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Application process and Decision-Making under the Licensing Act 2003

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Summary

This paper presents the findings of an empirical project on the operation of the Licensing Act 2003 with specific focus on the application process. It explores the submission of applications, the making of relevant representations (objections), the role of the local authority, and the incidence of negotiation, mediation and enforcement practices. The paper shows the varying extents to which applicants and local residents receive appropriate guidance, reveals the importance of mediation and negotiation in the process, and demonstrates the 'low key' nature of enforcement action, with the procedure for 'reviews' of licences infrequently utilised. While the adoption of a 'new governance' model of regulation in the Licensing Act 2003 has been enthusiastically embraced by participants, uncertainties remain on matters such as who has

responsibility for enforcement action and the proper role of the licensing officer in providing appropriate advice to parties.

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Introduction

The Licensing Act 2003 (2003 Act) introduced a modernised and integrated scheme covering three forms of ‘licensable activities’, sale by retail of alcohol or supply of alcohol by a bona fide members’ club to a club member;¹ provision of various forms of entertainment (principally music and dancing, indoor sports events, films and plays); and provision of late night refreshment (LNR), which is hot food or hot drinks provided from 11.00 pm to 5.00 am (see s 1(5) and sch 2, para 1(1)). It impacts significantly on society, with a large proportion of the leisure industry, employing over three million people, regulated by it. There are some 216,200 licences and certificates in force authorising these various activities (see DCMS National Statistics Bulletin, Alcohol, Entertainment and Late Night Refreshment Licensing, England and Wales, April 2009-March 2010, 8) and many millions of customers frequenting premises which provide them. While much has been written on the 2003 Act itself, including several books,² little attention has been focused on the application and decision-making process and it is this aspect which this article addresses. The decision-making framework under the 2003 Act is more prescriptive for the licensing authority (authority), which in most cases is the local authority (see s.3), than under previous licensing schemes regulating these activities. As will be seen (see 2 below), it represents a marked departure in several respects. A research project has been undertaken primarily in one licensing authority area, a small semi-rural authority with a handful of towns, to ascertain how authorities have adapted to and embraced the new framework when

¹ There is supply here because all club members jointly own club property, including the alcohol stock. There is therefore no sale when a member orders alcohol but a release to him of proprietary rights which he has in respect of the alcohol, even where payment is made: *Graff v Evans* (1882) 9 QBD 373.

² eg Manchester, Poppleston and Allen, 2008; Kalvin (ed), 2004; Barker and Cavemder, 2005.

discharging their licensing functions under the 2003 Act when it came fully into force on 24 November 2005 and this has been supplemented with subsequent additional data from a medium-sized suburban authority. The focus has been on the primary form of authorisation under the 2003 Act, premises licences, which can be obtained in the main by those carrying on a business that involves use of the premises for licensable activities. (The other two authorisations are a club premises certificate, for bona fide members' clubs run by members for the benefit of members, provided certain criteria under ss 62-64 are met, and a temporary event notice, which can be given by a 'premises user' to the authority when temporary or occasional licensable activities are taking place, provided certain qualifications under s.98 and s.100 are met, including ones relating to duration and numbers present.) In the cases studied, licensable activities often included sale or supply of alcohol and in such cases all sales or supplies must be made or authorised by an individual holding a personal licence and there must be a 'designated premises supervisor' (DPS) for the premises who holds a personal licence (and who can, but need not be, the premises licence holder). These are mandatory conditions which must be attached to the premises licence (see s.19) and the main purpose of the DPS is 'to ensure that there is always one specified individual ... who can be readily identified for the premises where a premises licence is in force' (Guidance, 2010, para 10.44 (Home Office)). There is an exception to these requirements for community premises (see s.25A). These requirements are confined to sale or supply of alcohol under a premises licence (s 111(1)).

The research was undertaken in two stages. Initially, a selection of case files from one authority was examined, with cases drawn from a one year period. The year selected was from December 2005 to November 2006, the first year the Act was fully in force. During this year there were 188 applications in connection with premises, covering new licence applications, variation and transfer applications, and applications to vary the DPS in cases where alcohol was sold or supplied on the premises. (During this year only, existing licences were converted into new licences, in some cases with variations of the existing licensable activities, and these conversions, totalling 135, and variations, totalling 110, are not included in the figures.) There has subsequently been a reduced number of applications year on year, with 152 in 2006-7, 135 in 2007-8, 122 in 2008-9 and 117 in 2009-10, the latest year for which figures are available. Nationally over the period (March-April) 2009-10 there were 33,908 premises applications, which include new premises licences, variations and transfers but not applications to vary the DPS (see Department of Culture, Media and Sport, 2010). Rather than select a truly random sample it was decided to focus upon three types of cases. The first was those with no 'relevant representations' ie objections from 'interested parties' and 'responsible authorities' (RAs). The former are essentially those living or working in the vicinity of the premises and local councillors, while the latter comprise various agencies (eg the police) with statutory responsibilities and expertise in particular areas, and a detailed explanation is provided in 5 below. The second was those with representations but where the case did not proceed to a hearing, and the third was those with representations that proceeded to a hearing. This was done so that analysis could be conducted on a range of cases, from simple to complex, with each of the parties providing a range of views on the process. Cases were selected from a one year period based on the date the application was lodged with the authority and it was envisaged that 10 cases of each type would be randomly selected for inclusion in the sample.

Due to the size of the authority, however, there were not 10 hearings held in this year (or in any other year). All of the hearings held in the December 2005 to November 2006 period (the

proceedings of which had been audio recorded on CD by the authority), which totalled seven, were included in the sample. After the selection of cases, a preliminary analysis was conducted to check for broad themes and issues. Utilising this data, semi-structured interviews were designed and conducted with a range of persons participating in the process. These included licensing officers (LOs), who are actively involved in all aspects of the licensing process; premises operators applying for premises licences; interested parties and RAs (see above) who can make relevant representations on applications; solicitors to the authority and applicants' legal advisors (including both solicitors and licensing consultants); and councillors on the licensing committee who, normally sitting as a sub-committee of three, make decisions in contested cases. An opportunity subsequently arose at a second authority to conduct similar interviews with several of the participants mentioned above, including licensing officers, RAs and councillors (but not applicants, their legal advisors or interested parties) and to attend some hearings there, and information gleaned here was fed into the research study.

