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CM15 8AY

Our Ref: DBW / Treble Twenty
Your Ref:
Date: 16 September 2022
Please ask for: David Wilson

Sent by email only to:
licensing@brentwood.gov.uk

Dear Sir or Madam,

Consultation Response of Treble Twenty Cars & Couriers Ltd in relation to the Brentwood Borough Council consultation in respect of its draft Hackney Carriage and Private Hire Licensing Policy for the period 1 October 2022 to 30 September 2027

I act on behalf of Treble Twenty Cars & Couriers Ltd ("Treble Twenty" or "my client") whose head office is at Unit 3, Kings Eight, St James Road, Brentwood, Essex CM14 4LF.

Treble Twenty is one of the longest established, largest, and most respected hackney carriage and private hire companies in Brentwood.

This letter and the accompanying table constitute the whole of my client's consultation response to the Council's consultation in respect of its draft Hackney Carriage and Private Hire Licensing Policy for the period 1 October 2022 to 30 September 2027.

The matters set out in the accompanying table are no less important than those detailed within this letter; I just thought a table was the better way of presenting those matters that required less comment to be made on my client's behalf.

Before raising matters of concern, my client and I would like to start by taking this opportunity to congratulate the Council for producing a short and simple policy document, which nonetheless covers all the substantive matters identified in the Department for Transport Statutory Taxi and Private Hire Vehicle Standards 2020 ("DFT Statutory Standards").

In essence, the policy consists of 15 pages (excluding cover, contents and appendices) whereas the equivalent policy of another local authority consisted of 134 pages (also

excluding cover, contents, blank pages, and appendices), much of which was unnecessarily duplicitous.

Regrettably, it may be that, as a result of a desire to produce a short, simple and clear policy document, some matters that should also have been included, were not.

For ease of reference, in both this letter and the accompanying table, I shall identify the part of the policy on which I am to comment by referencing the section number (and if it might assist, the section heading) or appendix letter (and, if necessary, paragraph number).

In respect of duplicitous items in this letter and the accompanying table, I apologise, but unfortunately this seemed to be necessary for the purposes of completeness and clarity.

1. Introduction and Appendix A

The impression is given that, save for "exceptional circumstances", the policy, as a whole, and specifically in relation to the assessment of previous convictions and suitability generally, will be applied inflexibly as if it were the "Rule Book" and supersedes the law.

The Council is respectfully reminded of the High Court judgment in Pinnington v Transport for London [2013] EWHC 3656 (Admin) in which Andrews J (as she was then) held at paragraph 17 that, although policy considerations are important, a policy has to be applied with a proper approach to the statutory test, ie is the applicant / licence holder a fit and proper person. In essence, a policy might help a decision-maker to decide whether a person meets the statutory test or not, but not meeting the policy does not automatically mean a person is not a fit and proper person to hold a hackney carriage or private hire licence.

At paragraph 20, the judge went on to hold that to restrict departure from policy only when "exceptional circumstances" were established was to "set the bar too high". It might instead be said that the circumstances would have to be unusual or rare, although it would probably provide decision-makers with better guidance by saying that "policy may be departed from in appropriate cases, having due regard to all the circumstances of the case".

In relation to convictions, at paragraph 22, the judge held that the mere existence of a conviction and sentence, in and of themselves, were not enough to justify a conclusion that a person is not a fit and proper person to be licensed. The judge went on to explain that a conviction should be the end point for a decision-maker, but the starting point for their considerations as to what were the circumstances.

For example, in the Pinnington v Transport for London case, Mr Pinnington had a recent conviction for possession of cannabis plants which, applying the policy, precluded him from the grant of a new London Cab driver's licence. However, to state the circumstances briefly: Mr Pinnington was caught by the police disposing of his late father's dead and dying cannabis plants in bin bags in rural Essex, something that he had agreed to do for his father, as he had not wanted his family to get into trouble for possession of the cannabis plants he had grown and used medicinally.

Applying the policy rigidly would mean that the conviction alone meant Mr Pinnington was not a fit and proper person, but applying the statutory test to the extenuating

circumstances giving rise to the conviction, the High Court held that he was a fit and proper person, a decision the Council might rightly think should have been reached by Transport for London and the magistrates' court.

