



**Notice of a public meeting of
Gambling, Licensing & Regulatory Committee**

To: Councillors Lisle (Chair), Funnell (Vice-Chair), Boyce, Cullwick, Douglas, Hayes, Hunter, Mason, Mercer, Pavlovic, Reid, Richardson, D Taylor, Wells and Derbyshire

Date: Monday, 18 March 2019

Time: 4.00 pm

Venue: The George Hudson Board Room - 1st Floor West Offices (F045)

AGENDA

1. Declarations of Interest

At this point in the meeting, Members are asked to declare:

- any personal interests not included on the Register of Interests
- any prejudicial interests or
- any disclosable pecuniary interests

which they may have in respect of business on this agenda.

2. Minutes

(Pages 1 - 8)

To approve and sign the minutes of the meeting held on 11 February 2019.

3. Public Participation

At this point in the meeting members of the public who have registered their wish to speak regarding an item on the agenda or an issue within the Committee's remit can do so. The deadline for registering is **5:00pm on Friday 15 March 2019.**

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be filmed and webcast, or recorded, including any registered public speakers who have given their permission. This broadcast can be viewed at <http://www.york.gov.uk/webcasts>.

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The Council's protocol on Webcasting, Filming & Recording of Meetings ensures that these practices are carried out in a manner both respectful to the conduct of the meeting and all those present. It can be viewed at http://www.york.gov.uk/download/downloads/id/11406/protocol_for_webcasting_filming_and_recording_of_council_meetings_20160809.pdf

4. Update on Disclosure and Barring Service (Pages 9 - 12) checks for York taxi drivers

This report is to update Members on the progress made on ongoing criminal record checks with the Disclosure and Barring Service (DBS), 'refresher' checks for York licensed hackney carriage and private hire drivers as requested by Members of the Committee on 8 October 2018.

5. Update Report - Private Hire Licensing (Pages 13 - 28)

This update report explains the Council's position regarding the interpretation of the law relating to private hire licensing and the ability to work outside the area within which they are licensed. An alternative interpretation of the law has been put forward by members of the trade. The Opinion of their legal adviser is attached for Members' information at Annex 1. The Council has sought external legal advice. This is attached for Members' information at Annex 2.

6. Urgent Business

Any other business which the Chair considers urgent under the Local Government Act 1972.

Democracy Officer:

Name: Angela Bielby

Contact Details:

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- E-mail – a.bielby@york.gov.uk

For more information about any of the following please contact the Democracy Officer responsible for servicing this meeting:

- Registering to speak
- Business of the meeting
- Any special arrangements
- Copies of reports and
- For receiving reports in other formats

Contact details are set out above.

This information can be provided in your own language.

我們也用您們的語言提供這個信息 (Cantonese)

এই তথ্য আপনার নিজের ভাষায় দেয়া যেতে পারে। (Bengali)

Ta informacja może być dostarczona w twoim własnym języku. (Polish)

Bu bilgiyi kendi dilinizde almanız mümkündür. (Turkish)

یہ معلومات آپ کی اپنی زبان (بولی) میں بھی مہیا کی جاسکتی ہیں۔ (Urdu)

 **(01904) 551550**

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City of York Council

Committee Minutes

Meeting	Gambling, Licensing & Regulatory Committee
Date	11 February 2019
Present	Councillors Lisle (Chair), Funnell (Vice-Chair), Boyce, Hayes, Hunter, Mason, Pavlovic, Reid, Richardson, D Taylor, Wells and Derbyshire
Apologies	Councillors Cullwick, Douglas and Mercer

Part A - Matters Dealt with Under Delegated Powers

23. Declarations of Interest

Members were asked to declare any personal interests not included on the Register of Interests, any prejudicial interests or any disclosable pecuniary interests which they may have in respect of business on the agenda. None were declared.

24. Minutes

Resolved: That the minutes of the meeting held on 6 November 2018 be approved as a correct record and signed by the Chair.

25. Public Participation

It was reported that there had been ten registrations to speak under the Council's Public Participation Scheme, although one resident had been unable to attend.

Gwen Swinburn spoke on the issue of DBS checks for drivers, the cancellation of the previous meeting of the Committee by Officers and the delay in giving the Committee the legal advice she had sought on the operation of UBER in the City. Finally she noted that there should be a work plan for the Committee, as this was best practice.

Colin Metcalfe, Secretary of the York Hackney Carriage Association, told the Committee that he felt this was becoming an Officer led Council and stressed the importance of not

ignoring the legal opinion the drivers had provided as UBER were operating illegally. He stated York should be the City to lead on tackling their operation.

Alan Rowley, a Member of the York Hackney Carriage Association, spoke on the differences between an operator and a driver in Taxi Licensing and how this worked in terms of allocating jobs. He stated that an operator needs to have a manned office within the controlled area, which UBER did not. Finally he stated that without meeting the triple licensing rule, drivers could not legally operate in the City and that UBER were doing so without challenge.

Steve Nelson, Vice Chair of the York Private Hire Association, stated that the legal opinion of CYC was wrong and went on to explain the restriction on where the vehicle was when receiving the booking. He also stated that it was his opinion that the Council were using the wrong interpretation of 'operate' and that a driver could only accept booking within their own licensed area.

