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For the attention of Mr John S Williams
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Our Ref: GBH/MXS

Dear Mr Williams

Vanquish Asset Management on behalf of Astons Champagne Bar, Victory Services Ltd on behalf of The Pleasure Lounge and Mr Manpal Singh of The Nags Head

As you are aware, we act for Vanquish Asset Management of Astons Champagne Bar, Victory Services Limited of The Pleasure Lounge and Mr Manpal Singh of The Nags Head.

On 19 March 2014 the Council published the report which is due to be considered by the full Council on 26 March 2014, under the title "Consideration of the adoption of the sexual entertainment licensing regime". We shall refer to this document as "the Report".

We have now had the opportunity to consider the Report and to take advice from Leading Counsel.

For the reasons set out in more detail below, our clients' position is that:

(1) The full Council does not have power to take the decisions which it is being invited to take; and

(2) Even if it did, the Report does not set out a lawful basis upon which those decisions could be taken.

We therefore urge you to remove this item from the agenda for the meeting.

The Council has no power to take these decisions

There is a fundamental division in current local authority law between matters which are for executive decision, and matters which are for non-executive decision. The legislation draws a

firm line between the "respective decision-making bailiwicks" of the executive and the full Council: see *R (Buck) v Doncaster MBC* [2014] PTSR 111.

If a particular decision is properly for the executive, and the full Council purports to take it, then that purported decision will simply be a nullity.

All local authority functions are functions to be exercised by the executive unless otherwise specified in relevant legislation: see Local Government Act 2000 s 9D.

Here, we are not aware of any basis upon which the decision to adopt the amended Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 could be a non-executive decision, unless it was said to be because it was a decision falling within Schedule 1 to the Local Authorities (Functions and Responsibilities) (England) Regulations 2000. However, there is no item within that Schedule which is in point here.

We are aware of Item B15 of Schedule 1, which reads as follows:

"Power to license sex shops and sex cinemas The Local Government (Miscellaneous Provisions) Act 1982, section 2 and Schedule 3."

However, the present case does not fall within Item B15, for two reasons. First, by virtue of r.2(1), the non-executive functions are those which are specified in column 1 of Schedule 1, by reference to the enactments specified *in relation to those functions* in column 2. What is proposed here has nothing to do with the licensing of sex shops or sex cinemas, which is the function specified in Item B15, column 1. The fact that sexual entertainment venues ("SEVs") are also licensed pursuant to Schedule 3 to the 1982 Act is nothing to the point – the legislation specified in column 2 is the point of reference only in relation to the functions which are specified in column 1. In other words, functions only fall within Schedule 1 if they both fall within the column 1 description *and* are undertaken pursuant to the legislation specified in column 2. Here, it is only the licensing of sex shops and sex cinemas (i.e. the subject-matter of the original, unamended Schedule 3) which has been made a non-executive function.

Secondly, the decision whether to adopt the amended Schedule 3 is in any case not an exercise of the power to license. Nor, even if this were to be relevant, would it be incidental or conducive to or calculated the facilitate the exercise of that power. It is, by its very nature, a different and prior function.

The same analysis applies to the setting of standard licence conditions and a fee structure, which are the other matters about which the full Council is, wrongly, being invited to take a decision.

Paragraph 3.4 of the Report is accordingly incorrect. Any decision about these matters is for the Council's executive, and of course may only be taken after following the appropriate procedural steps for a key decision.

The absence of a lawful basis for the proposed decision

What we say below is without prejudice to the analysis set out above, as to why the full Council is not the appropriate decision-making body in any event.

Schedule 3 to the 1982 Act constitutes an authorisation scheme under article 9 of Directive 2006/123/EC (the Services Directive), which is implemented by the Provision of Services Regulations 2009 ("POSR"). Paragraph 3.17 of the Report implicitly accepts this, when it refers to the Court of Appeal's decision in *Hemming*.

However, neither in the "legal comments" section of the Report, nor elsewhere in its text, is there any explicit recognition of this important consideration, and there is no consideration of its implications for the decision that members are being invited to take.

In particular, the Report fails to consider POSR regulation 14, which provides that a competent authority (here, the Council) must not make access to, or the exercise of, a service activity subject to an authorisation scheme unless certain conditions are satisfied. Most particularly, it is stipulated that the need for an authorisation scheme must be "justified by an overriding reason relating to the public interest" and that the objective pursued cannot be attained by means of a less restrictive measure, "in particular because inspection after commencement of the service activity would take place too late to be genuinely effective". POSR regulation 15 contains important rules as to the criteria upon which an authorisation scheme must be based, to which we return below. Finally, we note that authorisation procedures must secure that applications for authorisation are dealt with objectively and impartially: regulation 18(1)(c). It would be premature to consider that latter requirement at this stage, but we place on record our concern as to whether the Council, or certainly some members of it, would be able to satisfy it, in the light of aspects of what has been said and done to date.

