RECENT GAMBLING CASES - ARTICLES & PRESS UPDATES

Committee	Licensing Committee
Officer Contact	Stephanie Waterford x7232
Papers with report	**Appendix 1 – Articles from national press** **Appendix 2 – Articles from the Licensing Journal**
Ward(s) affected	All

SUMMARY

To inform the Committee of some recent articles in the national press and the IOL Licensing Journal.

RECOMMENDATION

That the committee notes the information

INFORMATION

There has been a high amount of discussion and interest recently in the press regarding the increase of betting shops.

Two articles are attached from the Guardian and also the Mail. (APPENDIX 1)

The Institute of Licensing have also sought to offer some views in recent editions of the Licensing Journal.

These articles are attached as APPENDIX 2.

MailOnline

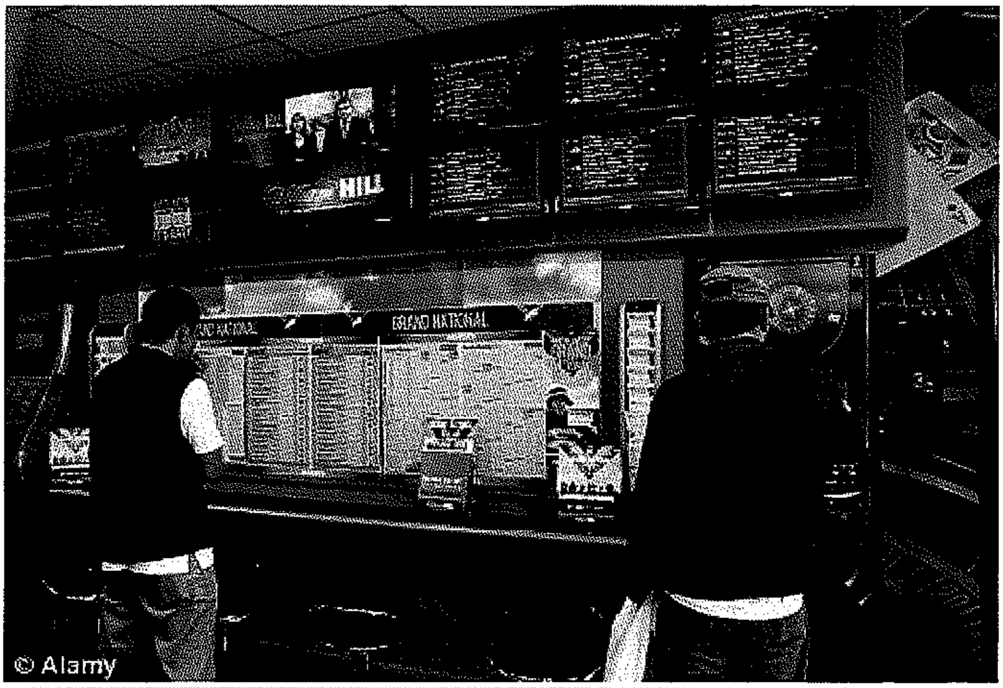
Council with 130 betting shops within eight square miles probes link between gambling and crime

By Sarah Bridge

PUBLISHED: 22:22, 9 March 2013 | **UPDATED:** 09:52, 10 March 2013

The largest licensing authority in the country is launching a special task force to investigate the effects of betting shops in a further sign of a backlash against bookmakers by local authorities.

Westminster City Council has 130 betting shops in its eight square miles of Central London as well as several casinos.



High stakes: An application for a new betting shop similar to the one pictured was rejected by Newham Council

The council is trying to establish if there is a link between crime and gambling and whether the public is being sufficiently protected.

Its licensing sub-committee recently turned down applications by several bookmakers to extend opening hours.

Its chairman, councillor Audrey Lewis, said: 'There is something about the Gambling Act that makes it very difficult to turn applications down and it needs redrafting.