Although my client is of the view that the Council has approached such matters in this way in the past, and expected it would continue to do so in the future, the failure to express these matters in the policy is, of course, a matter for concern.

Indeed, in relation to "failure to Disclose Information" at section 3 of the policy, the Council makes clear that a failure to disclose information will be treated as dishonest, describing same as "deception". A failure to provide information can result from many innocent reasons, such as misunderstanding a question; believing a conviction to have been filtered and not disclosable; or mis-remembering and giving incorrect dates or details of a conviction. Whilst such matters may cause further work for the Council and be a source of irritation, not every case of failing to provide information will be intentional and dishonest.

There is also a failure to address the position in relation to the standard and burden of proof, although it might be inferred that the Council recognises that the civil burden of proof / the balance of probability is to be applied.

In connection with hackney carriage and private hire licensing matters, as with alcohol and entertainment licensing under the Licensing Act 2003, the Court of Appeal held, in R (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court & Ors [2011] EWCA Civ 31, at paragraph 41, that a council performs an administrative function in a quasi-judicial like manner, whilst not strictly being judicial or quasi-judicial when determining a licensing matter.

Further in this regard, it should also be noted and referenced in the policy that:

- When considering the fitness and propriety of an applicant or licence-holder, a council is entitled to consider hearsay evidence: McCool v Rushcliffe Borough Council [1998] 3 All ER 889, [1999] LGR 365, QBD.

- Need not hear live evidence, ie it may rely on written statements and documents alone: Leeds City Council v Hussain [2002] EWHC 1145 (Admin), [2003] RTR 199.

- Should determine a matter to the civil burden of proof (balance of probability) with the burden of proof resting on the applicant: R v Crown Court at Maidstone ex parte Olson [1992] COD 496, 136 Sol Jo LB 174.

- Once licensed, the burden of proof shifts onto the council, which may only suspend or revoke a licence when satisfied the licence-holder is no longer a fit and proper person: Kaivanpor v Director of Public Prosecutions [2015] EWHC 4127 (Admin).

- When considering an application or disciplinary action, a council must fully consider the available information, afford the applicant / licence holder an opportunity to state their case, and exercise their judgment and discretion, as identified by Singh J (as he was then) in R (on the application of Singh) v

Cardiff City Council [2012] EWHC 1852 (Admin): Reigate & Banstead Borough Council v Pawlowski [2017] EWHC 1764 (Admin).

- Exercise judgment to determine if a person continues to be a fit and proper person to hold a licence and then, if they do not, consider whether to exercise discretion to allow them to retain the licence: R (on the application of Singh) v Cardiff City Council [2012] EWHC 1852 (Admin), as referred to above.

The policy generally, but specifically in relation to Appendix A, fails to acknowledge that there is often a wide range of possibilities and does not make reasonable or necessary provisions for these very different circumstances. In this regard, please refer to the comments in the accompanying take in relation to 4.3., 4.4., 4.6., 4.9. & 4.11, and 4.10. of Appendix A.

Although this letter and the table may be regarded as being forthright in some of their assertions, my client sincerely hopes the Council will heed the warnings and requests set out herein and in the attached table, because these are matters of importance to the hackney carriage and private hire trades generally.

I would be grateful if this letter and accompanying table could be acknowledged as soon as possible.

I would also be grateful if I could be advised of the date, time and venue for the meeting of the Licensing Committee when the policy is to be further considered and advised if I might be allowed to address the Committee on these matters in person or remotely.

Thank you in anticipation of your and the Committee's careful consideration of my client's consultation response.

