NEXSTART

Pavement Licensing

An overview of the pavement licensing provisions of the Business and Planning Act 2020 with Q&A's

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Glossary of Terms and Abbreviations

		Doc ref
Act, the	The Business and Planning Act 2020	1.1
determination period	the period of 7 days beginning with the first day after the public consultation period (s.3(10))	28.1
frontager	defined in the Highways Act 1980 as the owners and occupiers of premises adjoining the part of a highway on which an object would be placed	3.8
GLA road	roads in London for which TfL is the highway authority	3.7
the Guidance	guidance issued under s.8 of the Act	4.5
Highways Act permit	a permission granted under s.115E of the Highways Act 1980	3.3
highway authority	authority for any given highway as designated by the Highways Act 1980	3.7
no-obstruction condition	a condition on a pavement licence that anything done by the licence-holder pursuant to the licence, or any activity of other persons which is enabled by the licence, must not have an effect specified in s.3(6) of the Act (s.5(5)).	35.1
pavement licence	a licence granted under s.3 of the Act	1.1
public consultation period	the period of 7 days beginning with the day after that on which the application is made (s.2(4))	24.1
smoke-free seating condition	a condition on a pavement licence that, where the furniture to be put on the relevant highway consists of seating for use by persons for the purposes of consuming food and drink. the licence-holder must make reasonable provision for seating where smoking is not permitted (s.5(6)).	36.3
TfL	Transport for London	25.1

1. Introduction: pavement licences

1.1. The Business and Planning Act 2020 includes a range of measures intended to support the economy recover from the disruption caused by the COVID-19 outbreak in the UK. As the Explanatory Notes [1] to the introductory Bill stated:

> *As the economy starts to re-open, the Government wants to do all it can to support recovery, help businesses adjust to new ways of working and create new jobs. This Bill introduces a number of urgent measures to help businesses succeed in these new and challenging conditions over the coming months, and to remove short term obstacles that could get in their way.*

1.2. Those measures include, in Part 1 of the Act, provisions to make it easier for businesses that sell food and drink for consumption on or off the premises to seat and serve customers outdoors through temporary changes to (in England) regulatory procedures and (in both England and Wales) the alcohol licensing regime.

1.3. Ss.1-10 of the Act introduce to England a new species of licence known as a "pavement licence".

1.4. A pavement licence authorises the operator of a business selling food and drink to put furniture such as tables and chairs on the highway adjacent to its premises to sell food and drink from and/or for its customers to use.

1.5. The purpose of this document is to provide a short introduction to the proposed new regime, followed by a list of frequently asked questions and answers.

1.6. This is a dynamic document and will be updated as the Act progresses, becomes law, and then is operated in practice. **The authors welcome and encourage feedback.**

1.7. The document is not, and is not intended to constitute legal advice. It is for general informational purposes only. The views expressed are of the authors writing in their individual capacities only. All liability with respect to actions taken or not taken based on the content of the document are expressly disclaimed.

2. When did the pavement licensing provisions come into force?

22 July 2020

2.1. The Government asked Parliament to expedite the parliamentary process of the Bill. The Bill was introduced to the House of Commons on 25 June 2020, and cleared all the remaining Commons stages with only minor amendments on 29 June 2020. The Bill's course through the House of Lords was comparatively slower. The formal first reading in that place took place on 30 June 2020; the second reading on 6 July 2020, with the committee stage on 13 and 14 July 2020, and the report stage and third reading on 20 July 2020. The Bill went into "ping pong" between the Lords and the Commons on 21 July 2020, with the Commons accepting a suite of amendments put forward by the Lords.

2.2. The pavement licensing provisions come into force on day on which the Act received Royal Assent (s.24(1)): 22 July 2020.

2.3. As a pavement licence will take between 8-15 days from application to grant, there is no prospect of premises taking advantage of any authorisation under a pavement licence until mid-August at the earliest. It is appreciated that this was be a significant disappointment to the beleaguered English hospitality trade, who had hoped hoping for a rapid relaxation of the existing regime given that restaurants, cafes, bars and public houses were permitted to re-open 4 July 2020[1].

3. The existing regulatory regimes

3.1. An appreciation of the import of the new regime requires an understanding of the existing regulatory framework.

3.2. The established requirements for street tables and chairs is contained in:

- the Highways Act 1980;
- the Town and Country Planning Act 1990; and
- (particularly, in London) street-trading legislation.

Highways Act 1980

3.3. Part 7A of the Highways Act 1980 contains a regime for the grant of what have been variously and colloquially known as a "pavement licence", "street café licence" and a "tables and chairs licence".

3.4. To differentiate from a pavement licence granted under the Business and Planning Act 2020, this document uses the term "Highways Act permit" for a permission granted under the Highways Act.

3.5. So far as is relevant here, a Highways Act permit allows a person to use objects on the highway for a purpose which would result in the production of income (s.115E).

3.6. Highways include pavements, and without this authorisation, such placement would constitute an offence of wilful obstruction of the highway (s.137) and/or deposit of a thing on the highway (s.148).

3.7. An application for a Highways Act permit is made to a council: typically (although not necessarily) the highway authority for the relevant highway. Outside Greater London, the council of a county or the metropolitan district is a highway authority for all highways (excluding trunk, special and other specified roads) in that county or district. Within London, responsibility generally lies with the thirty-two London boroughs, although Transport for London ("TfL") is the highway authority for all 'GLA roads' (generally trunk roads).

3.8. The council to whom the application is made may not grant a permit unless it has first obtained consent from 'frontagers' with a relevant interest (s.115E(3)). Frontagers are the owners and occupiers of premises adjoining the part of a highway on which an object would be placed, and their relevant interest is in proposals to place objects wholly or partly between their premises and the centre of the highway (s.115A(7)). Their consent may not

[1] The effect of the replacement of previous regulations by The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020.

be unreasonably withheld (but may be given subject to any reasonable conditions) (s.115J). The council must put up a notice of application specifying a consultation period (and serve it on neighbouring owners and occupiers), and must determine applications having regard to any representations received (s.115G). If the council is not the highway authority for the relevant highway, it may not grant any permission without consulting the highway authority (unless a pedestrian planning order is in force), and - if it is not the local planning authority - without consulting that authority also (s.115H(1)(b)). A permit may be (and usually is) granted subject to conditions, including a condition requiring payment to the council of a fee (s.115F).

3.9. A permit will specify the area to which it relates, and different authorities have different policies as to area placement and size. The maintenance of a clear pedestrian route will always be required. Typical conditions imposed on permits control hours of operation, design and layout of the area, quality and type of furniture, boundary markers and/or barriers, what use can and cannot be made of the area.

