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Case No: CO/8028/2005

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2006

Before :

THE HONOURABLE MR JUSTICE BEATSON

- -

Between :

The Queen on the application of JD Wetherspoon plc	**Claimant**
- and -	
Guildford Borough Council	**Defendant**

- -
- -

Sir Richard Beckett QC and Stephen Walsh (instructed by **McLellans**) for the **Claimant**
Philip Kolvin (instructed by **Guildford Borough Council**) for the **Defendant**

Hearing dates: 7 and 8 March 2006

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Judgment

Mr Justice Beatson :

1 Introduction

1. In this application the claimant challenges the refusal by the defendant to grant its application under the Licensing Act 2003 for a variation of the permitted hours of its Lloyds No 1 Public House located in Bridge Street, Guildford. The Licensing Act 2003 introduced a new regime for licensed premises. The Act required licence holders to apply for the conversion of their licences. Paragraph 7 of Schedule 8 (dealing with transitional provisions) enabled licence holders to apply under section 34 for the variation of an existing licence at the same time as they applied for its conversion. In this judgment, unless otherwise stated, references to statutory provisions are to the Licensing Act 2003.

2. On 1 July 2005 the claimant applied to the defendant for the conversion and variation of the premises licence of its Lloyds No 1 Public House in Bridge Street. In particular it sought an extension of the permitted hours by 3 hours a day from 11 pm to 2 am. On 5 July 2005 the Surrey Police objected to the application. The matter came before the defendant's licensing sub-committee on 30 August 2005. The sub-committee decided not to grant this extension in the light of a cumulative impact policy the defendant adopted as part of the policy the Act required it to put in place. The claimant, which operates a large number of pubs throughout the country, challenges the defendant's application of the cumulative impact policy to the proposed variation. Sir Richard Beckett QC, on its behalf, submitted that the application raises a question of general importance to the licensed trade and to those involved in the implementation of the Licensing Act 2003. This is because it raises for the first time the inter-relationship between special cumulative impact policies and the general policy of the Act. It is not, however, the first occasion on which the new statutory and regulatory regime has come before the courts: see *R (British Beer and Pub Association and others) v Canterbury City Council* [2005] EWHC 1318 (Admin). Mr Kolvin argued on behalf of the defendant that the case in fact turns on the local application of a local policy by the duly elected licensing authority. The Chief Constable of the Surrey Police is named as an interested party but took no part in the hearing before me.

2 The statutory and regulatory regime

3. The new licensing regime contains three layers; the statutory provisions in the 2003 Act, guidance approved by each House of Parliament and issued by the Secretary of State, and the policies made and published by individual licensing authorities.

2.1 The Licensing Act 2003 and the Hearings Regulations

4. In *R (British Beer and Pub Association and others) v Canterbury City Council* [2005] EWHC 1318 at paragraph 4 Richards J, as he then was, stated:

> "The Act created a new licensing scheme, introducing a single integrated scheme for licensing premises which sell alcohol or provide regulated entertainment or provide late night

> refreshment. It replaces the previous separate regimes regulating liquor, public entertainment, cinema, theatre and late night refreshment licensing. It transfers primary responsibility to local authorities, with magistrates' courts exercising a purely appellate jurisdiction. It also introduces the concept of dual licences, one relating to the premises and authorising licensable activities on those premises (the premises licence), the other being held by the person responsible for the day-to-day operation of the premises (the personal licence)."

5. The Act provides that licensing authorities must carry out their functions with a view to promoting the four licensing objectives set out in section 4(2). These objectives, which are central to the legislation, are; the prevention of crime and disorder, public safety, the prevention of public nuisance, and the protection of children from harm.

6. Sections 16 to 25 deal with applications for premises licences and sections 34 to 41 with applications to vary a premises licence. The material parts of sections 34 to 36 are set out in paragraph 8 of this judgment. Broadly speaking a licensing authority must grant an application for a licence or to vary a licence where it does not receive relevant representations about the application: sections 18(2) and 35(2). It may impose conditions consistent with the applicant's operating schedule and the mandatory conditions concerning the supply of alcohol, exhibition of films and door supervision for which provision is made in the statute: sections 18(2)(a) and (b), 19 to 21, and 35(2). Where relevant representations are made, the authority must hold a hearing (unless those who have made representations agree this is unnecessary) and having regard to the representations, take such of the steps mentioned in section 18 (4) (if any), as it considers necessary for the promotion of the licensing objectives. The steps include granting the licence subject to conditions, excluding any of the licensable activities to which the application relates, refusing to specify a person in the licence as the premises supervisor, and rejecting the application.

7. Provision for the second layer of the regime is made by section 182. This requires the Secretary of State to issue guidance to licensing authorities on the discharge of their functions. The Secretary of State may not issue the guidance unless a draft of it has been laid before, and approved by resolution of, each House of Parliament. Provision for the third layer is made by section 5. This requires each licensing authority to determine and publish its policy with respect to the exercise of its licensing functions in respect of each three year period. Before doing so the authority must consult the persons listed in section 5(3), including the police, the fire authority, and representatives of the holders of licenses, businesses and residents in its area. In carrying out its licensing functions, a licensing authority must have regard to its statement of licensing policy (section 4(3)(a)) and to the Secretary of State's guidance (section 4(3)(b)).

8. The application that has given rise to these proceedings is an application to vary a premises licence and thus governed by sections 34 to 41 of the Act. It is only necessary to set out extracts from sections 34 to 36.

"34 Application to vary premises licence

(1) The holder of a premises licence may apply to the relevant licensing authority for variation of the licence....

35 Determination of application under section 34

(1) This section applies where the relevant licensing authority -

(a) receives an application, made in accordance with section 34, to vary a premises licence, and

(b) is satisfied that the applicant has complied with any requirement imposed on him by virtue of subsection (5) of that section [which concerns the form and manner the applicant must advertise the application].

(2) Subject to subsection (3) and section 36(6)[which prohibits variations to extend the period for which the licence has effect or to vary substantially the premises to which it relates], the authority must grant the application.

(3) Where relevant representations are made, the authority must -

(a) hold a hearing to consider them, unless the authority, the applicant and each person who has made such representations agree that a hearing is unnecessary, and

(b) having regard to the representations, take such of the steps mentioned in subsection (4) (if any) as it considers necessary for the promotion of the licensing objectives.

(4) The steps are -

(a) to modify the conditions of the licence;

(b) to reject the whole or part of the application;

and for this purpose the conditions of the licence are modified if any of them is altered or omitted or any new condition is added.

(5) In this section "relevant representations" means representations which -

(a) are about the likely effect of the grant of the application on the promotion of the licensing objectives, and

(b) meet the requirements of subsection (6).

(6) The requirements are -

(a) that the representations are made by an interested party or responsible authority within [the prescribed period],

(b) that they have not been withdrawn, and

(c) in the case of representations made by an interested party (who is not also a responsible authority), that they are not, in the opinion of the relevant licensing authority, frivolous or vexatious.

...

36 Supplementary provision about determinations under section 35

(1) Where an application (or any part of an application) is granted under section 35, the relevant licensing authority must forthwith give a notice to that effect to -

(a) the applicant,

(b) any person who made relevant representations in respect of the application, and

(c) the chief officer of police for the police area (or each police area) in which the premises are situated.

(2) Where relevant representations were made in respect of the application, the notice under subsection (1) must state the authority's reasons for its decision as to the steps (if any) to take under section 35(3)(b).

...

(4) Where an application (or any part of an application) is rejected under section 35, the relevant licensing authority must forthwith give a notice to that effect stating its reasons for rejecting the application to -

(a) the applicant,

(b) any person who made relevant representations in respect of the application, and

(c) the chief officer of police for the police area (or each police area) in which the premises are situated.

