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WITHOUT PREJUDICE SAVE AS TO COSTS

Dear Sir / Madam

Wokingham Borough Council Consultation Licensing Act 2003 Review of Statement of Licensing Policy

We write to you on behalf of The Copas Partnership (TCP) in respect of Wokingham BC's (WBC) consultation on the review of its statement of licensing policy; in particular the consideration of *whether a cumulative impact policy ought to be applied in the Remenham area.*

We write to inform you that the lawfulness of the purported consultation exercise being carried out by WBC is challenged and that should WBC introduce a cumulative impact policy (CIP) or cumulative impact assessment (CIA) based on the purported consultation WBC is put on notice that any such CIP or CIA will be challenged by way of judicial review on the grounds outlined below. The right is, of course, reserved to expand on these grounds and to include any other grounds in due course.

Background to Remenham CIP consultation

WBC's Licensing & Appeals Committee on 6 September 2010 considered the review of WBC's 2010 statement of licensing policy. John Halsall, as Chair of the Remenham Parish Council (RPC), raised concerns *that the proposed policy did not cover cumulative impact. The Health & Protection Manager believed that the statutory guidance on this matter referred to a number of premises in the same place at the same time. He thought that this was aimed at more urban environments and did not comfortably fit with Remenham's situation of being a rural area.*¹ The 2013 policy did not include a CIP.

A first step towards asking the Committee for a decision on whether to include a Cumulative Impact Policy ... for the Parish of Remenham was taken at a meeting of the WBC Licensing & Appeals Committee on 7 September 2016 (Agenda Item 13).²

¹ Minutes of a Meeting of the Licensing & Appeals Committee held on Monday 6 September 2010 from 6PM to 7.05PM.

² Minutes of a Meeting of the Licensing & Appeals Committee held on 7 September 2016 from .00PM to 8.00PM.

The Report to the Committee notes an email from Mr Dudley acting for the Remenham Farm Residents Association (RFRA) *had requested the consideration of a CIP relating to future premises licence applications on the riverside land in the Parish of Remenham from Henley Bridge to Temple Island.* The report paraphrases some of the then statutory guidance and at para.4.1 purports to deal with 'Remenham Specific Issues' but does no more than to note that:

the express concern (over many years) of those living and operating in the Remenham area are that the gradual increases in levels of visitors to the area as a result of events (with a variety of histories/traditions/commercial interests) has negatively impacted upon quality of life and Key to this is the ability of the licensing authority to understand how these concerns translate into 'evidence' that can be effectively used in consideration of a new CIP attached to the main Licensing Act 2003 policy.

There was debate about whether an external review of the evidence should be carried out by legal experts. It should be noted that some of the advice given to the committee was incorrect. Paul Anstey, Joint Services Manager, is minuted as clarifying *that licences were issued without a time limit.* This is not necessarily the case and, for example, the Open Swim licence (PRO429) is time specific running from 19 May 2016 to 30 September 2021.

After a robust discussion it was put to the vote and recommended that:

The recommendation contained in the report to commission an external review of evidence to support the adoption of a Cumulative Impact Policy for the parish of Remenham, subject to agreement from the Executive Member for Resident Services due to the financial implications.

WBC's Licensing & Appeals Committee met on 21 November 2017 with John Halsall sitting as Vice-Chairman.³ There were no declarations of interest. The Committee considered the CIP report (pp.77-82 of the Agenda)

John Halsall addressed the Committee *to illustrate the problem* which was that legal advice had been given at a licence application hearing that without a CIP the Committee could not take account of cumulative impact. This is incorrect (statutory guidance para.14.42) and accepted by WBC in its CIP Agenda report item 17 at p.79:

The absence of a special policy does not prevent any responsible authority or other person making representations on an application for the grant or variation of a licence on the grounds that the premises will give rise to a negative cumulative impact on one or more of the licensing objectives.

An informal consultation with the police and health bodies was carried out by WBC. It received no reply from Thames Valley Police Operations or SCAS/Hospitals. Replies from the TVP licensing officer ('a few minor skirmishes' and an overcrowding issue in 2015), Highways (two litter complaints per year and *a good safety record*) and Environmental Health (two noise complaints 2015, one 2016 and none 2017). The Parish Council/Ward Member claimed nuisance from May to September and that a CIP would be appropriate. No specific evidence supplied, merely generalised complaints.

