

PROTOCOL FOR LICENCE APPLICATIONS & HEARINGS UNDER THE
LICENSING ACT 2003 DURING THE COVID-19 PANDEMIC

2 April 2020 (Update 1)

Introduction

1. The COVID-19 pandemic presents challenges to our country that have not been seen during peace-time. The disruption to our society is likely to last many months. The more resilience, pro-activity and creativity we are all able to display now, the sooner we will be able to get back to normal once the pandemic has passed. But, in the words of Lord Chief Justice Burnett (on 19 March 2020), it is clear that *“this will not be business as usual”*. The Institute of Licensing is here to assist all its members in navigating the current period as effectively as possible.
2. This Protocol is designed to assist licensing authorities in complying with their obligations and duties under the Licensing Act 2003 during this emergency period. It takes into account the closure of premises (including most licensed premises), restrictions on freedom of movement and social distancing strictures set out in The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, The Coronavirus Act 2020 (in so far as it impacts on licensing proceedings), The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020, and Government guidance.
3. It is recognised that during this emergency period local authorities and police, in particular, will be burdened with exceptional duties that go outside the usual realms of licensing. However, that is not a reason to bring the licensing system to a complete halt for the undoubtedly long period ahead of us until the pandemic is over. The backlog of applications and hearings that would arise if that course is taken would soon become unmanageable in the long-term and further damage the public interest.

4. There is a significant public interest in ensuring that licensing processes can continue and enable new and current applications to be processed - and hearings convened - where necessary. Many operators in the licensed sector face an existential threat to their businesses. The resulting job losses will cause considerable damage to our national and local economies and to the lives of workers in the public and private sectors. To some degree, the continuation of the licensing processes may assist in mitigating some of this damage by ensuring that the necessary licences are able to be issued, or modified, where required.
5. In particular, supermarkets, take-away food and drink restaurants, delivery services and off-licences remain open for business and provide a vital role in supplying households with their sustenance. Some will require the ability to vary their premises licences to continue trading effectively over the coming months. Others will require new premises licence applications or temporary event notices to be processed in order to start-up, when permitted.
6. Problematic premises may be subject to ongoing premises licence reviews or summary reviews which represent a *“key protection for the community”* (s.182 Guidance, paragraph 11.1). The relaxation of the new premises closure regulations may well come at short notice. A few unscrupulous operators may even decide to open in defiance of the new closure regulations. The prospect of a new summary review application may be required to deter their unlawful activities. Such review applications should be determined sooner rather than later and in compliance with statutory time-periods.
7. All these considerations require the licensing processes to be up and running wherever possible.

Applications

8. The recent Government legislation, and current situation, do not remove the statutory duties on licensing authorities to process and determine licence applications under the Licensing Act 2003 within prescribed periods. These include applications for premises licences, club premises certificates, provisional statements, variations and minor variations, transfers, interim authority notices, Designated Premises Supervisor variations, personal licence applications and temporary event notices. However, the current situation requires some flexibility and creativity in the

implementation of the processes to ensure they remain as effective and fair as possible in all the circumstances.

9. Licensing Authorities should promote (on their websites or through other means) the use of online applications as the default position. Many Council staff are working from home and post is not being opened in a timely fashion, or at all. Applicants should be made aware that posted applications may not be received or considered promptly. At the same time, if possible, we recommend that Licensing Authorities should try to put in place mail-forwarding processes to ensure that licensing officers are able to process applications from the place where they are currently working. This can be done in a number of ways. A designated Council officer may be tasked with forwarding relevant mail to licensing officers either in person or via post or by email after being digitally scanned. The Royal Mail and some other postal services already offer mail-forwarding services so they can be diverted to a different address.

10. In many cases across England and Wales Licensing Authorities have developed formal and informal pre-application advice procedures. This enables applicants to take into account the views of environmental health and police officers prior to submitting an application. This process, in turn, provides an improved chance of an application avoiding representations from the responsible authorities or other persons, thus eliminating the requirement for hearings. If practicable, and if personnel issues permit, Licensing Authorities should aim to continue to provide this service to applicants, with the assistance of remote technology where required.

Compromise

11. Wherever possible, parties should actively explore the possibility for compromise to enable applications to be determined without the need for a hearing. Whilst this has always been the case (as adopted by the senior courts, for example, in relation to all litigation), the need for resolution by agreement, where possible, is now more important than ever.

