

# **NEXSTART**

## **Business and Planning Bill 2019-21**

### **Pavement Licences**

#### **Introduction**

**[29<sup>th</sup> June, 2020 – Version 01]**

#### **The new pavement licence**

On Thursday 25 June 2020 the Business and Planning Bill 2019-21 was introduced to the House of Commons by the Government and given its (formal) First Reading. The Bill is expected to speed through Parliament: it is hoped to complete all remaining Commons stages on Monday 29 June 2020, and to become law at some point that week,

The Bill introduces a new licence – a “pavement licence”. The operators of businesses selling food and drink may apply to their local authority for authorisation to put furniture such as tables and chairs on the highway adjacent to their premises to sell food and drink from and/or for their customers to use.

#### **The existing regimes**

The established regulatory requirements for street tables and chairs is been found in the Highways Act 1980, the Town and Country Planning Act 1990, and (in London) street-trading legislation. Different authorities had taken different approaches to what, precisely, an operator requires.

What is variously and colloquially known as a “pavement licence”, “street café licence” and a “tables and chairs licence” regime is found in Part 7A of the Highways Act 1980.

A local highways authority may grant a permission to use objects on the highway which would result in the production of income. Highways include pavements, and without this authorisation, such placement would constitute an offence of wilful obstruction of the highway (s.137). The council of a county or the metropolitan district is a highway authority for all highways in that county or district. In London responsibility generally lies with the 32 London boroughs. Applications are made to the relevant local highways authority and are subject to consultation, prior to determination. Conditions may be placed on the licence and licence fees are payable.

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.

Legislation affecting Greater London defines "street trading" more widely than in other parts of the country (so including the provision of services as well as the selling or exposing for sale of any article), and – in addition to a Highways Act permit and planning permission, many London boroughs choose to require a street trading licence (under the London Local Authorities Act 1990 (as amended by the London Local Authorities Acts 2004 and 2007), and – in the City of Westminster - the City of Westminster Act 1999)<sup>1</sup>.

### **Purpose of the new licence**

The existing regime has been criticised as costly, time-consuming and overly and unnecessarily complex.

As the country emerges from lockdown, pavement cafés have assumed a new importance given the strong scientific evidence of a lower risk of spreading coronavirus outdoors.

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<sup>1</sup> For an overview of the existing regimes, see Gareth Hughes, [A Guide to the Law on Tables and Chairs in England and Wales](#), Journal of Licensing (July, 2020).

With the forthcoming removal of restaurants, cafes, bars and public houses from the closure restrictions found in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 with effect from 4 July 2020, it was recognised that there was a pressing need to allow the hospitality sector cut through the existing red tape and offer an outdoor environment to customers. Although able to open, those businesses are required to operate safely, the Government producing detailed social distancing guidance<sup>2</sup>. Restrictions remain on gatherings indoors. There is also a much-needed corresponding economic benefit to the beleaguered hospitality sector being able to trade to the full extent possible given the inevitable constraints social distancing place on capacity. As the Explanatory Notes provide:

*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.*

The new licensing regime, found in cl. 1-10 of the Bill, provides a fast-track procedure for the grant of an authorisation that bypasses the existing regulatory regimes.

Anything that is done by a licence-holder pursuant to a pavement licence does not need a Highways Act permit; it is deemed to have planning permission; and it is not street trading for the purposes of any of the various statutes regulating that activity.

Pavement licences are of finite duration. No licence will extend beyond 30 September 2021 (cl. 4(1)-(4)) (unless this is date is substituted by regulation: cl. 10(2)).

Although statutory guidance (cl. 8) will doubtless put flesh on the bones, the statutory objectives of achieving social and economic benefits by a rapid liberalisation of the existing regime over the duration of the current crisis are matters that regulators will wish

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<sup>2</sup> <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>

to bear in mind when considering their powers under the new legislation. The draft guidance<sup>3</sup> says of the new process for pavement licences:

*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.*

The Bill relates solely to England.

### **Q&A Checklist**

**Q. Who operates the pavement licensing regime?**

**A: The “appropriate local authority”, being the local authority in whose area relevant premises are situated (cl. 1(6)).**

“Local authority” means (cl. 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*

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<sup>3</sup> <https://www.gov.uk/government/publications/pavement-licences-draft-guidance/draft-guidance-pavement-licences-outdoor-seating-proposal#applications>

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

This definition is in very similar terms to the definition of “licensing authority” in s.3(1) Licensing Act 2003. In nearly all cases, therefore, the appropriate local authority will be the licensing authority for the premises adjacent to which the applicant seeks a pavement licence for.

