Open all hours

Gregory Jones examines local authorities' attitudes to granting night café licences

The London Local Authorities Act 1990 (LLAA 1990) governs the regulation of so-called night café licences in most of London. This is the principal means of control by which cafés or restaurants can be allowed to trade into the night within the metropolitan. A 'night café' is defined in s 4 as:

"Any premises in a borough which are kept open for public refreshment at any time between the hours of 11 o'clock in the evening and 5 o'clock in the morning."

Section 6(2) of LLAA 1990 permits the council to grant an applicant a night café licence "on such terms and conditions and subject to such restrictions as may be specified".

"It is clear from the context of s 6(3) that one of the reasons underlying the licensing system is to preserve and maintain public order and safety, and to ensure that nuisance is not likely to be caused to residents in the neighbourhood." (*LB of Camden v Sherif Sonker* [2001] EWHC Admin 41 per Morrison J).

Planning status of the premises

Some local authorities, such as the Royal Borough of Kensington and Chelsea (Kensington & Chelsea), have adopted policies allowing them to refuse the grant of a night café licence if the premises do not have necessary planning permission for the use sought in the licence application.

This situation usually arises where there is planning permission for the restaurant use itself, but the planning permission is subject to a planning condition preventing trading beyond the evening. However, it may also arise where the premises have a lawful use as a restaurant (for example, by virtue of operating continuously without planning permission for 10 years), but there is a dispute as to whether that lawful use would extent to late night trading.

But is absence of planning permission a lawful reason for refusal of a night café licence? Certainly, the law generally recognises the distinctness of separate statutory regimes. So that, for example, planning permission for a development may be refused on the grounds of noise disturbance to neighbourhood amenities, notwithstanding that the noise levels might not amount to a statutory noise nuisance under s 80 of the Environmental Protection Act 1990 (*R v Kennet DC, ex p Somerfield Stores Ltd* [1999] JPL 361). More particularly, the LLAA 1990 states at s 8:

"Refusal of licence

(1)The council may refuse to grant, renew or transfer a night café licence on any of the following grounds:

(a) the premises are not structurally suitable for the purpose;

(b) there is a likelihood of nuisance being caused by reason of the conduct, management or situation of the premises or the character of the relevant locality or the use to which any premises in the vicinity are put;

(c) the persons concerned or intended to be concerned in the conduct or management of the premises as a night café could be reasonably regarded as not being fit and proper persons to hold such a licence;

(d) the premises are not provided with satisfactory means of lighting, sanitation and ventilation;

(e) the means of heating the premises are not safe;

(f) proper precautions against fire on the premises are not being taken;

(g) satisfactory means of escape in case of fire and suitable fire-fighting appliances are not provided on the premises;

(h) the applicant has, within the period of five years immediately proceeding the application to the council, been convicted of an offence under this Part of the Act; or

(i) the application has failed to comply with the requirements of subsection (4) or (6) (Applications of this Act)."

Subsections (4) and (6) of s 7 relate solely to the application procedure and do not involve the need for obtaining planning permission. It is submitted that the use of the word 'may' in s 8 does not mean that it is a non-exhaustive list of reasons for refusal to which others might be added. Rather, it means the council has a discretion whether or not to refuse an application on any other grounds listed.

The planning status of the premises is notably absent from the possible reasons for refusal set out at s 8. The grant of a night café licence in the absence of planning control would not override the planning regime. A person operating in breach of planning permission can be subject to enforcement action by the local planning authority notwithstanding that he may be in possession of a night café licence. Such action may, for example, include the local planning authority obtaining an injunction under s 187B of the Town and Country Planning Act 1990 preventing the operators from trading in breach of planning control (the principles of which have been recently explored by the House of Lords in *South Bucks v Porter* [2003] 2 AC 558).

Council policy and practice

As a standard condition on a night café licence, some councils also tell operators that they cannot use the licence unless and until planning permission has been secured. Kensington & Chelsea's suggested standard condition provides such an example.

"The premises may not be used under the terms of the licence unless and until

In brief

■ There are good grounds for believing that local authorities who refuse night café licences on the grounds that the premises do not have the necessary planning permission are acting *ultra vires*.

■ Similarly, conditions imposed upon such licences preventing the use of the premises in accordance with the licence until the necessary planning permissions are in force, may also be *ultra vires*.

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any necessary permission and/or consents have been obtained pursuant to the Town and Country Planning Act 1971, the London Building acts and the Buildings Act 1984 or any legislation amending or replacing the same."

Are such conditions lawful?

The position is not quite as clear as with reasons for refusal. Section 10 of the LLAA 1990 provides:

"Power to prescribe standard terms, conditions and restrictions
(1) the council may make regulations prescribing standard conditions applicable to all, or any class, of night café licences, that is to say terms, conditions and restrictions on or subject to which such night café licences, or night café licences of that class are general to be granted to be granted, renewed or transferred by them."

The discretion appears untrammelled, as does the discretion contained in s 6 to impose conditions upon the grant of a licence. However, it is a long-standing principle of English public law that no discretion is truly unfettered (see *Rookes Case* (1598) 5 Co Rep. 99b; "…and notwithstanding that the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law…").

A discretion must be exercised in accordance with reason and, if derived from statute, in accordance with the statutory intent. For it is also a general principle of law that where Parliament gives public authorities a power as to the exercise of which they have a discretion, that discretion is not unlimited. The limits of the discretion are to be found by an examination of the purpose and objects for which Parliament gave the power (see *R v LB of Tower Hamlets, ex p Chetnik* [1988] AC 858 per Lord Bridge at 872-873).

As previously stated, the operation of night café licences is a separate regime from that of town and country planning with different purposes and objectives. The court has held that the town and country planning acts present a comprehensive code (*Pioneer Aggregates v SoS for the Environment* [1985] AC 132). While there is a overlap between the issues that would be considered in a night café licence and a planning application, the regimes are distinct.

Further, if it correct to say that the absence of planning permission cannot be a reason for refusing a night café licence, it would be most odd if the same effect could be achieved by imposing a condition which prevents the operation of the night café licence unless any necessary planning permission has been secured.