Written Submission 99-101 Whitegate Drive, Blackpool

The application has been made with focused attention on the Licensing Objectives in particular ensuring that any proposal made will not have an adverse effect.

The parts of the Licence the applicant seeks to vary are.

1. The opening time – modifying from 08.00 hrs to 07.00hrs and
2. The terminal hour- modifying from 23.00hrs to 00.00 hrs

Assessment of the Area

The applicant's premises are located close to other Off Licenced premises which are listed below

1. 3 Whitegate Drive- **PL1119**- hours of operation 06.00hrs-00.00hrs (within cumulative impact area)
2. 27 Whitegate Drive – **PL0110**- hours of operation 08.00 hrs -23.00hrs (within cumulative impact area)
3. 64 Whitegate Drive- **PL1822**-hours of operation 07.00hrs -23.00hrs (within cumulative impact area)
4. 96-98 Whitegate Drive **PL1346** Tesco Express-hours of operation 08.00hrs-23.00hrs (within cumulative impact area)
5. 99-101 Whitegate Drive **PL118 Applicant**- hours of operation 08.00hrs-23.00hrs (within cumulative impact area)

In the immediate locality, there are further licensed premises that sell alcohol and hot food, none of which would be subject to the off-licence Cumulative Impact Policy

6. Bell Vue **PL1147**- opening hours 07.00hrs-00.30- alcohol sales terminate at 00.00hrs
7. Dominos Pizza **WA0134-** hot food sales terminate at 00.00hrs
8. Food Place **PL0068-** alcohol sales terminate at 00.00hrs
9. Guards Club **PL1203-** alcohol sales terminate at 00.00hrs
10. Michael's Restaurant **PL1968** – alcohol sales terminate at 00.00hrs
11. Ronnier Bars **PL2224**-alcohol sales terminate at 23.00 in the week bit at the weekend it is 00.00hrs
12. Scotto Pizzeria **PL2170 –** alcohol sales terminate at 00.00hrs

13. Monkey Grill Takeaway **WA0088**-hot food sales terminate at 01.00hrs in the week and 02.30hrs at the weekend

14. Turkish Kebab House WA0328- hot food sales terminate at 00.00hrs during the week and 00.30hrs at the weekend.

From the list of 14 premises that exist in the immediate vicinity of the applicant's premises, 10 have a terminal hour of midnight or beyond. This represents 71.4%.

If the applicant was granted a later terminal hour, it would move this figure to 78.5% of the premises in the immediate area have a terminal hour of midnight or beyond

5 of the premises are subject to the CIP policy, 4 have a terminal hour of 23.00hrs and one has midnight. From a proximity point of view, the applicant's premises is approximately 500m (½kilometer) from 3 Whitegate Drive(the premises with a midnight terminal hour).

Looking at all the premises in the round, people dispersing from the On Licensed Premises may be more of concern to cumulative impact than the Off Licenced Premises, they outnumber the Off Licences significantly, they virtually all have later terminal hours but none of these premises are subject to the CIP test and growth could continue to be unrestricted. In other words, the problem of cumulative impact could be worse by a sector (On Licensed) that impacts the trading potential of another (the Off Licensed sector)

Linking the proposed hours to the Councils Policy

Blackpool's Statement of Licensing Policy at para 4.1.7 states.

4.1.7 If relevant representations are made the Council will only grant the hours of use proposed where the operating schedule and any risk assessments adequately demonstrate that:

- *The applicant has properly considered what is appropriate for the local area when considering what hours and activities to apply for*
- *The potential effect on the licensing objectives is not significant*
- *The operating schedule demonstrates that the applicant is taking appropriate steps to minimise any adverse impact on local residents and businesses*

Taking the points in turn,

The applicant has properly considered the hours that are appropriate for the area, the research demonstrates that 71.4% of the premises in the immediate vicinity of the applicant's premises have a terminal hour of 00.00hrs or beyond.

The potential impact on the licensing objectives is not significant, if granted the average terminal hour percentage would move from 71.4% to 78.5%. This small percentage increase needs to be set against the backdrop of the premises in the area having a wind-down time. Whilst alcohol sales may cease at midnight the expectation with premises that sell alcohol for consumption on the premises is to have a graduated dispersal spread out over 30 minutes or so (known as the drinking up time). As such the applicant's premises will be well and truly closed by the time these premises are winding down so any impact on the Licensing Objectives is not envisaged to be significant, indeed the assessment is that it will be insignificant.

The Operating Schedule is robust, more so than any similar premises in the locality. The conditions on the applicant's licence were strengthened in 2014 and have been successful in minimising any

impacts on residents and businesses. The Operating Schedule will continue to have the positive effect already being experienced for the earlier hour in the morning and the later hour in the evening.

An existing premise (3 Whitegate Drive) has a terminal hour of midnight, the conditions on that licence are not as comprehensive as the ones on the applicant's licence and there have been no suggestions or advice from the Responsible Authorities on what could be offered to strengthen the conditions.

4.9 Off Licence Cumulative Impact Assessment

4.9.1 The Council has assessed the available evidence and has determined that the area highlighted in Appendix C is suffering from the cumulative impact of the number of premises licensed for the sale of alcohol for consumption off the premises only. This is undermining the licensing objectives. The location of the main concentration of off-licensed premises suffers from high levels of alcohol related crime and alcohol related hospital admissions. Applications for new licences, or variation of hours within this area will be refused unless the applicant can demonstrate that their application will not lead to an increase in the impact of off- licensed premises in this area.

Data from TENS, 4th May- 10th May & 12th May-18th May 2022

Date	Alcohol sales between 22.00hrs and 23.00hrs	Alcohol sales between 23.00hrs and 00.00hrs
4th May 2022 (TEN 1)		
5th May 2022		
6th May 2022		
7th May 2022		
8th May 2022		
9th May 2022		
10th May 2022		
12th May 2022 (TEN 2)		
13th May 2022		
14th May 2022		
15th May 2022		
16th May 2022		
17th May 2022		
18th May 2022		
Total		

See restricted financial information for further detail.

Alcohol sales represent 33% of the over all sales between 22.00hrs and 00.00hrs during the 2x TENS

4.10 Applications within the Cumulative Impact Area

4.10.1 Applications for new licences or variations to existing licences within a cumulative impact area, which are likely to add to the existing cumulative impact will normally, be refused if a relevant representation is received. To persuade the Council to depart from its policy an applicant must demonstrate that their application will not add to the existing cumulative impact in the area. This should be done through the operating schedule and the risk assessment process (if used)

4.10.2 Early contact, before submission of the application, with the responsible authorities is encouraged to discuss plans and control measures.

Early contact was made with the Licensing Authority to discuss the application before formal submission. A meeting was arranged on-site on the 22nd of April 2022. Before the meeting occurred, a written plan was submitted setting out the proposals.

Following the meeting, the plan was adjusted slightly to cater to some of the signals given off by the Responsible Authorities, namely, to keep the existing operating schedule rather than modify it and to update the plan.

A copy of the written plan is attached hereto labelled as **Appendix 1**

It was indicated both verbally and in writing from the Police that an objection would be submitted to the application on Policy grounds. **Appendix 2**

4.10.3 Examples of factors, which the Council may consider, that demonstrate that there will be no impact may include:

- ***Premises ceasing operation before midnight***
- *Premises that are not alcohol led and only operate during the daytime*
- *Situations where the applicant is relocating their business within the cumulative impact area but is retaining the same style of business, operating hours, and conditions*

With regards to the list of factors that the Council may consider appropriate for departing from its Off Licence Cumulative Impact Policy, bullet point 1 is applicable in this case.

4.10.4 Examples of factors the licensing authority will not consider to rebut the presumption of refusal:

- *The premises will be well managed and run as all licensed premises should meet this standard*
- *The premises will be constructed to a high standard*
- *The applicant operates similar premises elsewhere without complaint*

4.10.5 As with all applications made under the Licensing Act 2003, if no representations are received, the Council must grant the application. Anyone who does make a representation may rely on the evidence published in the cumulative impact assessment or the fact that a CIA has been published for the area.

Research into Previous Decisions

Between January 2019 and the current date, Blackpool Council has conducted 26 hearings that are visible for viewing on the public website. The table below provides a summary.

	Year	Hearing Date	Premises	CIP Area	Decision	Objections
1	2022	24/01/2022	**New**-253 Fleetwood Road	No	Refused	Elected Members
2	2022	15/03/2022	**New**-316a Church Street	Yes	Refused	Police
3	2022	24/03/2022	**New**- Marvins Highfield Road	No	Granted	Public
4	2022	08/04/2022	**Variation**- Barons Hotel 58-60 Hornby Road	Yes	Granted	Public & MP
5	2022	26/05/2022	**TEN**-Flames, Queen Street	Yes but Policy doesn't apply to TENS	Refused	Police
5	2021	08/03/2021	Review- New President Hotel - 320 Promenade	No	Revoked	N/A
6	2021	07/04/2021	**New**- 75 Highfield Road	No	Granted	Police
7	2021	23/07/2021	**New**- 47-53 Abingdon Street	Yes	Refused	Police, Public Health , Licensing Authority, Child Protection
8	2021	10/09/2021	**TEN**- Shadow Bar, Clifton Street	No	Refused	Police
9	2021	23/09/2021	**New**- 230 Church Street	Yes	Refused	Police, Public Health, Licensing Authority, Child Protection
10	2021	07/10/2021	**New**- 80 Sherbourne Road	Yes	Not Published ?	Police, Public Health, Licensing Authority, Child Protection
11	2021	11/10/2021	New- 253 Fleetwood Road	No	Refused	Elected Members

12	2021	05/11/2021	**New** -29 Osbourne Road	No	Refused	Licensing Authority, Child Protection, Public
13	2021	22/11/2021	**New**-156 Central Drive	Yes	Refused	Police, Licensing Authority, Child Protection
14	2021	03/12/2021	**New**-1-3 Dean Steet	Yes	Refused	Police, Licensing Authority, Child Protection
15	2020	09/01/2020	**Variation**-244 Talbot Road	Yes	Refused	Public. Plus recent prosecution for serving beyond there hours
16	2020	04/03/2020	**Variation** – sugar & spice Queen Street	Yes	Refused	Police & Licensing Authority
17	2020	23/06/2020	**New**-Herons Foods Bank Hey Street	Yes	Withdrawn	Police, Public Health, Licensing Authority, Child Protection
18	2020	09/07/2020	**Variation**- Mardi Gras Hotel	Yes	Granted	5x public objection inc Cllr Taylor 5x Supporting reps from public Police Mediate
19	2020	22/07/2020	**New**-Co Op North Drive	No	Granted	Elected member on behalf of a local school
20	2020	22/07/2020	**Variation**- Lawton Hotel & Beachfield Hotel	Yes	Granted	10x Public objectors Ext of hours
21	2020	12/10/2020	**New**- Bingo Premises	N/A	Granted	
22	2019	28/01/2010	Review -Cornhill Hotel	No	Revoked	
23	2019	14/02/2019	**Variation** – Albert Rd Store, Albert Road	Yes	Granted	4x public objections ext. of 4 hours for deliveries
24	2019	17/07/2019	Review – Turkish kebab 160 Lytham Road	No	Revoked	

25	2019	15/08/2019	Review- 27a Dickson Road	No	Revoked	
26	2019	10/09/2019	Variation – 74a Lytham Road	No	Granted	

13 applications over this period were in the CIP area (Town Centre and Off Licence CIP)

7 of these applications were New all of which were refused but for Heron's foods on the 23/06/2020 which was withdrawn.

6 of the applications were variations, 4 of which were granted 2 were refused (66.6% granted)

The 4 applications that were granted have a common theme; no Responsible Authorities objected albeit on some of these applications the Police seemed to be initially involved but then mediated.

The 2 variation applications that were refused were for later hours, one a takeaway in the town centre which received Police and LA objections. The other application, the New Road Inn, applied for an extra hour following a prosecution for failing to comply with its terminal hour but this application received no objection from the LA .

