Neutral Citation Number: [2014] EWCA Civ 94

Case No: C1/2013/1844

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR. JUSTICE HADDON-CAVE
CO/10908/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2014

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE LLOYD JONES

- -

Between:

R (ALISTAIR THOMPSON)	**Appellant**
- and -	
OXFORD CITY COUNCIL	**Respondent**
- and -	
SPEARMINT RHINO VENTURES (UK) LIMITED	**Intervener**

- -

- -

Gerald Gouriet QC and Jeremy Phillips (instructed by **Berwin Leighton Paisner LLP**) for the **Appellant**
Ranjit Bhose QC (instructed by **Jeremy Thomas, Head of Law & Governance of Oxford City Council**) for the **Respondent**
Philip Kolvin QC (instructed by **Robert Sutherland of Jeffrey Green Russell Ltd**) for the **Intervener**

Hearing date: 27 January 2014

- -

Judgment

LORD JUSTICE LLOYD JONES:

Introduction.

1. This is an appeal by Mr. Alistair Lockwood Thompson ("the appellant") against the Order of Haddon-Cave J. dated 28 June 2013 dismissing his claim for judicial review of Oxford City Council's ("the Council") refusal on 24 September 2012 to renew a licence for a sexual entertainment venue ("the SEV licence") for a lap-dancing club known as "The Lodge" at Oxpens Road in Oxford.

The statutory background.

2. As originally enacted, the provisions in Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 ("LGMPA 1982") concerning the licensing of "sex establishments" were limited to the regulation of sex cinemas and sex shops. They did not include other sexual entertainment venues such as strip clubs or lap-dancing clubs, which were subject to the licensing regime under the Licensing Act 2003. However in 2009 Parliament brought lap-dancing clubs within the licensing regime of Schedule 3 to LGMPA 1982. Section 27 of the Policing and Crime Act 2009 ("PCA 2009") amended the definition of "sex establishments" in paragraph 2 of Schedule 3 to LGMPA 1982 so as to include a "sexual entertainment venue". Local authorities were given the option of adopting Schedule 3 as amended so as to give effect to the new regime in their area.

3. By resolution passed on 19 April 2010 Oxford City Council resolved to adopt the amended Schedule 3 to LGMPA 1982. The resolution included the following statement:

> "(c) That "Sexual Entertainment Venues" are not generally appropriate near or in locations or areas containing any of the following:
>
> (i) Historic buildings or tourist attractions.
>
> (ii) Schools, play areas, nurseries, children's centres or similar premises.
>
> (iii) Shopping complexes.
>
> (iv) Residential areas.
>
> (v) Places of worship."

4. Whereas previously, under the Licensing Act 2003, licences had been of an indefinite duration, under the LGMPA 1982 licences for lap-dancing clubs may only be granted for a maximum of a year and therefore have to be renewed at least annually. Paragraph 8 of Schedule 3 gives appropriate authorities the power to grant or renew SEV licences and draws no distinction between fresh applications and renewal applications.

5. The statutory grounds for grant or renewal or refusal are set out in paragraph 12 of Schedule 3. Paragraph 12(2)(a) provides that the authority may refuse an application for the grant or renewal of a licence on one or more of the grounds specified in Paragraph 12(3) which provides as follows:

> "(3) The grounds mentioned in sub-paragraph (2) above are—
>
> (a) that the applicant is unsuitable to hold a licence by reason of having been convicted of an offence or for any other reason;
>
> (b) that if the licence were to be granted, renewed or transferred the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant, renewal or transfer of such a licence if he made the application himself;
>
> (c) that the number of sex establishments, or of sex establishments of a particular kind, in the relevant locality at the time the application is determined is equal to or exceeds the number which the authority consider is appropriate for that locality;
>
> (d) that the grant or renewal of the licence would be inappropriate, having regard—
>
> (i) to the character of the relevant locality; or
>
> (ii) to the use to which any premises in the vicinity are put; or
>
> (iii) to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.
>
> (4) Nil may be an appropriate number for the purposes of sub-paragraph (3)(c) above.
>
> (5) In this paragraph "the relevant locality" means —
>
> (a) in relation to premises, the locality where they are situated; and
>
> (b) ...."

Paragraph 10(2) of Schedule 3 provides:

> "Where the appropriate authority refuse to grant, renew or transfer a licence, they shall give him a statement in writing of the reasons for their decision."

6. The effect of paragraph 27 of Schedule 3 is that appeals against refusals on the grounds specified in paragraph 12(3)(a) and (b) are to a Magistrates' Court and then the Crown Court, whereas refusals on the grounds specified in paragraph 12(3)(c) and (d) are subject only to review by the High Court.

7. The Home Office Guidance on Sexual Entertainment Venues published in March 2010 states (at para. 3.36) that "the relevant locality" does not have to be a clearly pre-defined area and that local authorities are free to conclude that it simply refers to the area which surrounds the premises.

The Pennyfarthing Place premises.

8. The appellant had previously operated a similar establishment, also called The Lodge, at premises at Pennyfarthing Place in Oxford. A Public Entertainment Licence had been in force in respect of those premises from at least 1996. From 2007 the appellant and his business partner, Mr. Opher, ran The Lodge as a bar and nightclub as tenants of the landlord and licensee, Greene King Retailing Limited ("Greene King").

