

29th October 2004

Licensing Policy Consultation Team
Westminster City Council
City Planning Group
11th Floor
City Hall
64 Victoria Street
London SW1E 6QP

licensingpolicy@westminster.gov.uk

Dear Sir/Madam

City of Westminster Statement of Licensing Policy

The Westminster Licensees Association (WLA) welcomes the opportunity to comment on behalf of its members on the City of Westminster's draft statement of licensing policy.

By way of background, WLA is the only trade body dedicated to representing the interests of bar, club and restaurant operators within the Borough. It sits on the Westminster Entertainment Forum, has regular quarterly meetings with Council officers and is represented in discussions with local magistrates, the police and other key stakeholders. We also work closely with other trade and business bodies, both national and local.

The WLA currently represents over a third of all on-licensed premises within the Borough. Our members are predominantly restaurant, bar, nightclub and hotel operators and include national chains such as Mitchells & Butler, Spirit Group, established London operators such as Urbium and Regent Inns and flagship licensed premises such as the Institute of Directors and Westminster Central Hall. However, the bulk of our membership is made up of a large number of individual independent small businesses operating under their own fascia. It is these outlets in particular stand to be most affected by the changes to the licensing regime since they often do not have substantial head office or legal resources to draw upon.

Overview

Independent pubs, bars, restaurants and nightclubs are at the heart of Westminster's vibrant and dynamic evening and night time economy. They make a very positive contribution to the local economy both in terms of taxation and employment, they provide social and community spaces and facilities for residents, local businesses and visitors alike. They are a major part of the West End's appeal for overseas visitors and underpin other industries such as retail and tourism. If they are to continue to contribute to the economic, social and cultural life of the Borough, they need a supportive regulatory framework and that includes the licensing process.

We therefore welcome the Council's stated aim to encourage diversification of offering and promote a wide choice of high quality, well managed venues, within a safe and attractive environment, valued by those who live and work in the area. This chimes exactly with the

aims and objectives the WLA has for the West End in particular. However, this vision fails to be translated through the draft policy and we fear will therefore fail to be translated into actual decisions taken. The tone of the document is unremittingly negative when referring to licensed retail outlets; the only exception being references to a very tightly defined group of restaurants.

We are disappointed that the draft statement of licensing policy fails adequately to reflect the importance of this sector – the only reference being one paragraph in Appendix 12. The Council claims to recognise the benefits the trade brings, but then completely undermines this by surrounding any positive references with criticism of the trade. There is no attempt at presenting a balanced picture and, as a consequence, the policy as a whole fails to provide the encouragement, support and promotion of the interests of operators it claims to seek. More specifically, it fails to achieve the balance of interests the Council claims it is seeking to promote.

In general terms, we find the policy document to be unduly prescriptive and onerous, seeking to specify much of what will be required from operators in order to meet the licensing objectives. This is in direct contrast to the philosophy behind the Act itself which sought to allow operators to write their own licence, offering both their own commercial perspective as well as voluntary control mechanisms. The draft policy goes beyond this by setting out detailed criteria and considerations for each of the licensing objectives.

In places it far exceeds what was envisaged by the Act and steps outside of Government Guidance. In particular, we are concerned about the proposed draft Operating Plan and accompanying extensive checklists, the draft policy on hours, the use of blanket conditions and the special saturation policy. Government Guidance explicitly states that all applications must be judged on their merits, but the policy does not adequately provide for this. We believe all these elements to be outside the spirit and the letter of both Act and Guidance and exceed the national standards being set in Regulations.

We accept that the Council only has a duty to have regard to Guidance, but in acting contrary to Government advice it is supposed to provide detailed evidence to support its decisions. We do not believe that the evidence provided is sufficient to justify the adoption of such a draconian licensing policy. Our criticisms of the specific evidence are set out in detail below, but we would also refer the Council to our representations to the public inquiry into the Unitary Development Plan.

We believe that, as drafted, the policy will result in a stagnant market, with no incentive for existing operators to improve standards, quality of operation or diversification of offering. It will deter investment and instead place a disproportionate premium on existing licensed premises. In short, it will distort the entertainment market within the West End to the detriment of operators, customers, residents and visitors alike.