Decision-making Framework under the 2003 Act.

The decision-making framework differs significantly from how local authority licensing schemes have traditionally operated. First, premises licence applicants draw up their own operating schedule, indicating how they propose to carry out licensable activities at their premises, reflecting the 2003 Act's underlying market-based approach to regulation. Secondly, an authority, under s.4(1), must discharge its licensing functions under the Act, which include determining applications, with a view to promoting specified licensing objectives. Under s.4(2), these are (a) prevention of crime and disorder; (b) public safety; (c) prevention of public nuisance; and (d) protection of children from harm. An authority, under s.4(3), is also required to have regard to (a) its 'Licensing Statement' published under s.5, which is often referred to as its Statement of Licensing Policy (SLP) and which sets out the authority's policy in respect of the discharge of licensing functions and (b) any guidance issued by the Secretary of State under s.182. Thirdly, relevant representations need to be about the likely effect of grant on promotion of the licensing objectives (s 18(6)(a)) and submission is confined to interested parties and RAs (see 5 below). The authority must grant the application if no relevant representations are received and, if they are, hold a hearing and determine the application, having regard to the representations, according to what the authority considers necessary to promote the licensing objectives (s 18(2)-(4)). The framework emphasises consensus regulation through co-operative partnership, with what is in the public interest emerging from dialogue between participants in the licensing process rather than being determined by the authority under traditional 'command and control' style regulation.³ The main focus of this paper is the application process and decision-making in contested and uncontested cases ahead of any case going to a hearing for decision by a sub-committee.

³ Under this traditional style regulation, authorities exercise control and direct activities in accordance with what, in their view, the public interest requires. The approach under the 2003 Act reflects the move away, in more recent years, from this style of regulation, which has increasingly been seen as costly, associated with 'red tape' and delay, and overly regulatory and bureaucratic. Greater emphasis has been placed on deregulation, reduced regulation and different forms of regulation, including consensus regulation. This has led to the emergence of the 'new governance' model of public administration and public problem-solving (Salamon, 2002)), where there is negotiation and persuasion, with facilitation or enablement of 'networks' of organisations (multiple stakeholders) working together collaboratively toward public problem-solving.

The Submission of Applications

A premises licence application must be in prescribed form (ss 17(2) and 54), in accordance with the Licensing Act 2003 (Premises licences and club premises certificates) Regulations 2005, SI 2005/42 (Regulations), and must be accompanied, *inter alia*, by an operating schedule (s 17(3)), which is in fact incorporated into the application form. The application form, contained in Schedule 2 to the Regulations, requires a considerable amount of information and interviews with applicants showed that their experience of completing it was mixed. Some found completion difficult, at least in the first instance: ‘

For someone like me I just thought it was a complete minefield ... [although] when I look back now it's quite straightforward, but I think because I was new to it then it's not an easy form to fill in.

This included solicitors completing forms for applicants: ‘Looking at the forms, the forms were very complicated ... and not very user-friendly’. Others, however, had less difficulty: ‘the forms themselves were not particularly complicated, they were just quite extensive’. Additionally, legal advisors envisaged that applicants without legal support would probably find the process problematic:

From a solicitor's point of view it was probably not too bad but from on the ground, say Bob running the Dog and Duck round the corner ... the new regime, was, I think, a very difficult process.

Although this was true of some unrepresented applicants in the sample, this did not, on the whole, accord with our findings. In a number of cases guidance was sought from and provided by LOs who process the application form and, even where it was not, applicants were confident that the council would provide support if approached. Support would not relate to how applicants complete their operating schedule ie how they propose to run their business, but it included advice on how sections of the form might be understood. As one licensing officer (LO) stated:

In relation to applicants ... I'm in an advisory capacity ... obviously I can't tell them how they're going to run their business, they must do that part, but in terms of actually interpreting the questions on the form and explaining what's important and what isn't, that's how I would help.

The application comes in and then, if ... there's a problem with it, a concern with it, then I liaise ... with the applicant ... I've done it in writing, email, telephone, or if they're handy go out and see them.

Such support was perceived as particularly helpful, with one applicant describing assistance received as ‘brilliant’ and another indicating that it was ‘very, very good’.

Mandatory Grant and Conditions Consistent with the Operating Schedule

When completing an operating schedule indicating how they propose to carry out licensable activities, applicants must describe the steps that they intend to take to promote each licensing objective. This is very important as steps proposed can be carried across as licence conditions

which are binding on the applicant. The authority is required to grant the licence where there are no relevant representations but can attach 'such conditions as are consistent with the operating schedule accompanying the application' (s 18)(2)(a)). What applicants include and the extent to which conditions are carried across are therefore key determinants of the content of licences. What information is carried across as conditions is to some degree determined by the information provided and interviews with LOs and RAs in both authorities indicated this to be problematic. Thus, one LO stated that provision of information is 'an area which is falling really into non-use', in that applicants have little to say on promoting licensing objectives. Having little to say, as will be seen, may well be an advisable practice, given the possible extent of information being transferred across as conditions. Similarly, a child protection officer felt applicants offered little on protecting children and that greater resources were needed to educate them on what was required.

On the information provided, LOs were to some extent selective on what was carried across. A LO interviewed in one authority indicated that, although all information had been transferred across from existing licences during transition, largely due to pressures of work, practice since had been to carry across only information as conditions where these were regarded as enforceable. In the other authority, one LO, when faced with certain information which large-scale operators had routinely included (by adopting a 'standard' approach), stated that information would be ignored if it appeared not to have application to particular premises. Practice seemed uneven and this was confirmed in interviews with applicants' representatives eg one suggested that some authorities, but not others, routinely transfer all information as conditions. Describing the area as a 'minefield', another indicated that premises in some cases incurred 'unworkable' conditions if all information was carried across as conditions. It is clear that there is no requirement for all information to be so carried across, for the High Court in *The Queen on the Application of Bristol Council v Bristol Magistrates' Court* [2009] EWHC 625 (Admin) at [19] has stated that s.18(2) 'does not impose a duty to impose conditions that reproduce the effect of the operating schedule'.

