In the matter of the Licensing Act 2003

And in the matter of Local Government (Miscellaneous Provisions) Act 1982

And in the matter of the E1/Studio Spaces 110 Pennington Street E1W 2BB

ADVICE NOTE

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1. The E1 Studio Spaces venue at 110 Pennington Street E1W 2BB has the benefit of a premises licence under the Licensing Act 2003 (Lic No 142879) Annex 2 Condition 1 of the premises licence contains the following: "No nudity or semi nudity permitted;" I am asked to consider whether this is an enforceable condition for the purposes of the Licensing Act 2003.

2. The E1 Studio Space is hired to promoters of queer, fetish and kink events. A full description of the types of event with specific refence to the proposed Klub Verboten event has been provided in an e-mail (dated 11 March 2022) sent to the Tower Hamlets police licensing team (attached) – I note that the local licensing police have no over-arching objection to these events. Following reports arising from a previous event the Council have asked E1/Studio Spaces to put measures in place to ensure consultation with the police and licensing authority. E1/Studio Space are committed to co-operating and working with the Police and Council I understand that there have been numerous frank discussions between E1 and the authorities. This advice is prepared so as to advise E1 as to the legal context and assist this consultation. I understand that this advice note may be shared with the authorities.

3. The next planed event is that hosted by Klub Verboten and is due to be held on the 18th March 2022. The previous event was one hosted by an event organiser known as Torture Gardens which concluded on the 13th February 2022. It has been suggested that these queer, fetish and kink events may be relevant entertainment for the purposes of the Local Government (Miscellaneous Provision) Act 1982 and should be licensed as sexual entertainment venues ('SEV"). I am asked to consider whether the proposed event to be hosted by Klub Verboten and to be held at the premises on the 18 March 2022 need to be licensed under the provisions of the 1982 Act.

4. There is a bigger discussion that needs to be had concerning the extent and scope of relevant entertainment under the 1982 Act. I will for present purposes confine myself to the event proposed to be held on the 18th March 2022. Mindful of the wider consideration it is none-the-less a key principle of local authority regulation that circumstances must be considered on their own merits and in accordance with the Councils' policies and procedures (*cf* s 182 Guidance, para [1.17). The Council is undertaking its own investigation into the operation and nature of Torture Gardens and has requested CCTV of the Torture

Garden event and this has been retained and is available for viewing and collection. E1 has provided the council with an outline of the events at E1 and copies of the polices and procedures as requested. These have also been shared with the police.

Conclusions

[1] For the purpose of the 2003 Act the prohibition on nudity and semi-nudity is too vague to be enforceable and ought to be removed from the premises licence. I suggest a minor variation application.

[2.1] The event on the 18 March 2022 may be exempt due to the frequency exemption under the 1982 Act or benefit from a waiver in keeping with what seems to be the Council's long standing policy of support and tolerance.

[2.2] I would seek urgent confirmation from the Council (and the Police) that the event this evening is exempt under the frequency provisions and / or waived for the purposes of this evening pending the change (if any) of the Council's long standing practice.

[3] My verbal instructions confirm that the CCTV from the Torture Gardens event has been retained and saved for the Council. Details of the event have been shared with the Police and the Licensing Authority.

[4] In assessing the nudity condition and the issue of relevant entertainment the Council relies upon images that have not been sharded with E1. I am unable to comment until this is done.

[5] Given the wider debate it may be helpful to have a round-table discussion with the Council to consider the best way of moving forward.

[1] The enforceability of the nudity and semi-nudity condition

Legal Background – licensing conditions general principles

5. The s 182 Guidance to which local licensing authorities must have regard provides the following advice:

> Licence conditions – general principles
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> 1.16 Conditions on a premises licence or club premises certificate are important in setting the parameters within which premises can lawfully operate. The use of wording such as "must", "shall" and "will" is encouraged. Licence conditions:
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> - must be appropriate for the promotion of the licensing objectives;
> - must be precise and enforceable;
> - must be unambiguous and clear in what they intend to achieve;

- should not duplicate other statutory requirements or other duties or responsibilities placed on the employer by other legislation;
- must be tailored to the individual type, location and characteristics of the premises and events concerned;
- should not be standardised and may be unlawful when it cannot be demonstrated that they are appropriate for the promotion of the licensing objectives in an individual case;
- should not replicate offences set out in the 2003 Act or other legislation;
- should be proportionate, justifiable and be capable of being met;
- cannot seek to manage the behaviour of customers once they are beyond the direct management of the licence holder and their staff, but may impact on the behaviour of customers in the immediate vicinity of the premises or as they enter or leave; and
- should be written in a prescriptive format.

