

<b>Item No.</b> 7.	<b>Classification:</b> Open	<b>Date:</b> 28 February 2023	<b>Meeting Name:</b> Licensing Committee
<b>Report title:</b>		The Licensing Act 2003 – Remote Licensing Sub-Committee Hearings	
<b>Ward(s) or groups affected:</b>		All wards	
<b>From:</b>		Assistant Chief Executive – Governance and Assurance	

## RECOMMENDATIONS

1. That the Licensing Committee:
  - 1.1 Agrees that a combination of remote and in-person Licensing Sub-Committee hearings in Option D at paragraph 29; and
  - 1.2 Approves the proposed protocol attached to Appendix A of this report.

## BACKGROUND INFORMATION

2. The Authority is obliged by virtue of section 6 of the Licensing Act 2003 (“the 2003 Act”) to establish a Licensing Committee consisting of at least 10 but no more than 15 Members of the Authority. All matters, save for those matters expressly dealt with by full Council, relating to the discharge by the Authority of its licensing functions under the 2003 Act are referred to this Committee and the Committee must discharge those functions on behalf of the Authority. The proceedings of the Licensing Committee are governed by the 2003 Act and Regulations made under that Act.
3. On 25 March 2020 Parliament passed the Coronavirus Act 2020 in response to the Covid-19 pandemic. Section 78 of that Act authorised regulations (the Flexibility of Local Authority and Police and Crime Panels Meetings (England and Wales) Regulations 2020) to make provision for (among other things) “the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings. Since this time, all Licensing Sub-Committees have been convened remotely on MS Teams.
4. The provisions in the Coronavirus Act 2020 was limited in application to local authority meetings required to be held, or held, before 7 May 2021.
5. In anticipation of the expiry of the 2020 Act, Hertfordshire County Council (and others) issued proceedings and sought a declaration from the Court that (in effect) “meetings” held under the Local Government Act 1972 did not have to be in the same physical space and might occur by way of a remote or virtual hearing.

6. On 25 March 2021 the Divisional Court in Hertfordshire County Council and others v Secretary of State for Housing, Communities and Local Government [2021] EWHC 1093 (Admin) focussed on local authority meetings held under the provisions of the Local Government Act 1972. The decision did not focus on local authorities acting in their capacity as licensing authorities holding licensing hearings under the provisions of the 2003 Act and specifically the Licensing Act 2003 (Hearings) Regulations 2005 made under the Act.
7. The Licensing Committee is not a Committee that is established under the Local Government Act 1972. It is established by virtue of s.6 of the 2003 Act and Licensing Sub-Committees by virtue of s.9. Section 101(15) of the Local Government Act 1972 makes it clear that nothing relating to the arrangements for discharge of functions by local authorities applies in relation to any function under the Licensing Act 2003 of a licensing authority.
8. The 2003 Act provides for licensing hearings<sup>1</sup> before Sub-Committees of Members of the Authority. This enables parties to be “heard”. The 2003 and the Regulations made under that Act do not specify how a person is to be “heard”. Section 9 of the 2003 Act says that Regulations may be made about the proceedings of Licensing Committees and Sub-Committees i.e. licensing hearings and the public access to such hearings, agendas and record of decisions. The Regulations that deal with the proceedings of licensing hearings are The Licensing Act 2003 (Hearings) Regulations 2005 (“the 2005 Regulations”).
9. Regulation 21 of the 2005 Regulations enables the Licensing Committee, subject to the provisions of the 2005 Hearing Regulations, to determine the procedure to be followed at Licensing Sub-Committee hearings.
10. It is generally accepted by licensing practitioners that virtual hearings are permissible under the Licensing Act 2003.
11. There is a school of thought that “remote” or “virtual” hearings in England are not permitted by the Licensing Act 2003 (Hearings) Regulations 2005 and where objection has properly been taken, any decision from such a remote hearing is considered *ultra vires* and consequently a nullity and of no effect.
12. The Council does not accept that remote hearings in licensing proceedings are unlawful. In short, licensing proceedings are conducted under the 2005 Regulations which confer wide powers on licensing committees to regulate their own proceedings more flexibly than in other areas of local authority decision-making which were the main focus of the High Court in the Hertfordshire case.
13. In contrast, it is argued that the decision by the Court in R (Hertfordshire CC) v SSHLG does not apply to committees or sub-committees (licensing or otherwise) of principal councils, giving rise to an argument that remote committee and sub-committee meetings of principal councils remain lawful under the Local Government Act 1972.

