

## **Reference to Points of Law - Revised Guidance issued under section 182 of the Licensing Act 2003**

Section 182 of the Licensing Act 2003 provides that the Secretary of State must issue Guidance to Licensing Authorities on how to discharge their functions. (RG 1.6)

All licensing applications received by the Licensing Authority should be processed in accordance with the revised guidance. (RG 1.6)

Section 4 of the 2003 Act provides that, in carrying out its function, a licensing authority must 'have regard to' guidance issued by the Secretary of State under section 182. This Guidance is therefore binding on all licensing authorities to that extent. (RG 1.9)

City of York Council - the Licensing Authority - in processing the Minor Variation submitted by Ambiente Tapas Ltd have ignored the Guidance issued by the Secretary of State and which is binding on that Licensing Authority.

It is a reasonable presumption that the Licensing Authority was expected to follow this Guidance, unless there is a valid reason not to do so. No such valid reasons has been submitted for the Licensing Authority's departures from the Guidance or why the Guidance has been ignored by the Licensing Authority. Therefore the lawfulness and merits of the granting the minor variations are open to question to the extent that the minor variations granted should be rescinded.

### **The Minor Variations Process**

To be clear Revised Guidelines 8.61 only permits minor variations which 'will generally fall into four categories: minor changes to the structure or layout of the premises; small adjustments to licensing hours; the removal of out of date, irrelevant or unenforceable conditions or additional volunteered conditions.'

#### Conditions

The following 4 Conditions are included in the original licence granted in April 2018. They are Conditions which act as controls to prevent a Public Nuisance:-

Annex 2 Condition 19 (Number of Patrons) has been relaxed, the numbers increased from 12 to 20. This is outside the scope of the Minor Variation Process. (RG 8.61)

Annex 3 Condition 2 (Drink only with Food) has been removed. This is outside the scope of the Minor Variation Process. (RG 8.61)

Annex 3 Condition 3 (Sunday drinking hours) has been relaxed. The hours have been extended. This is outside the scope of the minor variations process. (RG 8.61. RG 8.66)

Annex 3 Condition 4 (Times of Outside Area use). These times have been relaxed. This is outside the scope of the Minor Variation Process. (RG 8.61)

All four of the above Conditions fall outside the four categories of permitted variations detailed in the Guidance. There was no valid reason for varying any of these conditions within the minor variation process. To vary the four conditions indicates that the Guidance has been ignored.

Furthermore, it is not permissible to relax or remove Conditions that ‘*could* impact adversely on any of the four licensing objective’. through the Minor Variations Process (RG 8.61)

There can be no doubt that to relax or remove Conditions in place to Prevent a Public Nuisance *could* impact adversely on any of the four licensing objectives.

As such, their removal is outside the scope of the Minor Variations Process for Amending or Removing Existing Conditions. (RG 8.72 RG 8.73)

This invalidates the application for Minor Variation application. The application should have been refused and returned.

These minor variations should not have been approved. The Guidance has been ignored.

The original Conditions: Annex 2 Condition 19, Annex 3 Condition 2, Annex 3 Condition 3 and Annex 3 Condition 4 must be restored.

### Permitted Hours

Within the existing licence the time at which alcohol can be supplied to customer in the outside area is controlled by separate and different times to the internal premises. Effectively the outside area has its own specific and individual Permitted Hours.

Through the Minor Variation process, on Sundays, the amount of time that alcohol can be supplied has increased (from 6½ hours to 8.) (10:00 - 16:30 = 6½ 11:30 - 19:30 = 8).

‘Variations to the following are excluded from the minor variation process and must be treated as full variations in all cases:

- Increasing the amount of time on any day during which alcohol may be sold or supplied for consumption on or off the premises.’

In this case the ‘time on any day’ is Sunday. The increase is 23% and, as such, cannot be considered ‘a small adjustment to licensing hours’ (RG 8.66. RG.8.61)

Approving the extended Sunday hours is outside the scope of the Minor Variation Process. The Guidance has been ignored.

The original Annex 3 Condition 3 must be restored.

### Layout of Outside Area

The seating layout of the outside area has been changed and enlarged to accommodate 66% more customers - a cycle store (requiring planning permission) was removed for this purpose earlier this year (2021) and prior to reopening following lockdown 3. As a result there is an *increase in the capacity for drinking on the premises* and therefore this should have been referred to the full variation process. This variation is outside the scope of the Minor Variations Process. The Guidance has been ignored. (RG 8.62) (CYC Planning Reference 15/01049FUL)

The original Annex 2 Condition 19 must be restored.