6. These principles reflect established legal principles. In *Crawley Borough Council v Stuart Attenborough* [2006] EWHC 1278 (Admin) Scott Baker LJ (sitting with Openshaw J) stated:

> '[6] Let me say a brief word in general terms. It is important that the terms of a premises licence and any conditions attached to it should be clear; not just clear to those having specialised knowledge of licensing, such as the local authority or the manager of the premises, but also to the independent bystander such as neighbours, who may have no knowledge of licensing at all.
>
> [7] The terms of the licence and its conditions may of course be the subject of enforcement. Breach carries criminal sanctions. Everyone must know where they stand from the terms of the document. It must be apparent from reading the document what the licence and its conditions mean.'

7. In *Crawley* the court found the terms to be 'so vague and unclear as to be, in effect unenforceable' [7]. Mitting J, in *R (opo Westminster City Council) v Metropolitan Stipendiary Magistrates and Marc Merran* [2008] EWHC 1202 (Admin) described the judgment of Scott Baker LJ as 'the yard stick to be applied' [19] when considering conditions on a premises licence. Mitting J confirmed the importance of ensuring 'the need for conditions to be certain so that the licensee knows what he must and must not do [18].'

8. I understand that it is broadly accepted that this condition and similar types of conditions seek to restrict and prohibit lap dancing and similar entertainments. There is a clear distinction between the strict dress code requirements of queer, fetish and kink event nights, and lap dancing and similar entertainments. Further lap dancing and similar entertainments are regulated by a distinct and separate legal regime under Sch 3 of the Local Government (Miscellaneous Provisions) Act 1982. It is clearly established that conditions under the 2003 Act should not duplicate other statutory requirements and duties or replicate offences set out in other legislation.

9. The s 182 Guidance recognises that a premises licensed under the 2003 Act may include adult entertainment (see paras [2.23] and [2.24]) in these circumstances the primary concern is the protection of children from harm (see para [2.27]). The aim of the 2003 Act is to protect children and not to interfere with the conduct of consenting adults within the night-time economy.

10. In the present circumstances there are no under 18s permitted onto the venue or the events; the nature of the event is not visible from the exterior of the premises; and the events themselves are promoted and advertised within the queer, fetish and kinkster community/-ies. All that could be reasonably expected and to be done to promote the protection of children from harm licensing objective is being done at the venue and by the organisers of events that use the venue.

11. In terms of wider safeguarding considerations I note that the event organisers themselves have policies and procedures in place to promote safeguarding and the well-being of patrons. Taking Klub Verboten as an example its policies and procedures have been vetted by the external safety consultants the Safer Sounds Partnership and also the Good Night Out campaign. The policies and procedures have also been shared with Tower Hamlets police licensing who have not raised any concerns.

12. In the context of adult events and entertainment local authorities should take great care to avoid conditions that are moralistic (see Collins J in *R v Newcastle Upon Tyne City Council ex p The Christian Institute* (5 September, 2000) [21] applied in *R (oao Thompson) v Oxford City Council* [2013] EWHC 1819 (Admin) [50] (see also Court of Appeal decision in *Thompson* [2014] EWCA Civ 94)). There is a self-evident 'moral' element in the Council attempting to regulate the dress code and behaviours of consenting adults. Paragraph 10.16 of the s 182 Guidance advises local licensing authorities that censorship and by extension a censorious approach is not properly related to the licensing objectives. Moral objections and censorship in these circumstances runs counter to the 'demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"' (see *Handyside v UK* (1979) EHRR 737 [49] and can undermined Article 10 Freedom of Expression. Freedom of Expression extends beyond the spoken or written work and includes artistic expression (see *Müller v Switzerland* (1988) 13 EHRR 212 [27] and can include dress (see for example *Vajnai v Hungary* [2008] ECHR 1910 in this case wearing a 5-pointed red star on a jacket; also *Tig v Turkey* (2005) where it was accepted that the wearing of a beard was arguable). In the particular present circumstances the free expression of the queer, fetish and kink community/-ies is an expression that runs against and in contrast to the presumed hetero-normative majority.