Mark Jennings, the GMB President of Professional Drivers and Secretary of Southend Licensed Taxi Drivers Association spoke on Local Authorities having full control over the operation of Private Hire Vehicles in their area and how he felt this was not happening in York, as CYC did not want a legal battle with UBER. He stressed that it was essential to regulate what he saw as illegal operation as it was a potential safeguarding threat and left the Council open to prosecution.

Drew Thompson, Member of the York Private Hire Association, also spoke on UBER and the way they were undermining the Committee's decision to remove their licence by continuing to send out of town drivers. He stated that this was an ongoing issue for York, taking money out of the local economy and needed to be dealt with swiftly by Members.

Tony Green, Vice Chair of the York Hackney Carriage Association, spoke on the importance of ensuring public safety via enforcement action. He stated there was a lack of enforcement officers and that UBER were continuing to illegally ply for hire, which made any insurance drivers had null and void. Finally he stated that 83% of complaints about UBER were from local drivers and that failure to control this behaviour had led to a hostile atmosphere.

Wendy Loveday, Chair of the York Private Hire Association, spoke on the different ways in which York and Leeds were tackling UBER's operation. She stated that Leeds Council firmly stated that working in their City without an operator's licence was illegal and that they would prosecute, without exception, any non Leeds driver working without a pre booked job. Finally she stated that it was CYC's responsibility to enforce the law and prosecute drivers found to be doing the same thing in York.

Mike Palmer, Secretary of the York Private Hire Association, also spoke on the lack of enforcement action in relation to UBER's continued operation in the City. He stated that drivers had offered Officers free travel to assist them with enforcement. He said a change of policy was needed as drivers were continuing to come into York in poor quality vehicles, with no local knowledge, leading to a rising number of complaints. He stated that it was the responsibility of Members to hold this company accountable.

26. Renewal of Sex Establishment Licence for Upstairs (Mansion), 53-55 Micklegate, York, YO1 6LJ

Members considered an application for the renewal of a Sex Establishment Licence in respect of Upstairs (Mansion), 53-55 Micklegate, York.

In coming to their decision, the Committee took into consideration all the evidence and submissions that were presented as follows:

The Licensing Manager's report and her comments made at the meeting. She advised that the application was for the renewal of a Sex Establishment Licence in line with Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, as amended by Section 27 of the Policing and Crime Act 2009, which allowed local authorities to regulate lap dancing clubs and similar venues. She outlined the report and annexes, noting the opening hours of the venue. She reported that consultation had been carried out correctly and that no objections had been received.

The Licensing Manager then outlined discretionary grounds for the refusal of an application for a sex establishment licence.

The application form.

In respect of the proposed licence, the Committee had to determine whether to take any of the steps mentioned under paragraphs 10, 12 and 13 of Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 (as amended), that it considered necessary.

Members were presented with the following options:

- Option 1 Grant a renewal of the licence as requested. This option was **approved**.
- Option 2 Renew the licence with modified/additional conditions imposed by the licensing committee. This option was **rejected**.
- Option 3 Refuse the application for renewal on one of the mandatory grounds or on one or more of the discretionary grounds within paragraph 12 to Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 (as amended). This option was **rejected**.

Reason for the Decision:

In reaching the decision the Committee noted that the business had operated without complaint.

27. Update Report - Private Hire Licensing

Members considered a report which explained the Council's present position regarding the interpretation of the law relating to private hire licensing and the ability to work outside the area within which they are licensed. An alternative interpretation of the law had been put forward by members of the licence trade and the opinion of their legal adviser was attached for Members information at Annex 1.

The Head of Public Protection and Senior Solicitor attended the meeting to present the report and answer Member questions. They highlighted paragraph 4 of the report and stated that the taxi trade within the City had provided an alternative legal opinion which, as of now, was an untested opinion. They went on to explain that the Council had sought their own external advice and this opinion had been awaiting the outcome of two

pending cases in Brighton and Reading. This would be ready by the following week.

In response to Member questions they stated:

- They believed there were enough enforcement staff, but explained it was hard for them to always be 'in the right place, at the right time' and they did rely on reports from the taxi trade, which were welcomed;
- There were ongoing prosecutions following enforcement action;
- The cases pending in terms of the legal opinion sought by the Council were in court after appeals from Magistrate's Court, and were on the same principles and issues as in York;
- The cases were an informative. Settled law was based on judicial decisions made in Court;
- The judgement in Reading was made the week before this meeting and the Counsel instructed by CYC was now in a position to finalise their advice; and
- The decision in response to that legal advice would be for Members, at this Committee and Executive, on advice from Officers.

During debate Members stated that it was always hard for enforcement Officers to be in the right place and that in all cases CYC relied on the support of the public in reporting breaches.

They were clear that this legal opinion needed to be brought to this Committee in March so that Members could make a decision pre- election and reassure both the trade and the public. It was then agreed

Resolved: That the report be noted.

Reason: To update the Committee on the Council's present position regarding the interpretation of the law relating to private hire licensing and the ability to work outside the area within which they are licensed.

