HOME OFFICE ALCOHOL STRATEGY UNIT

GUIDE TO THE LICENSING REGIME FOR 'INTERESTED PARTIES' UNDER LICENSING ACT 2003

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The Licensing Advice Project is a not for profit service funded by Westminster City Council on behalf of residents of City of Westminster. The Project provides free, independent, confidential and impartial advice to residents in respect of their rights and responsibilities as potential 'interested parties' as defined in Licensing Act 2003. The service facilitates the engagement of local residents in the licensing regime so that they can play a full role in the shaping of the communities in which they live. It is the only service of its kind in the country.

The Project has been running for 5 years and is seen as a benchmark in innovative partnership working.

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Introduction

1. The statutory scheme of which LA03 is the backbone envisaged a partnership approach within which local people have a full role to play. However for this to be the case it is vitally important that local people, often without the resources or wherewithal to obtain specialist legal advice, are sufficiently empowered with knowledge of their rights and responsibilities under the Act. This principle of partnership working is set out at 1.20-1.22 of the Guidance.

2. If a premises wishes to provide 'licensable activities', usually a licence/certificate under LA03 must be in operation. An application for a licence/certificate under LA03 must state which licensable activities are applied for. Licensable activities are:

   - Sale of alcohol – retail sale of alcohol or the supply of alcohol by a 'qualifying club' or to a member of a 'qualifying club'. NB – sale of tickets including alcohol in the price is retail sale of alcohol

   - Regulated entertainment – the provision of entertainment or facilities for entertainment, to the public or members of a qualifying club (and guests) or for consideration and with a view to profit. Examples include films, dancing and recorded music (although incidental recorded music is not licensable)

   - Late night refreshment – supply of hot food and/or hot drink to the public, between 11pm and 5am only.

3. LA03 states that a licensing authority must carry out its functions under the Act with a view to promoting the licensing objectives (s4(1)). Representations in respect of a licence application must be made by an 'interested party' and must relate to the **likely effect of the grant on the promotion of the licensing objectives**, which are (s4(2)):

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

The licensing objectives are the cornerstones of LAO3.

In the case of applications for new premises licences or variations (but not reviews) the 'cumulative impact' on the licensing objectives of a concentration of licensed premises can also give rise to a representation (Guidance 9.9), even when there is no saturation policy or cumulative impact zone designated by the licensing authority. Residents and residents' groups can play an important role in developing a saturation policy, which has to be put out for public consultation. This can be seen most recently in London Borough of Hammersmith and Fulham. In Westminster, residents played a significant role in developing the policy approach which culminated in the concept of the 'West End Stress Area', which has served as a blueprint for other local authorities.

The Licensing Objectives

4. **Public nuisance** is the most common licensing objective referred to in representations by interested parties. It is not given a statutory definition in LA03 but is addressed by the Guidance at paragraphs 2.32-2.33. The Guidance suggests it is for the licensing authority to make judgments about what constitutes public nuisance – quite a wide discretion then. It suggests the main issues will be noise nuisance, light pollution, noxious smells and litter (Guidance 2.32), although this is non-exhaustive. The most common is noise emanation from inside the premises or from people drinking/smoking outside the premises, or when leaving the premises.

5. Public nuisance retains its broad common law meaning. The oft-quoted section of the Guidance is that '…the prevention of public nuisance could therefore include low-level nuisance perhaps affecting a few people living locally as well as a major disturbance

affecting the whole community' (Guidance 2.33). This is different from the definition of statutory nuisance under Environmental Protection Act 1990. What constitutes 'public nuisance' has been examined in a diverse body of case law pre-LA03, and has been examined further in cases arising under LA03. **Crosby Homes (Special Properties) Limited v (1) Birmingham City Council (2) Nightingale Club** – District Judge Zara suggested that para 2.33 of the Guidance was 'a fudge'. He cited Bingham LJ in **R v Rimmington, R v Goldstein [2005] UKHL 63** and Rommer LJ in **AG v PYA Quarries Ltd [1957] 2QBD 169**: Public nuisance is something which 'materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects'. Further, the question of whether the nuisance affects 'a sufficient number of persons to constitute a class of the public' is a question of fact in every case. He suggests that the appropriate number is 'a representative cross section'. In the same case, Denning LJ stated that 'a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put stop to it, but that it should be taken on the responsibility of the community at large'.

6. The issue in the context of LA03 was finally taken to the higher courts in the case of 'The Endurance', **R (oao Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court [2009] EWHC 1996.** This is an important case for residents as it concerned outside drinking, which can affect the lives of residents living in the vicinity of licensed premises, especially in the summer and especially since the smoking ban. It concerned a review application by the Environmental Health Consultation Team of Westminster City Council, taken at the behest of residents. The Sub-Committee imposed conditions on the licence. The decision was upheld on appeal to the Magistrates' Court. Permission was sought by the Endurance to judicially review the decision. Permission was refused, Burton LJ holding that a public nuisance is merely something more than a private nuisance. This case is something of a blow to operators as the vast majority of complaints in the Endurance case had come from a single resident. The suggestion by the Appellant that para 2.33 of the Guidance was

unlawful was unceremoniously rejected by the Judge. The Appellant has sought permission to appeal to the Court of Appeal. Watch this space…

7. It is suggested that whether a nuisance is private or public can be taken while bearing in mind the following factors. Residents should bear these factors in mind when seeking to demonstrate in their representations that a public nuisance exists:

- the number of persons making a representation
- the geographic spread within the vicinity
- the extent and remit of any representative body (eg a Residents' Association)
- the existence of a petition
- involvement of local Councillors
- the time and place of the nuisance
- the effects of the nuisance
- the frequency of the nuisance

8. It is important to keep in mind s18(6)(a) and s35(5)(a) LA03 – that representations should relate to the **likely** effect of the grant. In the case **Daniel Thwaites Plc v Wirral Borough Magistrates' Court and Ors [2008] EWHC 838 (Admin)**, the High Court overturned a decision of the Magistrates' Court that had been made on the basis of the Justices' forecast (NB not that of residents) as to what would occur in the future in association with the premises. **Thwaites** seems to say that decisions must be based on actual evidence not speculation, but the statute suggests that speculative evidence can be taken into account; if the effect is more likely than not. In applications for new licences, the representations cannot usually be premises-specific and must to some extent be speculative.