The research raises several points.

The likelihood of a new grant in the CIP area is unlikely which is the purpose of a CIP policy.

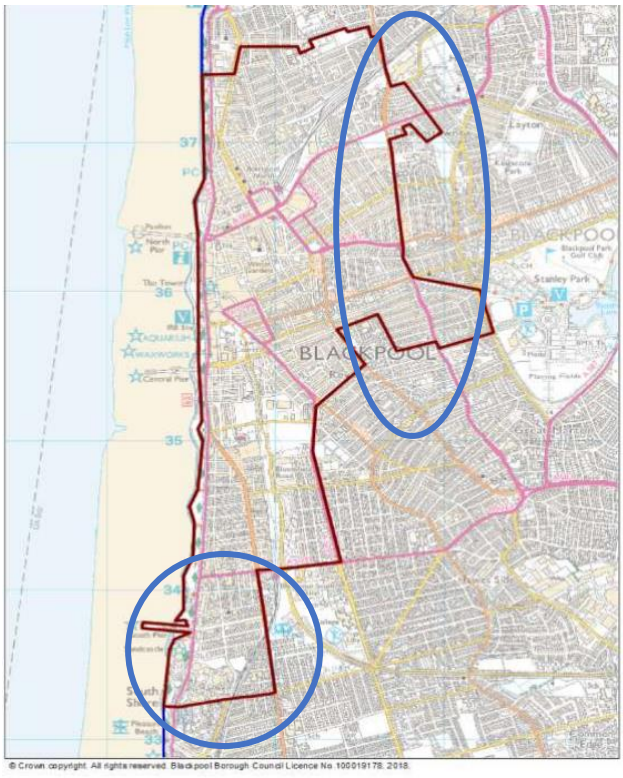
The likelihood of a successful variation is more than probable but this very much seems to be based on the input or not as the case may be of any Responsible Authority

There does not seem to be a clear understanding of what will be the cause for concern for the Responsible Authorities, the New Road Inn stands out as an example of peculiarity, in essence, the application was for an extension of 1 hour for alcohol and entertainment, the premises had recently been prosecuted for serving beyond their hours but ironically the prosecution was referred to in the Councils report for a reason the Police did not object. Achieving compliance was no doubt at the forefront of the police's mind so if a premises has received punishment for the offence and then listened to the advice to extend their hours it begins to make more sense why the Police would not stand in their way. However, in applications where cumulative impact is a consideration logic would dictate the overriding determination on whether you would or would not object should be based on the likely effect of the application adversely affecting the Licensing Objectives which would have engaged the Committee's discretion to determine the facts in more detail. Would the so-called Policy Objection not have been appropriate in such a case? If not from the Police but certainly from other Responsible Authorities.

A further example but more understandable is Albert Stores an Off Licence on Albert Road, applying for extended hours till midnight albeit sales had to be by delivery only after 8 pm. This application attracted no representations from the RA's (responsible authorities).

The operating schedule has a robust condition that prevents deliveries to any FY1 postcode after 8 pm but this still leaves 2 areas of the CIP area unaffected, the area South of Preston New Road (circled on the map below) and the area to the east of Whitegate Drive (circled on the map). This condition does take care of approximately 70% of the CIP area but there is no condition that would reduce the supply, for example, a maximum of 3 delivery vehicles shall be engaged/employed.

This application points to a genuine attempt to manage the risk the impact of extended sales could have in the CIP area, but it does not irradicate it, furthermore, it is impossible to irradicate any risk. Meaning that extended hours will be permitted provided any risk is minimal.



Map of the FY1 Postcode District

As part of the research for this application, 2 papers have been studied written by eminent Licensing Specialists. Both come from different angles and add in their own opinions. Research Paper 1 is more critical of the approach of Councils and the Police. But research Paper 2 is more supportive of the robust application of CIP policies

Research paper 2 highlights the issue of pre-hearing negotiations which can present difficulties when trying to understand the decision-making process which led to the withdrawal of RA representations.

Research Paper 1 and 2 are attached hereto as **Appendix 3 and 4** .

Pre-Application Discussion and the Policy Objection

From the previous cases considered, the 4 applications granted in the CIP area are variations without RA objections.

How can this be achieved?

The policy encourages pre-application discussion at an early stage. This was done in a comprehensive way.

What came from this discussion?

It was clear even before discussions set off that a Policy Objection was more than likely, there was nothing that could be offered to prevent this.

Is this a fair approach?

The Policy Objection was referred to during the pre-application discussion as being a necessary step, but the Committee would look at what wasn't being said rather than what was. ***(Rogers) v Swindon Primary Care Trust*** **attached as Appendix 5**

This would appear to be an unreachable bar, and the question needs to be posed, are the Authorities simply closing their ears to applications in the CIP area and setting a bar that is so high that it cannot be reached by any applicant, in other words, if you are in this area is the answer that nothing can be offered to avoid the Policy Objection? **(*British Oxygen Co Ltd v Minister of Technology [1971]* attached as *Appendix* 6)**

When you look at the case of the New Road Inn, Albert Stores, Mardi Gras Hotel, Lawton and Bleachfield Hotel and the Barons Hotel there does seem to have been some latitude on the so-called Policy Objection. The lack of the Policy Objection does appear to be one of the major determining factors in the outcome as they all attracted multiple Public Objections. Save for the New Road Inn which was refused as it faced numerous vociferous public objections where habitual trading after hours is referred to. (If you have been caught once it is likely that this was not the first occasion you committed the crime)

From the chronology of applications between 2019-2022, there are minor changes to the Objections submitted by the Responsible Authorities, especially from the Police who on occasions target the representations in more detail to the locality and individuals behind the application. However, the point that needs to be made is wherever there is an RA objection, whether it be a Policy Objection or a Policy Objection with some specific concerns, there is always a refusal.

Why could this be the case?

Section 182 Guidance has numerous paragraphs referring to Responsible Authorities as experts in their respective fields and as such, they should be listened to.

Many Councils also publicly indicate that their Officers will be supported (providing they are acting in good faith and in accordance with policy), simplifying the division of labour, Elected Members make Policy, and Council Officers implement it.

With these two things in mind when an objection from an RA has been received based on the last 3 years' worth of data the application seems to be doomed.

Is it doomed or has the applicant simply not discharged the burden of proof?

Without understanding where the bar is this is a difficult question to answer. The bar in the policy is slightly more visible, there are 3 points laid down in paragraph 4.10.3, this application ticks one of those boxes in that it will not be trading beyond midnight. Past this, there is very little to go on other

than to prove on the balance of probabilities that the application will not adversely impact the Licensing Objectives.

In the absence of any indicator of what exceptional circumstances could mean looking back at previous decisions seems to be the best starting point.

The policy indicates in para 4.1.7

*4.1.7 If relevant representations are made the Council will only grant the hours of use proposed where the **operating schedule and any risk assessments adequately demonstrate that:***

- *The applicant has properly considered what is appropriate for the local area when considering what hours and activities to apply for*
- *The potential effect on the licensing objectives is not significant*
- *The operating schedule demonstrates that the applicant is taking appropriate steps to minimise any adverse impact on local residents and businesses*

Risk Assessment is mentioned again in paragraph 4.10.1

*4.10.1 Applications for new licences or variations to existing licences within a cumulative impact area, which are likely to add to the existing cumulative impact will normally, be refused if a relevant representation is received. To persuade the Council to depart from its policy an applicant must demonstrate that their application will not add to the existing cumulative impact in the area. **This should be done through the operating schedule and the risk assessment process (if used)***

Risk Assessment

Steps involved with risk assessing

1: Identify the Hazards.
2: Decide Who Might Be Harmed and How.
3: Evaluate the Risks and Take Action to Prevent Them.
4: Record Your Findings.
5: Review the Risk Assessment.

The hazards: in this case are the impact on the Licensing Objectives from additional hours granted to premises selling alcohol

Crime and Disorder

1. sale of alcohol to a drunks
2. violence or public order in the premises or in the vicinity

Protection of Children from Harm

1. Increased risk of underage sales (more hours =more opportunity)
2. Increased risk of proxy sales

Prevention of Public Nuisance

1. Increased risk of people causing a disturbance on the street as they attend and leave the premises.
2. Increase in litter in the area

Public Safety

The only objective that could be truly set aside is Public Safety, if the premises are safe from 08.00hrs -23.00hrs there should be no reason why it would not continue to be safe from 07.00hrs-08.00hrs and from 23.00hrs-00.00hrs.

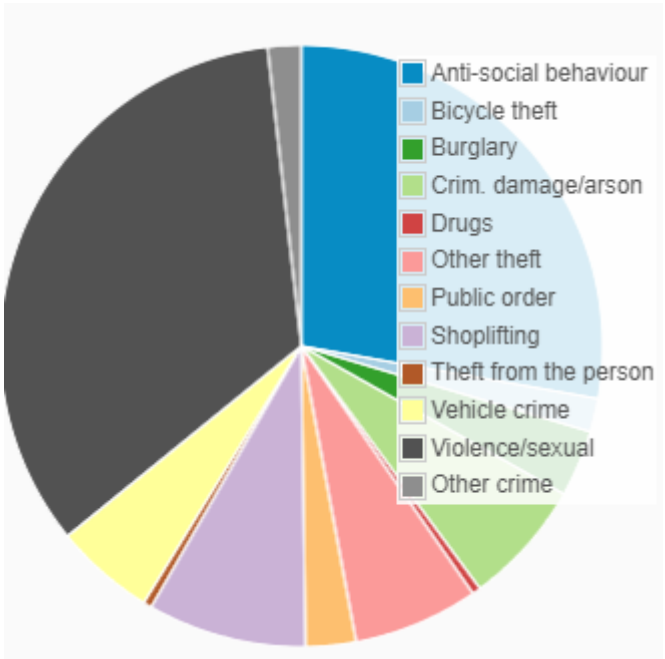
Who could be harmed? in this case, the scope of harm would extend to residents, customers, and staff

Evaluating the Risk

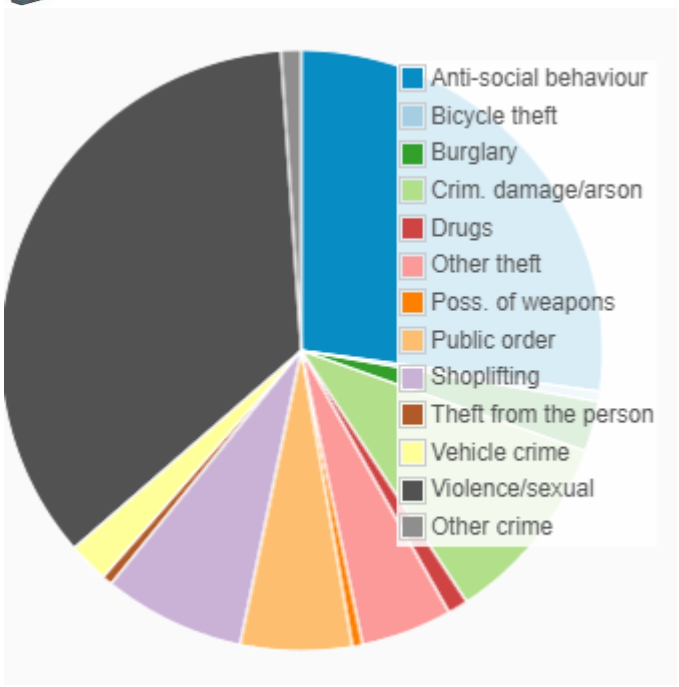
A crude analysis of the crime statistics in the Whitegate Drive area gives a picture of the crime categories but without drilling into each specific area and crime is not possible to do a further evaluation of the criminal activity. The trends of crime category month on month seem to be consistent, January sees a spike in vehicle crime and March sees a small increase in Public Order Offences.