Town and Country Planning Act 1990

3.10. Local planning authorities have generally taken the view that the placing of tables, chairs and the like on the public highway for use by a premises' customers constitutes a material change of use, requiring a separate application for planning permission for development under the Town and Country Planning Act 1990.

Street trading legislation

3.11. Outside Greater London there is an adoptive street trading regime found in Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982. Street trading is defined in the Schedule as "the selling or exposing or offering for sale of any article (including a living thing) in a street". This generally will not cover the activities carried out in a "pavement café" area. Furthermore, trading which is carried on at premises used as a shop in or in a street adjoining premises so used and part of the business of the shop is not street-trading under the 1982 Act.

3.12. Legislation affecting Greater London defines "street trading" more widely, so including the provision of services. In addition to a Highways Act licence and planning permission, many London boroughs choose to require a street trading licence or consent (under the London Local Authorities Act 1990 (as amended by the London Local Authorities Acts 2004 and 2007). The City of Westminster and the City of London have their own specific legislation, the City of Westminster Act 1999 and the City of London (Various Powers) Act 1987 (as amended) respectively.

4. Purpose of the new licence

4.1. The existing regime has been criticised [2] as costly, time-consuming, and overly and unnecessarily complex. In addition there is significant variation in the approaches taken by different authorities as to what, precisely, an operator requires.

[2] See Gareth Hughes, A Guide to the Law on Tables and Chairs in England and Wales, Journal of Licensing (July 2020).

4.2. As the hospitality sector emerges from enforced closure, with the revocation of mandatory closure provisions in respect of restaurants, cafes, bars and public houses with effect from 4 July 2020[3], pavement trading has assumed a new and urgent importance.

4.3. There is strong scientific evidence of a lower risk of coronavirus spreading from person to person when in outdoor environments. Government guidance on keeping workers and customers safe during COVID-19[4] advises, in the strongest terms, that health and safety risk assessments (required under existing health and safety legislation) address COVID-19 risk. That guidance encourages the use of outdoor spaces for service where possible, suggesting "increasing outdoor seating or outdoor points of sale" [2.2.2].

4.4. As well as the public health and safety benefits of utilising outside as opposed to indoor spaces, venues whose internal capacities will be significantly reduced by the implementation of measures to encourage social distancing may also recoup some of that shortfall from outside usage, with the corresponding financial benefit both to them and the wider economy.

4.5. It was recognised (some might say belatedly) that there was a pressing need to allow the hospitality sector cut through the existing red tape and offer an outdoor environment to customers. This is the need which the new pavement licensing regime aims to meet. The statutory guidance published by the Secretary of State[5] under s.8 of the Act ("the Guidance") sets out the purpose of the new process for pavement licences as [1.2]:

> *This new process introduces a streamlined and cheaper route for businesses such as cafes, restaurants and bars to secure a licence to place furniture on the highway. This will support them to operate safely while social distancing measures remain in place. This will provide much needed income over the summer months and protect as many hospitality jobs as possible.*

4.6. The streamlined route takes effect as a *fast-track* procedure for the grant of an authorisation that *bypasses* the existing regulatory regimes described in the previous section.

4.7. A pavement licence:

- authorises the restriction, by anything done by the licence-holder pursuant to the licence, of public access to the part of the relevant highway to which it relates *without the need for a Highways act permit*;

- constitutes deemed planning permission for anything done by the licence-holder pursuant to the licence, *thus removing any requirement for a separate planning application*;

- *removes any requirement for a street trading licence or consent* in respect of anything done by the licence-holder pursuant to the licence.

[3] By The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020
[4] https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/restaurants-offering-takeaway-or-delivery

[5] https://www.gov.uk/government/publications/pavement-licences-draft-guidance/draft-guidance-pavement-licences-outdoor-seating-proposal

4.8. A pavement licence can therefore be regarded as a regulatory "triple bypass". The underlying Highways Act permit, planning and street trading regimes remain in place - but all three can be by-passed by use of the pavement licence regime.

4.9. This regulatory short-cut is temporary. Although pavement licences may not have a duration of less than a minimum term of 3 months (s.4(2)(a)), no licence may extend beyond 30 September 2021 (s.4(2)(b) and (4)) unless this date is subsequently extended by regulations (s.10(2)).

4.10. The regime itself comes to an end on 30 September 2021 (s.10(1)) unless this so-called "sunset clause" is itself extended by a later date, if the Secretary of State considers it reasonable to do so mitigate the effects of coronavirus (s.10(2))

5. Who operates the pavement licensing regime?

Subject to delegation, the pavement licensing regime is operated by the "appropriate local authority", being the local authority in whose area the relevant premises are situated (s.1(6)).

5.1. "Local authority" means (s.9(1)):

(a) *a district council in England,*

(b) *a county council in England for an area for which there is no district council,*

(c) *a London borough council,*

(d) *the Common Council of the City of London in its capacity as a local authority, and*

(e) *the Council of the Isles of Scilly.*

5.2. This definition is in very similar terms to the definition of "licensing authority" in s.3(1) Licensing Act 2003.

5.3. In nearly all cases, therefore, the appropriate local authority will also be the licensing authority for the premises used by the applicant for a pavement licence.

5.4. In the twenty-five two-tier counties of England, the highway authority is the county council. Although in theory applications for Highways Act permits in a two-tier area can either be made to the county council or the relevant district council, in practice the overwhelming majority of applications are made to and processed by the county council. This practice has obviated the need for district councils receiving applications to consult with highways authorities.

5.5. Under the new regime, district councils must now process applications in what - for two-tier areas - will be a *novel* field the consideration and grant of highways permissions.

5.6. The Gudiance makes a suggestion [1.9] that the pavement licensing function can however be delegated by to another local authority, "for example to a County Council in a two-tier area" on the basis of s.101 of the Local Government Act 1972, which provides that subject to any express provision contained in that or any subsequent Act, a local authority may arrange for the discharge of any of their functions (a) by a committee, a sub-committee or an officer of the authority, or (b) by any other local authority.

6. Is the regime adoptive?

No, it will apply automatically upon the coming into force of the Act and be operated by the appropriate local authority.

7. Who can apply for a pavement licence?

Premises users with the necessary actual or proposed use adjacent to a relevant highway.

7.1. First, the application must relate to premises. It is not a portable licence. So the applicant needs to use or propose to use specified *premises.*

7.2. Second, the applicant must use, or *propose* to use, those premises for, or *including*, a relevant use (s. 1(1)).

7.3. A relevant use, in relation to premises, means either or both:

(a) *use as a public house, wine bar or other drinking establishment;*

(b) *other use for the sale of food or drink for consumption on or off the premises.*

7.4. This is a wide definition. It does not just include traditional hospitality sector venues or licensed premises such as restaurants, cafés, pubs and bars. It could encompass food and drink retailers with hitherto no hospitality element (so cheesemongers, delicatessens etc.), and even units with no previous food and beverage element (so art galleries, hairdressers and retail units).