9. To this extent, the case of **R(Bar1 Ltd) v First Secretary of State and Westminster City Council [2007] EWHC 808 Admin** is relevant. It was a planning

case seeking an extension of hours from midnight to 1am. The Judge decided that the inspector was entitled to take the view, as a matter of common knowledge if for no other reason, that if lots of people left a premises late at night, there would be some noise nuisance. The **Bar1 Ltd** case was not cited in **Thwaites**.

10. Of further interest to residents is the fact that the **Thwaites** case also stated that conditions relating to opening and closing times are a legitimate mechanism for the licensing authority to promote the licensing objectives. Such conditions are often important to residents where the end of licensable activities may not be too late but the when customers finally leave the premises, nuisance is nevertheless caused.

11. **Outside drinking and smoking.** While the smoking ban (Health Act 2006) may have been a boon for the health conscious, it has not had such an advantageous effect on residents who live adjacent or opposite to a licensed premises which has an outside area, or, worse, which does not have an outside area and thus customers smoke (and often drink) on the public highway. Tables and chairs (with or without permission) at the front of premises can also cause problems, in late night cafes as well as premises licensed to sell alcohol. The public nuisance problems this can cause are legion. The aforementioned case of 'The Endurance', **R (oao Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court [2009] EWHC 1996** clarified somewhat what factors may be taken into account when considering what is a public nuisance.

12. **Statutory nuisance under Environmental Protection Act 1990 –** s79(g) noise emitted from a premises so as to be prejudicial to health or a nuisance. The requirement is for a properly qualified officer to be satisfied that a statutory nuisance exists, or is likely to occur or recur. Sleeplessness has been held to be prejudicial to health (**Lewisham v Fenner [1995] 248 ENDS**). NB- noise from people talking/shouting etc outside a premises cannot be a statutory nuisance under this legislation. Loud music can be a statutory nuisance. Nuisance is unacceptable interference with the personal comfort or amenity of neighbours or the nearby community. Under s79, the local authority has a statutory duty to take such steps as

are reasonably practicable to investigate any complaints. If the notice is breached, without reasonable excuse, the owner/occupier is guilty of an offence. This procedure is entirely separate from the licensing regime.

13. The **protection of children from harm** objective is intended to protect children from moral, psychological and physical harm (Guidance 2.41). Some premises may provide adult entertainment, or adult entertainment at some times but not at others. In this case, an application could be made under LG(MP)A1982 (as amended by s27 PACA 2009. The Guidance (2.17) states that 'the display of advertising material on or immediately outside the premises' is regulated by The Indecent Displays Act 1981. It is important to peruse the operating schedule contained in the application form. As conditions should only be imposed where they are 'necessary' and not adequately covered by other legislation, local people might have difficulty raising concerns in the context of LA03 for some types of premises.

14. If a resident is concerned that under-age drinking is occurring at the premises, this would be a ground for using this licensing objective. This would no doubt also interest the police. There is now a 'two strikes and you're out' rule for under age sales, before which a police may initiate a review or other remedy under LA03 or other legislation.

15. The **crime and disorder** objective is concerned with matters such as fighting, drugs and disorder. In the context of lap dancing venues, protecting performers from assault may be a relevant consideration. It may be worthwhile for residents who have concerns over crime and disorder to contact their local Safer Neighbourhoods Team to ask for support. The police are a responsible authority and can make representations (and call for reviews) in their own right. The police also have other powers under LA03 and other legislation to tackle crime and disorder and nuisance. It is important to note that 'crime and disorder' does not mean large scale violent crime. Hamish Howitt (now called Hugh Guy Fawkes Howitt) breached the Health Act 2006 by allowing smoking in his premises in Blackpool. He was convicted on 5 November 2007 (hence the name change). The premises licence was reviewed and the licence was revoked, although

the police did not make a representation. It was reinstated on appeal to the Magistrates, the Deputy District Judge holding that 'crime and disorder' meant drunken, yobbish behaviour. The City Council appealed by way of case stated to the High Court. In R (oao Blackpool City Council) v Howitt [2008] EWHC 3300, HHJ Denyer held that a breach of the Health Act was a criminal offence, although it did not involve 'disorder'. Given that Mr Howitt had been convicted of a criminal offence (and had stated he would continue to allow smoking on the premises), the licensing authority was entitled to revoke the licence to promote the licensing objective of prevention of crime and disorder. Effectively, 'crime and disorder' means 'crime or disorder'. This would also cover, for example, premises where the premises licence holder had been convicted of showing football matches illegally.

16. The **public safety** objective is concerned with the physical safety of persons using the premises eg overcrowding), **not** with public health (Guidance 2.19). This is sometimes misunderstood by residents. The responsible authorities would usually be best placed to draw these concerns to the licensing authority's attention, but if residents have evidence of it they can of course include it in their representations. Examples include if the pub is often overcrowded or has crowds of people drinking outside the premises on the public highway, forcing pedestrians into the road. If the pedestrians are children, the protection of children from harm objective could be used too

Representations by interested parties to licensing applications

17. ie new premises licence applications, variation of premises licence applications, new club premises certificate applications, variation of club premises certificate applications, representations following application for review of premises licences, minor variations (note – different time limits and advertising requirements apply to minor variations).