Part B - Matters Referred to Council

28. Statement of Licensing Policy & Cumulative Impact Assessment

In accordance with the requirements of Section 5 of the Licensing Act 2003 (the 2003 Act), Members considered a report which sought their support of the formal review of the council's Statement of Licensing Policy. The report advised Members of the consultation undertaken and of the amendments made as a result of changes to legislation and revised guidance.

The report also sought Members support for the implementation of a Cumulative Impact Assessment in relation to part of the city centre (In accordance with the requirements of Section 5A of the 2003 Act) and the report advised them of the consultation undertaken.

The report sought a recommendation to Full Council that the draft Statement of Licensing Policy and Cumulative Impact Assessment be adopted.

The Licensing Manager presented the report and explained that the North Yorkshire Police Force Licensing Officer was in attendance to answer any questions Members may have on Cumulative Impact Assessment report.

In response to Member questions they stated:

- The report from the Police had been considered very closely. Patterns of behaviour did shift and the areas covered were under constant review;
- Reporting methods had changed and there was also a national increase in crime, but this remained one of the safest counties;
- The Cumulative Impact Assessment was evidence based and if the evidence was not there an area could not be included within the Controlled Area;
- The 'Top Tier' streets in the report were based on calls for service to the Police. This did not directly correlate with the red area on the map as that was created by plotting calls for service that were relevant to the Licensing Act;

- Due to policing numbers it was important to identify 'hot spots' and this was constantly under review. In relation to the train station the police worked closely with British Transport Police. There was also a Public Space Protection Order covering the city centre which includes the station;
- In relation to changes proposed to Micklegate and the suggestion to turn half the road into 'pavement cafes', all applications for outdoor seating would be reviewed on their own merits, against the Licensing Objectives; and
- All new and variation applications within CIA, especially the 'red zone', would have to demonstrate why the licence should be granted, as there would be a rebuttal presumption to refuse.

Members requested that the map be amended to consider the boundaries of properties within the zone. Officers stated that this would be discussed with the Police Force Licensing Officer.

It was agreed that this Committee recommend to Council

Recommended: That the draft Statement of Licensing Policy and Cumulative Impact Assessment be adopted.

Reason: To reflect the result of the consultation and meet legislative requirements.

Cllr S Lisle, Chair

[The meeting started at 4.00 pm and finished at 5.55 pm].

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Gambling, Licensing & Regulatory Committee**18 March 2019**

Report from the Assistant Director – Planning and Public Protection

Update on Disclosure and Barring Service checks for York taxi drivers**Summary**

1. This report is to update members on the progress made on ongoing criminal record checks with the Disclosure and Barring Service (DBS), ‘refresher’ checks for York licensed hackney carriage and private hire drivers as requested by Members of this Committee on 8 October 2018.

Recommendations

2. That the Report be noted.

Reason: In order that Members be updated on the progress of DBS checks for York taxi drivers

Background

3. The report brought before Members on 8 October comprehensively outlined the council’s position with regards to outstanding DBS checks and, as such, the position is not repeated within this report.
4. At the time of the last report there were 693 drivers were due a DBS check. As of 20 February 2019 (the time of writing) a further 291 drivers have become due a check, meaning a total of 984 drivers had become due a check.
 - All 984 (100%) drivers have been contacted by officers about the process.
 - It is pleasing that some 917 (93.2%) have now completed their checks satisfactorily.
 - There are 14 (1.4%) drivers with checks in progress with the DBS.
 - There are 22 (2.2%) drivers with whom we are checking ‘positive’ results. Please note that the DBS process flags all previous convictions and other matters which we may already be aware of.

- Some 18 (1.8%) of drivers have indicated their intention to surrender their licence as they are no longer driving.
 - There are ten (1.0%) drivers who we have been unable to contact or begin the process for good reason (for example because they have a long term illness) and three (0.3%) drivers refusing to co-operate.
5. As recommended at the meeting on the 8 October, we are in the process of contacting those drivers who have yet to surrender their licence (as they have indicated) or are refusing to co-operate with a view to determining whether they remain 'fit and proper' persons to hold a licence. Each case is being considered on its merits, but sanctions include suspension or revocation of their licence. The same considerations are being made in respect of those drivers we have been unable to contact.

Consultation

6. There is no consultation associated with this report as it is for information only.

Options

7. There are no options and analysis associated with this report as it is for information only.

Analysis

8. There are no options and analysis associated with this report as it is for information only.

Council Plan

9. This action supports the council's priority to meet its statutory duties.

Implications

10. There are no other implications.

Contact Details

Author:
Matt Boxall
Head of Public Protection
Tel: (01904) 551528

Chief Officer Responsible for the report:
Mike Slater
Assistant Director of Planning and Public
Protection

Report **Date** 08.03.19
Approved

Specialist Implications Officer(s) List information for all

N/A

Wards Affected: List wards or tick box to indicate all **All**

For further information please contact the author of the report

Background Papers

Committee Report from 8 October 2018

<https://democracy.york.gov.uk/ieListDocuments.aspx?CIId=606&MIId=11075&Ver=4>

Annexes

None

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Gambling, Licensing & Regulatory Committee**18 March 2019**

Report of the Assistant Director of Planning & Public Protection

Update Report – Private Hire Licensing**Summary**

1. This update report is for Members to note, at the request of the Chair. It explains the Council's position regarding the interpretation of the law relating to private hire licensing and the ability to work outside the area within which they are licensed.
2. An alternative interpretation of the law has been put forward by members of the trade. The Opinion of their legal adviser is attached for Members' information at Annex 1.
3. The Council has sought external legal advice. This concludes that the alternative legal view is flawed. This is attached for Members' information at Annex 2.
4. The Council's position remains the same and there is no need to amend current policy.