(5) Where the relevant licensing authority determines for the purposes of section 35(6)(c) that any representations are frivolous or vexatious, it must notify the person who made them of the reasons for that determination.

..."

9. Section 35(6) refers to representations made by an "interested party" or a "responsible authority" and section 35(3) and (5) to "relevant" representations. Section 13(3) provides that "interested party" means a person living in the vicinity of the premises or involved in a business in that vicinity or a body representing such persons and section 13(4) that "responsible authority" means any of a number of public officials or bodies in the area in which the premises are situated. In particular the chief officer of police, the fire authority, the enforcing authority under section 18 of the Health and Safety at Work Act 1974, the local planning authority, and a body which represents those who are responsible for or interested in the protection of children from harm and are recognised by the licensing authority as being competent to advise it on such matters are responsible authorities. By section 35(5) for a representation to be a "relevant representation" it must concern the likely effect of the grant of the application on the promotion of one or more of the four statutory licensing objectives set out in section 4(2) and listed in paragraph 5 above.

10. The Licensing Act 2003 (Hearings) Regulations SI 2005 No. 444 make provision for the holding of hearings required to be held by licensing authorities under the Act. Regulation 16(c) gives the parties the right *inter alia* to address the authority at a hearing. Regulation 23 provides that a hearing shall generally take the form of a discussion led by the authority. Regulation 24 provides that the licensing authority must allow the parties an equal maximum period of time in which to exercise their rights under regulation 16. By Regulation 18, the licensing authority may take into account documentary or other information produced by a party in support of their application, representations or notice (as applicable) either before the hearing or, with the consent of all the other parties, at the hearing.

2.2 The Secretary of State's guidance

11. The Secretary of State published her guidance in July 2004. Together with the Annexes to the guidance it is almost 180 pages in length. Paragraphs 3.13-3.28 deal with the cumulative impact of a concentration of licensed premises in an area. Paragraph 3.13 states that these paragraphs are concerned with "the potential impact on the promotion of the licensing objections of a significant number of licensed premises concentrated in one area". Paragraph 3.16 states that "where a licensing authority is satisfied that it is appropriate and necessary to include an approach to cumulative impact" it should indicate in its statement of licensing policy that "it is adopting a special policy of refusing new licences whenever it receives relevant representations about the cumulative impact on the licensing objectives". Such policies are referred to as "cumulative impact" policies and also as "stress" and "saturation" policies. Paragraph 3.17 requires that there be an evidential basis for a cumulative impact policy and paragraph 3.18 sets out the steps that a licensing authority must take before such a policy may be adopted.

12. Paragraph 3.19 states that the effect of adopting a cumulative impact policy is "to create a rebuttable presumption that application for new premises licenses or club premises certificates or material variations will normally be refused if relevant representations to that effect are received". Other aspects of this part of the guidance and in particular what is stated about the limitations on special policies relating to

cumulative impact are considered in paragraphs 54-55, 62, 63, 66 and 70 of this judgment.

2.3 The Defendant's statement of licensing policy

13. The defendant's statement of licensing policy, adopted on 17 November 2004, came into effect on 7 January 2005. The policy includes special provision relating to cumulative impact in paragraphs 9.13 to 9.22, and states that this is done as provided for in paragraphs 3.13 to 3.27 of the guidance issued by the Secretary of State. The cumulative impact policy applies to the Bridge Street area of Guildford.

14. The opening paragraph of the defendant's statement of its special policy on cumulative impact states the Bridge Street area "has been identified as being under stress because the cumulative impact of the concentration of late night and drink led premises in this area has led to serious problems of crime, disorder and/or public nuisance". The defendant's decision to designate Bridge Street as an area subject to a cumulative impact policy is not challenged in these proceedings (see paragraph 43 of this judgment) so that it is not necessary to consider the evidential basis for the policy in detail. For an understanding of the matters that are in issue, it suffices to note the following information that is contained the defendant's statement of its licensing policy. There was a 54% increase in alcohol related offences in the borough between April 2003 and March 2004, 90% of the alcohol related offences in the town centre occurred in just five streets. Of these five streets, Bridge Street had the largest (113%) increase in such offences with responsibility for about 9% of alcohol related offences though containing only 1% of the licensed premises in the borough: see paragraphs 9.2 and 9.3 and Annex 6 of the policy. Before me there was also evidence about the concentration of and the capacity of the licensed premises in Bridge Street from Inspector Kelley of the Surrey Police Force, and Mr Mattock, the defendant's licensing services manager. The agreed facts were that the total capacity of all licensed premises on Bridge Street was over 4,000. The capacity of the claimant's premises was about 850.

15. Paragraph 9.15 of the defendant's statement of policy states that there will be a rebuttable presumption that applications for new premises licences or club premises certificates within the Bridge Street area, or for material variations, will be refused if relevant representations are received about the cumulative impact on the licensing objectives. The presumption will be rebutted if an applicant demonstrates why the operation of the premises involved will not add to the cumulative impact already being experienced. Paragraph 9.16 states that applicants "will need to address the special policy issues in their operating schedules in order to rebut such a presumption".

16. Paragraph 9.20 of the policy states that while the council will not take "need" into account when considering an application, "the impact on the promotion of the licensing objectives of the number, type and density of licensed premises in a given area may lead to serious problems of nuisance and disorder outside and some distance from the premises. This is described as the 'cumulative impact', and is a proper matter for consideration by the Council".

17. Paragraph 9.21 sets out two situations in which the Council states it will not use the cumulative impact policy. The first, which is not relevant in this case, is that the policy will not be used solely as grounds for revoking a licence when representations are received about problems with an existing licensed premises. The second, which is relevant, is that the policy will not be used solely "to refuse applications to vary an existing licence except where the modifications are directly relevant to the policy, for example where the application is for a significant increase in the capacity limits of premises, and are strictly necessary for the promotion of the licensing objectives".

18. The formulation of the defendant's statement of policy reflects the terms of the Secretary of State's guidance. Thus, paragraph 9.15 reflects paragraph 3.19 of the guidance, paragraph 9.20 reflects paragraphs 3.12 and 3.13 of the guidance, and paragraph 9.21 reflects paragraphs 3.24 and 3.25 of the guidance.

3 The decision and the decision-making process

19. The court does not have before it a copy of the claimant's application. Its contents can, however, be discerned from a report prepared by Mr Mattock, the defendant's Licensing Service Manager, for the Licensing Sub-Committee's meeting on 30 August 2005. Apart from seeking an extension of the hours for the sale of alcohol from 11 pm to 2 am on every day of the week, the claimant sought a number of other variations. These including bringing forward the starting times of the sale of alcohol, extending the hours to 4 am on Christmas Eve, and on eight other days, and allowing promotional and music videos and live music on every day of the week until 3 am. It is convenient to summarise the licensing sub-committee's decision before setting out the information provided by the claimant and the evidence as to what transpired at the hearing.

20. The licensing sub-committee decided that the proposed variation to the licensable hours was directly relevant to the council's cumulative impact policy in Bridge Street. It also decided that the application sought a material variation to the licence, and that the claimant had not demonstrated that the extended hours would not add to the cumulative impact on crime and disorder in the area. Accordingly, the sub-committee imposed restrictions on the licensable hours in order to promote the licensing objective relating to the prevention of crime and disorder. It permitted alcohol to be sold from 9 am but did not grant the variations sought to the terminal hours. The claimant was notified of the decision at the end of the hearing and in a letter dated 5 September 2005. The reasons for the decision contained in the Record of the Hearing and Decision notice are set out in paragraph 36 below.

21. Mr Mattock's report sets out the information given by the claimant in respect of the variations. It states that the claimant proposed to take a number of additional steps to promote the four statutory licensing objectives. Mr Mattock's report sets these out as follows:-

> "Prevention of Crime and Disorder
>
> (a) The company states it is committed to strict compliance with the law in the course of the operation of its

premises and to maintaining good standards of behaviour by its customers.