In the 22 two-tier counties of England, the highways authority is the county council. The effect of the new Bill will be to confer upon the other tier – district councils - the novel function of granting highways permissions.

**Q: Who can apply?**

**A: Premises users with the necessary actual or proposed use adjacent to a relevant highway**

Firstly, an applicant needs to use, or *propose* to use, premises for, or *including*, a relevant use (cl. 1(1)).

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.*

This is a wide definition. It does not just include traditional hospitality sector venues such as restaurants, cafés, pubs and bars, but could encompass food and drink retailers with hitherto no hospitality element (so delicatessens etc), and even units with no previous food and beverage element (so art galleries, hairdressers and so on). 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 (and so entirely under the ambit of a pavement licence).

Secondly, the premises – in effect – must be adjacent to a relevant highway. This is because the geographic limit of an authorisation under a premises licence is “part of a relevant highway *adjacent* to the premises” (cl. 1(2)).

The phrase “adjacent to the premises” featured in regulation 4(3) of 2020 Regulations 2020 to bring beer gardens and the like into the closure provisions. “Adjacent” probably does not connote contiguous or abutting - somewhere very near should suffice.

**Q: Does an applicant need a premises licence under the Licensing Act 2003?**

**A: No**

An applicant does not need a premises licences to apply for a pavement licence. All they need is to propose to use premises for a use that includes sale of food or drink for consumption on or off the premises.

**Q: What is authorised on the highway?**

**A: The placement and use of removable furniture for defined purposes**

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

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.

The 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: cl 7(1). This therefore means that where a licence is in force, no offence of obstructing the highway is committed.

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

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

Pavement licences only authorise the placing of furniture on the highway. They do not alter any entitlements the premises may or may not have to serve food or drink. Those activities will still be covered 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, and land covenants in the normal way.

If the applicant has a licence to serve alcohol on-premises, temporary amendments to the Licensing Act 2003 contained elsewhere in the Bill will generally allow them to sell alcohol for consumption off the premises without needing to apply for a variation of their licence.

The grant of a pavement licence will not alter the permitted hours on an associated planning permission and/or a premises licence for the relevant premises. The Bill does not say anything about the hours that the furniture can be out on the highway, but a pavement licence holder would not be entitled to serve food and drink using that furniture otherwise than in accordance with what the associated planning permission and / or licence permitting the food and drink already allows.

**Q: What does “furniture” mean?**

**A: “Furniture” is defined in the Bill**

The Bill defines “furniture” as meaning:

(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;*

This is a comprehensive definition – no other types of furniture are permitted. “Counters or stalls for selling or serving food or drink” encompass bars, and the permitted use includes the sale and service of food or drink from furniture placed on the highway under the authority of the licence.

There is a catch all provision in the Bill in relation to articles used in connection with consumption of food or drink, but the same provision is not made for articles used in connection with sale and service (which might encompass, for example, barriers to assist queuing for a retail operation). It is a moot point whether such items might be said to be ancillary to “counters or stalls”, and it is possible that they could be conditioned.

This furniture is required to be removable. The draft Guidance suggests 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.

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

**A: On a “relevant highway” (as defined)**

A pavement licence only grants an authorisation in relation to a “relevant highway” (cl. 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 (cl. 1(5)).

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.



**Q: How is an application made?**

**A: Electronically**

Applications may only be made electronically and, if the appropriate local authority chooses to specify a form, in that form.

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.

It is anticipated that many local authorities will wish (if technologically possible within a short timeframe) to set up a system 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.

Where a local authority specifies a particular manner of electronic communication (such as an online application form) that is the manner which must be used (cl. 2(1)(b)).

**Q: What do all applications have to state?**

**A: The Bill requires prescribed particulars to be given (cl. 2(2))**

An application to the local authority must:

- 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;
- 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.

**Q: What other information may a local authority require?**

**A: Each local authority has discretion to require applications to be accompanied by such information or material as they may require (cl. 2(2)(f)).**

The draft statutory guidance suggests 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 draft guidance states that any requirements imposed should be reasonable and should be kept as minimal as possible.

Having said, that, the draft 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;

- (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.

Having made a plea for minimalism, the reasonable necessity of some of the suggested further enquiries in the draft Guidance are debatable.