Recommendations

5. That the conclusions in the Legal Advice at Annex 2 are accepted and it be recommended to the Executive that there is no requirement for a change in Taxi Licensing Policy as a consequence.

Reason: To provide clarity for the public in relation to the Council's interpretation of the law.

The Council's Legal Position

6. The Council is satisfied that having regard to the independent Legal Opinion, the settled legal position remains as follows:
Provided the three licences required in relation to a private hire vehicle (operator, vehicle and driver) have all been issued by the same

authority, then the private hire vehicle (PHV) can undertake journeys anywhere in England and Wales. That is irrespective of where the journey commences, areas through which the journey passes and, ultimately, the area where the journey ends.

See Adur District Council v Fry [1997] RTR 257.

In this case, a PHV was licensed by Hove Borough Council – operator, driver and vehicle. The situation concerned a booking for a journey that commenced, ended and throughout its length was within the district of Adur District Council.

The High Court determined that no offence was committed, and it was lawful for the PHV to undertake a journey that is wholly outside the district in which it is licensed. This is due to the limited meaning of the term “operate” contained in Local Government (Miscellaneous Provisions) Act 1976, Section 80(1), which meant “in the course of business to make provision for the invitation or acceptance of booking for a PHV” and could not be construed more widely.”

The Trade’s Legal Interpretation

7. On 19th November 2018, the Private Hire Association shared a legal Opinion it had obtained from Queen’s Counsel, that argues that operators of ‘out of town vehicles’ and their drivers are illegally operating in York. (Annex 1) It is important to stress, that this alternative view that has not been tested in the Courts.
8. The Council has instructed separate Counsel to advise, and a comprehensive advice note is attached at Annex 2.
9. The Advice concludes that the Trade’s legal interpretation is flawed.

Council Plan

10. Seeking independent counsel advice supports the council’s priority to meet its statutory duties.

Implications

11. There are no implications associated with the recommendation in this report.

Risk Management

12. There are no implications associated with the recommendation in this report.

Contact Details

Author:
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Michael Slater
Assistant Director of Planning
and Public Protection

Chief Officer Responsible for the report:
Neil Ferris
Corporate Director of Economy and Place

Report **Date** 8 March 2019
Approved

Specialist Implications Officer(s) List information for all
Alison Hartley
Legal Services Manager (Corporate Governance)

Wards Affected: List wards or tick box to indicate all **All**

For further information please contact the author of the report

Annexes

Annex 1: Legal Opinion – Private Hire Association
Annex 2: Legal Opinion – City of York Council

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RE: UBER BRITANNIA LIMITED**UNLICENSED PROVISION FOR THE INVITATION OF PHV BOOKINGS
LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1976****YORK PRIVATE HIRE ASSOCIATION**

OPINION

Introduction

1. On 12 December 2017 York city Council (“the council”) refused to renew the York private hire vehicle operators’ licence held by Uber Britannia Limited (“Uber”).
2. The refusal appears to have made little or no difference: Uber vehicles and drivers continue to present themselves in York and invite potential customers to book their services on their smartphones. Uber encourages and incentivises drivers to do so. The result is that out-of-town private hire drivers, and vehicles not meeting York’s licensing requirements, are undertaking PHV bookings on the City’s streets.
3. I have been asked by the York Private Hire Association whether the continued activities of Uber and its drivers in York is lawful. For the reasons given below, I am strongly of the opinion that Uber and Uber drivers are acting as unlicensed operators, contrary to section 46(1)(d) of the LGMPA 1976.

The law

4. It is important to recognise that the statutory provisions applying to PHV drivers and vehicles are materially different from the provisions applicable to PHV operators.

Vehicles

5. The owner of a vehicle may not use it as a private hire vehicle in a controlled district unless the vehicle is licensed under section 48 LGMPA 1976: section **46(1)(a)**.

Drivers

6. A private hire vehicle may not be driven in a controlled district otherwise than by someone licensed under section 51: section **46(1)(b)**. (It is also an offence for the owner of a vehicle to employ as a driver someone who is not so licensed: **46(1)(c)**).
7. No offence under sections 46(1)(a), (b) or (c) is committed, however, if a driver’s licence and a vehicle licence issued in a different controlled district are in force: section 75(2).

8. The so-called “right to roam” of PHV drivers and vehicles derives from section 75(2). It means that licensed drivers and vehicles may lawfully undertake journeys (not ‘accept bookings’) “which ultimately have no connection with the area in which they are licensed” (per Latham LJ in *Shanks v North Tyneside BC* [2001] LLR 706).
9. The right is not unqualified: PHV drivers and vehicles may not solicit custom, and may only fulfil a booking accepted by an operator licensed by the same authority as licensed them: *Dittah v Birmingham City Council* [1993] RTR 356. Thus all three licences (operator’s, driver’s and vehicle) must be issued by the same authority: *Dittah*.