12. This approach accords with the observations of Hickinbottom J in Taylor v Manchester City Council [2012] EWHC 3467 [at 82]:

Given the administrative nature of the authority's function, it is perfectly appropriate for the authority thus to liaise with the applicant licensee and the responsible authorities/interested parties to see whether a compromise can be reached.

Officer delegation

13. There is no lawful power, even during this emergency period, for Licensing Authorities to delegate decision-making to Officers where relevant representations have been received in response to an application. Determinations in such cases will still have to be made by licensing committees or their sub-committees.

Advertising of applications

14. Generally, licence applications are required to be advertised by way of a Blue Notice and an advert in a local newspaper or, if there is none, in a local newsletter, circular or similar document, circulating in the vicinity of the premises¹. This remains a legal requirement.
15. Individuals may still put up Blue Notices and newspapers may still operate (in print or online) under the social distancing advice. Wherever possible these statutory duties should continue to be complied with by applicants and checked by Licensing Authorities. Applicants may be requested to send a photograph of the Blue Notice in situ to the Licensing Authority as proof of compliance.
16. However, it is recognised that, with the current restrictions of movement in place, in certain circumstances such adverts may be less likely to be seen by persons likely to be impacted by an application.
17. Importantly, the regulations do not necessarily require the advert to be published in a *hardcopy* version of a newspaper etc. Publication of the advert in an online newspaper etc., or similar electronic method of publication, may well suffice, particularly during the current period. The

¹ Reg.25, Licensing Act (Premises Licences) Regulations 2005

aim is to ensure that information about applications can be circulated and conveniently read by the wider community. The legislative aims and purposes of the regulations may also be furthered by the Licensing Authority creating an online page for Licensing Notices with an option to be kept informed by way of an e-mailed circular.

18. To enable continued and effective community engagement with the licensing process, it is recommended that Licensing Authorities additionally advertise the *full* details of applications on their websites or online licensing registers. The current situation may not permit individuals who wish to inspect an application to visit their local council building. Accordingly, every effort should be made to ensure that not only the application form but also any supporting documents and plans should be available on a Licensing Authority's website.
19. Further, consideration should be given to emailing the details of all new applications to local ward Councillors, Parish Councils, local residential and civic amenity groups, and organisations representing local operators and businesses.
20. Licensing Authorities have a legal duty to advertise review applications by way of a Notice prominently displayed at, on or near the site of the premises to which the application relates as well as at the offices, or the main offices of the Licensing Authority in a central and conspicuous place². Every effort should be taken to comply with this requirement. However, if this requirement proves to be impracticable to comply with during the current period, then consideration should be given to advertising the review application using one or more of the online or electronic methods outlined above in relation to other types of applications. In our view this alternative method of advertising a review application is unlikely to be successfully challenged in the Courts, even if it amounts to a procedural irregularity, because the regulations will have been substantially complied with (for which see paragraph 23 below).

² Reg.38, Licensing Act (Premises Licences) Regulations 2005

Consultation Period & Representations

21. Licensing Authorities should indicate on their website, or through other means, that all representations in relation to a new application should, wherever possible, be submitted online or by email to reduce the risk that they may not be received or considered by the authority.

22. Care should obviously be taken to ensure that officers are in receipt of any representations received within the consultation period before agreeing to the grant of any application by delegated authority. The mail-forwarding suggestions, referred to above, should be followed. Licensing Authorities will need to consider what date they will deem a representation to be received on if it is sent in the post but officers are unable to date-stamp the document on the actual day it arrives.

23. As far as possible, it is important that the provisions of the Licensing Act 2003 and the Licensing Act 2003 (Premises Licences and Club Premises Certificates) Regulations 2005 are complied with. If, however, the process adopted by a Licensing Authority is challenged, the Senior Courts have previously ruled that procedural defects will not *automatically* invalidate a licensing determination provided there has been substantial, but not necessarily full, compliance with the relevant procedures (see Jeyanthan [1999] EWCA Civ 1465; R(D&D Bar Services Ltd) v LB of Redbridge [2014] EWHC 344, i.e. the “Funky Mojo” case; and R (Akin (t/a Efes Snooker Club) v Stratford Magistrates’ Court [2014] EWHC 4633). It will be a question of considering the extent and significance of the departure in each individual case and the resulting prejudice, if any. Although it will be a matter for the sub-committee, if challenged we suggest that compliance with those procedural requirements that are *practicably available* in the current crisis ought to suffice. Again, every effort should be made to ensure substantial compliance with the provisions and to take such steps as are required to avoid significant prejudice to any party. Fairness in the decision-making process is paramount.