The Licensing & Appeals Committee met on 13 March 2018 and *the Committee was unanimously in favour to start a consultation as proposed in the report.* John Halsall was present. No declarations of interest were made. A draft policy was published and displayed on the website under the consultation

³ Minutes of a Meeting of the Licensing & Appeals Committee held on 21 November 2017 from 7.00PM to 8.13PM.

– the section on cumulative impact was unchanged from the 2013 policy so there were no details to inform anyone looking for details of the consultation what it was about.

Ground 1: Cumulative impact policies replaced by cumulative impact assessments

Cumulative impact was not originally included in the Licensing Act 2003 (the Act). CIPs were introduced by the statutory guidance in 2005. CIPs were replaced by CIAs which were introduced into the Act at section 5A by section 141 of the Policing and Crime Act 2017. Revised statutory guidance was published in April 2018 which contains major revision of the guidance in relation to cumulative impact (para. 14.24 on).

The WBC consultation was published (by email) on 9 May 2018 and referred to consideration of a *cumulative impact policy* (emphasis added). However, the provisions of section 5A of the Act took effect from 8 April 2018 and the *revised guidance takes effect as soon as it is published*.⁴ WBC have therefore sought to publish, as part of their statement of licensing policy review, a consultation on a cumulative impact policy when such policies can no longer be introduced; having been replaced by CIAs.

The change from CIPs to CIAs is not simply one of name but represents important reform of the way in which cumulative impact measures may be adopted by licensing authorities. For putting cumulative impact policies on a statutory footing with effect from 6 April 2018 aims to *provide greater clarity and legal certainty about their use ... When introducing the proposed changes in the House of Lords, Baroness Chisholm of Owlpen said the system needed reforming because “not all licensing authorities are making effective or consistent use of” CIPs. In addition, the licensed trade had “concerns about the transparency of the process for putting a CIP in place and the quality of evidence used as the basis for some”*.⁵

A Home Office Impact Assessment on the proposal noted:

*We will also aim to ensure that LAs use robust and up to date evidence to support the implementation and retention of CIPs in their area ... Under the present arrangements CIPs can be implemented on relatively weak grounds and remain in place for a number of years based on limited or outdated evidence. This can lead to disproportionate restrictions on new business and potentially an associated impact on communities where a CIP places restrictions.*⁶

Ground 2: Failure to follow proper procedures

WBC recognises in its statement of licensing policy that:

If the Council considers that a ‘Special Policy’ is needed to deal with the cumulative impact of licensed premises, it will only do so following consultation as specified in the Licensing Act 2003 and following the proper process (10.3).

The Supreme Court decision in *Haringey 2014*⁷ is the leading authority on how local authorities should carry out consultations. It held that if there is a method laid down by legislation, as there is in the Licensing Act, it must be followed; and where there is a duty to consult it is not enough to go through

⁴ *Revised Guidance issued under section 182 of the Licensing Act 2013*, London: Home Office, para.1.6.

⁵ *Alcohol: cumulative impact assessments*, House of Commons Briefing Paper Number 07269, 2May 2017.

⁶ *Putting Cumulative Impact Policies on a statutory footing*, IA No: HO 0253 (1/11/2016).

⁷ *R (on the application of Moseley (in substitution of Stirling Deceased)) (AP) v London Borough of Haringey* [2014] UKSC 56

the motions – which is all WBC has done, albeit on the wrong basis. The authority should give sufficient reasons for any proposal to allow a consultee to *give an intelligent consideration and response* to what is being proposed. There is an obligation to let consultees know *what the proposal is and exactly why it is under positive consideration ... telling them enough (which may be a good deal) to enable them to make an intelligent response* – which WBC has not done. Adequate time must be given for consideration and response. A month is not sufficient time.

The Cabinet Office published *Consultation principles: guidance* in 2008 which was last updated on 19 March 2018. The guidance is for government departments and is accepted to be equally relevant to local authorities. *Be clear what questions you are asking* – WBC ask none. *Consultations should be informative. Give enough information to ensure that those consulted understand the issues and can give informed responses* – WBC has not done this.