Finally we note that throughout the document reference is made to the City Council rather than “Licensing Authority”. We believe that the latter is more appropriate since the Council has a broader role and some of its other functions will act as responsible authorities. The Licensing Authority therefore needs to maintain an impartial and objective stance and differentiation from the rest of the Council will assist in this.

The Association has a number of detailed comments to make. These are designed to be constructive to enhance the policy document and aid understanding. In the main, they are recommendations to clarify the intention of the Act and to avoid raising false expectations as to the degree of control the Council will be able to exert. These comments are set out below and grouped under the chapter headings used in the policy statement – where appropriate, paragraph numbers have also been provided.

Strategy

Paragraph 1.2 lists the licensing objectives. We believe it would be helpful to conclude the list of licensing objectives with a reference to the fact that these objectives are the only matters to be taken into account in determining the application and that any conditions to be attached must be necessary to achieve the licensing objectives. We believe that this will be particularly important given that the policy document subsequently goes on to make reference to matters outside this scope.

The policy goes on to refer to the Council's ability to decide whether to grant licences or impose conditions, but there is no reference to the fact that the exercise of these powers is strictly limited to cases where the licensing authority's discretion is engaged by means of a relevant representation. In the absence of such a representation, the licensing authority has no choice but to grant the application in the terms sought and may not impose any additional conditions on the licence. This must be made clear in the policy to avoid misleading both applicants and those seeking to influence the licensing process.

Policy Approach

The plethora of different policies applicable in some circumstances but not in others is complicated and has proved bewildering and difficult to interpret for individual licensees. One of the fundamental aims of the Act was to simplify the existing legislation and provide an opportunity for individual businesses to handle their own licensing applications. Westminster's policy is so complicated that no businessman would be able to approach it without professional assistance – it is, in short, a lawyer's charter and as such will be costly to implement and apply.

The inclusion of specific policies on each of the licensing objectives and references within them to matters that are likely to be the subject of conditions appears at odds with Guidance. The lists of matters the licensing authority will consider in assessing applications are wide-ranging and read as a checklist of issues which applicants must address. There is a danger that many of these issues will not be relevant to the majority of outlets and may translate into inappropriate or disproportionate control measures. The policy must make it clear that it is for applicants to decide how they will meet the licensing objectives and that these policies are, at best, examples of best practice not absolute requirements.

The ruling in the Delicious case stated that the policy should be clear, understandable and transparent, so that an individual business would be able to understand the exceptional circumstances and when they would apply. The proposed special saturation policy fails that test. We are also concerned that the reference in paragraph 2.1.9 to the transfer of operation from one premises to another as an exceptional circumstance implies that a quota will be operating, imposing an arbitrary cap on the West End.

Given that the new licensing regime has replaced six separate licences for different types of outlet, and that the Council wishes explicitly to promote a diverse and varied offering, we find it bizarre that the policy maintains separate provisions for different types of outlet. We are, however, pleased that the Council has finally woken up to the reality that many premises are chameleon-like, providing a different and mixed offering throughout the day and into the evening.

Crime and Disorder

The WLA supports the intention behind many of the initiatives that the Council seeks to promote in this section. However, this is entirely dependent upon how these policies are applied in respect of specific applications and we therefore reserve the right to be cautious about the outcome. In particular we want zero tolerance of illegal trading or anti-social behaviour. We urge the Council to press the police to deliver on this through the use of fixed

penalty notices and other control measures and for more resources to be devoted to the West End in particular.

The proposed Metropolitan Police Checklist and Operating Schedule are far too prescriptive and require too much detail to be provided by applicants. The list is best described as onerous and bureaucratic rather than comprehensive and will daunt many potential applicants. We also note that the issues listed relate primarily to premises providing late night entertainment rather than the full range of premises which the Council will be licensing. There is a danger therefore, that this checklist will be inappropriate and disproportionate in many cases. Furthermore, it strays into many commercial matters which are not strictly necessary to secure the licensing objective.

We are concerned that the prominence given to capacity limits in paragraph 2.2.4 will result in the imposition of these restrictions on all or many premises licences. We would remind the Council that blanket conditions of this sort are not permissible and that the Council and/or responsible authority would need to provide evidence of actual or likely risk to support their imposition. The majority of traditional pubs and bars trading without a public entertainment licence will not have a capacity limit applied, and we believe that the current system of case by case assessment remains the correct approach.