Whilst the request for contact details of the applicant would seem to be sensible, it is to be borne in mind that cl. 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).

Given the present economic uncertainty it seems very unlikely that any applicant would seek a licence of shorter duration than the maximum period. Deemed grants – in any event – are for a period of 1 year (but expire on 30 September 2021 if still in force at that time).

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.

The request for “reference of existing pavement licence currently under consideration by the local authority” appears to flag up cl. 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.

The draft 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*”.

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.

**Q: Does the applicant have to lodge an operating schedule?**

**A: No.**

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 set out standard conditions, and choose to add extra conditions to a pavement licence if they want to.

**Q: Is there an application fee?**

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

There can be an application fee, up to a maximum of £100. Given that this fee is not likely to fund the operation of the scheme by individual local authorities (which requires considerable work to be undertaken a rapid pace, in many cases by authorities who have had no previous highways function) it is likely that even at the maximum charge for the licence (which is designed to be “cheaper route” for the trade), the regime will not be self-funding for most local authorities. The likelihood, therefore, is that each will charge the maximum.

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: cl. 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.

**Q: What does the applicant have to do once the application is made?**

**A: Notice of the application must be fixed to the premises**

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. It appears that the notice should be affixed after the application is made.

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. The draft Guidance refers to a consultant period of 5 working days, which is inconsistent with the current provisions of the Bill. When enacted, the provisions of the Bill will take precedence over the Guidance.

The local authority may (but is not obliged to) prescribe the form of the notice. The draft Guidance contains a suggested template.

The Notice must:

- 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.

The draft Guidance suggests additional information to be included on the notice, much of which is set out on the template notice.

The draft Guidance encourages 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.

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

It is sensible for applicants to record and retain evidence that they have complied with all requirements, including posting the notice at their premises.

**Q: What must the local authority do when it receives an application?**

**A: Publish it and invite public representations.**

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, for example, on their website or via an online portal.

The local authority is also required to publicise the fact that representations may be made during the public consultation period and when that period comes to an end. The draft Guidance suggests (6.6) 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 draft Guidance states that in deciding what steps to take authorities should consider the needs of those who may find it more difficult to access online publications

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. The Bill silent as to the consequences of a failure on the part of a local authority to publish within a reasonable time or at all.

**Q: How long is the public consultation period?**

**A: 7 days beginning with the day after that on which the application is made (not counting Christmas Day, Good Friday or bank holidays)**

Cl. 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. Cl. 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.

The draft Guidance (apparently mistakenly) cites 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 Bill (when enacted) take precedence over provisions of any Guidance.

**Q: Who must local authorities consult?**

**A: The highways authority and others**

During the public consultation period, the local authority must consult the highways authority where the local authority is not itself the highways authority for the land. This is usually the county council in a two-tier area. In London, it will be Transport for London in respect of GLA roads (trunk roads) (not universally as the draft Guidance appears to suggest).

The local authority must also consult “such other persons as the local authority considers appropriate”. This might include residential neighbours, but it is a matter for the local authority to decide who to consult. Engagement with civil society is highly encouraged.

**Q: Can members of the public make representations about the application?**

**A: Yes**

Members of the public (including residential neighbours) can contact the local authority to make representations about an application. Local authorities must take into account any representations received from members of the public during the “public consultation” period.

**Q: When does the local authority have to decide the application?**

**A: At the end of the public consultation period**

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

**Q: How long does the local authority have to decide the application?**

**A: A 7 day determination period.**

The local authority must do decide the application within the “determination period”, being the period of 7 days beginning with the first day after the public consultation period. As with the public consultation period, no account is taken of Christmas Day, Good Friday or bank holidays in reckoning this period. The draft Guidance describes the determination period as 5 working days: this does not correspond with the provisions of the draft Bill.

If the local authority does not decide the application with the determination period, the licence which was applied for is deemed to be granted by the authority to the applicant (cl. 3(8)).

A licence deemed to be granted has a duration of one year (cl. 4(3)). It is in all other respects no different from a licence actually granted by an authority, and (cl. 6(3)) may be revoked by the authority that failed to make the determination if any of the grounds for revocation are made out.

Therefore, an applicant who secures a licence by deemed grant would be well advised to liaise with the local authority to ensure that speedy revocation is not a realistic prospect before expending money on removable furniture.