'We are not looking to make a moral judgment, but there is obviously money being spent here that would otherwise be spend on other goods and services.

'We are concerned whether all the crimes associated with betting shops are being fully reported.'

Last month, Newham Council in East London became the first authority to reject a new betting shop –

saying it would make more money from machines than traditional betting – and is calling for the laws to be changed.

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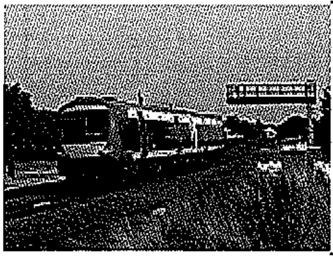
-  'Message for lady on phone in 1st class: Shhhhhh!' Noisy...
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Councils try to block spread of betting shops in poor areas

Newham council's rejection of Paddy Power application set to go before magistrates and potentially to high court

Randeep Ramesh, social affairs editor
The Guardian, Friday 1 March 2013 18.38 GMT

Betting shops are estimated to generate 80% of their income from fixed-odds betting terminals, according to Newham council. Photograph: Alex Segre/Rex Features

Local authorities are attempting to block the spread of betting shops in poorer areas, arguing that bookmakers have deliberately targeted deprived regions and blighted high streets with premises used primarily for gaming rather than gambling.

In a test case, Newham council in east London dismissed an application for a new Paddy Power betting shop on the grounds that it would make more money from gaming machines than from traditional betting on horses and sports results.

The local authority said this meant the application did not meet the licensing conditions of 2005 Gambling Act – the first time such a power has been exercised.

Newham, one of the country's poorest areas, has more than 80 betting shops – six per square mile – with five new shops opening each year. Paddy Power has a dozen in the borough and is applying to open three more this year.

Councillor Ian Corbett, who chairs the council's licensing subcommittee, said one road had 18 betting shops: "We need to encourage diversity on the high street. It's just one betting shop after another," he said.

"Betting shops we think generate 80% of their income from fixed-odds betting terminals [FOBTs]. They are not making money from over-the-counter bets any more. I am not against gambling, but this clustering in our borough drives crime. It's a crime generator."

Paddy Power said it disagreed with the decision and would appeal, with a hearing set for June in the local magistrates court. Industry experts expect magistrates will consider the matter to be of such seriousness that it will have to go to the high court, potentially halting all applications for new betting shops until it is resolved.

The issue is a vital one for bookies: FOBTs yield £1.4bn a year and machine income generates half of betting shop profits, up from 40% in 2008.

However, local authorities say there is a price to pay in terms of crime and addiction, and have warned of an over-concentration on poor high streets.

In Liverpool, environmental health officers were surprised to find 41 shops open in the deprived borough of Knowsley, with at least 137 FOBT machines.

The council has banned the opening of new betting shops and instigated a review of the "potential economic and social impact of fixed-odds terminals within betting shops on residents within the borough given the potential for individuals to lose significant sums of money in a short period of time".

In the Medway area of Kent, Tory and Labour councillors have joined forces over the issue and called for a meeting with the Association of British Bookmakers (ABB). Medway council says FOBT machines are a particular problem as they offer quickfire casino games allowing players to stake up to £100 on a 20-second spin of the wheel.

Vince Maple, Labour leader on the council, said the ABB had responded "very aggressively" at first. "We are having people contact us losing thousands of pounds and lives being ruined because of gambling debt. When I and the Tory leader of the council, Mike O'Brien, wrote to the industry about our concerns, the ABB said we were making false and offensive suggestions. I don't think that is very constructive."

The government is consulting over whether to lower the maximum stake on FOBTs from £100 to £2, saying it "cannot ignore the persistent concerns from many stakeholders and local communities about these types of gaming machines and their potential impact on problem gambling".

The ABB denied there was any problem with the machines and said it had engaged constructively with councils, including Medway. "Gaming machines are a popular product enjoyed by millions of people across the country and machines have been located in betting shops for 10 years without any discernible increase in problem gambling levels," it said.