18. An interested party is defined in LA03 as:

- a person living in the vicinity of the premises in question

- a body representing persons living in that vicinity (eg a Residents' Association)
- a person involved in a business in that vicinity
- a body representing persons involved in such businesses (eg a Trade Association)

Additionally, s33 PACA introduced an amendment to s13(3) and s69(3) LA03 to the effect that a member of a licensing authority can now be an 'interested party' . This means a Councillor can make representations on behalf of residents and can call for a premises licence or club premises certificate to be reviewed. Note – there is no requirement for the Councillor to live within the vicinity of the premises.

19. This is important because representations could not previously be made anonymously even if someone else was making the representation on the interested party's behalf, as the representation must contain the name and address of the interested party. The rationale for this has been that the local authority (and the Applicant in case of dispute) needs to satisfy itself that the representation complies with the 'vicinity' criteria. Representations must be disclosed to the Applicant when notice of hearing is given under the Hearings Regulations. In cases where an interested party has a fear of intimidation or violence if personal details are divulged to the Applicant, and the licensing authority considers such fears to be genuine, remedial measures can be considered. Examples are providing responsible authorities with details of the issues so that they may make representations if appropriate and justified or only divulging those personal details necessary for the applicant to be satisfied that the interested party is within the vicinity (The Guidance 9.17-18).

20. What constitutes '**in the vicinity**' is a matter for the licensing authority. The Guidance (9.5) suggests that the material consideration of the licensing authority should be 'whether the individual's residence or business is likely to be directly affected' by issues relating to the four licensing objectives. NB It is also interesting to note that under the Gambling Act 2005 s158a, an interested party is defined *inter alia* as a

person who 'lives sufficiently close to the premises to be likely to be affected by the authorised activities'.

21. Licensing authorities can chose to designate an area outside which representations will not be considered to be 'in the vicinity' although it is recommended that this only be a guideline (9.6 Guidance). Some take the view that 100m is appropriate. It may be possible for a local resident outside this area to persuade the local authority that they are affected issues relating to the four licensing objectives. Case law has held that 'vicinity' is a question of fact and degree, is dependent on local knowledge and is therefore best left to the local authority to decide **(R (4 Wins Leisure Limited) v Licensing Committee for Blackpool Council, Brook Leisure Blackpool Limited and World Wide Clubs (UK) [2008] LLR 128).** Therefore the Courts would only overturn a decision to exclude a representation for not being 'in the vicinity' in unusual circumstances. It is recommended that borderline cases be determined in the interested party's favour.

How can residents become aware of licensing applications?

22. There are a number of ways in which local residents can become aware of applications under LA03. The Regulations set out the requirements:

- by the placing of a pale blue notice at, on or near the premises, or a size equal to or larger than A4 for 28 consecutive days starting with the day after the day on which the application was given to the licensing authority

- The notice must state the relevant licensable activities (or qualifying club activities, if appropriate) applied for, or the nature of the variation proposed. The notice must also contain information about making representations, including the closing date and the address to which they should be sent

- placing an advert in a local newspaper whose circulation is within the vicinity of the premises at least once in the 10 days starting with the day after the day on which the application was given to the local authority

- Local authorities are required to keep a register of licensing applications, viewable on their website, if any. Applications can also be viewed at local authority offices

- Some authorities notify residents in the vicinity of the premises, or notify recognised residents' associations and amenity societies. However, this is not a legal requirement and the area in which it is carried out differs from one authority to the next and may not take into account local circumstances. One local authority has been judicially reviewed over its practice in this regard (see para 24].

- Westminster City Council produces a document which is available on its website or on an email list detailing all pending applications under LA03.

23. LA03 – the representation must also be made within the 'prescribed period', and not, in the opinion of the licensing authority, be frivolous or vexatious. 'The prescribed period' is 28 consecutive days starting on the day after the day on which the application was given to the licensing authority. Where a representation is deemed to be 'frivolous' or 'vexatious' the local authority must notify the maker of its decision as soon as reasonably practicable, with reasons. There is recourse to the Courts by way of judicial review for the aggrieved party. In borderline cases, as with the question of vicinity, the Guidance (9.12) recommends that the benefit of the doubt be given to the interested party making the representation.

24. Representations must be made in writing. The Regulations (21) provides that representations can be accepted by email but that a hard copy must follow 'forthwith'. As representations must be *received* by the end of the statutory 28 day period, it would be a sensible to send a representation by email in the first instance if there is insufficient time for a postal letter to be received by the local authority before the expiry of the 28 day period, then send a postal copy forthwith. The question of whether a licensing authority has a discretion with regard to late representations was examined by McCombe J in **R (oao Albert Court Residents' Association and Ors) v Westminster City Council [2010] EWHC 393 (QB)**. The Defendant authority had a policy to notify residents of licensing applications if they lived within a certain vicinity

of the premises, although there is no statutory requirement to do this. (It is however referred to in the Guidance 8.52). The application for variation was granted under s35(2) by delegated authority, there having been no 'relevant' representations. However numerous representations were received after the end of the consultation period from residents and residents' groups (including Albert Court Residents' Association) who alleged that they had not been notified of the application. The application was advertised correctly.

25. The Claimants issued a claim for judicial review and claimed *inter alia* that the authority had acted unlawfully in not carrying out its own policy properly or at all, that the Claimants had a legitimate expectation of being notified, and that the authority had a discretion to consider late representations, partly in cognisance of its overriding duty to promote the licensing objectives. It was common ground that the late representations were not and could not be 'relevant' representations. The Claimants proffered the case of **Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19** in support of their contention that the authority had a discretion. In this case, the House of Lords ruled that in refusing an application for a sex establishment licence, the local authority was entitled to take into account representations received after the expiry of the statutory 28 days, if there was 'significant relevant information', where it had acted fairly and properly exercised its powers. This suggested that it is for the local authority to decide and should not discourage residents who have not submitted representations within 28 days, if there is a good reason for the delay. The Defendant averred that LA03 conferred no such discretion, s35(2) stating that absent relevant representations, 'the authority must grant the application'. The statute with which **Miss Behavin'** was concerned did not contain a similar provision as in s35(2). The Defendant also relied on the judgment of Richards J in **The British Beer and Pub Association & Ors v Canterbury City Council [2005] EWHC 1318 (Admin)**, in particular that '(the licensing authority) has no power to assess an application, or to exercise substantive discretionary powers in relation to it, unless there are relevant

representations…'. Although the judge quashed the decision to grant, he rejected the argument that a licensing authority has a discretion as regards late representations.