Yours faithfully,

David B Wilson
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Consultation response of **Treble Twenty Cars & Couriers Ltd**	
Reference(s)	**Representation**
1.	See accompanying letter.
2.	The section heading “Decision Making” might be better replaced with “Delegation of decision-making powers”, as the section deals with who makes decisions, not how they make decisions.
3.	The use of the word “can” in 3.1 and “will” in 3.2 give the impression that a failure to disclose information will be regarded as being deception and that, as a result, an application will be refused, or a licence revoked. In both instances, the word “may” would demonstrate that dishonesty is not the only conclusion that could be reached on particular facts.
4.3	Although probably stylistic, the use of the phrase “can and will” serves again to create the impression that a particular approach will be taken, when it is hoped the Council really only meant to convey that it “will” take such matters into account, not that a particular conclusion would result.
5.1.4	The Council is deviating from the statutory test, as addressed extensively in the accompanying letter. The test is prescribed by statute, not set or defined by policy. If the Council insists upon applying a definition that has not been made by the courts, it would be prudent for the Council to do so by stating the statutory test to be applied and then explaining that the Council will seek to apply the statutory test in the way it describes.
5.2.2	The word “request” should be “requested”.
5.3.1	Whilst it is acknowledged that it is difficult to secure motor insurance for a licensed hackney carriage or private hire vehicle driver under 21 years of age, because the costs are prohibitive, by imposing the age limit and requirement to have held a DVLA or equivalent driving licence for at least 3 years, the Council is being directly and indirectly declinatory on the grounds of age, a protected characteristic under the Equality Act 2010, section 5. As the Council, as a public sector body, is subject to the section 149 Public Sector Equality Duty, which requires the Council to exercise its functions to “eliminate discrimination”, it is particularly disappointing and concerning that the Council has adopted such an approach. If the Council is in any doubt as to its position, it is respectfully urged to seek advice from the Equalities & Human Rights Commission. In relation to the requirement to complete the tax check requirement, it would be useful if it were made clear that this does not apply on first application, unless the applicant has held the same licence with the Council or any other local authority within the past 12 months.

	The Council has not advised that it is possible to sign up to the DBS update service on application for the certificate, although it is accepted that it is easier to sign up after the certificate has been issued. The Council has also not addressed the situation in relation to those individuals to whom the DBS issues a manually produced certificate, as it is not possible to sign up to the update service in respect of these certificates. Having previously suggested it would be able to automate the issue of all certificates within a couple of years, the DBS has more recently revealed that it is not going to be possible to do so and that it will, in the circumstances, refund fees to those individuals who have to repeatedly apply for new certificates. The Council is asked to verify the position with the DBS and to include up-to-date information about manual certificates in its policy.
5.4.2	This links to 5.3.1 above in relation to manual DBS certificates and the inability to subscribe to the DBS update service in relation to such a certificate. The Council must adopt a more flexible approach in relation to those individuals to whom manual certificates are issued by the DBS, because almost as soon as one has been issued, they will be required to apply for another. Whilst the responsibility to maintain the subscription to the DBS update service is the driver's, the Council will appreciate that some drivers rarely use or check their emails and will, therefore, overlook any email from the DBS advising that the card registered for payment of the annual update service fee has expired or been declined and inviting them to register another card. This is, I am afraid, a national problem, which affects drivers and councils alike, which would be best addressed by the DBS changing the way in which payment can be made. Many councils are in favour of charging drivers the subscription fee as part of the licence fee and then paying the fees over to the DBS. It might help to eradicate this problem, if the Council were to raise this issue directly with the DBS and to join forces with other councils by raising this with the LGA (Local Government Association).
5.4.3 5.10.2 6.5.1 7.4.2	The Council asserts that existing licence holders will have to comply with new policy requirements within a specified period of time following the implementation of the policy (6 months for subscription to the DBS update service at 5.4.3; 12 months for language proficiency requirements at 5.10.2; 6 months for operators in relation to new conditions pursuant to 6.5.1; and 6 months for vehicle licence holders in relation to the requirement for a Basic DBS check at 7.4.2). However, once issued, the Council has no power to vary or amend the conditions attached to a licence. To do so, or to attempt to do so, would unlawfully frustrate parliamentary intention, which was held to be unlawful by the House of Lords (as it was then) in Padfield & Ord v Minister of