(b) The measures identified in the company's "overview of operations" are designed to meet the crime and disorder objective.

(c) These measures will continue to apply to the additional hours sought by this variation.

Public Safety

(a) JD Wetherspoons state they undertake ongoing risk assessments in order to comply with health and safety legislation.

(b) The measures identified in the overview of operations address the public safety objective.

Prevention of Public Nuisance

(a) There is to be no change in the trading terms of these premises other than the later opening hours sought by this variation.

(b) The existing measures identified in the overview of operations will continue to apply.

The Protection of Children from Harm

(a) The company states it has many years of experience in catering for families, with over 95% of its premises having the benefit of children's certificates.

(b) It is company policy that children will be required to vacate the bar by 2100 hours unless they are eating in which case they will be required to vacate the bar by 2130 hours.

(c) Children must always be accompanied by an adult who will be required to maintain constant supervision of them.

(d) Again the overview of operations identifies the measures that ensure compliance with the objective."

22. It is apparent from this that, apart from the reference to ongoing risk assessments required for health and safety legislation, the claimant relied on the continued application of measures identified in its "Overview of Operations", a document not put before the court. It appears that the claimant considered these would suffice because there was to be no material change in the trading terms of the premises other than the later opening hours sought by the application. At the hearing the claimant amplified its proposals. It relied on its dispersal policy and its proposals for the provision of food which it considered to be a significant factor: see paragraph 30 of

this judgment. In their opening remarks the claimant's representatives stated that food would be provided up to one hour before the premises closed and during the discussion that it would be served until closing time.

23. The Surrey Police force's objection to the claimant's application is contained in a letter to the defendant dated 5 July 2005 signed by Sergeant Mills. This states:-

> "I am writing regarding the above application by Wetherspoons.
>
> As you are aware, they have requested to extend their opening hours when the new Licensing Act comes into force.
>
> Wetherspoons is situated in Bridge Street and there are concerns that increased opening and drinking hours will increase the crime and disorder in an already demanding area.
>
> Bridge Street is an area designated by Guildford Borough Council as one of cumulative impact. The evidence for this has been previously submitted and is recorded at appendix 6 of the Guildford Borough Council Licensing Policy.
>
> It is for this reason that we are objecting to the application."

24. A letter dated 6 July 2005 in precisely the same terms was sent by the police objecting to an application in respect of Yates Wine Lodge, also in Bridge Street and thus within the defendant's cumulative impact area.

25. The Surrey Police force is a "responsible authority" within section 13(4). Their representations are "relevant representations" within section 35(5) because they concerned the likely effect of the grant of the application on the promotion of one of the statutory licensing objectives, here that an extension of opening and drinking hours would increase crime and disorder in the area. This letter was the only representation in respect of the claimant's application. But for it, the defendant would have been required to grant the claimant's application: see section 35(2). Because a relevant representation was made, the defendant's licensing sub-committee was required to hold a hearing to consider it: see section 35(3)(a). The procedure at the hearing is governed by the Licensing Act 2003 (Hearings) Regulations SI 2005 No. 444, the material provisions of which are summarised at paragraph 10 above.

26. Evidence as to what occurred at the hearing is provided by Steven Benbough, a Senior Administrative Officer employed by the Council who was its clerk. He states that the members of the licensing sub-committee present were the Chairman, Councillor Angela Gunning, Councillor Ted Mayne and Councillor Sheridan Westlake. Apart from Mr Benbough two council officers, Mr Mattock, the Licensing Services Manager, and Mr Stanfield, a senior solicitor employed by the Council, were present. The claimant was represented by counsel and two of its managers. Chief Inspector Greenhalgh and Inspector Kelly of the Surrey Police, and Mr Durrant of the Environmental Health and Licensing Services were also at the hearing.

27. Mr Benbough states that Mr Stanfield advised the sub-committee that the application to convert the claimant's existing licence would be granted automatically and that the only matters for the sub-committee to determine were the application to extend the permitted hours, to allow promotional videos and music videos, and to allow regulated entertainment. Councillor Gunning confirmed that the members had all read the report, reminded applicants and interested parties that there was no need to repeat any matter that was covered in it and that each party would be allowed five minutes. Mr Benbough states that no objections were raised to the procedure proposed. He also states that the five minute limit applied to the opening remarks only and all parties were able to participate fully in the discussions that followed in the opening addresses without time limit.

28. Mr Benbough states that the claimant's initial remarks made the following points:-

> "(a) They were satisfied with the conditions recommended by the Council's Environmental Health Officer and would comply with them.
>
> (b) The police had made representations in connection with the Council's cumulative impact policy (CIP). The CIP should not apply in relation to a variation of hours.
>
> (c) Even if the CIP did apply, the application included a dispersal policy and proposals for the provision of food. The provision of food was a very significant factor and substantial menus would be provided up to one hour before the premises closed.
>
> (d) The representations of the police were not site specific.
>
> (e) Wetherspoons' style of operation meant that the variation would not add to crime and disorder.
>
> (f) The police's representations were based purely on the CIP and that increased hours of operation would increase crime and disorder. This was contrary to the Licensing Act 2003 and the guidance. The guidance to the Act states that more flexible hours was a solution. Many disagree, but this is the Act.
>
> (g) The Act aimed to reduce dispersal problems through longer opening hours. Arbitrary restrictions are against the aims of the Act.
>
> (h) Special policies can justify the refusal of an application, but should not lead to a terminal hour in a particular area. The imposition of a terminal hour would be contrary to the Act. The use of a CIP to introduce a terminal hour is unlawful.

(i) Wetherspoons could be an exception to the policy, largely due to its proposals for the provision of food and its style of operation."

29. Mr Benbough states that the police expressed the following concerns about the impact of the variation application on the cumulative impact policy area:-

"(a) The application would not provide any diversification and would bring no benefit to [the] area.

(b) Crime and disorder in the area was stable due to much work by the police and Guildford Borough Council. There were currently staggered closing times in the area and major changes would disrupt this stability.

(c) There would need to be an increased number of police officers in the area if opening hours were increased, which would have implications for other areas.

(d) The applicants needed to demonstrate the proposal would not impact on the area and identify special policies to achieve this. The police did not feel that the applicants had done so."

30. Mr Benbough's statement then summarises the discussion and the contributions by members of the sub-committee, the claimant's representatives, and interested parties. It suffices to record that in relation to the cumulative impact policy the claimant stated that the guidance gave increased capacity of premises as an example of a material variation that would engage the policy (see paragraph 22). The claimant stated that:-

"Wetherspoons's style of operation, including training of staff, management ratio....staff patrols, dispersal policy, zoning of music and winding down time, demonstrated that there would not be a detrimental impact on the area. The provision of food was also a key factor as there was not much other provision in the area and food would be served until closing time." (paragraph 23)

31. Mr Benbough also states:-

"The police claim that to allow the sale of alcohol for an extra 3 hours each day would be a material variation and stated that this would require increased policing. The premises would be a magnet for people to come to the area if it stayed open until 2 am. The police pointed out that there had been 15 crimes (including 5 assaults) since February 2005 in the location of Wetherspoons." (paragraph 25)

32. The Committee was advised by Mr Stanfield that as the applicant had not been given an opportunity to consider the crime statistics submitted by the police those statistics should not be taken into account and they did not do so.

33. Paragraphs 31-44 of Mr Benbough's statement deals with the sub-committee's deliberations after it retired to consider its decision. At paragraphs 33 and 36 he records statements by Councillor Westlake. The first was that paragraph 3.25 of the Secretary of State's guidance indicated that the CIP could be used to justify refusal as the proposed variation was directly relevant to the statutory licensing objectives. The second was that the food issue raised by the claimant was not a strong point and that many clients would not eat during the additional hours proposed.

