

Licensing of outdoor drinking and dining

Brief guidance note

Note: this is correct as of 24 July 2020

Purpose

As pubs and restaurants come out of lockdown and following the introduction of Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020¹, councils are working hard to support businesses to re-open safely.

This will include making preparations to implement the Business and Planning Act² provisions which permit temporary changes to licensing laws intended to allow many more licensed premises, such as pubs and restaurants, to sell alcohol and food for consumption off the premises including to drink and dine outside. Outdoor markets, pop-up car-boot sales and summer fairs will not need a planning application, as part of a drive to transform the way people shop and socialise.

The Act received Royal Assent on 22 July and provisions on pavement licensing and off-sales came into force straight away.

Councils have already been working hard to look at the measures that can be put in place to help hospitality businesses get up and running again in the coming months, including relaxing existing requirements and considering how town centres can be used differently to enable businesses to operate outside. This new Act will help ensure a consistent approach is taken so businesses can reopen as soon as they can, and people can get back to enjoying their high streets safely.

This note sets out the immediate first steps for councils to consider taking to help ensure they have processes and procedures in place for when the Act comes into force, and outlines some wider reopening issues for councils and business to consider. In doing so, it builds on the licensing guidance³ we published earlier in the response to the pandemic, and in particular the key principles which councils can base their work on.

This note replaces guidance published on 17 July 2020.

Overview of Business and Planning Act

Pavement licences

The Act introduces a new legal framework for issuing pavement licences, which will enable food and drink businesses to put removable furniture on the pavement adjacent to their premises in order to sell or serve food and drink, or for people to sit at to consume food and drink. The framework will supersede the existing framework for pavement licensing set out in the Highways Act 1980 but does not impact licences already issued under that Act.

Councils now have to process applications for pavement licences within two weeks from the date they are applied for, and a maximum fee of £100 will be payable. Each application will be subject to a seven-day consultation period, with any representations required to be considered in determining the application. Licences must be for a minimum of three months but at a councils' discretion can run for any period up to an end date of 30 September 2021. Where a council does not respond to an application within two weeks, a licence will be

¹ <http://www.legislation.gov.uk/uksi/2020/684/contents/made>

² <https://www.legislation.gov.uk/ukpga/2020/16/contents/enacted>

³ <https://www.local.gov.uk/approaches-managing-licensing-and-related-issues-during-covid-19-pandemic>

deemed to have been granted for a year but not beyond 30 September 2021. Both councils and the Secretary of State may issue conditions in relation to pavement licences: where licence conditions are breached, the council can serve a remediation notice or revoke the licence.

Alcohol licensing

The Act also amends the Licensing Act 2003 so that any premises with licences which currently only permit drinks to be consumed on the premises will be permitted to allow sales for consumption off the premises. The default extension will not however apply to premises which in the last three years have been refused permission for an off-sales licence, or have had this permission revoked.

The new permission will permit off-sales until 11pm, this is different from the more permissive provision set out in the initial drafting of the Bill.

The Act sets out an expedited off-sales review process which will enable responsible authorities under the Licensing Act to apply for a review of an off-sales licence if they believe one or more of the Act's objectives are being contravened.

Key considerations

Pavement licences

It is important that councils have systems in place quickly so that they can retain control over whether a licence is issued, the length of time it is issued for and conditions attached to it, rather than licences receiving deemed consents. This may inevitably be more challenging for authorities which do not ordinarily issue pavement licences under the Highways Act. The following sets out key considerations for councils administering the new framework; the Ministry of Housing, Communities & Local Government (MHCLG) has also published guidance⁴ setting out how the new process for pavement licences works.

Delegation of functions

Pavement licensing is designated as a non-executive function. Councils will have discretion to delegate this function to a committee, sub-committee or an officer or to any other local authority⁵. A decision for delegation of functions will need to be made urgently where provision is not already made for these licences in existing schemes of delegation or a council's constitution.

Given the short statutory timescales, councils may want to consider delegating all functions under the new Act to officers. This would include making decisions on individual applications, which will need to be made in seven days following the consultation period. There is no formal appeal mechanism proposed on the face of the Act. Alternatively, mechanisms for member decision making or panels could be pre-scheduled for the weeks following the commencement of the Act, when applications may first be expected, or would need to be able to be convened at extremely short notice. Councils will already be proactively engaging with local businesses to understand how many will wish to access the new licence, which will help in understanding likely demand and any potential challenges which may need greater consideration.

⁴ <https://www.gov.uk/government/publications/pavement-licences-draft-guidance/draft-guidance-pavement-licences-outdoor-seating-proposal>

⁵ under s.101 of the Local Government Act 1972

Local conditions

The Act provisions include a statutory 'no obstruction' as well as a 'smoke-free seating' condition which requires licence holders to make reasonable provision for seating where smoking is not permitted. MHCLG's guidance sets out further guidance on what is considered as reasonable provision for seating where smoking is not permitted.