Temporary Event Notices

24. Temporary Event Notices (“TENS”) should be processed as before. However, given the tight time-scales involved, applicants should be told that Licensing Authorities expect applicants to submit any TENS online and forwarded to the relevant officers by email at the same time if possible.

Adjournments

25. Adjournments of hearings beyond the prescribed statutory time limits are governed by regulations 11 to 13 of Licensing Act 2003 (Hearings) Regulations 2005 (the “Hearing Regulations”). A Licensing Authority may extend a time limit for a “*specified period*” where it considers this “*to be necessary in the public interest*”. Therefore, a hearing may not simply be adjourned “until further notice”. As indicated above, the public interest includes the interests of applicants, operators, residents, responsible authorities and the wider community.

26. However, as will be appreciated, this power to extend time limits does not apply to summary reviews or reviews following a closure order. That position will continue unless and until the Government decides to amend the relevant legislative provisions.

27. It is inappropriate to invite responsible authorities, or others, to object to applications purely to trigger an adjournment.

Remote Hearings

28. The default position should be that, where required, hearings should *not* be routinely adjourned.

29. Where licensing authorities are able to establish and publish clear and effective protocols concerning hearings conducted without the need for parties to be physically present, then it should be possible in many cases for the issues to be resolved at the first hearing.

30. Where, however, an adjournment does prove necessary to enable the necessary processes to be established and explained to all parties then we suggest that such adjournments should not be listed to a date too far in the future.
31. Wherever possible, Licensing Authorities should seek to convene remote hearings using video and audio technology. Such an approach would be in accordance with the Lord Chief Justice's recent instructions to Courts and Tribunals. It should apply, with equal measure, to hearings before a Licensing Authority.
32. There is no legal bar to holding licensing hearings remotely. Licensing hearings are governed by specific provisions in the Licensing Act 2003 and the Licensing Act 2003 (Hearings) Regulations 2005. They provide a wide degree of flexibility to Licensing Authorities in determining their own hearing procedures³. Procedural irregularities in relation to hearings do not automatically render a decision void, though care must be taken to cure any resulting prejudice in so far as possible⁴. The Courts are highly likely to look favourably on departures from usual procedures necessitated by the current exceptional circumstances.
33. The Coronavirus Act 2020 (s.78) provides further powers for Councils to hold remote hearings in accordance with Regulations. On 2 April 2020, the Secretary of State made The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 ["the Coronavirus Regulations"]. They come into force on 4 April 2020 and relate to local authority meetings that are held before 7 May 2021.⁵
34. Part 2 of the Coronavirus Regulations concerns remote attendance at local authority meetings. At present Part 2 applies only to England but not Wales⁶. The relevant provisions state⁷ :

³ See s.9(3) of the Licensing Act 2003 and Hearing Regs.21

⁴ See regs. 31 and 32 of Licensing Act 2003 (Hearings) Regulations 2005

⁵ Reg 2(4) of Coronavirus Regulations 2020

⁶ Reg. 2(2) of Coronavirus Regulations 2020. It is anticipated that further, similar, regulations applying to Wales will be introduced.

⁷ Further, reg.6 in Part 3 of the Coronavirus Regulations 2020 (applying to England but not Wales) provides that, for the purposes of Schedule 12 of the Local Government Act 1972, any reference to being "present" at a meeting includes being present through remote attendance. Any reference to a "place" where a meeting is held includes reference to more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers.

PART 2

Remote attendance

Meetings of local authorities

4.- (1) *In respect of a reference in any enactment to a meeting of a local authority, that authority may, as they may determine—*

(a) hold such meetings and at such hour and on such days; and

(b) alter the frequency, move or cancel such meetings,

without requirement for further notice.

(2) Where an appointment would otherwise be made or require to be made at an annual meeting of a local authority, such appointment continues until the next annual meeting of the authority or until such time as that authority may determine.