	Agriculture, Fisheries & Food, & Ors [1968] AC 997, [1968] 1 All ER 694, [1968] 2 WLR 924. The Council can ask licence holders to cooperate and might take a dim view of those who do not do so, but whether such a failure, in and of itself, would genuinely call into question whether a person was no longer a fit and proper person is perhaps unlikely, applying and considering the approach of the High Court in Pinnington v Transport for London, as referred to extensively in the accompanying letter.
5.5.1	The sentence might be re-written to more simply express that "The criteria for determining whether an individual should be granted or permitted to retain a hackney carriage and / or private hire driver's licence are the same."
5.7.1 & 5.7.2	The DVLA Group 2 medical standard provides for an initial medical assessment on application and then at 45 and every 5 years thereafter to age 65 after which tests are required annually. The Council's proposals do not, contrary to the assertions made in the policy, adopt the DVLA Group 2 medical standard. To reduce the frequency for undertaking medical examinations from 5 years to 3 years, without any justification or material evidence to justify such a requirement, is a breach of the Regulators' Code (BRDO 14/705), which requires regulators, such as the Council, to make evidence-based decisions and not to impose unnecessary regulatory burdens, least of all those that increase costs on those they regulate. The DFT Statutory Standards advocate the adoption of the DVLA Group 2 medical standards, as do the 2010 DFT Best Practice Guidance and the 2022 draft DFT Best Practice Guidance. None of these governmental guidance documents recommend the adoption of a hybrid arrangement for medical examinations. The Council could, as part of the driver application process, require all applicants for new / renewal licences to agree to submit to medical examinations in accordance with the DVLA Group 2 medical standard and it could also attach a condition to that effect to private hire driver licences. It is not necessary to require medical examination every 3 years just because the maximum duration the Council may issue a driver's licence for is 3 years.
5.7.3	Whilst it is accepted that, by virtue of the Local Government (Miscellaneous Provisions) Act 1976, section 57(2)(a)(i) & (ii), a council can require medical examinations as the Council asserts, this power applies only in connection with the consideration of an application for a driver's licence.

	Regrettably, there is no equivalent statutory power to require licence holders to submit to medical examinations, so the Council will have to look to achieve this by requiring drivers to agree at application to notify the Council of any changes to their medical fitness to drive, and to attach conditions to private hire driver licences.
5.11	Unless the Council has material evidence to justify imposing a limit on the number of attempts an applicant may make to pass the knowledge test, the Regulators' Code would prevent the Council from imposing an arbitary limit. In the circumstances, the Council is asked to remove the proposed limit, especially at this time when there is a national shortage of drivers and a decreasing pool of candidates, as the unemployment levels have hit a 40-year low.
5.12.1 6.1.5	As referred to in the accompanying letter and in relation to 5.4.3 & 5.10.2 above, to suspend or revoke a licence for non-compliance, in and of itself, might well be unlawful. However, it is noted that the Council qualifies this assertion with the word "may" and it is assumed that suspension or revocation is unlikely to be the sole reason for suspension or revocation. For example, if a condition required a driver to have a medical examination at intervals specified by the DVLA Group 2 medical standards and they did not do so, because they had cataracts, the Council would be likely to revoke the licence because the driver was medically unfit to drive due to the cataracts, not because they had failed to comply with the condition of their licence requiring them to submit to a medical examination.
5.13 6.5.2	It is respectfully suggested that the private hire driver conditions (at 5.13) and the private hire operator conditions (at 6.5.2 to 6.8.1) should not be included in the body of the policy, but be appended to it.
5.13.5	The wording of this condition, relating to passenger carrying capacity, seems not quite to reflect what the Council intends. The condition prohibits a driver from refusing to carry "fewer persons than the number specified on the plate", which seems inadvertently to mean that a driver can refuse to carry the number of persons specified on the plate! It might, therefore, be prudent to express the condition as, "A driver shall not carry more persons than the number marked on the plate."
5.13.9	The wording of this condition seems to encourage drivers to commit criminal offences in relation to the carriage of disabled people by permitting drivers to charge before a disabled person gets into their vehicle.

