



NEXSTART

Outdoor Areas and Structures

This information has been developed by a cross-sector group looking to reduce risk for licensed premises operating during the current pandemic and so ensure the safety of the public, premises staff and officers and provide clarity for all involved. This note deals with England only.

Introduction

The Government has encouraged the use of outdoor areas to help businesses recover from the coronavirus pandemic.

Under Step 3 from May 17, hospitality premises were able to admit customers indoors, but will want to use outdoor areas to maximise trading space and facilitate social distancing.

At the time of writing, Step 4 removing all COVID related restrictions, provisionally from June 21, has not been confirmed.

This Note seeks to clarify certain points of concern. It should be noted that aspects of the guidance below will apply, even after COVID restrictions have been lifted.

Outdoor Areas and Structures

Premises are not legally regarded as being “outdoors” if they are “enclosed” or “substantially enclosed”. These are legal definitions, set out in statute. Premises are enclosed or substantially enclosed, and therefore not outdoors, if they have a ceiling or roof and are surrounded by sides or walls of some description of up to 50% around the perimeter of the

space in question. When calculating if the “outdoor” space is more than 50% enclosed, doors and windows that could be open or closed still count towards the 50% total enclosure – in other words, they are counted as “walls”, not “openings”. A roof or ceiling that can be retracted or closed still counts as a roof or ceiling. If the outdoor space does not have a ceiling or roof of any sort, then it will definitely be outdoors. If there is a roof or ceiling, retractable or otherwise, then the surrounding sides will have to be more than 50% open in order to be “outdoors”.

What if the outdoor space meets these tests but is adjacent to walls or fences that form part of a neighbouring building? Some Councils say that there must be a clear gap between the sides of the outdoor structure and the nearest neighbouring wall, fence or hedge. Sometimes it is said that this gap must be 1 metre, or 1.5 metres. There is no specific law or rule about this, so being closer than 1.5 or even 1 metre is not against the law. The purpose of maintaining a clear gap is to prevent the effects of trapping cigarette smoke, or raising the risk of transmission of the Coronavirus. These are problems that should be looked at carefully, on a case by case basis, if you think they might arise.

Under Step 3 from 17 May 2021, most legal restrictions on meeting others outdoors were lifted - although gatherings of over 30 people still remain illegal. Indoors, the Rule of 6 or 2 households applies. It should be noted that, in an outdoor structure like a marquee, once the sides go down and it is defined as “enclosed” and therefore “indoors”, the Rule of 6/ 2 household restrictions apply.

At the time of writing, it is still proposed that Step 4 will proceed on 21 June, although that will be subject to changes in information or variants of concern. Step 4 should entail the removal of all legal restrictions on social interactions, leaving businesses free to implement their own risk assessments and mitigation measures. The last categories of businesses that have remained under restrictions will be permitted to reopen. If everything proceeds according to plan, this date will mark the removal of all legal restrictions relating specifically to the Coronavirus. It is likely that guidance will continue to apply, to assist and encourage businesses and the public to take measures that could reduce the transmission of the virus. Failure to comply with guidance is not an offence. Failure to take appropriate measures to address all kinds of risk can constitute a breach of other legislation, including licensing and health and safety, and this has always been the case.

Pavement Licences

The Business & Planning Act 2020 provides for pavement licences which authorise removable furniture on part of the highway to sell, serve and consume food and drink supplied from adjacent premises. [See NEXSTART FAQ on Pavement Licences]

The Government has announced that it will extend this legislation. New Draft Regulations were laid on 9 June 2021, extending the pavement licence provision from 30 September 2021 to 30 September 2022: (Business and Planning Act 2020 (Pavement Licences) (Coronavirus) (Amendment) (Regulations 2021)).

The extended date of 30 September 2022 only applies to pavement licences applied for on or after the date that the new Regulations come into force. At the time of writing, it is not known when that will be.

The date of 30 September 2021 will continue to apply as an end date for any pavement licence applied for before the new Regulations come into effect. If the licence holder makes a fresh application, they may benefit from the new 2022 long stop date.

Any pavement licence can be specified to be for a shorter date if required, and/or Councils can grant for a shorter date than applied for, subject to a minimum period of three months.

The Licensing Authority *may* require a fee of up to £100 [Business and Planning Act 2020, s 2(1)(c)]. It is not mandatory to require all or any of the fee. It is not possible to require more than £100.

[On 5th March 2021, MHCLG Minister, Robert Jenrick wrote to local authorities](#) asking them to take certain steps with regard to Pavement Licences:

“Therefore, unless there are very good reasons, we would expect licences granted under these provisions to continue to apply into this summer so that businesses do not have to re-apply or be charged a further application fee when they are able to re-open to serve customers outdoors”.

There are some significant ambiguities within this statement. There is no facility within the existing Act, or the amending Regulations to renew, automatically or otherwise, any pavement licence that has already been granted. A pavement licence will expire on the long-stop date (either 30 September 2021, or 30 September 2022, depending upon when it was applied for), or it will expire on a shorter date if that was specified on the licence. A further licence beyond the time period previously allowed could only arise from a fresh application.

It would be possible to grant an application made after 30 June 2021, but before the new Regulations have come into effect provided that there is no limit on the duration of the licence, in which case it will expire at the end of 30 September 2021. However, after 30 June 2021 it will not be possible for a Council to grant a new licence and limit its duration as there is a minimum period of three months in such circumstances.

[MHCLG Minister, Robert Jenrick wrote to local authorities on 15 April 2021](#) saying:

“I would encourage you all to ensure that this guidance is applied proportionately and consistently in your areas to support businesses to reopen safely and to avoid overzealous interpretations of the rules. It is in the public interest that local residents can socialise in a licensed and controlled environment outside, where Covid-19 risks are lower. If a disproportionate regulatory approach is taken, it risks driving residents into unregulated activity and premises which may be far less covid secure and/or illegal.”

Local Authorities are well used to the standard tests of proportionality and reasonableness in taking regulatory enforcement. In cases of doubt or ambiguity, it is usually a good idea to seek advice early.

Please note that this document does not constitute legal advice but is the group’s considered opinion of the matters contained within.

Dated 10th June 2021

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