34. Paragraph 44 of Mr Benbough's statement records that "the sub-committee agreed that paragraphs 9.15 and 9.21 of the CIP were relevant. It accepted the evidence of the police that the application would lead to increased crime and disorder and agreed that the applicants had not demonstrated that this would not be the case as required by the CIP".

35. The meeting then reconvened to enable the sub-committee to announce its decision. Councillor Gunning stated that the sub-committee had taken into account the representations by the claimant and the Police and paragraphs 9.15 and 9.21 of the CIP and that the crime statistics mentioned by the Police had not been taken into account.

36. The decision of the Licensing Sub-Committee was also sent to the claimant under cover of a letter dated 5 September 2005. This informed the claimant of its right to appeal to the Magistrates Court against the decision. The letter enclosed the Record of the Hearing and Decision Notice as approved by the officers present and by the sub-committee's chairman. The section headed "Reasons for Decision" states:-

> "Having considered the representations received and the guidance issued by the Secretary of State under Section 182 of the Licensing Act 2003, the Sub-Committee agreed that the proposed variation to the licensable hours was directly relevant to the Council's special policy relating to cumulative impact in the Bridge Street area of Guildford and to the promotion of the Licensing Objectives.
>
> The Sub-Committee noted that the special policy created a rebuttable presumption that applications for material variations within the Bridge Street area would normally be refused, if relevant representations had been received about the cumulative impact on the Licensing Objectives, unless the applicant could demonstrate why the operation of the premises would not add to the cumulative impact already being experienced. In this respect, Members considered the representations of the applicant that the style of operation of the premises and, in particular, the intention to serve food throughout its licensable hours would mean that the proposals would not add to the cumulative impact.
>
> Having accepted that the application did represent a material variation and noted the receipt of the relevant representation

> from Surrey Police, the Sub-Committee concluded that the applicant had not demonstrated that the extended hours of licensable activities would not add to the cumulative impact on crime and disorder in the area. Therefore, the Sub-Committee imposed restrictions on the licensable hours in order to promote the Licensing Objective relating to the prevention of crime and disorder."

4 The submissions of the parties

37. The claimant's case is that the cumulative impact policy and the presumption against the grant of new licences or material variations cannot lawfully be applied to an application for a variation which merely seeks an increase in the hours under which an existing licence may authorise licensable activities. Sir Richard submitted that this is precluded for two reasons.

38. The first is that the Licensing Act 2003 was meant to be liberalising legislation introducing a single integrated system and removing the discretion of licensing authorities save where relevant representations are made. He submitted that the philosophy of the statute is that longer licensing hours are important to ensure that concentrations of customers leaving premises simultaneously are avoided so that the friction at late night food outlets, taxi ranks and elsewhere which leads to disorder and disturbance is reduced. At the core of this is the argument that in the light of this philosophy an increase in hours cannot not in itself be regarded as increasing the cumulative impact of the licensed premises in an area with a particularly high concentration of such premises. He relied in particular on paragraphs 3.15, 3.29, 6.5, 6.6, 6.8 and 6.9 of the Secretary of State's guidance. He argued that applying a presumption against the grant of new licences or material variations to existing licences in such a case is contrary to the scheme and policy of the Licensing Act 2003.

39. Sir Richard also relied on the stated rationale of the guidance on cumulative impact policies as seen in particular in paragraphs 3.13 to 3.16, and 3.25 to 3.27 of the Secretary of State's guidance and the rationale of the defendant's policy as seen in paragraphs 9.13, 9.15, 9.20 and 9.21 of the defendant's policy. He argued that the language used in these documents shows that a variation which solely seeks an increase in hours falls outside cumulative impact policies. He pointed to the references to the "particular concentration of licensed premises" (paragraph 3.14), "the number, type and density of premises" (paragraph 3.15), and to the policy being about "future premises licence or club premises certificate applications (paragraph 3.18). He argued that, with the single exception of the example of an application to increase the capacity limits of premises (paragraph 3.25), the examples in the guidance all concern new applications.

40. In broad terms he also suggested that the focus on new applications in the guidance and the defendant's statement of policy means that it is misleading to apply the cumulative impact policy to increases in hours. Relying on *R v Westminster City Council, ex p Chorion plc* [2002] EWHC (Admin) 754 at 25 and *R (British Beer and Pub Association and others) v Canterbury City Council* [2005] EWHC 1318 (Admin) at 87, he submits it is susceptible to judicial review on this ground.

41. Sir Richard also relied on the statement in paragraphs 3.26 and 3.27 that a cumulative impact policy cannot justify provisions for a terminal hour or quotas which seek to impose limitations on trading hours in particular areas. He also relied on the absence of any statement in the guidance that a variation solely seeking an increase in hours can be subject to the policy and the repeated reference to the application of cumulative impact policies to new applications as opposed to variations: see paragraphs 3.15, 3.16, 3.18 and 3.21. The claimant's case (see paragraph 70 of its skeleton argument) is that the application of the defendant's cumulative impact policy to the extension of premises' hours of trading fetters the discretion of the licensing authority.

42. Sir Richard also submitted (see paragraph 43 of the claimant's skeleton argument) that the defendant's "special policy creates a presumption against the extension of hours in Bridge Street beyond those which were permitted under the Licensing Act 1964". He argued that the effect is an attempt to limit the hours and to re-impose fixed closing times in zoned areas, unless the applicant can demonstrate an exception.

43. It is important to state what is not challenged in these proceedings. First, there is no challenge to the defendant's decision to have a special policy dealing with cumulative impact or to designate Bridge Street as an area subject to that policy: see paragraph 42 of the claimant's grounds and paragraphs 10 and 50 of its skeleton argument. As I have observed, this means that it is not necessary to consider the evidential basis for the adoption of the defendant's local policy (on which see guidance paragraph 3.17). It also means that it is not necessary to consider the procedure the defendant followed (on which see section 5(3) of the 2003 Act and paragraph 3.18 of the guidance).

44. Secondly, the application of the special policy to applications seeking material variations to existing licences is not challenged, although the claimant relies heavily on the concentration both in the guidance and in the defendant's policy on applications for new licenses and claims that guidance and policy are misleading. In paragraphs 51-55 of its skeleton argument the claimant argues that the material exhibited to Mr Mattock's statement indicates that consultation was not conducted on the issue of whether the policy might apply to variations of hours and that no consideration was given to this issue when the policy was adopted. The claimant relies on this as some support for its argument that on its true interpretation, neither the guidance nor the policy applied to applications to extend the licensed hours.

45. The claimant stated (see paragraph 69 of its skeleton argument) that the reason it has not challenged the defendant's cumulative impact policy in these proceedings is because the policy is said to apply only to material variations, and it's case is that a variation which merely seeks an increase in trading hours cannot be "material" for the purposes of the special policy. Accordingly many issues that fell for decision in *R (British Beer and Pub Association and Others) v Canterbury City Council* [2005] EWHC 1318 do not arise in the present case. The cumulative impact policy adopted by the defendant was one authorised by the guidance and its adoption is not, save in respect of the application of that policy to increases in hours, questioned by the claimant.

46. Thirdly, notwithstanding paragraph 14 of the claimant's grounds and paragraph 59 of its skeleton argument, the procedure adopted at the hearing of the claimant's application by the licensing sub-committee was not challenged at the hearing.

Fourthly, notwithstanding paragraph 14 of the grounds, the decision that, on the facts of this case, the claimant failed to rebut the presumption is not challenged. Paragraph 14 of the grounds stated there was insufficient time at the meeting to take sub-committee members to particular sections of the written material before the sub-committee other than to point out some key elements of the operation of the premises. On this see the evidence summarised in paragraphs 27-32 above.