Although the question of whether the adoption of Schedule 3 by a local authority is consistent with POSR is ultimately one for the court, in the first instance it is the local authority which must consider these issues, and it must do so properly. Because the Report, and the legal advice upon which it is based, fail to address the implications of POSR, it does not direct members' attention to the correct questions, nor does it provide the material which would allow those questions to be addressed.

Thus, paragraph 5.8 of the Report states that the Council should have a "rational basis" for any resolution to adopt the Schedule 3 regime, and that the reasons in favour of adoption should be "sufficiently cogent". Paragraph 3.2 refers simply to whether it is "appropriate" for the Council to undertake the activities of controlling the number and location of SEVs. This

is the language of ordinary domestic public law. There is no recognition of the need for an overriding public interest reason justifying adoption of Schedule 3, still less of the requirement that the objective pursued should not be attainable by less restrictive means.

Because these requirements are not recognised by the Report, it equally fails to consider whether there is any material upon which members could conclude that they were satisfied here.

It is apparent that, in order to decide whether adoption of the Schedule 3 authorisation scheme is justified by an overriding public interest which is not attainable by less restrictive means, an authority must consider what controls over SEVs would exist in the absence of the Schedule 3 regime, and whether those controls are adequate in the light of the available evidence about how they are functioning in practice.

The Report fails to acknowledge the crucial fact that, even without adoption of the Schedule 3 regime, SEVs will invariably be licensed by a premises licence or a club premises certificate under the Licensing Act 2003. At best, the fact that there might be some alternative regime is something which might be inferred from paragraph 5.4 of the Report, but without any detail of what that alternative regime involves. In particular, the Report fails to explain that licences under the 2003 Act may be granted subject to conditions, or that where relevant representations are made, an application for a licence may be rejected if the authority considers that appropriate in the light of the statutory licensing objectives, which cover the prevention of crime and disorder, public safety, the prevention of public nuisance, and the protection of children from harm (and that there is provision for the review and revocation of licences).

The Report completely fails to give any substantive consideration to whether the regime under the 2003 Act has failed to deliver satisfactory regulation of SEVs in Tower Hamlets, and (if so) why that is, and whether it demonstrates that there is an overriding public interest in introducing the more intrusive and burdensome Schedule 3 regime. Paragraph 3.37 of the Report says that "these considerations" are good reasons for the regulation of SEVs under the Schedule 3 scheme. This appears to be a reference back to paragraph 3.35. But that paragraph contains nothing but generalities, unrelated to the particular circumstances of this borough, and certainly not based upon any analysis of what if any specific problems are not being satisfactorily addressed by the current regime. Similarly, the Report's analysis of the consultation carried out is limited to the numbers who expressed support for or opposition to the adoption of Schedule 3, and does not attempt any qualitative consideration of the reasons which consultees gave for their views. Thus, quite apart from the fact that (as the Report is constrained to recognise) there was a strong expression of public opinion *against* the adoption of Schedule 3, there is no analysis of how far those who did support adoption may have done so on grounds upon which it would be legally impermissible for the Council to base any decision, such as moral or political objections to the operation of SEVs. This failure of analysis has occurred despite the fact that the Council's own equality analysis has identified dramatic differences of view according to the religious affiliation of respondents, strongly

suggesting that moral views have indeed been the principal factor in support for a new regime.

Although the analysis above is based principally upon the requirements of POSR, we would add that the failure to consider the existing regime and its practical operation, and the failure to consider the substance of consultation responses, would also mean that any decision based upon this Report was flawed on ordinary *Wednesbury* grounds.

The illegality of the Council's proposed policy

The full Council is being invited to adopt the amended Schedule 3 on the basis that this will bring into operation the policy approved by the Cabinet on 11 September 2013. We note, incidentally, that if we were wrong about the decision to adopt Schedule 3 being a matter for the executive rather than the full Council, it would inevitably follow that the adoption of such a policy was a matter for the full Council as well – the present approach being taken by the Council to the division of responsibility for these two matters is plainly unsustainable.

The Report therefore in effect acknowledges (at paragraph 6.1) that members cannot sensibly divorce consideration of whether to adopt Schedule 3 from consideration of the proposed policy.

We consider that the proposed policy, as set out in Appendix 1 to the Report, is plainly unlawful. Evidently an applicant for a licence could wait to see, before mounting any challenge, whether that general policy was in fact applied to its case, or whether it was departed from in its particular case. Nonetheless, to adopt the legislation on the footing that it will bring an unlawful general policy into effect must itself be unlawful.