Crime Data Source https://www.streetcheck.co.uk/crime/fy15ed

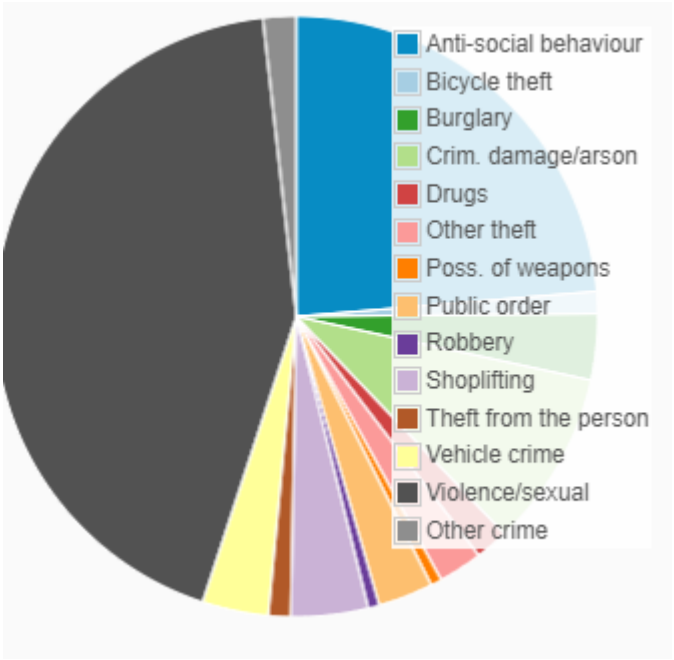
April 2022- 233 Crimes



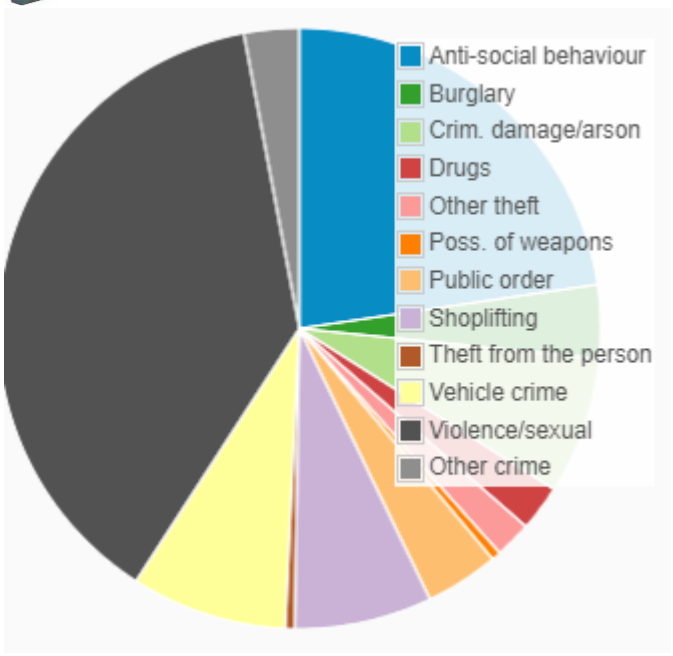
March 2022-184 Crimes



February 2022-169 Crimes

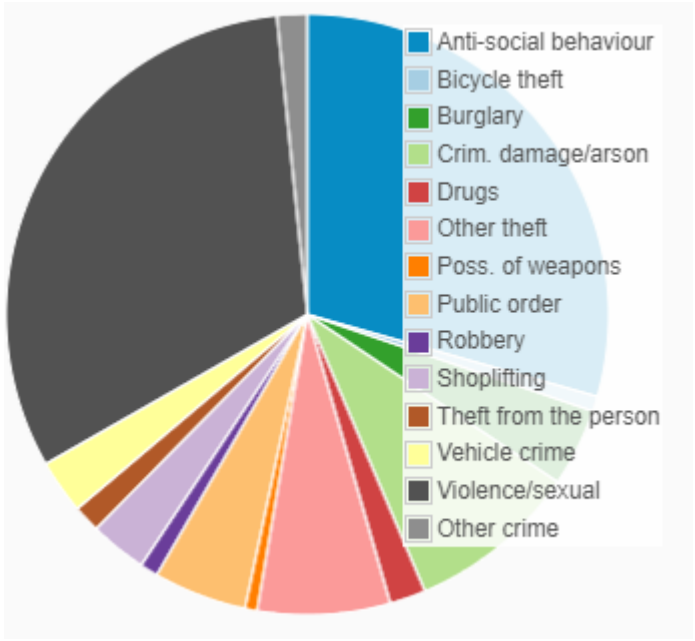


January 2022-203 Crimes



Comparison with Central Drive

Statistics from April 2022- 619 crimes in Central Drive compared with 233 in the Whitegate Drive area



The trend seems to demonstrate that there is a lot more volume and a lot more anti-social behaviour as an overall proportion of crime especially when you compare this area with the Whitegate Drive area. There seems to be approximately 60% more crime reported in the Central Drive area than in the Whitegate Drive area, albeit they are in the same ward area. The statistics and colour charts in the Statement of Licensing Policy also bear this out. The added disadvantage that the Central Drive area has, is far bigger outlet density. The policy seeks to draw the distinction

between crime and outlet density, but I think all parties would agree that statistics are far more complex, and many other social and economic factors are also significant drivers of crime.

The evaluation demonstrates that crime reduces as you move to the outer edges of Talbot Ward where the applicant's premises is situated, again a fact illustrated in the policy and one that is obvious to anyone with a certain amount of Local Knowledge.

2 Temporary Events were applied for in the month of May and the pattern of sales was recorded which demonstrates that alcohol is not a significant part of the business, and no issues came to light during the period of later trading. It is also of note that the application has not attracted any adverse remarks or representations from residents

An evaluation of premises in the locality including what Licensable activities each offers including operational hours has also been carried out to allow us to apply a rating to the crime categories identified in the risk assessment. The theory being the more information you have the more credibility the evaluation score has.

A standard risk assessment would rate the hazard in terms of severity and then rate the risk in terms of likelihood using the methodology below.

5	**Multiple Fatalities**	5	10	15	20	25
4	**Fatality / Life changing injury / illness**	4	8	12	16	20
3	**Major Injury** *(Requires Medical Treatment or is LTI)*	3	6	9	12	15
2	**Minor Injury** *(First Aid Treatment Required)*	2	4	6	8	10
1	**Property Damage / Negligible Injury** *(Required no treatment)*	1	2	3	4	5
		Very Unlikely / Rare	**Unlikely**	**Possible**	**Likely**	**Almost Certain**
		1	2	3	4	5

The hazards identified in the risk assessment would in the worst case be minor injuries, however in the most part matters such as antisocial behaviour, littering and young people accessing alcohol may fall under the category of property damage or negligible injury, which scores 1 on the risk rating.

When assessing the impact of the application you should look at the parts of the licence that the applicant seeks to vary i.e. 07.00hrs- 08.00hrs and 23.00-00.00hrs.

Since the premises have traded for many years without concern the likelihood of any spike in issues identified in the risk assessment is unlikely (worst case scenario), this can also be bolstered by the recent Temporary Event Notices that came and went without concern and the evaluation of the immediate area. All this information complied together enables a competent person to demonstrate that the overall risk to the Licensing Objectives being adversely affected would achieve a score that would put it in the low-risk category (green boxes).

For the sake of completeness, a risk assessment has been completed and is attached as **Appendix 7.**

Conclusion

The applicant does not seek to go against the grain of the policy, the application has been tailored to do the exact opposite. This is a community-based store with a loyal and diverse customer base. A significant investment in the store has enhanced the shopping experience and created a store that is a credit to the area rather than a blight.

Only 2 hours of trading have been analysed which demonstrates that alcohol accounts for 33% of the total sales, if a thorough analysis of the trading pattern was undertaken (from opening time to closing time) it is likely that alcohol would be even less of a feature as generally speaking sales of alcohol begin to pick up from 4 pm onwards.

The Policy refers to 3 categories of applications where it may consider departing from its policy to refuse. Those that trade before midnight, premises that are relocating, and those that are not alcohol-led and trade in the daytime.

Alcohol-led and daytime are not defined in the policy but there are several guides you could look to establish whether something is alcohol-led.

Section 176 of the Licensing excludes certain premises from selling alcohol, one of the premises is a garage that sells mostly fuel. The general test is that if a petrol station can demonstrate that it sells more goods than fuel then it may sell alcohol if granted a licence. The balance of goods to fuel need only be 51% goods vs. 49% fuel. (The calculation is far more complex and involved and this is just a general point)

The term ancillary use is heavily used in Licensing examples includes alcohol being served ancillary to a table meal or when considering Section 77 certificates under the previous regime alcohol had to be ancillary to music singing, dancing, and substantial refreshments.

Gambling Provisions also refer to the Primary Purpose or even sex shops in the Lambeth City Council case which defined the term “significant degree”, there is a wealth of examples to try and determine what the primary purpose of an establishment is or if indeed if it is alcohol led.

Whilst the applicant is not seeking to suggest he trades only in the daytime it is of considerable importance to state that this establishment is not alcohol led which can be evidenced from the financial information submitted. If the Licence were granted for the extra hours, we say that there would be little if any impact on the immediate area. If granted 2 Off Licences will share similar hours, those being the applicant (if granted) and 3 Whitegate Drive. The location of these 2 premises also serves as an advantage as they are approximately 500 meters apart so the likelihood of cumulative impact being experienced is minimal.

3 important considerations seem to be a factor when considering Cumulative Impact, they are

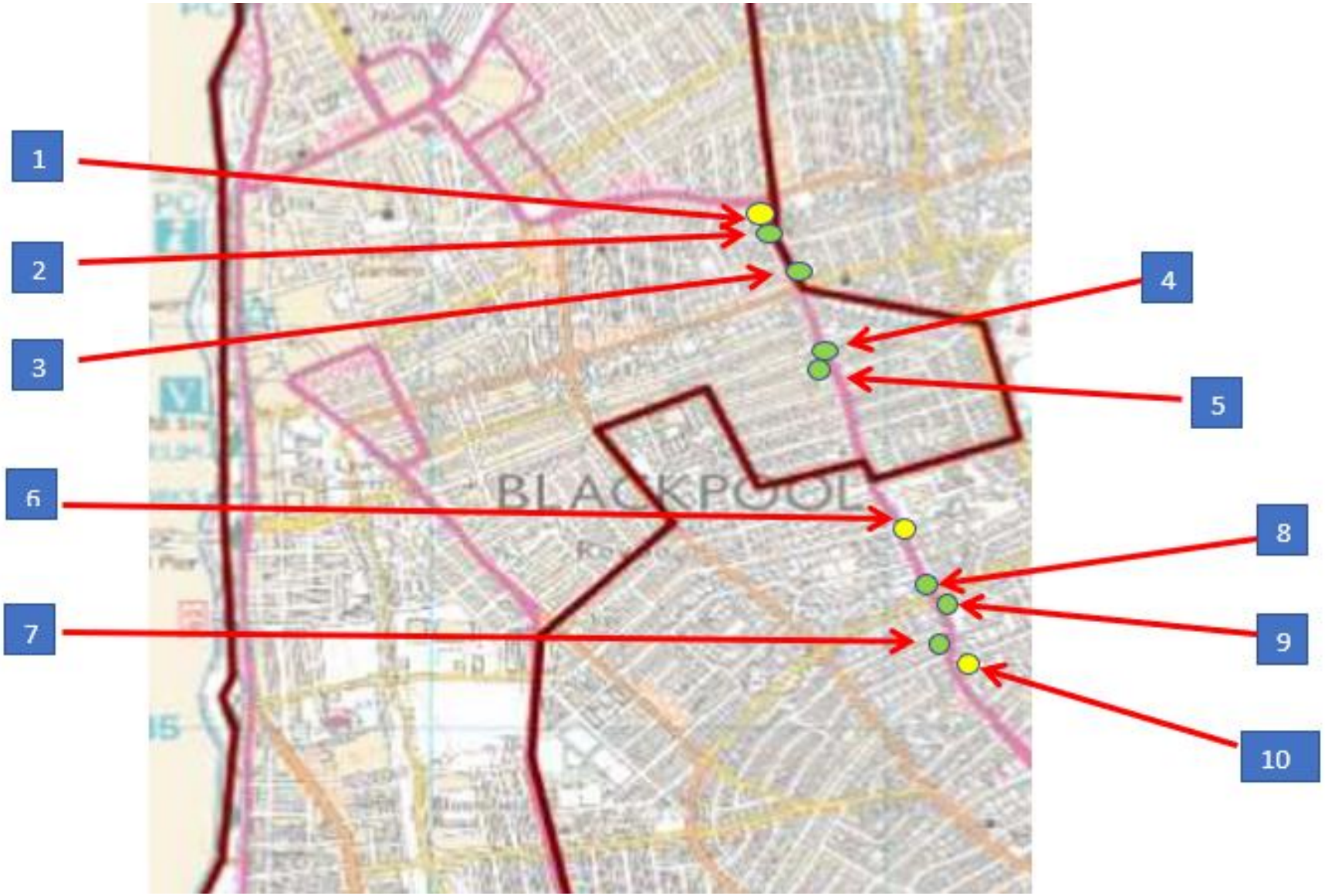
Location, Time, and Activity

This written submission seeks to address these 3 headings and we hope that the information provided is as detailed as possible enabling the reader to form the decision that the Licensing Objectives will not be undermined and, in these circumstances, it is both reasonable and justifiable to depart from the Policy of refusal.

