

Meeting: GENERAL PURPOSES COMMITTEE

Date: 31st January 2011

Meeting: FULL COUNCIL

Date: 23rd February 2011

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1982

ADOPTION OF AMENDED SCHEDULE 3 PROVISIONS (BY WAY OF THE POLICING AND CRIME ACT 2009)

Environmental Health & Licensing

Author – Heather Morris Ext. No. 2175
Lead Officer – Heather Morris Ext. No. 2175
Contact Officer – Heather Morris Ext. No. 2175

1 PURPOSE

1.1 To seek the General Purposes Committee's approval and recommendation to Full Council to adopt the amendments to schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 made by section 27 of the Policing and Crime Act 2009.

2 RECOMMENDATIONS

2.1 That the General Purposes Committee resolves to recommend to Full Council to adopt the amendments to schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 made by section 27 of the Policing and Crime Act 2009, in addition to the existing adopted provisions of Schedule 3, as was originally approved by Committee on the 12th October 1982, and then by Full Council on the 26th October 1982.

2.2 That the General Purposes Committee resolves to recommends to Full Council to delegate the determination of sexual entertainment venue licences and sex establishment licences under schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982; where there are relevant objections to the General Purposes Committee; where no relevant representations are received to the designated Head of Service.

2.3 That the General Purposes Committee resolves to recommend to Full Council the following fees be approved for sexual entertainment licence applications:

- (1) application for the grant of licence: £4,530
- (2) renewal of a licence: £2,405
- (3) transfer and/or major variation of a licence: £645
- (4) minor variation to a licence: £89

2.4 That the General Purposes Committee resolves that the licensing department consults with existing sex establishments within Stevenage, the nominated responsible authorities as stated under the Licensing Act 2003, and holders of Licensing Act 2003 premises

licences/club premises certificates that permit the consumption of alcohol on the premises as to the proposed policy set out in appendix I and report any responses received to the General Purposes committee before having the policy formally adopted.

3 BACKGROUND

- 3.1 Since November 2005, the Licensing Act 2003 requires a wide range of regulated entertainment to be licensed by the Council acting as the licensing authority. This includes live and amplified music, dancing and dance performances.
- 3.2 The definition of regulated entertainment has led in part to a national increase in the number of lap-dancing clubs licensed under the Act, although this has not materialised within the Borough of Stevenage.
- 3.3 Members will be familiar with the restrictions in the Act which mean licence applications must be granted in the absence of relevant representations that address the four licensing objectives, and which can only be made by responsible authorities or interested parties living or working within the vicinity of the premises. Whilst licences are subject to review procedures, they otherwise continue in force for the life of the business concerned, or until such time that the licensed is surrendered by its holder(s).
- 3.4 Sex shops, in contrast, are licensed under the Local Government (Miscellaneous Provisions) Act 1982. This regime gives the Council a wider discretion in determining whether to grant or refuse licences (including statutory grounds for refusal); a power to set a limit on the number of premises that may be suitable for a particular locality, greater flexibility on applying licence conditions and the ability to accept representations from a wider scope of the community.
- 3.5 Sex shop licences are only valid for up to a year at a time, meaning that there is scope for regular review.
- 3.6 Parliament has therefore aimed to address the wider concerns as to the growth and operation of lap-dancing clubs across the United Kingdom, by bringing about amendments to schedule 3 of the 1982 Act through the Policing and Crime Act 2009.
- 3.7 A new class of licensed sex establishment – the sexual entertainment venue (SEV) – has been created, which will allow lap-dancing clubs and similar premises to be licensed under the 1982 Act rather than solely under the Licensing Act 2003.
- 3.8 *The Policing and Crime Act 2009 Act requires local councils to resolve whether to adopt the provisions of the 1982 Act even if, as in Stevenage, it has already adopted schedule 3 in relation to sex shops, before it can licence sexual entertainment venues (SEV's) under the 1982 Act.*
- 3.9 A decision to adopt the amended schedule 3 only applies to the relevant (that is, “adult”) entertainment that is provided in an SEV. Any other activity such as the sale by retail of alcohol, late night refreshment or other forms of regulated entertainment will remain to be licensed under the Licensing Act 2003.
- 3.10 *If the Committee decided not to adopt these provisions, the Licensing Authority will be required as soon as reasonably practicable after 6 April 2011 to consult with local people about whether it should make such a resolution in order to consider their views before the additional provisions can be adopted.*