Operators

10. Section 80(1) LGMPA 1976 provides:

“operate” means in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle.
11. An operator may only make provision for the invitation or acceptance of PHV bookings in the controlled district in which he is licensed: LGMPA section **46(1)(d)**, applying section 80, subsections (1) & (2).
12. **Section 75 of the LGMPA 1976 does not provide an exemption for operators from section 46(1)(d):** (i.e. there is no equivalent exemption to that provided for drivers and vehicles from sections 46(a), (b) & (c)). Thus, whilst drivers and vehicles may lawfully undertake *journeys* “which ultimately have no connection with the area in which they are licensed” (*Shanks*), provision for the invitation or acceptance of bookings may only be made in the controlled district in which the operator is licensed.
13. Whether or not provision has been made in breach of section 46(1)(d) is a question of fact. The following guidance emerges from the cases -
 - “It is simply a question of asking, in common sense terms, whether there has been provision made in the controlled district for invitation or acceptance of bookings”: *Kingston Upon Hull City Council v Wilson* (1995) WL 1082181, per Buxton J.
 - “There could well be provision for invitation of bookings in one place and for acceptance in another”: *East Staffordshire BC v Rendell* (1995) WL 1084118, per Simon Brown LJ.
 - “As the authorities clearly show, the [main] question is not where the act of accepting any particular booking or bookings take place, but where the provision is made”: *idem*
 - “The determining factor is not whether any individual booking was accepted, let alone where it was accepted, but whether the person accused has in the area in question made provision for the invitation or acceptance of bookings in general”: *Windsor and Maidenhead v Khan* [1994] RTR 87, per McCullough J.

Invitation of bookings

14. Uber customers make bookings using the Uber Rider App on a smartphone. The App is licensed by Uber BV. When customers activate the Uber Rider App, they are immediately presented with a map of their local area, showing the position of each nearby Uber vehicle that is currently available for hire. Each vehicle is continuously advertising its availability for hire and inviting potential customers in the vicinity to commence the process of booking.
15. *Rose v Welbeck* [1962] 1 WLR 1010 was a decision on the prosecution of a driver for plying for hire: but the court's analysis of the facts, and discussion of what amounted to an invitation to book, are relevant. There, a PHV vehicle was parked in a public street, bearing the inscription "Welbeck Motors, Minicabs" on both its sides, together with a telephone number. Winn J said: "At the very lowest, the evidence in the present case discloses behaviour and appearance on the part of this vehicle which amounts to an invitation:

'Get in touch one way or another with my owner and see whether he is willing for you to take me as a vehicle which you are hiring.'"

Lord Parker CJ said: "The vehicle was saying:

'Not only do I, if I may personify the vehicle, recommend you to Welbeck Motors Ltd., where you can hire a minicab, but further I am one of those minicabs and I am for hire.'"

16. In terms of 'invitation to book' there is no meaningful distinction to be drawn between the invitation made by vehicles displayed on the Uber Rider App, and that made by the parked *Welbeck* vehicle: the former is merely a modern, internet-assisted manifestation of the latter.
17. By exhibiting (on the Rider App) their physical presence in York, and their availability for immediate hire, Uber drivers and vehicles self-evidently invite bookings for their services. Provision for that invitation is made by 'Uber'; and it is made in York, where Uber are unlicensed.

Uber's 'Regions'

18. On 14 February 2018 Uber announced its unilateral decision to divide the UK into nine 'regions', each of which spans several different licensing districts, with their own standards and local licensing requirements.
19. UBL has told drivers on the Uber platform that if they hold a vehicle/driver's licence from any licensing authority within one of Uber's so-called regions, they will have exclusive rights to work as Uber drivers anywhere within that region.

20. Uber has placed York within its wide “Yorkshire Region” (which includes other local authority areas such as Leeds, Bradford and Kirklees). Uber uses surge pricing to encourage ‘out-of-town’ Uber drivers, including those licenced by Leeds, Bradford and Kirklees, to come to York and activate the Driver App. I have been shown screen shots of a Leeds Driver App showing how Leeds drivers are encouraged to go York where there is surge pricing.
21. The only discernible difference to Uber’s operations in York, since the refusal to renew its licence there, is that York licensed drivers who were working on the Uber platform on 12 December 2017 are no longer eligible to do so: the entirety of Uber’s provision in York is now made by ‘out-of-town’ vehicles and drivers licensed by other authorities.

Surge Pricing

22. ‘Surge pricing’ (also known as “dynamic pricing”) is a feature of the Uber model. It applies a multiple to its standard rates for journeys that commence in certain areas. These areas, and the applicable multiple, are broadcast to drivers via the Driver App. Drivers who commence journeys in areas where surge pricing is in force receive a multiple of whatever fare they would otherwise have received. Surge pricing therefore provides a strong incentive for drivers to travel to areas where ‘surge’ is in operation, in the expectation of receiving enhanced rewards for their work.