The policy is also heavily biased against the practice of drinking whilst standing but claims to want to promote customer choice. Many customers choose to stand and the provision of permanent seating is unlikely to change this. There is also no evidence to suggest that standing whilst drinking inevitably translates into high volume consumption, anti-social behaviour or over crowding. Again, we strongly recommend that the Council adopts a case by case assessment based on the degree of risk or concern about a particular premises rather than imposing blanket requirements for permanent seating in all premises. The correct focus of the policy should be on responsible management of the premises.

We are concerned by the very general reference to restrictions on drinking in areas within and outside the premises. We are unclear what is meant in respect of this and believe that there is a danger that this may be applied in a manner that falls outside the terms of the legislation.

Public Safety

We note the reference to the fact that there are a considerable number of premises without fire safety certificates or licences that specify their safe capacities. The tone is pejorative and implies that these premises immediately pose a greater risk to public safety. This is not necessarily the case and, as noted above, we believe that the issue of capacity limits should continue to be directed at those premises and events where there is a clear identified risk.

We are concerned that many of the items listed in this section duplicate existing statutory provisions and are therefore unnecessary and should not be applied as conditions. We further note that there is no legal basis for the implied requirement for written risk assessments to be provided in support of applications.

Prevention of Public Nuisance

Appendix 11 provides guidance on the control of noise and again implies that these matters must be adopted by all licensed premises. Again, many of these policies will be appropriate but in certain cases they will be excessive and disproportionate. There is a danger of over-regulation here and of imposing very high costs on businesses which make a major contribution to the local economy. We believe it would be preferable to refer to industry best practice on this matter and in particular the Code of Practice published by the British Beer and Pub Association, and allow applicants to propose, in the first instance, the most appropriate and balanced degree of control.

This is one of the areas of the policy which we believe to be particularly unbalanced in favour of the views of a highly vocal minority of residents. It is unreasonable to expect no noise at all from licensed premises operating in the heart of what was, until recently, termed the Central Activity Zone and the area in which licensed retail development was actively encouraged. We refer to our evidence submitted as part of the public inquiry into the Unitary Development Plan in this regard.

Protecting Children from Harm

We note the reference to the Portman Group code of practice at paragraph ii of policy CH1, but believe it to be misleading. This code is primarily a producers' code of practice governing the naming, packaging and producers' marketing of alcoholic products. It does not deal with retail display or promotion. It may be more appropriate to refer to the Retail Alert Bulletins which advise retailers of which products should be withdrawn as a result of adverse rulings.

The remainder of these policies appear sensible and moderate.

Hours

We are strongly opposed in principle to the concept of core hours and recommend that this is removed from the final version of the policy. In practice, we see little that differentiates the policy described from the existing terminal hours approach for the majority of outlets. Moreover, discussions with licensed retailers and amongst our members suggest that the perception is that this will translate into fixed terminal hours. It is arguable that many licensees would be more inclined to support the proposed approach if the core hours were more realistic.

Government Guidance specifically states that terminal hours should neither be fixed nor engineered by the local authority. It goes on to recommend that policy statements should emphasise that "*consideration will be given to the individual merits of an application.... that longer licensing hours are important to ensure that concentrations of customers leaving premises simultaneously are avoided... that licensing hours should not inhibit the development of thriving and safe evening economies*". It concludes "*arbitrary restrictions that would undermine the principle of flexibility should therefore be avoided*". Westminster's policy flies in the face of these statements.

Fixed and artificially early closing times encourage customers to drink to time and result in a door rush as all customers are forced to leave the premises at a particular time and often before they are ready to do so. This leads to a greater degree of noise and nuisance immediately outside the outlet as well as friction at public transport point, late night cafés and other outlets with later opening hours. It is our contention that Westminster's proposed policy will actually exacerbate these problems rather than promoting a more gradual dispersal of customers throughout the evening and night.

