

**8 December 2015**

**Planning and Licensing Sub-Committee**

**Local Government (Miscellaneous Provisions) Act 1982**

**Report of:** *Ashley Culverwell – Head of Borough Health, Safety and Localism*

**Wards Affected:** *All*

**This report is :** *Public*

## **1. Executive Summary**

- 1.1** This report seeks clarification by Members of the Sub-Committee on a matter pertaining to the Council's Street Trading and Market Policy. In the first instance seeking clarification on a matter of policy pertaining to one particular product type. In the second instance to identify whether clothing may be sold by a trader and if so, whether this should be restricted or conditioned in any way.

## **2. Recommendation**

### **2.1 That Members**

- a) Provide an interpretation of the meaning of paragraph 5.2 of the Street Trading and Market Policy (2012) with particular regard to the sale of clothing, by;**
  - i) resolution that clothing is not permitted to be sold under provision of paragraph 5.2 at all; or**
  - ii) resolving that whilst clothing may be sold, this cannot be of a nature that is the same or distinctly similar to that sold by other traders, including shops in the vicinity; or**
  - iii) To determine that clothing does not fall under paragraph 5.2 and therefore that clothing of any nature may be sold by Street Traders; and**
- b) If resolved in the case of either 2.1 a) i) or ii), to further determine whether there are specific grounds for diversion from the policy in the individual circumstances relating to Jacky's Boutique to permit clothing to be sold;**
  - i) Without duplication of the stocks of local shop traders; or**
  - ii) Regardless of whether the items sold by Jacky's Boutique are a duplication of other local traders**
- c) Any other decision that Members consider appropriate.**

### 3. Introduction and Background

- 3.1 Street trading (including markets and market stalls) is governed under provision of the Local government (Miscellaneous Provisions) Act 1982 (the Act).
- 3.2 Section 2 of the Act provides that a district council may by resolution designate a Street (or Streets) in their district as either prohibited Streets, consent streets or licence streets. Designation as either a 'licence' or 'consent' street is necessary in order for the council to undertake the process of licensing stalls for trading purposes.
- 3.3 Consent of any relevant corporation that owns the land and of the Highways authority is required before a resolution is passed to adopt an area for the purpose of street trading. Such a process was followed in and prior to August 2011, when Brentwood High street was adopted as a 'licence' street.
- 3.4 Since being adopted as a 'licence' street and having received the relevant planning consent, the High street in Brentwood has been the site of a successful Saturday Market, which, more recently in October 2014, expanded to operate on Fridays in addition to Saturday.
- 3.5 In 2012, when the Market commenced trading, the Council published a Street Trading and Market policy (the policy), which outlines how the Council will carry out its functions with regard to street trading and further, sets out its expectations with regard to running a vibrant and successful market. The Street Trading and Market Policy is attached at **Appendix A**.
- 3.6 Essex Farmers Markets (EFM) has been contracted to run the Friday and Saturday Market under contract with the Council. EFM are responsible for the setting up and dismantling of the stalls before and after each trading day, provision of the stalls and ensuring compliance with the requirements of the policy and any conditions of licence.
- 3.7 Full responsibility for who may and may not trade at the Market falls to EFM, where this is lawful and where it is within the terms and conditions as laid down by the Council. In matters where there is dispute over a condition or policy requirement/disqualification it is for the Council in its role as the licensing authority to assess the facts and make judgement on the question at hand.
- 3.8 Whilst the policy covers many aspects relating to the licensing of street trading, sections 3.5, 5.2. and 5.4 identify matters that would not normally be considered for a licence to trade.

**Section 5.2 of the policy states that the Council may refuse an application on the following grounds:**

*That there are already enough traders trading in the street from shops or otherwise in the goods in which the applicant wishes to trade.*

**Section 5.4 of the policy states:**

*The Act allows the Council to attach such further conditions as appear to be reasonable. Each application will be considered in its own right and on its own individual merits. In this respect the Council has produced some guidance on the types of products which may be refused in order to be in keeping with the character of the Council and of the town centre and which as part of the Council's policy may also form part of the licence conditions. These are:*

- a) To allow one type of product to be sold by one trader.*
- b) To ordinarily refuse products not in keeping with the character of the High Street or the objectives of providing specialist and niche products which could include for example:*

- *Products of a sexual content*
- *Trailer vehicles*
- *Cooked food of burgers, hotdogs, chips, pizza and fast food*
- *Cleaning products*
- *Products promoting the use of drugs or tobacco related products*
- *Branded products found in local supermarkets and shops, including household items, make-up and health products*
- *Funfair type products; donuts and candyfloss*
- *Knives and other weaponry*
- *Canned or branded drinks, chocolate, sweets and crisps*
- *Mobile phone accessories*

- 3.8** It should be noted that section 5.2 is a repeat of a portion of Schedule 4 of the Act itself and is therefore a matter of law and not restricted purely to policy. However, it is an aspect of the Act which allows discretion in stating that the Council **may** refuse, rather than **must** or **shall** refuse.

**3.9 Section 5.3 of the policy states:**

Healthy competition is good for the town, however, the objective of the market is to compliment and enhance the offering provided by the shop traders in the town.