26. The case has wider significance for local residents as it may cause local authorities which currently take positive steps to encourage residents to engage with the licensing regime in this way, or are contemplating doing so, may cease to do so. This increases the onus on local residents to be vigilant to changes which may have a detrimental impact on the communities in which they live.

27. Representations can be withdrawn before or at the hearing.

What information should go into a representation?

28. A representation can be made in support or against an application. Where a relevant representation is made, the licensing authority's discretion is engaged. To be relevant, the representation must be about the **likely effect of the grant** of the licence/certificate (or of the application to vary) on at least one of the licensing objectives.

29. The representation needs to state the name of the premises and the reference number of the application, and the name and full postal address of the person making the representation. It should state the fact that the writer wishes to make a representation, and the grounds on which he/she wishes to make the representation, ie which licensing objective(s). It is a good idea to obtain a copy of the application from the local authority. A resident may be able to see from the local authority's Register if any problems have occurred at the premises in the past eg if a similar application has been refused in the past or if the premises licence has been reviewed. Perusing the application will allow the resident to see precisely what is sought, and any measures proposed to alleviate or minimise any potential problems. It is a good idea to peruse the licensing authority Statement of Licensing Policy, which the authority is required to produce and to review periodically before making a representation. Currently, the Policy must be reviewed every 3 years but there are

proposals to remove this requirement, although the general duty to review the Policy as and when necessary would remain.

30. Although it is not necessary to produce a recorded history of evidence, it helps to keep a record of any problems you have experienced in the past, with times and dates, as more effective representations will be evidence based and premises-specific. It is important to show that the problems experienced relate to the premises in question. It is also important to consider any conditions which could be attached to the licence to ease concerns, or if the only remedy is outright refusal of the application.

31. If there is sufficient strength of feeling, it may be an idea to gather a petition, with names and addresses, stating clearly the nature of the objections. It can be useful to do this because sometimes an operator will gather a petition of its customers, in support of the premises and it can be useful to compare the addresses of local residents against the application (who live 'in the vicinity') and the addresses of customers who may live outside the local area and so are not adversely affected by the operation of the premises. It may also be useful to speak to your local Residents' Association or similar. Councillors may also provide help and assistance (including at the hearing) if necessary. Residents' Associations may inform people living close to the premises or publicise the application in some other way and can be a useful way of coordinating opposition.

32. The Sub-Committee need to have details of the problems that residents experience now and what problems it is anticipated will occur in future. They should describe what causes the noise and disturbance (eg people shouting, fighting, leaving rubbish outside the pub, litter problems in the surrounding area). For instance, if litter, public urination and noise makes the neighbourhood less pleasant to live, then say so. If the noise keeps you awake, describe how late it goes on until, how often in occurs and the effect on you (eg you have to keep windows shut in summer or turn up the TV). Photographs, video and sound recordings are very useful to evidence concerns.

33. It is an offence knowingly or recklessly to make a false statement in connection with an application.

34. Note that interested parties cannot make representations on Temporary Event Notices (TENs), applications to change the Designated Premises Supervisor or applications to transfer the premises licence (although any concerns they have could be passed to the appropriate responsible authority). Sometimes, an operator will use TENs to demonstrate an ability to operate to a later hour with no adverse effect on the licensing objectives, prior to an application to vary the licence.

Determination of applications

35. The provisions for determining applications differ depending on whether relevant representations are received or not. Unless relevant representations are made, a licensing authority **will be required** to grant the licence/certificate in the terms sought, which for applications for a new licence/certificate is subject only to such conditions as are consistent with the operating schedule accompanying the application and certain mandatory conditions.

The Sub-Committee hearing

36. If the licensing authority considers that a representation is relevant and not vexatious or frivolous, its discretion is engaged and it must hold a hearing to consider the application (unless all parties agree it is not necessary). The Hearings Regulations contain provisions in this regard. The hearing should be held within 20 working days beginning with the day after the last day for representations, unless the time limit is extended under Hearings Regulation 11. The licensing authority will write to those who made relevant representations to inform them of the date of the hearing. The notice must inform interested parties of their right to appear and be represented, the consequences if a party does not attend, the procedure to be followed and must identify any points on which the authority wants clarification.

37. The Hearings Regulations require interested parties to give notice no later than 5 working days before the hearing whether they will attend, whether they will be represented and whether they think a hearing is necessary at all. If the interested party wishes any other person to appear at the hearing (other than the person representing him), permission must be requested in the notice, details of the person given and a brief synopsis of the points which that person will address the authority on must be given. Hearings are held in public unless it is in the public interest not to do so. An interested party may withdraw a representation at any time, including at the hearing, although if a representation is withdrawn less than 24 hours before a hearing, the hearing must proceed.

38. After an interested party has submitted a representation, fresh evidence can be admitted. This should be done as soon as possible, and preferably before the licensing officer draws up the papers to go before the Sub-Committee. Any documentation submitted on the day of the hearing can only be taken into account with the consent of all the other parties.

39. Prior to the hearing, a mediation meeting may be useful to see if a position can be agreed, or conditions agreed should the Sub-Committee be minded to grant. This shows a willingness on all sides to engage. Operators are sometimes perfectly willing to engage with responsible authorities but not with residents; it is recommended that for the proper exercise of the licensing regime, residents should be open to mediation and discussion prior to hearings. It may be in many cases that the addition or conditions or a watering down of the application may resolve any differences. If agreement can be reached between all parties, a hearing may not be necessary – Hearings Regulation 9. However, getting the agreement of numerous interested parties is often difficult.