Councils are also encouraged to publish local conditions and the MHCLG guidance sets out issues that councils may want to consider.

For councils issuing pavement licences for the first-time, conditions will need to be prepared and published quickly. Councils with existing conditions for pavement licences may also wish to review or update these in the context of new legislation.

Conditions will be important, particularly for any licences deemed to be granted, as these will be the most significant way councils can influence how pavement licences operate in their area. Any blanket conditions should follow the general rule of being necessary and proportionate, with any others tailored to specific licences.

Councils can impose any additional reasonable conditions whether they are published upfront or not but these will need to be supported by a clear justification for the need of a condition which is in addition to any published local conditions.

Conditions could, for example, cover some of the following matters:

- maximum number of chairs and tables
- type of furniture
- hours of operation with justification for this
- removal of furniture
- maintaining public liability insurance
- use of plastic/polycarbonate drinking vessels
- barriers/separation from footway
- noise/nuisance.

Local conditions should be published on the council's website where possible.

Smoke-free conditions

As outlined above, councils can impose conditions on pavement licences and publish a set of conditions it will look to place in any licence granted. Where a council is deemed to have granted a licence under the provisions of the Act, it will be deemed to have been granted subject to these published conditions. Any conditions imposed by the council take precedence over the two national conditions imposed by the Act.

The ability to impose conditions could be used, for example, to make all pavement licences in a local authority smoke free, and we are aware some councils are looking to introduce conditions to achieve this. Where no conditions on smoking are imposed by the council, then the Act requires the licence holder to make reasonable provision for seating where smoking is not permitted. Where a council imposes a smoke free requirement on pavement licences it will undoubtedly want to ensure it can successfully resist any challenges to the provision, and it can show it has a reasonable justification for imposing this condition (as required by government guidance).

Fee setting

Councils are responsible for setting fees for pavement licences up to a maximum is £100, and as with licence conditions a decision on this should be made as soon as possible. It is recognised that, relative to existing fee levels, in some places this is unlikely to allow for full cost recovery of what could be significant costs in the coming weeks, and MHCLG's new burdens team are looking into this issue to see what costs may need to be considered as part of the new burdens process

The Local Government Association (LGA) is making the case to government that councils are supported financially to meet the costs of processing an expected large number of applications in a short period of time.

Length of licence

Councils have discretion to grant licences for a minimum of three months and up to 30 September 2021, although MHCLG guidance suggests 12 months should be the normal period.

Whilst councils will want to support businesses as far as possible, a one-year licence may not be appropriate everywhere for example where timed road closures have been introduced to create areas for outside seating, but only for a limited period of time.

Councils could also consider a length of licence that would enable an opportunity to review licences before summer 2021, allowing any changes to be made to local conditions for the summer of 2021.

Applications and payments

The MHCLG's guidance sets out what information applicants are required to provide in their application as well as additional information councils can ask for, such as a plan of the proposed red line of the area that is to be used to provide food and drinks outside for the purpose of the licence. An example of an application form is included in Annex A.⁶

Whilst there is no definition of 'adjacent to' in the Act this would usually be taken to mean next to or at least very near to the business to which the licence applies.

Councils will need to make sure they have processes in place for businesses to apply electronically. That could be via online application forms, or by simply providing an email address for completed applications to be sent to the relevant team in the council. Councils will also need a mechanism for applicants to pay for applications online. Both are requirements in the Act.

Consultation and decision making

The applicant is required to post a notice of the application on the premises it relates to; this needs to be on the same day that the application is submitted to the local authority. The applicant must ensure the notice remains in place for the seven-day consultation period, which starts the day after the application is submitted to the council. MHCLG's guidance includes a template public notice which could be provided to applicants or made available with application details on councils' website.

Councils will also need to publish the applications they receive, alongside any information submitted by the applicant; this could be on the council's website. Councils will need to consider data protection before publishing applications online. It should also be clear how

⁶ www.local.gov.uk/sites/default/files/documents/Annex%20A%20Example%20Application%20Form.docx

representations can be made by members of the public in relation to individual applications, and when the consultation period comes to an end.

The Act does not specify which team within the council should administer the new framework, so this could be done by licensing or highways teams.

Councils are required to consult the highways authority on new applications (if they are not the highways authority) as well as anyone else they consider appropriate. This could potentially include planning, environmental health, local police and fire and rescue service and the relevant Ward member.

Considerations should also be given to security implications and potential threats that could arise from an increased outdoor drinking and dining offer. Councils should consider seeking advice on security from local police colleagues, Designing Out Crime Officers and Counter Terrorism Security Advisors. The Centre for the Protection of National Infrastructure (CPNI) has published guidance⁷ for authorities on protective security considerations in the context do high street hospitality.