47. There is also no challenge to the way that, once the sub-committee decided that the policy (and thus the presumption) applied to the claimant's application, it weighed the factors. The key question therefore is whether the defendant was lawfully entitled to apply its policy and thus the presumption to the claimant's application to extend the hours when the sale of alcohol is permitted. Putting it another way, can a variation which merely seeks an increase in trading hours be a "material variation" for the purposes of the special policy dealing with cumulative impact?

48. Mr Kolvin submitted that the policy of the legislation is based on local decision making informed by local knowledge and local people. In the forward to her guidance, the Secretary of State states that the legislation is fundamentally based on local decision-making. Mr Kolvin argued that this case turned on the local application of a local policy by the duly elected licensing authority and, consequentially, it is challengeable only on *Wednesbury* grounds. The application sought to add an extra three hours every night in a drink led pub in the heart of what Mr Kolvin described as the stress area. He submitted that, since, the rationale for the defendant's special policy was crime and disorder associated with a surfeit of late night drinking, it was clearly not perverse for the defendant to find it was an application for a material variation. By "material variation" Mr Kolvin meant that the variation was directly relevant to the special policy in force for Bridge Street as opposed to the statutory licensing objectives. The claimant's challenge was in part based on the assumption that the defendant claimed to be entitled to apply its cumulative impact policy to variations that were material to the statutory licensing objectives, perhaps as a result of what Councillor Westlake is recorded as having stated at the hearing: see paragraph 33 of Mr Benbough's statement summarised at paragraph 33 above. This was not in fact the position taken by the defendant. Nor could it realistically have done so in view of the contents of paragraph 3.25 of the guidance and paragraph 9.21 of its statement of policy that special policies cannot be used to justify rejecting applications to vary a licence "except where those modifications are directly relevant to the policy". The defendant denies (see paragraph 27 of its skeleton argument) that the policy as interpreted by it creates a presumption against the extension of hours within the area beyond those permitted under the Licensing Act 1964. This is because its policy applies to "material variations" and it does not follow that all extensions of hours will be material to the reasons of the cumulative impact policy, and thus to attract the operation of the policy. It is said, by way of example, that an application for the extension of hours by a small restaurant or performance venue may not be "material" to the reasons for the cumulative impact policy even if it is material to the statutory licensing objectives.

49. The defendant also invited the court to dismiss the claim on the ground that the claimant had an alternative remedy, an appeal to the Magistrates Court (see schedule 5 to the 2003 Act) which it did not exercise. An appeal was lodged on 22 September 2005 but the claimant withdrew it on 5 October 2005.

5 *Discussion*

50. The issue whether the defendant was lawfully entitled to apply its cumulative impact policy and thus the presumption to the claimant's application to extend the hours when the sale of alcohol is permitted involves consideration of four questions. These are whether such reliance on a cumulative impact policy is precluded:-

(1) by the 2003 Act,

(2) by the Secretary of State's guidance,

(3) by the defendant's statement of licensing policy.

51. These three questions are concerned with whether any of the layers of the regulatory regime circumscribe what can and what cannot be a "material variation" for the purposes of a cumulative impact policy. If the answer to the first three questions is "no" a fourth question must be addressed. The fourth question is concerned with the particular decision made by the defendant in this case. It is:-

> (4) Was the defendant entitled to find the claimant's application in respect of its Lloyds No 1 Public House a "material variation" so that its cumulative impact policy applied to the application?

5.1 *The statute and the guidance*

52. The first two questions can be considered together. The foundation of the claimant's arguments is that the philosophy of the legislation is liberalising and to introduce a lighter regulatory touch. The Secretary of State's preface to her guidance refers to the desirability of proportionate regulation, greater freedom and flexibility for businesses, the avoidance of disproportionate standard conditions and greater choice for customers. Paragraph 5.99 of the guidance is also relevant. It states the statutory review procedures "should in general allow licensing authorities to apply a light touch bureaucracy to the grant and variation of premises licences by providing a review mechanism when concerns relating to the licensing objectives arise later in respect of individual premises" (emphasis added).

53. It is, however, clear that the statute does not directly preclude reliance on a cumulative impact policy in the case of an application to extend the permitted hours. The statute does not directly mention the term "cumulative impact": see guidance paragraph 3.13.

54. It is also clear that one element of the general policy underlying the 2003 Act is that a general lengthening of licensing hours will reduce problems of nuisance and disorder by allowing a more gradual dispersal of customers from licensed premises. This is seen from the references to the importance of a general lengthening of licensing hours in paragraphs 3.15, 3.29, 6.5 and 6.6 of the guidance. The statement in paragraph 3.15 that "...the general lengthening of licensing hours can be expected to reduce..."

problems of nuisance and disorder by allowing more gradual dispersal of customers is of particular note in the present context because it is in the section of the guidance dealing with cumulative impact policies. As will be seen (paragraph 62), however, the statement is not unqualified.

55. The statement in paragraph 3.29, the first paragraph in the section dealing with licensing hours, is also significant. This states:-

> "The government strongly recommends that statements of policy should recognise that longer licensing hours with regard to the sale of alcohol are important to ensure that the concentrations of customers leaving premises simultaneously are avoided. This is necessary to reduce the friction at late night fast food outlets, taxi ranks and other sources of transport which lead to disorder and disturbance."

Paragraph 6.6 of the guidance states:-

> "The aim through the promotion of the licensing objectives should be to reduce the potential for concentrations and achieve a slower dispersal of people from licensed premises through longer opening times. Arbitrary restrictions that would undermine the principle of flexibility should therefore be avoided."

56. In the light of the terms of the guidance, the statement in paragraph 25 of the defendant's grounds for contesting the claim that "the Licensing Act 2003 neither encourages nor discourages longer hours" overstates the position. While the claimant has not been able to point to anything in the Act itself to this effect, it should not be forgotten that the guidance can only be published after it has been approved by an affirmative resolution of each house of Parliament. To this extent Parliament has endorsed the statements in the guidance set out or summarised in paragraphs 52, and 54-55 above. The defendant is, however, correct in stating in paragraph 36 of its skeleton argument that "the Act itself neither promotes nor prohibits longer hours". Accordingly, the answer to the first of the questions I posed in paragraph 50 is "no".

57. I turn to the second question which cannot be answered so briefly. The fact the element of the underlying policy favouring longer hours is expressed in guidance which licensing authorities have to take account of rather than in the statute itself is important for two related reasons. The first is the nature of guidance such as this. The second is that the desirability of longer licensing hours is not the only element of the underlying policy expressed in the guidance and that in a particular case the different policy elements in the guidance may pull in different directions.

58. As to the first, guidance such as this is not drafted in the tight way in which a statute is drafted. It has similarities to the planning policies and development plans considered by Davis J in *Cranage Parish Council v First Secretary of State* [2004] EWHC 2949 (Admin). At paragraph 49 of the judgment his Lordship stated:-

> "For one thing, in the planning field of policies and development plans of this kind are commonly drafted by

> planners for planners and often are very loosely drafted. They are not, putting it broadly, intended to be legally binding documents in the strict sense. For another, the relevant phrases used will often be hardly sensible bearing a strict hard edged interpretive approach and resort will be needed to elements of value judgment....."

59. Similarly, in *R v Rochdale Metropolitan Borough Council, ex p Milne* [2001] Env. LR 406 at paragraph 51 Sullivan J stated that "a legalistic approach to the interpretation of development plan policies is to be avoided". A similar approach has been taken in contexts other than planning: see the authorities referred to in paragraph 82 below. These qualities apply to the licensing guidance in this case and must be taken into account in considering whether the statements favouring a general lengthening of licensing hours preclude the application of a cumulative impact policy to an application to increase hours.