Local Licensing Control

23. Uber’s conduct is in no way a ‘technical breach’ of the statutory provisions. It goes to the heart of the licensing regime and its purposes. The Courts have said that “*the hallmark of the licensing regulatory regime is localism*”¹, and that “*that the authorities responsible for granting licences should have the authority to exercise full control*” over “*all vehicles and drivers being operated ... within its area.*”²
24. The undermining of local licensing control is a nationwide concern. In its representation to TfL, on the opposed renewal of Uber’s London licence, the Mayoress of Watford wrote:

“Uber’s method of operation seems inconsistent with the principles of a locally determined licensing regime that allows for each authority area to decide what is best in the interests of public safety for residents and visitors...”

I understand there to be every bit as great concern in York about the lack of local licensing control as there is in Watford - and as there is in licensing authorities throughout the Country.

¹ *Blue Line Taxis v Newcastle upon Tyne City Council* [2012] EWHC 2599 (Admin).

² *Shanks v North Tyneside Borough Council* [2001] EWHC 533 (Admin).

Conclusions

25. The licensing requirements of PHV drivers and their vehicles, and the exemptions therefrom, are different from those made of PHV operators. The gross oversimplification - “*cross-border hiring is lawful*” – is a misreading of the relevant case law (*Shanks*) and suggests a failure to recognise that distinction. There is no “loophole” in the law that allows Uber to operate a private hire vehicle in an area in which neither Uber, the vehicle nor the driver are licensed.
26. Uber is not a licensed operator in York.
- a. Uber supplies Uber drivers (who are not licensed in York) with the means (smartphone and App) by which the drivers advertise their presence in York, and their availability for immediate hire there.
 - b. Uber actively encourages and incentivises Uber drivers (not licensed in York) to trade in York.
 - c. Uber drivers, so supplied with the means, and so incentivised, come to York and invite potential passengers to make bookings with Uber, via the Uber App.
27. I have no doubt at all that Uber, together with Uber drivers, are making unlawful provision in York for the invitation of PHV bookings, contrary to section 46(1)(d) of the LGMPA 1976.

Gerald Gouriet QC

Francis Taylor Building
Inner Temple

Friday, 16 November 2018

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In the matter of
Section 46(1)(d) of the Local Government (Miscellaneous Provisions) Act 1976

And in the matter of York City Council

ADVICE NOTE

1. Section 46(1)(d) of the Local Government (Miscellaneous Provisions) Act 1976 provides:

Except as authorised by this Part of this Act – no person shall in a controlled district operate any vehicle as a private hire vehicle without having a current licence under section 55 of this Act’.

2. A question has arisen in York as to whether the business model of Uber is in breach of this sub-section. This has been brought into focus by an Opinion provided to the York Private Hire Association by Gerald Gouriet QC (16th November, 2018).
3. The Editors of *Paterson’s Licensing Acts 2019* provide a detailed footnote to this sub-section (see 2.467 / p 1181):

It is suggested that PHV operators who knowingly send drivers in their fleet expressly to work in areas where they are not licensed will be in breach of this subsection if they are found as a question of fact to be making provision in those areas for the invitation of bookings: see the definition of ‘operate’ in s 80(1). The detailed circumstances of each case will be relevant. Whether or not the display of a waiting PHV on a potential passenger’s Smartphone is an invitation to book that vehicle has yet to be determined by the courts. The operator may in any event be vulnerable to having his operator’s licence revoked or refused renewal under s 62(1)(d) of the 1976 Act on the ground that he undermines local licensing control.’

4. This footnote along with the Gerald Gouriet QC Opinion to the York Private Hire Association (16th November, 2018) seem to me to represent, in part, the anxieties and challenges raised by the advent of new technologies on established systems.
5. The recent case of *Reading Borough Council v Ali* [2019] EWHC 200 (Admin) is of assistance. This case is an appeal by way of case stated from the decision of the Chief Magistrate to acquit Mr Ali of two charges of plying for hire contrary to s 45 of the Town Police Clauses Act 1847. The respondent is an Uber driver, he, his vehicle and Uber are licensed by Transport for London (“TfL”) to conduct private hire business pursuant to the “triple lock” licensing-regime under the Private Hire Vehicles (London) Act 1998. On the nights in question, some 60 Uber vehicles were in Reading. In the early hours of 21st January, 2017, Mr Ali was parked in Kings Road in the center of Reading waiting for a passenger to make a booking for his vehicle via the Uber smartphone App. Two of the appellant’s Licensing Enforcement Officers who were registered as Uber passengers saw the outline of his vehicle on their App, approached the vehicle and interviewed Mr Ali. He said he was waiting for a booking through the Uber App. A

similar series of events occurred just after midnight the following night when the same Officers interviewed Mr Ali again.

6. Similarly, the Gouriet Opinion summaries the circumstances in York as follows:

‘Uber customers make bookings using the Uber Rider App on a smartphone. The App is licensed by Uber BV. When customers activate the Uber Rider App, they are immediately presented with a map of their local area, showing the position of each nearby Uber vehicle that is currently available for hire. Each vehicle is continuously advertising its availability for hire and inviting potential customers on the vicinity to commence the process of booking’ [14].

7. The question that arises for Mr Gouriet and the York Private Hire Association, is whether this business model is lawful. Gouriet opines that: ‘I am strongly of the opinion that Uber and Uber drivers are acting as unlicensed operators, contrary to section 46(1)(d) of the LGMP 1976’ [3]. And again at [27]: ‘I have no doubt at all that Uber, together with Uber drivers, are making unlawful provision in York for the invitation of PHV booking contrary to section 46(1)(d) of the LGMPA 1976’.