9. On 14 October 2009 Greene King applied for a licence variation to alter the layout of the premises in Pennyfarthing Place and to add the licensable activities of "film, performance of dance, facilities for making music and anything of a similar description". This variation was sought in preparation for the operation of the premises as a lap-dancing club. Objections were made to the variation, particularly in light of the proximity of the premises to St. Ebbe's Church. On 10 December 2009 Greene King's application for variation of the licence was granted. An appeal against the grant of the licence by the Rector of St. Ebbe's Church was subsequently dismissed by Oxford Magistrates' Court on 30 June 2010.

10. On 10 February 2010 the Council granted a licence to the claimants specifically for the operation of the Pennyfarthing Place premises as a lap-dancing club. The Lodge operated as a lap-dancing club continuously thereafter until March 2011 when a renewal of the licence was refused.

11. Following the Council resolution of 19 April 2010 adopting the new licensing regime under the amended Schedule 3 to the LGMPA 1982, the appellant had to apply for a licence under the new regime to enable the Pennyfarthing Place premises to continue to operate as a lap-dancing club. On 2 March 2011 the Council's Licensing and Registration Sub-Committee ("the Sub-Committee") heard the appellant's application for an SEV licence for the Pennyfarthing Place premises. The application was refused. On 1 April 2011 the appellant lodged a claim for judicial review of the refusal. The premises at Pennyfarthing Place were closed on 10 June 2011. The application for judicial review was subsequently discontinued on 22 September 2011 following the grant of an SEV licence in respect of the Oxpens Road premises.

The Oxpens Road premises.

12. The appellant decided to move the club to a new location at premises in Oxpens Road, Oxford, which had previously been occupied by a bar called The Coven. On 19 May 2011 he made an application for an SEV licence for those premises in Oxpens Road which are located about half a mile from the centre of Oxford.

13. On 12 July 2011 the Licensing and Registration Sub-Committee of the Council heard the application in respect of the Oxpens Road premises. The Committee was addressed by Mr. Gouriet QC on behalf of the appellant and by a number of objectors, including Mr. John Payne, Solicitor, for St. Ebbs Church. At the meeting Mr. Gouriet amended the application so that the licence, if granted, would permit the premises to open at 11.00 p.m. rather than 9.00 p.m.

14. On 18 July 2011 the Sub-Committee published its decision granting to the appellant an SEV licence for the premises at Oxpens Road for one year ("the 2011 decision"). It is necessary to set out the reasons in full:

> "[The Sub Committee examined all the documents submitted and considered all the representations made at the hearing. It had particular regard to the written objections concerning the location of the premises and the Council resolution of 19/04/2010 (the Resolution) concerning generally inappropriate locations for sexual entertainment venues.
>
> 2. The Sub Committee noted that government guidance and case law made clear that moral objections to sexual entertainment were not relevant to consideration of the Application. With this in mind the Sub Committee disregarded any passages within the representations received which expressed moral concerns.
>
> 3. The Resolution states that "sexual entertainment venues are not generally appropriate near or in locations / or areas containing any of the following:
>
> - Historic buildings or tourist attractions,
> - Schools, play areas, nurseries, children's centres or similar premises,
> - Shopping complexes,
> - Residential areas,
> - Places of worship,"
>
> 4. The Sub Committee noted that relevant locality is not defined in The Resolution nor in the applicable legislation or government guidance. Without a full assessment of the entire area The Sub Committee felt that it had insufficient information to allow it to define the dimensions of an exact area as the relevant locality, nor to reach a decision on the appropriate number of sex establishments in such an area.
>
> 5. However, for the purposes of deciding the Application the Sub Committee found that the relevant area in this case is the area near to the proposed premises. It further found that the

only buildings sufficiently near the proposed premises to engage the Resolution, and which could fall within the categories set out, are the Oxford Ice Rink and Oxford and Cherwell Valley College. Neither fall squarely within any of the categories but the College is similar to a school and the Ice Rink does attract many children and tourists.

6. Despite the location of the College and Ice Rink the Sub Committee were satisfied that with the amended hours of operation at the proposed premises the College would be closed and public skating sessions over well before any sexual entertainment began. There was evidence that private skating sessions took place after 23:00 but the Sub Committee found the risk of these sessions bringing children or vulnerable people into contact with the Premises was very low.

7. The Sub Committee noted the representations concerning proximity of the proposed premises to residential and shopping areas but found that whilst the premises are between the residential areas of St Ebbe's and St Thomas's they could not reasonably be considered to be in or sufficiently near them to engage The Resolution. Nor are they sufficiently near the Westgate shopping centre.

8. The Sub Committee also considered the representations concerning incompatibility of the proposed premises with planning policy aspirations for the west end of Oxford City. However, the Sub Committee had to base their view on the character of the relevant locality and nearby premises at the time of application and not as it may develop in the future. If granted any licence would in any event require annual renewal which would take into account the character of the locality at the relevant time.

9. The Sub Committee noted the Applicant had the benefit of a good track record in operating a sexual entertainment venue (SEV) at a similar Oxford premises and that Thames Valley Police did not object to the application. It was significant that the Applicant appeared willing and, from his track record, able to operate premises discreetly, anonymously and with no external indication as to the nature of entertainment taking place. Given the location of the Ice Rink, the College and coach parking area the Sub Committee found it particularly important that any SEV in the proposed location have no external indication of the type of premises or entertainment being carried on.