4 DISCUSSION

4.1 Meaning of “relevant entertainment”

4.1.1 Relevant entertainment is now defined in the 1982 Act as:

“any live performance or live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of an audience (whether by verbal or other means).”

4.1.2 This definition excludes nudity on its own and requires there to be a reasonable assumption that the performance or display is designed to sexually stimulate a person.

4.1.3 Guidance from the Home Office suggests an audience can consist of just one person (e.g. where the entertainment takes place in private booths). It states that local authorities should judge each type of relevant entertainment on its merits, which could include but is not limited to:

- 4.1.3.1 - lap dancing
- 4.1.3.2 - pole dancing
- 4.1.3.3 - table dancing
- 4.1.3.4 - strip shows
- 4.1.3.5 - peep shows
- 4.1.3.6 - live sex shows

4.2 Timetable for implementation and impact on existing businesses

4.2.1 The power to adopt the new schedule came into force on the 6th April 2010.

4.2.2 The resolution to adopt the additional provisions cannot come into effect for at least a month after it has been passed (the matter, if approved by General Purposes, will be laid before Full Council on the 23rd February to approve).

4.2.3 Once approved by Full Council, the passing of the resolution must then be advertised for two consecutive weeks in a local newspaper, and the first advertisement must be at least 28 days before the effective date. Therefore, if passed, the resolution will come into force on 1st April 2011 (“the first appointed day”).

4.2.4 Existing SEV operators (for which in Stevenage there currently are none) would have between the first appointed day, 1st April 2011 and 1st October 2011 (“the second appointed day”) in which to submit applications for licences. However, the Council may not determine an application until it has considered all such applications at the same time.

4.2.5 Any licence determined and granted by the Council after the second appointed day for existing businesses will come into effect on 1st April 2012 (“the third appointed day”). It will be lawful for existing businesses, for which we have none, to operate under their 2003 Act authorisations until either the Council has refused to grant an SEV licence (including any appeal), or the third appointed day, whichever is later.

4.2.6 Applications from existing businesses must be considered first if an application is made for a new SEV licence between the second and third appointed days. Applications granted to new businesses will take immediate effect immediately whilst those for existing business take effect from the third appointed day.

- 4.2.7 No business will be able to operate without a SEV licence after the third appointed day. The penalty if such a business were found to be operating on summary conviction is a maximum fine of £20,000.
- 4.2.8 SEVs which also sell alcohol and/or provide other forms of regulated entertainment will still require authorisations under the 2003 Act as well as the SEV licence under the amended 1982 Act. However, live or recorded music which is integral to the provision of relevant entertainment (such as lap-dancing or pole-dancing) is not treated as regulated entertainment and does not require authorisation under the 2003 Act.

4.3 Conditions

- 4.3.1 The licensing authority may impose reasonably necessary and proportionate conditions on the new SEV licences.

4.4 Infrequent events exemption and waivers

- 4.4.1 Premises which provide relevant entertainment on an infrequent basis of no more than 24 hours a time on no more than eleven occasions within a twelve month period, with at least a months break between events, do not require a SEV licence. They may require authorisation under the Licensing Act if regulated entertainment is being provided (such as non-incidentual live music).
- 4.4.2 The Council is entitled to grant a waiver under the 1982 Act if it feels requiring a licence is unreasonable or inappropriate. The waiver can last for as long as the council thinks fit and can be terminated on 28 days' notice.

