

REVISION OF STATUTORY GUIDANCE TO LICENSING ACT 2003

Summary

1. This report advises members of changes to the guidance accompanying the Licensing Act 2003 to which they are required to have regard to in making related licensing decisions.

Background

2. Section 182 of the Licensing Act 2003 (the Act) provides that the Secretary of State must issue, and from time to time may revise, guidance to licensing authorities on the discharge of their functions under the Act. Licensing authorities must have regard to this guidance in carrying out their functions. Licensing authorities may deviate from the guidance but must give full reasons for their actions. Departure from the guidance may give rise to an appeal or judicial review and the reasons given for departure will be a key consideration for the courts.
3. The first publication of the guidance was in July 2004. This is the document with which members are familiar and have been using as a basis for their decisions to date.
4. On 28 June 2007 the Secretary of State issued revised guidance which became operative from that date superseding the earlier version.
5. The revised document can be found on the DCMS website at http://www.culture.gov.uk/Reference_library/Publications/archive_2007/guidance/section182_licact03june07.htm
6. On 26 July Lord Clement-Jones, Culture Media and Sport spokesperson in the House of Lords prayed against the revised Guidance. The Act states that either House can disapprove the Guidance within 40 days. The effect of disapproval (following debate and vote) is that the Secretary of State must revise it. The whole process would start again. In the meantime the guidance laid on 28 June remains in force. It is understood that the issue concerning Lord Clement-Jones was regarding live music.

Significant Guidance Revisions

7. The revised guidance has been reformatted making reference to specific issues easier. A summary of the main formatting changes is attached at Annex1.
8. The guidance for the police on their powers has been removed completely and made available as separate advice. The sections on transitional matters and amusement with prize machines (AWP's) have been deleted as no longer required.
9. Annex 2 contains a summary of the substantive changes and additions. Officers comments on the main changes are highlighted below.

Chapter 1 Introduction.

Within this chapter are some subtle changes of emphasis which may give some additional scope to the licensing authority to reduce the impact of extended opening hours.

Paragraphs 1.17 - 1.19 stress that although flexible opening can reduce problems associated with standard opening times, the promotion of the licensing objectives is paramount.

This contrasts with the old guidance which advocated longer opening hours with regard to the sale of alcohol to reduce friction caused by people leaving premises simultaneously.

Paragraphs 1.23 - 1.27 relate to integrated strategies and refers to powers of licence holders. They stress that the Act is part of the government's strategy to tackle crime, disorder, antisocial behaviour and alcohol harm. Effective targeted enforcement is encouraged. Reference is made to the use of Designated Public Places Orders to control the consumption of alcohol in a public place outside licensed premises. Paragraph 1.26 states that licence holders cannot be responsible for the control of individuals when away from their premises but states that they should take reasonable steps to prevent crime and disorder and public nuisance immediately outside their premises, for example on the pavement, in a beer garden or smoking shelter to the extent where these matters are within their control. Paragraph 1.27 states that licensing authorities may consider imposing conditions as appropriate when considering applications for new licences or following a review in respect of these areas.

Although not tested in law it is the opinion of licensing officers that given this new guidance the licensing sub committee could use conditions to control activities in a smoking shelter, designated smoking area or beer garden where the issues are in the control of the licence holder.

Chapter 2 - The Licensing Objectives.

Paragraphs 2.19 - 2.29 relate to public safety.

The main change concerns the implementation of the Regulatory Reform (Fire Safety) Order 2005 which replaced previous fire safety legislation. This order places a duty on the responsible person (employer or person in control of premises) to carry out a fire safety risk assessment of their premises and put in place such controls as necessary to remove or reduce risks. This may include capacity limits. The Fire Authority then have a duty to audit the risk assessments. The effect of this legislation is that the Fire Authority cannot through the Licensing Act request occupancies to be placed on licences for fire safety reasons.

Capacities can however be applied for public safety or the prevention of disorder on premises where overcrowding may lead to customers becoming frustrated and hostile.

Paragraphs 2.32 - 2.40 relate to public nuisance.

Paragraph 2.35 states that the approach of licensing authorities and responsible authorities should be one of prevention and when their powers are engaged licensing authorities may use licensing conditions where other legislation does not provide adequate protection.

Chapter 3 - Licensable Activities, provides guidance as to what is and is not a licensable activity.

