

Sex Shops, Sex Cinemas, and Sexual Entertainment Venues Policy

2017



ASHFORD
BOROUGH COUNCIL

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Overview

The purpose of this policy is to:

- Set out the expectations of the local authority in meeting the requirements of the legislation.
- Provide guidance to; members of the public, applicants, elected members, and officers on matters relating to Sex Establishments, Sex Cinemas, and Sex Shops.
- Assist any persons making representations in respect of an application to make a properly directed and evidenced representation.

Notwithstanding this policy, each application will be assessed on its individual merit and will be granted or refused purely on that merit. Whilst this policy will set out the broad scope of expectations, it should not be seen as restricting or predetermining the outcome of any application or representation in respect of the licensing of any premises.

This policy statement came into effect on 12th January 2017 and will be formally reviewed after a period of 5 years.

In formulating this policy the Licensing Authority has taken into account the views of consultees approached as part of the original 2011 policy. Other strategies such as the Sustainable Community Strategy 2008-2018 and the Community Safety Partnership Strategic Assessment, as contained in *Appendix A*, have also been considered in relation to this subject.

The Local Government (Miscellaneous Provisions) Act 1982 (as amended by Section 27, Policing and Crime Act 2009) provides that a local authority may, by resolution, adopt Schedule 3 to that Act. If adopted this will provide for the licensing of sexual entertainment venues (SEV), sex shops and sex cinemas within the borough.

Functions under Schedule 3 are the responsibility of the full council of the local authority, as defined. Under section 101 of the Local Government Act 1972, local authorities may arrange for the discharge of these responsibilities by a committee or sub-committee of the appropriate authority.

Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 was adopted on 17th February 2011 by Ashford Borough Council.

An authority may delegate its functions to those who sit on its licensing committee set up to discharge licensing functions under the 2003 Act. However, when dealing with an application for a sex establishment licence, the members of the committee would not be acting as the licensing committee under the 2003 Act and would instead be exercising their functions under Schedule 3.

Definitions

For the purposes of this policy the following definitions will apply:

Sex Shop

Any premises, vehicle, vessel or stall used for a business which consists to a significant degree of selling, hiring, exchanging, lending, displaying or demonstrating:

- a) sex articles; or
- b) other things intended for use in connection with, or for the purpose of stimulating or encouraging:
 - i. sexual activity; or
 - ii. acts of force or restraint which are associated with sexual activity.

No premises shall be treated as a sex shop by reason only of their use for the exhibition of moving pictures by whatever means produced.

Sex Article

Anything made for use in connection with, or for the purpose of stimulating or encouraging—

- a) sexual activity; or
- b) acts of force or restraint which are associated with sexual activity; and

anything to which sub-paragraph below applies.

This sub-paragraph applies:

- a) to any article containing or embodying matter to be read or looked at or anything intended to be used, either alone or as one of a set, for the reproduction or manufacture of any such article; and
- b) to any recording of vision or sound, which
 - i. is concerned primarily with the portrayal of, or primarily deals with or relates to, or is intended to stimulate or encourage, sexual activity or acts of force or restraint which are associated with sexual activity; or
 - ii. is concerned primarily with the portrayal of, or primarily deals with or relates to, genital organs, or urinary or excretory functions.

Sex Cinema

Any premises, vehicle, vessel or stall used to a significant degree for the exhibition of moving pictures, by whatever means produced, which—

- a) are concerned primarily with the portrayal of, or primarily deal with or relate to, or are intended to stimulate or encourage—
 - i. sexual activity; or
 - ii. acts of force or restraint which are associated with sexual activity;
 or
- b) are concerned primarily with the portrayal of, or primarily deal with or relate to, genital organs or urinary or excretory functions,

but does not include a dwelling-house to which the public is not admitted.

No premises shall be treated as a sex cinema by reason only—

- a) if they may be used for an exhibition of film (within the meaning of paragraph 15 of Schedule 1 to the Licensing Act 2003) by virtue of an authorisation (within the meaning of Section 136 of that Act), of their use in accordance with that authorisation.
- b) by their use for an exhibition to which section 6 of that Act (certain non-commercial exhibitions) applies given by an exempted organisation within the meaning of section 6 (6) of the Cinemas Act 1985.