	Until 28 June 2022, this would only have applied to drivers of designated wheelchair accessible vehicles who were not entitled to charge more as a result of having to comply with statutory duties in relation to the carriage of a person in a wheelchair. However, the provisions of the Equality Act 2010 were amended with effect from the aforementioned date by the Taxis and Private Hire Vehicles (Disabled Persons) Act 2022. The Council is respectfully referred to the amended version of the 2010 Act and the statutory guidance issued by the DFT, which is available online at: https://www.gov.uk/government/publications/access-to-taxis-and-private-hire-vehicles-for-disabled-users/access-to-taxis-and-private-hire-vehicles-for-disabled-users--2
5.3.14	It is assumed that the requirement for drivers to deliver found lost property to Thurrock Council at Civic Offices, New Road, Grays is an error, and that the Council's own address should have been specified. If this was not an error and the Council genuinely proposes requiring drivers to deliver found lost property to the Civic Offices of another council, this would be a further regulatory burden the Council was seeking to impose in breach of the Regulators' Code. The Council is respectfully asked to amend this condition of licence accordingly.
5.14 7.5.1 7.6.1 7.7.1	It is agreed that the hackney carriage byelaws; hackney carriage vehicle pre-licence standards; hackney carriage vehicle licence conditions; and the private hire vehicle pre-licensing standards should be appended to the policy.
6.3 7.3.1	Whilst it is anticipated that references to company or partnership are intended to convey that an application for an operator's licence or a vehicle licence may be made by a company or partnership, as well as by an individual, that is not expressly stated and, as a result, it appears an application may only be made by a company or a partnership.
6.5.3.2	The list of matters to be notified is different to that at 5.13.2 and does not accurately describe each. For example, the DFT Statutory Standards refers to "arrest and release" whereas this condition incorrectly refers to arrest, whether or not charged.
7.4.1	Can the Council please amend the requirement in relation to a Basic DBS check for a vehicle licence to only require it to have been issued in the previous 12 months? Otherwise, anyone who owns more than one vehicle might be required to obtain as many as 12 Basic DBS certificates a year if, for example, a certificate were only accepted for one month from the date of issue.

Appendix A	The comments in relation to the policy expressed in the accompanying letter also expressly relate to policy in relation to the fitness and propriety of applicants and licence holders.
Appendix A, 3.	After each of the times the word “trial” appears, it is suggested that the words “and / or sentencing” should be added to make clear that the Council would also want to know what sentence were passed, if an applicant were to be convicted of an offence.
Appendix A, 4.1.	Contrary to the section heading of “crimes resulting in death”, this section also refers to “serious injury” without defining what that term means or differentiating such matters from 4.3., which is concerned with “offences involving violence against the person”. To further complicate matters, the term “serious injury” is not one known to the criminal law in relation to offences against the person. In the circumstances, to avoid the risk of offences falling into two categories of offences without any rational way of determining whether an offence should fall into one category or the other, the Council is asked to simplify this section by removing the reference to “serious injury” so that this section is concerned only with “crimes resulting in death”, as per the section heading.
Appendix A, 4.3.	Offences involving violence against the person covers a very wide range of actions and offences. At the lowest end of the range, there is common assault which does not actually require there to be actual violence, so someone throwing a punch and missing is guilty of common assault, as is someone spitting at another, again irrespective of whether the spit makes contact with the intended victim. At the other end of the range there are offences of intentionally causing grievous bodily harm (“GBH”) and attempted murder. See the CPS Guidance at: https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard. With the greatest of respect to the Department for Transport that has promulgated these standards, it is preposterous to suggest that offences at both ends of the spectrum should be treated the same. Ten years is grossly excessive for a common assault and may be grossly inadequate for someone convicted of GBH or attempted murder. The Council is asked to reconsider this provision and to apply its own common-sense approach.
Appendix A, 4.4.	The same sentiment as expressed above in relation to 4.3. applies equally to possession of weapons. At the lower end of the range there is the person, who fearing they are about to be attacked by a rowdy group of youths, picks up a tree branch from the ground in order to defend themselves, should it become necessary to do so. At the other end of the scale, there is the person who is armed with an illegally possessed gun. The Council is asked to reconsider this provision and to apply its own common-sense approach.
Appendix A, 4.6.	Again, the same sentiment as expressed above in relation to 4.3. applies equally to offences of dishonesty. At the lower end of the range there is the homeless person who steals food because they are hungry. And at the top end of the range there are the likes of