Cases from the research did not suggest any clear philosophy on what information is carried across as conditions. The level of detail provided varied, with some applications containing extremely vague undertakings such as promises to 'not adopt drinks promotions', to implement a 'proof of age system', and to 'comply with Health and Safety legislation'. Other examples included a willingness to join a pub watch scheme (set up and run by licensees to reduce crime and disorder in pubs) and to ensure that soft drinks were always on sale. Such information was nevertheless transferred across as licence conditions. However, similar information appeared not to be carried across in other cases. So, while the above-mentioned undertaking to adopt a 'proof of age system' was transferred, another undertaking requiring provision of identification by customers who appeared to be under 21 (essentially, a 'proof of age system') was not transferred. In some instances applicants were perhaps creating hostages to fortune with the information provided eg an undertaking to 'comply with any safety or crime prevention policies agreed with the police or fire or local authority' could have far-reaching consequences, as it is vague, forward looking and dependent upon what others regard as appropriate practice. This could obviously be avoided if applicants made no relevant undertakings, as in a small number of cases in the sample, and here there was nothing that could be transferred across as conditions by the authority. In such cases, this may, of course, elicit from a RA a relevant representation or, more likely, a

request for further information to determine whether a relevant representation would be appropriate.

Making and Submission of Relevant Representations

Relevant representations, usually objections, are confined to interested parties and RAs. 'Interested party', defined by s.13(3), means any of the following:

- (a) a person living in the vicinity of the premises,
- (b) a body representing persons who live in that vicinity,
- (c) a person involved in a business in that vicinity,
- (d) a body representing persons involved in such businesses,
- (e) a member of the licensing authority.

The last-mentioned category, introduced by Policing and Crime Act 2009, s.33, and enabling local councillors to make objections, post-dates the fieldwork for the research.

'Responsible authority', defined by s.13(4), includes:

- the police;
- the fire and rescue authority;
- the local enforcement agency for the Health and Safety at Work etc Act 1974 (which is often the local authority, although it can be the Health and Safety Executive);
- the local planning authority;
- the local authority section with responsibility for environmental and public health (EH);
- the body with responsibility for protection of children from harm (which may be the local authority social services department, the area child protection committee, or another competent body);
- any other licensing authority in whose area part of the premises is situated;
- various bodies with responsibilities for waterways where licensable activities take place on a vessel; and
- the local weights and measures authority, more commonly known as the local authority trading standards (TS) department.
-

Noticeably absent is the authority to which the application is made. This was a deliberate policy decision, so that only those with expertise should be entitled to make representations. As Baroness Blackstone explained during the course of the legislation's passage (at HL Deb 27 February 2003, vol 645, col 400):

Judgment of the merit of an application against the licensing objectives should be left to the experts. The experts on crime and disorder, and the protection of children from harm are the police, and so the police have a voice. The experts on public safety are the health and safety and fire authorities, and so they have a voice too. The experts on public nuisance are the local environmental health authority. It follows that they should have a voice too ... The experts in what it is like to live and do business in a particular area are local residents and businesses ...

What we are not doing, however, is allowing the licensing authority to make

representations in its own right. One of the fundamental principles of the Bill is that applications should be granted administratively where the experts have not raised any concerns about them.

The authority's role is thus essentially a neutral and impartial adjudicator ie a 'referee' or 'umpire', although there has subsequently been a move away from this approach. Representations are now permitted from councillors as 'interested parties' and, under the Police Reform and Social Responsibility Bill, currently going through Parliament, the authority itself will be included within the category of persons able to make representations.

To constitute relevant representations, representations must be about the likely effect of grant on promotion of the licensing objectives (s 18(6)(a)). Many representations from interested parties will clearly be about likely effect, even if not expressly linked to a particular licensing objective eg representations concerning disorder occurring at the premises obviously relate to prevention of crime and disorder, and representations about noise obviously relate to prevention of public nuisance. In other instances, eg complaints about parking and traffic problems, it may be less clear. One view might be that such complaints are linked to the public safety objective, in that such problems may make it less safe for road users and pedestrians, but another view might be that traffic congestion concerns are not related to public safety and are therefore irrelevant. LOs may respond differently in such cases and may or may not assist complainants in reformulating their objections:

Interviewer: You mentioned one of the things you'll do is you'll look at any comments that members of the public give and look to their relevance. What do you do if you regard them as irrelevant?

Interviewee: We write to them. I write to them and tell them they are irrelevant and for whatever reason.

Interviewer: Do you invite them to re-submit them if you think that they could be relevant?

Interviewee: No ... I can't say that I've actually written to them asking them to do that, but on occasions I know that particular individuals have written back and perhaps have explained their position in more depth and then we've looked at them again. Certainly we had one ... [where] a lady wrote in and we didn't consider it relevant, she was obviously quite concerned and then ... emailed back with a more lengthy detailed response and as a result of that we considered it and then deemed that it was relevant. That doesn't happen very often.

The importance of advice on the licensing objectives becomes apparent when looking at the range of objections in the sample. Some objection letters were clearly tailored to the licensing objectives and included complaints about crime and disorder, obstructing public rights of way, noise, smells associated with LNR, litter, light pollution, public safety, and supply of alcohol to children. Others, less clearly tailored, could, to a greater or lesser extent, be 'stretched' to fit eg complaints about access, parking and traffic congestion. Some objections, however, could probably be dismissed as irrelevant. These included complaints about impact upon natural environments, suitability of premises for licensable activities, and devaluation of property values. They also included whether there was a 'need' for another outlet supplying alcohol, the objection in this instance consisting of a photocopy of a newspaper article bemoaning 'binge drinking', a

photocopy of the statutory notice for the application, and a short handwritten comment questioning the need for another local outlet in the light of existing provision. The question of 'need' is not a relevant factor, as is made clear from the Guidance (see para 13.23). Although some of these may be valid concerns eg impact upon natural environments (such as public open spaces), they are excluded from consideration as they fall outside the licensing objectives.