Paragraph 3.16 gives greater clarity as to what is and is not private, and therefore exempt, entertainment.

Paragraphs 3.20 - 3.23 concern incidental music and gives examples of what might and might not be relevant in determining if the activity is regulated entertainment.

Chapter 4 - Personal licences.- no significant changes

Chapter 5 - Premises licences - Who needs a licence

Paragraph 5.25 gives suggestions as how licensing authorities should proceed where there is insufficient evidence to determine primary use of garage premises.

Chapter 6 – Hours of Trading – no significant changes

Chapter 7- Temporary Event Notices

Paragraph 7.15 advises that licensing authorities may make minor corrections on applications received rather than returning them to the applicant. This applies also to other applications under the Act.

Chapter 8 – Applications for premises licences

Paragraphs 8.8 - 8.11 relate to councillors as interested parties and provide greater guidance. These paragraphs are included as Annex 3.

Paragraphs 8.33 - 8.38 provides useful guidance as to when a variation application is required. They give examples of amending hours, activities, conditions and making any plan alteration.

Chapter 9 – Determining applications

Paragraph 9.3 states that representations may also be made in support of an application.

Paragraph 9.6 states that where licensing authorities have used a fixed specified distance to define vicinity this should only be used as a guide. Representations should be allowed from outside that area if they are likely to be affected by disorder or disturbance occurring on those premises.

Paragraph 9.8 relates to relevant, vexatious and frivolous representations and contains an important addition to the previous guidance. The addition reads as follows “.... There is no requirement for an interested party or responsible authority to produce a recorded history of problems at a premise to support their representations, and in fact this would not be possible for new premises...”

This addition, accompanied by the emphasis on prevention in paragraph 2.35, will enable interested parties and responsible authorities such as environmental protection to make representations on the likelihood of problems occurring rather than having to rely on a history of previous incidents.

Chapter 10 - Conditions attached to premises licences and club premises certificates

Paragraphs 10.19 - 10.21 Stress that there is no general presumption in favour of lengthening licensing hours and the promotion of the licensing objectives should be paramount.

Paragraphs 10.48 - 10.53 The guidance strengthens the need to have an auditable track of authorisation of persons permitted to sell alcohol under the authority of a personal licence holder. It is suggested that written authorisation is provided to individuals giving details of the functions they may carryout. This does not absolve the personal licence holder of responsibility but would help with a due diligence defence.

Paragraphs 10.58 - 10.64 provides guidance on the interaction of the Licensing Act, the Private Security Industry Act 2001 and the Violent Crime Reduction Act 2006 in relation to door supervisors.

Chapter 11 - Reviews – no significant changes

Chapter 12 - Appeals – no significant changes

Chapter 13 - Licensing Policies

Paragraph 13.25 provides an explanation of what could be considered to be cumulative impact.

Paragraphs 13.40 - 13.42 relate to licensing hours and again stress that the promotion of the licensing objectives is paramount.

Paragraphs 13.64 - 13.68 relate to the relationship of licensing with planning and building control. These are reproduced as Annex 4

Paragraph 13.73 refers to the application of Designated Public Places Orders and applies clarification of when and where it applies in relation to public areas licensed by the local authority.

Annex D-Pool of Conditions

Introduces the concept of "Challenge 21" in relation to proof of age for alcohol sales

Consultation

10. No consultation is necessary with this report.

Options

11. Not Applicable.

Analysis

12. Not Applicable.

Corporate Priorities

13. Effective application of the Licensing Act 2003 contributes to the reduction in the actual and perceived impact of violent, aggressive and nuisance behaviour on people in York

Implications

Financial

14. There are no financial implications.

Human Resources (HR)

15. There are no human resource implications.

Equalities

16. There are no equality implications.

Legal

17. Members of licensing sub committees must have regard to the new statutory guidance when determining applications

Crime and Disorder

18. Effective application of the Licensing Act will have a positive effect of reducing Crime and Disorder

Information Technology (IT)

19. There are no information technology implications.

Property

20. There are no property implications.

Other

21. There are no other implications.

Risk Management

22. This report is for information only.

Recommendations

23. Members are asked to note the content of the new Guidance and have regard to it when coming to any licensing decisions under the Licensing Act 2003

Reason: To comply with statutory requirements

Contact Details

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Report Approved



Date 20/9/07

Specialist Implications Officer(s)

There are no specialist implications.