Given this I maintain that the applied for and approved Minor Variations are ***all*** outside the scope of the Minor Variation Process. The Licensing Authority, in accepting the proposals and then approving the minor variations application has ignored the Guidance issued by the Secretary of State.

### Imposed Condition

A new Condition 6 has been added to the Premises Licence through the Minor Variation Process.

‘There shall be a minimum of 10 seats provided in the outside area at all times when in use in order to prevent the need for vertical drinking.’

No such condition was proposed by the Premises Holder in their Minor Variation Proposal. Given this, I must be assumed that this new Condition 6 has been imposed by the Licensing Authority.

Licensing Authorities cannot impose their own conditions through the minor variation process. (RG 8.69).

This invalidates the new Condition 6 and it must be removed: The Licensing Authority has ignored the Guidance issued by the Secretary of State.

### Prevention of Crime & Disorder

Annex 2 Condition 2 requires that ‘The premises shall act as a restaurant / cafe not as a bar or vertical drinking establishment providing food and non-alcoholic drinks’.

The original Premises Licence Annex 3 Condition 2 requires that ‘In the outside area alcohol is only to be supplied ancillary to the provision of food to persons seated at tables and by waiter or waitress service only.’ The Condition was volunteered by the Premises Licence applicant as a control measure to prevent a public nuisance and at the original Licensing Hearing.

This Condition has been removed from the licence as amended by the minor variation process/ approval and at the behest of the Premises Licence Holder

As a result, the principle of alcohol only being served to customers as ancillary to food has been reversed, food can, but not necessarily, be served as ancillary to alcohol. Alcohol can be supplied without the need purchase/partake in food. As such this renders the outside area - regulated by the

Premises Licence with its own Permitted Hours, Conditions and Planning Consent - a bar. The premises is not permitted to operate as a bar.

As such, the Premises Licence holder has applied for a minor variation that, if granted, would require them to operate the outside area knowingly in breach of Annex 2 Condition 2. In granting that variation the Licensing Authority has condoned this breach. (See also 'Conditions' above)

The minor variation application should have been refused and returned.

### **Other Specific Reference**

#### Retrospective Planning Approval 14/1960/FUL

##### Paragraph 3.1

'The Environmental Protection Unit have concerns about this application...Specifically, the noise .... from customers using the rear courtyard dining area, talking, laughing, shouting etc and noise from collection of refuse and delivery noise in the early mornings.'

##### Paragraph 4.13

'The applicants propose that there will be no more than 8 covers in the external area. It would only operate until 18:00 and there would be no alcohol served. The area does not have a premises license for serving alcohol. ....The Environmental Protection Unit are satisfied that the likelihood of noise from customers using the rear yard can be adequately controlled by a restriction on the hours of use. However, this is based on no more than 8 people using the yard. If more tables and chairs were to be installed, then it is possible that noise from customers could affect the amenity of nearby residents, particularly if the yard was to be in use during the evenings. These matters could be controlled through appropriate conditions.'

##### Condition 5

'The use of the rear yard as an outside seating area for customers is not permitted outside the following times:

Monday to Saturdays 0830 to 1800 hours Sundays and Bank Holidays 0930 to 1630 hours, and there shall be no more than 8 customers within this area at any one time.

Reason: In the interests of residential amenity, in accordance with Local Plan policy GP1(i).'

It should be noted that the outside area was not licensed.

#### Planning Committee Report 16/00012/FUL

##### Paragraph 4.12

'Officers agree with residents that if alcohol were permitted to be served in the yard, or if it were to open into the evening, when background noise levels are known to be lower, there would be an undue effect on residential amenity. The times of operation can be controlled via a planning

condition. Alcohol is currently not permitted in the outside area; prevented by the premises licence. This matter would need to continue to be managed through the licensing legislation.’

### Condition 3

‘The use of the rear yard as an outside seating area for customers shall only occur during the following times -

Monday to Saturdays 08.30 to 19.00 hours Sundays and Bank Holidays 09.30 to 17.30 hours

Reason: In the interests of residential amenity.’

It should be noted that the outside area was not licensed.

## **City of York Council - Statement of Licensing Policy 2019-2024**

### Definition of Public Nuisance - 7.11

‘Public nuisance is not narrowly defined and can include low level nuisance affecting one or a few person(s) living locally, as well as a major disturbance affecting the whole community. Issues will mainly concern noise nuisance, light pollution and litter.’

### Planning 8.7

‘While there is no obligation for an applicant to have planning permission before applying for a premises licence, provisional statement or for a substantial variation, it is recommended that lawful planning use is obtained initially. The planning authority is a responsible authority under the Act whom applicants are required to give notice of applications.’

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