

BEFORE THE LONDON BOROUGH OF TOWER HAMLET'S
LICENSING SUB-COMMITTEE

STUDIO SPACES LTD/ E1

SUMMARY OF LICENSING AUTHORITY'S

SUBMISSIONS IN RELATION TO VARIATION APPLICATION

For Hearing: 26 July 2022

Submissions on the variation application

1. The premises licence holder has applied for a variation to their premises licence to remove a condition that states: "No nudity or semi nudity permitted".¹
2. The Licensing Authority has made a representation in relation to this application that is within the Agenda Papers at pages 202-205.
3. The position of the Licensing Authority, acting as a responsible authority, is as follows:
 - a. The reference to "semi-nudity" is vague and ill-defined and should be deleted from the terms of the condition.
 - b. The sub-committee should consider modifying the condition to read:

"No display of nudity by either performers or customers shall be permitted on the premises. "Nudity" is defined as (a) in the case of a woman, exposure of her nipples, pubic area, genitals or anus; and (b) in the case of a man, exposure of his pubic area, genitals or anus. References to "man" or "woman" include persons who self-identify as a "man" or "woman".

¹ Condition 1 of Annex 2 to Premises Licence

4. The premises is well known for hosting fetish and kink nights. Many are organised by two external promoters “Torture Gardens” and “Klub Verboten”. The latter appeals particularly to the LGBTQ+ community.
5. The Licensing Authority is in possession of CCTV footage and screen grabs from inside the premises for events held in February 2022. These demonstrate that the premises knowingly hosts events where customers and/or performers display nudity in breach of the existing condition on their premises licence. Some attendees also openly perform sexual acts on themselves and others in the premises in view of other attendees. A number of screen grabs and a Table identifying scenes in the video showing nudity has been produced by the Licensing Authority and will be relied on at the hearing. Efforts have been made to redact faces identifying an individual, however given the sensitivity of the footage, the sub-committee is asked to treat this information as private and it is not to be published (it will of course be served on the licence holder).
6. The repeated examples of the display of nudity at the premises are breaches of an existing licence condition. This potentially amounts to a criminal offence being committed by the licence holder under section 136 of the Licensing Act 2003 for knowingly allowing a licensable activity to be carried on in breach of the terms of the premises licence. If the licence holder were to be convicted, the court may impose a sentence of up to 6 months imprisonment and or an unlimited fine. Therefore the crime and disorder objective is engaged by the licence holder’s unlawful activities which amount to a knowing and deliberate breach of their premises licence.
7. It is a question for the sub-committee whether a licence holder who knowingly commits criminal acts under the licence should be afforded further relaxation of the terms of their licence. On one view this would not promote the licensing objectives but undermine them. If a licence holder can continuously breach a term of their licence and be rewarded for doing so then what incentive is there for other licence holders to comply with the conditions on their own licences?
8. The Licensing Authority also has public safety concerns about these events being held in an insufficiently regulated setting. The premises does not currently have a Sexual Entertainment Venue licence under the Local Government (Miscellaneous Provisions) Act

1982. There are no conditions on the premises licence that promote the health, safety and welfare of persons attending the fetish or kink nights at the premises.

9. The Licensing Authority has referenced in its representation an alleged sexual assault at the venue involving customers having sexual relations with others. Given the police have not made a representation in response to this variation application, the Licensing Authority is unable to ask the sub-committee to place any weight on this complaint and does not do so.

Public Sector Equality Duty

10. This Licensing Authority accepts that this variation application engages the Council's Public Sector Equality Duty ("PSED") imposed by section 149 of the Equality Act 2010. The Licensing Authority positively invites the sub-committee to consider their PSED when reaching their determination.

11. The PSED requires a public authority (which includes this licensing sub-committee), in the exercise of its functions, to have due regard to the need to:

- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

12. The "protected characteristics" are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation.²

² S.149(7) of the Equality Act 2010

13. The sub-committee will wish to have regard to the “Brown Principles”.³ In summary this means:

- a. Decision-makers must be made aware of their duty to have 'due regard' and to the aims of the duty.
- b. Due regard is fulfilled before and at the time a particular policy that will or might affect people with protected characteristics is under consideration, as well as at the time a decision is taken.
- c. Due regard involves a conscious approach and state of mind. A body subject to the duty cannot satisfy the duty by justifying a decision after it has been taken. Attempts to justify a decision as being consistent with the exercise of the duty, when it was not considered before the decision, are not enough to discharge the duty. General regard to the issue of equality is not enough to comply with the duty.
- d. The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision.
- e. The duty has to be integrated within the discharge of the public functions of the body subject to the duty. It is not a question of 'ticking boxes'.
- f. The duty cannot be delegated and will always remain on the body subject to it.
- g. It is good practice for those exercising public functions to keep an accurate record showing that they had actually considered the general equality duty and pondered relevant questions. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by the equality duties.

³ Set out in *R(Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158

14. The sub-committee must satisfy itself it is in possession of sufficient information to properly fulfil their duties under the PSED. If the sub-committee is not satisfied, it should request that an Equality Impact Assessment is carried out prior to making its determination in this variation application.
15. The applicable PSED principles as they apply in licensing are set out in more detail in a recent article within the Journal of Licensing, Number 33, July 2022 by Jeremy Phillips QC and Michael Feeney “SEVs and the PSED”. The legal advisor to the sub-committee is respectfully referred to that article, albeit the focus is on SEV licences.

Freedom of expression

16. The applicant submits that this application also raises issues in connection with its customers’ right to freedom of expression under article 10 of the European Convention on Human Rights.
17. Article 10 is a qualified, not an absolute right. It is set out below:

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

18. This sub-committee should take into account the article 10 rights of users of the premises in reaching its decision. It should only infringe these rights if justified in doing so under Article 10(2) and must ensure that any infringement is no more than is necessary and proportionate.

Conclusion

19. The sub-committee is invited to consider the Licensing Authority's representation, as well as the other relevant representations, and take such steps as it considers appropriate and proportionate in order to promote all the licensing objectives and, in particular, the prevention of crime and disorder and public safety.

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22 July 2022