4.5 Application procedure

- 4.5.1 Unlike the Licensing Act 2003, the prescribed application procedure is that the applicant once they have made their application, has to advertise their application in a local newspaper and copy their application to the chief officer of police within 7 days of making the application to the Licensing Authority, as well as them displaying a site notice for 21 days, from when they have submitted the application to the council.
- 4.5.2 Objections may be accepted within 28 days on relevant grounds (objections based purely moral grounds cannot be taken into account). Objections are to be considered by the General Purposes Committee, which has a well developed procedure for hearing licensing applications.
- 4.5.3 Under the Provision of Services Regulations 2009, which incorporates the EU Services Directive, there is a requirement for applications to be processed as quickly as possible and, in any event, within a reasonable period from the time when all relevant documentation has been submitted as part of the application.
- 4.5.4 SEV licences may be granted for a period of up to one year, and renewal procedures are on the same basis as for the grant of a licence. At present, sex shop licence applications that do not attract representation are delegated to Head of Environmental Health and Licensing or to the General Purposes Committee where relevant representations have been received for determination.
- 4.5.5 Officers would like to recommend that this practise is maintained for the provision of SEV's, in that applications that do not attract representations are delegated to approved Heads of Service, and to the General Purposes Committee where relevant representations have been received.

4.5.6 Appeals against a refusal to grant a licence on the specified statutory grounds, or against the imposition of licence conditions, are made to the magistrates' court. There is no right of appeal where the refusal is based on the character of the locality at the time the application is made or the layout, character or condition of the proposed premises, other than by way of judicial review if the decision is made without regard to the normal principles of administrative decision-making.

4.6 Fees

4.6.1 Licence fees under the 2003 Act are set centrally relative to the premises rateable value. Discretion is given to the Council to set fees for SEV licences under the 1982 Act. The current annual fee set by the Council for sex shop licences is £4,530 (new) and £2,405 (renewal).

(nb: different fees may be set for different classes of sex establishments).

4.6.2 The Provision of Services Regulations 2009 requires that any fees charged must be reasonable and proportionate to the costs incurred, and must not exceed those costs. They must not be set to either act as an economic deterrent or to raise revenue for the local authority. Nor should enforcement costs be assimilated with the application fee but should be separately charged to successful applicants.

4.6.3 On this basis, officers recommend that the application fee to be charged for a new SEV should be £4,530, and that the fee to renew should be £2,405.

4.6.4 It is suggested that both transfers and major variations to these licences should be set at £645, and in line with the provisions of the Licensing Act 2003, £89 for minor variations.

4.7 Licensing policy and conditions

4.7.1 There is no requirement for Licensing Authorities to prepare a licensing policy for sex establishments, and the Council has not previously done so for the current two licensed sex establishments (shops) that exist.

4.7.2 In preparation for adopting the additional provisions to Schedule 3, the Licensing Department has prepared a draft policy which includes proposed standard conditions for sex shops, cinemas, and if approved, SEVs.

4.7.3 Where criteria are set out for sex establishment licensing, the Provision of Services Regulations states the criteria for conditions must be:

4.7.3.1 non-discriminatory,

4.7.3.2 justified by an overriding reason relating to the public interest,

4.7.3.3 proportionate to that public interest objective,

4.7.3.4 clear and unambiguous,

4.7.3.5 objective,

4.7.3.6 made public in advance, and

4.7.3.7 transparent and accessible.

4.7.4 In addition, when setting policy, the Council must take into account the Regulators' Compliance Code under the Legislative and Regulatory Reform Act 2006. This places a duty to encourage economic progress when determining general policies or principles as follows:

"Good regulation and its enforcement act as an enabler to economic activity. However, regulation that imposes unnecessary burdens can stifle enterprise and undermine economic progress. To allow or encourage economic progress, regulators must have

regard to the following provisions when determining general policies or principles or when setting standards or giving general guidance about the exercise of regulatory functions.

3.1 Regulators should consider the impact that their regulatory interventions may have on economic progress, including thorough consideration of the costs, effectiveness and perceptions of fairness of regulation. They should only adopt a particular approach if the benefits justify the costs and it entails the minimum burden compatible with achieving their objectives.