It said Newham's decision was based on a "misconception that there must be more profit or turnover from betting than machines to satisfy primary gambling activity. That is simply not the case."

• This article was amended on 2 March 2013 to remove a reference to an ABB meeting in London to discuss the controversy surrounding the machines. The ABB has denied it is holding such a meeting.

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Article

What control do licensing authorities have over betting premises?

Betting offices have proliferated on high streets in recent years, and although some of them have been associated with problems of social disorder, many local authorities have felt unable to reject applications to open new ones. In the first of a two-part look at betting shops that will be concluded in the next issue, **Gerald Gouriet QC** argues that the authorities have more power than they appear to realise

The current situation

There is a misconception shared by many licensing authorities that they have practically no power to prevent an unwanted increase in the number of betting offices opening on their high-streets.

The groundswell of concern came into prominence in a recent Channel 4 *Dispatches* documentary[1]. Some betting shops, particularly in the more deprived and densely populated areas, seem to attract groups of punters who loiter immediately outside, often the worse for drink, making certain pavements a no-go area for intimidated shoppers/residents. There are reports of disorder of one kind or another breaking out *inside* betting shops, and the police having to be called, whether because a disgruntled punter becomes violent over a disputed bet, or there is fighting amongst the customers themselves for no identifiable reason. Vandalism of gaming machines (presumably in an attempt to steal the money in them) is commonplace. There are even armed robberies of betting offices, in areas where crime is high enough already, with guns pointed at behind-the-counter staff.

It would be strange indeed if the Gambling Act 2005 gave no power to a licensing authority to say "enough is enough" in those circumstances, and refuse a licence for yet another betting shop that, on the evidence, was likely to attract the same attendant problems: but that is precisely the interpretation of the legislation, wrong in my view, that has been allowed to hold sway in licensing districts in many parts of the UK.

The 2005 Act, so the argument runs, does not permit a licensing authority to refuse a licence to an applicant save in the narrowest of circumstances. And those circumstances rarely, if ever, apply to an application made by one of the respected national bookmakers.

The statutory obligation to "aim to permit" gambling in premises

The source of the misconception is section 153(1) of the 2005 Gambling Act, which it is worth citing in full:

Section 153 Principles to be applied

(1) In exercising their functions under this Part a licensing authority *shall aim to permit* the use of premises for gambling insofar as the authority think it -
- (a) in accordance with any relevant code of practice under section 24,
- (b) in accordance with any relevant guidance issued by the [Gambling] Commission under section 25,
- (c) reasonably consistent with the licensing objectives (subject to paragraphs (a) and (b)), and
- (d) in accordance with the [policy] statement published by the authority under section 349 (subject to paragraphs (a) to (c)).

[italics added][2]

The licensing objectives are given by section 1, which provides –

Section 1 The licensing objectives

In this Act a reference to the licensing objectives is a reference to the objectives of –
- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or

1 August 6, 2012.

2 Gambling Commission Guidance (@ 5.5) describes the italicised words as creating a "presumption in favour of [grant]".

being used to support crime,
(b) ensuring that gambling is conducted in a fair and open way, and
(c) protecting children and other vulnerable persons from being harmed or exploited by gambling.

The expressed purposes of the 2005 Act were to consolidate and *deregulate* gambling, and section 153 is the embodiment of those purposes. Introducing the White Paper which preceded the Gambling Bill, the Secretary of State[3] wrote:

It has been clear for some time that these laws are in need of reform. They are very complicated, and hard for the general public to understand...

...above all they were enacted or have their roots in an era when gambling was widely regarded as an activity which was at best morally questionable. The legal framework for gambling is one of grudging toleration...

...There is a powerful case for lifting regulatory burdens on an industry which has built a world reputation for integrity...