10. In considering The Resolution the Sub Committee focused on the harm it seeks to address or objectives it aims to achieve. In the absence of any specific detail in the Resolution on these points the Sub Committee found that among the primary

> concerns should be the welfare of children and prevention of nuisance and crime. With appropriate conditions the Sub Committee felt that the premises could operate without aggravating these aims.
>
> 11. Taking all these factors into account the Sub Committee found that whilst the Resolution was engaged at a low level in relation to the Ice Rink and College there were good reasons to believe the premises would not be inappropriate in the proposed location and an exception to the general position should be made in this case.
>
> 12. The Sub Committee found that in order to ensure the proper running of the premises it is necessary to attach conditions to the license. The Licensing Authorities Standard Conditions for Sexual Entertainment Venues should apply together with all conditions on the Applicant's existing premises licence at The Lodge so far as they relate to the carrying on of sexual entertainment, also the additional conditions offered by the Applicant during the hearing. These conditions should be combined in one clear schedule avoiding any duplication.
>
> 13. The Sub Committee had regard to the Human Rights Act 1998 and European Convention on Human Rights as well as its duty under the Crime and Disorder Act 1998. However, it found that it had heard no evidence that any person's human rights would be infringed by granting the application nor sufficient to convince it that any significant crime and disorder would be caused by the grant.
>
> Decision: The Application as amended is granted subject to the conditions set out on the attached Schedule."

15. On 17 November 2011 The Lodge opened as a lap-dancing club in the premises at Oxpens Road.

16. In July 2012 the appellant applied to the Council to renew the licence. On 24 September 2012 a differently constituted Licensing and Registration Sub- Committee heard the application for the renewal of the SEV licence. On this occasion the appellant was represented by Mr. James Rankin of counsel who submitted that the question whether a licence for such an activity would be inappropriate having regard to the character of the relevant locality or the use to which the premises were to be put had been examined in detail by the Sub- Committee in July 2011 and that there had been no change of circumstances since. He submitted that, in the light of the Sub-Committee's decision in 2011 that the grant of the licence would not be inappropriate on these grounds, to say otherwise now would be perverse.

17. A dozen objectors were present at the meeting, including a representative of the St. Ebbe's New Development Residents' Association. The Sub-Committee also had

before it a large number of written objections to the application. A full account of those objections is given by Haddon-Cave J. in his judgment. For present purposes it is sufficient to refer to the following matters. First, there were objections on the ground that the renewal of the licence would be inappropriate having regard to the character of the locality and the use to which the premises were put. These focussed on The Lodge's proximity to the Ice Rink, the Oxford and Cherwell Valley College, the Oxpens Road Car and Coach Park and residential accommodation. A member of the City Council, objecting on behalf of some of his constituents, expressed the matter as follows:

> "[T]he granting of such a renewal would frustrate the four licensing objectives adopted by the Council in line with the national legislative requirements. The provision of a sexual entertainment venue at this unsuitable location close to the city centre, to housing and to major tourist and leisure facilities, will jeopardise the prevention of crime and disorder, public safety, and the prevention of nuisance. The proximity of such an establishment to two distinct quiet residential areas also risks clear and egregious conflict with all four objectives most critically, the fourth objective to secure the protection of children from harm because of the nature of sexual entertainment to be provided."

Secondly, the Oxford Feminist Network submitted the results of a survey it had conducted of female local residents, seeking their views and experiences following the licensing of the Oxpens Road premises as an SEV. Some 108 responses were said to have been received. These included allegations of harassment by individuals who had left the club.

18. The judge considered that the gravamen of the objections was best summed up in the following passage from the written objection by the chair of St. Ebbe's New Development Residents' Association:

> "The Oxpens location is most inappropriate for entertainment of this sort. It is immediately opposite the Oxford and Cherwell Valley College, which is open for use by its adolescent pupils until 10.00pm. It abuts onto the coach park which is used regularly and frequently by school parties by all nationalities. It is about 100 yards from the Ice Rink which has night time sessions which are much used by student sporting groups. It would be hard to find a place in Oxford more full of impressionable young people to be intrigued by advertisement and present in the vicinity during the hours of operation of the club."

19. On 24 September 2012 the Sub-Committee published its decision refusing to renew the SEV license for the premises at Oxpens Road. It is, once again, necessary to set out the decision and reasons in full.

"[T]he Sub Committee examined all the documents submitted and considered all the representations made at the hearing. The Sub Committee had particular regard to the written objections concerning the location of the premises and the Council resolution of 19/04/2010 concerning generally inappropriate locations for sexual entertainment venues.

2. The Resolution of 19/04/2010 states that "sexual entertainment venues are not generally appropriate near or in locations / or areas containing any of the following:

- Historic buildings or tourist attractions,
- Schools, play areas, nurseries, children's centres or similar premises,
- Shopping complexes,
- Residential areas,
- Places of worship,"

3. The Sub Committee found that the relevant locality for the purposes of deciding the application is the area near to the premises.

4. Taking into account the ground of refusal at paragraph 12 (d) of Schedule 3 of the Act the Sub Committee found that renewal of the license would be inappropriate having regard to the character of the relevant locality or use to which premises in the vicinity are put.

The Sub Committee reached this conclusion for the following reasons:

- [1] The premises are near to Oxford Ice Rink, Oxford and Cherwell Valley College and the Oxpens car and coach park. The Ice Rink is a facility which attracts many children, young people, families and tourists and the College is similar to a school. The Sub Committee therefore felt the Resolution of 19/04/2010 on generally inappropriate locations was engaged in respect of the Ice Rink and College.
- [2] The Oxpens car and coach car park, whilst not an 'attraction' in itself, nevertheless brings many tourists, visitors and local residents into the area of the premises at all hours. The operation of a sexual entertainment venue in the locality was therefore not appropriate.