In certain circumstances, restrictions on licensing hours will be appropriate and necessary to secure the licensing objectives and we accept that the Council should be able to do so where concerns have been raised. Our objection is based on the blanket nature of the approach and the failure to provide for any case by case assessment.

We note that no specific evidence is provided to support such a restrictive policy and submit that it is fundamentally flawed and an unsound basis for the making of licensing decisions. We therefore recommend that it is removed in its entirety.

We have the following observations to make about the way in which the core hours policy is currently drafted, which appear to be anomalous. Commenting on the proposed policy should not be taken to imply any degree of support for it, however:

- the core hour's policy refers both to the hours in which the premises are open and to the hours when licensable activities are taking place, however, it is not clear from the hours referred to on page 30 which these relate to. The Licensing Act is clear that it regulates licensable activities and therefore these hours must relate only to the times during which licensable activity may take place, not the closing time of the premises.
- In discussion, we have heard the core hours referred to as being existing licensing hours. They are not, and the existing regime should not be taken as the starting point for new provisions
- Licensing hours for New Year's Eve have already been set nationally to allow 36 hour licensing and existing premises will retain this as a grandfather right. It therefore appears somewhat perverse to impose an earlier hour.
- The Council's approach to "cooling down" and "drinking up" time appear somewhat contradictory. On the one hand premises are advised to cease alcohol sales at least 30 minutes before customers are required to leave but on the other they must ensure the premises is cleared 30 minutes after the last licensable activity ceases. In outlets where the sale of alcohol is the only or the last licensable activity, this means that there is very limited scope for a longer wind down period. A longer drinking up time is a key contributor to gradual and sensible dispersal of customers with the minimum of noise and nuisance.
- We trust that the positive benefits of a longer wind down period (as outlined in para 2.3.6 will translate into sensible licensing decisions when existing licensees apply to vary their licences to provide late night refreshment during this time.
- We note the exception provided for restaurants. This policy is badly drafted and is based solely on assumptions with no evidence to support the claims made. Other types of outlet – such as café or jazz bars – may also appeal to older customers, and it is the management of the outlet not its generic type which dictates whether it is likely to be associated with disorder or nuisance.

Stress Areas

The concept of stress areas has been extensively debated in the context of the Unitary Development Plan. We refer the Council to the previous evidence submitted in this regard. Whilst the WLA does not support the concept of stress areas, if such a policy is to be adopted, the most appropriate vehicle is planning policy. In view of the fact that the modified UDP will shortly be adopted, we see no reason for including a further stress area approach in licensing policy.

Although the Council is at pains to point out that less than 6% of the area governed by WCC will be designated a stress area, it is worth noting that these areas also include many of the capital's prime leisure venues and the recognised heart of the entertainment capital of the UK. We believe that the stress areas proposed are too widely drawn to be helpful in the context of isolating true cumulative impact.

The adoption of a special saturation policy cannot be a decision for the local authority to take on its own initiative, but as a result of representations made by a responsible authority. We assume that this is the case in this instance and that the proposed policy is based on representations received. These must be provided and made public so that interested parties may comment on it and challenge it where appropriate. At present the only evidence provided is that used by WCC to justify the stress area approach at the UDP inquiry. We note in this context that the planning inspector found it was insufficient to justify such a restrictive policy, and we submit that this remains the case in this instance.

Appendix 12 simply sets out the number of licensed premises in the Borough as a whole and the number of people estimated to be on the streets, there is no attempt to identify a casual connection between incidents of crime, disorder or nuisance and the customers of licensed premises within a given area. This is the test set out by Guidance and it is patently not met.

Moreover, the statistics provided are general and relate to all forms of offence and CAD call out – no attempt is made to isolate which of these relate to complaints about licensed premises or alcohol related offences. We further note that many alcohol-related incidents will arise from people who have not been drinking in licensed premises. Much of the evidence is assertion and assumption or at worst hearsay – no attempt is made to link alleged problems to precise locations.

We further note that the evidence provided in support of the stress area approach relates almost exclusively to the West End rather than Edgware Road or Bayswater. If all three areas are to be designated, we would remind the Council that it is obliged to provide detailed evidence – as required under Guidance to support this designation. The evidence provided in Appendix 12 does not support the classification of Edgware Road and Bayswater as being subject to a special saturation policy.

