

Bath & North East Somerset Council

MEETING: **Development Control Committee**

MEETING DATE: **31 August 2011**

AGENDA
ITEM
NUMBER

RESPONSIBLE OFFICER: Lisa Bartlett, Development Manager of Planning and Transport Development (Telephone: 01225 477281)
Simon Barnes Senior Legal Advisor (Tel: 01225 395176)

TITLE: **PLANNING AND LICENSING LEGISLATION**

WARD: **ALL**

BACKGROUND PAPERS: None

AN OPEN PUBLIC ITEM

The Issue

At the meeting of the Development Control Committee on 3 August 2011 concern was expressed by a public speaker that some takeaway food premises had been granted Premises Licences, the hours of which exceeded the trading hours allowed by the conditions of their planning permissions. The speaker was concerned that these premises had been allegedly trading in accordance with the longer Premises Licence hours in breach of the hours specified in their planning conditions.

Members requested that officers investigate this issue and report back to Committee.

The specific complaint was with regard to takeaway food premises which are licensed to provide late night refreshment, however this report will also look more generally at the relationship between licensing and planning.

Relevant law and policy

As members will know, determinations under the planning acts must be made in accordance with the development plan unless material considerations indicate otherwise. This means that the planning authority can consider a wide range of factors such as highway safety, residential amenity, ecology and design.

By contrast, licensing decisions are made under a different statutory regime, namely the Licensing Act 2003. Decisions under the Licensing Act can only be made on the basis of four licensing objectives set out in the Act which are:

- (a) the prevention of crime and disorder;
- (b) public safety;

- (c) the prevention of public nuisance; and
- (d) the protection of children from harm

There is a further important difference between planning and licensing which is that unlike a planning application, if no relevant representations (i.e. representations relating to the licensing objectives) are received by a licensing authority during the consultation period then the licensing authority must grant the licence as applied for together with such conditions as are consistent with the operating schedule submitted by the applicant and mandatory conditions if appropriate. It is only if relevant representations are received that the application will be determined by the licensing committee and the statutory guidance issued to licensing authorities by the government is very clear on how licensing authorities should approach that duty:

“[the licensing authority] may then only impose conditions that are necessary to promote one or more of the four licensing objectives.”

The statutory guidance then goes on to address the issue which was raised before the DC Committee. The full text is set out below and the penultimate paragraph (underlined) is of particular relevance:

“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.”

The Council’s own Statement of Licensing Policy is consistent with the above advice and also recognises the distinction between licensing and planning:

“9.1 The Licensing Authority recognizes that Licensing and Planning are separate regimes. Where an application is granted by the Licensing Authority which would require planning permission this would not relieve the applicant of the need to obtain that permission. It will still be necessary, for the applicant to ensure that he/she has all the necessary permissions in place to enable them to run the business within the law.

9.2 There will, however, be a clear separation of the Planning and Licensing regimes to avoid duplication and inefficiency. Therefore, any decision made under the Licensing Act will not take into consideration the need for planning permission.

9.3 The Licensing Authority recognises that licensing applications should not be seen as a re-run of the planning application process as different considerations will apply.

9.4 In addition, if an application is granted by the Licensing Authority which involves a material alteration to a building, this would not relieve the applicant of the need to apply for planning permission.”

With regard to planning conditions, circular 11/95 states (emphasis added):

“**22.** Other matters are subject to control under separate legislation, yet also of concern to the planning system. A condition which duplicates the effect of other controls will normally be unnecessary, and one whose requirements conflict with those of other controls will be *ultra vires* because it is unreasonable. For example, a planning condition would not normally be appropriate to control the level of emissions from a proposed development where they are subject to pollution control, but may be needed to address the impact of the emissions to the extent that they might have land-use implications and are not controlled by the appropriate pollution control authority (for further advice on conditions and pollution see paragraphs 3.23--3.28 of PPG23: Planning and Pollution Control) (England only). A condition cannot be justified on the grounds that the local planning authority is not the body responsible for exercising a concurrent control, and therefore cannot ensure that it will be exercised properly. Nor can a condition be justified on the

grounds that a concurrent control is not permanent but is subject to expiry and renewal (as, for example, with certain licences). Nor, as a matter of policy, should conditions be imposed in order to avoid a liability to pay compensation under other legislation. Even where a condition does not actually duplicate or conflict with another control, differences in requirements can cause confusion, and it will be desirable as far as possible to avoid solving problems by the use of conditions instead of, or as well as, by another more specific control.

23. Where other controls are also available, a condition may, however, be needed when the considerations material to the exercise of the two systems of control are substantially different, since it might be unwise in these circumstances to rely on the alternative control being exercised in the manner or to the degree needed to secure planning objectives. Conditions may also be needed to deal with circumstances for which a concurrent control is unavailable. A further case where conditions may be justified will be where they can prevent development being carried out in a manner which would be likely to give rise to onerous requirements under other powers at a later stage (eg. to ensure adequate sewerage and water supply for new developments and thus avoid subsequent intervention under the Public Health Acts).”