Wards Affected:

All

For further information please contact the author of the report

Background Papers:

Licensing Act 2003.

Guidance issued under Section 182 of the Licensing Act 2003.

Annexes

- Annex 1** Summary of main format changes
- Annex 2** Summary of substantive changes and additions
- Annex 3** Extract from Section 182 Guidance to The Licensing Act 2003
Paragraphs 8.8 - 8.11
- Annex 4** Extract from Section 182 Guidance to The Licensing Act 2003
Paragraphs 13.64 – 13.68

Annex 1

Summary of Main Format Changes

Previous Chapter/paragraphs		New Chapter
SoS Foreword		
List of principle aims		Ch.1: Introduction
Chapter 1	Background	Deleted
Para 1.1		Inside cover
Paras 1.4 – 1.7	Aim/status of Guidance	Ch.1: Introduction
Chapter 2	Introduction and Purpose	Ch.1 Introduction
Paras 2.11, 2.16, 2.18, 2.23, 2.24	Industry initiatives	Annex E
Chapter 3	Statements of Licensing Policy	Ch.13: Statements of licensing policy
Para 3.15	Description of cumulative impact	Chapter 13 (paragraph 13.19)
Para 3.30	Zoning experience in Scotland	Deleted
Para 3.42	Portman Group Code of Practice	Annex E
Chapter 4	Personal Licences	Ch.4: Personal Licences
Chapter 5	Premises Licences	Ch.3: Licensable activities, Ch 5: Who needs a premises licence?

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		Ch.8: Applications for premises licences, Ch.9: Determining applications, Ch.11: Reviews
Paras 5.1-5.25	Licensable activities	Ch.3: Licensable activities
Paras 5.26-5.28	Licensing of different types of premises	Ch.5: Who needs a premises licence
Para 5.29	Relevant licensing authority	Ch.8: Applications for premises licences
Paras 5.30-5.39	Authorised persons, interested parties and responsible authorities	Ch.8: Applications for premises licences
Paras 5.40-5.52	Applications for premises licences, the operating schedule, steps to promote the licensing objectives, advertising applications	Ch.8: Applications for premises licences
Paras 5.53-5.64	Licensing of different types of premises	Ch.5: Who needs a premises licence?
Paras 5.65-5.77	Considering applications for new and major variations of premises licences	Ch.9: Determining applications
Paras 5.78- 5.81	Transfers of premises licences	Ch.8: Applications for premises licences
Para 5.82	Ref to applications for DPS	Ch.8: Applications for premises licences
Paras 5.83-5.91	Provisional statements	Ch.8: Applications for premises licences
Paras 5.92-5.96	Interim authorities	Ch.8: Applications for premises licences
Paras 5.99-5.117	Reviews	Ch.11: Reviews

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Para 5.118	Rights of freeholders to be notified of licensing matters	Ch.8: Applications for premises licences
Para 5.119-5.126	AWP machines	Deleted
Paras 5.127-5.129	Large scale temporary events	Ch.5: Who needs a premises licence?
Chapter 6		
Hours of Trading		
Para 6.2, 6.3	Shops, stores and supermarkets	Ch.10: Conditions
Para 6.4	Workers rights	Ch.10: Conditions
Para 6.5, 6.6	Principle of flexibility	Ch1: Introduction
Paras 6.7-6.9	Zoning	Deleted
Para 6.10	Staggered closing times	Deleted
Para 6.11, 6.12	Relaxation of opening hours for local, national and international occasions	Ch.8: Applications for premises licences
Para 6.13	Drinking up time	Deleted
Para 6.14	Closing early	Deleted
Chapter 7		
Conditions		
Paras 7.20-7.30	Crime and disorder	Ch.10: Conditions
Paras 7.31-7.37	Public safety	Ch.2: The Licensing Objectives
Paras 7.38-7.46	Public nuisance	Ch.2: The Licensing Objectives
Paras 7.47-7.60	Protection of children from harm	Ch.2: The Licensing Objectives
Paras 7.61-7.66	Safer clubbing – drugs in pubs	Annex E