When tailoring representations to the licensing objectives, objectors usually made explicit reference to objectives when formulating their representation, as in the example below, or alternatively used objectives as sub-headings:

We wish to make representations, not to the granting of the Licence, but to the use of amplifiers and/or lighting for performances in the [premises] on the grounds of 'Public Nuisance'. We are alarmed to read of the activities to be included in the Licence, ie plays, spoken word, theatre groups, films, exhibitions, live music, recorded music, performances of dance, facilities for making music and dancing ... Such activities ... may cause noise disturbance to near neighbours if they take place in the [premises].

Several residents' letters had identical wording, suggesting a degree of co-ordination between them. This may well have helped to ensure that representations were focused on the licensing objectives, through residents with knowledge of the objectives sharing this with others. However, co-ordination is no guarantee that representations will be so focused, as the following extract from one case where residents had met beforehand and co-ordinated their observations shows:

The traffic congestion ... is already very bad ... on most weekends especially when any show is on. Yellow lines have been refused and consequently it is often very difficult to get out of one's own drive. The additional traffic, noise etc. if this ridiculous idea ever comes about is impossible to imagine. The traffic flow through the Town will be horrendous. The toilet facilities are already bad compared with [a neighbouring town] and other places in the area and this proposal will make things even worse.

The prime consideration here is traffic congestion, which could be tailored to a question of public safety (as mentioned above) but, with no apparent appreciation of the importance of the licensing objectives, the resident focuses instead on congestion and road access difficulties from his drive. There is an oblique reference to noise, which may be taken to fall within the prevention of public nuisance licensing objective, even though there is no attempt to describe it as such, but traffic congestion nevertheless constitutes the gist of the resident's concerns.

Without legal advice or LO support, such residents risk being silenced by the process, although it is conceivable that authorities might decide that such matters merit consideration notwithstanding they fall outside the licensing objectives. Indeed, interviews with solicitors suggest that they have observed this phenomenon, although the weight of our evidence points to authorities observing the licensing objectives even where their restrictive nature is acknowledged. If the objectives are observed, however, residents will only be heard if they happen to frame their observations to accord with a relevant objective, research the licensing objectives, or receive advice from LOs. Essentially, this means that only active and engaged citizens can make effective use of the process. Although not substantiated by the research

(because of the limited number of objectors interviewed and the absence of appropriate demographic data), there is evidence to suggest that the most 'effective' objectors were those who lived in relatively affluent neighbourhoods with strong community ties and residents' associations. The sharing of information and the middle class confidence of these residents (evident, for instance, when one resident in interview, commenting on the hearings process rather than the act of objecting, said that her experience as a magistrate helped her understand the process and resulted in it being less daunting) resulted in cogent representations on the licensing objectives. In comparison, for one interview with an objector in a less affluent residential area characterised by tightly packed terraced properties, interviewer and interviewee seemed to be talking at cross purposes. The interviewer was concerned with the interviewee's understanding of the licensing objectives; the interviewee simply wanted to know why she was being subjected to excessive noise. The interviewee had no knowledge of the objectives and was fortunate that the reasons for complaining happened to be in accordance with the objectives. Nevertheless, the objector failed to attend the hearing and the application was only amended in line with an agreement made, after 'negotiation', with the police. Making representations without legal advice or LO support, therefore, could be viewed as an example of where consensus regulation works in a manner that disadvantages the socially marginalised (see, Yeung, 2004: 179).

In the case of RAs, representations are less likely to be irrelevant as RAs are recognised as having expertise on at least one licensing objective eg EH on noise and TS on protecting children from harm from under-age sales of alcohol (for which TS have enforcement responsibility under s.186(2)(c) of the 2003 Act). A representation, however, might still be adjudged irrelevant eg a planning authority's objection to licensing hours based on the hours exceeding those permitted for the premises under planning permission. This would be based not on the likely effect of grant on promotion of the licensing objectives but on amenity, which determines hours under planning law. Nevertheless, there were examples of RAs making representations on matters outside their expertise. As one licensing consultant remarked at a hearing, 'The police officer was going on about noise which isn't the police's remit. That's environmental health's [concern] and I did tell them this.'

On notification of applications, concerns by RAs may be raised informally with LOs in the first instance, rather than through a formal representation, and concerns drawn to the attention of applicants (or their legal advisors). A period of 'negotiation' may take place between RA and applicant which resolves concerns without any representation being made, as can be seen in the following interview with a police licensing officer:

Interviewee: ... whenever I've ever spoken to the brewery or their solicitors, they've always gone along with what we've proposed, with a quick bit of negotiation ...

Interviewer: With an awareness that you might have to sort of compromise and negotiate on that, did you ask for more, as it were, at the outset? Sort of like trade union bargaining terms, if I could use that expression?

Interviewee: Probably, with regard to night clubs, probably yes, which gave us a bit of leeway to ... become a bit softer, but also gave the DPSs the idea that they were actually gaining something from us, which I'm sure is just human nature.

Interviewer: If they accepted your more slightly more rigorous controls, then presumably those just went through, and were accepted?

Interviewee: That's right.

Applicants may not be aware of this ‘trade off’ before negotiations began, although it is more likely that legally represented applicants will be eg a solicitor remarked that he always contacted the police before making an application to ‘start negotiations before we lodge’. When asked if he would routinely ask for more than the applicant wanted, expecting this excess to be ‘traded away’, he stated: ‘It all depends, it all really depends. It depends on certain police forces’. Earlier, this solicitor acknowledged the importance of local decision-making cultures and how part of his role was to be aware of this to aid negotiation. Since unrepresented applicants may be less likely to be aware of this, they may be subjected, via ‘negotiation’, to more restricted hours and conditions.