	the Brink's Mat robbers who stole £26,000,000 of gold in 1983. The Council is asked to reconsider this provision and to apply its own common-sense approach.
Appendix A, 4.7.	For the purposes of more clearly separating the provisions in relation to drug dealing and drug possession, the Council is asked to separate this one paragraph into two paragraphs, each starting with "Where an applicant . . .".
Appendix A, 4.9. Appendix A, 4.11.	Although the offence of using a hand-held device whilst driving has been addressed separately at 4.11, I include same in the comments to be made generally in relation to motoring convictions. A licensed hackney carriage or private hire vehicle driver probably drives 4-6 times the annual mileage of the average motorist in a year. That is relevant when considering the frequency and pattern of offending, because a licensed driver who commits two speeding offences 12 months apart will have driven the same distance that an average motorist would drive in 4-6 years. In the circumstances, if these speeding offences had been committed by an average motorist with the same mileage driven between them, the penalty points imposed for the first offence would have been long since expired and removed from the average motorists driving record. To describe speeding and other minor road traffic offences as an occupational hazard would, of course, be to downplay the potential seriousness of such offences, but if a driver does commit three such offences to accrue 7 or more live penalty points, maybe, rather than to punish the driver, the Council could source a driver improvement course, which the driver could be required to undertake at their own expense. This would hopefully help the driver to break the pattern of offending and become a safer and better driver, which would be a benefit to all road users, not just the driver and his passengers.
Appendix A, 4.10.	Although drink or drug driving is not to be encouraged or condoned, as has been made clear in the national media, there is currently a wave of drug spiking taking place across the country, although drink spiking has been commonplace for decades, generally being intended as a joke amongst a group of friends. In any event, however spiking may arise, a person spiked who drives is still guilty of an offence, even though they were unaware they had been spiked and were incapable of driving. This is because these offences are what are known as "absolute offences", which simply means a person is guilty of the offence if they did the act alleged, even if they were unaware of this and lacked mens rea, the criminal intent to commit the offence. As extensively addressed in the accompanying letter, the policy proceeds on the basis that every situation is black and white and that guilty is guilty, and that the consequences should always be the same. Hopefully,

	the examples set out here at 4.3., 4.4., 4.6., 4.9. & 4.11., and 4.10 serve to illustrate the need for the Council to make some changes and to apply its own common-sense to these matters and the wider policy generally.
Appendix G	The Council's proposal to lower standards for private hire vehicle drivers is a concern to my client, as I am sure it would be to the travelling public, if they were aware of the proposals. Whilst there is only one mark difference in the pass mark for the 'Highway Code' section, there can be no good reason why an applicant for a private hire vehicle driver's licence should be allowed to have a lower standard of knowledge in this key area of testing. Drivers that do not know the Highway Code are bound to be more likely to commit motoring offences and to put fare-paying passengers and other road users at greater risk of being involved in an accident. Furthermore, the removal of the 'Routes' section of the test and the lowering of the pass mark for the 'Places of Interest' section of the test for applicants for a private hire vehicle driver's licence will serve only to undermine and devalue the appropriately high standards the Council has maintained for years. In the eyes of the travelling public, the knowledge and competence of existing and future private hire drivers will be regarded as being second-rate to hackney carriage drivers if the proposed dilution of standards for passing the knowledge test are reduced. The knowledge test is appropriately hard to pass, but that is why my client advocates scrapping the limit on the number of attempts a candidate can have to pass the test. Please see comments above in relation to 5.11. Finally, at 6, for the sake of completeness, alongside "All" in the pass mark column could be added ": 5" to adopt a consistent style the provision of information in relation to the other elements of the test.
Appendix H	The second category in the table, which may only be determined by a Licensing Sub Committee, should also expressly state that the Licensing Sub Committee may attach additional conditions and / or amended conditions to a licence, subject to there being such a power to attach conditions to a licence. It is not clear in what circumstances the Licensing Manager may be called to determine the position in relation to an applicant / licence holder not holding a DVLA driving licence (category 5 of the table), but should this be concerned with non-DVLA driving licences, maybe the Licensing Manager should also have the power to grant a licence, not just to revoke or refuse a licence.

	The last category might better refer to the “Power to depart from policy” rather than the “Agreement to depart from policy”, there being no indication of any such agreement. Furthermore, should the reference to “officer” be deleted and the power also delegated to the Licensing Sub Committee, so as to make clear that both may depart from policy in appropriate cases?