- [3] The Oxpens road is a busy transport link and pedestrian route for visitors and residents living in the St Thomas and St Ebbs areas, a sexual entertainment venue was not appropriate in such a well used location.

- [4] The increasing concentration of student accommodation in the area, including development of student housing at Luther Court, Mill Street and Park End St, meant an increased use of the locality by young and possibly vulnerable students as a route to and from their accommodation.

- [5] Many of the representations received indicated there had been a negative change in the character of the vicinity brought about by the opening of the premises.

- [6] Many of the representations received indicated that the operation of premises had created a hostile atmosphere in the locality and a heightened fear of the risk of sexual violence. Whilst acknowledging there was no evidence of any violent incidents attributable to the operation of the premises, the Sub Committee gave weight to the representations and felt the heightened fear reported was at least in part due to the existence of the premises and the type of entertainment it operated. The Sub Committee were mindful of the Council's duty under section 17 of the Crime and Disorder Act 1998 to take reasonable steps to prevent crime and disorder.

- [7] Of particular concern were reports contained in the representation of Louise Livesey concerning incidents of harassment by users of The Lodge toward a user of the Ice Rink. Whilst recognising these reports were both anonymous and hearsay and accordingly carried limited weight the Sub Committee nevertheless took some account of them.

5. The Sub Committee recognised that its findings were a departure from the Council's decision to grant the license in July 2011 but found that as a differently constituted Sub Committee with the benefit of evidence concerning the operation of the premises over the last year they were entitled to reach a different conclusion.

6. The Sub Committee were aware of the human rights considerations as set out in paragraphs 26 and 27 of the Head of Environmental Development's report, but found that the Applicant's right to protection of his licence was not a right so significant as to override their own calculation of the public interest.

> Decision: The Application is refused on the grounds that a sexual entertainment venue at the Premises would be inappropriate, having regard to the character of the relevant locality and the use to which other premises in the vicinity are put."

The Judicial Review.

20. In his application for judicial review the appellant sought to challenge the Council's decision of 24 September 2012 on three grounds.

    (1) Apparent bias on the part of a member of the Sub-Committee.

    (2) Insufficiency of reasons.

    (3) Taking into account irrelevant and/or inaccurate considerations.

21. The judge dealt with the allegation of apparent bias at the start of the hearing. He dismissed this part of the application on the ground that the appellant had failed to raise any objection to the composition of the Sub-Committee prior to or at the meeting on 24 September 2012. (See ***Locabail (UK) Limited v Bayfield Properties*** [2000] QB 451, per Lord Bingham at para 69.) In his reserved judgment the judge stated (at para 39) that he would in any event have dismissed the apparent bias ground on the merits. There has been no attempt to challenge this ruling.

22. On the challenge based on the adequacy of reasons given by the Sub-Committee, the judge considered that when the reasons were read fairly, as a whole and against the background of the representations made at the hearing by the parties, the reasons were intelligible, adequate and enabled the informed reader to understand the principal important controversial issues and why the application for renewal had been refused when previously a licence had been granted. Furthermore the reasons were "properly relevant to the ground for refusal". In this regard he considered that six of the specific matters referred to by the Sub Committee were new or substantially new matters and that three related to entirely fresh factors or circumstances, namely the reported effect of the operation of the club on the area in the previous twelve months. In his judgement, when considered cumulatively, they represented a reasonable, comprehensive and comprehensible catalogue of reasons explaining objectively a change of heart from the 2011 decision and a refusal to renew in 2012.

23. So far as the third ground is concerned, it had been submitted on behalf of the appellant that the Sub-Committee erred in taking into account an "increasing concentration of student accommodation in the area" because incomplete developments were not relevant to assessing the present character of the area and there was insufficient evidence to justify such findings. The judge concluded that the Sub-Committee was entitled to take into account both the present and future character of the area under Paragraph 12(3)(d). He considered that prospective licences required a prospective view. The fact that an area was developing and in a continued state of change was a relevant consideration as to why renewal might be appropriate. Furthermore he considered that there was ample evidence before it to justify the conclusion of the Sub Committee.

Ground 1: The learned judge was wrong to hold that the reasoning of the Court of Appeal in *Dunster Properties Ltd v. The First Secretary of State* [2007] EWCA Civ 236 (duty to explain departure from decision of previous planning inspector) was not applicable to licensing cases.

Ground 2: The judge was wrong to reject the appellant's claim that the licensing sub-committee refusing him renewal of his licence (granted the previous year under Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982) had failed to give an adequate and intelligible explanation for departing from the reasoned decision of the differently constituted sub-committee that granted him the licence.

24. Grounds 1 and 2 may conveniently be considered together.

25. The Schedule 3 regime gives a wide discretion to licensing authorities, in particular in forming value judgements as to whether the grant or renewal of a licence would be appropriate having regard to the character of the locality. This is reflected in the provisions of paragraph 27 of Schedule 3 which distinguishes between appeals against refusals on the grounds specified in paragraph 12(3)(a) and (b) which are subject to appeal to the magistrates' court and the Crown Court, and appeals against refusals on the grounds specified in paragraph 12(3)(c) and (d) which are subject only to review by the High Court. As the judge pointed out, this indicates an intention to give local authorities a wide discretion under sub-paragraphs (c) and (d). Moreover, the fact that the maximum term of an SEV licence is twelve months indicates that local authorities are to keep these matters under frequent review.

26. The argument before us centred on the significance of a previous decision in which a differently constituted Sub-Committee had come to a different conclusion on the question of whether the grant or renewal of a licence would be appropriate having regard to the character of the locality and the use to which the premises in the vicinity were put.