7.5. The minimum that is required is a *proposed* and *partial* food and beverage element, and that element can be for consumption entirely off the premises.

7.6. Third, the premises – in effect – must be *adjacent to a relevant highway*. If is not, this does not debar the making of an application, but no effective licence may be granted as a result. This is because the geographic limit of an authorisation under a premises licence is "part of a relevant highway *adjacent to* the premises" (s.1(2)).

7.7. The phrase "adjacent to the premises" featured in the (now revoked) Regulations to bring beer gardens and the like into the closure provisions. "Adjacent" in our view does not means contiguous to or abutting the frontage of the premises - somewhere very near should suffice.

8. Can the applicant be a company?

Yes.

8.1. The Act refers to an application being made by "a person". By virtue of the Interpretation Act 1978, s.5 and Schedule 1, "person" "includes a body of persons corporate or unincorporate" and so would include a company, partnership, LLP or unincorporated association.

9. Does an applicant need a premises licence under the Licensing Act 2003?

No.

9.1. An applicant does not need to hold a premises licence under the Licensing Act 2003 to apply for a pavement licence.

9.2. All an applicant needs is to use or propose to use premises for a use that includes sale of food or drink for consumption on or off the premises: see question 6 above.

10. What does the pavement licence authorise?

The placement and use of removable furniture for defined purposes.

10.1. The pavement licence authorises the placement of removable furniture on part of a relevant highway adjacent to the premises for either or both of two defined purposes.

10.2. The defined purposes are the use of that furniture:

(a) to sell or serve food or drink supplied from, or in connection with the relevant use of the premises and/or

(b) by other persons for the purpose of consuming food or drink supplied from, or in connection with relevant use of the premises.

10.3. The pavement licence authorises the restriction, by anything done by the licence-holder pursuant to the licence, of public access to the part of the relevant highway to which the licence relates (s.7(1)).

10.4. This means that where a pavement licence is in force, by placing removable furniture on the highway in accordance with its provisions, no offence of obstructing the highway without lawful authority is committed. There is therefore no need to apply for a Highways Act permit (see paragraph 3.3 and following of this document).

10.5. The licence also constitutes planning permission for anything done *pursuant to the licence* (s.7(2)) (but not otherwise).

10.6. Street-trading consent is not required for anything done *pursuant to the licence* (s.7(3)) (but not otherwise).

11. Does a pavement licence affect or give rise to other entitlements to sell food and beverages (including alcohol?)

No.

11.1. Pavement licences only authorise the placing of temporary furniture on the highway (for highways purposes) and the furniture's use for planning and in connection with street trading purposes.

11.2. Pavement licences therefore do not add to or alter any entitlements the premises may or may not have to serve food or beverages. This is confirmed in the Guidance [1.10]. Such entitlements will still be covered in the normal way by:

- the planning regime;
- the licensing regime where the activity is a licensable activity (e.g.: the sale of alcohol);
- registration requirements for food businesses;
- (where relevant) the provisions of tenancy agreements including user clauses; and
- (where relevant) land covenants.

11.3. If the premises the applicant uses or intends to use has a Licensing Act 2003 licence to serve alcohol for consumption only on the premises, temporary amendments to 2003 Act contained in s.11 of the Act will generally result in a temporary authorisation for alcohol to be sold for consumption off the premises without the need to apply for a variation of the licence.

11.4. The grant of a pavement licence will not extend or alter the permitted hours conditioned on any planning permission and/or specified on a premises licence for the premises to which it relates.

11.5. So if premises has a Licensing Act 2003 licence permitting the sale of alcohol between specified hours, those are the *maximum* hours that alcohol may be sold for consumption on an area covered by an associated pavement licence. In many cases, we anticipate that shorter hours will be placed on the use of the pavement licence by way of condition (see paragraph **35.2** below).

12. Is a pavement licence necessary for patrons of premises to drink on the pavement?

No.

12.1. A pavement licence authorises the placement and use of removable furniture on part of the highway for defined purposes.

12.2. If the patrons of premises stand outside those premises and consume drink (whether alcoholic or not), that is not an activity that would require a pavement licence. Were those patrons to obstruct the highway, they commit an offence, but otherwise (subject to the provisions of any public spaces protection order) what they do is lawful. The sale of alcohol to those persons is lawful if the premises licence permits the sale of alcohol for consumption off the premises and no condition debars it.

13. What does “furniture” mean?

“Furniture” is defined in the Act.

13.1. The Act defines “furniture” as meaning (s.9(1)):

(a) *counters or stalls for selling or serving food or drink,*

(b) *tables, counters or shelves on which food or drink can be placed,*

(c) *chairs, benches or other forms of seating, and*

(d) *umbrellas, barriers, heaters and other articles used in connection with the outdoor consumption of food or drink;*

13.2. The statutory definition is comprehensive: so it is the complete list rather than examples of what furniture may be placed on the highway under a pavement licence.

13.3. In our view "counters or stalls for selling or serving food or drink" encompasses *bars.* However, a bar selling alcohol where alcohol is "appropriated to the contract" at the bar (i.e. by draft dispense there or bottles being selected) is only lawful in licensing terms if that area is licensed[6].

13.4. Paragraph (d) of the furniture definition includes a catch all provision in relation to articles used in connection with consumption of food or drink. No catch-all provision is not made for articles used in connection with sale and service (which might encompass barriers to assist queuing for a retail operation). There are moot points as whether such items might be said to be part of "counters or stalls", or whether their provision could be conditioned. Given the short life of the pavement licensing scheme, we anticipate that many local authorities will take a pragmatic approach.

13.5. This furniture is required to be removable (s. 1(2)). The Guidance suggests [1.5] that local authorities should be pragmatic when determining what is 'removable' but in principle this means it is not a permanent fixed structure, and is able to be moved easily, and stored away at the end of use for the day. We consider that in appropriate cases it may be permissible for furniture to remain in situ for longer periods of time.

14. In respect of what highways can pavement licences be granted?

On a "relevant highway".

14.1. A pavement licence only grants an authorisation in relation to a "relevant highway" (s.1(2)). This means a highway to which Part 7A of the Highways Act 1980 applies, but not one over Crown Land or land maintained by Network Rail (s.1(5)).

14.2. The types of highways to which Part 7A apply are set out in s.115A of the Act and include:

- pavements ("footways" as they are defined in the Act);
- highways in relation to which a pedestrian planning order is in force;
- and highways whose use by vehicles is prohibited by a traffic order (which include temporary orders made for purposes connected to coronavirus (s. 9(3)).

