The Licensing Panel has the right to revoke or suspend a licence after its grant if valid complaints and specific evidence of undermining the Licensing objectives are received. This is achieved by an application to review the premises licence which can be submitted by the police, responsible authorities, other persons (members of the public), borough councillors and Fylde Council itself as the Licensing Authority.

The issue of the relationship between licensing and planning was also considered by the High Court in *The Queen on the application of Blackwood v Birmingham Magistrates and The Birmingham City Council* [2006]. In this case a judicial review challenge was brought by a local resident against the decision of the Magistrates, on appeal from the Licensing Committee, to grant a variation of a premises licence. In summary, the main ground of challenge was that the Magistrates had failed to take account of relevant planning matters raised by the appellants and in doing so had acted unlawfully. The judicial review challenge was rejected by the High Court. The judge, Deputy Judge Parker QC, whilst noting that there was an overlap between the objectives of planning and licensing, stated at paragraph 62 of his judgment:

“It was not for the Magistrates in a licensing appeal under the Act to examine whether the proposed variation required planning consent or to speculate whether, if it did, such consent would be forthcoming. That would be a planning matter falling exclusively within the competence of the planning authority.”

Although this case was concerned with licensing, the Court made it clear that, whilst there is some overlap, the two regimes are separate and distinct.

Planning Practice

Whilst there is no current planning policy in place that sets out a specific closing time (for either premises or external areas) current planning practice at Fylde is to limit the use of external dining and drinking areas in those circumstances where the premises are close to existing residential properties and there is potential for disturbance to residents. In making

planning decisions it is necessary to have regard to material considerations and there may, therefore, be occasions where it is appropriate to allow later use of external areas, for example where there are no residential properties in the immediate vicinity or where there is already a degree of activity and associated disturbance.

Any planning policy would be best pursued through the adoption of a Supplementary Planning Document (SPD). Until that time it is proposed that planning applications are determined on their own merit having regard to the consistent application of the limitation of hours of use of external dining areas. Where the hours of use are proposed to be permitted beyond 9.00pm, the reasons for such extension would be set out in the committee or delegated report. The adoption of an SPD would only be material in the determination of planning applications and would not address the perceived inconsistency between planning and licensing.

Summary

In taking planning decisions, the council can only take into account matters relevant to planning. In taking licensing decisions, the council can only take into account matters relevant to the licensing objectives. In either case, a decision taking into account irrelevant factors could be legally challenged. Inconsistent decisions between the two committees should therefore not be viewed as necessarily demonstrating a failure of either process.

On the contrary, it would not be unusual for the two regimes to reach separate conclusions as they involve consideration of different (albeit related) matters. For example, licensing considers public nuisance whereas planning considers amenity. As such licensing applications should not be a re-run of the planning application and should not cut across decisions taken by the local authority planning committee or following appeals against decisions taken by that committee. Licensing committees are not bound by decisions made by a planning committee, and vice versa.

Where a condition of planning permission and a premises licence allow different terminal hours for the use of premises, the operator must observe the earlier closing time or be at risk of enforcement action. This is widely understood and accepted within the hospitality industry and by planning and licensing councillors.

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