60. The second reason is that the desirability of a general lengthening of licensing hours is not the only element of the policy underlying the 2003 Act contained in the guidance. The guidance refers to a number of other elements. These include more proportionate regulation to give businesses greater flexibility and consumers greater choice, the necessary protection of local residents and children, local decision making and flexibility see the Secretary of State's forward and paragraphs 2.7 and 3.14 (local meetings, feedback and representations), 3.35 to 3.40 and Annex H (the protection of children), and 3.55, 6.5, 6.6 and 6.20 (flexibility). The statement by the Secretary of State in the preface to the guidance, that the legislation is fundamentally based on local decision making, must also be kept in mind. The recognition in paragraphs 3.13-3.14 of the guidance that a concentration of licensed premises in an area may have a cumulative impact on one or more of the statutory licensing objectives and the legitimacy of licensing authorities considering such cumulative impact in developing their licensing policy statement is yet another element of the regulatory policy. It is one of only two scenarios in which the guidance contemplates and recommends a presumption. The other is in relation to the admission of children to premises with specified characteristics: see Annex H to the Secretary of State's guidance, pp 166-167. In considering the effect of the statements in the guidance relied on by the claimant it is important to remember the other elements of policy it contains.

61. Again, *R v Rochdale Metropolitan Borough Council, ex p Milne* [2001] Env. LR 406, at paragraph 48, is instructive. Sullivan J states that:-

> "It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: 'is this proposal in accordance with the plan?' The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach."

62. In the present context the interaction of the different policy elements in the licensing guidance may also not be easy. They may not necessarily point to the same conclusion in a particular case and may pull in different directions. The elements favouring giving businesses greater flexibility and consumers greater choice may, for example, need to be moderated to reflect the elements requiring the protection of local residents and children. There may also be tension between the interaction of the policy element favouring longer hours and the policy element recognising the need to deal with the cumulative impact of particular concentrations of premises. I have referred to the fact that the reference in paragraph 3.15 to the desirability of a general lengthening of licensing hours upon which the claimant relied is not unqualified. The full sentence is:-

> "While the general lengthening of licensing hours can be expected to reduce this impact by allowing a more gradual dispersal of customers from premises, it is possible that the impact on the surrounding areas of the behaviour of the customers of all premises taken together will still be greater in these cases than the impact of customers of individual premises."

63. Paragraph 3.15 thus recognises that notwithstanding the desirability of a general lengthening of licensing hours, it is possible that, where there is a particular concentration of licensed premises in an area, the impact of the behaviour of the customers of all premises will be greater than the impact of customers of individual premises. This provides some recognition in the guidance that, notwithstanding the general desirability of lengthening licensing hours, the needs of an area in which there is a particular concentration of licensed premises have to be balanced against this.

64. The statute requires licensing authorities to take account of the guidance, but, save where the guidance itself states how conflicts and tensions are to be resolved, how this should be done is a matter for the local licensing authority. It might seek to do so in its statement of policy. Alternatively, it might do so when it determines a particular licensing application. Both in formulating its statement of policy and in determining a particular application the licensing authority must have regard to the guidance: section 4(3)(b) and paragraph 2.4 of the guidance. In determining a particular application the licensing authority must also have regard to its statement of licensing policy: section 4(3)(a).

65. Any tension between the policy elements favouring the lengthening of licensing hours and recognising the needs of an area in which there is a particular concentration of licensed premises is not resolved by the guidance. This together with the fact that there are other policy elements in the guidance suggests that the guidance does not preclude the application of a cumulative impact policy to an application to extend hours.

66. It is, in my judgment, also significant that, where the drafter of the guidance wished to exclude a particular scenario from the scope of the cumulative impact policy or to limit the operation of such a policy, he has done so expressly. Thus, paragraph 3.22 states "it would normally not be justifiable to adopt a special policy on the basis of a concentration of" off-licences. Paragraph 3.24 states that "special policies should never be used as a ground for revoking an existing licence or certificate when relevant

representations are received about problems with those premises." Paragraph 3.25 states "special policies can also not be used to justify rejecting applications to vary an existing licence or certificate except where those modifications are directly relevant to the policy.....and are strictly necessary for the promotion of the licensing objectives." (The words omitted are the example of an application to vary a licence with a view to increasing the capacity limits of the premises which is also to be found in paragraph 9.21 of the defendant's statement of policy, set out in paragraph 17 above.) Paragraph 3.26 provides that "a special policy relating to cumulative impact cannot justify and should not include provisions for a terminal hour in a particular area" and "attempting to fix a terminal hour in any area would.....directly undermine a key purpose of the 2003 Act". Finally, paragraph 3.27 states that "special policies must not impose quotas". There is, however, nothing in the guidance that expressly precludes or restricts the applicability of cumulative impact policies to variations which only seek to lengthen licensing hours.

67. The guidance recognises (in paragraph 2.3) that it "cannot anticipate every possible scenario or set of circumstances that may arise". But applications to vary a premises licence by increasing the trading hours are a common class of application. It cannot be the case that such applications were not anticipated, particularly in view of what the guidance states about lengthening licensing hours. Such applications could therefore have been excluded from the ambit of cumulative impact policies if that was what was intended.

68. Notwithstanding the absence of an express prohibition in the guidance on the application of cumulative impact policies to an application for extended hours, should one be implied? In *Cranage Parish Council v First Secretary of State* Davis J stated (at paragraph 50(3)) that there may be instances where even if the words of a policy support an interpretation, consideration of the purpose and underlying objective of the policy in question may show that such linguistic interpretation simply will not accurately represent the true policy. *Petter and Harris v Secretary of State for Environment Transport and Regions* (2000) 79 P and CR 214 is given as an example.

69. Sir Richard relied on the provisions referred to in paragraphs 39-40 and 54-55 in support of his contention that the scope of the cumulative impact policy should be limited by implication and on the authorities referred to in paragraph 40 of this judgment. He also relied on the focus of the guidance and on paragraph 3.9 of the guidance. He submitted that, despite the references to "material variations", the focus of the guidance is on new applications for licences. Moreover, all but one of the examples given concern new applications. The exception is that it is stated in paragraph 3.25 that an application for increased capacity could fall within the policy. Sir Richard submitted that such an application differs from an application for longer hours because it necessarily affects the potential number of people in licensed premises at any point in time and thus the concentration of people in the area subject to the cumulative impact policy.

70. Paragraph 3.9 of the guidance is to be found under the heading "fundamental principles". It states that "...a statement of policy must not undermine the right of any individual to apply under the terms of the 2003 Act for a variety of permissions and to have any application considered on its individual merits" (emphasis added). Similarly, in paragraph 3.30 of the guidance, which states its disapproval of zoning, that is setting fixed trading hours within an area, it is stated that "[i]t is acceptable for

a statement of policy to make clear that stricter conditions with regard to noise control will be expected in areas which have denser residential accommodation, but this should not limit opening hours without regard to the individual merits of any application" (emphasis added).

71. In my judgment no such limit should be implied in the present case. First, areas which are designated as subject to a special cumulative impact policy are, by definition, areas which the guidance marks out as ones in which the policy elements in the rest of the guidance are insufficient. Implying the limit for which the claimant contends would take a common class of applications out of the scope of the special policy and significantly reduce its efficacy.

72. Secondly, I have referred to the way that paragraph 3.15 of the guidance sets the general desirability of longer hours against the needs of areas in which there is a particular concentration of licensed premises and to the other policy elements within the guidance. Moreover, although applications to vary a premises licence by increasing the trading hours are a common class of application, and the general desirability of increased hours is addressed in the guidance, such applications are not included in the categories excluded from the scope of a cumulative impact policy. To construe the guidance in the way the claimant suggests it should be construed would be to add a further category to the limitations on special cumulative impact policies set out in paragraphs 3.22-3.27. I accept Mr Kolvin's argument (defendant's skeleton argument, paragraph 38) that to do this is to take one of the elements of the national guidance and to elevate it to a legal concept.