8. The High Court in the *Reading* case gave consideration to the Uber business model and concluded:

33. In my judgment, there was no unlawful plying for hire in this case for a number of reasons. First, the mere depiction of the respondent’s vehicle on the Uber App, without either the vehicle or the driver being specifically identified or the customer using the App being able to select that vehicle, is insufficient to establish exhibition of the vehicle in the sense in which that phrase is used by Lord Parker CJ in formulating the two stage test for plying for hire in *Cogley v Sherwood* and *Rose v Welbeck*. That requires not just exhibition of the vehicle but its exhibition expressly or implicitly soliciting custom, inviting members of the public to hire the vehicle.

34. It seems to me that depiction of the vehicle on the App does not involve any exhibition of that kind, but is for the assistance of the Uber customer using the App, who can see that there are vehicles in the vicinity of the type he or she wishes to hire. I agree with Mr Kolvin QC that the App is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years. If I ring a minicab firm and ask for a car to come to my house within five minutes and the operator says “I’ve got five cars round the corner from you. One of them will be with you in five minutes,” there is nothing in that transaction which amounts to plying for hire. As a matter of principle, I do not consider that the position should be different because the use of internet technology avoids the need for the phone call.

9. At para 16 of the Gouriet opinion it is said that ‘[i]n terms of ‘invitation to book’ there is no meaningful distinction drawn between the invitation made by vehicles displayed on the Uber Rider App, and that made by the parked [*Rose v Welbeck*] vehicle: the former is merely a modern, internet-assisted manifestation of the latter’. This analysis is expressly rejected by Lord Justice Flaux and the very opposite position taken, that the use of the app *is simply the use of modern technology to effect a similar transaction to those which have been carried out by PHV operators over the telephone for many years* [34].

10. In *Reading* the court further drills down into the character of waiting – that is the vehicles being physically present in an area that is not in the area the controlled district of which the operator, vehicle and driver are licensed – and the Uber App. In so doing the court further distinguishes the Uber business model from the *Rose v Welbeck* scenario:
38. This leads on to the third reason why this was not plying for hire, which is the character of the waiting. The respondent was waiting in his vehicle until a customer confirmed a booking on the Uber App and he accepted that booking. There was no question of his soliciting custom during the period of waiting. His vehicle did not advertise itself as available for hire nor did he do anything which would have suggested to the public that he was available for hire. Indeed, as the Chief Magistrate found, if a member of the public had approached the vehicle and sought a ride, the respondent would have refused to take such a passenger off the street without a prior booking through the Uber App.
39. The waiting here was of a completely different character to that in *Rose v Welbeck*. Unlike in that case, the respondent was not waiting to solicit custom from passing members of the public, but he was waiting for a private hire booking via the Uber App. Putting the example given by Lord Parker CJ in *Cogley v Sherwood* of what would not be plying for hire into the context of the Uber App, if approached in the street, the respondent would have been saying: ‘You cannot have my vehicle, but if you register for the Uber App and make a booking on it, you will be able to get a vehicle, not necessarily mine.’
11. In effect the Uber business model represents no more than an efficient, speedy and convenient modern manifestation of the private hire regime under the 1976 Act. In *Dittab v Birmingham City Council* [1993] RTR 356 it was held that ‘an accurate statement of the law’ (363) was provided by the Department of Transport letter (dated 25 June, 1993) which read: ‘In our view applying section 80(2) to sections **46(1)(d)** and (e) has the effect that an operator requires a licence from the area in which he intends to operate and may only operate in that area vehicles and drivers licensed by the same district. This has the practical effect that an operator licensed in area A may only use vehicle and drivers licensed in area A but these vehicles and drivers will be able to go anywhere in the course of hiring’ (363) (Emphasis added). Further in *Shanks v North Tynside Borough Council* [2001] EWHC (Admin) Lord Justice Latham came to the firm conclusion that *Dittab* was correctly decided [22].
12. In *Shanks* it was held that ‘[t]he meaning of “operator” in section 80 when taken in conjunction with section 75(2) provides for considerable flexibility. The operator can use the vehicles within his organisation for journeys both inside and outside the area of the local authority in which he is licensed **and, indeed, can use such vehicle and drivers for journeys which have no ultimate connection with the area in which they are licensed.** There is, it seems to me, therefore, no reason to believe that the construction, which I consider to be the right construction of the Act, renders the operation of private hire vehicles in any way so restrictive as to justify the conclusion that the construction that I have reached must be wrong.’ [26]. (Emphasis added).
13. That the drivers and vehicles may be in areas (such as Reading or York) which have no ultimate connection with the area in which they – and the operator – are licensed. This is

both lawful and an accepted part of the *considerable flexibility* of the private hire regime.¹ The key factor for enforcement purposes (and compliance with section 46) is that the vehicle licence, the driver licence and the operators licence are issued by the same local authority how-so-ever the vehicles and drivers may rightly roam.