Mark Marshall

Pre-Application Information, 99-101 Whitegate Drive, Blackpool PL 1118

Appendix 1



Pre-Application Information, 99-101 Whitegate Drive, Blackpool PL 1118

Key = 000.00hrs terminal hour 

23.00hrs terminal hour 

The map identifies the approximate location of existing Off Licensed Premises on Whitegate Drive, it has been constructed using google earth satellite images to roughly identify the location, no mapping software has been used so the exact location will not be precise.

The premises have been listed 1-10 and are identified as follows

1. 3 Whitegate Drive- **PL1119**- hours of operation 06.00hrs-00.00hrs (within cumulative impact area)
2. 27 Whitegate Drive – **PL0110**- hours of operation 08.00 hrs -23.00hrs (within cumulative impact area)
3. 64 Whitegate Drive- **PL1822**-hours of operation 07.00hrs -23.00hrs (within cumulative impact area)
4. 96-98 Whitegate Drive **PL1346** Tesco Express-hours of operation 08.00hrs-23.00hrs (within cumulative impact area)
5. 99-101 Whitegate Drive **PL118 Applicant**- hours of operation 08.00hrs-23.00hrs (within cumulative impact area)
6. 206 Whitegate Drive **PL1922-**hours of operation 07.00hrs-23.00 midnight during Easter and Christmas
7. 305-321 Whitegate Drive **PL1198** B&M Bargains **-**hours of operation 08.00hrs-23.00hrs
8. 285b Whitegate Drive **PL0106-**hours of operation 08.00hrs-23.00hrs
9. 289 Whitegate Drive **PL2117-**hours of operation 07.00hrs-23.00hrs
10. Tesco Service Station **PL1073**- 24 hours.

The applicant has invested approximately £250,000 in the last 2 years and seeks to increase his commercial viability by making an application for 1 hour earlier in the morning and 1 hour later in the evening. Whilst he could open earlier and later at this moment in time (subject to amending the opening hours) he would not be permitted to sell alcohol outside his current hours (08.00-23.00).

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As such he believes that opening earlier or later without the full range of goods being available could cause difficulties between his staff and customers if they attempted to use the facilities post 11 pm but were denied the opportunity to purchase alcohol.

In addition, the availability and the layout of the displays would be difficult to close off, so he feels it is within everyone's interest to make his hours of operation compatible with his Licensable hours.

The initial instructions received were that the applicant wished to streamline and modernise some of the conditions and extend the hours from 07.00hrs - 01.00hrs.

Having reviewed the location and the timings of premises around him, further advice was given for him to moderate his ambitions with regards to the terminal hour and consider midnight as the closing time. The applicant has agreed that this is a sensible proposal so an application will be submitted to reflect the local area risk assessment carried out.

Whilst in the cumulative impact area the application is a variation, not a new application so he has the benefit of being able to establish a certain amount of earned credits over the many years of operation.

The premises were subject to regulatory action in 2014, where a closure order and a Sec51 Review were conducted, the sanctions imposed included a suspension and the imposition of conditions.

The applicant was in the early stages of business at this time and the regulatory action affected him very deeply, emotionally, and finically. Since 2014 he has focused all his attention on the Whitegate Drive Premises, which involved selling off interests in other premises in the town. He has committed substantial resources to the Whitegate Drive store which required heavy borrowing all of which needs to be paid back.

He has improved as an Operator and a businessman since the infractions in 2014 and this should be held up as an example of how the Regulatory system can shape and influence improvements. Since 2014 he has had a good operational record, we hope this fact will be endorsed by the Authorities.

The first steps will be to meet with the Police and Licensing Authority to establish compliance with the conditions on the premises licence and appreciate the spec of the facilities, particularly the CCTV system.

Thereafter if any recommendations are forthcoming from the Authorities with regards to additional conditions, they will be considered and incorporated into the application.

A site meeting has been arranged for 17.30hrs on the 22nd of April 2022, between Lee Petrak, Sgt Nat Cox, the applicant, and his representative.

The applicant wishes to gain as much information as possible to assist in the decision-making process, this will include understanding the impact the extra hours of trading could have, especially the terminal hour of midnight. He, therefore, intends to apply for 2 standard Temporary Event Notices (TENS) each of which will last for 7 days.

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The proposed date of the TENS will be;

TEN 1- **Wed 4th May 2022-Tues 10th May**

TEN2-**Tues 12th May 2022-Wed 18th May**

The TENS will be lodged by COP on Tuesday 19th April 2022, the 10 working days' notice required will therefore commence on the 20th of April 2022.

The TENs are purely for research and analysis. A detailed record of all sales, including alcohol, will be made each evening so the Authorities can understand the pattern of purchases made.

We anticipate that actual alcohol sales will be modest, but the advantage of the secondary spend will hopefully become clearer and therefore the viability argument becomes more evidence based.

As a rough approximation, we anticipate approximately £250 worth of alcohol to be sold in the extra hour (23.00hrs 00.00hrs) over the seven days. We believe that the secondary spend will at least equal this figure there for netting an extra £500 per week. Over 52 weeks of the year this should see the sort of return needed to assist in repaying the loans on the substantial investment made in the premises. However, the TENS will assist in making that business case and hopefully provide reassurance that there is not going to be any dramatic increase in the volume of alcohol sold, this should in turn assist in the argument that the application if granted will not impact negatively on a any of the Licensing Objectives.

The conditions that we will be proposing are the model conditions provided by Sgt Cox;

1. *CCTV will be installed at the premises and will comply with the following:*
    a. *The CCTV system shall be installed, maintained and operated to the reasonable satisfaction of Lancashire Constabulary. The coverage should include the entrance/exit, checkout and main alcohol displays. The system will be capable of providing an image that is regarded as identification standard.*
    b. *The system will display on any recording the correct time and date of the recording.*
    c. *The system will make recordings during all hours the premises are open to the public.*
    d. *The system will, as a minimum, record images of the head and shoulders of all persons entering the premises.*
    e. *Digital recording shall be held for a minimum of 21 days after the recording is made and will be made available to the Police for inspection upon request.*

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2. *A staff member who is conversant with the operation of the CCTV system will be available to attend the premises within an hour if requested by Police. This staff member will be able to show police recent data or footage with the absolute minimum of delay when requested. This data or footage reproduction should be almost instantaneous.*

3. *If the CCTV is not working correctly the Licence Holder shall take immediate steps to rectify the fault. A log of the steps shall be kept and be made available for inspection Police Officer or to a Local Authority Enforcement Officer.*

4. *Appropriate signage alerting customers to CCTV recording shall be displayed in conspicuous positions on the premises.*

5. *A Challenge 25 proof of age policy shall be implemented and adhered to. Any person who looks or appears to be under the age of 25 shall be asked to provide identification that they are over the age of 18. The following are the only forms of identification acceptable:*

   - *A recognised proof of age scheme accredited under the British Retail Consortiums Proof of Age Standards Scheme (PASS).*
   - *Photo driving licence.*
   - *Passport.*
   - *Official ID card issued by HM Forces or European Union bearing a photograph and date of birth of the holder.*

   If no suitable identification is provided the sale of alcohol will be refused.

6. *All staff shall receive suitable training about the proof of age scheme to be applied upon the premises. Records to evidence this shall be made available to an authorised officer upon request. Refresher training shall be conducted every 3-6 months as a minimum.*

7. *"Challenge 25" posters shall be displayed in prominent positions on the premises.*

8. *An authorisation, signed and dated by the Designated Premises Supervisor, shall be kept at the premises showing all persons authorised by them to make sales of alcohol at the premises.*

9. *A refusals/ challenges register to be kept and maintained which will be made available for inspection by a Police Constable or authorised officer and this register will be reviewed regularly by the Designated Premises Supervisor.*

Site Meeting 22nd April 2022

The contents of the proposal were discussed and whilst there were no strenuous objections to modifying any of the conditions on the licence there were certain comments that made us review the requirement to modify conditions.

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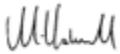
The comment that was noted was that the Licence conditions were very robust, this comes from a review of the licence in 2014. It can only serve as an advantage to retain robust conditions on a licence especially since additional hours are being sought. We will therefore retain the existing conditions leaving in place a robust set of conditions that have clearly served to minimise any issues with these premises for the previous years.

The other matter raised was that the plan held by the Licensing Authority was not up to date, an amended plan is served with the application, but we do not seek to extend the Licensed area in any way. The area added to the plan is stocked with fresh foods and dry goods only.

It was acknowledged by the Responsible Authorities that the CCTV system and the electronic refusal register in place were of an excellent standard, this is a consequence of substantial investment into this side of the business all of which comes with on-call IT support services.

Within a matter of days of the visit, the Premises Licence holder was advised that a Test Purchase was carried out which was successfully passed, although we have no further details with regards to the time, date, and items selected (tobacco or alcohol)



Mark Marshall
Director
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Pre-Application Information, 99-101 Whitegate Drive, Blackpool PL 1118

Appendix 2

5668

From: Cox, Nat <Nat.Cox@lancashire.police.uk>
Sent: 27 April 2022 15:00
To: Mark Marshall; lee.petrk@blackpool.gov.uk
Subject: RE: Pre Application information

Hi Mark

No worries, no objection from here except as discussed, in support of the council policy.

I believe the premises was subject to a test purchase and passed but it was nothing to do with my team.

Cheers

Nat

Nat Cox (3390)
West Licensing Sergeant
Bispham Police Station
Mobile 07970 336242
Phone 01253 604074
nat.cox@lancashire.police.uk

From: Mark Marshall <info@mm-squared.co.uk>
Sent: 27 April 2022 11:26
To: lee.petrk@blackpool.gov.uk; Cox, Nat <Nat.Cox@lancashire.police.uk>
Subject: Pre Application information

Hi

I have submitted the variation for Kadish on Whitegate Drive.

Following the meeting, I picked up on a few matters,

1. The conditions on the licence are robust, as such, they should not really be amended if we are seeking additional hours, the theory being if they have worked well for the last 8 years there is no reason why they shouldn't continue to work for the extra hour at the end of each day
2. The plan you had was not up to date so I have amended that and submitted a new one with the application. I have updated the pre-application information to redefect our modified position.

I understand you may have conducted a test purchase shortly after our meeting? Please can you confirm the details, Kadish tells me he was successful but it would be good to know the time, date, items that were chosen for the purchase, and challenges made form the staff.

I have still had no reply from Dave regarding his observations of the premises? It's not essential as generally speaking being a decent compliant operator makes no difference but always better to have too much information than too little if this can be organised at some point.

