

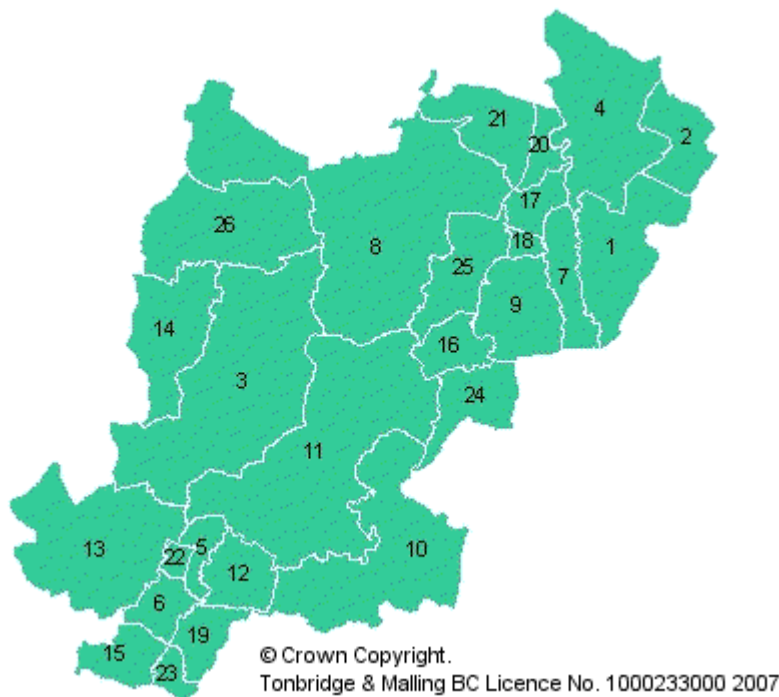


# Tonbridge & Malling Borough Council's Policy on Licensing Sex Shops, Sex Cinemas and Sexual Entertainment Venues

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## 1. Introduction

- 1.1. Tonbridge and Malling Borough Council lies in the heart of Kent and is an area of variety and historical interest. The Council is made up of 53 borough councillors (members) representing the 26 wards in the borough. The Council area has a population of 112,400.



## 2. Overview

- 2.1. Tonbridge and Malling Borough Council consulted local residents and businesses on whether the Council should adopt the new powers to regulate sexual entertainment venues contained in Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 ('the 1982 Act') between the 1 September 2011 and 14 October 2011. A full list of consultees can be supplied on request.
- 2.2. The overwhelming view expressed by respondents was that the Borough Council should adopt the new provisions. Accordingly, the sexual entertainment licensing provisions contained in the 1982 Act were adopted at Full Council on Thursday 23 February 2012. These provisions shall come into effect on 1 June 2012.

- 2.3. 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 event notice in order to provide relevant entertainment. This is because such entertainment is expressly excluded from the definition of regulated entertainment found in the Licensing Act 2003. However, if the premises also carries on other licensable activities (e.g. the sale of alcohol or the provision of regulated entertainment then this is not a provision of relevant entertainment), they will nevertheless continue to require a premises licence, club premises certificate or temporary events notice under the Licensing Act 2003 for those other activities, subject to any exceptions contained in that Act.
- 2.4. 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.
- 2.5. 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 Licensing Act 2003. 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 nor will providing entertainment facilities for the purposes of the provisions of relevant entertainment be regulated entertainment under the Licensing Act 2003.
- 2.6. The Council sees the licensing process as an integral part of its approach to achieving its corporate priorities which are set out below

During 2012/15 we will work with a range of partners and our local communities towards achieving the following key priorities:

- A clean, smart, well maintained and sustainable Borough.
- Healthy living opportunities and community well-being.
- Children and young people who are safe, involved, with access to positive activities.
- Low levels of crime, anti-social behaviour and fear of crime.
- A continuing supply of homes, including affordable housing to buy and rent, and prevention of homelessness.
- Continued delivery of priority services and a financially viable Council.