Sexual Entertainment Venue

Any premises at which relevant entertainment is provided before a live audience for the financial gain of the organiser or the entertainer.

Exemptions from being a Sexual Entertainment Venue

The following are not sexual entertainment venues for the purposes of this policy:

- a) sex cinemas and sex shops;
- b) premises at which the provision of relevant entertainment is such that, at the time in question and including any relevant entertainment which is being so provided at that time
 - i. there have not been more than eleven occasions on which relevant entertainment has been so provided which fall (wholly or partly) within the period of 12 months ending with that time;
 - ii. no such occasion has lasted for more than 24 hours; and
 - iii. no such occasion has begun within the period of one month beginning with the end of any previous occasion on which relevant entertainment has been so provided (whether or not that previous occasion falls within the 12 month period mentioned in subparagraph (i));
- c) premises specified or described in an order made by the relevant national authority.

Relevant entertainment:

Any live performance or any live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).

Home Office Guidance states relevant entertainment would therefore apply to the following forms of entertainment, as they are commonly understood:

- Lap dancing
- Pole dancing
- Table dancing
- Strip shows
- Peep shows
- Live sex shows

However this list is not exhaustive and the licensing authority will judge each case on its merits. Decisions will be based on the content of the entertainment provided and not the name given to it.

Nudity

Schedule 3 sets out the definition of a 'display of nudity'. In the case of a woman, it means exposure of her nipples, pubic area, genitals or anus and, in the case of a man; it means exposure of his pubic area, genitals or anus.

Spontaneous Entertainment

Where activities that would otherwise be considered to involve the provision of relevant entertainment take place, but are not provided for the financial gain of the organiser or entertainer, such as a spontaneous display of nudity or a lap dance by a customer or guest, the premises will not be considered a sexual entertainment venue by virtue of those circumstances alone. This is because the relevant entertainment must be provided for the financial gain of the organiser or entertainer. However, it should be noted that an organiser might be considered to have provided the entertainment where he has permitted the activity to take place, whether expressly or impliedly.

The 'Organiser'

Any person who is responsible for the organisation or management of the relevant entertainment or the premises at which the relevant entertainment is provided. In most circumstances, this will refer to the manager of the premises, but could also refer someone who is responsible for organising the relevant entertainment on behalf of the persons responsible for the management of the premises.

The 'organiser' must be someone who is in a position of responsibility over the provision of the relevant entertainment and should not be interpreted to

mean a member of staff who is merely employed to work during the provision of relevant entertainment. It is only necessary for one person to hold a sexual entertainment venue licence for premises, even if there is more than one person who is responsible for the organisation or management of the relevant entertainment or the premises.

Exemptions from the need for a Sexual Entertainment Venue Licence

Venues that intend to provide relevant entertainment less than 11 times in any rolling year are exempted from the need for a sex entertainment venue.

In order to avail themselves of this exemption, operators must not have held any relevant entertainment in the previous month.

The Licensing Authority encourages operators of such venues to consider the active promotion of the legislative aims and the licensing objectives under the Licensing Act 2003 in particular those relating to the protection of children from harm and the prevention of public nuisance.

Operators are encouraged to maintain written records of any relevant entertainment in order to assist the Licensing Authority to prove or refute any allegation of unlicensed events.

Waiving the need for a Sexual Entertainment Venue Licence

The amendments to Schedule 3, Local Government (Miscellaneous Provisions) Act 1982, allow for the Licensing Authority to waive the need for a sex entertainment venue licence under certain circumstances.

An applicant can apply for a waiver either as part of the application for a licence or separately. The local authority can grant a waiver if they consider that to require a licence would be unreasonable or inappropriate. Where a waiver is granted the appropriate authority should inform the applicant that a waiver has been granted. The waiver may last for such a period that the appropriate authority think fit, but can be terminated by the appropriate authority at any time with 28 days notice.

The licensing sub-committee will consider applications for such waiving of the need for licences on an individual basis. However it is felt that, unless clear and unambiguous evidence can be produced to support such a waiving of licence, the default position will be that a licence will be required.