Following the seven-day consultation period the council will need to either:

- grant the licence in respect of any or all of the purposes specified in the application
- grant the licence for some or all of the part of the highway specified in the application, and impose conditions, or
- refuse the application.

Where decisions are not made before the end of the determination period, the application is deemed to have been granted subject to any local conditions published by the local authority before the application was submitted. Deemed consent will be granted for a year (but not beyond 30 September 2021).

Enforcement

MHCLG's guidance sets out the steps that councils can take by way of enforcement action where conditions have been broken. Councils can issue a remediation notice as well as revoke a licence.

Where tables and chairs have been placed on the highway without permission, they could be subject to enforcement action in relation to offences of obstructing the highway and depositing an object in the highway.

Off-sales

Provisions in the Business and Planning Act will automatically grant premises with a licence for on sales only permission to provide off-sales for customers to take away, without the need to apply or notify the council. There are some exemptions to this extension, for example premises that have previously had an application for off-sales refused, or permission for this revoked. Businesses with club premises certificates are also excluded from this.

⁷ <https://www.cpni.gov.uk/high-street-hospitality-protective-security-considerations>

Home Office has produced guidance⁸ which sets out further details about this new process.

Under the new permission, businesses will be authorised for off sales until 11pm. This is different to the initial provisions set out in the Bill where off sales mirrored hours for sale for consumption on the premises.

Premises that already have an off sales licence with a cut-off time before 11pm will also be permitted to provide off sales until 11pm or until the current on-sales licensing hours for that premises end, whichever is the earlier. Where off sales were permitted beyond 11pm these can continue.

Given this is a permissive change, councils will need to be able to promptly deal with issues arising from the addition of off-sales to a premises licence. The Act introduces an expedited off-sales review process which will enable responsible authorities under the Licensing Act to apply for a review of an off-sales licence if they believe one or more of the Licensing Act's objectives are being undermined.

In the event of an application for a review, the licensing authority can consider whether any interim steps should be taken within 48 hours and must review the off-sales licence within 28 days. Interim steps could include modifying conditions linked to the off-sales licence or revoking it altogether (although this may not alter the pre-existing conditions on the premises licence).

Individual businesses, the police and other responsible authorities must all work collaboratively with councils to ensure the new policy can be implemented as smoothly as possible. Whilst there is no requirement to notify the council, Home Office guidance advises businesses to engage with their local licensing authority to make them aware of their plans to utilise the licence extension and discuss any issues or concerns.

Other re-opening considerations

Councils will have been working closely with hospitality businesses as they look to re-open and offering advice and support with how this can be done safely. It is likely that premises will look and operate quite differently as new measures are brought in to ensure compliance with COVID-19 secure guidelines⁹ and to protect staff and customers.

Re-opening will bring its own set of challenges and councils are encouraged to take a pragmatic approach to issues arising where there is discretion to do so.

The LGA's note on 'Approaches to managing licensing and related issues during the COVID-19 pandemic'¹⁰ sets out some overarching principles when considering how to approach issues in a practical way and may be useful for councils with issues arising from re-opening.

- Ensuring that there is open and honest engagement with local businesses (in some cases it may be preferable to engage directly rather than through third parties) about

⁸ <https://www.gov.uk/government/publications/guidance-for-temporary-alcohol-licensing-provisions-in-the-business-and-planning-bill>

⁹ <https://assets.publishing.service.gov.uk/media/5eb96e8e86650c278b077616/working-safely-during-covid-19-restaurants-pubs-bars-takeaways-030720.pdf>

¹⁰ <https://www.local.gov.uk/approaches-managing-licensing-and-related-issues-during-covid-19-pandemic>

the challenges facing both licensed businesses and councils during the COVID-19 response.

- Being as flexible as possible while remaining mindful of the requirements and objectives of relevant legislation.
- Where possible, prioritising requests, applications or hearings that are business critical in terms of the COVID-19 response - for example pavement licences which will require a two-week turnaround - and potentially deferring those which may not need an urgent response if there are valid reasons why they cannot feasibly go ahead. Each case should be considered on its own merits in discussion with applicants and notes taken outlining the justification for why a decision was reached.
- Planning now for how licensing can quickly scale up work that for legitimate reasons has not been able to be progressed due to COVID-19 issues, eg preparing for additional hearings as a contingency measure.
- Ensuring member oversight where functions have been delegated and keeping councillors briefed on a regular basis.
- Dealing with applications on a case by case basis and avoiding a one size fits all approach for existing licensed premises.

COVID-19 secure guidelines

From 4 July new Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020¹¹ mean most licenced and other hospitality premises are now permitted to reopen and are expected to follow COVID-19 Secure guidelines.¹²

The guidance sets out high level principles and is designed to help businesses understand how to work safely and keep customers safe during the pandemic, ensuring as many people as possible comply with social distancing guidelines. Although the guidance itself is not legally enforceable, the Health and Safety at Work Act 1974 (the Act) provides a framework for considering the steps businesses should take to ensure they are operating in a way that is safe and can help to prevent the spread of COVID-19.

