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When is it right for a licensing authority to consent to or compromise a licensing appeal?

How much latitude for manoeuvre does a licensing authority have when arriving at its decisions? It all depends on the situation, suggest **Sarah Clover** and **Ian de Prez**

Most licensing decisions are subject to a statutory appeal to the local Magistrates' Court.[1] In an ideal world, a licensing authority would be reasonably confident in defending all such appeals, but inevitably that is not always the case. If the appellant proposes a compromise, the council as licensing authority may seem to be between a rock and a hard place. Magistrates and their legal advisers do not want valuable court time to be taken up when sensible concessions can be made, and there may be some risk of a costs award. However, residents who objected to the original licence application and participated in the licensing panel hearing may well be aggrieved, believing that a compromise which extends hours or moderates conditions amounts to an undemocratic dereliction of duty by the council.

We have faced the difficulties - practical and theoretical - that arise in these situations from the different perspectives of an in-house local authority lawyer and a barrister often acting for leisure industry clients. The suggestion, made to both of us on occasion, that it is either not legally possible or usually unethical for a local authority to reconsider its decision, is demonstrably wrong.

It is true to say that in a case under the Licensing act 2003, a council may not *directly* change its decision.[2] What it can do is agree a compromise to be embodied in a consent order placed before the court. Precisely how the council achieves a settlement will depend on its constitution and particularly its scheme of delegation. Most constitutions allow the solicitor to the council to settle cases, perhaps in consultation with senior councillors. Although it may not always be strictly necessary, a consideration of the case by the whole licensing committee - as a confidential item because legal advice is being given - may be desirable, given the importance of democratic accountability.

In R (*Chief Constable for Nottinghamshire*) *v Nottingham Magistrates'*[3] *Court* the Divisional Court confirmed that the Magistrates' Court has discretion to allow responsible authorities or other persons to become parties to an appeal alongside the appellant and the council as initial respondent. The court held that the wish of the police to become a party to the appeal, although the council was defending its decision and relying on police evidence, ought to have been considered by the lower court. It must follow that a resident disapproving of the terms of a consent order would in most cases expect to obtain the court's permission to intervene, if it wished to do so.

Even if there is no formal intervention of this kind, the magistrates might not automatically accept a consent order; they may ask for explanations and further information from both the council and the appellant.

Why it is sometimes right to make concessions

It is axiomatic that a local authority always has the power and the duty to revisit any of its decisions that are challenged. A public body is subject to the scrutiny of the courts through judicial review. Any aggrieved party on the receiving end of a public body's decision may question that decision, and before referring it to the courts must comply with the relevant pre-action protocol. The very purpose of this protocol is to highlight the nature of the grievance to the public body in advance of any proceedings and to invite them to consider the challenge and respond to it. Part of the purpose of the protocol is to give the public body an opportunity to accept

[1] For sex establishments these rights of appeal are limited, leaving judicial review as the only remedy for most cases . Hackney carriage vehicle licence appeals for no apparent reason are made directly to the Crown Court.

[2] Unless of course the applicant makes a fresh application to it or the court remits the matter back to it under s 181(c) of the Act.

[3] [2010] 2 All ER 342.

that it has made an erroneous decision in some way, and to yield to the complainant's challenge. This would be impossible and the protocol would be useless if there were no mechanism by which a public body, in this case the council as licensing authority, could revisit the decision.

Licensing decisions are no different from other local authority decisions in their susceptibility to judicial review. Most challengers are likely to prefer to pursue a statutory appeal if the right to it exists, but the possibility of judicial review can quite properly influence the authority's response to a statutory appeal, given the overlap between the subject matter covered by these two types of challenge.

Judicial decision makers have assumed in several cases that councils have the power and sometimes the duty to concede or compromise appeals and that they should expect costs penalties if they do not take up this option wisely.

In *Birch House Business Centre v Denbighshire County Council* in 2010 District Judge Shaw said "the fact that a licensing committee has decided to revoke a licence does not of course mean a local authority is duty bound to resist any appeal against revocation."

As a Magistrates' Court decision, this is only of persuasive authority. However, in the High Court Foskett J made the same point in *Mayor and Burgesses of LB Tower Hamlets –v Ashburn Estates Ltd (t/a the Troxy).*[4]

It will surely be right to make concessions if the sub-committee's decision is based on an error of law or it if was affected by procedural unfairness or the overlooking of an important element in relevant policy or guidance, or if the decision simply cannot be defended to the magistrates with any degree of conviction.

What of those cases where the appellant would probably not have succeeded in a judicial review, but nonetheless hopes to persuade the Magistrates' Court that the authority's decision was *wrong* as defined by *Hope and Glory*? [5]

There is a not uncommon scenario – expressly identified in *Hope and Glory* - where the decision may not have been wrong when it was made but is wrong by the time the appeal is heard because of a significant change of circumstances (for example, where discussions between a significant objector and the appellant have led that objector to change his mind and no longer support a restrictive approach in the authority's licensing decision). In these instances the council can properly make the compromise without any embarrassment.

Some will argue that, beyond this point, a licensing authority should err on the side of caution and let the court decide an appeal.

It may be suggested that too much readiness to concede when there is some basis for defending a decision, even if it is questionable is bound to cause a loss of confidence in the decision - making process. *Hope and Glory* says that a council's decisions under the Licensing Act 2003 are administrative in nature, not quasi-judicial, but they are still formal decisions made after a hearing governed by regulations, and so should be respected.

Furthermore, although it is not unreasonable for a council to take into account a costs risk when deciding how to respond to an appeal, this factor should weigh less heavily than it would in a private law case to which the council is a party, because the public interest and the integrity of a regulatory process are in issue. Furthermore, recent case law [6] appears to strengthen the argument of a licensing authority resisting a costs application.

The *Nottingham* case has actually made little difference in practice to the involvement of third parties in appeals, because residents are fearful of the process, and of the risk of a costs award, even when it is unlikely to occur. For this reason, it may be argued that the council should continue to defend the position that the residents saw them take.

These points are not without merit. However, there is no legal reason that would prevent a licensing authority from compromising in these broader circumstances. The nature of the public interest may be a moot point; every case is different. There will be some, surely, where the public interest is best served by a compromise which removes the possibility of even longer hours and fewer conditions and protects the public purse. We conclude that it is not possible to be dogmatic. How the local authority acts is for it to decide – as long as does so in good faith and reasonably as defined by public law.

The council must be mindful that dissatisfied local residents may complain to the Ombudsman and will have certain legitimate expectations that will be recognised in public law. For these reasons proportionate consultation with those likely to be affected by a decision about an appeal is an important consideration. (Richard Brown has written about this issue in a broader context. [7])

In conclusion, it may be seen that a stark position that licensing authorities may not negotiate and compromise in advance of a licensing appeal is clearly wrong. Precisely how and when they choose to do so, however, will be a matter to be decided on its merits in every case.

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[4] [2011] EWHC 3504.

[5] [2011] 3 All ER 579.

[6] *R-v-Newham LBC v Stratford Magistrates* [2012] EWHC 325 Admin.

[7] (2012) JoL 3.