In ‘negotiation’ RAs may threaten to object to secure agreement with applicants. This occurred, for instance, when a TS officer was seeking to ensure uptake of a suggested condition and was unhappy with the applicant’s proposed wording. Referring to this when interviewed, the TS officer remarked that ‘if this is the way you word it ... then I’ll just raise an objection to it’, before going on to indicate that ‘that’s probably ... the closest I’ve ever got to actually saying I will make a formal objection if you don’t change the wording on this.’ In some instances, an overt threat may not be necessary eg a police licensing officer put success in negotiations down to their role qua police officers:

I think that’s the way it is because they still have a modicum of respect for the police, and if the police say, we don’t want you to do this, because we think there might be problems they know that this is coming from experience and they accept that.

Agreement may well be secured if there is only a minor disagreement eg a licensing consultant acknowledged that ‘negotiation is what it’s all about’ and that prolonged conflict was ‘not worth it for the sake of half an hour [extra at closing time]’. RAs, however, may be more assertive in the face of what they regard as unreasonable demands eg attempts by companies at ‘standardisation’. As one police licensing officer observed:

I just find that they say ‘well we want to do this’ as a standardisation, it’s not because they’re looking at the premises individually, they suddenly say, ‘well we’re having a corporate standardisation and we’re going to stay open and that’s what we’re applying for and you can’t stop us.’

Referring to a particular instance, the officer remarked: ‘[I] dug my heels in, did my case and then they backed down accordingly.’

Where there is protracted opposition from a RA this may convey the impression that the outcome will rest with the RA, although the decision-making function is that of the authority. This was evident in one case, from examination of the file, and the point was put to the RA [EH]:

Interviewer: ... we almost got the impression ... from some of the correspondence on file, that the applicant could have almost seen you as the decision maker in terms of if you’d made an objection to the application on the basis of noise complaints, that that wouldn’t go any further, so in effect they’re going to have to listen to what you’ve got to say because if they don’t they’re not going to get their licence. Are you making statements as

strong as that? Because you didn't put it in those terms, but the message was 'I'm almost the decision maker here'.

Interviewee: Yes, really strong, yes, and there's a reason for that ... they don't give a damn. They've caused horrendous problems in the past ... I made a recommendation on what we would see as a reasonable number of events and ... they didn't agree with that.

The applicant in this case, in interview, described how she felt forced to accept this limitation and described it as 'really odd'. However, she 'just went and did what he wanted' to avoid going to a hearing as 'that year it wasn't an emergency'. Negotiations will take place during the period of time within which relevant representations can be made - 28 consecutive days from the day after the application was given to the authority (Regulations, reg.22(b)) - and, if successful, may lead to no representation being made and the applicant amending his operating schedule. (Although there is no express provision in s.17 for the authority to accept an amended operating schedule, there is nothing in the section to preclude an authority from accepting one.) However, if negotiations are prolonged and agreement cannot be reached, this will reduce the time period available for making a relevant representation, with the attendant risk that the period may elapse without a representation. In one case, to avoid being 'timed out', a police licensing officer made a 'holding objection': 'Perhaps I could lodge an objection on crime and disorder issues at this time, I may have to withdraw them [sic] but it gives me a bit of thinking time.' Further, it seems that, on occasions, an apparent agreement through negotiation may not always be reflected in an amended schedule and again the period may elapse without any representation made. As one police licensing officer observed:

I have done negotiations with solicitors and then all of a sudden things have crept back in, you know, 'hang on, that's not what we discussed'. No, but if you miss it and the four week period is up, then 'sorry it's too late' then. And I did get walked over by a petrol company once [when they said] 'we'll get someone to come back to you' and never did and then all of a sudden the negotiation period's up, they just said 'tough'.

Unlike interested parties, some RAs may well have close links with LOs and, when raising concerns or making formal representations, may be inclined to see them as 'on their side', although the LO, representing the authority, essentially has a neutral and impartial role. A number of factors or practices may contribute towards this. These include the fact that licensing may be located within the same section of the local authority as some RAs (eg EH and/or TS) and joint visits or exercises may take place with these RAs. There may similarly be close links with the police, again with joint visits, and links may be strengthened if, as is not uncommon, LOs are ex-police officers. This was the case with two out of the three officers in one authority, a matter which one RA employee described as the 'old boys' network'. Close links, including joint visits, can be seen from the following extract from an interview with a police licensing officer:

Interviewer: Can you tell us a little bit about the working relationship you have with the council, in terms of how the mechanics of you making representations works, and to what extent there might be negotiation between you on that?

Interviewee: We are invariably in daily touch anyway and if there's any concerns we always voice them straightaway ... we would make that first contact with the DPS ...

[and] I've often done joint visits,⁴ it may be my issue, it may be [the LO's] issue, but we've always gone together, to actually show, that as the authorities, we are talking with one voice. And then that would be followed up with a letter to the brewery, or in some cases a warning letter, an informal warning, then a formal warning. And, I know that we have had a couple of reviews and they [the brewery] come to us straight away, and I know our solicitor was like, this is not a police matter, but I think we've always looked to support each other.

Any close links may be reinforced if, as in the case of one authority, a 'responsible authorities committee' is formed, enabling all RAs to come together regularly with the licensing section (four times per annum) to discuss matters such as problematic issues or premises and to set dates for joint visits. Links are further reinforced in this authority, as LOs have responsibility for particular geographic areas and this enables cultivation of close working relations with local police beat officers in addition to the police licensing officer.

Close links with the police and other RAs sit uneasily with the neutral and impartial role of LOs, a point not lost on LOs as they find themselves in a difficult position with conflicting interests:

[L]icensing has now merged with trading standards and environmental health, so effectively we're dealing with two separate responsible authorities ... and then we're still the licensing authority that are supposed to be the impartial, you know, party. The difficulty with that is we're supposed to be doing, what do they call it now, like cross-working, so I could go out and assist [TS] on an under-age sales exercise or something, but then how could my evidence be then used in a committee hearing, for example for a review? It would, I think we'd be in quite a precarious position with that. Exactly the same [applies] with environmental health, so if I was to go out and do some noise monitoring or something and again they wanted to use my evidence ... So it's a case of trying to broaden our experience, our knowledge base, but staying within the law and within the practical way of implementing that. That is very difficult.