14. Parliament has since enacted The Police, Crime, Sentencing and Courts Act 2022 (“the 2022 Act”) that authorises remote access to fully in-person hearings in courts and *tribunals*, where: it is ‘in the interests of justice’, there is the ‘capacity and technological capability’ to do so and providing remote access would not ‘create an unreasonable administrative burden’. Courts and Tribunals must consider the need for open justice, the timing of a request for remote access and its impact on the business of the Court/Tribunal, the extent to which resources are necessary to allow remote observation and any statutory limitation on those entitled to observe the hearing. It appears logical that Parliament would have included Licensing Sub-Committees as an administrative Tribunals when enacting the 2022 Act.
15. In *R (Hertfordshire CC) v SSHLG (No 2)* [2021] 1 W.L.R. 3742 the Divisional Court went on to find that the phrases “open to the public” and “held in public” in various legislative provisions that govern access to meetings and documents were descriptive phrases in Schedule 12 Local Government Act 1972. However, the provision in Schedule 12, paragraph 4 appears to relate to meetings of the full council rather than meetings of that council’s Licensing Committee or Licensing Sub-Committee.
16. In terms of licensing, a full Licensing Committee or a Licensing Sub-Committee is not a committee or sub-committee established under the Local Government Act 1972. A Licensing Committee is established under s.6(1) of the Licensing Act 2003, which provides that “*Each licensing authority must establish a licensing committee consisting of at least ten, but not more than fifteen, members of the authority*”.
17. Section 9(1) of the Licensing Act 2003 permits the licensing committee to establish one or more sub-committees consisting of three members of the committee and s.9(3), subject to any such regulations, each licensing committee may regulate its own procedure and that of its sub-committees
18. The Licensing Act 2003 makes repeated provision for the holding of a “hearing” to consider relevant representations in relation to the different types of applications licensing authorities consider. Hearings differ from “meetings” of a committee or sub-committee, because the Act provides separate powers for regulations to be made to make regulations that prescribe the procedure to be followed in relation to a “hearing” held by a licensing authority (s.183(1)) and regulations concerning the provision of “meetings” (s 9(2)). Section 9(3) of the Licensing Act 2003 provides that “subject to any such regulations, each licensing committee may regulate its own procedure and that of its sub-committees”. This suggests that the Local Government Act 1972 and the Licensing Act 2003 cannot relate to the same subject matter as they are expressed to be separate and distinct, and the 1972 Act has no concept of “hearings”.
19. *R (Hertfordshire) v SSHLG* also weighed against the application in the context of the 1972 Act was the need for certainty in local democracy, with its potential for issues as to quorum and voting on particular resolutions. Such matters do not cause difficulties for licensing hearings. Southwark’s Licensing Sub-

Committees have a quorum of three, the members are visible in a remote hearing, and decisions are taken in a private session rather than being the subject of a public vote.

20. Licensing committee and sub-committee meetings and licensing hearings are further distinguished from Schedule 12 Local Government Act 1972 meetings in that:
  - The duties relating to political balance on local authority committees found in ss.15-16 of the Local Government and Housing Act 1989 do not apply to Licensing Act 2003 Committees and Sub-Committees.
  - A licensing hearing is an administrative function rather than an exercise in local democracy, it is the exercise of a power delegated by the people as a whole to decide where the public interest lies (see *R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] PTSR 868 at [41]).
  - With the exception of hearings relating to reviews of premises licences and club premises certificates, any licensing hearing can be dispensed with completely if the licensing authority and the participants consider it to be unnecessary
21. s.78 of the Coronavirus Act 2020 enables the making of regulations to make provision relating to local authority meetings, including the places at which such meetings are held. The section makes no reference to “hearings” (or indeed to committees or sub-committees established under the 2003 Act). The Licensing Act 2003 treats “meetings” and “hearings” as separate concepts, these omissions suggest that s 78 of the 2020 Act and regulations made under it could not extend to licensing hearings. Nothing within the Flexibility Regulations (made under s.78) deals with Licensing Act 2003 Committees, Sub-Committees, or any sort of “hearing” (as opposed to (“meeting”); possibly because Parliament did not consider it necessary to legislate for remote licensing hearings because it considered that remote hearings were already within the scope of the 2003 Act and the Hearings Regulations.
22. The Licensing Act 2003 may not provide an express power to conduct remote hearings, but it also does not expressly prohibit the conduct of remote hearings either. Matters of procedure are left to regulations and, in the absence of regulations, to the licensing committee itself.
23. Finally, if the Hearings Regulations are construed as requiring in-person hearings, then Reg.31 provides that any irregularity resulting from a failure to comply with any provision of the Regulations before the authority has made a determination shall not of itself render the proceedings void; reg.32 follows that only requires the licensing authority to cure the irregularity if it considers that any person may have been prejudiced as a result. Where parties agree to a remote hearing, it seems difficult to see what prejudice might arise. The Licensing Act 2003 permitting a lawful licensing determination to be reached without a hearing (ss.18(3), 31(3), 35(3), 44(5) and 72(3)) all appear to be at odds for a determination being reached a remote hearing.