40. In the spirit of a partnership approach, residents should try to think of conditions which may satisfy them should the application be granted, or granted in a modified form, even if they oppose the grant totally. It is preferable to do this at the

representation stage, but certainly before the Sub-Committee hearing. If a premises is selling alcohol whilst breaching one of the conditions of its licence it is effectively carrying out licensable activities without authorisation; and this is a criminal offence.

41. It is important for interested parties to attend at hearings if possible, although their representations will be still be taken into account either way. Some licensing authorities hold their hearings in evening, which obviously makes it easier for people who work to attend. If a party does not attend, the hearing can go ahead or be adjourned.

42. Hearings are generally held in public. The Sub-Committee is comprised of 3 Councillors drawn from the 10-15 Councillors who make up the Licensing Committee. At the hearing, an interested party may address the Sub-Committee and amplify their representation. Hearings Regulation 23 states that the hearing 'shall take the form of a discussion led by the authority'. The extent to which it is a discussion varies. At some authorities the hearings are quite informal. The point is that the hearings are designed to allow interested parties without recourse to legal advice and representation to represent themselves. Permission from the Sub-Committee is needed to question another party.

43. The decision must be given within 5 working days of the hearing, although many authorities give their determination on the day, and a written formal decision at a later date. The Guidance frames the background for the decision very much with the local residents in mind, specifically referring to the local community even where it might be the case that none have made representations. It is open to the Sub-Committee to:

- Grant or vary the licence or certificate (as appropriate)
- Refuse to grant or vary
- Grant or vary in part, including modifying conditions if necessary
- Exclude licensable activities from the licence or certificate

44. Conditions imposed should not merely replicate what is on the operating schedule or duplicate existing legislative provisions (**R(Bristol City Council) v Bristol Magistrates' Court and Somerfield Stores Ltd [2009] EWHC 625 (Admin)**), which said that there is no duty to impose conditions that reproduce the effect of the operating schedule, but there is a power to impose such conditions. There is no obligation to impose a condition proposed in the operating schedule if the licensing authority considers that compliance with other legislation is sufficient. The Guidance already states (10.15) that 'if other existing law already places certain statutory responsibilities…it cannot be necessary to impose the same or similar duties.' The Guidance states at 2.35 that 'conditions relating to noise nuisance may not be necessary where (other legislation) adequately protects those living in the vicinity'. However, each case is considered on its own merits and it is clear that where the licensing authority does not consider existing legislative provisions adequately deal with the issues, they can impose such conditions as they see fit to promote the licensing objectives (Guidance 10.18). The Bristol case was therefore not perhaps the victory for the trade that was claimed in some circles and should not discourage residents pushing for conditions where they see them as necessary and proportionate for the promotion of the licensing objectives.

45. Conditions must be focused on measures within the direct control of the licence holder – Guidance 2.38.

Appeals against decisions of licensing authorities

46. Notice of the decision which is sent out to interested parties must contain information on the right of appeal. s181 and Schedule 5 LA03 provide the framework for appeals against decisions of the licensing authority. An interested party has the right of appeal against a decision of the licensing authority. Appeals are made to the Magistrates' Court for the petty sessions area in which the premises is situated and is commenced by notice of appeal given by the Appellant to the justices' chief executive for the

magistrates' court within 21 days beginning on the day on which the appellant was notified (in writing) by the licensing authority of the decision appealed against.

47. Where an interested party appeals against a decision of the licensing authority, the holder of the premises licence is a respondent in addition to the licensing authority (Schd 5 (9)(3)). There has been much debate whether a corresponding right exists for an interested party to be a respondent where the applicant appeals against the decision of the licensing authority. The judgment of DJ Purdy in **Lucas v Westminster City Council (2005)** seemed to establish this right but the judgment has been contradicted in other judgments (eg **Reed and Hodson v Tanbridge District Council (2006).**) It should be noted that both these cases were heard in the Magistrates' Court and so are not binding on higher courts or other magistrates' courts. The recent High Court case **R(oao The Chief Constable of Nottinghamshire Police) v Nottingham Magistrates' Court and Tesco Stores Limited** has now clarified the matter somewhat. In this case, the police applied to be joined as a party to the appeal by Tesco against the decision of the licensing authority. They were refused permission.

48. The decision was judicially reviewed and the High Court decided that there was no express or implied right for an interested party or responsible authority to appear or be represented on appeal. On the question of whether the Magistrates have the power to permit responsible authorities or interested parties to appear, the High Court said that it was for the Magistrates' Court to decide how best to achieve the objective with which he is charged. There is a need to protect Appellant from the burden of undue duplication of argument. The power of a Magistrate to permit an interested party to be heard is only fettered by the objectives which the statue requires the Magistrates' to achieve – the just resolution and the furtherance of the licensing objectives and Policy. The matter was remitted back to the Magistrates' Court to determine on those terms whether to permit the police to be a party. Thus, the case remains that it is for the Magistrates' Court to decide in each case, although the framework under which the decision must be made has been clarified. Interested parties may consider in some

circumstances asking to be joined as a party to an appeal if they consider that the local authority will not or is unwilling to represent their views either at all or effectively, or if they have some other good reason for doing so in the circumstances of their particular case.