LOs may have close links and frequent communication with some RAs but not others,⁵ leading to a hierarchy of the extent to which they make representations. For instance, one LO stated that the police were most active, TS would take an interest if there was a history of under-age sales, and EH would ask for conditions rather than object to grant. Others disclosed that 'Planning have never made an objection' and the Area Child Protection Committee were a 'waste of time ... You just get a bog-standard letter, it's as though, well I sometimes wonder whether they ever looked at the application' (although Child Protection, according to one LO, was now more likely to object after a change in personnel). These views were supported in interview by a number of RAs. A planning officer, for instance, stated that notification of applications allowed checks to ensure compliance with planning regulations; it was not anticipated there would be an objection, but rather their normal powers would be used. Similarly, a Health and Safety officer indicated

⁴ Joint visits seem not to be uncommon; as another police licensing officer observed, when 'something's wrong or situations have happened and come to our attention, then I tend to do a joint visit with a council licensing officer, or the police area beat manager'.

⁵ The effectiveness of partnership working is also a function of effective systems and in one authority a RA officer stated in interview that he had minimal involvement in the application process. We later discovered that this was because he was mistakenly omitted from a system that notified RAs of all new applications.

she would utilise her own powers in the event of non-compliance. In contrast, other RAs eg police and EH in interview provided numerous examples of ‘negotiation’ and making representations under the 2003 Act. However, in our case sample, the police made only one objection and EH two. This could be various reasons for this - the low number of cases in our sample, because LOs perceive a greater involvement of the police and EH due to close partnership working, and the fact that some RAs use notification as a means of commenting, rather than objecting eg planning might simply advise applicants that planning permission would be needed and TS might recommend some applicants consider adopting a ‘proof of age’ scheme. The largest number of representations from RAs in the sample was in fact from the Fire and Rescue Authority (FRA), although representations from the FRA are now less likely. This is because, under the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541, which post-dates the sample period selected, the FRA’s role is significantly reduced. The Order introduced a self-compliance risk-based system, with primary responsibility imposed on employers, occupiers and owners of premises rather than the FRA. As one LO put it, commenting on the change, ‘we don’t get the same liaison, we don’t get the phone calls, we just get the bog-standard letter printed off and that’s it’.

Limited involvement by some RAs may reflect the lack of information contained in the application form on the particular licensing objective(s) with which the RA is concerned, since this provides little basis for making a representation. As one RA remarked:

I do think that in terms of the detail that’s provided, so there’s the four boxes on the application form [in which applicants have to indicate how they will promote each of the licensing objectives], there’s often significant detail in the top two [prevention of crime and disorder and prevention of public nuisance] and very little in the one that’s around the protection of children from harm, so I guess it’s quite hard to make a decision on limited information and I would hypothesise that’s because those people filling in the application form actually don’t really know what to put in those boxes ... from a safeguarding perspective ... we should get out and train those people about what needs to be in place. It would be very simple for them to fill that box in and equally easier for me to actually make a judgment based on what’s contained in the box.

The interviewee in this case went onto observe:

I have often asked for further information ... needing to go back and clarify were the premises going to be hired out, were the children who were going to be at the premises going to be the responsibility of the adult who brought them or would they be left in charge with another adult who wasn’t known to them? ... it was always forthcoming and people were always helpful.

Our findings suggest, therefore, that some RAs are more likely to make representations and be pro-active on receipt of applications than others, although this may well vary between local authority areas. This was apparent in respect of health and safety, for example, where in one authority but not the other receipt of an application routinely triggered a fresh inspection of the premises outside the normal cycle of inspections.

Mediation

The 2003 Act makes no specific provision for mediation, although common sense suggests that if applicant and interested parties and/or RAs can reach agreement on concerns raised this might be more satisfactory than proceeding to a hearing. Informal mediation would be in keeping with consensus regulation under the 2003 Act and the Secretary of State's Guidance. Authorities' Statements of Licensing Policy (SLP) may or may not refer to mediation and how this might be undertaken. Where reference is made, the SLP might provide an indication of the authority's role, which might be putting parties in touch with each other to progress discussion (ie an intermediary) or, alternatively, it might be more 'hands on' through arranging a meeting for all parties to attend to discuss problems and possible solutions. Worthing Borough Council's SLP, for instance, provides that 'the Council will seek to encourage direct contact between the parties to try and achieve agreement' (para 15.1) and Cornwall Council's SLP provides: 'the Licensing Authority may initially arrange, facilitate and minute a mediation meeting to address and clarify the issues of concern' (para 8.7). Neither study authority SLP mentions mediation but it is clear from interviews with LOs that this takes place:

Interviewer: Would you try and mediate it in all cases?

Interviewee: Yeah most cases ... So say if the police came along and said 'We're not happy that these want to open until 2 o'clock, we want them to open until 1 [o'clock] or, you know, have they got CCTV, we want them to have CCTV' or whatever, then I would go back to the applicant or their solicitor and say 'The police have objected on these grounds' and you know, I'd send them a copy of the objection and say 'Are you prepared to put it right' kind of thing. And in the majority of cases they do, so they will happily come to some agreement.

Interviewer: So would you see your role as more of an intermediary then?

Interviewee: Yeah.