27. In ***R v Birmingham City Council ex parte Sheptonhurst Limited*** [1990] 1 All ER 1026 the applicant sought judicial review of decisions by four local authorities refusing to renew licences for sex shops in their respective districts under the LG(MP)A 1982, the provisions applicable in the present case. The main question for consideration was whether the discretion to refuse to renew a licence is different from the discretion to refuse to grant a licence and, if so, what limitations there are upon the discretion to renew. The applicant had submitted that the renewable licence could not be refused on ground 3(d)(i) unless there had been some change in the character of the relevant locality since the grant or renewal of the licence. In two of the cases, Mann LJ, sitting as an additional judge of the Queen's Bench Division, had rejected this submission:

> "It is to be observed that the statute imposes no constraint upon a Local Authority's discretion when it is considering a renewal. The legislature must be taken to know that a Local Authority is a body of changing composition and shifting opinion, whose changes and shifts reflect the views of the local electorate. In my judgement it is not perverse to refuse a renewal where there is no change in the character of the relevant locality or in the use to which any premises in the locality are put. What is

> "appropriate" may be the subject of different perceptions by different elected representatives. In assessing what is "appropriate" any particular body of elected representatives confronted with an application for a renewal should take into account the previous grant, but in my judgement their obligation is no more than that. In both cases before me the previous licence was a factor before the decision takers. In both cases the principle ground of challenge therefore fails."

28. The Court of Appeal agreed. O'Connor L.J. stated:

> "…[W]here Parliament, having expressly limited the grounds on which a licence may be refused, has drawn no distinction between grant and renewal of the licence and provided that a licence shall not last for more than a year, then it seems to me that to accede to Mr. Tabachnik's submission [that Parliament cannot have intended that the vagaries of local opinion should be determinative of an existing trader's rights to continue to trade] would be to introduce a fetter on the discretion of the Local Authority in cases of renewal which Parliament has not done. However, although the discretion is unfettered, there is a difference between an application for grant and an application for renewal and that distinction, as the cases have pointed out, is that when considering an application for renewal the Local Authority has to give due weight to the fact that a licence was granted in the previous year and indeed for however many years before that. It is of particular importance that the licensing authority should give due weight to this fact in this field, for I do not doubt that there is opposition to sex shops on grounds outside the limits imposed by paragraph 12 of the Schedule. I have come to the conclusion that the licensing authority were entitled to have a fresh look at the matter… In a case where there has been no change of circumstances, if the licensing authority refuses to renew on the ground that it would be inappropriate having regard to the character of the relevant locality, it must give its reasons for refusal: see paragraph 10(20) of the Schedule. If the reasons given are rational, that is to say properly relevant to the ground for refusal, then the court cannot interfere. I believe this to be the true protection for a licence holder applying for renewal against a wayward and irrational exercise of discretion. The fact that in previous years the licensing authority did not chose to invoke those reasons for refusing to grant or renew the licence does not make the reasons irrational."

29. On behalf of the appellant it is suggested that the judge misinterpreted this passage. The appellant submits that in the present case the judge concluded that it was sufficient if it could be inferred objectively why the refusing Sub-Committee came to a different decision. There is no basis for this criticism. While the judge concluded that there was no reason why the 2012 decision needed to comment seriatim on the

reasons for the 2011 decision, he clearly proceeded on the basis that there was a need to provide an explanation for the departure. In his view adequate reasons were given. Accordingly I can see no distinction between the approach of the judge in the present case and that of Sales J. in ***R (KVP ENT Limited) v. South Buckinghamshire District Council*** [2013] EWHC 926 (Admin).

30. Another decision to the same effect is that of the Court of Appeal in ***North Wiltshire DC v. SSE*** (1992) P & CR 137 where Mann L.J. emphasised that in such circumstances the decision maker is free to disagree with the earlier judgment but before doing so he should have regard to the importance of consistency and give his reasons for departure from the previous decision.

31. The appellant also relies on ***Dunster Properties Ltd v. First Secretary of State*** [2007] EWCA Civ. 236. There, Dunster had sought planning permission for a first floor extension to a residential property in Chelsea. There were two successive decisions by planning inspectors. The first inspector, Mr. Sargent, rejected an objection in principle to there being any extension at first floor level but dismissed the appeal on the basis of the particular designs. Dunster then applied for planning permission on the basis of different designs. On this occasion, when the matter came on appeal before a different inspector, Mr. Mead, the inspector rejected the planning authority's objections to the particular design but upheld the objection in principle. Mr. Mead clearly took an entirely different view on the issue of principle from that expressed by Mr. Sargent. However the only reference in the second decision to the earlier decision was this statement:

> "I have no comments on either of those two remarks other than to state that each case is judged on its own merits and my conclusions on the current scheme are given above."

32. The Court of Appeal quashed the second decision. It considered that it was for Mr. Mead to exercise his planning judgement in relation to the application before him. Not only was he not in any sense bound by the reasoning in the previous decision but it was not even a starting point for his process of judgement and reasoning. Nevertheless Mr. Sargent's conclusions on the point of principle were a material consideration which Mr. Mead had to take into account. The Court of Appeal considered that, although not much may have been called for by way of reasons, those given by Mr. Mead were inadequate. Lloyd L.J. (at paragraphs 21 – 23) observed that in that case the reader could not tell why the inspector had disagreed with his predecessor on this issue and that, accordingly, the salutary safeguard of requiring reasons in order to demonstrate that the decision was based on relevant and rational grounds had not performed its intended function. In his view it appeared that Mr. Mead had not faced up to his duty to have regard to the previous decision and had failed to "grasp the intellectual nettle of the disagreement, which was what was needed if he was to have proper regard to the previous decision". Either he did not have a proper regard to it, in which case he had failed to fulfil the duty to do so, or he had done so but had not explained his reasons, in which case he had not discharged the obligation to give his reasons.