49. Hearings are hearings *de novo* **(Sagnata Investments Limited v Norwich Corporation (1971) 2QBD 614)** and are full re-hearings. As per **Sagnata**, the correct approach on appeal is for the Magistrates' to reverse the Sub-Committee decision if satisfied it was wrong, and thus the Claimant bears the onus and should begin proceedings. The hurdle which must be crossed on an appeal is tough. From a policy perspective, a policy must not be applied 'blindly and routinely without the possibility of exception' (**R (oao Chorion Plc) and Westminster City Council [2002] EWCA 1104 (Admin), see also R v Chester Crown Court ex parte Pascoe and Jones [1987] 151 JP 752, 755.)** The **Chorion** case is an important case that set out the guidelines for how a Council's policy should be applied. In the judgment of Scott-Baker J, on appeal the Magistrates' Court 'must accept the policy and apply it as if it was standing in the shoes of the council considering the application'. The lawfulness of the policy itself cannot be challenged in the Magistrates' Court. On appeal, it is for the party seeking to persuade the Committee to depart from policy to show how it can be done without imperilling it or the reasons which underlie it (Turner J in **R v Sheffield Crown Court ex parte Consterdine (1998) 34 Licensing Review 19.**)

50. The status of the Sub-Committee hearing is important. Lord Goddard stated that the appellate Court should pay great attention decision to which the duly constituted and elected authority has come **(Stepney Borough Council v Joffe 1949 KB 599).** The status of the decision of the Sub-Committee was the result of lengthy submissions in 'The Endurance' case. **Joffe** also set out that the appellate Court must be satisfied that the Sub-Committee decision was 'wrong', not merely that it was 'not right' (confirmed by Burton LJ in 'The Endurance' case). Thus, the Magistrates may well consider that they would have made a different decision to the Sub-Committee, on the

evidence before them. However, unless they are persuaded that the decision of the Sub-Committee is actually wrong, the appeal is still liable to be refused. Importantly, Burton LJ also said that the appellate Court must be satisfied the decision below was wrong, even if it was not wrong at the time the decision was made. This could happen, as fresh evidence can be adduced.

51. Whether joined as a party to the appeal or as the Appellant in their own right, interested parties should be aware of costs implications. S 181(2) LA03 sets out a general discretion as to costs. It does not necessarily follow that costs follow the event in these hearings and awarding costs against a local resident is the exception rather than the rule, but it has happened **(Barrington v North Dorset District Council [2008] LLR 17**. In this case, the Justices found that his submissions were ill-informed or ill-conceived. The issue was raised in a parliamentary question tabled by the Rt. Hon. Vince Cable MP to the then Secretary of State the Rt Hon James Purnell MP in response to allegations that certain breweries and pub chains had attempted to intimidate residents who might wish to appeal by warning them that if they lose the appeal, they will be liable for costs. Mr Purnell responded that the advice of the Magistrates' Association and the Justices' Clerks' Society is that the awarding of costs should be 'an exception, not a rule. I would therefore not expect residents who are appealing to be penalised.' The question of costs in licensing cases is even more esoteric following the decision in **Prasannan v Royal Borough of Kensington and Chelsea [2010] EWHC 319 (Admin)** where Belinda Bucknell QC sitting as a Deputy High Court judge held that a successful appellant can be at risk of a costs order against it. Hence, the discretion is very wide. Generally, if local residents have a cogent, arguable case the Magistrates' Court would think carefully before awarding costs against a resident Appellant even if the appeal is refused.

52. It is also possible to challenge a local authority decision in the High Court by judicial review, and to challenge Magistrates' court decisions in the High Court by judicial review or by case stated.

Other matters

53. **Minor variations –** introduced by The Licensing Act 2003 (Premises Licences and Club Premises Certificates)(Miscellaneous Amendments) Regulations 2009 by adding s41A (premises licence) and s86A (club premises certificate) as a way in which operators could make minor changes (ie changes which did not harm the licensing objectives) by a simplified (and cheaper) procedure. The application does not have to be advertised in a local newspaper, and only needs to be advertised on the premises for 10 days on a white notice, as opposed to 28 days for full variations. If there are no objections, the application must be granted. The vast majority of minor variations would not be of interest to interested parties, but there may be the occasional case where due to the particular circumstances of a locality, a variation may be deemed minor by the licensing authority but in fact may not promote the licensing objectives in the opinion of local residents.

54. **Live music exemption –** The DCMS is currently consulting on proposals that live music performances for 100 people or less will no longer need to be licensed. Therefore unlicensed venues would be able to put on events and licensed venues which do not have permission for live music would be able to put on events. The exemption would only apply to indoor events which take place between 8am and 11pm. The proposals includes provision that the exemption can be revoked if there have been problems with noise, nuisance or disorder. Residents would have the power to call for the exemption to be revoked if a specific premise gave cause for concern. The consultation process closes on 26 March 2010.

Reviewing a premises licence or club premises certificate

55. Where the operation of premises has given cause for concern in relation to the licensing objectives, an interested party may apply to review an existing premises licence or club premise certificate. This can be done 'at any stage' (Guidance 11.2). As with representations, an application for review must not be frivolous or vexatious. There is an additional hurdle, that of repetition. A 'reasonable interval' must have

elapsed since a review on similar grounds. This is suggested in the Guidance as being 12 months, unless there are compelling circumstances or new grounds (or following a closure order). Again, it is a matter for the local authority to decide.

56. Where a ground for review is rejected as frivolous, vexatious or repetitious notification shall be given as soon as is reasonably practicable and, only where it is vexatious or frivolous, reasons given.

57. The sanction of review should not be used as justification to grant an application for new licence or to vary licence. The sole criteria there is the likely impact of the grant on the licensing objectives.

58. It is good practice to try to resolve any problems informally prior to applying for a review. This would typically involve informing the DPS and/or premises licence holder of the concerns, informing the local authority, a Councillor, the police (if it is crime and disorder) etc. This might lead to a meeting where the premises licence holder might agree to voluntary undertakings. It has the advantage that if there are problems with the way the premises operates, they are given a chance to rectify the problems informally and if they do not, the residents can gather useful evidence if they want to take it to a review. Some local authorities have a dedicated team to deal with noise issues. It is important to engage with the local authority as it can be a useful source of corroborating residents' evidence if licensing officers have also witnessed it. As residents only get one 'bite of the cherry' it is important to be as well prepared as possible. Of course, responsible authorities can themselves institute reviews.

