

## **February 2014 No 2**

# **Licensing Committees, Taxi Licence Fees, Licensing Act Licence Fees, Draft Mandatory Condition, Member Training**

## **2 Licensing Committees?**

There is currently some discussion around the workings of licensing committees. It is clear that a number of authorities only have one committee discharging Licensing Act, Gambling Act, taxis, street trading, sex establishments and many other licensing functions, whilst others have two - the statutory committee for Licensing Act and Gambling Act matters, and the discretionary committee for all other licensing functions. This matter was addressed in "*PH Law*" December 2007 (available in the subscribers' area of our website) but it is worth revisiting.

In my view, the correct approach is to have two licensing committees, and using one committee for all licensing functions is not lawful.

My reasoning for this is as follows.

The Licensing Act 2003 section 6(1) is quite specific that a licensing committee must be established;

"(1) Each licensing authority must establish a licensing committee consisting of at least ten, but not more than fifteen, members of the authority."

For the remainder of this note, this committee will be referred to as the "statutory licensing committee".

Section 7 of the Act then regulates the exercise and delegation of licensing functions (defined in section 4(1) as being all functions under the Licensing Act - ". . . functions under this Act ("licensing functions") . . . "). Section 7(1) makes it clear that all licensing functions should be discharged via the statutory licensing committee;

"(1) All matters relating to the discharge by a licensing authority of its licensing functions are, by virtue of this subsection, referred to its licensing committee and, accordingly, that committee must discharge those functions on behalf of the authority."

Section 9 allows the statutory licensing committee to establish sub-committees (consisting of 3 members of the licensing committee).

It can be seen therefore that Licensing Act 2003 functions (and Gambling Act 2005 (“the 2005 Act”) functions by virtue of section 154 of the 2005 Act) are generally discharged by the statutory licensing committee established under the 2003 Act. There are some exceptions (statements of licensing policy etc) but this is the general position. The statutory licensing committee can then delegate to a sub-committee or an officer under the provisions of section 10 of the 2003 Act (again there are some functions cannot be discharged by an officer).

It is also clear that a matter that is not a licensing function governed by the 2003 Act, or related to such a function, cannot be discharged by the statutory licensing committee. This is by virtue of section 7(3) which states:

- “(3) A licensing authority may arrange for the discharge by its licensing committee of any function of the authority which—
- (a) relates to a matter referred to that committee by virtue of subsection (1), but
  - (b) is not a licensing function.”

There is no mechanism for the statutory licensing committee to consider any matter which is not a licensing function within the meaning of the 2003 Act or which is related to a licensing function.

This is why a second or “other licensing committee” is required to discharge licensing activities which are not governed by the 2003 or 2005 Acts. The mechanism to enable the local authority to discharge these matters is contained in sections 101 and 102 of the Local Government Act 1972 (unless the matter is an Executive function, which relates to certain taxi matters under the Local Government (Miscellaneous Provisions) Act 1976, and the whole of the Scrap Metal Dealers Act 2013).

Accordingly in my view it is necessary to have two distinct committees: the statutory licensing committee and the other licensing committee.

They must be separately constituted. The statutory licensing committee does not need to be politically balanced (although it can be) as it is not a committee created under the Local Government Act 1972. However, the other licensing committee does have to be politically balanced. Subject to that, they can have the same members, and a similar structure with regard to sub-committees.

In addition they will run under different rules – The Licensing Act 2003 (Hearings) Regulations 2005 and The Gambling Act 2005 (Proceedings of Licensing Committees and Sub-committees) (Premises Licences and Provisional Statements) (England and Wales) Regulations 2007 for the statutory licensing committee as opposed to the Council Constitution and Standing Orders for the other licensing committee.

It can be seen that as the statutory licensing committee does not have any power to deal with non Licensing Act and Gambling Act matters, and the other licensing committee does not have the power to deal with such matters, if there is only one

committee in existence discharging all of these functions, then some of them will be determined *ultra vires* the power of the particular committee.

In a situation where there is only one licensing committee, the consequences will depend on how that committee is actually constituted. If it is constituted under section 6 of the 2003 Act, then it will not have had any power to determine other matters including taxi licensing, street trading, sex establishment licensing etc. Conversely if it is constituted under section 101 of the 1972 Act, it will have been acting *ultra vires* if it has determined Licensing Act and Gambling Act functions.

As I mentioned earlier, the two committees can have the same members and indeed can meet on the same day, one after the other, but there must be a clear separation of roles. This includes separate agendas, committee reports and minutes.

What then are the consequences if a local authority only has one licensing committee? In relation to previous decisions made by one committee, my view would be to keep quiet. There is no advantage to the Council or to any licensee in revealing that a licence may have been granted *ultra vires* (and therefore void). If such discoveries are made by an unsuccessful applicant, then a potential challenge may lie, but that would have to be by judicial review, in all probability within 3 months of the decision so hopefully the realistic risk of challenge is slim.

There is also a risk of a third party recognising the deficiency as well. This could be the police or a local resident who could then argue that a premises licence had been granted unlawfully and therefore did not exist. Again, practically speaking it is hoped that that risk is also minimal, but if such a challenge is brought it could be problematic.

For authorities that do anyhow one licensing committee, my suggestion would be to designate the existing licensing committee as the statutory licensing committee and constitute a second licensing committee as the other licensing committee. I would then suggest delegating all other Council (as opposed to Executive) licensing functions which are not governed by the 2003 or 2005 Acts to the other licensing committee.

## **Taxi Licensing Fees**

Licensing fees were examined in the *Bulletin* February 2013 (available in the subscribers' area of our website) but another point needs clarification.