13. The expression of the queer, fetish and kink life-style and experience in the present circumstances none-the-less takes place in an enclosed, risk assessed and self-regulated space (*cf Müller*). It is entirely disproportionate and unjustifiable to impose a condition in respect of nudity and semi-nudity under the Licensing Act 2003 to restrict this expression.

14. Fundamentally the condition is unenforceable for lack of clarity. Neither the 2003 Act, the s 182 Guidance nor the Tower Hamlets Statement of Licensing Policy under the 2003 Act provide a definition of nudity (to which an ordinary meaning of bare uncovered flesh can be applied) or 'semi-nudity'. The use of the term semi-nudity is too vague to have any precise or enforceable impact. The coupling of nudity with semi-nudity suggests some element of bare flesh exposure which is unacceptable to the Council; however does not state what degree of bare flesh it finds offensive. Not only is the licencee left in the dark

about what he must and must not do (*Merran* above) but so too is the independent bystander (*Crawley* above)

15. The recent Klub Verboten press release (16.03.2022) asks: '*Is the sight of an ankle, bare shoulders, buttocks, cleavage and bare chests matters of legitimate public interest?*' I understand that members of the public and Klub Verboten have written to the Council and asked for a definition of semi-nudity. It is my understanding that no official statement or advice has been given. The letter from the Council (11 March 2022) itself demonstrates the very subjective and vague interpretation of this condition. The Principal Licensing Officer states that having viewed images on the Torture Gardens website the events at E1 'may have involved some degree of nudity and/or semi nudity of the patrons.' The reference to degrees of nudity is itself imprecise and not part of the purported condition. It would be useful for the officer to provide the images upon which she relies.

16. There is and can be no definition of semi-nudity as it is far too vague and demonstrates a vulnerability to moralistic interpretations. For example, to some an uncovered breast may be deemed to be inappropriate while for others a bare breast is a powerful expression of gender, sex and sexuality. In this regard it seems to me that the Council's Public Sector Equality Duty ("PSED") pursuant to s 149 of the Equality Act 2010 is engaged. The s 182 Guidance states that the statement of licensing policy should recognise the Equality Act 2010 and the PSED and the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation (see s 182 Guidance paras [14.66] and [14.67].

17. The Council's statement of licensing policy does not mention the Equality Act 2010 although it does have a policy statement in relation to the promotion of racial equality (see LBTH SLP para [29]) but does not mention the other protected characteristics. The Council has a separate policy in relation to sexual entertainment venues which are regulated by the 1982 Act. This policy is included as Appendix 4 of the SLP and includes the bare assertion that the Sex Establishment policy was prepared with regard to the Equalities Act 2010. It is established that the PSED must be exercised 'in substance, with rigour and with an open mind' (see *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 *per* Aikens LJ). It is unclear whether the Council have complied with the PSED and in any event would be required to grapple with the PSED in any attempt to enforce the condition.

18. For the reasons set out above I am of the firm view that the purported condition prohibiting nudity and semi-nudity is so vague and unclear as to be unenforceable (*Crawley* above). The Licensing Officer makes reference to images view on the Torture Gardens website it would be useful to be provided with these images.

19. I am concerned that the purported condition purports to impose an unlawful moralistic standard that is also censorious, undermines Freedom of Expression and discriminatory – these matters may need closer examination. Furthermore, the policy of the Council has been one of acceptance and support for queer, fetish and kink spaces (see below) – this condition does not support this policy.

20. Given the clear uncertainties in respect of the wording and the appropriateness of this condition I would suggest that a minor variation application is made to remove this condition from the premises licence. This will also enable further frank discussion, if required, with the licensing authority moving forward.

[2] Sexual Entertainment Venue – definition

21. Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 makes provision for an adoptive local authority regime in respect of the control and regulation of sex establishments in its local area.