By section 5A of the Act, before the authority publishes a CIA it must consult the police; fire & rescue services; local health board; premises, club premises and personal licence holders; and businesses and residents in the area. WBC provides a list of consultees at Annex B of Agenda Item 27 L&A Committee 21 March 2018. There is no mention of businesses and residents in the area. If a search is made for the consultation on WBC's website all that is found is a link to the draft 2018 policy which does not contain details of the proposed CIP.

Section 5A also lays down what the licensing authority must provide to those consulted:

The reasons why it is considering publishing a cumulative impact assessment. WBC has not done this. The email sent on 9 May 2018 does not give any reasons and offers no evidence. It also refers to CIPs which have now been replaced with CIAs which are differently described in the statutory guidance. There is no real engagement; WBC is merely following a bureaucratic process which is no more than going through the motions.

A general indication of the part or parts of its area which it is considering describing in the assessment. 'Remenham' is not sufficient and is not what was requested by the RFRA at the L&A Committee on 7 September 2016, which specified 'riverside land'. As stated in Agenda item 17 of the 21 November L&A Committee on the basis of legal advice from a leading licensing QC: *the policy would need to be site specific*. Despite this WBC apparently considers the whole of Remenham acceptable – are there issues for the whole area? This is not 'site specific'. Does 'Remenham area' refer to Remenham Village or Remenham Parish? A map should have been included so that consultees could know the area in question.

Whether it considers that the assessment will relate to all relevant authorisations or only to relevant authorisations of a particular kind. The email is silent in this respect. Can it be taken that all authorisations are to be included? Where is the evidence to link particular licensable activities with adverse effects on the licensing objectives? Detail should have been included so that consultees could know the types of licensable activities that are in question.

The statutory guidance⁸ makes clear the steps that a licensing authority should take when considering whether to introduce a CIA:

- (1) Identify concern about crime and disorder; public safety; public nuisance; or protection of children from harm in a particular location.

⁸ *Revised Guidance issued under section 182 of the Licensing Act 2003*, April 2018, para.14.34.

- (2) Consider whether there is good evidence that crime and disorder or nuisance are occurring, or whether there are activities which pose a threat to public safety or the protection of children from harm.
- (3) If there is evidence such problems are occurring, identify whether these problems are being caused by the customers of licensed premises, or that the risk of cumulative impact is imminent.
- (4) Identify the boundaries of the area where problems are occurring (this can involve mapping where the problems occur and identifying specific streets or localities where such problems arise).
- (5) Consult those specified in section 5(3) of the 2003 Act, and
- (6) subject to the outcome of the consultation, include and publish details of the special policy in the licensing policy statement.

It is clear from this that the authority must consider the nature and extent of any cumulative impact and the evidence to support it *before* it goes to consultation and give this information to those being consulted so that they are able to give an informed response. This is made clear in paras. 14.29-14.33 of the Home Office guidance which concludes:

After considering the available evidence and consulting those individuals and organisations listed in section 5(3) of the 2003 Act and any others, a licensing authority may be satisfied that it is appropriate to publish a CIA (para.14.33).

The statutory guidance makes clear the steps that a licensing authority should take when considering whether to introduce a CIA. Plainly, WBC has not complied with this in any meaningful way, if at all.

Ground 3: Bias/conflict of interest/incorrect advice

Bias

The recommendation at the September 2016 meeting was to commission an external review of evidence **to support** the adoption of a Cumulative Impact Policy rather than to examine the evidence (emphasis added). This is also tacit admission that the evidence to support the consultation is at best to be gained post facto to the consultation.

A recent licence application, for 'By the River', attracted three representations. For some reason names and addresses have been redacted (see paras.9.26-9.30 statutory guidance). One of the representations states that WBC is considering a CIP and that *we are assured that it will receive sympathetic consideration in the current review of Licensing being carried out by WBC*. Who felt able to say this and on what basis?