Best wishes

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Cumulative Impact

This article relates to the issue of evidence in licensing hearings, specifically in relation to applications in a cumulative impact policy area.

Cumulative Impact is an important licensing concept which, unusually, arises entirely outside of primary legislation.

What is Cumulative Impact?

"Cumulative impact" is not mentioned specifically in the 2003 Act. It means the potential impact on the promotion of the licensing objectives of a significant number of licensed premises concentrated in one area. (Section 182 Guidance para 13.19)

Problems occurring as a result of cumulative impact are described as large numbers being concentrated in an area, for example when leaving premises at peak times or when queuing at fast food outlets or for public transport.
(Section 182 Guidance 13.20).

Large concentrations of people are of concern in Cumulative Impact Zones (CIZ) because they may also increase the incidence of disorder or criminal activities in the street. Local services such as public transport services, public toilet provision and street cleaning may not be able to meet the demand posed by such concentrations of people leading to issues such as street fouling, littering, traffic and public nuisance caused by concentrations of people who cannot be effectively dispersed quickly. (Section 182 Guidance 13.21).

These are the reasons for implementing Cumulative Impact Policies (CIP's) and these, therefore are the types of impacts that should be examined when considering new applications within CIP areas.
The s182 Guidance also makes it clear that there should be an evidential basis for the decision to include a 'special policy' within the statement of licensing policy. (Section 182 Guidance 13.23). This is confirmed in:

R (on the application of JD Wetherspoon) v Guildford Borough Council [2006] EWHC 815 (Admin)
in which Beatson J ruled that any application in a CIZ should be judged against the reasons and evidence for the CIP being introduced in the first place. For example, a CIP introduced on the basis of evidence of cumulative impact of vertical drinking establishments leading to violent disorder, or of takeaways leading to excessive littering would not be impacted by an extension of licensable activities at a restaurant. The cumulative impact identified must be pertinent to the evidence founding the policy, and this should be part of any representations to the Licensing Authority where there is an application in a CIZ.

CIPs in Statements of Licensing Policy

CIPs cannot be used to justify rejecting or modifying applications to vary an existing licence except where the rejection or modifications are directly relevant to the CIP and are strictly appropriate for the promotion of the licensing objectives. (Section 182 Guidance 13.36) It should be possible to tell, from the Statement of Licensing Policy where the CIP is set out, whether modifications are directly relevant to the Cumulative Impact policy or not.

It is instructive to look at the Cumulative Impact Policy of Guildford that was under consideration in ***Wetherspoon v Guildford:***

> Para 14. "The opening paragraph of the defendant's statement of its special policy on cumulative impact states the Bridge Street area "has been identified as being under stress because the cumulative impact of the concentration of late night and drink led premises in this area has led to serious problems of crime, disorder and/or public nuisance".
>
> P. 23. …Bridge Street is an area designated by Guildford Borough Council as one of cumulative impact. ***The evidence for this has been previously submitted and is recorded at appendix 6 of the Guildford Borough Council Licensing Policy.***
>
> P. 48. [Mr Kolvin] submitted that, since ***the rationale for the defendant's special policy was crime and disorder associated with a surfeit of late night drinking***, it was clearly not perverse for the defendant to find it was an application for a material variation. By "material variation", Mr Kolvin meant that ***the variation was directly relevant to the special policy*** in force for Bridge Street as opposed to the statutory licensing objectives**."**

P. 74: Beatson: "In the present case ***the Secretary of State's guidance expressly states that it applies to variations that are material to the reason for the adoption of the special cumulative impact policy".***

P. 83. Beatson: " For the reasons given in the sections of this judgment dealing with the guidance and the statement of policy, the words "material variation" are capable of including a variation of hours if such variation is directly relevant to the cumulative impact policy. ***A variation will be directly relevant to the special policy if, for instance, it would create further late hours drinking in a drink led establishment in an area suffering crime and disorder because of a concentration of licensed premises and late hours drinking in such establishments in the area***."
[All emphasis added].

These excerpts from ***Wetherspoon v Guildford*** make it very plain that the evidential reason for the Cumulative Impact Policy should be set out, in the Statement of Licensing Policy, for all to see. Only then can a determination be made as to whether an application is directly relevant to the CIP or not. Only then can applications be made, adopting the correct burden of proof, and the Applicant be enabled to rebut the presumption and show why the particular reasons for the Cumulative Impact Policy do not apply to him. Only in this way can it be seen whether a CIP has been imposed because of (i) problems of intoxicated people leaving drinking led establishments contributing to crime and disorder in key hotspots; or whether the problem is (ii) accumulations of people in certain areas at certain times leading to conflict in queues for taxis or fast food outlets; or whether the problem is (iii) the numbers of people leaving all kinds of licensing premises at the same time and causing noise in residential areas, or any of a vast number of other potential reasons as to why a Cumulative Impact Policy might be imposed. It is categorically not enough to say that CIPS are always imposed for the same reasons – they are not. A quick glance at the various Statements of Licensing Policy, and CIPS around the country quickly reveal that. It would, for example, be possible for a new application for a restaurant to argue that they did not contribute to the Cumulative Impact problem in scenario (i) above , but it would not be possible for them to argue that they did not contribute in scenario (iii). Without knowing and making explicit the evidential base, it is impossible to approach this application process, or decision making exercise correctly.

A CIP can never be absolute. Statements of licensing policy should always allow for the circumstances of each application to be considered properly and for applications that are unlikely to add to the cumulative impact on the licensing objectives to be granted. After receiving relevant representations in relation to the

variation of a licence, the licensing authority must consider whether it would be justified in departing from its CIP in the light of the individual circumstances of the case. The impact can be expected to be different for premises with different styles and characteristics. If the licensing authority decides that an application should be refused, it will still need to show that the grant of the application would undermine the promotion of one of the licensing objectives and that appropriate conditions would be ineffective in preventing the problems involved.

The effect of adopting a CIP is to create a rebuttable presumption that applications for the grant or variation of premises licences or club premises certificates which are likely to add to the existing cumulative impact will normally be refused or subject to certain limitations, following relevant representations, unless the applicant can demonstrate in the operating schedule that there will be no negative cumulative impact on one or more of the licensing objectives. However, a special policy must stress that this presumption does not relieve responsible authorities (or any other persons) of the need to make a relevant representation, referring to the evidence and information which had been before the licensing authority when it developed its statement of licensing policy, before a licensing authority may lawfully consider giving effect to its special policy.
If there are no representations, the licensing authority must grant the application in terms that are consistent with the operating schedule submitted. (Section 182 Guidance 13.29 and 13.30).

This means that there must be representations before a Sub-Committee could refuse an application in a CIZ, and it also means that there must be adequate information or evidence before the Licensing Authority on which the Sub-Committee could base any determination to refuse the application. Licensing authorities may not refuse any applications other than for good reason. In the case of a CIP, that good reason may well be that the applicant has failed to discharge their burden – the rebuttable presumption – that their proposal will not increase the impact on the cumulative impact zone. That is still evidence upon which the Sub-Committee can base their decision.

Where the Applicant puts forward a case, however, that they will not add to the cumulative impact, what is the position for objectors to the application? Must they too produce evidence, or it is enough simply for them to point out that the application is in a Cumulative Impact Zone and stay silent?

It is not uncommon in dealing with applications in the CIZ to find that a representation from the Police, or another, does nothing more than assert that the premises are in a CIZ and then insist, as a direct result of this fact, that the application ought to be refused.

Where the applicant produces evidence which, on the face of it, is persuasive that they will not add to cumulative impact, what approach should responsible authorities, and the Sub-Committee take then? What does "rebutting the presumption" actually mean?

This often arises in the context of an applicant adducing empirical evidence that the extension of hours would not be likely to have an adverse effect on the cumulative impact in the area, for example, by pointing to events which have been held in the recent past at the hours applied for, under the authorisation of TENs (Temporary Events Notices). This is often said to demonstrate empirically that trading to the later hour does not give rise to increased incidents or impact at the relevant times.

R (on the application of Portsmouth City Council) v 3D Entertainment Group (CRC) Ltd [2011] EWHC 507 (Admin).

This case concerns the nature and quality of evidence that should be adduced in a cumulative impact case, both by the applicant, in trying to rebut the presumption, and also by responsible authorities trying to resist the application.

It is not the most straightforward of cases to understand and to a certain extent, it turns on its own facts. On the face of it, this case could be read as meaning that the police and other objectors do not have to do anything at all in a cumulative impact case, other than point out the existence of the CIP. But can that be right?

The Council appealed to the High Court against the decision of the Magistrates' Court sitting in Portsmouth. The Magistrates had allowed the appeal of 3D Entertainment against the refusal by Portsmouth City Council's Licensing Committee to allow the Respondent to amend its premises licence in respect of a night club called Route 66, to extend its opening hours from 2am to 3am Monday to Saturday and from 12.30am to 3am on Sunday. The Club was in the Cumulative Impact zone.

In the first place, the Magistrates erred by directing themselves that they did not need to follow the approach set out by the Court of Appeal (Civil Division) in ***Sagnata Investments v Norwich Corporation [1971] 2 All ER 1441*** when dealing with appeals of this nature. This was clearly wrong.

The magistrates in their written reasons said as follows "Our view is that as an independent and impartial tribunal in the context of licensing applications, we should not be following the approach of Sagnata." They

went on to say that they were entitled to "look" at the decision-making process and "reasoning" adopted by the council but did not consider themselves in "any way" bound by it. In the final statement of the case the magistrates stated "Our view was that to be truly independent at re-hearing, which is de novo, we should not be influenced by decisions at an earlier hearing. Given those circumstances, the doctrine of precedent we felt should be abrogated."

This was the starting point of the High Court's decision to overturn the Magistrates' determination. It is highly likely that this coloured the High Court's approach to the whole case.

It appears that what the Magistrates actually did in their determination was to conclude that the Appellants had discharged the burden of proof, and had rebutted the presumption, simply by setting out some conditions in their Operating Schedule. The Magistrates found those conditions persuasive in concluding that there would be no additional cumulative impact, but, objectively, it was hard to see why they should reach such a conclusion.

Supperstone J:

"[13] The magistrates found that the conditions put forward by the Respondent on the appeal were sufficient to demonstrate that there would be no cumulative impact on any of licensing objectives. The three conditions were as follows: (1) no re-admission after 1 am; (2) an ID scanner would be used; (3) all drinks to be sold in polycarbonate glasses or PET bottles, and, when not available, they would be decanted into polycarbonate bottles.

[14] Mr Lucie submits, and I agree, that conditions (2) and (3) relate only to the premises themselves and will have no impact outside those premises. Condition (1) was said to be "a significant condition which will prevent any migrating customers". The magistrates do not state what this means. It may stop persons migrating to Route 66 after 1am but it cannot mean that it will prevent people migrating away from Route 66 after that time. Those migrating away from the premises will add to the cumulative impact."

The reality, therefore, was that the Magistrates had no cogent evidence before them from the Appellants that was capable of discharging their burden, and rebutting the presumption against the premises that there should be no grant in the Cumulative Impact Zone.

Having accepted those conditions as being sufficient to discharge the burden, however, the Magistrates then turned to the Police, as responsible authority, and placed the rest of the weight of the case on their shoulders. The Magistrates looked to the Police, and through them, the Council to persuade them, with "hard evidence" that there *would* be cumulative impact if the application were granted. They expected also that the Council

and Police would "investigate" the cumulative impact, and produce evidence accordingly. This, the High Court found, was the wrong approach, and it is not difficult to see why, in the context of this case. The Magistrates essentially had removed any burden upon the Appellant, other than to put forward an Operating Schedule, which did not really deal with cumulative impact at all, and to make an assertion that they would not add to cumulative impact. Evidentially, this is not of probative or persuasive value, and very clearly, this should not have been accepted as discharging the burden at all. In all the circumstances, what the Magistrates effectively did was to reverse the burden of proof, and put all the hard work onto the Police. This is clearly wrong.