The issue of the relationship between licensing and planning was also considered by the High Court in The Queen on the application of Blackwood v Birmingham Magistrates and The Birmingham City Council [2006]. In this case a judicial review challenge was brought by a local resident against the decision of the Magistrates, on appeal from the Licensing Committee, to grant a variation of a premises licence. The main ground of challenge was, in summary, that the Magistrates had failed to take account of relevant planning matters raised by the appellants and in doing so had acted unlawfully. The judicial review challenge was rejected by the High Court. The judge, Deputy Judge Parker QC, whilst noting that there was an overlap between the objectives of planning and licensing, stated at paragraph 62 of his judgment:

“It was not for the Magistrates in a licensing appeal under the Act to examine whether the proposed variation required planning consent or to speculate whether, if it did, such consent would be forthcoming. That would be a planning matter falling exclusively within the competence of the planning authority.”

Although this case was concerned with licensing, the Court made it clear that, whilst there is some overlap, the two regimes are separate and distinct.

Specific cases

The public speaker at the meeting on 3 August referred to two specific cases of takeaway food establishments which were allegedly trading beyond the hours specified in their planning permissions.

In both cases complaints were made to the Planning Enforcement section and the complainant provided evidence in support.

Officers investigated the complaints, spoke to the operators of the premises concerned and received assurances that, contrary to the information submitted by the complainant, the premises were not trading in breach of their planning conditions. Officers did not receive any complaints about either premises from local residents. Officers also consulted colleagues in the Environmental Protection team who confirmed that there had been no complaints of nuisance caused by the premises concerned.

Officers therefore concluded that, as there had been no complaints from residents and no evidence of any adverse effect on residential amenity, further action was not expedient. The complainant's representatives were informed accordingly and the cases were closed.

Discussion

There are two issues here:

- the relationship between planning and licensing
- the two enforcement complaints referred to above.

Dealing first with the relationship between planning and licensing, whilst these are separate regimes, there is a degree of overlap. Clearly it is desirable that planning and licensing conditions are consistent, but the Council must act within the boundaries of the relevant law and policy.

The starting point is that each planning or licensing application must be looked at on its merits, so this precludes the adoption of blanket policies where particular conditions are imposed as 'standard'.

Licences contain a schedule setting out when the licensable activities in question may be carried on. A planning permission may contain conditions governing hours of operation, but this is not mandatory.

Planning officers who are dealing with applications for licensed premises can liaise with the licensing department if appropriate and the licensing team consult with planning regarding licence applications. However, it may be that there are planning reasons why an hours of operation condition is required which is not consistent with the licence.

For example, a licensing authority dealing with an application for a late night takeaway, having considered representations from people living in the vicinity of the premises (only people in the vicinity are entitled to make representations on licensing applications), may be satisfied that the sale of hot food and drink can continue until 5am because there will be no adverse impact on the licensing objectives of public nuisance and crime and disorder. However the planning authority, which can consider representations from anybody, may take the view that the use of the premises as a takeaway should be limited to midnight due to an adverse effect on traffic in terms of

customers parking near the premises. In this situation, notwithstanding the licence, the premises could only trade until midnight, otherwise it would be at risk of planning enforcement action. If it wanted to trade later, it would need to apply for the necessary planning consent. Members are advised that this approach has been applied by the LPA in practice and has been upheld on appeal.

It is also important to bear in mind that the licensing system is much more flexible than the planning system. Licences can be reviewed on the application of a responsible authority¹ or a member of the public which can lead to conditions being altered. By contrast, a planning permission runs with the land and therefore if there are planning reasons why the hours of operation should be limited to particular times then it is important that this is secured in planning terms because the licence (or perhaps even the licensing regime) might change in the future.

With regard to the two enforcement complaints, members will be aware that the Council should not take planning enforcement action unless it is expedient to do so. In both cases, officers investigated the complaints and concluded that as there was no demonstrable harm, it was not expedient to take the matters any further. However, the complainant clearly still has concerns and it would be open to officers to re-open the cases and carry out further investigations.

Conclusion

Whilst there is liaison and sharing of information between the licensing and planning departments of the Council, the two regimes are governed by different legal and policy frameworks which can sometimes lead to differing results, in particular with regard to hours of operation. However the government recognises this and has made it clear that in cases where the operating hours on a planning permission and a Premises Licence differ, the operator must abide by the earlier time. If they do not, then they will leave themselves open to enforcement action. If an operator wishes to synchronise their planning permission and licence then it is up to them to make the appropriate application.

With regard to these specific enforcement complaints, officers investigated and came to the conclusion that it was not expedient to pursue the matters any further. However, in light of the complainant's obvious concerns, officers are of the view that it would be appropriate to look again at these complaints and report back to a future meeting of the Committee.

¹ 'Responsible Authority' is a defined term in the Licensing Act 2003 encompassing various authorities including the police, fire service and the body responsible for the protection of children