73. Thirdly, paragraphs 3.9 and 3.30 are not in the section of the guidance dealing with special cumulative impact policies. The guidance permits the adoption of such a policy if there is an evidential basis for it and the specified procedure is followed. The guidance provides that, where a cumulative impact policy is so adopted, there will be a rebuttable presumption that applications for new premises licences or material variations will normally be refused. To that extent, where there is such a policy, the guidance must permit an individual application to be considered on the basis of the rebuttable presumption so that the burden of proof lies on the applicant. In any event, if an area is so affected by serious alcohol related crime that the evidential basis for the special policy exists, requiring an applicant for a variation of the hours of premises in the area to demonstrate that the variation would not add to the area's problems does not mean that the "merits" of the application are not considered. A reversed burden of proof does not preclude consideration of the "merits" of an application.

74. Fourthly, while it is true that the focus of the guidance is on new applications for licences and all but one of the examples are of new applications, there are several references to material variations: see paragraphs 3.19, 3.23, and 3.25. There are also other references to "vary" and "varied" within the section of the guidance dealing with cumulative impact: see paragraphs 3.14 and 3.24. For this reason the suggestion that the focus on new applications in the guidance means that it is misleading to apply it to variations seeking an increase of hours is wholly misplaced. In *R v Westminster City Council, ex p Chorion plc* [2002] EWHC (Admin) 754 the meaning of the content of the defendant's published policy was held to differ from the meaning intended by the defendant. In the present case the Secretary of State's guidance expressly states that it applies to variations that are material to the reasons for the

adoption of the special cumulative impact policy. The fact that it does not include by way of example an application of the sort made by the claimant does not mean that the guidance means something different from that intended by the defendant

75. I have said (paragraph 47 above) that there are two ways of putting the key question in this case. These are; was the defendant lawfully entitled to apply its cumulative impact policy to the claimant's application to extend the permitted hours, and can a variation which merely seeks an increase in trading hours be a "material variation" for the purposes of that policy? Taking account of the nature of quasi-statutory guidance, the fact that the guidance in this case contains a number of policy elements, and the fact that the exclusions from and restrictions to cumulative impact policies do not include an application which seeks only to extend hours, I have concluded that, whichever way the third of the questions I posed in paragraph 50 is put, the answer to it is 'no'.

76. I have reached this conclusion without recourse to the answers to Parliamentary Questions given by the Parliamentary Under-Secretary of State on 18 October 2005 (HC Deb. Col 1008 W) and 6 February 2006 (HC Deb. Col 842 W) relied on by the defendant. These answers, however, also support it. The question answered on 6 February 2006 asked what guidance the Secretary of State had issued to local authorities on whether the extension of a licensed premises' opening hours, without any increase in the licensed premises area or capacity, would count as a material variation for the purposes of a cumulative impact special policy. Mr James Purnell, the Parliamentary Under-Secretary of State replied:

> "An extension of the hours during which alcohol can be sold might or might not be a material variation, depending upon its effect on the cumulative impact on the licensing objectives being experienced in the area of the special policy. It is for the local licensing authority, in the first instance, to judge if an application to vary is 'material', and, if a decision is subject to legal challenge, for the courts to then rule definitively."

77. In view of my conclusion that the guidance does not preclude the application of a cumulative impact policy to an application seeking an increase in hours it is not necessary to consider the defendant's submission that, in any event, the guidance does not bind the authority in law but is only a matter which the authority must take into account (section 4(3)(b)) in carrying out its licensing functions. While that is true, in the present case had the claimant's argument on the guidance been correct, the fact that the defendant is not bound by the guidance would not, in my judgment, have been an answer to the claim. This is because, while the guidance envisages that a licensing authority may depart from it, paragraph 2.3 states that it may do so if the authority has reason to do so and if full reasons are given for departing from the guidance. In the present case because the defendant did not consider that either its statement of policy or its decision about the claimant's application departed from the guidance no such reasons are given.

5.3 The defendant's statement of policy

78. I can deal with this briefly. I have referred to the fact that the relevant paragraphs of the defendant's policy reflect the Secretary of State's guidance: see paragraph 18 of this judgment. Paragraph 9.15 of the policy makes it clear that the policy will apply to "material variations of licences of premises within the Bridge Street area. Paragraph 9.21 states that the policy will not be used "to refuse applications to vary an existing licence except where the modifications are directly relevant to the policy....". There is nothing in the defendant's cumulative impact policy which excludes applications to extend hours from its scope. Save in relation to its applicability to variations which seek an increase in trading hours, the claimant has not challenged the defendant's cumulative impact policy in these proceedings: see paragraphs 43-45 of this judgment. The policy does not set a fixed closing time in the Bridge Street area and does not purport to apply its special policy in circumstances in which the Secretary of State's guidance advisers that it should not do so.

79. I have rejected Sir Richard's submissions based on the focus of the guidance on new applications (see paragraph 74). He made similar submissions about the defendant's statement of policy with the additional point that the consultation and consideration at the time the policy was adopted was confined to new applications. In my judgment, this argument is also misplaced in respect of the statement of policy. Accordingly, the answer to the third of the questions I posed in paragraph 50 is "no".

5.4 The defendant's decision that the claimant's application was "a material variation" so that its cumulative impact policy applied

80. The claimant submitted that the application of the special policy and the consequent presumption constituted a fettering of the defendant's discretion. That argument is, in my judgment, unfounded. The principles concerning policies and when policies can be regarded as improperly fettering discretion are stated in *British Oxygen Co v Minister of Technology* [1971] AC 610 and, in the context of licensing law, in *R (Westminster City Council) v Middlesex Crown Court and Chorion plc* [2002] EWHC 1104 (Admin) paragraphs 19, 22-24 and 34. There is no improper fetter in this case. The claimant was permitted to demonstrate that its application would not add to the impact within the area. It sought to do so by reference in particular to its proposals regarding the provision of food. The sub-committee considered but rejected this and its other arguments. Mr Benbough's evidence shows that the committee considered the claimant's application against the background of its policy and the Secretary of State's guidance. The policy made it clear that where it applied it was for a person making an application to show that the proposal would not add to the cumulative impact in the area.

81. The defendant was entitled to have a policy provided it was prepared, as it was, to consider that an exception to it should be made to the policy in a given case. In fact, there is no challenge to the way that, once the sub-committee decided that the policy (and thus the presumption) applied to the claimant's application, it weighed the factors and concluded that the presumption had not been rebutted. The challenge is only to the decision that the special policy and the presumption applied to applications to extend hours and to the decision that such an application constituted a "material variation" of the licence. I turn to that.

82. The defendant relied on decisions concerning planning to show that in order for the claimant to succeed it has to show that the defendant's finding that the claimant's application constituted a material variation is *Wednesbury* unreasonable: see *Cranage Parish Council v First Secretary of State* [2004] EWHC 2949 (Admin) and the authorities relied on by Davis J in that case, in particular R *v Derbyshire County Council ex p Woods* [1997] JPL 958 and *Northavon DC v Secretary of State for the Environment* [1993] JPL 761 at 763. This approach is, however, of more general application to documents such as the Secretary of State's guidance and the defendant's statement of policy: see, for example, *R v Secretary of State for the Home Department, ex p Ozminnos* [1994] Imm AR 287. The courts do not abdicate their control over questions of law and will consider whether a policy document has been misinterpreted or whether the interpretation involves an error in law (*R v Ministry of Defence, ex p Walker* [2000] 1 WLR 806, 810) or is not reasonably open to the authority in question. Such documents are, however, not (*ex p Ozminnos* at page 292 per Auld J) to be subjected to fine analysis or to be interpreted in the way one would interpret a statute. Where wording of a policy document is properly capable of more than one meaning the question is whether the public body involved, here the licensing sub-committee, has adopted and applied a meaning which it is capable of bearing. If it has, its decision will not be flawed on public law grounds.