3.2 Regulators should keep under review their regulatory activities and interventions with a view to considering the extent to which it would be appropriate to remove or reduce the regulatory burdens they impose.

3.3 Regulators should consider the impact that their regulatory interventions may have on small regulated entities, using reasonable endeavours to ensure that the burdens of their interventions fall fairly and proportionately on such entities, by giving consideration to the size of the regulated entities and the nature of their activities.

- 4.7.5 In preparation, a draft four year policy has been produced and is attached at appendix I.
- 4.7.6 Officers recommend consulting with the statutory responsible authorities and existing premises licence holders as defined and identified under the Licensing Act 2003, as well as other businesses likely to be affected by the policy.
- 4.7.7 It is proposed that, should the General Purposes Committee agree to the draft policy, that the Licensing Department conducts this consultation over a three month period, reporting the results of this to the General Purposes Committee at a future meeting that would be set in advance of the second appointed day, for ratification and adoption.

5 IMPLICATIONS

5.1 Financial Implications

- 5.1.1 As most of the applications are dealt with administratively, there is not expected to be a large increase in workload.
- 5.1.2 There are no financial implications to the Council arising from this report.

5.2 Legal Implications

- 5.2.1 Whilst most legal issues have been described in the main body of the report, there is an important issue surrounding the right of existing premises licences to be entitled to an SEV licence. Whilst more advice will be provided to the Committee at the time it comes to determine the particular applications, Members may wish to note the following Home Office guidance:

“...[W]hen making such decisions, local authorities must take into account any rights the existing operators may have under Article 1, Protocol 1 of the European Convention on Human Rights (which entitles every person to the peaceful enjoyment of their possessions) and Article 10 (freedom of expression).

In light of the leading case of *Belfast City Council v Miss Behavin' Ltd* (Northern Ireland) it would be prudent for local authorities to assume that freedom of expression includes the right to use particular premises as sexual entertainment venues and that a person who is denied the right to use his premises as a sexual entertainment venue where he already has a licence to do so under the 2003 Act (or in future under the 1982 Act) has been deprived of possessions. (Some Lords did not decide this point or disagreed that such

rights were engaged and therefore it would still be open to local authorities to argue that such rights were not engaged in a particular case).

However, in any event, the House of Lords were agreed that such rights would only be engaged at a low level. This led Lord Hoffman to say that if the local authority exercises its powers rationally and in accordance with the purposes of the statutory provisions, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights.

Nevertheless, local authorities would be well advised to consider whether any interference with the applicant's rights under Article 10 or Article 1, Protocol 1 of the European Convention on Human Rights is necessary and proportionate for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others or, in the case of Article 1, Protocol 1, can be justified in the general interest".

5.2.2 The Licensing Authority is bound by the provisions of the Act, the statutory guidance issued by the Home Office and its own Statement of Licensing Policy (to be consulted upon and approved separately), in its administration of the licensing regime, and in determining licensing issues. The integrity of the policy therefore has the potential to directly impact upon the Authority's determination of applications under the Act.

5.2.3 Unsuccessful adoption and implementation of the Act would cause considerable difficulty to businesses and residents alike as follows:

5.2.3.1 Legal challenge arising from failure to properly adopt resolution under Schedule 3

5.2.3.2 Risks associated with not adopting the resolution

5.2.3.3 Legal challenge arising from refusal to grant an SEV licence or against the terms of a condition contained within it

5.2.3.4 Legal challenge arising from failure to properly implement a policy

5.2.3.5 Imposing licence fees contrary to Provision of Services Regulations

BACKGROUND DOCUMENTS

Sexual Entertainment Venues: Guidance for England and Wales (Home Office, March 2010)
Local Government (Miscellaneous Provisions) Act 1982, schedule 3
Policing and Crime Act 2009

APPENDICES

- Appendix 1 - DRAFT Sex Est./Sexual Entertainment Venue policy