The approach to doing so will mirror how businesses manage other health and safety risks in the workplace. Central to the Government guidelines on reopening is the development of an appropriate risk assessment to carry out an appropriate COVID-19 risk assessment and identify specific actions needed, depending on the nature of the business, including the size and type of business, how it is organised, operated, managed and regulated. Relevant issues for a risk assessment in a hospitality business could include:

- the number of people able to access the premises safely
- how seating areas will be spaced out/rearranged to enable social distancing
- how mechanisms for ordering/serving food and drink will be managed to reduce social contact (eg table service, apps etc)
- processes for cleaning and hand sanitising
- use of PPE/plastic screens
- approach to eg screening live sport, snooker/ pool and other activities in licences premises, and how the risks of these will be managed.

Businesses will also want to consider how they can take measures to support the government's test and trace system through collecting contact details of customers. Government have issued guidance about Test and Trace¹³ and expectations for pubs/ restaurants about collecting contact details in a way that complies with data protection legislation.

As enforcing authorities for the hospitality industry under the HSAW and licensing authorities, councils will need to be mindful of the distinctions between the two frameworks and the handling of any issues that arise. Licensing authorities are not expected to approve premises' approaches to reopening, but will wish to work with businesses where any changes have implications for a premises' ability to adhere to the conditions of its licence or comply with the objectives of the Licensing Act, which, in the absence of a health objective, do not easily incorporate COVID-19 considerations. Therefore, if there are concerns about the extent to which a premises is complying with the guidance on being COVID-19 secure, that would first and foremost be a health and safety issue, rather than a licensing one. While councils will clearly want to bring together their licensing and health and safety expertise to provide businesses with a joined-up approach to advice and support, there will need to be consideration of which framework is the appropriate one for dealing with any issues or concerns.

¹¹ <http://www.legislation.gov.uk/ukxi/2020/684/contents/made>

¹² <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/restaurants-offering-takeaway-or-delivery#takeaways-4-5>

¹³ <https://www.gov.uk/government/news/public-asked-to-leave-a-name-and-number-with-venues-to-help-stop-the-spread-of-covid-19>

Ultimately it is up to individuals and businesses to make sure they act responsibly and safely, including maintaining social distancing. Councils will need to work closely with police, businesses and other partners to ensure existing and new requirements are complied with, and people are able to enjoy a drink or a meal safely.

Summary of relevant regulations for licenced venues

The following summarised the latest position on requirements for premises in the coronavirus restriction regulations¹⁴. These are correct as of 16 July 2020.

Social distancing requirements

From 4 July will be 2 metres, or 1 metre with risk mitigation where 2 metres is not viable.

Capacity limits

30 people is not the maximum that can be in a premises at any one time. The number of people allowed in premises at any one time will be determined by calculating the maximum number of customers that can reasonably follow social distancing guidelines taking into account total indoor and outdoor space and specific venue characteristics such as furniture as well.

Activities permitted

Unless otherwise specified activities in licensed premises for example screening of live sport and pool are permitted although these should be included in a risk assessment and mitigations put in place.

DJs are permitted apart from in the following settings:

- In dance halls, discotheques, and any other venue which —
 - (a) opens at night
 - (b) has a dance floor or other space for dancing by members of the public (and for these purposes members of the venue in question are to be considered members of the public)
 - (c) provides music, whether live or recorded, for dancing.

Premises required to remain closed

An up to date list is available on gov.uk¹⁵ but includes:

- nightclubs, dance halls, discotheques
- casinos
- sexual entertainment venues and hostess bars.

Outdoor events

Outdoor events, that are organised by businesses, charitable organisations, and public bodies, are not restricted to 30 attendees provided they have carried out a thorough risk assessment and taken all reasonable steps to mitigate the risk of viral transmission, taking into account that risk assessment, in line with COVID-19 Secure guidance.

¹⁴ <http://www.legislation.gov.uk/ukxi/2020/684/contents/made>

¹⁵ <https://www.gov.uk/government/publications/further-businesses-and-premises-to-close/further-businesses-and-premises-to-close-guidance>

This includes ensuring that social distancing between different households or support bubbles, and between staff and performers and customers is maintained at all times. In addition, those operating venues or running events following COVID-19 Secure guidance should take additional steps to ensure the safety of the public and prevent large gatherings or mass events from taking place.

The Events Industry Forum has published guidance on outdoor events¹⁶ which has been developed with input from DCMS.

¹⁶ <https://www.eventsindustryforum.co.uk/index.php/11-features/14-keeping-workers-and-audiences-safe-during-covid-19>