14. At para 12.99 *Button on Taxis* (4th Edn) opines that '[t]he simplest way to establish whether or not an offence has been committed is to inquire whether all three licences have been issued by the same authority? If the answer to that is 'Yes', and the 'happy family of licences' is present, then there is no restriction on the geographical area in which the journey can take place.' These established principles seem to have informed the approach of the High Court in the *Reading* case [2]:

The respondent is an Uber driver, He, his vehicle and Uber are licensed by Transport for London to conduct private hire business pursuant to the "triple lock" system under the Private Hire Vehicles (London) Act 1998. Uber had been refused an operating licence by the appellant. However, if Uber, their vehicles and drivers were conducting a private hire business, they could lawfully operate in Reading with their private hire vehicle ("PHV") licences from Transport for London ("TfL"). What drivers were not permitted to do was ply for hire, which only licensed hackney carriages are permitted to do.

15. It seems to me that the key question informing the *Reading* case and also the Gouriet opinion is whether or not the Uber business model is lawful, in other words is it a genuine private hire operation? In *Reading* the court accepts that the Uber business model is indeed a modern variant of the traditional private hire regime ([33] & [34] above).
16. In *Reading* the court went on to further consider whether the Uber business model in the context of pre-booking (an established feature of the private hire model), here again the court was satisfied that the Uber model was in accord with the principles of private hire:

37. Whatever the correct contractual analysis, in my judgment it has no impact on the question we have to decide. On any view, there is a pre-booking by the customer, which is recorded by Uber as PHV operator, before the specific vehicle which will perform the job is identified. This is all in accordance with the transaction being PHV business, not unlawful plying for hire. There was no soliciting by the respondent without some prior booking, as he only proceeded to the pick-up point after the customer had confirmed the booking and the respondent as driver had accepted the job. Whenever any contract was concluded, I have little doubt that this was not plying for hire, because on the facts found in this case, the customer could not use the respondent's car without making a prior booking through the App. As with the charabanc in *Sales v Lake*, the customer would make a booking to be picked up at a pre-arranged point. On the evidence in this case, all the Uber App did was to facilitate that booking.

17. This reflects existing established principles: In *Britain v ABC Cabs (Camberly) Ltd* [1981] RTR 395 the court was asked to determine whether the collection of a passenger within a controlled district (Rushmoor) in pursuance of a contract of hire made outside of the control district (Surrey Heath) 'was operating' for the purposes of the 1976 Act (403 – 404): 'I am satisfied that when the defendants' vehicle picked up the passenger at

¹ It seems to me that this 'considerable flexibility' (*Shanks*) is further reflected in the recognition that there are no restrictions upon where a private hire operator may advertise (see *Windsor & Maidenhead Royal Borough Council v Khan* [1994] RTR 87). To my knowledge there has been no consideration given to the Uber app (and similar applications) as being a form of advertisement.

Farnborough Station, the only material act which the defendants did in the borough of Rushmoor controlled district, they were not “making provision for the invitation or acceptance of bookings” at all, whether for a private hire vehicle or for any other vehicle. In my judgment to conclude otherwise would be to strain the language of the definition far beyond breaking point. If they were making provision for the invitation or acceptance of bookings anywhere, they were doing that, it would seem to me, in their office at Camberley, which is not a controlled district. In my judgment therefore no offence was made out under section 46(1)(d) and the justices rightly dismissed that information.’

18. The case of *Milton Keynes Council v Skyline Taxi and Private Hire Ltd* [2017] EWHC 2794 applies *Britain* and also endorses the practice whereby the traditional methods of business practice are replaced by automated computerised systems. In *Milton Keynes* ‘the definition of the word ‘operate’ focuses on the arrangements in pursuant to which the a private hire vehicle is provided and not with the provision of the vehicle itself ... the word ‘operate’ is not to be equated with, or taken as including, the providing of the vehicle, but refers to the antecedent arrangements.’ (per Dyson J in *Bromsgrove v Powers* (1998) cited in *Milton Keynes* [8]). Those *antecedent arrangements* being the triple lock.

19. Thus, in *Milton Keynes Hinkinbottom LJ* states [10] that:

‘However, because of the limited definition of “operate” [[8], above], he only commits an offence if, in the course of business and in a controlled district, he makes provision for the invitation or acceptance of bookings for a private hire vehicle in circumstances in which the vehicle and/or the driver do not have the required licence(s). That too is firmly established by the cases to which I have referred (see, eg, *Britain* at page 403). Therefore for these purposes, it is irrelevant (eg) where the customer might be picked up, or where the contract for hire might have been made, or where the particular booking might in fact have been accepted.’

20. In light of *Reading*, *Milton Keynes* and the established principles to which these cases adhere and apply, the assertion by Gouriet [at para [17]] that ‘[b]y exhibiting (on the Rider App) their physical presence in York, and their availability for immediate hire, Uber drivers and vehicles self-evidently invite bookings for their services. Provision for that invitation is made by ‘Uber’; and it is made in York, where Uber are unlicensed’ is, in my opinion, untenable and *self-evidently* wrong.

21. It seems to me that the Gouriet opinion is flawed in that it advances an analysis of the App-based Uber business model that has now been rejected by the High Court in the *Reading* case and secondly, fails to apply the established legal principles in respect of the specific legal definition of ‘operate’ within the 1976 regime.

Leo Charalambides
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 5th March, 2019

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