15. Can a pavement licence be granted in respect of car parks, beer gardens, village greens and the like?

No.

15.1. Pavement licences only relate to relevant highways (see question 11 above).

[6] See Revised Guidance issued under section 182 of the Licensing Act 2003 at [8.38]

15.2. The new regime has no relevance to the use of non-highway areas, which remain subject to the existing law.

16. How is the sale of alcohol regulated in areas covered by pavement licences?

Under the existing provisions of the Licensing Act 2003.

16.1. The sale of alcohol for consumption "off the premises" is governed by well-established principles. It makes no difference whether or not consumption takes place within the area of a pavement licence - the principles are the same for any area outside the red line demarking the premises on the plan forming part of a Licensing Act 2003 premises licence.

16.2. Premises licences with an off-sale authorisation have always been able to sell alcohol for consumption off the premises so long as the alcohol is "appropriated to the contract" within the licensed premises.

16.3. This means that orders can be taken, drinks can be supplied and money paid entirely *off* the premises (so in unlicensed pavement café areas, or unlicensed beer gardens) as long as the drink orders are collected and assembled for customers (by being dispensed or bottles selected) within the premises[7].

16.4. It is different if alcohol is appropriated to the contract within those areas (for example from a bar): then a premises licence (or Temporary Event Notice) is required.

16.5. The application form for a premises licence under the Licensing Act 2003[8] states in its "Notes for Guidance":

> *Describe the premises, for example the type of premises, its general situation and layout and any other information which could be relevant to the licensing objectives. Where your application includes off-supplies of alcohol and you intend to provide a place for consumption of these off-supplies, you must include a description of where the place will be and its proximity to the premises.*

16.6. In the absence of any specific condition limiting consumption of "off-supplies" (i.e. alcohol sold for consumption off the premises) to defined areas, we do not consider that descriptions of any place for consumption of "off-supplies" (or any corresponding marking on the application plan, which becomes the licensing plan) is a matter which would ordinarily require an application to vary were it to be changed.

16.7. If there is a condition on an existing premises licence which prohibits the consumption of alcohol on the highway, then this is not "trumped" by a pavement licence.

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[7] See Revised guidance issued under section 182 of the Licensing Act 2003 at [8.35]. For a detailed analysis of the concept of "appropriation to the contract" in a licensing context, see Charles Holland "What licence do you need to deliver alcohol?" (2020).

[8] https://www.gov.uk/government/publications/premises-licence-application-forms

17. How is an application made?

Electronically.

17.1. Applications *may only* be made electronically (s.2(1)(a) and (b) and, if the appropriate local authority choses to specify a form, in that specified form (s.2(1)(a)).

17.2. There are no prescribed forms and it is up to individual local authorities whether or not they specify forms and, if so, in what format.

17.3. It is anticipated that many local authorities will wish to set up systems to receive applications for pavement licences in order to assist processing and to ensure that that prescribed particulars of the application are received in a uniform format.

17.4. Where a local authority specifies a particular manner of electronic communication (such as an online application form or a specific email address) that is the manner which must be used (s.2(1)(b)). It follows that if a local authority does not do so then an application submitted to the authority's published email address will (in our view) be effective.

18. What do all applications have to state?

The Act prescribes minimum particulars which must be given in all cases.

18.1. An application to the local authority must (s.2(2)):

- specify the premises to which it relates;
- specify the part of the relevant highway to which it relates;
- specify the statutory purpose (or purposes) to which it relates (see paragraph 8.2 above);
- specify the days of the week on which, and the hours between which, it is proposed to put furniture on the highway;
- describe the type of furniture to which the application relates;
- specify the date on which the application is made;
- contain or be accompanied by such evidence of public liability insurance in respect of anything to be done pursuant to the licence as the particular authority requires (this is a matter which can be provided for on the application form); and
- contain or be accompanied by such other information or material as the local authority may require.

19. What other information may a local authority require?

Each local authority has discretion to require applications to be accompanied by such information or material as they may require.

19.1. The Guidance suggests [3.2] that local authorities may require applicants to provide other additional information or material to help them make a swift determination. Where they do so, it is obviously good practice to include these requests on their standard application form. The Guidance states that any requirements imposed should be reasonable and should be kept as minimal as possible.

19.2. The Guidance goes on to gives examples of further information as including:

- a plan showing the location of the premises shown by a red line, so the application site can be clearly identified (some authorities may require this on an OS Base Map);
- a plan clearly showing the proposed area covered by the licence in relation to the highway, if not to scale, with measurements clearly shown;
- the proposed duration of the licence (for e.g. 3 months, 6 months, or a year);
- evidence of the right to occupy the premises e.g. the lease;
- contact details of the applicant;
- photos or brochures showing the proposed type of furniture and information on potential siting of it within the area applied;
- evidence that the applicant has met the requirement to give notice of the application (for example photograph);
- (if applicable) reference of existing pavement licence currently under consideration by the local authority; and
- any other evidence needed to demonstrate how any local and national conditions will be satisfied.

19.3. Having made a plea for minimalism, in our view the reasonable necessity of some of the suggested further information in the Guidance are debatable.

19.4. Whilst the request for contact details of the applicant would seem to be sensible, it is to be borne in mind that s.2(8)(b) deems applicants to have agreed that their address for the purposes of communications is the address incorporated into, or otherwise logically associated with that person's application (which must be made electronically).

19.5. Given the present economic uncertainty it seems very unlikely that any applicant would seek a licence of shorter duration than the maximum period. In any event, deemed grants are for a period of one year (but expire on 30 September 2021 if still in force at that time) (s.4(3)-(4).

19.6. The suggestion that the local authority may require "evidence of the right to occupy the premises e.g. the lease" does not appear to serve any useful purpose – in general regulators do not concern themselves with the property rights of applicants, and leases and franchise agreements may contain commercially sensitive information.

19.7. The request for "reference of existing pavement licence currently consideration by the local authority" appears to flag up s.2(9) which provides that where a person applies for a pavement licence, the person may not make another application for a pavement licence in respect of the same premises before the end of the determination period. It may be more efficient to have this as a threshold question rather than for second applications to be submitted and then voided on this basis.

19.8. The Guidance suggests that the local authority may require "evidence that the applicant has met the requirement to give notice of the application (for example photograph)". It is not clear how such evidence can be given at the time the application is made, given that the obligation on the applicant is to fix a notice of the application to the premises stating that "the application has been *made*" (s.2(6)(b)).

19.9. The suggestion that an applicant provide "evidence needed to demonstrate how any local and national conditions will be satisfied" might also be criticised as being unduly onerous.