33. In the present case the judge considered ***Dunster*** of limited assistance and sought to distinguish it on three grounds. First, he considered that ***Dunster*** was "a pure planning case" and not a licensing case, whereas in the present context local authorities were entitled to take a fresh look at the matter and effectively were entitled to change their mind from one year to the next. Secondly, it was a decision on its own particular facts, involving a refusal by the second inspector to give reasons for differing from the previous decision notwithstanding a specific request to do so. Thirdly, ***Dunster*** involved a static matter, namely the aesthetic significance of retaining a gap above a house, whereas the present case involved consideration of dynamic matters.

34. To my mind, the principles stated in ***Dunster*** are of general application and are not limited to planning cases. The explanation provided by Lloyd L.J. as to why the reasons provided were inadequate was in no sense dependent on the planning context; on the contrary it flows from the function of reasons as a safeguard of sound decision making. Moreover, I do not consider that ***Dunster*** turned on its particular facts or the refusal to give reasons following a request. Accordingly, I consider that while it was open to the Sub-Committee in the present case to depart from the decision of its predecessor, it was under a duty to take account of the earlier decision, to grasp the nettle of any disagreement with the earlier decision and to state its reasons for coming to a different conclusion. That obligation to give reasons arises at common law but is reinforced in the present case by paragraph 10(2) of Schedule 3. The third ground of distinction relied on by the judge – that the present case was concerned with dynamic matters – is better considered in the context of the actual decision.

35. In summary, therefore:

    (1) On an application to renew an SEV licence it is not necessary for an objector to demonstrate that something has changed since the decision granting the licence. Were the position otherwise, the efficacy of annual reconsideration would be much reduced.

    (2) However, the decision maker has to have due regard to the fact that a licence was previously granted.

    (3) If there is no relevant change of circumstances, the decision maker has to give his reasons for departing from the earlier decision.

36. Mr. Gouriet placed at the forefront of his oral submissions the 2011 decision which found that the only buildings sufficiently near the proposed premises to engage the Council's resolution were the Ice Rink and Oxford and Cherwell College. While neither fell squarely within any of the categories of the resolution, the Sub-Committee accepted that a College is similar to a school and that the Ice Rink attracted many children and tourists (paragraphs. 4, 5). However, it was satisfied that the effect of the amended hours of operation – the application had been amended at the meeting so that the club would not open until 11.00 pm – would be that the College would be closed and public skating sessions over well before any sexual entertainment began (paragraph 6). Furthermore, Mr. Gouriet pointed to the treatment of representations concerning the impact of the club on the character of the locality. Here the Committee attached considerable weight to the fact that the appellant appeared willing and, from his track record, able to operate premises discreetly, anonymously and with no external indication as to the nature of the entertainment taking place (paragraph 9). On

this basis, he submitted, the Committee concluded that while the resolution was engaged at a low level in relation to the Ice Rink and the College, there were good reasons to believe that the premises would not be inappropriate in the proposed location and an exception to the general position under the resolution should be made in this case (paragraph 11).

37. Turning to the 2012 decision that the renewal of the licence would be inappropriate having regard to the character of the relevant locality or use to which premises in the locality are put, Mr. Gouriet submitted that the dominant factors said to support the decision were points 1 -3 in paragraph 4. In particular, he submitted that point 1 draws attention to the existence of the Ice Rink and the College – institutions addressed in the 2011 decision – while failing to address at all the solution provided by opening hours which was accepted by the Committee in 2011. Mr. Gouriet submits that while, in principle, that conclusion in the 2011 decision might be overcome by other factors, the 2012 decision fails to identify any such factors. Similarly, he draws attention, as dominant considerations in the reasoning of the 2012 decision, to points 2 and 3 which relate to the presence in the area of tourists, visitors and local residents at all hours because of the car and coach park, and the busy pedestrian and transport link along Oxpens Road. These considerations, the 2012 decision concludes, show that the operation of a sexual entertainment venue in the locality was not appropriate. In so concluding, Mr. Gouriet submits, the Committee failed to address the solution accepted in the 2011 decision, namely the anonymity and discrete character of the premises.

38. In these circumstances, it is submitted on behalf of the appellant, that the Committee in taking its 2012 decision failed to give due weight to decisive factors in the 2011 decision and failed to grasp the nettle by explaining its departure from the earlier decision.

39. To my mind, the answer to this submission is provided by the Committee's statement at paragraph 5 of the 2012 decision that it recognised that its findings were a departure from the 2011 decision but that it considered that, as a differently constituted Committee "with the benefit of evidence concerning the operation of the premises over the last year", they were entitled to reach a different conclusion. When that passage is read in the light of the preceding discussion of matters relating to the impact of the club on the nearby area, it is clear that the Committee was persuaded that what had been seen as solutions in 2011 – limitation of opening hours and anonymity of the premises - were insufficient to meet the perceived mischief.