We note the reference in the evidence to the lack of effective late night transport. This is an issue on which the WLA has been campaigning for some time and resulted in pledges being made at the recent mayoral elections. We would expect the Council to be supportive of efforts to improve the situation and to bring to bear their lobbying power on London Underground and the Mayor's office.

The Government's Guidance is quite clear not only as to the steps which must be gone through before a policy can be adopted, but also the type of issues the policy can and cannot cover. It states that:

“The effect of adopting a special policy of this kind is to create a rebuttable presumption that applications for new premises licences or club premises certificates or material variations will normally be refused ... A special policy should never be absolute ... special policies should not include provisions for a terminal hour... special policies must not impose quotas.”

Westminster's approach appears to diverge from this general presumption against grant since it relates only to certain types of premises. This misuses the ability to set a special policy. The policy presumption should apply to all types of outlet just as the ability to argue an exception should apply to all. The earlier suggestion that exceptions will only be granted if one premise replaces another implies that a quota is operating. It is a moot point whether the customers of restaurants and the type of outlet the policy appears to except may not equally cause the same problems of cumulative impact. The key is whether an outlet is well run and managed, not what its generic type is.

Whilst the policy claims to provide for exceptions in certain circumstances, again does not provide for the full exceptions set out in guidance. Guidance clearly states that all cases must be considered on their merits and that all applicants must be able to demonstrate that in their specific circumstances, the presumption does not apply. The exceptions set out in this policy do not provide for such a situation and unduly limit applicants' abilities to argue that they are exceptions. Moreover, no reference is made to the need for responsible authorities or interested parties to make representations before the policy can be applied.

On the basis of the evidence provided we do not believe that a special saturation policy is justified. This is particularly because a special policy is a peculiarly blunt instrument and will only serve to place an artificial cap on the market. This inevitably has the effect of driving up prices and driving down quality.

Policies by type of use

As a general point, we see no reason for introducing specific policies for different types of outlet. The purpose of licensing reform was to replace six regimes with one premises licence

for any type of premises. This policy undermines that. We do, however, welcome the inclusion of a combined use definition, since many premises are now offering a variety of different types of offer both throughout the day and throughout the premises itself. For example, many bars with a supper hours certificate may wish to provide late night refreshment.

The definitions used are outdated and too tightly drawn to be meaningful. For example, the definition of a restaurant allows customers to drink at the bar before a meal but an outlet would fall outside the more flexible provisions if it allowed the same customers to drink at a bar after a meal. Music and dancing premises appear to cover both nightclubs and other premises which may offer entertainment but which fall within a separate use class. We strongly believe that the classification of nightclubs should be separate from other premises offering music and dancing.

We would like more information on how the test of “exclusively and primarily” will be applied in relation to pubs and bars. We urge a common sense and light touch approach in determining this. Paragraph 2.5.13 appears to acknowledge that this type of traditional pub offering minimal food and other forms of entertainment plays a positive role in London’s tourist and cultural scene, but the effect of the policy would be place a cap on this segment of the market.

Temporary Events

We note the suggestion in the policy that between 1 and 2 months’ notice be given of temporary events. This is far in excess of the statutory minimum of 10 working days and cannot be insisted upon. It is also not clear whether it is working or calendar days which are being referred to. We can see no justification for such a long notice period, particularly given the fact that these are not applications for permission but rather notices of intent and that there are minimal administrative checks which the Council must carry out.

There is no legal basis for requiring TENs to be notified to the Fire Authority. Only the police are able to object to these notices.

Conditions

Again, we believe it will be important to note at the start of this section that the licensing authority may only consider the imposition of conditions over and above the mandatory conditions and those offered as part of the operating schedule, if their discretion has been engaged by means of a relevant representation.

This section contains requirements for applicants to address issues in their operating schedule that are already subject to separate legislation – for example, disabled access, health and safety at work, noise at work, gas and electrical and fire safety. Government guidance specifically states that conditions should not duplicate these provisions. It is not appropriate for the licensing regime to be used to enforce other statutory provisions which are subject to separate enforcement mechanisms.