20. Does the applicant have to lodge an operating schedule?

No.

20.1. The applicant does not have to propose conditions with the application. There is nothing equivalent to an "operating schedule" for a premises licence application under the Licensing Act 2003. It is up to the local authority to publish any proposed standard local conditions, (s.5(2)) and choose to add such of those or any extra conditions to individual pavement licences as they consider reasonable (s.5(1)).

20.2. However, the application does require the particulars set out at s.2(2) (see above 18.1) and *may* require further details (see above 19) that include the particulars of operation such as the purpose of the proposed used, days of the week, hours, and types of furniture along with a plan and any such other particulars as the local authority may require.

21. Is there an application fee?

There can be an application fee of up to £100.

21.1. A local authority may require an application fee of up to £100 (s. 2(1)(c)). No fees in excess of the £100 application fee are permissible.

21.2. If a fee is required it must be paid at the time of the application.

21.3. It is not unlawful *per se* for a local authority to charge no fee, although a decision not to do so must be lawfully arrived at.

21.4. Given the capping of the fee at a £100 maximum, it seems unlikely that the processing and determination of applications by local authorities will be self-funding even if the maximum fee were charged. The process requires considerable work to be undertaken at a rapid pace, in many cases by authorities who have had no previous highways function and who may have to put systems in place.

21.5. Unless and until a fee has been required by an individual local authority then - we consider - none is payable. Local authorities who wish to recoup some of the costs of administering the scheme under the fee scheme may wish to make a timely requirement of a fee.

21.6. No fee is payable where an applicant has previously applied for a Highways Act permit or a street trading consent, but, before that application is determined, an application is made for a pavement licence: (s.7(9)-(10)). The earlier application is treated as withdrawn. It is not clear what happens if the fee was paid to a different local authority, or what happens to any fee in excess of £100 paid in respect of the initial application.

21.7. The statutory fee appears to be limited to the application process. We do not consider that there is a power to levy a further fee to encompass the local authority costs of running and enforcing the pavement licensing scheme (see *R (on the application of Hemming (trading as Simply Pleasures Ltd)* v. *Westminster City Council* [2017] UKSC 50)).

22. What does the applicant have to do once the application is made?

Notice of the application must be fixed to the premises.

22.1. The applicant has to post a notice of the application on the premises to which it relates, on the same day that they submit the application to the local authority (s.2(5)). It appears that the notice should be affixed *after* the application is made.

22.2. The notice must be easily visible and legible to the public. The applicant must ensure the notice remains in place for the public consultation period which is the period of 7 days beginning with the day after the day the application is submitted to the authority (s.2(4)) excluding Christmas Day, Good Friday and bank holidays (s.9(5). The Guidance refers [2.1] to a public consultation period of 5 working days, which is inconsistent with the provisions of the Act (which take precedence).

22.3. The local authority may (but is not obliged to) prescribe the form of the notice (s.2(6)(a). The Guidance has a suggested template annexed to it.

22.4. The Notice must (s.2(6)):

- state that the application has been made and the date on which it was made;
- indicate that representations relating to the application may be made to that local authority during the public consultation period and when that period comes to an end; and
- contain such other information or material as that local authority may require.

22.5. The Guidance suggests [7.3] additional information local authorities may require to be included on the notice, much of which is set out on the template notice.

22.6. The Guidance encourages [7.2] applicants to talk to neighbouring businesses and occupiers prior to applying to the local authority, and so take any issues around noise, and nuisance into consideration as part of their proposal.

22.7. Local authority requirements for notices should be clearly set out on their website to assist applicants.

22.8. Applicants are obliged to secure that notices remain in place until the end of the public consultation period (s.2(5)(b)). It is sensible for applicants to record and retain evidence that they have complied with this requirement, perhaps by keeping regular log, supported by photographs, that the notice is in place. As a local authority may only determine application where it is made in accordance with s.2, securing that the notice remains in place during the public consultation period is important. If a notice is pulled down it should be replaced as soon as possible: in our view, a temporary interruption of this nature may be argued not to invalidate an application[9].

23. What must the local authority do when it receives an application?

Publish it and invite public representations.

23.1. The local authority is required to publish the application and any information or material which the applicant has submitted with it to meet the requirements of the authority, in such a manner as it considers appropriate (s.2(3)(a)), for example, on their website or via an online portal.

23.2. The local authority is also required to publicise the fact that representations may be made during the public consultation period (and indicate when that period comes to an end) (s.2(3)(b). The Guidance suggests [7.6] that local authorities might consider using digital methods of publicity, such as automatic notices, which members of the public can opt in to receive. The Guidance goes on to state that in deciding what steps to take authorities should consider the needs of those who may find it more difficult to access online publications.

23.3. There is no proposed statutory time frame in which a local authority should publish the application and supporting information. Given the short duration of the time frame for the public consultation period (7 days beginning with the day after that on which the application is made) plainly the authority should publish as soon as practicable.

23.4. The Act is silent as to the consequences of a failure on the part of a local authority to publish within a reasonable time or at all or in accordance with its provisions. We consider that it is arguable that such a failure would not invalidate the application nor prevent the operation of the deeming provisions.

24. How long is the public consultation period?

Seven days beginning with the day after that on which the application is made (not counting Christmas Day, Good Friday or bank holidays).

24.1. S.2(4) provides that the "public consultation period" means the period of 7 days beginning with the day after that on which the application is made. S.9(3) provides that in reckoning the period, no account is to be taken of (a) Christmas Day, (b) Good Friday, or (c) a day which is a bank holiday.

[9] On the basis of the approach identified in *R v Soneji* [2006] 1 A.C. 340.

24.2. The Guidance refers [7.1] to a different period of 5 working days – that will produce different results if (say) an application is made on the Friday before a Bank Holiday weekend. The provisions of the Act take precedence over provisions of any Guidance.

24.3. In our view an application is "made" on the day when it is sent to the local authority, containing the minimum statutory information and accompanied by any specified fee. This triggers the start of the public consultation period on the following day.

25. Who must local authorities consult?

(If not the highway authority themselves) the highway authority, and any others they consider appropriate.

25.1. During the public consultation period, the local authority must (s.3(2)(a)) consult the highway authority where the local authority is not itself the highway authority for the relevant highway. This is usually the county council in a two-tier area. In London, it will only be Transport for London in respect of GLA roads (trunk roads) (not universally as the Guidance appears to suggest [7.4]).

25.2. The local authority must also consult such other persons as it considers appropriate (s.3(2)(c))

25.3. Frontagers as defined in the Highways Act (see paragraph 3.8) are obvious candidates for persons whom it is appropriate to consult. In contrast to Highways Act permits, the consent of frontagers is not required as a precondition to the grant of a pavement licence.