5.—(1) *A reference in any enactment to a meeting of a local authority is not limited to a meeting of persons all of whom, or any of whom, are present in the same place and any reference to a “place” where a meeting is held, or to be held, includes reference to more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers.*

(2) For the purposes of any such enactment, a member of a local authority (a “member in remote attendance”) attends the meeting at any time if all of the conditions in subsection (3) are satisfied.

(3) Those conditions are that the member in remote attendance is able at that time—

(a) to hear, and where practicable see, and be so heard and, where practicable, be seen by, the other members in attendance,

(b) to hear, and where practicable see, and be so heard and, where practicable, be seen by, any members of the public entitled to attend the meeting in order to exercise a right to speak at the meeting, and

(c) to be so heard and, where practicable, be seen by any other members of the public attending the meeting.

(4) In this regulation any reference to a member, or a member of the public, attending a meeting includes that person attending by remote access.

(5) The provision made in this regulation applies notwithstanding any prohibition or other restriction contained in the standing orders or any other rules of the authority governing the meeting and any such prohibition or restriction has no effect.

(6) A local authority may make other standing orders and any other rules of the authority governing the meeting about remote attendance at meetings of that authority, which may include provision for—

(a) voting;

(b) member and public access to documents; and

(c) remote access of public and press to a local authority meeting to enable them to attend or participate in that meeting by electronic means, including by telephone conference, video conference, live webcasts, and live interactive streaming.

35. A ‘local authority meeting’ includes a meeting of a local authority or a committee or sub-committee of a local authority (Reg.3). The remote attendance provisions (Regs. 4 and 5) apply in respect of a reference in any enactment to a meeting of the local authority. In our view this includes the Licensing Act 2003 and the regulations made thereunder⁸.

36. Whilst the Coronavirus Regulations remove any residual doubts about the legality of remote hearings, and enable Councils to make their own standing orders to facilitate their conduct, in our view, the specific licensing provisions already in existence enable remote hearings, in any event, to lawfully take place in proceedings under the Licensing Act 2003. This is now of particular relevance to licensing hearings in Wales which are not, yet, covered by the remote meetings provisions in the Coronavirus Regulations.

37. Technical and practical obstacles are there to be overcome. We are aware of several Licensing Authorities that have already successfully conducted remote licensing hearings over recent

⁸ See s.9 Licensing Act 2003

days. Other decision-making bodies, including the Supreme Court, Court of Appeal, High Court, Crown Court and Magistrates' Courts, have also rapidly adapted to the new reality through the effective use of remote technology.

38. It is recognised that it may take some days for the processes that enable remote hearings to be put in place. But hearings should not, generally, be adjourned for more than a few weeks to enable this to happen and should be adjourned to a specific date. The Court and Tribunal system has, within a few days, been able to get some 43% of its sites back to work either for in-person or remote hearings. Licensing Authorities should have a similar objective or else, in the words of the Lord Chief Justice, *"access to justice will become a mirage"*.
39. At first, Licensing Authorities may wish to prioritise the most urgent work for remote hearings. Depending on the individual circumstances, these priority matters may well include summary reviews and reviews. Other priorities may include new or variation applications involving premises that sell food and drink to the community (e.g. supermarkets, off-licences, convenience stores, take-away restaurants and delivery services).
40. There are several effective and inexpensive video-conferencing tools on the market that will enable effective remote licensing hearings. For example: Zoom, Skype for Business/Microsoft Teams, Pexip, Google Hangout Meet, Blue Jeans and Cisco Webex. These programs generally enable individuals to view and participate in a video-conference using a desktop computer, laptop, tablet device or even smart-phone. It will be for Licensing Authorities, either individually or collectively, to decide which commercial platform is best suited to its particular requirements.
41. Alternatively, in some cases, audio-only dial-in telephone conference calls may be sufficient to facilitate a remote hearing. Products available include, for example, BT Meetme or WhatsApp group audio-chats. Remote hearings may well combine participants joining through video-link and others who dial-in using their usual telephone.
42. Licensing authorities should liaise with parties over the use of remote technologies. Many leading operators and practitioners are already well-adapted to remote working and can provide facilities and knowledge that will assist the process.