## KEY ISSUES FOR CONSIDERATION

24. Remote hearings have transformed licensing and modernised local democracy. It has enabled national expertise in terms of expert evidence and representation without the economic and environmental costs of individuals travelling to physically attend hearings, where physical attendance can be inconvenient, expensive or impossible. Officers and the Chair of Licensing have observed that there has also been a marked increase in resident participation, providing openness, and transparency to the system and local democracy.

### Options Available to the Committee

25. It is accepted by licensing practitioners that the legal argument on remote licensing hearings will in due course be determined by the Courts. This is unlikely to be determined before 2025.
26. Because the full Licensing Committee falls outside the scope of the Licensing Act 2003 (Hearings) Regulations 2005, it is proposed that all full Licensing Committees are held in person.
27. Until the issue of remote Licensing Sub-Committees is determined by the Courts, the options available to the Licensing Committee are:

#### **Option A - All Licensing Sub-Committees return to in person hearings.**

The benefit of this would be that Southwark is not open to any risk of a judicial review of a sub-committee's decision being deemed *ultra vires*. Officers would anticipate that there would be a decrease in resident participation.

#### **Option B All Licensing Sub-Committees are remote hearings.**

Although there is risk of a judicial review challenge, the number of Appeals is small, which would suggest a challenge on the legality of remote hearings even smaller. This would however, maintain the noted increase in resident participation.

#### **Option C Licensing Sub-Committees have hybrid arrangements.**

For this option to be viable, it would be on the basis of members being based in the Council offices during the entire period of a hearing and those other persons participating in the hearing having the option of either attending the meeting in person or remotely. This would maintain the increase of resident participation, although hearings may be appear "disjointed."

#### **Option D There is a combination of remote and in-person hearings.**

Officers are of the view that based on risk, this would be the most preferable option and it is proposed that this option would operate:

- All reviews under the Licensing Act 2003 to be held in person, unless all parties who plan to participate agree on a remote hearing.
- All other Licensing Act 2003 related applications Licensing Sub-Committees to be held remote where parties agree.

- All non-Licensing Act 2003 related Licensing Sub-Committees to return to be held in person. This would include hearings under the Gambling Act 2005, Markets applications under the Food Act 1984, Special Treatments Licence Applications under the London Local Authority Act 1990 which are low in number.
- There be an officer discretion to arrange Licensing Act 2003 applications in person where it is in the interests of justice.

28. A benchmarking exercise was carried out in December 2022 via the London Boroughs Legal Alliance (the LBLA”) and the Lawyers in Local Government Prosecution and Licensing Special Interest Group to assess how other authorities convene Licensing Sub-Committee hearings. The results of the benchmarking exercise are included in Figure 1 below.

<b>Authority</b>	<b>Response</b>
Ealing	We are still doing remote hearings & no immediate change envisaged for now.
Reading	Conduct Licensing Appeals/Applications Committees in person for Licensing Act matters.
Tower Hamlets	Tend to be hybrid but it very much depends on what the various parties want to do. Members, legal advisor, Committee Services officer and Licensing Officer attend in person, others having the option of joining via Microsoft Teams.
Bexley	Try to hold all meetings in person but have the option to hold the meeting as a hybrid (and have done so). Could hold virtual only meetings if absolutely necessary but do not offer that option.
Hillingdon	In person only.
Buckinghamshire	All licensing sub-committee hearings are taking place remotely on MS Teams and broadcast using a live webcast for the wider public.
Southampton	Remote hearings for all Licensing Act matters.
Eastleigh BC	Remote hearings for all Licensing Act matters.
Fareham BC	In person.
Redbridge	In person.
Brent	Remote (via Zoom) is the default position. Will do hybrid /in person if circumstances warrant it.
Enfield	Use a mixed model - some in person, some hybrid, but since the official end of lock down none totally remote as far as aware.
West Berkshire	Hearings are in person but people are also allowed to join in remotely. The hearings are broadcast on You Tube.
Kingston Upon-Thames	Remote.
Merton	Remote.