What of the situation, though, where the Appellant goes much further than 3D Entertainment , and does produce quality evidence that is capable of discharging the burden of proof upon them, and rebutting the presumption against them. Is it sufficient in those circumstances for an objector, or a responsible authority simply to assert that the premises are situated in a CIZ, and that therefore the application should not be granted? Too often, in these situations, the objector or authority will claim, using 3D Entertainment as support, that they do not have to do any more, as they cannot be required to produce "hard evidence". This is to misread and misunderstand the case.

If the Applicant does indeed take strides in rebutting the presumption, then the responsible authorities have to step up to the plate if they wish to challenge that stance. It could be said that they have to "rebut the rebuttal", and they have to do it with evidence, not with bare assertion. There is nothing in 3D Entertainment to undermine such an approach.

P. 73. Wetherspoon v Guildford: Beatson J:

" A reversed burden of proof does not preclude consideration of the "merits" of an application."

It is also worth considering s182 Guidance para 9:12 concerning representations from the Police.

The problem often arises, in the perennial way, where responsible authorities assert that they have evidence of incidents and problems logged against the premises, which may or may not be produced, even in summary format, and any attempt to probe or substantiate that evidence is resisted on the basis of ***3D Entertainment***, with the assertion that hard evidence may not be demanded.

This is unreasonable. The maxim "he who asserts must prove" is well established. This maxim ought not to be departed from just because of a Cumulative Impact Policy.

3D Entertainment:

In stating a case for the High Court, the Magistrates did, it appeared possibly for the first time, accept that the burden was on the Applicants when they stated:

"It is in the Applicants' obligation to produce evidence given the special policy."

However they qualified this by stating:

"But that evidence must be effectively challenged and objectively assessed."

Supperstone J was suspicious:

Supperstone J:

"They do not explain what this qualification means in terms of how they applied the policy and, in particular, the reverse burden."

If they had explained themselves – or if that had been possible – then all might have been well. As a basic proposition, this proposition does not seem objectionable. What appears to have happened, and the reason for the Learned Judge's disapproval was that, notwithstanding the correct identification of the appropriate approach in the Statement of Case, this was not the approach that the Magistrates had in fact adopted, and they could not argue that, somehow, they had, by rewriting history in the way that it ought to have been.

Supperstone J:

"[11] Mr Lucie *[Counsel for the Appellant, Portsmouth City Council],* submits, by reference to the matters he refers to in para 34 of his skeleton argument, that the magistrates adopted an approach that was not

consistent with the policy and, in particular, the reverse burden. In my judgment, ***the magistrates failed properly to apply the special policy in particular by requiring the police and the council to adduce evidence that there would be a negative cumulative impact. This amounted to an error of law.***

[18] For the reasons I have already given, the magistrates, in my judgment, erred in law in concluding that the Appellant [*Portsmouth Council]* had to have "hard evidence" from the police and that there was duty upon it to "investigate the cumulative impact". ***The burden was on the Respondent to persuade the Appellant that the operating schedule was such that there would be no cumulative impact.*** In applying the wrong test, the magistrates fell into error in finding that the Appellant had acted unreasonably. Further,

having found the conditions put forward by the Respondent on the appeal (one of which they described as "significant") were sufficient to demonstrate that there would be no negative cumulative impact on any of the licensing objectives, the magistrates were dealing with an application that was different to the one presented at the Committee."

All the highlighting in bold and italics is mine. It is implicit in what the Learned Judge was saying that the Magistrates did not apply the Special Policy (CIP), and looked to the Police and Council first and foremost to discharge the evidential burden concerning cumulative impact, which was entirely the wrong approach. Had the Applicants, 3D Entertainment, successfully discharged their burden first, in the proper way, it cannot then be objectionable to require the police or other objector to back their continued resistance to the application with some kind of cogent probative evidence, and not just bare assertion.

It can clearly be seen how a Cumulative Impact Policy is intended to work. Where there are relevant representations to the Licensing Authority, all the work thereafter falls on the Applicant to demonstrate to the committee's satisfaction that their application will not add to the cumulative impact. The Applicant must demonstrate this first and foremost in their Operating Schedule. Those making representations, including residents and responsible authorities, do not have to produce "hard evidence" that there will be an impact; they simply have to make representations that trigger a hearing. Of course, those making representations, whether individuals (no longer referred to as "interested parties"), or responsible authorities will no doubt give some explanation in their representations as to why there will be an effect on the Cumulative Impact zone, but they are not required to back it up with evidence. The burden of proof is on the Applicant.

Crucially, the Applicant faces a burden that relates to matters more extensive than simply the operation of his own premises and the compliance with the four licensing objectives. The Applicant must demonstrate that the licensable activities, and the behaviour of his clientele once they have left his premises will not contribute to the overall Cumulative Impact in the area. This is a wider consideration than a standard application, which would normally not consider the behaviour of patrons once they are away from the immediate vicinity and direct control of the licensee. A Cumulative Impact Policy is designed to be different, and this is an important consideration.

BREWDOG

A case in which the proper approach to evidence, and a Cumulative Impact Policy has been tested is ***Brewdog Bars Ltd v Leeds City Council in the Leeds Magistrates' Court. District Judge Anderson 6/9/12.***

The District Judge was assessing an application from an operation known as Brewdog. They are a Scottish company specialising in craft beers with a "devoted clientele". They do not operate large public houses selling cheap lager or cheap food. They have outlets in other cities including in cumulative impact areas where they operate well and without police objection. They made an application to come to Leeds.

Their customers, according to DJ Anderson, could be described as "alcohol geeks." He said: "They are not run of the mill or everyone's cup of tea, but there is a demand for outlets selling a good quality of beer".
And he called them : "an intelligent, well-run company, and in a short space of time they have shown themselves to be an effective operator".

He acknowledged that the application was in the Cumulative Impact Policy area in Leeds.

He noted the objection of the Police and the potential impact of another premises on the levels of crime in the area. But, he said:

"It cannot be the policy of the Cumulative Impact Policy to bring the iron curtain clanging down to allow [certain other clubs] to continue to trade while shutting out Brewdog which attracts more discerning customers who do not engage in binge drinking, though I do accept the requirement of the Cumulative Impact Policy is to ascertain specifically whether there will be impact.

If I accept, as I do, that the enterprise sells expensive beers in expensive measures, then I think I can conclude that the people likely to be attracted are not "get it down your neck" drinkers but rather better heeled customers. The type of clientele a premises attracts has a material part to the play in the decision, because if I am not worried about their clientele and am impressed by the running of their bars elsewhere, it follows that it is unlikely that their clientele will have any adverse impact on the area here."

The Police argued that customers may 'accidentally' cause impact. Their argument was that customers could get caught up in a melee caused by others, but the District Judge said that their argument was not a valid one. He said that a simple increase in footfall isn't a rational reason to refuse entry to Leeds by Brewdog.

He said he had heard nothing which caused him to believe that the application should not be granted, and that he was satisfied that the appellants had discharged the burden of proof placed on them.

He said: “I accept that the Committee and the Police did their best but their application of the Policy was too rigid. They seemed to take the view that man was made for the Policy, when the Policy should be made for man.”

The licence to Brewdog in the Cumulative Impact Zone was granted.

The exercise of weighing and evaluating this case is left entirely to the reader.

November 2012

Sarah Clover
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Clerked by: Gary Smith
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Appendix 4

Cumulative Impact Policies: more honoured in the breach?

Gerald Gouriet QC
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Introduction

The sub-title to this talk is taken, of course, from Hamlet:

"… it is a custom more honour'd in the breach than in the observance."

I have had reason to wonder, in the last year or two, if some licensing authorities more honour their CIPs in the breach – whether they more often grant a licence in the teeth of their own policy, than apply the policy and refuse applications in accordance with its terms. And if they do so, why? In the imagined words of a notional bystander: *"What on earth is going on?"*

The licensing authority for one of our cities (one of a handful that compete for the reputation as "The Binge Drinking Capital of England") recently granted an application in its cumulative impact zone for premises that would accommodate nearly a thousand people, authorising the sale of alcohol and unrestricted music and dancing until 01:00 in the morning, 7 days a week. I find it very difficult to see how that could do anything other than add to the existing cumulative impact: but the application was granted – not as an exception to the policy, but because (on no cogent evidence: mere assertion) it was said that *'there will be no additional cumulative impact'.*

So: what is going on?

Nature and purpose of cumulative impact policies

My starting point is to remind myself of the problems that cumulative impact policies are intended to solve. The policies began life in Westminster back in 2001/2. The problems were described –

*"We also recognise the cumulative effect that licences can have on an area. In some mixed residential and commercial areas, a few well **managed [licensed] premises** or night cafes may be able to operate without harming local residents. In these areas, however, the cumulative effect of more and **more such premises** may be such that an adverse effect on local residents is impossible or virtually impossible to avoid. It is argued that in some areas the number of **such premises** has reached saturation point. Consequently, in these areas it would be undesirable to licence any more entertainment premises or night cafes."*

[The emphasis and underlining are mine.]

High Court approval of cumulative impact policies came in the Chorion litigation [1]. The language of the Crown Court judge (as summarised by the High Court) is instructive:

"The first question was whether, notwithstanding the applicant was a fit and proper person and the premises would be well managed, a … licence could be refused on the sole ground that the area was already saturated with licensed premises… and that the cumulative effect of the existing premises was impacting adversely on the area to an unacceptable degree. The answer to this [is] 'yes'."

[underlining mine]

In the High Court, the need for a CIP in Westminster was succinctly put by Scott Baker J:

"The nature of the problem is such that it is cumulative rather than attributable to any specific individual or licensed premises."

The judge continued –

"It is both understandable and appropriate for the Claimant to have a policy in the light of the problems it has identified in the West End. The policy needs to make it clear that it is not directed at the quality of the operation or the fitness of the licensee but on the global effect of these licences on the area as a whole."

Why the problems experienced need to be addressed by a CIP

The evidence in the Chorion case was that the alcohol-fuelled issues on the street (crime, disorder, nuisance) could not with any certainty be traced back to any particular licensed premises; and that even well-run premises, with a decent client base against whom there could be no justifiable criticisms, were making their own contribution, however small, to the cumulative impact experienced away from the premises themselves. The 'global effect' Scott Baker J spoke of was the sum-total of all these small contributions – i.e. the cumulative impact. The Court sympathised with the proposition that it was next to impossible to take effective action other than by stemming the growth of additional licensed outlets.

Exceptions to policy

Scott Baker J concluded his judgment with guidance that finds an expression in most of the cumulative impact policies I see today –

"If the policy is not to be consistently overridden in individual cases it must be made clear within it that it will only be overridden in exceptional circumstances and that the impeccable credentials of the applicant will not ordinarily be regarded as exceptional circumstances. It should be highlighted that the kind of circumstances that might be regarded as exceptional would be where the underlying policy of restricting any further growth would not be impaired. An example might be where premises in one place would replace those in another."

One might have thought the *Chorion* case had settled the issue once and for all: but in recent years I have seen great bundles of testimonials in support of applications, which only say that like premises elsewhere are well managed and cause no (on-site) problems. And these bundles have been accepted by licensing sub-committees as persuasive, if not determinative.

If there is one principle above all others that stands out in the above citations, it is that even well-run, incident-free premises play a rôle in contributing to the adverse

cumulative impact experienced in our towns and cities; and it is no answer to a cumulative impact objection to say “my premises are well managed and there are no on-site issues.”

It is legitimate, therefore, to conclude: **“Cumulative impact policies came into being to solve the problems caused by well-run premises.”**

Having discussed the origins of cumulative impact policies in 2001, and identified their purpose then, the question arises: is there any evidenced need for such policies today?

The best of times. The worst of times.

It is very difficult, these days, to come to a reliable conclusion on any issue the supporting facts for which are derived from the press or television reports. It is not so much the exaggeration indulged-in to make a good story better (though there is plenty of that), as it is the wildly different accounts we get from one day to another, from one report to another, from one testimony to another. Just as last week we were told that ‘an Aspirin a day’ is good for us (if not essential), and this week we are told it will kill us; so binge drinking was once on the increase, and now it is on the decrease - and tomorrow no doubt it will be on the increase again; alcohol-fuelled crime is under control, and at the same time out of control; drunken anti-social behaviour is not what it used to be, and is worse than it ever was.