43. Where health advice and the law permits, Members may choose to meet in the town hall or other council building in-person, with or without an officer present in the same room. Participants can either attend the meeting room in person (exercising suitable physical distancing) or join remotely. Alternatively, all Members, officers and parties may join remotely. Most commercial video-conference programs will permit private Members' deliberations to take place without other participants being able to hear or see those deliberations. Meetings can also be recorded, where required. Some video-conferencing applications also enable a transcript of proceedings to be automatically produced after the hearing.
44. Agenda Documents should all be accessible online or digitally in a format and pagination common to all participants. The Coronavirus Regulations (Reg.15) confirm that it is sufficient for Agenda Papers to be published only on the website of the Council.
45. Before a remote hearing, parties should be encouraged to submit by email written submissions, at least 24 hours before the hearing is due to start, summarising the points they wish to make at a hearing and the outstanding issues. Although voluntary, these written submissions (of whatever length is considered appropriate) are likely to assist in the conduct of the remote hearing and the decision-making process.
46. A significant number of licensing hearings are not attended by the general public. It is nonetheless important to preserve the 'public' element of even remote hearings, so far as is practicable. This can be done by advertising online a web-link to view (but not participate in) remote licensing hearings. Alternatively, a simple telephone call into a meeting would enable the public to listen in to meetings. Whilst there may be some members of the public who are unfamiliar with using remote technology, most are still able to use a telephone. As far as possible Licensing Authorities are encouraged to provide protocols or instructions for use in such circumstances. Prior to the current crisis there were many individuals who were unable to travel to Council buildings to view a licensing hearing in person. That inability to cater for everyone did not prevent licensing hearings from taking place in the past. Nor should it prevent the use of remote hearings in the current period.

47. The Coronavirus Regulations (Regulations 13 to 17) serve to confirm that a meeting is “open to the public” if it can be accessed through remote means including (but not limited to) video conferencing, live webcast, and live interactive streaming.
48. As a last resort, Licensing Authorities are reminded of their existing powers to exclude the public from all or part of a hearing “*where it considers that the public interest in so doing outweighs the public interest in the hearing ... taking place in public*”⁹. We suggest, however, that it would be inappropriate to use such power routinely simply because insufficient efforts have been made to enable remote access to occur.
49. Where a remote hearing is held, parties should be advised to log-in 15-20 minutes before the start of a hearing. A telephone number of an officer should be provided to parties in case of technical difficulties. These can generally be resolved by a short conversation before the hearing starts.
50. Participants in a remote hearing are advised to consider potential noise interruptions before a remote hearing starts. For example, by silencing phones and closing the door of the room they are in. Virtual video backgrounds can easily be used to avoid distractions and preserve the privacy of participants if they are calling in from their homes.
51. Parties should be reminded that, even where an application has attracted representations, applications can be determined without the need for a hearing where *all parties consent* to dispense with a hearing by virtue of regulation 9 of the Hearing Regulations. In these cases written representations may be submitted and considered before a determination is made.
52. We would emphasise that during the current closure period many licensed operators are already preparing for their post-pandemic future. This may include proposed changes to their business models and refurbishments. Others are actively considering investing in new businesses. These businesses may provide much-needed new jobs for those who are out of work and investment that will regenerate areas. Some of these projects may well require licence applications to be determined to enable them to come to fruition. These features should form an important part

⁹ Reg.14(2) of the Hearing Regulations

of the public interest considerations to be taken into account before any hearing is adjourned beyond the usual period in which they should be determined (usually 20 working days from the last date for representations). The sooner these applications can be determined, the better.

Appeals

53. The listing of Licensing Appeals to the magistrates' court will be subject to decisions by Her Majesty's Court & Tribunal Service and individual courts. The Ministry of Justice and HM Courts & Tribunal Service are keeping a (constantly updated) list of Courts that are open for business here:

<https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served>

54. As is to be expected, the Courts are prioritising urgent cases (including closure orders) over the coming days. Councils are advised to liaise with their local magistrates' court for information on the listing of licensing appeals.

Protocol revisions

55. This Protocol is intended to be a living document and will be amended as and when required, particularly in light of any further relevant regulations issued under the Coronavirus Act 2020 (in so far as they may impact on licensing proceedings) or further guidance and advice issued by the Government. The Institute of Licensing welcomes comments and suggestions from members and others as to how this Protocol can be improved.

The Institute of Licensing
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