

Report of City Solicitor

Report to Licensing Committee

Date: 13 March 2012

Subject: Appeals under the Licensing Act 2003

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| Are specific electoral Wards affected? If relevant, name(s) of Ward(s): Various Please see Appendix 1 | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| Are there implications for equality and diversity and cohesion and integration? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| Is the decision eligible for Call-In? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: 10.4.5 Appendix number: 1 | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |

Summary of main issues

1. This report outlines appeals which have been lodged against decisions of the Licensing Sub-committees under the provisions of the Licensing Act 2003. It outlines the current position in relation to each appeal and the predicted hearing date if known.
2. The report identifies the outcome of one appeal in relation to McDonalds' premises at Colton Retail Park, Leeds.

Recommendations

3. That Members note the contents of this report and request further updates as matters are dealt with.

1 Purpose of this report

- 1.1 This report outlines for Members information the appeals which have been lodged against decisions of the Licensing Sub-committees made under the Licensing Act 2003 and the outcome of a recent appeal in relation to McDonalds at Colton Retail Park.

2 Background information

- 2.1 Decisions of the Licensing Sub-committees can be the subject of an appeal to the Magistrates' Court under Section 181 of the Licensing Act 2003. Schedule 5 to the Act sets out the detail of who may appeal each decision. The applicant can appeal against a partial or full refusal of a grant or variation. The applicant for any review and the respondent licence holder may appeal any review decision. Responsible Authorities or Interested Parties who made relevant representations in relation to grants, variations, or reviews may also appeal. In the cases referred to in this report, each of the appeals has been lodged by the applicant for the grant or variation of the licence.
- 2.2 On appeal, the Magistrates' Court can:
- Dismiss the appeal;
 - Substitute any other decision which could have been made by the Licensing Authority for the decision actually made by the Sub-committee; or
 - Remit the case back to the council to dispose of in accordance with the direction of the Court.
- 2.3 In making the decision, the Magistrates stand in the shoes of the Licensing Authority and must take into account the council's own licensing policy and the section 182 Guidance issued by the Secretary of State.
- 2.4 Recent case law, R (On the application of Hope and Glory Public House Ltd) v City of Westminster Magistrates Court [2011], indicates that the Court can only substitute its own decision or remit the case where it is satisfied that the decision of the sub-committee was wrong. Otherwise it must dismiss the appeal. The appellant bears the burden of persuading the Magistrates' Court that the decision of the Licensing Sub-committee was wrong. The fact that a different decision could legitimately have been made on the same facts does not necessarily mean that the decision was wrong. In making their decision, the Magistrates are entitled to take into account any fresh information arising since the subcommittee dealt with the matter. That might in itself suggest a different outcome to the decision.
- 2.5 In most cases it is unusual for the court to order costs against the Licensing Authority since it is clear that the sub-committee would have acted in good faith when making the decision on the basis of the information before them.

3 Main issues

- 3.1 A number of appeals have been lodged recently against decisions of the Licensing Subcommittee and these are set out in the table at Appendix 1. There is no single reason why the number of appeals has increased. The appeals lodged raise a number of different issues, including the importance of the Cumulative Impact Policy, whether garage premises are excluded premises under section 176 of the Licensing Act, and issues relating to the appropriateness and correct wording of conditions. There has been no single sub-committee which has had more decisions appealed and there has been no change in approach to decisions.
- 3.2 In the appeal relating to McDonalds at Colton Retail Park, a hearing took place before the Leeds Magistrates' Court on Thursday, 23 and Friday, 24 February 2012. The appeal lodged in that case was against the refusal of a variation to licence. The existing licence authorised the provision of late night refreshment to midnight within the restaurant and 01:00hours as a drive-through. The variation sought a licence for late night refreshment for both restaurant and drive-through purposes from 23:00hours to 05:00hours every day of the week. This would effectively render the premises a 24-hour, 7 day a week establishment. Objection was received from the Environmental Protection Team and 13 local residents also objected. The principal objections were of increased nuisance, noise and litter. At the hearing, Councillor Bill Hyde made representation on behalf of local residents and Brian Kenny from the Environmental Protection Team addressed the Sub-committee in relation to their representation on nuisance. The Sub-committee resolved to refuse the application for variation because of its impact on the objective of preventing public nuisance. The Sub-committee found that there would be an increase in traffic movement into the trading estate in close proximity to local residents and that the resultant noise was likely to disturb residents between 01:00hours and 05:00hours which was a particularly noise sensitive period.
- 3.3 Eight grounds of appeal were listed including:
- That the Sub-committee failed to properly consider the evidence presented, showed bias against the appellant (McDonalds) and placed too much weight on the representations.
 - That the Sub-committee confused issues of planning and licensing during their questioning of the appellant.
 - That the Sub-committee expressed personal views that there should not be a 24/7 culture in Britain.
 - That insufficient weight was given to the explanation of activities and use at the site.
 - That the Sub-committee did not balance the evidence presented by the appellant against speculative assertions from the interested parties (effectively that the Sub-committee should have allowed the application and the review process could be used to resolved any subsequent problems).

- That the issue of the proximity of the entrance to residential properties was not raised as an issue at the hearing and therefore the appellant did not have the opportunity to address this.
- That the Sub-committee failed to consider the evidence presented.
- The decision was irrational and solely without cause and unsupported by evidence.

3.4 The Magistrates' Court heard from Councillor Bill Hyde and Brian Kenny, who repeated the information that they had submitted to the Sub-committee as well as representatives from the business concerned. In a detailed judgment the Magistrates decided to dismiss the appeal. In doing so, they decided that they could not be sure that the decision of the Sub-committee was wrong bearing in mind the need to promote the objective of preventing public nuisance and the representations and evidence put forward by the council's witnesses. In making that decision, the Court effectively dismissed all of the grounds of appeal including those alleging that the Sub-committee was biased and failed to apply the correct legal tests. Had the Magistrates detected that that was the situation, then they would have been entitled to conclude that the wrong decision was reached.

4 Corporate Considerations

4.1 Consultation and Engagement

4.1.1 This report does not raise any issues of consultation and engagement.

4.2 Equality and Diversity / Cohesion and Integration

4.2.1 This report does not raise any issues relating to Equality and Diversity, Cohesion and Integration.

4.3 Council Policies and City Priorities

4.3.1 In making their determinations, the Sub-committees have regard to the council's Statement of Licensing Policy. The Magistrates hearing the appeal must also have regard to the same policy.

4.4 Resources and Value for Money

4.4.1 Where an appeal is lodged then the council is obliged to respond to that appeal. It is possible for the council to be awarded its costs of defending the appeal. Costs are normally awarded where the appeal is dismissed save in exceptional circumstances.

4.5 Legal Implications, Access to Information and Call In

4.5.1 This report is potentially exempt as a number of the cases listed in Appendix 1 are the subject of ongoing proceedings and therefore discussion of the appendix may raise matters to which a claims to legal professional privilege could be upheld.

4.6 Risk Management

4.6.1 The ability of the council to successfully defend appeals is influenced by the quality of decision making. That, in turn, relies upon Members being given appropriate training, having the correct information provided to them in reports and having access to timely and accurate advice where required.

5 Conclusions

5.1 There has been an increase in appeals under the Licensing Act 2003. This increase does not relate to the activities of any particular sub-committee or any particular type of decision.

6 Recommendations

6.1 Members note the content of this report.

7 Background documents

7.1 None