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Chapter 8	Temporary Event Notices	Ch.7: Temporary Event Notices
Chapter 9	Club Premises Certificates	Ch.6: Club premises certificates
Chapter 10	Appeals	Ch.12: Appeals
Chapter 11	Police powers	Removed from guidance and made available as separate advice on DCMS website
Chapter 12	Sale and supply of alcohol to children	Deleted. Summary table of offences in Ch.2: The Licensing Objectives
Chapter 13	Transitional matters	Deleted
Chapter 14	Other offences	Deleted
Annex A	Schedule 1	Annex A: Schedule 1
Annex B	Schedule 2	Annex B: Schedule 2
Annex C	Relevant Offences	Annex C: Relevant Offences
Annexes D-H	Pools of conditions	Annex D: Pools of Conditions
Annex I	Statutory qualifying conditions for clubs	Deleted
Annex J	Safer Clubbing checklist	Deleted
Annex K	Key actions for LAs – safer clubbing	Deleted
Annex L	Specimen Closure Order and notes	Removed from Guidance and made available as separate advice with original Chapter 11 (police closure powers) on DCMS website.

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Annex 2

Summary of Substantive Changes and Additions

CHAPTER/PARAGRAPHS	TITLE	AMENDMENT/ ADDITION
Chapter 1		
Chapter 1	Introduction	
Para 1.10	Licensing Policies	Status of licensing policies following revisions to the guidance.
Para 1.17-1.19	Hours of opening	General principle of flexible opening times. Licensing objectives paramount in any consideration of an application.
Paras 1.23-1.27	Related legislation and strategies	Powers/responsibilities for tackling crime and disorder and public nuisance outside premises.
Para 1.33	Violent Crime Reduction Act 2006	Description of new/forthcoming powers/offences.
Chapter 2		
Chapter 2	The Licensing Objectives	
Para 2.2 and 2.3	Crime and disorder	Role of the Security Industry Authority.
Para 2.19-2.29	Public safety	Implications of the new fire safety regime.
Para 2.61	Protection of children from harm	Table of relevant offences under the 2003 Act.
Chapter 3		
Chapter 3	Licensable activities	
Para 3.18 and 3.19	Private events	Further clarification of entertainment at private events.
Para 3.22	Incidental music	Factors to be considered (or not) in determining whether music is incidental.
Para 3.30	Small venues providing dancing and amplified or unamplified music	Capacity limits under the new fire safety regime
Chapter 5		
Chapter 5	Who needs a premises licence?	
Para 5.25	Garages	Suggested approaches where there is insufficient

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		evidence on the primary use of a garage.
Chapter 7		
Chapter 7	Temporary event notices	
Para 7.15	Notification arrangements	Additional text on dealing with obvious minor factual errors on TENs.
Chapter 8		
Chapter 8	Applications for Premises Licences	
Para 8.8-8.11	Interested parties	The role of ward councillors/prejudicial interest under the recently revised Model Code of Conduct for Members.
Para 8.26	Application forms	Electronic applications, notices and representations.
Paras 8.33-8.38	Variations	Clarification of when an application to vary is required.
Chapter 9		
Chapter 9	Determining applications	
Para 9.3	Where representations are made	Clarification that representations can be made in support of an application.
Para 9.6	Where representations are made	The use of fixed distances to determine vicinity.
Para 9.14-9.18	Disclosure of personal details of interested parties	Dealing with isolated incidents of intimidation.
Para 9.19	Hearings	Avoiding unnecessary hearings where only positive representations are made.
Para 9.21	Hearings	Extending time limit for holding a hearing where a mediated agreement is likely.
Chapter 10		
Chapter 10	Conditions attached to premises licences and club premises certificates	
10.16	Duplication with other statutory provisions	Impact of new fire safety regime.
10.19-10.21	Hours of trading	Flexible opening times. Licensing objectives

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		paramount in any consideration of an application.
10.50-10.53	Authorisation by personal licence holders to sell alcohol	Recommends written authorisation
10.58-10.64	Door supervision	Updated text on door supervision (mandatory condition).
Chapter 11		
	Reviews	
Para 11.1	The Review Process	Purpose of reviews.
Chapter 13		
	Statements of licensing policy	
Para 13.2-13.5	General	Reviewing licensing policy statements.
Para 13.6 and 13.9-13.11	Consultation on policies	Consultation on policy statements.
Para 13.25	What is cumulative impact?	Application of Cumulative Impact Policies.
Para 13.29	Effect of special policies	Variations adding to existing cumulative impact.
Para 13.40-13.42	Licensing hours	Flexible opening times. Licensing objectives paramount in any consideration of an application.
Para 13.64-13.68	Planning	Relationship between the planning and licensing regimes.
Para 13.73	Live music, dancing and theatre	Application of Designated Public Place Orders.
Annex D		
	Pools of conditions	
Core principles	Pools of conditions	General introduction to pools of conditions.
Part 5. Conditions relating to the protection of children from harm	Proof of age cards	Updated to refer to "Challenge 21" policies.
Index		
		Index of key words and terms