59. This approach echoes the Guidance 11.9 – `It is important to recognise that the promotion of the licensing objectives relies heavily on a partnership between licence holders, authorised persons, interested parties and responsible authorities in pursuit of common aims. It is therefore equally important that reviews are not used to drive a wedge between these groups in a way that could undermine the benefits of cooperation.'

60. The new minor variations procedure could be a way for operators voluntarily to rectify problems. Note though that the advertising provisions do not apply for minor variations, and interested parties have only 10 days from the day after the application is made to make a representation.

61. **The application form –** is designed to be relatively simple to complete. It can be obtained from your local authority or downloaded from the DCMS website. Grounds for a review must relate to a particular premises, not the cumulative impact of a number of premises, unless the general situation in eg a town centre can be positively linked by a causal connection to a particular premises. The Guidance 11.7 suggests that a possible scenario would be where there are direct incidents of crime and disorder associated with a particular pub. As with a representation, the Applicant must state which of the four licensing objectives provide the grounds for the application. As much information as possible should go into the application, and supporting evidence should be appended. It is important therefore that time and care is taken over the application so that the best possible case can be put forward.

62. The importance of substantiating claims with documentary evidence in the form of photographs, film, sound recordings etc cannot be overstated. A Freedom of Information Act request to the licensing authority can be made asking them to disclose all noise complaints within, say, the previous two years, and details thereof. A similar request can be made regarding any s80 noise abatement notices served under Environmental Protection Act 1990. Residents should consider formalising their evidence in witness statements summarising their concerns and the content of any information gathered as above. It is also vital to talk to officers of the local authority, and ask that they monitor the premises and, if appropriate, support the residents. You can ask for details of any licence breaches noted, and ask whether the officers have had any concerns about the operation of the premises. Of course, a responsible authority can institute a review themselves if they deem it necessary and proportionate.

63. After the review has been served, it is still important to keep an eye out for any breaches of licence conditions or noise nuisance etc. This evidence can be particularly important because after being served with a review, it is reasonable to assume that an operator may be on their best behaviour. A further Freedom of Information Act request can be made shortly before the hearing, bringing the matter fully up top date and ensuring that the Sub-Committee has all relevant information before it. The Applicants for the review may also wish to try to rally local support; the operator may well be trying to do the same.

64. It is an offence knowingly or recklessly to make a false statement in connection with an application.

65. The review application and supporting evidence must be served on the licensing authority and, on the same day, a copy given to the each responsible authority (a list will be on your Council's website) and the premises licence or club premises certificate holder, whose details will be on the licence/certificate.

66. Reviews must be advertised by the licensing authority:

- By the placing of a pale blue notice at, on or near the premises, or a size equal to or larger than A4 for 28 consecutive days starting with the day after the day on which the application was given to the licensing authority. The notice must contain information about making representations, including the closing date and the address to which they should be sent

- Licensing authorities are required to keep a register of licensing applications, viewable on their website, if any. Applications can also be viewed at local authority offices.

- Some authorities notify residents in the vicinity of the premises, or notify recognised residents' associations and amenity societies. However, this is not a legal requirement and the area in which it is carried out differs from one authority to the next and may not take into account local circumstances. One local authority has been judicially

reviewed over its policy. It is important for local residents to be vigilant to changes which may have a detrimental impact on the communities in which they live.

67. Similar provisions apply as to time periods for representations (which can be in support of or against the review) as described previously. Representations must be made within 28 days beginning on the day after the application is given to the licensing authority and a hearing must be held within 20 working days beginning with the day after the last day for representations, unless it is in the public interest not to do so under Regulation 11 LA03 (HR) 05.

68. **Note on Repetition –** s51 Licensing Act 2003 states that 'Where a premises licence has effect, an interested party or a responsible authority may apply to the relevant licensing authority for a review of the licence'. However, the licensing authority can at any time reject a ground for review if they deem it repetitious. Indeed, the Guidance (11.10) states that where the review is made by an interested party, the licensing authority 'must first consider whether the complaint made is relevant, vexatious, frivolous or repititious'. Does this fetter the ability of an interested party who was not involved in the previous review, to exercise his or her right under s51(1)? Also, the licensing authority has to give reasons only if it has rejected the application for being frivolous or vexatious, not for repetition. Further, an Applicant must state on the application only whether he/she has made an application for review before, to allow the licensing authority to determine whether the application is repetitious. Whether a previous application on similar grounds has been made by another interested party is another matter. The Guidance (11.13) states that 'more than one review originating from an interested party should not be permitted within a period of twelve months on similar grounds save in compelling circumstances'. It should be emphasised that the Guidance is not primary legislation and only needs to be taken into account by the licensing authority.

The Sub-Committee hearing

69. After receipt of an application for review, the licensing authority **must** hold a hearing, regardless of whether or not there are any representations. As with hearings for applications for new premises licences or to vary premises licences, the hearing follows a set procedure which the Licensing Authority publishes. Similar provisions apply as detailed in paras 38-40 above. Hearings are generally held in public. The Sub-Committee is comprised of 3 Councillors drawn from the 10-15 Councillors who make up the Licensing Committee.

70. The Applicant for the review will present the case for review. The premises licence holder's representative will then speak, followed by the responsible authorities and others who may have made representations. Note that representations can be in support or against the review.

71. s52(3) LA03 - At the hearing, the licensing authority must, having regard to the application and any relevant representations, take such steps as mentioned in subsection 4 (if any) as it considers necessary for the promotion of the licensing objectives. S52(4):

- decide no action is necessary
- modify or add conditions
- exclude a licensable activity
- remove the designated premises supervisor
- suspend the licence for a period of not more than 3 months
- revoke the licence

72. Guidance 9.25 - The licensing authority should determine the application with a view to promoting the licensing objectives 'in the overall interests of the local community', and in doing so must give appropriate weight to the steps necessary to promote the licensing objectives, the representations, the Guidance, and the authority's statement

of licensing policy. Thus, even if there are no resident representations, the licensing authority should take their decision with the local community in mind. Conditions should be reasonable, necessary and proportionate. See para 44 above.