25.4. Other consultees that a local authority considers appropriate may include local businesses, residents and residents' groups. In our view, engagement with civil society is to be highly encouraged.

26. Can members of the public make representations about the application?

Yes.

26.1. Any member of the public can make representations about an application. Local authorities *must* take into account any representations received from members of the public during the public consultation period (s.3(2)).

27. When does the local authority have to decide the application?

At the end of the public consultation period

27.1. The local authority may grant (wholly or in part) or reject an application at the end of the public consultation period (s.3(3)).

28. How long does the local authority have to decide the application?

A seven day determination period.

28.1. The local authority must decide the application within the "determination period", being the period of 7 days beginning with the first day after the public consultation period (s.3(10)). As with the public consultation period, no account is taken of Christmas Day, Good Friday or bank holidays in reckoning this period (s. 9). The Guidance describes the determination period as 5 working days [1.3, 2.1]: this does not correspond with the provisions of the Act.

29. What happens if the local authority does not decide the application by the end of the determination period?

The application is deemed to be granted.

29.1. If the local authority does not decide the application with the determination period, the pavement licence applied for is deemed to be granted by the authority to the applicant (s.3(9)).

29.2. A pavement licence deemed to be granted has a duration of one year (s.4(3)). It will be granted subject to any standard local conditions with the local authority published before the application was made (s.5(3)) and (to the extent that the standard local conditions do not include them) the no-obstruction and smoke-free seating conditions condition (s. 5(4)).

29.3. A pavement licence deemed to be granted is in all other respects no different from a licence actually granted by a local authority, and (s.6(3)) may be revoked by the authority that failed to make the determination if any of the grounds for revocation are made out.

29.4. Therefore, an applicant who secures a licence by deemed grant may benefit from liaising with the local authority to ensure that speedy revocation is not a realistic prospect before expending money on removable furniture.

30. What are the local authority's powers in determining the application?

The local authority may only grant (wholly or in part), with or without conditions, or reject.

30.1. Provided they do so within the determination period, the local authority may (s.3(3)):

- grant the licence in respect of any or all of the purposes specified in the application,
- grant the licence for some or all of the part of the highway specified in the application (it can make its own determination as to how much of the space requested in the application the licence will be allowed to cover),
- impose conditions,
- or refuse the application.

30.2. A local authority can make a specific determination as to the duration of the licence (which must be a minimum of 3 three months (s.4(2)), or it can leave the duration open-ended (s.4(1)(b), in which case the licence will expire at the end of 30 September 2021 (unless this backstop date is extended in the future by the Secretary of State).

30.3. In the unlikely event that an application is for a shorter period than 3 months, the licence must be granted for 3 months.

31. How should the local authority exercise its powers?

Subject to a bar on grants of licences that would obstruct, the local authority should exercise its powers in accordance with established principles of administrative decision-making.

31.1. The local authority may only grant a licence (s.3(5)) if it considers that (taking into account any in conditions subject to which it proposes to grant the licence) nothing done by the licence-holder pursuant to the licence would have the effect of:

(a) *preventing traffic, other than vehicular traffic, from—*

(i) *entering the relevant highway at a place where such traffic could otherwise enter it (ignoring any pedestrian planning order or traffic order made in relation to the highway),*

(ii) *passing along the relevant highway, or*

(iii) *having normal access to premises adjoining the relevant highway,*

(b) *preventing any use of vehicles which is permitted by a pedestrian planning order or which is not prohibited by a traffic order,*

(c) *preventing statutory undertakers having access to any apparatus of theirs under, in, on or over the highway, or*

(d) *preventing the operator of an electronic communications code network having access to any electronic communications apparatus kept installed for the purposes of that network under, in, on or over the highway.*

31.2. In considering, in particular, whether furniture put on a relevant highway would have that the effect in (a), the authority must have regard in particular to (a) the needs of disabled people and (b) the recommended distances required for access by disabled people as set out in guidance by the Secretary of State (s.3(7)). The Guidance states [4.1] that in order to do this, authorities should consider the following matters when determining applications:

- *Section 3.1 of Inclusive Mobility*[10] *sets out a range of recommended widths which would be required, depending on the needs of particular pavement users, but is clear that in most circumstances 1500mm clear space should be regarded as the minimum acceptable distance between the obstacle and the edge of the footway,*

- *any need for a barrier to separate furniture from the rest of the footway so that the visually impaired can navigate around the furniture, such as colour contrast and a tap rail for long cane users. In some cases, it may be appropriate to use one or more rigid, removable objects to demarcate the area to which the licence applies, for example wooden tubs of flowers. However, this will need to be balanced to ensure any barriers do not inhibit other street users, such as the*

[10] https://www.gov.uk/government/publications/inclusive-mobility

mobility impaired, as such barriers may create a further obstacle in the highway;

- *any conflict of street furniture with the principal lines of pedestrian movement particularly for disabled people, older people and those with mobility needs. The positioning of furniture should not discourage pedestrians from using the footway. The available route must be entirely clear and not pass through an area with tables and chairs;*

- *so that where possible furniture is non-reflective and of reasonable substance such that it cannot easily be pushed or blown over by the wind, and thereby cause obstruction – for example, the local authority could refuse the use of plastic patio furniture, unless measures have been taken to ensure it is kept in place.*

31.3. The local authority's licensing function will be an administrative function. It will have a duty to behave fairly in the decision-making procedure. Its power is one delegated to by the people as a whole to decide what the public interest decides. It will require an evaluation of what is to be regarded as reasonably acceptable in the particular location, having regard to the temporary nature of the licence and the Act's objectives (see *R (Hope and Glory Public House Ltd)* v *City of Westminster Magistrates' Court* [2011] EWCA Civ 31 at [41-42]).

31.4. The local authority must consult the highway authority for the relevant highway to which the application relates (where it is not that authority), and, as a matter of general principle, it must give conscientious consideration to any representations received as a result. It would, however, be an unlawful fettering of discretion were a local authority to effectively substitute the highway authority's views for its own.

31.5. The local authority must take into account any representations made to it during the public consultation period (s.3(2)).

31.6. Whilst, in contrast to a Highways Act permit, the consent of frontagers (not to be unreasonably withheld) is not a precondition to the grant of a pavement licence, a reasonable objection from a frontager is a matter that may weigh significantly against a grant of a licence that extends to an area partly between the frontager's premises and the centre of the highway. Whilst it is not necessarily unreasonable for a frontager to require payment as a condition for consenting to a Highways Act permit (see s.115J(2) of the 1980 Act), in view of the economic objectives of the Act and the limited duration of the pavement licensing scheme, the same might not be said to be the case here.