40. Contrary to the submission of Mr. Gouriet, it does not appear that points 1 – 3 are given any primacy in the decision. They refer in turn to static land use and other land use and provide a description of the area which is necessary for what follows which relates to changing circumstances of different kinds. Point 4 finds an increased use of the locality by students as a thoroughfare. Point 5 refers to representations indicting that there had been a negative change in the character of the vicinity brought about by the opening of the premises. Point 6 states that many of the representations indicated that the operation of the premises had created a hostile atmosphere in the locality and heightened fear of the risk of sexual violence. Point 7 refers to reports of incidents of harassment of members of the public by users of the club.

41. Although Mr. Gouriet sought to question the weight and reliability of the evidence on which the Committee relied in coming to its conclusions in relation to the impact of the club's operation on the area, there was in fact a considerable body of evidence relating to the impact of the club on the area in the first year of its operation. The Oxford Feminist Network made written submissions objecting to the renewal of the licence. This included the results of its survey of local residents to which 108 responses had been received. There were direct quotations from the responses of four women. The first states that men coming from the club had jeered and "made horrible comments about my body and way I dress" in a manner which made her feel threatened. (I am satisfied that the terms and context of this quotation make it clear that it does refer to The Lodge and is not a general statement about such clubs.) A second explains that she has to go past The Lodge every Wednesday as she goes to midnight ice hockey; she states that she has often felt uncomfortable walking past it and has on two separate occasions been harassed in the street by individuals who have left the club. The third, who lives in Oxpens Road, states that she feels threatened when she has to walk or cycle home at night; she feels isolated when the only other people there are on their way to or from the club. The fourth states that when walking past The Lodge she has had cars stop and ask if she is a prostitute and has had sexual expletives shouted at her from other cars. She tries to avoid the area, especially after dark, as she fears that one day the problem will escalate to something worse than verbal abuse. Doorstep consultations with other residents had led to reports of men leaving the club shouting sexually explicit epithets whilst walking down the street, urinating in doorways, ripping drainpipes and other fixtures from their holdings and, more rarely, climbing fences into gardens whilst drunk, leaving residents feeling unsafe and being forced to ring the police on more than one occasion. Local businesses reported that their staff and customers were racially abused by men leaving the club, demanding the use of a payphone to telephone prostitutes. I accept, as did the Committee, that this evidence is hearsay evidence from anonymous sources and therefore carries less weight than might otherwise be the case. Nevertheless, I consider that the Committee was entitled to have regard to this evidence and that it is capable of sustaining the Committee's conclusions.

42. On a fair reading of the 2012 decision, it is clear that the Committee concluded on the evidence relating to the club's operation over the previous year that the limitation of opening times and absence of external indications as to the nature of the activities taking place had not been sufficient to protect the character of the area.

43. I should refer at this point to a further matter concerning points 3 and 4 of paragraph 4 of the 2012 decision. Point 3 draws attention to the fact that Oxpens Road is a busy transport and pedestrian route. Point 4 states that the increased concentration of student accommodation in the area has given rise to an increased use of the locality by students as a route to and from accommodation. This was clearly a matter to which the Committee attached weight. In my view, subject to certain other objections which are considered subsequently, it was a further new matter to which the Committee was entitled to have regard and did regard in departing from the 2012 decision.

44. Both Mr. Gouriet and Mr. Philip Kolvin QC, in his written submissions on behalf of the intervener, have submitted that before a decision maker may depart from an earlier decision in relation to the same matter he must address each material consideration in the earlier decision and explain whether and, if so, why he takes a different view as to

its significance. This seems to me to go much too far and to place an undue burden on the decision maker. I consider that the guidance as to what is required by way of reasons in a planning context provided by Lord Brown in ***South Buckinghamshire District Council v Porter (No. 2)*** [2004] UKHL 33 (at paragraphs 35-6) applies equally in this context. In the present case it is sufficient that the 2012 decision makes clear on a fair reading that evidence concerning the operation of the premises over the preceding twelve months, other changed circumstances and the features of the matters previously addressed which it considered significant led it to a different overall conclusion.

45. Finally, in this regard, I should record that, contrary to the submission of Mr. Kolvin QC on behalf of the intervener, I can see nothing in the statutory scheme for SEV licences, the approach of the Sub-Committee or in its 2012 decision which conflicts in any way with the Services Directive (2006/123 EC) which is implemented in the United Kingdom by the Provision of Services Regulations (SI 2009/2999). In particular the nature of the activities licensed is such that there are compelling justifications for limiting the period of authorisation and for granting to local authorities a wide discretion on applications to renew.

Ground 3. The judge was wrong to hold that in assessing the "character of the relevant locality" for the purposes of deciding (under paragraph 12(3)(d) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982) whether the renewal of a licence would be appropriate having regard to that character, a licensing authority was entitled to have regard to proposed future development; in particular, to applications for planning permission, believed by the authority to be pending, but not yet lodged at the time of the licensing hearing.

46. On behalf of the appellant Mr. Gouriet submits that the Committee in coming to its 2012 decision had regard to irrelevant considerations namely building developments which had not been completed. The evidence before the Administrative Court was that the developments of student housing refers to the following developments:

(1) A development at Luther St. including 82 student study rooms for which planning permission was granted on 7 November 2012, subject to a legal agreement which at 4 June 2013 had not been completed.

(2) A development at the rear of Mill Street including 55 student study rooms for which planning permission was granted in February 2012 and which had not been implemented.

(3) A development at the rear of Park End Street including 44 student study rooms. This scheme was first submitted to the Council in 2011. Planning permission was granted on 9 February 2013 and construction began in March 2013.

(4) A development at Pembroke College including 123 student study rooms construction of which began in 2010 or 2011 and which has been in use since October 2012.