#### **4. Issues Options and Analysis of Options**

- 4.1** Jacky's Boutique is a longstanding trader on the Market, having operated on a Saturday for some approximately three years and on a Friday, since Friday trading commenced approximately one year ago.
- 4.2** Jacky's Boutique sell Ladies and Children's clothing and has been permitted to do so by adopting a broad interpretation of Schedule 4 of the Act the Council's policy. This is because it has been the belief of Officers that a literal interpretation of these provisions would disallow clothing of any nature to be sold on the basis that there are already many outlets in and around the vicinity that stock and sell clothes. Instead, a purposive view has been taken to permit clothing provided that it is not the same or distinctly similar to clothing sold elsewhere.
- 4.3** It should be noted that whilst Jacky's Boutique has been told that they cannot duplicate stock, this has not to date been put in writing and only verbal guidance has been given to date.
- 4.4** Complaints have been received from a number of traders representing approximately 5 or 6 local shops. These traders complain that their stock is being duplicated and that particularly since Friday trading commenced, this is affecting their trade. The shop traders are concerned that their overheads are higher and that with the market selling the same (or very similar) items, they are unable to compete on a level footing.
- 4.5** A complaint was received approximately 12 months ago, which was dealt with by way of an inspection of the stall, with a request to remove one item that duplicated the stock of one of the shop traders. Nothing else was received by way of complaints until recently where it appears that items are being sold that duplicates ranges that are sold in a number of local shops.
- 4.6** On 17 November 2015, a meeting was held at the Council offices, which was facilitated by licensing staff. In attendance, were Gary O'Shea and Keith Alexander from the licensing team, the Market operator from EFM, two representatives from Jacky's Boutique and various representatives from Virgo, Dolly's, Queenies and Influence. These all being fashion shops in and around the Brentwood high Street area. In addition there are other traders that could not be present whom have been invited to this hearing and whom it is alleged have similar concerns over stock duplication.
- 4.7** The matter as to whether there is an actual duplication of stock between the goods sold by the stall and those of the shops was not specifically addressed.

- 4.8** This matter is not a question of whether there is duplication, rather than seeking a decision on the substantive question as to whether duplication is permitted at all, or indeed whether the policy permits any form of clothing to be sold on the market.

## **5. Reason for Recommendations**

- 5.1** A policy is in place to identify the parameters under which the council will carry out its function under the licensing regime and to identify what would normally be expected from applicants and licence holders. Whilst there should be good reason if ever the Council were to divert from policy, it should be something that the Council is prepared to do if the specific individual circumstances so merit. In other words the Council must not use the wording of any policy to fetter its discretion in any given individual case.

- 5.2** The recommendations in this report are broad as in effect there is a twofold question being asked as follows:

In the first instance, 2.1 (a) seeks clarification on the general interpretation of the Council's policy in order to establish whether clothing is permitted to be sold on the Market and if so whether there should be any restriction on this.

However, paragraph 2.1 (b) has been included to be considered only if it is determined that the policy either does not permit clothing to be sold or if the stock of clothing is restricted by the policy in any way i.e. if members resolve either 2.1 (a) (i) or 2.1 (a) (ii). In this event Members are requested to further resolve whether the specific facts of this case merit a diversion from policy.

- 5.3** It was evident at the meeting on 17 November that there was a difference of opinion between the shops and the Market trader, which was unlikely to be resolved by discussion. It was therefore decided that the only means to address the question in full was to seek clarification from this Sub-Committee after consideration of all relevant facts.
- 5.4** The Council should not become involved in debate over pricing or facts surrounding competition law. The matter at hand is purely a policy issue and potentially whether or not the policy should be fully applied here.

## 6. References to Corporate Plan

- 6.1 The proposals contained within this report link directly to the following priorities of the corporate plan:

**A prosperous Borough** – “Safeguarding public safety through a risk based regulation and licensing service.”

**Street Scene and Environment** –

*“Develop effective partnership arrangements so all issues affecting neighbourhoods are delivered in a timely and efficient way”*

## 7. Consultation

- 7.1 Full consultation took place prior to adoption of the high Street as a ‘licence’ street. There is no further consultation required in relation to individual applications, nor would any form of consultation assist with determination relating to a matter of policy.
- 7.2 Notwithstanding the above, relevant local shops have been contacted following the complaints received and given opportunity to attend the hearing. The Market trader has also been advised that representative(s) may also attend the hearing to assist with their case.

## 8. Legal Implications

- 8.1 There is a right of appeal to Magistrate’s court in respect of any applicant or licence holder aggrieved by the refusal to grant or renew a licence or by the revocation of a licence. This means that, having traded for some three years, if Members determined that no clothing could be sold, this would effectively amount to a refusal or revocation of licence and could be appealed.
- 8.2 Should members determine for any reason that clothing can be sold whether this is restricted by type or not this would amount to a policy decision for which there is no right of appeal in law. This means that the only recourse for any party if aggrieved by the decision would be judicial review.
- 8.3 In either case clear reasons should be given and recorded in order to support the decision(s) made.

## **9. Appendix A – Street Trading and Market policy**

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