31.7. Many local authorities - whether alone or in partnership with other stakeholders such as the managers of BIDs and responsible authorities - may have adopted a masterplan for road closures and the provision of pavement facilities. The implementation of such a plan would plainly be a highly relevant factor to the exercise of discretion on individual applications.

31.8. The local authority should consider what (if any) reasonable conditions should be attached to a licence as necessary and proportionate to the promotion of the legislation's objectives (*Hope and Glory* at [42]). The question of conditions is always closely allied with the question of whether or not to grant.

31.9. The local authority must have regard to any guidance issued by the Secretary of State (s.8).

31.10. The Guidance provides [5.2] that when determining applications and setting conditions, issues authorities will want to consider include:

- *public health and safety – for example, ensuring that uses conform with latest guidance on social distancing and any reasonable crowd management measures needed as a result of a licence being granted and businesses reopening;*

- *public amenity – whether the proposed use might create nuisance to neighbouring occupiers by generating anti-social behaviour and litter;*

- *accessibility – taking a proportionate approach to considering the nature of the site in relation to which the application for a licence is made, its surroundings and its users, taking account of:*

- *considerations under the no-obstruction condition, in particular considering the needs of disabled people;*

    - *any other temporary measures in place that may be relevant to the proposal, for example, the reallocation of road space. This could include pedestrianised streets and any subsequent reallocation of this space to vehicles;*

    - *any other social distancing measures in place, for example any queuing systems that limit the space available on the pavement;*

    - *whether there are other permanent street furniture or structures in place on the footway that already reduce access;*

    - *other users of the space, for example if there are high levels of pedestrian or cycle movements.*

31.11. In our view, the suggestion in the Guidance that conditions ensure that uses conform with "latest guidance" on social distancing carries with it a risk that conditions may become out of date as that guidance alters, and that the local authority becomes involved in the micro-management of matters which (according to that guidance) is for the risk assessment of operators.

31.12. As with any other public function, in determining an application, a local authority must have regard to its wider duties, including:

- the prohibitions on unlawful discrimination etc. in s.29 of the Equality Act 2010;

- the Public Sector Equality Duty contained in s.149 of the Equality Act 2020;

- the prohibition on acting in a way which is incompatible with right under ECHR by virtue of s.6 of the Human Rights Act 1998;

- the need pursuant to s.17 of the Crime and Disorder Act 1998 to have due regard to the likely effect of the exercise of its functions on, and the need to do all that it reasonably can to prevent (a) crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment); (b) the misuse of drugs, alcohol and other substances in its area and (c) re-offending in its area;

- its duty under s.89 of the Environmental Protection Act 1990 to keep relevant highways clear of litter and refuse.

32. Should local authorities adopt their own policies?

This a matter for local discretion, but policies must not frustrate the objectives of the Act.

32.1. Whilst there is no bar on local authorities adopting their own policies, it should be borne in mind that the objective of the Act is to provide a streamlined route to a temporary licence to enable premises to take advantage of outdoor trading during the summer months.

32.2. The ability of a local authority to publish conditions subject to which it proposes to grant pavement licences gives applicants and residents an expectation of that authority's general approach.

32.3. In our view if local authorities do adopt policies, they should avoid frustrating the objectives of the Act with overly detailed or burdensome policy requirements.

33. What conditions may be attached to the licence?

A combination of default and deemed national, standard local and (where reasonable) bespoke conditions

34. How are local conditions imposed?

By publication and (where grant is deemed) deeming of standard conditions, and any further bespoke conditions

34.1. Local authorities may (s.5(2)) (and are encouraged to) publish standard local conditions subject to which they propose to grant pavement licences so that applicants and those making representations are aware of them.

34.2. Where there is a deemed grant of an application due to failure to determine the application within the determination period, any published standard local conditions are deemed to be attached to that grant (s.5(3)).

34.3. The local authority may also add bespoke conditions to individual pavement licences in addition to the standard ones. These additional conditions need not have been published anywhere or notified before they are added to the pavement licence. Only such conditions as the local authority considers reasonable imposed (s.5(1)). This is the case whether the conditions are standard or bespoke.

34.4. The Guidance states [5.4] that there is an expectation that bespoke conditions will be supported by a clear justification for their need. It gives as examples of bespoke conditions limits on the maximum number of chairs and tables, or other type of furniture, and the days and times of operation.

35. What should standard local conditions include?

35.1. Standard local conditions are automatically imposed on deemed grants of applications made after their publication. It is suggested that they therefore include the minimum reasonable requirements a local authority expects to place on licences.

35.2. There has been debate as to whether standard local conditions could lawfully include a cut-off hour. In our view, given that standard conditions are attached to the licences deemed to be granted (see paragraph 33.2 above), it is not unreasonable to provide a default cut-off point in terms of hours, as otherwise such licences could be utilised 24 hours a day even in residential areas. However, we emphasise that in the normal course of events, when determining an application, a local authority may only impose such conditions as it considers reasonable - so each application must be determined on its merits, and if a local cut-off time is not reasonable given the circumstances of an individual application, it should not be imposed.

35.3. NEXSTART's Group A has produced an advisory note on Pavement Licence Conditions (V.1 21 July 2020).

36. What are the default and deemed national conditions?

The Act provides for a default no-obstruction and smoke-free seating conditions, and further conditions may be provided for by regulations.

36.1. All pavement licences will either have an express or (in default) deemed "no-obstruction condition" and "smoke-free seating condition" (s.5(4)).

36.2. A "no-obstruction condition" is is a condition that anything done by the licence-holder pursuant to the holder, or any activity of other persons which is enabled by the licence, must not have one of the specified statutory effects debarring grant of the licence, namely the effect of:

(a) preventing traffic, other than vehicular traffic, from—

(i) entering the relevant highway at a place where such traffic could otherwise enter it (ignoring any pedestrian planning order or traffic order made in relation to the highway),

(ii) passing along the relevant highway, or

(iii) having normal access to premises adjoining the relevant highway,

(b) preventing any use of vehicles which is permitted by a pedestrian planning order or which is not prohibited by a traffic order,

(c) preventing statutory undertakers having access to any apparatus of theirs under, in, on or over the highway, or

(d) preventing the operator of an electronic communications code network having access to any electronic communications apparatus kept installed for the purposes of that network under, in, on or over the highway.

36.3. A "smoke-free seating condition" is a condition that, where the furniture to be put on the relevant highway consists of seating for use by persons for the purpose of consuming food or drink, the licence-holder must make reasonable provision for seating where smoking is not permitted. In considering whether a licence-holder has made reasonable provision for seating where smoking is not permitted, a local authority must have regard to guidance issued by the Secretary of State.