Restriction on Numbers in Relevant Localities

Paragraph 12(3)(c) and 12(3)(d) of Schedule 3 allow appropriate authorities to refuse applications on grounds related to an assessment of the “relevant locality”. A licence can be refused if either, at the time the application is determined the number of sex establishments, or sex establishments of a particular kind, in the relevant locality is equal to or exceeds the number that the authority considers appropriate for that locality; or that a sex establishment would be inappropriate having regard to the character of the relevant locality, the use to which any premises in the vicinity are put or the layout, character or condition of the premises. Nil may be the appropriate number.

The Licensing Authority can set specific relevant localities in respect of each type of sex establishment (sex shop, sex cinemas and sex entertainment venues) and to set limits on each type of premises.

Sex Shops and Sex Cinemas

The Licensing Authority considers that there should be no more than two licensed sex shops permitted in the defined locality for Ashford Town Centre. The Licensing Authority currently has no limit on the number of sex cinemas that should be permitted within this area or any other defined locality. Ashford Borough Council would consider representations as to why our view should be changed about any particular locality.

By restricting the numbers to the above levels the Licensing Authority believes that it maintains its responsibilities under the legislation whilst allowing for fair competition. As stated previously it is aware of and has taken into consideration Section 17, Crime and Disorder Act 1998 and its regeneration policies.

Sex Entertainment Venues

In defining the localities in respect of sex entertainment venues the Licensing Authority is mindful of the potential for crime and disorder where such premises do not have robust management systems in place. The Licensing Authority is also mindful that, where there is a high volume of other premises licensed under the Licensing Act 2003, there is also the potential for conflict at the entrance to sex entertainment venues originating, not within the premises, but with would-be customers who are refused entry.

In licensing of sex entertainment venues the Licensing Authority will consider the impact of such premises and their operation on the vicinity. This would include:

- 1) the likely effects of any increased footfall or vehicular traffic,
- 2) any advertising or displays of an erotic or pseudo-erotic nature,

- 3) the type of location (residential, commercial, industrial)
- 4) the vicinity of establishments whose patrons are likely to be effected by the operation of the premise (e.g. schools, children's residential establishments, religious venues, historical or tourist attractions)
- 5) localities where the cumulative impact of the venue, taken with other licensed premises or commercial interests, is likely to have an adverse effect on the licensing objectives.
- 6) The need to provide effective door management
- 7) The management protocols within the premises

The council have not set a maximum limit on numbers that they are prepared to licence.

Related Legislation

Licensing Act 2003

Schedule 7 to the Policing and Crime Act 2009 amends the Licensing Act 2003 to ensure that premises for which a sexual entertainment venue licence is required or held (or for which the requirement has been waived under paragraph 7 of Schedule 3 to the 1982 Act) do not also require a premises licence, club premises certificate or temporary events notice in order to provide relevant entertainment. This is because such entertainment is expressly excluded from the definition of regulated entertainment found in the 2003 Act. However, if the premises also carry on other licensable activities (e.g. the sale of alcohol or the provision of regulated entertainment that is not relevant entertainment), they will nevertheless continue to require a premises licence, club premises certificate or temporary event notice under the 2003 Act for those other activities, subject to any exceptions contained in that Act.

In practice, this will mean that the vast majority of lap dancing clubs and similar venues will require both a sexual entertainment venue licence for the provision of relevant entertainment and a premises licence or club premises certificate for the sale of alcohol or provision of other types of regulated entertainment not covered by the definition of relevant entertainment.

Live music or the playing of recorded music which is integral to the provision of relevant entertainment, such as lap dancing, for which a sexual entertainment licence is required, is specifically excluded from the definition of regulated entertainment in the 2003 Act. Therefore, a sexual entertainment venue will not require a premises licence or club premises certificate just because it plays recorded music for a performer to dance to. (Nor will providing entertainment facilities for the purposes of the provision of relevant entertainment be regulated entertainment under the 2003 Act).

Premises which fall under the exemption created for infrequent entertainment do not require a sexual entertainment venue licence but may instead need an appropriate authorisation under the 2003 Act, for example, to cover the performance of dance and the playing of live or recorded music.