- 8.8 Local councillors play an important role in their local communities. They can make representations in writing and at a hearing on behalf of an interested party such as a resident or local business if specifically requested to do so. They can also make representations as an interested party in their own right if they live, or are involved in a business, in the vicinity of the premises in question.
- 8.9 However, local councillors are subject to the Local Authorities (Model Code of Conduct) Order 2007 which restricts their involvement in matters, and participation in meetings to discuss matters, in which they have a 'prejudicial' interest (i.e. an interest that a member of the public would reasonably regard as so significant that it is likely to prejudice the member's judgement of the public interest). However, the latest version of the Code, which came into force on 3 May 2007, has relaxed the rules on prejudicial interest. In terms of licensing, this has the effect of allowing councillors with a prejudicial interest in an application to attend relevant meetings to make representations, answer questions or give evidence, provided that the public are also allowed to attend for the same purpose, whether under the licensing legislation or otherwise and as long as they withdraw from the meeting immediately afterwards. It must be emphasised that councillors have a duty to act in the interests of all of their constituents. Their role as a community advocate must therefore be balanced with their ability to represent specific interests.
- 8.10 The Code applies to any council member whether or not they are a member of the licensing committee. A member of a licensing committee, representing others or acting in their own right, would need to consider carefully at a committee meeting whether they had a prejudicial interest in any matter affecting the licence of the premises in question which would require them to withdraw from the meeting when that matter is considered. In addition, a member with a prejudicial interest in a matter should not seek to influence improperly a decision on the licence in any other way.
- 8.11 In addition, councillors who are not themselves interested parties or representing interested parties may wish to be kept informed of licensing related matters within the area, such as applications and reviews. The Act does not prevent licensing authorities from providing this information to councillors, for instance by way of regular updates, as long as it is done in a neutral way that could not be seen as 'soliciting' representations. It should be remembered that the 'licensing authority' in most cases is the full council, including all ward councillors, and each is therefore entitled to information required to inform that role.

RESPONSIBLE AUTHORITIES

- 8.12 The third group – "responsible authorities" – are public bodies that must be fully notified of applications and that are entitled to make representations to the licensing authority in relation to the application for the grant, variation or review of a premises licence. All representations made by responsible authorities are relevant representations if they concern the effect of the application on the licensing objectives. For all premises, these include:

PLANNING AND BUILDING CONTROL

- 13.64 The statement of licensing policy should indicate that planning, building control and licensing regimes will be properly separated to avoid duplication and inefficiency. Applications for premises licences for permanent commercial premises should normally be from businesses with planning consent for the property concerned. However, applications for licences may be made before any relevant planning permission has been sought or granted by the planning authority.
- 13.65 The planning and licensing regimes involve consideration of different (albeit related) matters. For instance, licensing considers public nuisance whereas planning considers amenity. As such licensing applications should not be a re-run of the planning application and should not cut across decisions taken by the local authority planning committee or following appeals against decisions taken by that committee. Licensing committees are not bound by decisions made by a planning committee, and vice versa.
- 13.66 The granting by the licensing committee of any variation of a licence which involves a material alteration to a building would not relieve the applicant of the need to apply for planning permission or building control where appropriate.
- 13.67 There are also circumstances when as a condition of planning permission, a terminal hour has been set for the use of premises for commercial purposes. Where these hours are different to the licensing hours, the applicant must observe the earlier closing time. Premises operating in breach of their planning permission would be liable to prosecution under planning law.
- 13.68 Proper integration should be assured by licensing committees, where appropriate, providing regular reports to the planning committee on the situation regarding licensed premises in the area, including the general impact of alcohol related crime and disorder. This would enable the planning committee to have regard to such matters when taking its decisions and avoid any unnecessary overlap. A planning authority may also make representations as a responsible authority as long as they relate to the licensing objectives.