36.4. Further, the Secretary of State may by regulations specify conditions for pavement licences and make provision as to whether, or the extent to which, those conditions have effect in addition to, or instead of, any other conditions to which pavement licences are subject (s.5(8)). It would appear that this gives the Secretary of State the power - by regulation – to add conditions to licences, including doing so retrospectively.

37. How does a pavement licence relate to a Part 7A Highways Act 1980 permit?

The schemes run in parallel, but all extant Part 7A applications are withdrawn if a pavement licence is applied for.

37.1. A person may still apply for permission to put furniture on the highway under Part 7A of the Highways Act 1980 if they elect to, but a local authority may not *require* them to apply under that the 1980 Act, instead of under the pavement licensing provisions in the Act.

37.2. Having secured a pavement licence, licence-holders may wish to give consideration to applying for a more permanent permit licence under the Highways Act 1980.

37.3. Where a person has already applied for a licence under the Highways Act 1980 or the London Local Authorities Act 1990 or another local Act and has paid a fee and then, before a decision is made on that first application, the person applies for a pavement licence, the local authority cannot charge a fee in respect of the application for a pavement licence, and the first application is treated as being withdrawn.

37.4. The holder of a Highways Act 1980 permit may carry on using the same and need not apply for a pavement licence.

38. What enforcement powers are available under the scheme?

A local authority may require steps to be taken or revoke the licence.

38.1. If a local authority considers that a licence holder has breached a condition of a licence, it may either revoke the licence or serve a notice on the licence-holder requiring the taking of such steps to remedy the breach as are specified in the notice within such time as is so specified. If the licence-holder fails to comply with a notice, the licensing authority may revoke the notice *or* take the steps itself and recover the costs of doing so from the licence-holder.

38.2. There is no power to vary the pavement licence once granted or add further conditions.

38.3. A local authority may revoke a licence if it considers that—

(a) *some or all of the part of the relevant highway to which the licence relates has become unsuitable for any purpose in relation to which the licence was granted or deemed to be granted,*

(b) *as a result of the licence—*

(i) *there is a risk to public health or safety, or*

(ii) *anti-social behaviour or public nuisance is being caused or risks being caused,*

(iii) *the highway is being obstructed (other than by anything done by the licence-holder pursuant to the licence),*

(c) *anything material stated by the licence-holder in their application was false or misleading, or*

(d) *the licence-holder did not comply with the duty to fix the notice to the premises and secure that it remained in place during the public consultation period.*

39. What other enforcement powers are available?

39.1. The Highways Act 1980 provides for the following relevant offences:

- Under s.137, if a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway.
- Under s.148, if, without lawful authority or excuse, a person deposits anything whatsoever on a highway to the interruption of any user of the highway.

39.2. Both offences are punishable on summary conviction (s.310) by a fine not exceeding level 3 on the standard scale (currently £1,000). Neither of these offences are subject to the restriction found in s.312 on the institution of proceedings, and they may be prosecuted by a council despite it not being the highway authority.

39.3. The highway authority has a power under s.149 of the Highways Act 1980 to remove things deposited on highways so as to be a nuisance. This power is exercisable forthwith in cases where the deposit causes a danger.

39.4. Planning breaches are enforceable under the Town and Country Planning Act 1990.

39.5. Breaches of the street trading regimes give rise to offences within the legislative scheme.

39.6. The operators of licensed premises who break the criminal law by placing items on the highway without permission risk licensing reviews on the basis their doing so impinges upon the licensing objective of the prevention of crime and disorder.

40. Does a prohibition on a public spaces protection order (PSPO) apply to the area of a pavement licence?

40.1. The Act makes no provision to exclude from a public spaces protection order made under the Anti-social Behaviour, Crime and Policing Act 2014 a place where facilities and activities relating to the sale or consumption of alcohol are at the relevant time permitted by virtue of pavement licence.

41. Must fee refunds be made in the event of an application being refused?

41.1. Given that the maximum application fee is unlikely to cover the average costs of processing an application, it seems unlikely to us that there is any obligation on a local authority to make any reimbursement in respect of the any enforcement element of the scheme should an application be refused.

42. Is pavement licensing an executive or non-executive function?

It is a non-executive function.

42.1. Where a local authority operates executive arrangements, any of its functions which are not specified in regulations made under s.9D(3) of the Local Government Act 2000 will be the responsibility of an executive of the authority under executive arrangements: s.9D(2) of the 2000 Act.

42.2. The relevant regulations are the Local Authorities (Functions and Responsibilities) (England) Regulations 2000. These have been amended by the Act to include functions relating to pavement licences. The reference in the Guidance at [1.9] to delegation by the executive is therefore erroneous.

43. Is there a right of appeal against a decision?

A: No.

43.1. The Act does not provide for any appeal process.

43.2. The Guidance suggests [5.7] that councils may wish to consider the scope for an internal review process, for example permitting appeals to their licensing committees.

43.3. It has been argued[11] that licensing committees established under the Licensing Act 2003 may only deal with matters under the Licensing Act 2003, the Gambling Act 2005 and (by virtue of s.7(3) of the 2003 Act, matters referred to it which are not licensing functions, and that they do not have power to deal with other matters. Many (but by no means all) local authorities have a second licensing committee established under s.101 of the Local Government Act 1972 to deal with other licensing matters (including taxis, street trading etc). This second committee would not suffer from this restriction on its powers.

43.4. As there is no statutory right of appeal, it is beyond the powers of a local authority to reject an application and then to overturn its own refusal on an internal review. Furthermore, the compressed timescale provided for in the Act seems insufficient for an effective internal review of a "minded to reject" decision. Seven days is - in our view - not long enough for an application to be considered, provisionally rejected, reviewed and re-considered on review (particularly by a committee). The process would also carry with it the risk of a deemed grant if the internal review was not completed within the determination period.

[11] James Button The need for two licensing committees (Journal of Licensing (July 2020).

44. What about premises which have long had tables and chairs on the without any express permission?

44.1. These premises may well not require planning permission because of the duration of their user. They may further benefit from a legitimate expectation that what they are doing is not street trading nor will be the subject of highways enforcement without the giving of notice. We see little urgency or regulatory justification in taking enforcement action merely because of the creation of the pavement licensing regime.

45. Can a pavement licence be transferred?

No.

45.1. The Act does not contain any provisions for the transfer of a pavement licence. In the event of a business sale it may be feasible (in the short term at least) for the purchaser to carry on the activities in partnership with the licence holder for those purposes or as agent for him/her/it.

46. Can a pavement licence be surrendered?

Yes

46.1. A pavement licence may be surrendered at any time by giving notice to the local authority (s.4(5)).