73. A **right of appeal** to the Magistrates' Court exists for the applicant, the premises licence holder and interested parties also exists following determination of the review. If a party appeals, the effect of the Sub-Committee decision is stayed pending resolution of the appeal – which can be some months later. If this delay causes the premises to rectify the problems in the lead up to the appeal, all well and good. There are also costs implications on an appeal, which there is not before Sub-Committee.

74. Notice of the decision which is sent out to interested parties must contain information on the right of appeal. s181 and Schedule 5 LA03 provide the framework for appeals against decisions of the licensing authority. Appeals are made to the Magistrates' Court for the petty sessions area in which the premises is situated and is commenced by notice of appeal given by the Appellant to the justices' chief executive for the magistrates' court within 21 days beginning on the day on which the appellant was notified (in writing) by the licensing authority of the decision appealed against.

75. Where an interested party is aggrieved by a decision, he/she should think carefully about the remedy which it seeks and whether, tactically, they would be better served by appealing or biding their time and reviewing the licence again if the problems continue (subject to the provisions on repetition). Sometimes, given the time delay and costs implications in the Magistrates' Court and the fact that the decision of the Sub-Committee is stayed pending determination of the appeal (with a further potential appeal to the High Court by judicial review or case stated after that) it can be serve the interests of residents to allow the 21 day appeal period to expire, at which point the decision of the Sub-Committee will take effect. In a case where some restrictions were placed on a licence, but not as stringent as the residents had hoped, this approach be the most efficacious way of achieving the desired outcome.

76. Where the Applicant for the review appeals against a decision of the licensing authority, the holder of the premises licence is a respondent in addition to the licensing authority. There has been much debate whether a corresponding right exists for an interested party to be a respondent where the applicant for the licence/variation appeals against the decision of the licensing authority. See paragraph 42 above.

77. The appeal hearing is a hearing *de novo* and evidence which was not available or not put forward at the time of the Sub-Committee hearing can be adduced. See also paras 46 and 49. Residents who did not make representations at the time of the application can, if the Appellant deems it appropriate, have their views heard as part of the Appellant's case.

78. Although awarding costs against a local resident is the exception rather than the rule, it has happened (Barrington v North Dorset District Council [2008] LLR 17. Generally, if local residents have a cogent, arguable case the Magistrates' Court would think carefully before awarding costs against a resident Appellant.

79. It is also possible to challenge a local authority decision in the High Court by judicial review, and to challenge Magistrates' court decisions in the High Court by judicial review or by case stated.

Other statutory measures to curb problems caused by licensed premises

80. **Other LA03 measures: s160 closure order** – applies for up to 24 hours to all premises licences and TENs in an area where there is expected to be disorder, where the closure is necessary to prevent disorder. On the application of a police superintendent or above, to Magistrates' Court.

81. **s161** – applies for up to 24 hours to all premises licences and TENs where there is actual or imminent disorder on or in the vicinity of individual premises and the closure is necessary for public safety, or where there is noise nuisance and closure is necessary to prevent it. On the authorisation of police inspector, having regard to the conduct of the premises' management, and can be served on the premises by a police

constable. This makes it a particularly valuable tool on behalf of residents where there is noise nuisance, for example in breach of a licence. A review of the licence would normally follow. Interested parties can make representations on the review in the usual way.

82. Additionally, police have the power to apply for a s53a summary review.

83. **PACA 2009** introduces a Mandatory Code for drinks promotions which is aimed at reducing crime and disorder and public nuisance caused by excess alcohol intake. At the time of writing, the mandatory conditions are before Parliament for approval and the first three are due to come into force on 6 April 2010.

84. **The Crime and Security Act 2010 –** received Royal Assent on 8 April 2010. It amends Licensing Act 2003 to insert new section 172A-E and introduces a new power for licensing authorities to impose 'Early morning alcohol restriction orders'. It amounts to the power to impose a blanket ban on 24 hour premises, the ban operating between 3am and 6am in respect of all premises selling alcohol, including supermarkets and off licences. The local authority would need to show that the measure was necessary to promote the licensing objectives and a public hearing held following consultation with, among other people, residents. One of the stated aims of the measure is to 'make life better for local residents'. The power may add significantly to the ability to stop alcohol related disorder, where it cannot be related with certainty to a particular premises, creating a kind of 'cumulative impact zone', as opposed to a review which cannot be taken on the grounds of cumulative impact.

85. **Criminal Justice and Police Act 2001** – where there has been sale of alcohol otherwise than in accordance with an authorisation, including a breach of a licence condition. The effect is to stop all licensable activities until the breach has been rectified, on pain of prosecution. Can be either a police constable or an authorized officer of the Council. Again this is a useful tool on behalf or local residents as it can be done by an officer of the Council if for example, a premises is selling alcohol after it's

permitted hours, which may cause a public nuisance as well as being a breach of its licence.

86. **Anti-social Behaviour Act 2003 – s40.** For premises licences and TENs where there is public nuisance caused but noise from the premises and closure is necessary to prevent the nuisance. The premises can be closed for up to 24 hours on the application of an Environmental Health Officer, authorised by the Council's CEO. Again, this is useful in alleviating problems suffered by residents.

Abbreviations:

LA03 - Licensing Act 2003

PACA – Policing and Crime Act 2009

LG(MP)A 1982 – Local Government (Miscellaneous Provisions) Act 1982

The Regulations – The Licensing Act 2003 (Premises licences and club premises certificates) Regulations 2005

The Hearings Regulations – The Licensing Act 2003 (Hearings) Regulations 2005

The Guidance – DCMS Guidance issued under section 182 of the Licensing Act 2003 – Consolidated version published 10 December 2009

Helpful web links for residents:

http://www.licensingadvice.org/advice3

http://www.licensingadvice.org/advice

http://www.licensingadvice.org/jargon