We note that paragraph 3.1.5 suggests that the Council will be looking to reinstate undertakings on premises licences during the conversion period. This is wholly at odds with Government Guidance which clearly states that:

“it would be wholly inappropriate for the effect of transition to be to give legal force to such an assurance or undertaking where no such force existed before, and where the Licensing Justices had either no power to impose the content of such an undertaking as a condition or had chosen not to impose it as a legally binding condition. Accordingly undertakings and assurance will not be transferred to converted Premises Licences as new conditions”

There is no legal basis, therefore, for the proposals contained in this paragraph and the Council must make this clear. We strongly recommend that this paragraph is deleted in its entirety.

Management and Enforcement

We note that the Council is in the process of developing a risk assessment based approach to inspection and enforcement activity. In the absence of further information as to how this will be determined and implemented, we are unable to comment further on the proportionality of the proposals. We would strongly urge the Council to engage the trade in discussions about the proposed approach at the earliest opportunity.

Appendix 3

The table should be amended to refer to “relevant” representations and we strongly recommend that the power for officers to determine whether a complaint is irrelevant is extended to objections to an application and representations as well.

Appendix 6

We note the Council’s expectation that all applications should be able to demonstrate that the proposed activities are lawful planning uses. We would be concerned if this were to be interpreted as an absolute requirement to have planning permission before submitting a licensing application. Whilst considerations for planning can be relevant to licensing and vice versa, they are two distinct regimes and should be freestanding. As a matter of administrative law, one should not be made contingent upon the other. There is therefore no legal basis for insisting that planning consent be sought first nor that, in its absence, the licensing authority can refuse to determine.

Appendix 7

The draft operating schedule set out in Appendix 7 is complicated, lengthy and over prescriptive. The format of operating schedules will be set by national regulations and the draft circulated by Westminster far exceeds those national requirements. We would not expect the Council to continue to pursue its approach once national standards are in place.

We have a number of observations to make on the document as it stands at present:

- operating schedules are not required for premises seeking simply to convert their existing licences. This is not made clear
- operating schedules should be flexible since anything included in an operating schedule will automatically become a condition of the licence. This cannot be the case if applicants are expected to answer every question and will only result in inappropriate and disproportionate conditions being volunteered unknowingly.
- Conditions should not duplicate other statutory provisions, yet the questions in the draft pro forma do just that eg fire and health and safety risk assessments
- There is no legal basis for requiring detailed noise and environmental reports to be submitted. This would impose a disproportionate burden on many smaller, independent operators, increasing the cost of applying for a licence, it also arguably falls outside the scope of the licensing objectives. National regulations will prescribe supporting documentation and at present, these are not referred to.
- The draft pro forma contains reference to capacity limits, implying that these will be imposed as a blanket condition. This is not permissible and our earlier comments apply. It should be for the operator to volunteer or a responsible authority to recommend.

Appendix 10

We note the draft policy of the City of Westminster Police and their express intention to submit blanket objections to all licence applications within the West End Stress Area.

This is excessive and goes beyond what is expected within the Act and Guidance. Both documents clearly state that representations must be specific to the application in question and should not be simply blanket objections without reference to the individual merits of the case in question.

We would strongly urge the Council to use their powers to weed out this type of blanket, non-specific objection at the earliest stage in the process and note that the Act gives officers the power to do so.

Finally, we would recommend the Manchester model to be the Council and Police as an example of best practice partnership working between the licensing department, police and trade. It promotes good practice and responsible management whilst at the same time naming and shaming the irresponsible operators. We would like an opportunity to share our thoughts on how this approach may be incorporated into the licensing policy.

We will, of course, be lobbying the police to modify their approach.

Omissions

Whilst not wishing to further add to an already lengthy document, we are somewhat surprised that the policy statement makes no reference to personal licences, the handling of provisional statement or gaming machine permits.

Conclusion

We appreciate that this is a somewhat lengthy and critical response, but the draft policy is a detailed and complex document. We trust that our observations will be viewed in a constructive manner and taken into account when the final draft of the policy is formulated.

The WLA remains committed to working with the Council to ensure a smooth transition to the new regime, and to that end will continue working with officers on revisions to the rules of management and the enforcement regime to be adopted.

Yours faithfully

Kate Nicholls
Secretary