22. 'Sex establishments' are defined in para 2 as 'a sexual entertainment venue, sex cinema, a hostess bar or a sex shop'. Paragraph 2A defines 'sexual entertainment venue' ("SEV"):

> [2A] (1) In this Schedule 'sexual entertainment venue' means any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer.
>
> (2) In this paragraph 'relevant entertainment' means –
> (a) any live performance; or
> (b) any 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 the audience (whether by verbal or other means).
>
> (12) For the purposes of this paragraph relevant entertainment is provided if, and only if, it is provided, or permitted to be provided, by or on behalf of the organiser.
>
> (13) For the purposes of this Schedule references to the use or any premises as a sexual entertainment venue are to be read as references to their use by the organiser.
>
> (14) In this paragraph –
>
> 'audience' includes an audience of one;
>
> 'display of nudity' means –
> (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;
>
> 'the organiser', in relation to the provision of relevant entertainment at premises, means any person who is responsible for the organisation or management of –
> (a) the relevant entertainment; or
> (b) the premises.
>
> 'premises' includes any vessel, vehicle, or stall but does not include any private dwelling to which the public is not admitted;
>
> and for the purposes of sub-paragraphs (1) and (2) it does not matter whether the financial gain arises directly or indirectly from the performance of nudity.

23. The legislative provisions in respect of Sexual Entertainment Venues ("SEVs") were introduced to the Local Government (Miscellaneous Provisions) Act 1982 by the Policing and Crime Act 2009 which received Royal Assent on the 12th November, 2009.

24. The key question, that is at the core of this advice, is the construction of 'relevant entertainment' under the 1982 Act. Should it be narrowly constructed so as to encompass lap dancing and similar entertainment or is the definition wider so as to include sex-on-premises venues such as those that might occur at queer, fetish and kink events? There is no decided authority on the point. Unsurprisingly the approach of different local authorities varies considerably. Research concluded at the end of 2012 by Professor Phil Hubbard and Dr Rachela Colosi has shown that local authorities have applied the definition of sexual entertainment venue to at least six gay night clubs, two burlesque/variety venues, one sex-on-premises encounter and a swinging (swingers) venue.[1] The written sex establishment policy along with the practical enforcement and application of the 1982 of the Council is one that is focused upon lap dancing and similar entertainments.

25. Professional and academic commentary in P Kolvin QC, *Sex Licensing*, IoL 2010 opine (para 3.6) that '*it is plain that the legislators have tried to make the definition* [of relevant entertainment] *as wide as possible. … , there is very little by way of commercial sexual activity which would not be covered.*" This conclusion is also supported by Professor Colin Manchester in *Manchester On Alcohol & Entertainment Licensing Law*, 4th Edn., 2017 at para 5.3.44 (page 232). This is the position argued by Charalambides & Holland in the Journal of Licensing (vol 30) July 2021. This question of construction, however, has not been directly addressed by the courts.

26. The exercise of assessing relevant entertainment is not, however entirely unknown to the courts: The case of *Willowcell Ltd v Westminster City Council* (1996) 160 JP 101 concerned the holder of a public entertainment licence who claimed that a coin-operated peep show which displayed women gyrating and caressing themselves to music (greater sums of money granted displays of increasingly explicit content) was dancing and consequently did not require a sex encounter establishment licence. The Court of Appeal held that peep show performances did not constitute dancing and the premises should be licensed as a sex encounter establishment. Ward LJ held that this display was not to be '*public dancing or music of other entertainment of the kind*' because it involved lewd sexual displays; this was a matter of fact and degree involving a spectrum comprising at one end the *Folie Bergers* (where dance is enhanced by the titillation of some nudity) to the extreme of '*lonely dark cubicles'* for voyeuristic display. The middle of the spectrum is occupied by striptease where '*the exotic is beginning to shade into the erotic*'. Ultimately it will be for the courts to decide what is relevant entertainment for the purposes of the 1982 Act.

[1] See: Phil Hubbard & Rachela Colosi, Determining the Appropriateness of Sexual Entertainment Venues, (2013) 5 JoL, page 4 (at page 5).