The licence fee levying provisions contained in sections 53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976 contain limiting factors as to what can actually be recovered (examined in the earlier *Bulletin*) but it should also be recognised that in both cases the fee can only be levied on the grant of the licence.

This has two important consequences.

Firstly, if an application fails and no licence is granted, no fee can be levied. There is no mechanism to deduct any “administrative costs” for the costs to the authority of processing a failed application. These costs can be significant, and may well include committee time as well as the officer time of dealing with the application itself. However these are the overall costs associated with the licensing regime, and under the ruling in *R v Manchester City Council, ex p King*<sup>1</sup>, the licence fees can be used to recover those costs. This is obviously subject to the limiting factors contained in sections 53 and 70, but it seems clear that this activity will fall within the concept of “administration”. Accordingly, those costs can be recovered as part of the overall cost and levied as part of the licence fee paid by successful applicants.

Secondly, there is no mechanism to charge for any additional items during the period of the licence. This would include transfers of vehicle ownership, replacement plates, badges and other signage, charging for changes of address, replacement licences and so on. Once again, those costs can be recovered as they are part of “administration”, but must be factored into the overall costs paid by the licensee as part of the licence fee for the grant of the licence.

## **Licensing Act 2003 Locally Set Fees**

At last we have some progress on the long-running saga of locally set fees under the Licensing Act. You will recall that the statutory provisions allowing locally set fees (197A and 197B of the Licensing Act 2003) were contained in the Police Reform and Social Responsibility Act 2011, but only now is formal consultation on those proposals taking place. This is contained in “*A consultation on fees under the Licensing Act 2003*”<sup>2</sup> which has a closing date for responses of 10<sup>th</sup> of April 2014. A detailed analysis of this document will feature in the next *Bulletin*.

## **Selling Alcohol at below Duty+VAT**

As a follow-on to the article in the last *Bulletin* about the Guidance, the Draft Order containing the additional mandatory condition itself is now available.<sup>3</sup>

The proposed condition reads as follows:

- “1. A relevant person shall ensure that no alcohol is sold or supplied for consumption on or off the premises for a price which is less than the permitted price.
  
2. For the purposes of the condition set out in paragraph 1—

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<sup>1</sup> (1991) 89 LGR 696, DC

<sup>2</sup> Available at <https://www.gov.uk/government/consultations/locally-set-licensing-fees>

<sup>3</sup> <http://www.legislation.gov.uk/ukdsi/2014/9780111109120/contents>

(a) “duty” is to be construed in accordance with the Alcoholic Liquor Duties Act 1979;

(b) “permitted price” is the price found by applying the formula—

$$P = D + (D \times V)$$

where—

- (i) P is the permitted price,
- (ii) D is the rate of duty chargeable in relation to the alcohol as if the duty were charged on the date of the sale or supply of the alcohol, and
- (iii) V is the rate of value added tax chargeable in relation to the alcohol as if the value added tax were charged on the date of the sale or supply of the alcohol;

(c) “relevant person” means, in relation to premises in respect of which there is in force a premises licence—

- (i) the holder of the premises licence,
- (ii) the designated premises supervisor (if any) in respect of such a licence, or
- (iii) the personal licence holder who makes or authorises a supply of alcohol under such a licence;

(d) “relevant person” means, in relation to premises in respect of which there is in force a club premises certificate, any member or officer of the club present on the premises in a capacity which enables the member or officer to prevent the supply in question; and

(e) “valued added tax” means value added tax charged in accordance with the Value Added Tax Act 1994.”

It can be seen that this condition will apply to on and off licences, and clubs. However as drafted it does not apply to alcohol supplies under a temporary event notice. Whether this is a loophole which will be exploited remains to be seen, but it is an odd omission.

There is also the strange situation that the existing additional mandatory conditions apply to a “responsible person”, whereas this additional mandatory condition applies to a “relevant person”.

A “responsible person” under the 2010 Order<sup>4</sup> is defined with reference to s153(4) of the 2003 Act:

“(4) In this section “*responsible person*” means—

(a) in relation to licensed premises—

- (i) the holder of a premises licence in respect of the premises,
- (ii) the designated premises supervisor (if any) under such a licence, or

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<sup>4</sup> Licensing Act 2003 (Mandatory Licensing Conditions) Order 2010/860

- (iii) any individual aged 18 or over who is authorised for the purposes of this section by such a holder or supervisor,
- (b) in relation to premises in respect of which there is in force a club premises certificate, any member or officer of the club present on the premises in a capacity which enables him to prevent the supply in question, and
- (c) in relation to premises which may be used for a permitted temporary activity by virtue of Part 5—
  - (i) the premises user, or
  - (ii) any individual aged 18 or over who is authorised for the purposes of this section by the premises user.”

However for the purposes of this condition, the definition of “relevant person” is different (see above). If there is any rational reason for this, it would be helpful if the Home Office explained that, and in the absence of any explanation it does suggest a certain lack of understanding of their own legislation.

Beyond that, it remains to be seen when this condition will be brought into effect.

## **Training for Licensing Committees**

Many local authorities have elections in May this year which will result in new members on licensing committees. As the council elections are later in the month than usual (22<sup>nd</sup> May) to coincide with the European elections, there is a limited amount of time for member training before the summer recess (realistically only June and July). We have many years experience of training licensing committee members and an in-house course can be tailored to your particular requirements. If you are interested, please contact us as soon as possible as dates are already booking up.

**James Button**

**14<sup>th</sup> February 2014**

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