- Sustainable regeneration of Tonbridge town centre and economic development in communities across the Borough.”

### **3. Policy**

3.1. The purpose of this policy is to:

- Set out the expectations of Tonbridge and Malling Borough Council in relation to the licensing of sexual entertainment venues, sex shops and sex cinemas
- The process for making an application
- The process the Council will follow in considering and determining an application.
- Assist any persons making representations in respect of an application to make a properly directed and evidenced representation.

3.2. Notwithstanding this policy, each application will be assessed on its individual merit. Whilst this policy will set out the broad scope of the Council’s 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.

### **4. Definitions**

4.1. For the purpose of this policy the following definitions (as set out in the 1982 Act) will apply:-

#### **4.2. 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 sex articles (anything for use in connection with or for stimulating or encouraging sexual activity or acts of force or restraint which are associated with sexual activity) or other things intended for use in connection with, or for the purpose of stimulating or encouraging sexual activity or acts of force or restraint which are associated with sexual activity.

#### **4.3. Sex Cinema**

Any premises, vehicle, vessel or stall used to a significant degree for the exhibition of moving pictures, by whatever means produced which are concerned primarily with the portrayal of, or primarily deal with or relate to, or are intended to stimulate or encourage sexual activity, acts of force or restraint which are associated with sexual activity or 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 to which the public is not admitted.

#### **4.4. 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.

## **5. Relevant Entertainment**

5.1. 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).

5.2. The following forms of entertainment will therefore fall within the definition of 'regulated entertainment',:-

- Lap Dancing
- Pole Dancing
- Table Dancing
- Strip Shows
- Peep Shows
- Live Sex Shows

5.3. However, this list is not exhaustive and Tonbridge and Malling Borough Council 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.

## **6. Exemptions from being a sexual entertainment venue**

6.1. 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 provided which fall (wholly or partly) with the period of 12 months ending with that time
  - (ii) no such occasions 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 occasions falls within the 12 month period mentioned in subparagraph (i)).

6.2. Premises which fall under this exemption created for infrequent entertainment do not require a sexual entertainment licence but will instead need an appropriate authorisation under the Licensing Act 2003. For example, to cover the performance of dance.

6.3. Operators are encouraged to maintain written records of any relevant entertainment that falls within the exemption. This will enable the Licensing Authority to verify whether the venue falls within the permitted exemption.

6.4. Any records should contain information of the date, times of the event and those persons who have participated in the relevant entertainment, which includes performers, security, management and bar staff. If tickets are sold then details should be recorded of the number of tickets sold at each event.

## **7. Nudity**

7.1. Schedule 3 of the 1982 Act 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

## **8. Spontaneous Entertainment**

8.1. 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.

## **9. The Organiser**

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

9.2. 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.

## **10. Planning**

10.1. Applicants are encouraged to ensure that the proposed activity will constitute a lawful planning use and the hours sought do not exceed those authorised by any

planning permission. Where the hours authorised by the relevant planning permission are different to the licensing hours for those premises, the applicant must observe the earlier closing time. Premises operating in breach of their planning permission would be liable to enforcement action under planning law.

- 10.2. Failure to obtain planning permission (where required) 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 be dealt with as part of the planning process.
- 10.3. The Borough Council will not normally consider planning matters such as 'need' in determining a licence application as this is more appropriately dealt with by the planning process.

## **11. European Convention on Human Rights**

- 11.1. The Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) and makes it unlawful for a local authority to act in a way which is incompatible with a convention right. The Council will have regard to the Human Rights Act when exercising its licensing functions, with particular reference to the following relevant provisions of the European Convention on Human Rights.

**Article 6** – in the determination of civil rights and obligations every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

**Article 10** – freedom of expression

**Article 1 of the First Protocol** – every person is entitled to the peaceful enjoyment of his or her possessions

## **12. Locality, Character and Layout**

- 12.1. Paragraphs 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 to the layout, character or condition of the premises in respect of which the application is made.