... In the Government's view the law should no longer incorporate or reflect any assumption that gambling is an activity which people should have no encouragement to pursue. It is an important industry in its own right, meeting the legitimate desires of many millions of people and providing many thousands of jobs.

But while section 153 is certainly permissive - the licensing authority "shall aim to permit the use of premises for gambling..." - it falls far short of requiring the grant of a licence whenever an applicant jumps the statutory hurdles set out in the section, namely being in accordance with the relevant Gambling Commission Code of Practice and Guidance, being reasonably consistent with the licensing objectives and being in accordance with the authority's own Policy Statement.

If a grant were mandatory in those circumstances, it would have been easy for the section to have said so. But it doesn't. It says that the authority should aim to permit, not that the authority must permit. "Aim to permit" is merely a steer, albeit a strong one, to look favourably on an application, all other things being equal.

The regrettable resonance of repealed law

The widespread misreading of section 153 has its origins, perhaps, in the very different provisions of the repealed Betting, Gaming and Lotteries Act 1963, which governed the licensing of betting offices until 2007. Paragraph 19 of Schedule 1 to the 1963 Act was headed: "Grounds for refusal to grant or renew a betting office licence." Paragraph 20(1) read: "Save as provided by [paragraph 19] of this Schedule the appropriate authority shall not refuse any application for the grant or renewal of a... betting office licence."

Although there are no equivalent provisions in the Gambling Act 2005, the approach to the licensing of betting offices under the 1968 Act - no refusal unless one of the stated grounds is made out - seems to have lingered with practitioners and influenced their interpretation of Section 153.[4] Applications are being decided under the mistaken impression that unless there is a failure to meet the requirements of section 153(1)(a)-(d) "the discretion to refuse is not engaged". The position is, in fact, the other way around: unless the requirements of section 153(1)(a)-(d) *are* met, there is no discretion to grant.

So it is that some licensing authorities have been persuaded that because the prevention of street drinking and nuisance are not licensing objectives, they cannot be taken into consideration in the determination of a betting premises licence application. Similarly, the clustering of betting offices, the "degeneration" of high streets – even incidents of armed robbery, where "gambling" is not the reason for the crime, but the mere presence of large sums of money is – are frequently ignored, albeit with an expressed reluctance, as irrelevant considerations.

The point has been missed that an application's being in accordance with the relevant Gambling Commission Code of Practice and Guidance, and being reasonably consistent with the licensing objectives and being in accordance with the authority's own Policy Statement, takes us to the point where the licensing authority must "*aim* to permit" – but no further. In the exercise of its residual discretion there is nothing in the Act to prevent a licensing authority, on the back of cogent evidence, having regard to nuisance, general disorder, damage to high street regeneration, robbery, etc, as factors speaking against the grant of a betting premises licence.

Support for the existence of a discretion to refuse

The fact that section 153 of the 2005 Act leaves room to refuse, even when what I have called the "statutory hurdles" are overcome, is illustrated by subsection (2), which reads:"In determining whether to grant a premises licence a licensing authority may not have regard to the expected demand for the facilities which it is proposed to provide." That subsection can only be necessary if a licensing authority is entitled to refuse notwithstanding the steer of section 153(1).

If it were otherwise, and a refusal was bound to follow when the statutory requirements (the four "hurdles") of section 153(1) were satisfied, then section 153(2) would be wholly redundant.

The same can be said of section 210(1), which reads: "In making a decision in respect of an application under this Part a licensing authority shall not have regard to whether or not a proposal by the applicant is likely to be permitted

3 Tessa Jowell.

4 It is also possible that the current misinterpretation of the Gambling Act 2005 can be traced to the deceptively *similar*, but fundamentally *different* regime created by the Licensing Act 2003 in respect of pubs and bars etc.., which *does* indeed confine licensing authorities to decisions which relate directly to the 'promotion' (or otherwise) of the hallowed 'four licensing objectives'. Critically, the earlier legislation (which did supply much of the structure and design of the 2005 Act), contains no section corresponding to the 'aim to permit' provision.

in accordance with the law relating to planning or building." Again, if section 153(1) created an obligation to grant, rather than a steer to look favourably on an application, then section 201, as well as 153(2), would have no purpose. It is unlikely that a High Court would interpret the Gambling Act in such a way as to render two of its important sections purposeless and unnecessary. The sections have a function; and that function illustrates that there is a discretion to refuse a betting premises licence, notwithstanding the steer in section 153.