There are however circumstances in which live or recorded music may be not be licensable under the 2003 Act due to deregulation. In summary, deregulation;

- Allows unamplified live music between 08:00 and 23:00 on any day on any premises
- Allows amplified live music between 08:00 and 23:00 on any day on premises authorised to sell alcohol, provided the audience does not exceed 500.
- Allows the playing of recorded music between 08:00 and 23:00 on any day on premises authorised to sell alcohol, provided the audience does not exceed 500.

The exemption from requirements of the 2003 Act for live music or the playing of recorded music that is integral to relevant entertainment does not apply to such venues.

The Licensing Act deregulation of entertainment does not extend to dance which is sexual in nature, and as such dancing remains licensable at all times unless a sexual entertainment licence is in place for that purpose.

Please refer to the *Revised Guidance issued under section 182 of the Licensing Act 2003* for full details of the circumstances where entertainment may and may not be a licensable matter.

Unless the performance of live or recorded music is appropriately authorised by a premises licence, club premises certificate, deregulation, or a Temporary Event Notice, allowing it to take place could lead to enforcement action.

Town and Country Planning Act

The Licensing Authority will not normally undertake action where another, more appropriate, regime exists to resolve matters. Failure to obtain planning permission is not a ground for refusal of the grant of an application under the 1982 Act and such a failure to obtain planning permission will normally be dealt with as part of the normal planning process.

Operators and persons making representations should be aware that in many cases there would be a need to obtain planning permission before a premises may be used for the purposes relevant to this policy. The Licensing Authority will not normally consider planning matters such as “need” in determining a licence application as this is more appropriately dealt with by planning legislation.

Applicants may wish to seek independent advice in relation to both planning and licensing prior to making any application under Schedule 3 Local Government (Miscellaneous Provisions) Act 1982.

European Convention on Human Rights

When determining applications for licences under this policy the Licensing Authority will have consideration to any rights an existing operator may have under Article 1, Protocol 1 of the European Convention on Human Rights (ECHR) (which entitles every person to the peaceful enjoyment of their possessions) and Article 10 (freedom of expression).

The Secretary of State has certified that the Policing and Crime Act 2009 is covered by Section 19, Human Rights Act 1998 as being in compliance with the ECHR.

Whilst the rights under Article 1 and 10 may be activated the weight to be accorded to these rights in this context is low level. The right to freedom of expression to participate in the activities of sex shops, sex cinemas and SEVs

is not prohibited but may be controlled by licensing. Similarly the right to possession of an existing licence is proportionally protected subject to a fair balance of the rights of the holder and the public interest.

The Application Process

Applications for licences for sex shops, sex cinemas and sex entertainment venues must be made on the prescribed form and accompanied by the requisite fee.

Ashford Borough Council takes account of the findings of the *Hemming and Others v Westminster City Council* case concerning sex establishment licence fees. Application fees are used to cover the cost of administering the application process and do not include enforcement costs.

Notices

Applicants for a sexual establishment licence must give public notice of the application by publishing an advertisement in a local newspaper that is circulated in the local authority area no later than 7 days after the date the application is made.

Where the application relates to premises, a notice should also be displayed on or near the premises in a place where it can be conveniently read by members of the public. The notice should be displayed for a period of 21 days beginning with the date the applications was made.

All notices should be in the form prescribed by the appropriate authority and identify the premises or, if the application relates to a vehicle, vessel or stall, specify where it will be used as a sex establishment.

The applicant is required to submit a copy of any application to the Chief Officer of Police for the area within seven days of submitting the original application to the local authority. The requirement does not apply in the case of electronic applications as it is the duty of the local authority to send a copy to the police.

Objections

Any person can object to an application, however the licensing authority is likely to give greater weight to objections relevant to the grounds set out in paragraph 12, of Schedule 3, Local Government (Miscellaneous Provisions) Act 1982 for refusing a licence (See details below). Less weight is likely to be given to objections based on moral grounds/values and local authorities cannot consider objections that are not relevant to the grounds set out in paragraph 12. Objectors must give notice of their objection in writing, stating the general terms of the objection.