Who to believe?

I had no difficulty in believing the Bishop of Beverley, who in a recent case gave the following evidence:

“The side of the church’s property and my back garden backs on to Trinity lane where there is a 14th Century building called Jacob’s Well. Drinkers regularly use Trinity Lane as a urinal. They urinate up against the gate (not the wall) which means the urine seeps under the door. ***This happens a couple of times a month****. I have seen human excrement on the street which has had to be cleaned up.* ***This happens once every couple of months.*** *At* ***least once a month*** *I also have to clear away broken bottles on the road.*

*Whenever I leave to get to the train station I have to go down Barker Lane. Barker Lane is commonly called ‘Sick alley’ – for obvious reasons. I have to negotiate walking past the sick as well as the numerous bottles left there. Thi****s is almost a daily occurrence****.*

I recently had to apply for listed building consent to install secondary glazing in my home because the noise from the street was that bad. It had got to the stage where it was difficult to have a quiet night’s sleep/rest on an evening. This has helped considerably with the noise when inside my home, but walking to and from anywhere… at the weekend does mean that we have to brave the hoards and the noise – which on Saturday starts at lunchtime. ***I would not be able to say where any of these people are going to or coming from.***

The Church yard attached to the Church is a magnet for drunks and also those that are searching for some ‘privacy’. We have caught people ‘in flagrante’ in the

daytime, but invariably we find condoms and underwear in the church yard on Sunday mornings."

A pretty picture. And from an impeccable source.

A licensing consultant recently gave this evidence on an appeal – which I think has the ring of truth about it notwithstanding the absence of a Crook and Mitre:

"My experience (includes)… a report commissioned for the Tonight Programme on young people's drinking culture (Broadcast Thursday 17th April 2014), and the drinking habits of my own 22 year old son and 19 year old daughter. The evidence drawn from these sources is that young people go out with the intention of getting drunk."

First-hand experience

Nor am I inclined to discount my own observations. Recently, in order to resolve the conflict arising from one independent expert saying that patrons of a certain nightclub were noisy, drunk and occasionally violent, and another independent expert saying that he had rarely encountered such an orderly dispersal, I turned up at the subject premises at their 03:00 a.m. closing time to see things for myself. I had not been there two minutes when a twenty-something clubber (very well-dressed) tottered out of the premises and vomited on the pavement next to me. Another urinated in some weeds growing near the bus stop where a noisy group was shouting abuse (or maybe praise) at the well-dressed 'vomiter'. The noise as more and more poured out from the club was awful. The door-staff were hopeless. There were unmistakable signs of drugs misuse by the clubbers: pupils the size of saucers; silly smiles; trance-like drifting in and out of moving traffic. The occasional blasting of car horns was certainly enough to wake anyone trying to sleep in the nearby houses and flats. The sudden bursts of laughter, the horseplay, the shouting and screaming from departing clubbers would surely have kept them awake.

A couple of weeks ago I went to Norwich on a Saturday night. I had read that Prince of Wales Road was the most dangerous street in Norwich, and that "*you take your life in your hands if you go there after midnight on a weekend."* A site visit was irresistible. I knew I was safe when I saw how many uniformed police officers were already stationed there. About 30 on my first count – but the number grew as more patrol cars arrived. What impressed me more than the number of drunk people coming out of the clubs and bars was the number going into them. Of course not everyone milling around the streets was drunk – but a significant number were. From time to time it was indeed 'intimidating' (a word we so often hear from resident objectors, and too often disparage) to run the gauntlet through a group blocking the pavement. I was occasionally subject to mild verbal abuse.

I entered licensed premises well known to me as claiming to have a "mature" customer base, and for not being "a music venue", "serving food", etc., according to the over-used mantra. The music-level was as deafeningly high as I have ever heard in any nightclub. There was no shortage of mildly drunk 20-30 year olds; and a good few, of that age band and older, were already (it was only 12:30) way past "mildly drunk". Needless to say, there was no sign of food being eaten – or even available. In short, there is absolutely no question but that many of these premises'

customers would undermine, significantly, the Norwich cumulative impact policies, when they spilled out, drunk and in high spirits, into the city night.

I spoke to a police officer about these and other licensed premises known to me – brand-names popping up all over the Country: he said that the premises themselves were 'OK', and they did not give rise to *'many'* problems on site. It was what was on the streets, he said, that was his principal concern.

My practice takes me to many towns and cities other than Norwich. And I have sometimes been curious enough to leave my hotel room and take a look around me late at night and early in the morning. What I saw in Norwich on a Saturday night was little different from what I have seen, for example, in Newcastle, York, Manchester, Nottingham and Birmingham.

In 2015 figures from The Office for National Statistics appeared to show that binge drinking among young adults was on a downward curve; and in 2016 the proportion of adults who said they drink alcohol was said to be at its lowest level since 2005. Then, in 2017, The Journal of Studies on Alcohol and Drugs reported that binge drinking has fallen among college students. But no statistics, no sheet of paper with numbers on it, can persuade me to ignore what I have witnessed with my own eyes. However much better things may be than they have been (and that is open to question) there are undoubtedly alcohol-related (drunk-related!) issues in the UK, serious issues, which still need to be addressed.

In answer to the question I posed at the top of this segment, therefore, I have no doubt whatsoever that there is a present need for cumulative impact policies in a number of licensing districts throughout the UK. It would be absurd to conclude otherwise.

I now turn to the implementation, or otherwise, of cumulative impact policies in licensing areas where they have been adopted.

What is going wrong?

To be clear: first of all, many licensing authorities *do* decide applications in accordance with their cumulative impact policies – each case, of course, being decided on its merits. Nothing is going wrong there.

Secondly, I am not saying that every grant of a new premises licence in a cumulative impact zone means that something is "going wrong". A grant, such as the recent grant of a licence for Koko (Camden Palace) seems – I do not know the details – to be a good illustration of things "going right".

Thirdly, even if a new licence will add to the cumulative impact in an area, it may still properly be granted if the licensing sub-committee thinks that the 'Hope & Glory balance' [2] tilts in its favour.

So: when I say "something is going wrong" I am referring to grants of new licences in cumulative impact zones, in respect of premises whose customers (away from the premises) will certainly add to the familiar list of anti-social problems; which premises have *nothing material to the question of cumulative impact* to distinguish them from the existing bars and clubs in the area.

I am truly perplexed by some of these grants, and in preparing this talk I have tried to figure out why the sub-committee has so decided. Here are six possible answers:

(1) Sub-committees too readily buy the sales-pitch (*no matter how far-fetched it is*)

I sometimes think there is a crib-sheet doing the rounds of "things to say" (whether they are true or not) when you want a licence in a cumulative impact zone. I mention that because I have begun to see, from application to application, *precisely the same words and phrases cropping* up in different witness statements, in support of different applications, by different operators, represented by different lawyers – as though these words and phrases have been 'cut-and-paste' from some master document.

My imagined crib-sheet might read –

"Say:

> **We have a mature customer base**: it is immaterial that your customers are mostly in their twenties – go ahead and say they're in their late thirties and forties. It's notoriously difficult to assess a person's age, so you won't be found out.
>
> **We don't encourage students**: get your private investigator to visit your existing premises during the holidays.
>
> **We are food-led**: you can give whatever figures of the 'alcohol/food split' you like – no one will be able to contradict you.
>
> **We are hiring in a well-known chef**: he/she needn't be employed – a consultancy will do (but don't volunteer this). They needn't even be well-known! Get them to talk about their "passion" for whatever gimmick food offering you have in mind. "Passion" is the big thing right now.
>
> **We will have 75% of the floor area given to seating**: people drink while they're sitting down, so don't worry: just make sure you don't agree to restaurant conditions. Say you want "flexibility" – no-one will press you as to what exactly that means.
>
> **We are not a music venue**: say that your disk-jockeys only play background music.
>
> **We are not a dance venue**: so long as you don't have a dedicated dance-floor, people can do the conga round the whole place every night of the week if you like.
>
> **There have never been any problems at our existing premises**: although this is wholly irrelevant to cumulative impact, get as many witnesses as you can to say that your existing premises don't cause any problems. Fill your application bundles with them. There cannot be too many pages. Neighbours (like the bank next door) who shut up shop at 5:00 are sure to be able to help.
>
> **Find some gimmick**: exotic cocktails and craft beer are almost played to death – but there is still life in them. Have you thought about a "cocktail

sommelier"? How about "Local beers, wines and ciders, carefully matched to [whatever specialist food will be on the menus]"? Find *something* to hang your application on. Anything that deflects attention from the cumulative impact of your drinkers when they have left the premises.

If that parody seems unfair, let me assure the reader that I have heard every one of those claims made, and a licence granted on the back of them; but when the premises have opened, it has been a very different picture. Which brings me to my second suggestion as to why things are "going wrong":

(2) There is insufficient follow-up by sub-committees *(or by anyone else)*

I often wonder if there is *any* follow-up. The country is littered with licensed premises in which the reality falls far short of (or may be wholly different from) what was promised on application. If councillors sitting on licensing sub-committees would only see for themselves (as I have done, frequently) the utterly disappointing finished product – how it operates, who in fact are its customers, how loud the music is – they may be more inclined to look critically at the exaggerations and bland promises offered to them at hearings.

(3) Sub-committees accept evidence at face-value *(little or no testing of the evidence)*

Perhaps it is a function of licensing sub-committees not being at ease with the concept that some witnesses (putting it mildly) tend to exaggerate, and others (putting it bluntly) lie their heads off? The licensing justices, who also sat as magistrates in criminal cases, heard more lies from the witness box, I dare say, than they heard truth. They had no compunction in dismissing evidence as poppycock. By contrast, I find that many local authority sub-committees shrink from any hint that a witness may be untruthful: there is a 'Bateman cartoon' of horrified faces if any such suggestion is made.

Applicants for licences are just as capable of being untruthful as anyone else. An applicant may say of his existing premises (forgive my repeating the list) –

"We have similar premises elsewhere – there is only background music; our customers are mature (not the 18-25s); there is no dancing; we serve food throughout opening hours; we are more a restaurant than a bar."

– when the reality (for anyone that has the opportunity and inclination to look for themselves) is that a DJ plays loud dance music every night, as in a recent case of mine; or that there is an availability of food, rather than the service of it; or that similar operations are not restaurants at all but bars serving alcohol. In one case in which I was involved, investigation found that student discounts were offered – where assurances had solemnly been given that the style of operation "did not attract students".

Regrettably, the unwillingness of sub-committees to believe it even *possible* that witnesses might lie to them has had the unfortunate consequence of developing a culture – or something close to it – in which just about anything can be said at a licensing hearing without fear of contradiction. There is no real scrutiny or testing of evidence. Cross-examination is rarely allowed; and if it is, most sub-committees loathe it, especially if done effectively. The truth does not always come out on its

own, and the usual means of teasing it out are not liked by sub-committees, and discouraged at hearings. As a result, some witnesses, as the saying goes, “get away with blue murder”.

Of course licensing sub-committees *expec*t to be told the truth – that is how things should be: but it is not always how they are. It is a matter of genuine sadness to me, over and above mere regret, that I find increasing numbers of witnesses – and even a few lawyers – who seem to have no qualms about misleading a committee or court. When two ‘independent’ experts give diametrically opposed evidence, and there is no reconciling their versions of events, and it is impossible to smooth things over by saying one of them is simply mistaken or perhaps exaggerating a little, *then, unhappily, one of those experts is probably not telling the truth*. And as for lawyers – all I will say here is that we are required by our codes of conduct <u>never</u> to mislead a court or tribunal: about the law, about the evidence, or even about our availability.