It is only the first three which are referred to in point 4 of paragraph 4 of the 2012 decision.

47. Mr. Gouriet submits that unless it can be demonstrated that a proposed development will actually be completed within the time period of a licence, it should not be taken into account. Furthermore, he submits that if it is shown that a development which would make the grant of a licence inappropriate will have been completed within a period of twelve months, a Council should grant a licence for a shorter period. In this regard he draws attention to the following statement in the 2011 decision:

> "The Sub Committee also considered the representations concerning incompatibility of the proposed premises with planning policy aspirations for the west end of Oxford City. However, the Sub Committee had to base their view on the character of the relevant locality and nearby premises at the time of application and not as it may develop in the future. If granted any licence would in any event require annual renewal which would take into account the character of the locality at the relevant time."

48. The appellant relies on an observation of Turner J. in ***R v. Wandsworth LBC, ex parte Darker Enterprises Ltd.*** (1999) 1 LGLR 601. There the Council had refused to renew an SEV licence on the ground that the locality had changed so that the premises were no longer in keeping with the changed circumstances. The judge observed that on the occasion of the previous renewal it would not have been open to the Council to have refused the application on this ground because the process of improvement was, at that time, incomplete.

49. I have difficulty in accepting that there is room in this context for such a rigid rule limiting consideration to developments which are complete or which will be completed within the period of the licence. Under Schedule 3, LG(MP)A 1982, a Council is given a wide discretion in the assessment of whether the grant or renewal of a licence would be appropriate having regard to the character of the relevant locality. It seems to me that in making that assessment it should be permitted, at least, to have regard to an imminent development of which it is aware, even if there can be no certainty that it will be completed and operational within the period of the licence. In this regard I note that in ***Sheptonhurst***, in the appeal concerning the decision of Norwich City Council, this court appears to have accepted that planned or ongoing development was relevant to an assessment of the character of the locality and to the appropriateness of grant or renewal. (See O'Connor L.J. at pp. 15-16.)

50. Nevertheless, the ability to take account in this context of forthcoming developments cannot be open-ended. The fact that SEV licences can be granted for very short periods which may not, in any event, exceed twelve months has an important bearing on this. Accordingly, I would suggest that it would not be open to a Council to rely, in refusing to grant an SEV licence, on a Development Plan which contemplated development say some five years in the future.

51. However, it is not necessary to decide this issue because I am satisfied that the point being made by the Committee in point 4 is a very different one. It is not saying that new student accommodation in the vicinity would *per se* make the presence of the club inappropriate. (In this regard, I note that the developments referred to are not in

the immediate vicinity of the club.) Rather it is making a point about the use which is made of Oxpens Road as a pedestrian route to and from student accommodation. It states that the increasing concentration of student accommodation in the area means an increased use of the locality by young and possibly vulnerable students as a route to and from their accommodation. As such it is a development of the point made in point 3 that Oxpens Road is a busy transport link and pedestrian route for visitors and residents. The references to individual developments may be to developments still in design or construction, but they are put forward as examples of the general proposition that student accommodation is increasing. The decision might, instead, have referred to the development at Pembroke College which was occupied in October 2012, a matter of days after the decision.

52. For these reasons I do not consider that the Committee took account of an irrelevant consideration in referring to the increasing use of Oxpens Road as a route to and from student accommodation.

Ground 4. The learned judge did not address the appellant's complaint that he had been denied the opportunity at the licensing hearing to respond to the alleged 'future development', because the matter was not raised then, and appeared for the first time in the authority's written decision of 18 September 2012."

53. Mr. Gouriet submits that the appellant was given no advance notice of the point relating to new student accommodation in the area, no reference having been made to the matter until it appeared in the written decision of 24 September 2012. Accordingly, he submits that Mr. James Rankin, who represented the appellant at the meeting, was disadvantaged. Had proper notice of this point been given, Mr. Gouriet suggests, it would have been possible to make enquiries as to the likely date of completion of the projects referred to and to demonstrate that the three referred to in the decision lay some way in the future. Moreover, it is submitted that had the appellant and his advisers been aware that these matters were considered significant, it would have been possible to seek a licence for a shorter period than twelve months.

54. This point, which is really a point on natural justice, does not appear to be addressed by the judge.

55. For reasons set out earlier in this judgment, I consider that the point being made in the decision is not that new student accommodation per se makes the grant of a licence inappropriate. Rather, the point being made goes to the use of Oxpens Road as a pedestrian route to and from student accommodation. The use of Oxpens Road as a busy transport link and pedestrian route was not a new point and cannot have taken Mr. Rankin by surprise. It was clearly in issue at the meeting of the Committee. Thus, for example, the report by the Oxford Feminist Group includes a number of references to the use of Oxpens Road by members of the public who have to pass the club. Indeed the point is made that these are in very high numbers because of the proximity of the club to major transport hubs.

56. Notwithstanding the fact that this was a live issue of which the appellant had notice prior to the meeting, Mr. Rankin's address to the meeting does not appear to have dealt with the point at all. This, I would suggest, is entirely understandable. His case was that the restriction of opening hours and advertising had addressed any problem

that might otherwise arise from the presence of the club in this area. The extent of pedestrian use of Oxpens Road was irrelevant to that submission. In these circumstances, it is unrealistic to suggest that had he been provided with this information about student accommodation in advance he would have addressed it or that the appellant has been prejudiced in any way as a result.

Conclusion.

57. I would dismiss the appeal.

LORD JUSTICE LONGMORE:

58. I agree.

THE MASTER OF THE ROLLS:

59. I also agree.