Conflict of interest

Adoption of a CIP has been supported by the RPC and RFRA. John Halsall is chair of RPC and a member of RFRA. He lives in the house adjacent to TCP operations for the Women's Regatta, HRR (barn bar) and Henley Masters Regatta. He would have an interest in a CIP which covers this area.

John Halsall sat as Vice-Chair of the L&P Committee on 21 November 2017. No declarations of interest were given. From the minutes it appears that he took a full part in the meeting. In particular he gave information to the Committee *In order to illustrate the issue* so that the committee would understand the need for a CIP – but the information given was incorrect (para.9 above). The Agenda contains the informal consultation responses. One, in support of the introduction of a CIP, is from 'Parish Council/Ward

Member'. Is this John Halsall? The minutes state that *after much discussion and upon being put to the vote, most Members were in agreement that the consultation should be carried out ...* We are not told what the vote was.

After the committee meeting JH writes in the Remenham Newsletter⁹ *finally there is some action on cumulative impact as an officer has been asked to prepare a report for the Licensing Committee of WBC.*

John Halsall also sat as Vice-Chair of the 21 March 2019 meeting which resolved that a consultation exercise should be carried out. No declarations of interest were given. John Halsall should have recused himself from both the November 2017 and March 2018 meetings.

Incorrect advice

At the L&A Committee on 7 September 2016 Paul Anstey, Joint Services Manager, is minuted as clarifying *that licences were issued without a time limit.* This is not correct. For example, the Open Swim licence (PRO429) is time specific running from 19 May 2016 to 30 September 2021.

At the L&A Committee on 21 November 2017 further incorrect information was given relating stating that legal advice had been that cumulative impact may not be considered without a CIP being in place.

The discussions and decisions of WBC's licensing committee were based on incorrect information which would have misled them into considering that a CIP consultation was justified.

Lack of evidence to support a consultation

WBC embarked on the consultation with insufficient evidence to support it. The informal consultation reported in the Agenda of the 21 November 2017 licensing committee meeting certainly did not produce evidence to justify a CIA.¹⁰ Thames Valley Police made no response and the TVP licensing officer had nothing much to report other than *a few minor skirmishes all of which were dealt with by on site security* and an overcrowding issue in 2015 which was resolved. It concludes: *there has been nothing of such a nature that they would deem any action such as review of any premises to be necessary.* TVP, which has access to statistical information on crime and disorder in the area, did not produce evidence to support the introduction of a CIP/CIA and have not expressed concerns about crime and disorder, public safety or the protection of children from harm.

No response was received from SCAS/Hospitals and the Highway Authority has had nothing more than two complaints per annum over the last five years for litter and two slight personal injury accidents. It concludes: *This information suggests a good safety record during the event – demonstrating that the present system is working well and there is no need for a CIA.*

The Parish Council/ward member responded: *Between May and September each year, Remenham is subject to impact and noise from a variety of events which run consecutively and in some cases concurrently.* We are not told what 'impact' covers but the response goes on to state that the roads are not suitable – this is a Highways matter and the Highways Authority does not raise the issue in its response but states of the two slight personal injury accidents: *neither of which were directly attributable to the traffic management during the event but were linked to the error of the person involved* - again demonstrating that the present system is working well and there is no need for a CIA.

As to noise, Environmental Health reports two complaints about noise in 2015 (both from Mahiki), one in 2016 from The Angel on the Bridge and none in 2017. Hardly the stuff of a CIA area and the

⁹ No 259 – Nov-Dec 2017, p.16.

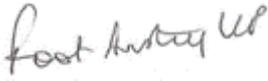
¹⁰ *Ibid*, Agenda Item 17.

premises concerned have not been the subject of subsequent complaints - again demonstrating that the present system is working well and there is no need for a CIA.

'Rewind' was reviewed in 2013 for breaching its licence in respect of noise. Additional conditions were put in place and there have been no complaints since – this is an excellent example of the system working well and the lack of need for a CIA.

WBC published a consultation based on no or insufficient evidence thereby failing to comply with the procedures which should have been followed.

Yours faithfully

A handwritten signature in black ink that reads "Foot Anstey LLP". The signature is written in a cursive, slightly slanted style.

Foot Anstey LLP

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