Children and puppies will push the boundaries of what they can get away with. If they are not checked, their conduct goes from bad to worse – sometimes, until they are completely out of control. So it is with all of us who attend licensing hearings.

(4) Lack of transparency: pre-hearing meetings

I raised concerns about pre-hearing meetings when I gave evidence last year to the House of Lords Select Committee on the Licensing Act. This is what I said:

I am concerned at the growing extent to which decisions are influenced (if not effectively taken) by the result of discussions taking place behind closed doors, at which not all interested persons are present.

It is usually local communities, residents’ associations or individual local people who are kept out of the loop. The position is best illustrated by an example, which may be taken as descriptive of a number of cases in which I have recently been involved:

- *An application is made in a cumulative impact zone.*
- *There is residential objection, as well as initial objection from the police and other licensing authorities.*
- *Pre-hearing meetings take place between the responsible authorities and the applicant and his legal team. As a result of those meetings the responsible authorities withdraw their representations (or do not make any).*
- *What is said at those meetings is not made public. The meetings are "behind closed doors". All that a licensing committee (or magistrates' court on appeal) hears is that **“the police do not object”,** or **“the responsible authorities have no concerns”.** The police and responsible authorities frequently do not attend the licensing hearing. <u>The basis upon which they have decided not to object is seldom known, and therefore never examined critically.</u>*
- *The objecting resident or association is left high and dry, often being asked “have all the responsible authorities got it wrong?” – when in fact no one knows if they have got it wrong or right: all we know is that they have made no representation, we do not know upon what basis.*

- *The application is granted, undue weight being given to the fact (but not the reasons behind) absence of police objection, and little scrutiny being given to the application itself.*

Sometimes (rarely) one gets to hear what has been said at these meetings between the authorities and an applicant. At other times it may reasonably be inferred that the authorities have been told a similar story to the one told to the residents in trying to persuade them not to object. And that story, as we have seen already, may be a rather 'tall' one.

I am strongly of the opinion that there should be much greater transparency regarding these behind closed doors pre-hearing meetings. In particular, it is essential that reasons are given (by the relevant responsible authorities) for not making representations.

But even with the benefits of transparency, pre-hearing meetings can sail too close to the equivalent of a hearing. If attended heavy-handed (as in my recent experience) there is a vulnerability to 'discussion' being steamrollered to 'decision' when not all interested persons are present, or if they are present, not having come to the meeting prepared to argue their position to a conclusion.

(5) Lack of objection is not the same as support

A fifth culprit for "things going wrong", touched on above, is the undue importance sometimes given by sub-committees to the absence of any representation on behalf of the police or any other responsible authority. Frequently, the lack of any representation means nothing more than that an applicant has given various assurances to the police or licensing officers – at those 'behind closed doors meetings' already discussed – and the authorities are satisfied that, ***if those assurances can be relied on***, they would have no objections. The all-important question – *can* the assurances be relied on? – never gets asked.

I have been told by police officers that they have neither the resources nor the time to investigate the truthfulness or otherwise of the various promises and assertions made at pre-hearing meetings. Their lack of objection, on analysis, is no better than: "If what we have been told is true, then there is no ground for objection" - but it is held out by applicants (and sometimes accepted by committees) as being support.

Current Home office guidance is that "*The police should be the licensing authority's main source of advice on matters relating to the prevention of crime and disorder licensing objective... The licensing authority should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives."* That guidance is wrongly interpreted by licensing authorities: absence of police (and other) objection is too frequently equated to a representation in favour, and taken as determinative of a decision to grant the application. Although it is anticipated that this guidance will change, I think it will continue to resonate with licensing sub-committees.

Even when an applicant's assurances to residents (i.e. as to how their premises in other towns and cities operate) are found to be demonstrably false - as has too often been my experience - the absence of police objection, or objection from other

responsible authorities, can present an impenetrable barrier to successfully resisting a grant.

(6) The sub-committee is overly concerned as to costs on an appeal

A vulnerability to costs, should there be a successful appeal of a refusal to grant – particularly when the police have not objected – has been cited to me, informally after the hearing, as the principal reason for the sub-committee having granted a licence, when otherwise they would have unhesitatingly refused.

There is a body of case-law [3] to the effect that honest decision-making by an administrative authority which has conducted itself reasonably and with propriety should not be penalised in costs simply because a court on appeal says that the decision was wrong. That any licensing committee should give a decision that it *thinks is wrong*, solely to avoid the risk of costs on appeal, betrays either an ignorance of, or a fundamental misunderstanding of, the principles spelled out in these cases.

Conclusions

I have no doubt that some of the eyebrow-raising grants I have seen would have been decided no differently, even if the sub-committee were alive to the various issues I have raised in this talk. It may be, for example, that the creation of new jobs or the bringing to life of a derelict building weighed more favourably in the balance. The problem then would be that the real reasons for the decision might not have been given. Other grants, however, have to my mind been inexplicable: contrary to policy, with no genuinely exceptional circumstances advanced by the applicant.

In summary, I think that cumulative impact policies are likely to be *'more honour'd in the breach…*' unless licensing sub-committees scrutinise applications far more critically, adapting their procedures as necessary to allow evidence to be effectively tested; and committees should be on the alert for the wool to be pulled over their eyes – by the bale.

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[1] The Queen on the application of Westminster City Council v Middlesex Crown Court [2002] EWHC 1104 (Admin) ("Chorion")

[2] The Queen (on the application of Hope & Glory Public House) v City of Westminster Public House [2009] EWHC 1996 (Admin)

[3] Waveney District Council v Lowestoft [2008] EWHC 3295 (Admin)) and the cases cited therein

This talk was given at the Institute of Licensing's National Training Event on 16th October 2017.

Appendix 5

Lord Justice Buxton, Lord Justice Brooke, Sir Anthony Clarke MR
[2006] EWCA Civ 392, [2006] 1 WLR 2649

The claimant challenged the policy of her local health authority not to allow prescription to her of the drug Herceptin.
Held: The policy had not been settled upon lawfully and was to be set aside. On the one hand the PCT developed a policy which treated financial considerations as irrelevant, but at the same time its policy is to refuse funding save where exceptional personal or clinical circumstances can be shown. There was no evidence that one woman in a group who might benefit might have a greater clinical need than another, and 'there is no rational basis for distinguishing between patients within the eligible group on the basis of exceptional clinical circumstances any more than on the basis of personal, let alone social, circumstances.' Where fundamental rights are involved the court must subject the decision to rigorous scrutiny.
The court interpreted the decision in North West Lancashire: 'a policy of withholding assistance save in unstated exceptional circumstances . . will be rational in the legal sense provided that it is possible to envisage and the decision-maker does envisage, what such exceptional circumstances might be. If it is not possible to envisage any such circumstances then the policy will be in practice a complete refusal of assistance: and irrational as such because it is sought to be justified not as a complete refusal but as a policy of exceptionality.'

Paragraph 62 of the judgement is the relevant part of this case.

62. We would accept that conclusion subject to this important qualification, which can in our view be seen from the passage just quoted. In it Auld LJ stresses that a policy which allows for exceptions in undefined exceptional circumstances is not unlawful "provided that the policy genuinely recognises the possibility of there being an overriding clinical need and requires each request for treatment to be considered on its individual merits." As we see it, that means that a policy of withholding assistance save in unstated exceptional circumstances (in the case addressed by Auld LJ, and no doubt in this case also, overriding clinical need) will be rational in the legal sense provided that it is possible to envisage, and the decision-maker does envisage, what such exceptional circumstances might be. If it is not possible to envisage any such circumstances, then the policy will be in practice a complete refusal of assistance: and irrational as such because it is sought to be justified not as a complete refusal but as a policy of exceptionality.

Appendix 6

British Oxygen Co Ltd v Minister of Technology [1971] AC 610

Key point

- When an Act of Parliament confers unlimited discretion to the executive, the executive is free to implement a policy on its implementation provided that it nonetheless considers applications contrary to the policy

Facts

- s13 Industrial Placements Act gave the Minister of Technology discretionary power to issue grants to industrial plants
- The Minister made a policy of not reimbursing products under £25
- British Oxygen Co applied for grants for their gas cylinders which cost £20 each; their application was refused
- British Oxygen Co applied for judicial review on the grounds that it was unreasonable to disregard the application simply because the cylinders were under £25 each

Issue

- Was the £25 rule within the scope of the Minister's discretion?
- Did laying down the £25 rule amount to an illegal fetter on the Minister's statutory discretion

Held (House of Lords)

- Appeal dismissed
- The Minister had unlimited discretion on the allocation of grants under the Industrial Placements Act
- The Minister is entitled to lay down a policy to guide the application of the grant, as long as he continues to hear opposing applications

Lord Reid

Extent of discretion

- 'Does the Act read as a whole indicate any policy which the Board is to follow or even give any guidance to the Board? If it does then the Board must exercise its discretion in accordance with such policy or guidance (Padfield)…But I can find nothing to guide the Board as to the circumstances in which they should pay or the circumstances in which they should not pay grants to such persons': p. 633D – p. 634A
- 'There are two general grounds on which the exercise of an unqualified discretion can be attacked. **It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion.** But, apart from that, if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him.': p. 634E

Fettering of discretion

- 'The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' (to adapt from Bankes L.J. [in *Kynoch* [1919] 1 KB 176] on p. 183)…There may be cases where an officer or authority ought to

listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all': p. 625B

- 'a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always **willing to listen to anyone with something new to say**': p. 625B

Commentary

- Lord Reid held that an unlimited discretion can only be subject to review on substantive grounds for bad faith and *Wednesbury* unreasonableness – bad faith refers to acting with improper purpose, under the ground of review of illegality

Appendix 7

Persons at Risk		Staff and Members of the public					
Hazard		**Existing Controls, Safe Work Procedures & Reference to Safe System of Work (Where applicable)**	**Risk Rating**			**Further Action**	**Date Completed**
			L	**C**	**Total**		
1	**Staff, residents and customers.** **Crime and Disorder**, namely the sale of alcohol to drunken persons and violence in or around the premises**.**	• The premises are equipped with a comprehensive CCTV system • The premises is not frequented by large groups • Staff serve from behind a protective screen • Staff are trained and vigilant to any issues of disorder	2	1	**2**	Maintain existing controls	
2	**Residents and customers.** **Protection of Children from harm,** namely increased risk of underage sales or proxy sales	• Comprehensive staff training in place which details underage sales and fraudulent ID issues • Full visibility to the front of the shop which provides excellent line of site from the point of sales area to identify potential proxy sales. • 50 inch CCTV monitor visible for staff serving behind the counter which covers all areas around the building including Manor Road which combats line of sight issues in this location • Recently passed LA test purchase which demonstrates internal training systems are fit for purpose	1	2	**2**	Maintain existing controls	
3	**Residents .** **Prevention of Public Nuisance,** namely Increased risk of people causing disturbance on the street as they attend and leave the premises and increased litter in the vicinity	• Public bin located inside and outside the premises • Notices advising resident to respect the needs of residents and be mindful of noise • Customers tend to come to the premises alone in couples to buy essential groceries, alcohol tends to be an ancillary purchase	1	2	**2**	Maintain existing controls	

Risk Level Rating

5	Multiple Fatalities	5	10	15	20	25
4	Fatality / Life changing injury / illness	4	8	12	16	20
3	Major Injury *(Requires Medical Treatment or is LTI)*	3	6	9	12	15
2	Minor Injury *(First Aid Treatment Required)*	2	4	6	8	10
1	Property Damage / Negligible Injury *(Required no treatment)*	1	2	3	4	5
		Very Unlikely / Rare	Unlikely	Possible	Likely	Almost Certain
		1	2	3	4	5

Risk Rating	Action Level	
16-25	STOP	Extremely High Risk, an alternative method must be employed before work commences.
11-15	URGENT ACTION	High Risk, risk reduction methods must be implemented, or alternative methods employed.
6-10	ACTION	Moderate risk with harmful consequences which require further controls and monitoring.
1-5	LOW RISK	No further action required, but ensure controls are maintained and reviewed.