Mediation is most likely to be undertaken by LOs, although on occasions others may become involved eg in one case involving noise nuisance, after an unsuccessful LO mediation, EH successfully 'negotiated' an agreed terminal hour:

I was asked to get involved, for the mere reason that I was seen as being probably more independent and more likely to side on the person who was making the objections to the variation.⁶ I spoke to both parties and you could say, I turned round and said to the licensee 'Look if you want to go until 10 o'clock fine, I've got no reasons to object, but you are likely to give rise to a statutory nuisance potentially', and he was going 'oh ...' and I managed to browbeat him down in the hours that he was prepared to accept. Then I went back to the objector and said to them 'Well this is what we consider unreasonable and ... we've said to the licensee if he stops at 9 o'clock then he's unlikely to cause statutory nuisance etc, would you be prepared to accept that?' and once I said to them 'look if it stops at 9 then I'm happy with that so you're not going to get anywhere with me if you make a complaint up to 9 o'clock' and they went 'ok fair enough'. So it did

⁶ There appears to be an apparent contradiction in these positions. The likelihood of siding with the objectors may reflect the officer's true position since an affirmative response was received to an earlier question asking whether the officer saw himself as being 'an advocate in licensing for local residents who have problems'.

work in the end, so it was like a trade-off situation where you'd be a diplomat between the two.

Where agreement cannot be reached, the case will proceed to a hearing before a licensing sub-committee unless all parties agree that this is not necessary (s 18(3)(a)), as may be the case where recommended improvements are carried out.

Within the case sample there were successful attempts at mediation eg one resident described how the mediation meeting alleviated fears as to the extent of entertainment applied for, but in the majority of cases mediation did not succeed for a number of reasons. First, there might be a degree of intransigence on the part of those involved, with allegations that parties were 'unreasonable' and/or refusing to give further ground. Thus one applicant remarked 'we felt like we've done everything we could anyway' and indicated that some residents simply 'wanted the application to fail completely'. Similarly, a resident stated that an applicant 'listened to us, but then we heard a few weeks after, well it [the application] was going ahead whether we like it or not basically'.

Secondly, if there has been a history of problems at the premises, mediation has to take place within this context and this may make a successful resolution more difficult. One resident explained that mediation would not be worthwhile because 'I couldn't really speak to the pub owners because they had the attitude of they didn't want to know what I thought'. The resident claimed she had experienced noise pollution from the premises for a prolonged period and informal attempts at resolving the problem had failed. So it was clear that no further progress was likely to be made. There might therefore be a failure of mediation (or to start mediation) because objections are part of an on-going process of addressing or attempting to address difficulties eg in one application, prior history led to a number of representations where the application sought to go beyond what was previously informally agreed with residents and agreement could not be reached. Indeed, if there was a long history of prior complaints, one LO confirmed mediation was unlikely to be attempted.

Thirdly, misunderstanding may arise as to what had been agreed at a mediation meeting, as occurred in one case, and this led to the 'agreement' subsequently unravelling.

Fourthly, for a limited time one authority refused to disclose to applicants names and addresses of objectors on the grounds of the protection of privacy, which effectively precluded informal mediation. This led in one hearing to the applicant's representative bemoaning her inability to negotiate with residents. This practice has, however, since been discontinued, since some measure of disclosure may be necessary to comply with Art 6(1) of the European Convention on Human Rights (see *McMichael v UK* (1995) 20 EHRR 205). For these purposes, disclosure of the road or street in which the person making the representation lives, without disclosure of the person's name or precise address, may be sufficient for compliance with Art 6(1) (Guidance, para 9.18).

Finally, an obstacle to successful mediation may be the attitude of legal representatives. Differing opinions were offered on the benefit of advising clients to meet with residents. One representative placed mediation at the centre of his approach, even going so far as 'coaching the clients to go knock on the door': 'We offer residents' meetings to see a number of residents. We

recommend that very much to clients. Face to face contact can sometimes really break down issues and barriers.’ Another, however, offered a cautionary note to such practices: ‘you’ve got to be careful of intimidation, just knocking on someone’s door. So, I say, you know, you can only do that if you feel that you can do it amicably and just be careful.’

Within the two authorities, it was readily apparent that mediation, although not formally recognised within the statutory framework, was an important element in the decision-making process for the resolution of disputes.

Review Applications and Enforcement

An understanding of the process requires consideration of enforcement, since applications can be made by residents and RAs for a review of a premises licence (with consequent sanctions eg additional conditions, licence suspension or revocation) on any ground relevant to one or more of the licensing objectives (s 51(4)(a)). Reviews, introduced by the 2003 Act to deal with ‘problem’ premises, were seen by RAs as a ‘last resort’. Thus a TS officer indicated it would be utilised ‘only after a package of support had been offered’, while a police licensing officer observed:

if we’re taking a premises to review it’s the last process where we’ve exhausted every avenue of negotiation and the actual review itself we’re not doing willy-nilly, we’re taking it, that’s the last resort if you like.

Additionally, RAs were critical of what they felt to be the high-level intervention threshold for reviews and the otherwise low key nature of enforcement action generally under the 2003 Act. Thus, for the TS officer mentioned above, much more could be made of the enforcement regime:

I can’t understand why we’ve got such a huge problem or perceived problem with alcohol and all of the stuff that goes with it and yet we’ve sort of brought in a piece of legislation that has said, ‘leave the licensing people [licensees] alone and only step in if things get really bad’.

The same point was made by an EH officer, who thought reviews could be more widely used if the intervention threshold was ‘amenity’ rather than ‘statutory nuisance’. If the threshold was ‘statutory nuisance’, the EH officer could use his own powers rather than seeking a review under the 2003 Act. It was apparent, however, from an exchange in a hearing between this officer and a LO as to whether there were complaints as to ‘statutory nuisance’, as opposed to a mere noise complaint (ie amenity), that this LO at least did not regard ‘amenity’ as the relevant threshold. The EH officer’s view was shared by another EH officer in the other authority: ‘if there’s that much of a problem we’d have to deal with it under [statutory] nuisance [legislation] anyway’. In short, EH officers believed that the 2003 Act did not add anything that could not be achieved utilising pre-existing powers.⁷

⁷ The approach to ‘noise nuisance’ has subsequently developed in a way that has perhaps lowered the threshold for reviews, for in *R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates’ Court* [2009] EWHC 1996 (Admin), the High Court (at [64]) approved a statement in the Guidance (para 2.33) that prevention of public nuisance could ‘include low-level risk perhaps affecting a few people living locally’ and there was no indication that conduct needed to amount to a statutory nuisance. The High Court’s decision in this respect remains authoritative since, although the case subsequently went on appeal to the Court of Appeal, this was on the

The low key nature of enforcement action under the regime may reflect the ‘administrative’ nature of the LO’s role. Indeed, the term ‘administrative’ was used throughout the interviews to describe LOs from a range of respondents and LOs themselves perceived their role as largely neutral. This limits LOs’ engagement, or the perception of their engagement, in enforcement action. In the words of one EH officer: ‘I think if you’ve got a licence somebody needs to enforce it and the people that need to enforce it are the people who issued the licence, not everybody else and they follow on behind.’ This was also acknowledged by one LO: ‘that’s the biggest problem really with the legislation, in that they [RAs] see us as we’re the licensing authority, we issue the premises licences so therefore we should be able to take them away.’