**Q: What are the local authority’s powers in determining the application?**

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

Provided they do so within the determination period, the local authority may:

- 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.

A local authority can make a specific determination as to the duration of the licence, from a minimum of three months, , or it can leave the duration open-ended, 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).

**Q: How should the local authority exercise its powers?**

**A: Subject to the bars on grant, the local authority should exercise its powers in accordance with established principles of administrative decision-making**

The local authority may only grant a licence 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.*

The local authority's licensing function will be an administrative function, and the authority 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 objectives of the Bill (see *R (Hope and Glory Public House Ltd) v. City of Westminster Magistrates' Court* [2011] EWCA Civ 31 at [41-42]).

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

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.

The draft Guidance provides 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:
- 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;
- whether there are other permanent street furniture or structures in place on the footway that already reduce access;
- the recommended minimum footway widths and distances required for access by mobility impaired and visually impaired people as set out in Section 3.1 of Inclusive Mobility, :
- other users of the space, for example if there are high levels of pedestrian or cycle movements.

The suggestion in the draft 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.

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.

**Q: What conditions may be attached to the licence?**

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

**Q: How are local conditions imposed?**

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

Local authorities may (cl. 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.

Where there is 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 (cl. 5(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 reasonable conditions may be added (cl. 5(1)), and – so that they can be justified, it would be advisable for the local authority to set out reasons for their imposition.

Additional conditions might, for example, limit the maximum number of chairs and tables, or other type of furniture, and the days and times of operation.

**Q: What are the default and deemed national conditions?**

**A: The Bill provides for a default no-obstruction condition, and further deemed conditions may be published by the Secretary of State**

All pavement licences will either have an express or (in default) deemed “no-obstruction condition” (cl 5(4)). This 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.*

Further, the Secretary of State may publish conditions for pavement licences (cl. 5(6)). Applications granted or deemed to be granted thereafter are deemed to be subject to those published conditions, save where inconsistent with any other condition attached (cl. 5(7)-(8)).

The draft Guidance contains a condition relating to clear routes of access as follows:

*It is a condition that clear routes of access along the highway must be maintained, taking into account the needs of disabled people, and the recommended minimum*

*footway widths and distances required for access by mobility impaired and visually impaired people as set out in Section 3.1 of Inclusive Mobility*

In turn, section 3.1 of Inclusive Mobility provides:

*A clear width of 2000mm allows two wheelchairs to pass one another comfortably. This should be regarded as the minimum under normal circumstances. Where this is not possible because of physical constraints 1500mm could be regarded as the minimum acceptable under most circumstances, giving sufficient space for a wheelchair user and a walker to pass one another. The absolute minimum, where there is an obstacle, should be 1000mm clear space. The maximum length of restricted width should be 6 metres (see also Section 8.3). If there are local restrictions or obstacles causing this sort of reduction in width they should be grouped in a logical and regular pattern to assist visually impaired people. It is also recommended that there should be minimum widths of 3000mm at bus stops and 3500mm to 4500mm by shops though it is recognized that available space will not always be sufficient to achieve these dimensions.*

The draft Guidance provides guidance on the effect of this condition. It is deemed to be attached to licences which do not contain conditions providing for clear routes of access. Where there is a local condition which does impose a clear route of access requirement in inconsistent terms to the condition published by the Secretary of State, the latter condition is not imposed.

**Q: How does a pavement licence relate to a Part 7A Highways Act 1980 permit?**

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

A person may still apply for permission to put furniture on the highway under Part 7A of the Highways Act 1980 if they want to, but the local authority may not *require* them to apply under that Act, instead of under these provisions. Licensees may start to think next year about replacing their temporary pavement licence with a more permanent licence under the Highways Act 1980.

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.

**Q: What enforcement powers are available?**

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

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.

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.

The highway authority retains the power under s.149 of the Highways Act 1980 to remove things deposited on highways so as to be a nuisance notwithstanding they are placed there under a pavement licence. This power is exercisable forthwith in cases where the deposit causes a danger.

**Q: Is there a right of appeal against a decision?**

**A: No.**

There is no statutory appeal process for these decisions, however, the Guidance suggests that local authorities may wish to consider the scope for an internal review process, for example permitting appeals to their Licensing Committee.

**Charles Holland, Trinity Chambers and Francis Taylor Building**

**Sarah Clover, Kings Chambers**

**Leo Charalambides, Kings Chambers and Francis Taylor Building**

**28 June 2020**