- 12.2. Schedule 3 to the 1982 Act defines 'relevant locality' as follows:

- In relation to premises the locality where they are situated

- In relation to a vehicle, vessel or stall, any locality where it is desired to use it as a sex establishment.

12.3. Once the Borough Council has determined the relevant locality, it will 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 consider a particular locality is suitable for a sex shop but is not suitable for a sexual entertainment venue or vice versa.

12.4. The Borough Council has determined not to set specific relevant localities in respect of each type of sex establishment, instead judging each application it receives on its own individual merits.

12.5. In licensing of sexual entertainment venues the Borough Council will consider the impact of such premises and their operation on the vicinity. This will include:

- The likely effects of any increased footfall or vehicular traffic
- Any advertising or displays of an erotic or pseudo-erotic nature
- The type of location (residential, commercial, industrial)
- The vicinity of establishments whose patrons are likely to be ~~effected~~ affected by the operation of the premises
- The proximity of residential premises, including any sheltered housing and accommodation for vulnerable people
- The proximity of educational establishments to the premises
- The proximity of places of worship to the premises
- Access routes to and from schools, play areas, nurseries, children's centres or similar premises in proximity to the premises
- The proximity to shopping centres
- The proximity to community facilities/halls and public buildings such as swimming pools, leisure centres, public parks, youth centres/clubs (this list is not exhaustive)
- The proximity to historic buildings and tourist attractions
- Localities where the cumulative impact of the venue, taken with other licensed premises or commercial interests, is likely to have an adverse effect on crime and disorder and public nuisance
- The nature and concerns of any objections received from residents or businesses
- Any evidence of complaints about noise and/or disturbance caused by the premises
- The proximity of other sex establishments

12.6. When considering an application for the grant, renewal, variation or transfer of a licence the Council will also take into account the following

- The type of activity to which the application relates



- The duration of the proposed licence
- The days and hours of operation of the activity
- The layout and condition of the premises
- The use to which other premises in the vicinity are put
- The levels of crime and disorder in the area.

12.7. Sex establishments should not be functionally visible to passers by on retail thoroughfares or pedestrian routes. In more sensitive locations applicants should consider whether it would be appropriate to locate such premises at basement level or locate entrances away from retail thoroughfares or busy pedestrian routes.

### **13. Waivers**

13.1. The Borough Council may waive the need for a sex entertainment venue licence under certain circumstances.

13.2. An applicant can apply for a waiver either as part of the application for a licence or separately. The Borough Council may grant a waiver if they consider that to require a licence would be unreasonable or inappropriate. . The waiver may last for such a period that the Borough Council think fit, but can be terminated by the Council at any time with 28 days notice.

13.3 The Borough Council will consider waiver applications on an individual basis.

### **14. Application Process**

14.1. The Borough Council may impose restrictions on the licence or to place conditions on the licence. Where such restrictions or conditions are applied, the Borough Council will ensure that they are necessary, reasonable and proportionate to achieve the objectives of any primary legislation, in particular the 1982 Act and any subsequent, relevant legislation.

14.2. The Borough Council will consider

- The locality, character and layout of the premises including access
- The times of operation
- The suitability of the applicant
- The cumulative impact of the premises when taken together with other licensed premises in the locality.
- The management procedure in place to ensure the premises is operated in a way conducive to the area.