Powers on a review

It is also worth noting the powers of a licensing authority on a review: one may take, for example, the broad discretion expressly given by section 200(2)(b) of the Act, which empowers the authority to instigate a review of the licence. The subsection provides –

Section 200 Initiation of a review by the licensing authority

(2) A licensing authority may review any matter connected with the use of premises in reliance on a premises licence if the authority ...

(a) ...

(b) *for any reason (which may relate to the receipt of a complaint about the use of the premises) think that a review would be appropriate.'* [italics added]

Section 201(5) of the Act goes on to provide that, in considering whether to take action under section 202 (revoke or suspend the licence; add, remove or amend conditions) -

"... the licensing authority shall have regard (*in addition to the matters specified in section 153*) to –

(a) any representation made in accordance with section 197(6) or 200(5)

(b) any representations made at the hearing of the review (if there is one), and

(c) [the grounds on which the review was instigated].

The words I have italicised (in section 200(2)(b), and section 201(5) in particular) make it plain that, on a review, regard may be had to considerations going beyond the "principles to be applied" given by section 153. If that is so on a review of a licence, why not on an application for grant? The basis on which the grant of a licence may be refused are usually, and for good reason, mirrored by the basis on which a licence may be taken away[5]. In my view the provisions in the 2005 Act relating to review lend significant support to there being a much wider discretion to refuse betting premises licences than has so far been recognised[6].

Conclusion

In plain English, there is a self-evident gap between "shall aim to permit" and "shall permit". The Statute is unhelpfully silent on what circumstances might legitimately pull the aim away from the target. But that indicates a broad, rather than a narrow, discretion. Only two matters are ruled out of consideration: likely demand, and likely planning permission. The remaining discretion, it would seem, is to be found in the familiar territory that lies between the good sense of the licensing authority and *Wednesbury* unreasonableness.

The variety of circumstances in which there may be a lawful refusal cannot be drawn up in a pre-defined list. But an authority aiming with the best will in the world to permit the use of premises as (perhaps "yet another") betting office may well find that police and residents' complaints of intimidating street drinkers loitering outside the existing betting offices, or disorder (fighting) amongst disgruntled punters, or the vandalising of gaming machines - not to mention the small matter of armed robberies - swing the committee's gun-sights irresistibly away from permitting premises to be used for gambling and towards a perfectly legitimate refusal of a licence.

Gerald Gouriet QC
Barrister, Francis Taylor Building

5 See, for example, the Licensing Act 2003, where the same test applies (whether the proposed action is appropriate for the promotion of the licensing objectives) on applications and reviews.

6 Further support is found in Section 202(3), which reads – "A licensing authority may, in particular, take action under subsection (1)..." - i.e. revoke, suspend, add, remove or amend conditions – "...on the grounds that the licensee has not used the licence." The use of the phrase "in particular" seems to me to indicate that the there is a broad discretion to take action under subsection (1) in a variety of circumstances, one *example* (merely) of which is given; i.e. the licensee's not using the licence.

Article

What control do licensing authorities have over betting premises? Part 2

In his follow-up article on whether licensing authorities are behaving too permissively towards betting premises applications, **Gerald Gouriet QC** examines the crucial need for evidence, rather than personal distaste, in arriving at a decision

In the first of two articles about betting offices and the perceived problems of their proliferation, published in the last issue of this journal[1], I dealt with the existence of a discretion to control the number of betting offices in the area of any licensing authority that had particular concerns. (There had been a widespread misconception that new laws were needed in order to address evidenced crime and disorder and under-age gambling – the flames being fanned by sensational television programmes masquerading as responsible journalism.)