When considering an application for the grant, renewal or transfer of a licence the Licensing Authority will have regard to any observations submitted to it by the Chief Officer of Police and any objections that they have received from anyone else, (including statutory agencies such as Kent Fire and Rescue Service, UK Border Agency, The Local Safeguarding Children's Board) within 21 days of the application.

Where the Licensing Authority receives notice of any objection the authority will, before considering the application, give notice in writing of the general terms of the objection to the applicant. Unless an objector specifically requests their name or address to be withheld, their details will be made available to the applicant and the public as part of the hearing process.

Hearings

Under paragraph 10(19) of Schedule 3, before refusing an application, renewal or application to transfer a licence all applicants will be given the opportunity to appear before and be heard by the licensing committee or sub-committee that is responsible for determining the application.

Whilst Schedule 3 does not make explicit provision for objectors to be heard, this council believes it right to offer an oral hearing to objectors. This does however remain within their discretionary powers. Although a local authority is under a duty to consider any objections made within 28 days of the application, it has discretion to hear later objections provided the applicant is given the opportunity to deal with those objections.

Refusal of a Licence

Paragraph 12 of Schedule 3 sets out the grounds for refusing an application for the grant, renewal or transfer of a licence. A licence **must not** be granted:

- a) to a person under the age of 18;
- b) to a person who is for the time being disqualified due to the person having had a previous licence revoked in the area of the appropriate authority within the last 12 months;
- c) to a person, other than a body corporate, who is not resident in an European Economic Area (EEA) State or was not so resident throughout the period of six months immediately preceding the date when the application was made; or
- d) to a body corporate which is not incorporated in an EEA State; or
- e) to a person who has, within a period of 12 months immediately preceding the date when the application was made, been refused the grant or renewal of a licence for the premises, vehicle, vessel or stall in respect of which the application is made, unless the refusal has been reversed on appeal.

A licence **may** be refused where:

- a) the applicant is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reason;

- b) if the licence were to be granted, renewed or transferred the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant, renewal or transfer of such a licence if he made the application himself;
- c) the number of sex establishments, or of sex establishments of a particular kind, in the relevant locality at the time the application is determined is equal to or exceeds the number which the authority consider is appropriate for that locality;
- d) that the grant or renewal of the licence would be inappropriate, having regard—
 - i. to the character of the relevant locality; or
 - ii. to the use to which any premises in the vicinity are put; or
 - iii. to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.

A decision to refuse a licence must be relevant to one or more of the above grounds.

In making any determination to refuse an application, renewal or transfer the local authority will give consideration to:

a) Unsuitability of the applicant

In determining the suitability or otherwise of an applicant the local authority will consider any previous convictions and in particular those that have been imposed in respect of offences involving violence, dishonesty, or a breach of the requirements of the legislation covering the type of establishment in respect of which the application is made.

b) Business carried out on behalf of a person who would be refused

The local authority takes a serious view of any application that seeks to subvert the underlying principles of the Act. Where it is considered that the applicant is effectively operating the business on behalf of a person who would, for whatever reason, be refused or disqualified from the grant of a licence due to the mandatory or discretionary grounds for refusal there will be a presumption towards refusal unless overwhelming reasons are accepted for the contrary decision to be made.

c) The application exceeds the limit set on the number of the specific type of sex establishment in an area

Where an application would exceed the number set it will be for the applicant to show reason why the authority should set aside the limit. In deciding whether to allow the application the authority will have consideration to:

- i. any nuisance associated with the premises or the activities undertaken thereon;
- ii. the possibility of children or other vulnerable persons being harmed or exploited by the provision of sexual entertainment or the operation of sex shops or sex cinemas;
- iii. the potential of the activities associated with the operation of the premises being a source of crime and disorder, being associated with crime or being used to support crime;
- iv. Any other reason including the existence of a police caution, representations from the police or others.

d) The grant of the licence would be inappropriate

In deciding whether the grant of a licence is appropriate the local authority will consider the type of area in which it is intended to site the premises and the hours during which it is intended to operate. In particular it will consider the factors outlined in part (d) of the discretionary grounds for refusal however these should not be seen as being the only factors under consideration and each case will be decided on its individual merits taking into account any representations made by statutory authorities or members of the public. The authority is also likely to consider:

- i. the proximity of any school or other educational establishment
- ii. the proximity of any religious establishment
- iii. the proximity of any premises intended for use of children or vulnerable adults
- iv. whether the area is predominantly residential rather than commercial in nature

Relevant Locality

Schedule 3 to the 1982 Act does not define “relevant locality” further than to say that:

- a) in relation to premises, it is the locality where they are situated; and
- b) in relation to a vehicle, vessel or stall, any locality where it is desired to use it as a sex establishment.