83. For the reasons given in the sections of this judgment dealing with the guidance and the statement of policy, the words "material variation" are capable of including a variation of hours if such variation is directly relevant to the cumulative impact policy. A variation will be directly relevant to the special policy if, for instance, it would create further late hours drinking in a drink led establishment in an area suffering crime and disorder because of a concentration of licensed premises and late hours drinking in such establishments in the area.

84. In the present case the sub-committee was advised that the cumulative impact policy could only apply if it determined that a variation was directly relevant to the special policy and the committee so decided. Although Councillor Westlake stated that it would suffice if the variation was relevant to the statutory objectives (see paragraph 33 above) it is clear from the terms of the decision and the references to paragraph 9.21 of the statement of policy (see paragraphs 34 and 26 above) that this was not the basis of the decision of the sub-committee. Was this decision one that was not reasonably open to the sub-committee?

85. The evidence before the sub-committee included the view of the local police force that granting the application would disrupt the current staggered closing times within the area. The evidence is that there is, in the Bridge Street area, a spectrum of terminal hours; 11 pm, midnight, 12.30 am, 1 am, 1.30 am and 2 am on Saturdays. Granting the claimant's application would remove the only 11 pm terminal hour and would thus have the effect of narrowing the range of terminal hours in the Bridge Street area. It is to be noted that the policy element favouring a general lengthening of licensing hours is stated (see eg paragraph 3.15 of the guidance) to allow more gradual dispersal of customers. The statement in paragraph 3.26 that a special policy cannot justify provisions for a terminal hour in a particular area suggests that it is not unreasonable in the context of the regulatory regime for a licensing authority to take into account that the effect of granting an application would narrow the range of terminal hours in an area subject to a cumulative impact policy.

86. The sub-committee also had before it the view of the police that the three hours a day extension sought by the claimant would, if granted, operate as a magnet for people to come into the area and drink. In my judgment the defendant's sub-committee was for these reasons entitled to conclude that the claimant's application to extend the terminal hours by three hours a day at its drink led public house with a capacity of approximately 850 people was directly relevant to the special cumulative impact policy and thus was a "material variation" of the licence. It was thus entitled to conclude that its cumulative impact policy applied to the claimant's application. Accordingly, the answer to the fourth of the questions I posed (see paragraph 51) is "yes". Since I have stated there is no challenge to the way the sub-committee weighed the factors and concluded that the claimant had not rebutted the presumption the substantive challenge to the defendant's decision fails and the claimant's application must be dismissed.

6 Failure to pursue an alternative remedy

87. In view of my conclusion on the substantive issue, it is not necessary to rule on the defendant's submission that the application should also be dismissed on the ground that the claimant did not pursue its appeal to the Magistrates Court. The defendant relied on the rule that judicial review does not lie where an alternative remedy by way of an appeal is available and the decisions in *R v Chief Constable of Merseyside Police, ex p Calverley* [1986] QB 424 and *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 WLR 477, 485. Many other cases also refer to the principle that judicial review is a remedy of "last resort" (*R v Hammersmith and Fulham LBC, ex p Birkett* [2002] 1 WLR 1593 at paragraph 42, per Lord Steyn) or a "long stop" (*R v Takeover Panel, ex p Guinness plc* [1990] 1 QB 146, 177-178, per Lord Donaldson MR). The defendant submitted that since the legislation provides that liquor, entertainment and late night refreshment licensing are to be dealt with at local level by local licensing committees, with appeals to the local Magistrates Court and no further appeal to the Crown Court, it was particularly inappropriate for the claimant to abandon its appeal to the Magistrates Court in order to pursue an application for judicial review.

88. On behalf of the claimant, Sir Richard submitted that the alternative remedy issue was in reality concluded by the grant of permission by Walker J. Secondly, he submitted that in the light of the nature of the claimant's challenge, an appeal to a local Magistrates Court was not the most effective and convenient remedy either for the claimant or in the public interest. He relied on the decisions in *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58 at 63 and *R v Nottingham City Council, ex p Hamilton Howitt* [1999] EWHC (Admin) 498. In *ex p Hamilton Howitt* Dyson J, as he then was, relying on *R v Birmingham CC ex p Ferrero* [1993] 1 All ER 530 stated at paragraph 24, that the court must ask itself what is the real issue to be determined and whether the statutory appeal procedure is suitable to determine that issue. His Lordship stated in that case that, where the real issue is whether an authority has fettered its discretion, that is more apt for resolution by the High Court than by Magistrates. Mr Kolvin submitted that those cases were distinguishable because *ex p Cowan* concerned the requirements of the principles of natural justice in the context of licensing applications and *ex p Hamilton Howitt* involved the practice of the local authority in a large number of cases in which the licences of private hire

hackney carriage drivers were revoked or suspended by the imposition of what was (unsuccessfully) argued to be a standard punishment.

89. As to Sir Richard's first submission there are statements in the authorities that questions about the availability of an alternative remedy will normally arise on the application for permission (*R v Falmouth and Truro Port Health Authority, ex p South West Water Limited* [2001] QB 445, 472; *R v Secretary of State for Health, ex p British Association of European Pharmaceutical Distributors* [2001] EULR 464 at paragraphs 160-161; *R v Chief Constable of West Yorkshire, ex p Wilkinson* [2002] EWHC 2353 (Admin) at paragraph 42). I do not, however, consider (cf *R v Chief Constable of West Yorkshire, ex p Wilkinson* [2002] EWHC 2353 (Admin) at paragraph 43) that the alternative remedy argument will only exceptionally be available to be deployed at a substantive hearing.

90. It is clear that the existence of an alternative remedy may well be a ground for refusing the substantive application (see *R v Mansfield DC ex p Ashfield Nominees Limited* (1999) 31 HLR 805). The test of whether a claimant should be required to pursue an alternative remedy in preference to judicial review is the "adequacy", "effectiveness" and "suitability" of that alternative remedy: see *ex p Cowan, R v Devon CC, ex p Baker* [1995] 1 All ER 73 at 92. In *R v Leeds CC, ex p Hendry* (1994) 6 Admin LR at 443 it was said that the test can be boiled down to whether "the real issue to be determined can sensibly be determined" by the alternative procedure and in *R v Newham LBC, ex p R* [1995] ELR 156 at 163 that it is whether "the alternative statutory remedy will resolve the question at issue fully and directly". At the permission stage it may not be possible to determine the adequacy of the alternative remedy or whether that remedy will resolve the issue fully and directly. The focus of a challenge at the substantive hearing may, moreover, differ from its focus at the permission stage.

91. I turn to the adequacy of the remedy in the magistrates court. I accept the defendant's submission that licensing applications are primarily a matter to be dealt with at local level first by local licensing authorities and then by local Magistrates Courts. The claimant's actions showed that initially it also considered that the appropriate remedy was an appeal to the Magistrates. In the present case, however, the issue is not the primarily factual one of whether in the circumstances of this particular case the claimant in fact rebutted the presumption created by the cumulative impact policy. That issue might well have been best resolved by the statutory appeal. The issue here is whether the defendant was entitled to regard an application to extend the hours when the sale of alcohol is permitted in respect of premises within an area subject to a cumulative impact policy as a "material variation" for the purposes of the policy. In general a deliberate decision to abandon an appeal in order to challenge by judicial review that which should have been challenged by way of an appeal may well constitute an abuse of process. In the present case, however, the issue raised is one on which there is a need for uniformity in the understanding of licensing authorities as to the scope of their cumulative impact policies in the light of the Secretary of State's guidance. In this sense as Sir Richard submitted the issue affects the exercise of licensing functions by licensing authorities throughout the country: *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58 at 63. Accordingly, had the claimant succeeded on the substantive ground, I would not have denied it a remedy on this ground.

92. For the reasons given in relation to the substantive challenge, however, this application is dismissed.