The *existence* of a discretion to take action having been established in the last journal, this article will address the *exercise* of that discretion. The discussion falls under five headings:

- The duty not to exercise a statutory discretion so as to frustrate the policy and purposes of the Act.
- The continuing duty under section 153 of the Gambling Act 2005 to "aim to permit" premises to be used for gambling.
- The need for evidence.
- The relevance of planning decisions.
- The powers on a review.

Policy and purposes of the Act

The case of *Padfield v Minister of Agriculture Fisheries and Food*[2] decided that even if a statute gives what looks like an unfettered discretion (in that case it was to a Minister) in unqualified terms, it should not be exercised so as to frustrate the policy and objects of the Act. The policy of the Gambling Act 2005 is manifestly permissive. Section 153 requires that in exercising its functions a licensing authority *shall aim to permit* the use of premises for gambling insofar as the authority think it in accordance with the Gambling Commission's Codes of Practice and Guidance, and with the authority's own statement of policy, and reasonably consistent with the licensing objectives.

It follows that the discretion described in my first article (i.e. the discretion found in the gap between "shall aim to permit" and "shall permit") must not be exercised so as to frustrate the permissive purposes of the Gambling Act. Indeed, on *Paterson's* reading (cited below), the duty is to promote those purposes, if that can be done while maintaining accordance with the Gambling Commission Codes and Guidance, and reasonable consistency with the licensing objectives, etc. With regard to the latter, it should not be overlooked that *reasonable* consistency is what is required, and not absolute consistency.

Continuing duty to aim to permit

The fact that a licensing authority has a discretion to refuse (only to be exercised where the evidence justifies a refusal – see below) does not absolve the authority from its continuing duty to try to find a way of granting if it can. The editors of *Paterson's Licensing Acts* put it in this way:

[Section 153] appears to place a duty upon the Licensing Authority to exercise their powers so far as is lawfully possible to achieve the position in which they can grant the premises licence and thus permit the use of premises for gambling...[3]

It is important to remember that the "aim to permit" requirement of section 153 applies to *all* the licensing authority's functions under Part 8 of the Act. Those functions include the authority's making a representation (as a responsible authority) on a fresh application. If such a representation by a licensing authority reads like a letter of objection from a resident or the police requesting the rejection of an application (I have encountered such), it is unlikely to be held by a district judge or High Court on appeal as consistent with "aiming to permit", and to that extent may well be found *ultra vires* and unlawful. It is frequently the case that the solution to perceived problems can be found in the imposition of suitable conditions on a licence, rather than a refusal of the licence outright: any representation made by the licensing authority itself should be looking, *and genuinely looking*, for such a solution.

1 Gouriet, What control do licensing authorities have over betting premises?, (2012) 4 JoL 26.

2 [1968] AC 997 HL.

3 *Paterson's Licensing Acts 2013*, para 6.158 (page 74).

The need for evidence

The need for evidence remains the single most important consideration on any contested hearing for a new betting premises licence. I have often encountered representations that are not evidenced at all, but are merely articulated fears which, however understandable as *fears* for the future, cannot be treated as evidence of anything other than what they are – concerns as to an outcome which may or may not happen. As such, they should not be allowed, standing by themselves, to sway an application in the direction of refusal. Glidewell J said in the *Dransfield* case:[4] "[the licensing authority] cannot properly guess or simply make assumptions..." In other words, the licensing authority should not assume the worst, however understandable the fear. Much the same was underlined in the *Thwaites* case:[5] "They proceeded without proper evidence and gave their own views excessive weight... in all the circumstances their decision was unlawful."