If the authority is seen as largely responsible for enforcement action, this may lead to the withdrawal or reduced involvement of other agencies in enforcement eg a police licensing officer described how the police now take a ‘back seat’:

[The authority] don’t do it as it should be done from a police perspective, not as it used to be done. So you don’t get the police visits to public houses any more, you don’t get the enforcement that you used to get, because we’ve said right, the council have got responsibility for a great percentage of licensing law so we’ll take a backwards step.

Conclusions

It is clear from the research that in each authority LOs played a key role by providing assistance to parties involved in the application process. Assistance was provided, in particular, to applicants eg where they encountered difficulties in completing application forms and to interested parties eg highlighting the importance of the licensing objectives. RAs themselves required little in the way of assistance from LOs, because of recognised expertise in their particular area, greater familiarity with the licensing system and a general awareness of what was expected. Uncontested cases where grant was mandatory were essentially unproblematic, apart from transferring information across from the operating schedule as licence conditions. No clear stance was apparent here, and approaches differed between transferring everything and only matters considered relevant and/or enforceable as conditions. This has significant implications, since licence conditions are not easily removed. A variation application is needed, which in most cases will need to be a full variation under ss 34-36 rather than a ‘minor variation’ under ss 41A–41C (see Guidance, para 8.73), and an application is still necessary before conditions can be removed.

In contested cases, representations from residents were not always focused on the licensing objectives and, since practice differed on whether they were assisted by LOs in reformulating their representations to accord with the objectives, some residents were disadvantaged where no assistance was provided. RAs were not immediately involved in the process through making a representation and initially often drew their concerns informally to the applicant’s attention. With a view to ‘negotiation’ and agreed compromise, RAs might request more rigorous controls than were felt necessary and applicants, if aware of the ‘negotiation’ element in the process,

narrow question of how a case should be approached by a magistrates’ court on appeal (see [2011] EWCA Civ 31) and no consideration was given by the Court of Appeal to the question of what constituted a public nuisance for the purposes of the 2003 Act.

equally might apply for more than they wanted. After a period of ‘negotiation’, concerns might be resolved, in keeping with Parliament’s intention, for the Guidance (para 8.41) envisages applicants being made aware of the concerns or expectations of RAs and being able to take steps to address them. If concerns were not resolved informally, the RA would make a relevant representation. Some were more likely to make representations than others, although representations made did not necessarily lead to a hearing and were sometimes withdrawn eg where remedial action was required and such action was taken. A representation might also be withdrawn if the applicant and person making the representation subsequently came to an agreement, either through their own efforts or mediation by LOs (or occasionally others, eg an EH officer). This is, however, provided the licensing authority agrees that a hearing is unnecessary (see s.18(3)(a)) and not all do. Practice differs and some authorities take the view that, once a representation has been made, the case should proceed to a hearing for determination by the authority. Although not formally recognised within the statutory framework, it was evident that mediation was an important element in the decision-making process and, on occasions, proved successful. In the majority of cases examined, however, it failed for a number of reasons, as indicated.

LOs for the most part were able to maintain a ‘neutral’ stance when dealing with those involved (applicants, interested parties and RAs), although this was more difficult in some cases eg where there were close links with particular RAs. Although LOs felt a sense of unease in such instances, cases studied gave no indication that this had any significant impact on their work. The close links may well not have been apparent to applicants and interested parties nor do they seem to have hampered LOs when undertaking mediation. Certainly in each authority applicants and interested parties spoke appreciatively of LOs’ help and support and there was no intimation of any ‘leanings’ in favour of RAs. The ‘neutral’ stance of LOs, however, gave rise to a perception of their limited engagement in enforcement action. Enforcement by the licensing authority was generally seen as low key in nature, with matters left to RAs to seek licence reviews. Since reviews were sought only as a last resort and were perceived as requiring a high intervention threshold, impact was necessarily limited.

In sum, the research has highlighted a range of different practices and perceptions of how the application process and decision-making operate. It is clear that participants in the licensing process have generally embraced the ‘new governance’ model of problem-solving (see note 3) and consensus regulation through co-operative working. This is particularly evident in ‘negotiations’ with RAs and mediation meetings organised by LOs with a view to achieving an agreed outcome. Indeed, the importance of negotiation and mediation in the operation of the scheme cannot be underestimated. This is not readily apparent simply from an examination of the statutory scheme but each plays a key part in the application and decision-making process.

Bibliography

Barker, K and Cavender, S (2005) *Licensing: The New Law* (Bristol: Jordan Publishing)
Department of Culture, Media and Sport (2010) *Alcohol, Entertainment and Late Night Refreshment Licensing Statistics, 2009/10* (<http://www.culture.gov.uk/publications/7456.aspx>)
Home Office (2010) *Guidance issued under section 182 Licensing Act 2003*
Kolvin, P (ed) (2004) *Licensed Premises: Law & Practice* (Haywards Heath: Tottel Publishing)

Manchester, C, Poppleston, S and Allen, J (2008) *Alcohol and Entertainment Licensing Law* (London: Routledge-Cavendish)
Salamon, L (ed) (2002) *The Tools of Government* (Oxford: Oxford University Press)
Yeung, K (2004) *Securing Compliance: A Principled Approach* (Oxford: Hart Publishing)