The above list is not exclusive, and the Borough Council may consider other factors where relevant to the particular application

- 14.3. Applications for licences for sex shops, sex cinemas and sex entertainment venues must be made on the prescribed form and accompanied by
- (i) the relevant fee;
  - (ii) A site plan of radius of  $\frac{1}{4}$  of a mile (scale 1:500) clearly showing the locality in which the proposed sexual entertainment venue will be situated. The plan should clearly identify the proposed sexual entertainment venue marking the site/premises boundary with a red line and define other types of businesses and residential properties around the site as listed at 12.5;
  - (iii) A plan of the premises (scale 1:100) showing the part(s) of the premises that it is proposed to licence as a sexual entertainment venue. All areas requiring to be licensed should be outlined in red on the plan. If a part of the premises is within a licensed premises under the Licensing Act 2003 which will have a dual purpose then the plan should show the site where facilities for the public are shared such as toilets and bar
- 14.4. The plan of the premises must show the position of all CCTV cameras. All such cameras must be approved by Kent Police and be operated in accordance with the CCTV code of practice.
- 14.5. Plans may be considered in other scales with prior agreement with the Borough Council.
- 14.6. Applicants must give public notice of the application by publishing an advertisement in a local newspaper that is circulated in the area of Tonbridge and Malling no later than 7 days after the date the application is made.
- 14.7. Applicants must display a notice of the application on or near the premises in a place where it can be conveniently read by members of the public. The notice must be displayed for a period of 21 days beginning with the date the application was made.
- 14.8. All notices should be in the form prescribed (**Appendix B**) 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.
- 14.9. The applicant must serve the application on Chief Officer of Police at Tonbridge Station no later than 7 days after the date of application.
- 14.10. In determining an application the Borough Council shall have regard to all relevant considerations, including any comments made by:
- Police

- Fire Authority
- Planning and Building Control
- KCC Safeguarding Children Board
- UK Border Agency
- Environmental Health (Environmental Protection and Food and Safety)
- Councillors
- Interested Parties (local residents/businesses)

14.11. Officers from any of these authorities may inspect the premises to ensure that the required technical standards are met.

14.12. The Borough Council will not determine an application for the grant of a licence, unless, the applicant allows an authorised officer a reasonable opportunity to enter the proposed sex establishment to make such examination and enquiries as may be necessary to determine the suitability of the applicant and the premises.

## **15. Objections**

15.1. Any person can object to an application.

15.2. Objections cannot be based on purely moral grounds/values or religious grounds as the legislation specifically prohibits this. Any objections on this basis will be refused or disregarded if presented with other reasons for objection.

15.3. Objections to the application must be made in writing and be received by the Borough Council within 28 days of the application being made. The objection must state in general terms the grounds of the objection.

15.4. The general terms of any objection will be provided to the applicant prior to the determination of the application. However, the Council will not without the consent of the objector reveal his/ her name or address to the applicant.

## **16. Conditions**

16.1. The Borough Council may attach conditions to a licence. To assist applicants the Licensing Authority has formulated a pool of conditions (**appendix A**) in respect of each type of licensed premises. However this list is not exhaustive and is merely to give an indication of what may be considered in respect of any individual application.

16.2. Some of the conditions will be placed on the particular type of establishment as mandatory conditions and others may be applied only where a perceived necessity exists and in a manner that is both proportionate and reasonable to promote a safe and well managed venue. Each case will be dealt with on its individual merits.

16.3. Whilst conditions or restrictions may be imposed in relation to any matter (other than any matter in relation to which requirements or prohibitions are or could be imposed by or under the Regulatory Reform (Fire Safety) Order 2005) it is likely that the conditions or restrictions will be attached in respect of the following areas:

- Hours of opening and closing
- Visibility of the interior of the premises
- Displays or advertisements
- Any change to the type of premises
- Minimum distance between audience and performers
- The control of access to changing room facilities
- The control of private viewings

## **17. Hearings**

17.1. 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 & Appeals Panel that is responsible for determining the application.

17.2. Whilst Schedule 3 does not make explicit provision for objectors to be heard, the 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 objection 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.

17.3. Persons making written objections will also be informed of the date and time of the Licensing & Appeals Panel hearing where they will be invited to address the committee and ask questions relating to the application.

17.4. All objectors and applicants are reminded that they can if they wish be legally represented at their own expense at the hearing. Alternatively they may if they wish ask a Councillor to represent them.