The mere apprehension of unwelcome consequences if a new betting office is permitted – increased levels of crime and disorder, etc. – is not enough. It is no more than speculation. Whereas in the normal run of civil litigation it might be permissible to conclude, *on the balance of probabilities*, and on the evidence, that such and such a catastrophe will be the result of a given proposal, the continuing "aim to permit" requirement of section 153 of the Gambling Act would seem to make it necessary, in most cases if not all, to give the benefit of any doubt ('may or may not happen') to the applicant for the premises licence. It does not seem to me to be possible to square "aiming to permit" with giving the benefit of the doubt to those who have expressed no more than fears as to the consequences of permitting. Of course there might be cases where the *inevitability* of serious adverse consequences justifies refusal; otherwise there would be no purpose in giving the licensing authority a discretion. But in practice such cases will be few and far between.

Relevance of planning decisions

It is far from uncommon on an application for a betting premises licence for concerns about rising crime and disorder, street drinking, etc., or the proximity of schools, to have reared their heads on a planning appeal relating to the same premises. The *Dransfield* case I have mentioned above contains an important *dictum* from Glidewell J that is too frequently overlooked:

If a [planning] inspector... has specifically dealt with a particular issue, and expressed his view or conclusion on that issue, it is clear that his view or conclusion must be given great weight by the [licensing authority] and there would have to be good reason for rejecting that view or conclusion.

I have heard a planning inspector's carefully considered conclusion (on precisely the issue, and on identical evidence, as that before the licensing authority) rejected because the inspector was "probably not a local man" (I paraphrase the actual words). Whether that is what Glidewell J had in mind as a "good reason" is to be doubted.

The powers on review

The express powers of a licensing authority on a review are wider than those which by implication they have at their disposal when considering an application. If the "benefit of the doubt" has (rightly) been given to an applicant, despite the representations of local people as to the feared consequences, and if when the betting office opens those fears are realised, then not only may the residents bring a review, but the licensing authority may do so, of its own volition and independently of any residential or other complaint. The following provisions of the Act illustrate the breadth of the powers of a licensing authority on a review:

A licensing authority may review any matter connected with the use of premises in reliance on a premises licence if the authority... for any reason... think that a review would be appropriate.[6]

In considering whether to take action of a kind specified in section 202(1) [revocation, suspension, amendment of conditions] the licensing authority shall have regard (in addition to the matters specified in section 153) [the "principles to be applied"] to... any representation made at the hearing of the review...[7] [The underlining is mine.]

I cannot see the need for any further powers to be given to a licensing authority to deal proportionately and effectively with real *and evidenced* problems, should they arise after the opening of a betting office. I am unaware, however, despite having heard innumerable predictions of increased crime and disorder, etc., if a new betting premises licence be granted, of any review having been brought, whether by residents, police or the authority themselves, on the ground that those predictions have been proved all-too accurate. One has to ask, why? It is difficult to find any justification for the frequently-expressed fears as to adverse consequences arising from a grant, in the absence of successful reviews in which it has been held that those consequences have materialised.

Conclusions

The overall scheme of this legislation (along with its relation, the Licensing Act 2003) is that of permissiveness at the stage of grant, balanced by wide powers of adjustment on a review if things should not go as well in practice as was hoped on application – including the power to revoke the licence. It is important that a proper understanding of that scheme, and in particular the protective strength of the legislation given by the review regime, is not abandoned in favour of misplaced objections (and refusals) at the application stage – too many of which have had to come before a district judge on appeal to be corrected, at a high cost to the appellant and the taxpayer, which is on many occasions unnecessary, and is sometimes inexcusable.

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4 *R v Manchester Crown Court ex parte Dransfield Novelty Company Limited* [2001] LLR 556.
5 *Daniel Thwaites Plc v Wirral Borough Magistrates' Court* [2008] EWHC 838 (Admin).
6 Gambling Act 2005, section 200(2)(b).
7 Gambling Act 2005, section 201(5)(b).