27. The assessment of relevant entertainment is not static. In *Keep Street Live Campaign Ltd v London Borough of Camden* [2014] EWHC 607 (Admin) following a challenge to the council's adoption of a policy for busking in its area under Part V of the London Local Authorities Act 2000 one of the grounds was in respect of the definition of 'busking' which was said to be too wide with insufficient clarity and certainty, Patterson J stated: '[43] *Street entertainment is a performance art. Given the nature of street entertainment it would be impossible to come up with an absolute definition. The art will, in any event, evolve so any definition needs to be sufficiently flexible to cover the development. There will be, as the Defendant conceded, occasional cases that fall on the wrong side of the line. However, absolute certainty is not the text.*'

28. Naturally the evolution of the queer, fetish and kink community/-ies and the expression and celebration of this identity needs to be considered in light of contemporary attitudes to sex and sexuality the obvious moralistic approach of the Court of Appeal in *Willowcell* would be inappropriate. The London Borough of Tower Hamlets have previously demonstrated a far more nuanced and broadminded approach than that applied in *Willowcell.*

29. It will be relevant to consider the approach of the Council and the Licensing Police for Tower Hamlets. The current approach of the Council is one that it regulates lap dancing and similar entertainment but does not require an SEV licence for sex-on-premises venues, a number of which operate within the borough. The Principal Licensing officer writes that the Torture Garden Events have 'elements that could reasonably be assumed to fall within the meaning of relevant entertainment under Sch 3 of the 1982 Act. The Officer does not supply copies of the images and elements upon which she relies so I am unable to comment.

30. Significantly the well-known, venerable and highly respected venue known as Backstreet operates sex-on-premises events for over 35 years. In 2019 Tower Hamlets blocked a proposal of a 46-flat development of a site on Mile End Road because it would 'harm the long-term provision of a night club that serves the LGBT+ community'. Cllr Rachel Blake, the deputy mayor, described Backstreet as 'an important community asset'. She stated that 'It is the last true gay fetish club, and diversity matters to us.' 'This kind of venue really matters to us, it matters to Tower Hamlets and to the whole of London. It is very important to have safe spaces for the whole community.'

31. Given the very clear approach of the police and the Council of not objecting but rather actively supporting fetish venues creates a legitimate expectation that this (albeit unwritten) policy will continue to be applied. It is unclear whether and why the Council is now proposing to change its long-standing policy of acceptance and support for queer, fetish and kink spaces and events. No doubt we can comment on any public proposals to change this long standing approach in due course. In the short-term the council can confirm that the event proposed by Klub Verboten this evening has the benefit of the long-standing tolerance and waive the requirement for an SEV licence.

<u>Waiver</u>

32. Schedule 3 para 6(2) provides that the appropriate authority may waive the requirement of a licence in any case where they consider that to require a licence would be unreasonable or inappropriate. A number of considerations may be relevant to any consideration of a waiver as may be demonstrated by the approach taken in respect of Backstreet and the hitherto acceptance and support for queer, fetish and kink spaces and events. In due course it may be prudent to apply for a waiver for such events at E1 / Studio Space so as to confirm the long-standing policy of the Council.

Exemption

33. Even if it can be said that the Klub Verboten event constitutes relevant entertainment for the purposes of the 1982 Act the event and the premises are exempt from requiring an SEV licence pursuant to Sch 3 para 2A(3)(b) – the frequency exemption. This enables relevant entertainment to be provided on 11 occasions within any 12-month period provided each occasion last no longer than 24 hours and no such occasion begins less than a month from the end of the last.

34. The last fetish event concluded on the Sunday morning of the 13th February 2022 having started the night before on the 12th February 2022. There are thirty-three clear days between the event concluding on the 13th February 2022 and the start of the event this evening.

35. For the purpose of the event scheduled for the 18th March 2022 I am of the view that it falls within the frequency exemption and can lawfully go ahead.

Conclusion

[1] For the purpose of the 2003 Act the prohibition on nudity and semi-nudity is too vague to be enforceable and ought to be removed from the premises licence. I suggest a minor variation application.

[2.1] The event on the 18 March 2022 may be exempt due to the frequency exemption under the 1982 Act or benefit from a waiver in keeping with what seems to be the Council's long standing policy of support and tolerance.

[2.2] I would seek urgent confirmation from the Council (and the Police) that the event this evening is exempt under the frequency provisions and / or waived for the purposes of this evening pending the change (if any) of the Council's long standing practice.

[3] My verbal instructions confirm that the CCTV from the Torture Gardens event has been retained and saved for the Council. Details of the event have been shared with the Police and the Licensing Authority.

[4] In assessing the nudity condition and the issue of relevant entertainment the Council relies upon images that have not been sharded with E1. I am unable to comment until this is done.

[5] Given the wider debate it may be helpful to have a round-table discussion with the Council to consider the best way of moving forward.

Leo Charalambides
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18th March, 2022