17.5. All parties may use witnesses and supporting documentation however, copies of documents and details of witnesses must be submitted to the Borough Council for consideration prior to the hearing and in exceptional circumstances with approval of all parties at the hearing.

17.6. The Licensing & Appeals Panel will consider all the evidence presented to it during the hearing and members may ask questions of officers, applicant and objectors. After the evidence has been presented all parties will be asked to leave to allow for the Licensing Sub-Committee to come to a decision on the application.

- 17.7. When a decision is reached the Licensing & Appeals Panel will inform the applicant and relevant parties of their decision and the reasons for coming to that particular decision.
- 17.8. The decision of the Licensing & Appeals Panel will be confirmed, in writing, to the parties within 5 working days of the meeting at which the application was considered giving reasons for the decision.

## 18. Refusal of a Licence

- 18.1. 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:
- To a person under the age of 18
  - 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
  - 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
  - To a body corporate which is not incorporated in an EEA State or
  - 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.
- 18.2. A licence may be refused where
- The applicant is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reason
  - 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
  - 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 or exceeds the number which the authority considers is appropriate for that locality
  - That the grant or renewal of the licence would be inappropriate, having regard to the character of the relevant locality or to the use to which any premises in the vicinity are put or to the layout, character of the premises, vehicle, vessel or stall in respect of which the application is made.
- 18.3. In making any determination to refuse an application, renewal or transfer the local authority will give consideration to:

**a) Unsuitability of applicant**

In determining the suitability or otherwise of an applicant the local authority may consider

- previous experience of the applicant
- any evidence of the operation of any existing/previous licence held by the applicant, including any licence held in any other local authority area
- any report about the applicant and management of the premises received from objectors
- 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 Borough Council takes a serious view of any application that seeks to subvert the underlying principals 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 sex establishment in an area**

Tonbridge and Malling Borough Council has not set a limit on the number of establishments of a specific type that will be permitted within any particular locality. In deciding whether to allow the application the authority will have consideration to:

- Any nuisance associated with the premises or the activities undertaken thereon
- 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
- 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.
- Any other reason including the existence of a police caution, representations from the police or by other enforcement agencies in relation to crime and disorder.

This list is not exhaustive

**d) The grant of the licence would be inappropriate**

In deciding whether the grant of a licence is appropriate the Borough Council 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. The Council is also likely to consider:

- The proximity to other premises/ establishments (please see list at 12.5)
- Whether the area is predominantly residential rather than commercial in nature and premises may cause disturbance to local community.
- Whether management systems are suitable to ensure the safety of performers, customers and staff.

Again, this list is not exhaustive

## **19. Duration of Licences**

19.1. Licences for sex establishments will be granted for up to one year.

## **20. Renewal of Licence**

It will be the applicant's responsibility to apply for the renewal of the licence in good time (not less than 6 weeks) prior to the expiry of the existing licence. In the event that no application is made prior to the expiry of the existing licence the licence shall cease to remain in force, and a new application will be required.

## **21. Appeals**

21.1. Section 27 of Schedule 3 to the 1982 Act permits appeals against the decision of the Council in relation to sexual entertainment venues. Appeals will be heard in the first instance by the Magistrates Court. An appeal must be made to the Magistrates Court within 21 days of notification of the decision of the Licensing & Appeals Panel .

21.2. An appeal can be made in the following circumstances:-

- By an applicant for the grant, renewal or transfer of a licence whose application is refused
- By an applicant for the variation of terms, conditions or restrictions on or subject to which the licence is held whose application is refused
- The holder of any such licence who is aggrieved by any term, condition or restriction on or subject to which the licence is held
- The holder of any such licence whose licence is revoked

21.3. There is no right of appeal for objectors.

- 21.4. There is no right of appeal against refusal on the ground that there are sufficient sex establishments in the locality or that to grant would be inappropriate having regard to the character of the locality, use of premises in the vicinity and the layout, character, condition and location of the premises.

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