Figure 1: Benchmarking received from the LBLA and Prosecutions and Licensing Special Interest Group (05/12/2022).

## **Draft Protocol**

29. If members agree that option D is the most appropriate option, a proposed protocol for remote Licensing Sub-Committees is attached at **Appendix A**, which members are asked to approve.
30. It is not intended to make any changes to Southwark's Statement of Licensing Policy 2021-2026.

## **COMMUNITY, EQUALITIES (INCLUDING SOCIO-ECONOMIC) AND HEALTH IMPACTS**

### **Community Impact Statement**

31. The Southwark's Statement of Licensing Policy 2021-2026 recognises as long as licensed premises are well run and managed, they have a positive value of working together with the local community and making a significant contribution toward building community cohesion and cultural development.
32. The policy equally recognises that negative impacts can also occur if good management practices are not followed. Potential negative impacts may arise in the form of noise, nuisance, disturbance and crime and disorder problems. With licensed premises there are also risks of individual alcohol addiction.
33. Licensing is about regulating the carrying on of licensable activities within the terms of the 2003 Act. Southwark's Statement of Licensing Policy makes clear that licensing law is not the primary mechanism for the general control of nuisance and anti-social behaviour by individuals once they are beyond the direct control of the individual, club or business carrying on licensable activities. The s.182 Guidance also states that licensing law is a key aspect of such control and should always be part of a holistic approach to the management of the evening and night-time economy. It is therefore desirable that the statement of licensing policy is in line with the Council's wider objectives and consistent with other policies.
34. Members should note that the statement of licensing policy must not be inconsistent with the provisions of the 2003 Act and must not override the right/s of any individual as provided for in that Act. Nor must the statement of licensing policy be inconsistent with obligations placed on the Council under any other legislation, including human rights legislation. Members should also note that the Council has a duty under Section 17 of the Crime and Disorder Act 1998, when carrying out its functions as a licensing authority under the 2003 Act; to do all it reasonably can to prevent crime and disorder within the Borough.
35. The policy seeks to provide the necessary balance between responsible business operators contributing toward a thriving business and late night economy whilst ensuring that the quality of life of those who live and work in the Borough is protected and enhanced through the licensing system. We believe these aims are achievable if all parties concerned work together.

36. Central to this, is a licensing process which aims to be inclusive and ensures that local community concerns are understood, debated and resolved. This is supported by offering broad support to licensees, through the range of involved authorities, to establish best practice management, and by a strong directed enforcement resource.

### **Equalities (including socio-economic) impact statement**

37. Positive equalities obligations are placed on local authorities, sometimes described as equalities duties, with regard to race, disability and gender. Race equality duties were introduced by the Race Relations Amendment Act 2000 which amended the Race Relations Act 1976. Gender equalities duties were introduced by the Equality Act 2006, which amended the Sex Discrimination Act 1975. Disability equality duties were introduced by the Disability Discrimination Act 2005 which amended the Disability Act 1995.
38. The Council in exercising its licensing function must have regard to the guidance issued by the Secretary of State under section 182 of the 2003 Act. It must also give appropriate weight to the views of those persons/bodies listed in the Act which it is required to consult before determining its policy.
39. Equality impact assessments are an essential tool to assist Councils to comply with our equalities duties and to make decisions fairly and equalities and human rights impact assessments that are carried out should be mindful of the protected characteristics under the Equality Act 2010.

### **Health impact statement**

40. The Licensing Act 2003 does not include health as a licensing objective although Public Health is a responsible authority by virtue of s.13(4)(bb) Licensing Act 2003 who may submit representations in respect of applications to promote the licensing objectives: the prevention of crime and disorder, Public Safety, the prevention of public nuisance and the protections of children from harm.

### **Climate change implications**

41. Following Council assembly on 14 July 2021, the Council has committed to considering the climate change implications of any decisions.
42. Decisions on licensing must be to promote the licensing objectives. Climate change can be addressed as part of the licensing applications for example not using single use plastics (both receptacles and straws) unless there is no alternative.
43. The impact on climate change has been considered in the context of this report and the continued use of remote Licensing Sub-Committee hearings avoids the physical attendance at hearings without the economic and environmental costs of individuals travelling to physically hearings.



## Resource Implications

44. The proposed protocol on remote Licensing Sub-Committee meetings does not have any resource issues in itself.
45. The resource costs of managing this process may be borne within the current licensing budget.

## SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

### Director of Legal Services

46. Part 3G: Licensing Committee And Sub-Committees, The Head Of Service And Officer Panel Exercising Licensing Functions of the Council's Constitution (22 September 2022) (<https://moderngov.southwark.gov.uk/documents/s109072/3G%20Licensing%20-%20July%202017.pdf>) provides that the function of the Licensing Committee is:

- “3. To establish policies and procedures for considering and determining additional licensing functions conferred on the authority by statute.*
- 4. To consider and determine the following applications:*
  - the grant, renewal, variation or transfer of any general safety certificate in respect of a sports stadium or regulated stands*
  - street trading and markets*
  - film classification*
  - any other licensing responsibilities of the authority created by statute and delegated to the committee.*
- 4. Where appropriate to hear and consider the case for the applicant either by way of written or oral representation and consider objections and representations to the application from authorised persons and interested parties or their designated representatives.*
- 5. To consider and determine the revocation of licences and registrations reserved to the licensing committee.*
- 7. To consider the designation of new sites for street trading and markets.*
- 8. To establish sub-committees under the relevant statutory provisions empowered to discharge any and all of the authority's licensing functions”.*

47. Most local authority Committees are established under powers contained in the Local Government Act 1972. The expiry of The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020, removed the temporary provisions which enabled such Committees to meet remotely during

the coronavirus pandemic. Licensing Sub-Committees are, however, governed by the Licensing Act 2003 and the Licensing Act 2003 (Hearings) Regulations 2005.

48. Section 9(3) of the Licensing Act 2003 states that a Licensing Committee may regulate its own procedure and that of its sub-committees, subject to regulations made by the Secretary of State.
49. Regulation 21 of the Licensing Act 2003 (Hearings) Regulations 2005 gives a wide discretion to local authorities to determine the procedures for hearings: "Subject to the provisions of these Regulations satisfying the requirements set out in those regulations the authority shall determine the procedure to be followed at the hearing".
50. The Regulations require hearings to be conducted in public and this can be satisfied by the live streaming of hearings. There is therefore no impediment to conducting most hearings under the Regulations remotely.
51. Licensing Sub-Committees are also responsible for dealing with a range of other functions which do not fall under the 2005 Regulations, including street trading licences. These tend to be relatively few in number but when they arise will have to be dealt with at in person hearings.
52. There is a legal requirement to hold Licensing Sub-Committee hearings in a fair manner. This applies whether a hearing is held in-person or remotely. Care needs to be taken when holding remote hearings to ensure all parties are present throughout the meeting, to ensure any loss of connection is picked up and resolved as soon as possible, and that the hearing is adjourned on resuming the meeting that a repetition and/or summary of what the party missed during loss of connectivity is provided.

#### **Strategic Director of Finance and Governance (EL22/132)**

53. The strategic director of finance and governance notes the recommendation to the Licensing Committee to agree that a combination of remote and in-person Licensing Sub-Committee hearings be operated as outlined in the body of this report; and approve the proposed protocol as set out in Appendix A.
54. The strategic director also notes that there are no resource implications contained within the report and that there are no financial implications as a result of accepting the proposals.
55. Officer time to effect recommendations will also be contained within existing budgeted revenue resources.

## BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
The Licensing Act 2003 plus secondary regulations	<a href="https://www.legislation.gov.uk/ukpga/2003/17/contents">https://www.legislation.gov.uk/ukpga/2003/17/contents</a>	
The Licensing Act 2003 (Hearings) Regulations 2005	<a href="https://www.legislation.gov.uk/uksi/2005/44/made/data.pdf">https://www.legislation.gov.uk/uksi/2005/44/made/data.pdf</a>	

## APPENDICES

No.	Title
Appendix A	Protocol for Remote Licensing Sub-Committee Hearings

## AUDIT TRAIL

<b>Lead Officer</b>	Doreen Forrester-Brown, Assistant Chief Executive – Governance and Assurance	
<b>Report Author</b>	Debra Allday, Senior Solicitor – Regulatory Team	
<b>Version</b>	Final	
<b>Dated</b>	16 February 2023	
<b>Key Decision?</b>	No	
<b>CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER</b>		
<b>Officer Title</b>	<b>Comments Sought</b>	<b>Comments included</b>
Director of Legal Services	Yes	Yes
Finance Director	Yes	Yes
Cabinet Member	No	No
<b>Date final report sent to Constitutional Team</b>		16 February 2023