Case law has indicated however that in defining the relevant locality the local authority should not seek to specify wide areas. Again in determining the relevant locality each case will be decided on merit having consideration to the individual circumstances of the application.

Once the council has determined the relevant locality, it should seek to make an assessment of the ‘character’ of the relevant locality and how many, if any, sex establishments, or sex establishments of a particular kind, it considers appropriate for that relevant locality. The council may decide that a particular locality is suitable for a sex shop but is not suitable for a sexual entertainment

venue or vice versa. Nil may be the appropriate number. No numbers were set for sexual entertainment venues as part of the consultation process.

Conditions

The Local Government (Miscellaneous Provisions) Act 1982 allows the Licensing Authority to attach conditions to a licence.

Whilst conditions may be prescribed on any matter it is likely that the following considerations will attract the attachment of conditions:

- Hours of opening and closing
- Visibility of the interior of the premises
- Displays or advertisements
- Any change in the type of premises

Every licence granted, renewed or transferred subject to model conditions shall be presumed to have been subject to model conditions unless specifically excluded or varied. The authority may specify other conditions specific to individual premises dependant on the type of activity undertaken. These may include specifying minimum distances between the audience and performers, the control of access to changing room facilities, and the control of private viewings.

In order to promote the legislation the Licensing Authority will formulate a pool of model conditions in respect of each type of licensed premises. Whilst these conditions form the basis for promoting the efficient operation of premises they will be applied only where a perceived necessity exists and in a manner that is both proportionate and reasonable to promote the legislation. Each case will be dealt with on its individual merit.

Appeals

In the event that the appropriate authority refuses an application for the grant, renewal or transfer of a sex establishment licence the applicant may appeal the decision in a magistrates' court, unless the application was refused under 12(3)(c) or (d), in which case the applicant can only challenge the refusal by way of judicial review.

Duration of Licences

Licences for sex establishments can be granted for up to one year.

Exchange of Information

The authority may from time to time exercise its powers under section 115 of the Crime and Disorder Act 1998 to exchange data and information with the police and other partners to fulfil its' statutory objective of reducing crime in the area.

Details of applications and objections which are referred to a licensing committee for determination will be published in reports that are made publicly available in accordance with the Local Government Act 1972 and the Freedom of Information Act 2000.

Appendix A

In formulating this policy the Licensing Authority has taken into consideration:

1. **The Sustainable Community Strategy** and in particular the following key themes that drive this strategy:

Economic

The aim to continue the transformation of Ashford town centre to ensure that the town meets the needs of new and existing businesses and a growing population.

Communities

Improving community safety and reducing anti social behaviour had consistently been identified by residents as a top priority for the council and its partners.

Visitor destination

The Borough has varied and high quality cultural, sporting and leisure activities which can also be an important factor in attracting families and business to relocate to the area. Ashford has a thriving cultural life and good sporting facilities. As the town grows, the challenge will be to ensure that adequate additional facilities are provided and that all parts of the community have good access to them.

2. **The Community Safety Partnership Strategic Assessment** and in particular the following key themes:

- Safeguarding;
 - Child sexual exploitation
 - Human trafficking
 - Modern Slavery
- Domestic abuse and sexual offences
- Organised crime;
 - Drugs
 - Gangs
 - Serious acquisitive crime
 - Digital Crime

The Licensing Authority have also taken into consideration the provisions of Section 17, Crime and Disorder Act, 1998 that requires responsible authorities to consider crime and disorder (including antisocial behaviour and other behaviour adversely affecting the local environment); and the misuse of drugs, alcohol and other substances in the exercise of all their duties, activities and decision-making. This means that in all policies, strategies and service delivery there is a need to consider the likely impact on crime and disorder.