First, whilst the policy pays lip service to the principle that each application must be dealt with on its own merits, it begins with the statement that the policy of the Council is to refuse applications for SEVs, and that this policy is intended to be "strictly applied" and will "only" be overridden in genuinely exceptional circumstances, which it is said will not include a number of plainly material considerations such as size, quality of management and operating hours. The reality is that this is an inflexible, blanket policy seeking to shelter behind the facade of a suggestion that individual circumstances will be considered, whilst at the same time proclaiming that material circumstances will not in fact be taken into account. For the unlawfulness of such an approach, see for example the discussion in *North West Lancashire HA v A* [2000] 1 WLR 977. If you disagree, we invite you to identify, before the meeting of the full Council, some possible example of exceptional circumstances in which the Council might depart from the policy.

We are of course aware that our clients, as the operators of existing licensed venues, are to be exempt from the general "nil policy" if they can demonstrate when applying for a licence high standards of management, a management structure and capacity to operate the venue, and the ability to adhere to the standard conditions for sex establishments. Our clients certainly take

the view that they can and will demonstrate those matters. Nonetheless, our clients are entitled to be concerned that, in the present climate of evident hostility to SEVs by some within the Council, and in view of the imprecision of the requirement for "high standards of management" in particular, there might in future be some attempt to say that these conditions are not met, or indeed to withdraw the exception altogether (although we do not accept that could lawfully be done), in which case the nil policy would on the face of it apply. We reserve our position as to how, if at all, the Council's approach fits with paragraph 12 of Schedule 3: that is an issue to be addressed if and when an application for the grant or renewal of a licence is refused.

Secondly, and this is a connected point, we do not consider that the Council's approach to the concept of "locality", upon which the general nil policy is based, is one which is lawful. The relevant locality in relation to a particular establishment is a matter which must be considered specifically in relation to that establishment. The Council's approach goes well beyond the "preliminary" or "tentative" identification of localities which was said to be permissible in *R v Peterborough CC ex p. Quietlynn Ltd* (1986) 85 LGR 249.

Thirdly, we return to the question of regulation 15 of the POSR. The criteria upon which an authorisation scheme is based must preclude the competent authority from exercising its power of assessment in an arbitrary manner. They must be non-discriminatory. They must be justified by an overriding reason relating to the public interest, and must be proportionate to that public interest objective. They must be clear and unambiguous, objective, made public in advance, and transparent and accessible. We do not consider that the present policy meets these requirements. Without prejudice to the generality of that comment, our clients have a particular concern as to the section of the policy headed "Location of premises". On the footing that the nil policy will not apply to our clients, we take it (although we invite you to say whether this is in fact correct) that the provision concerning location of the proposed premises and proximity to places of the seven identified kinds will be applied to them. However, and again we invite confirmation of this, it is *not* our understanding that the policy is that being proximate to places of those kinds will in itself normally point to or result in refusal of an application. Rather, the intention of the policy is simply that the Council will consider whether the licensed premises would have a material adverse impact by reason of that proximity. Were our understanding in that respect incorrect, the policy would lack clarity and transparency, and it would be disproportionate, particularly in view of standard licence conditions 11 and 14 and the likely hours of operation of licensed premises.

Fees

The question of fees only arises if, contrary to the arguments above, it would be proper for the full Council to adopt the Schedule 3 regime.

We note what is said in paragraphs 3.14 to 3.28 of the Report, and that it seeks to justify the proposed approach by reference to the decision in *Hemming*. However, we consider that the estimated costs for each application are grossly excessive, and are in no way justified by what

is set out in the Report. The suggestion that each individual application will require, on average, the devotion of the amounts of time set out in Appendix 6 to the Report is fanciful, still more so if one considers the suggestion that exactly the same resources will be required not only for the initial application but also for each annual renewal. The suggestion time and expenditure on compliance visits is also excessive. The suggestion that any committee hearing will cost a further £2000 for each application considered is unexplained and implausible. We refer also to the points that we have made in previous correspondence contained in Appendix 4 to the Report.

The action that the Council should now take

Given the point made at the outset of this letter, the Council ought not to be considering this matter on Wednesday at all.

Further, whichever the appropriate decision-making body, the present Report provides no proper basis for taking the proposed decision. Nor, lest it should be suggested otherwise, can there be any possibility of such fundamental defects being cured by some oral supplementing of the report (or by the opportunity to make representations for 3 minutes at the meeting which we have been offered, and for which we are grateful). That would not be consistent with a proper consideration of the issues.

The Council needs to reconsider properly, and in a light of a proper appreciation of the legal regime, what has to be shown before Schedule 3 can be adopted, whether there is in fact any justification for such adoption in this borough, and (if there was, which we dispute) what a lawful set of criteria for dealing with applications would look like, in place of the present policy.

Yours sincerely

GARETH HUGHES
Barrister and Director
for Jeffrey Green Russell Limited