

LICENSING SUB COMMITTEE C

A meeting of Licensing Sub Committee C was held on 20 January 2012.

PRESENT: Councillor Taylor (Chair); Councillors P Sharrocks and J Walker.

OFFICERS: B Carr, T Hodgkinson and S Vickers.

ALSO IN ATTENDANCE: A Ellis – Area Manager – Elite Fuels
M Foster – Applicant's Legal Representative
T Scott – Project Retail Ltd
B Hodgson and D Lester – D & B Licensing
D Comb – Cleveland Police Legal Representative
Sgt P Higgins – Police Licensing Unit
PC J Arbuckle – Cleveland Police
Councillors S Khan and J McPartland

**** DECLARATIONS OF MEMBERS' INTERESTS**

There were no Declarations of Interest made by Members at this point of the meeting.

LICENSING ACT 2003: APPLICATION FOR PREMISES LICENCE – ELITE FUELS LTD, FLEET POINT SERVICES, CAMBRIDGE ROAD, MIDDLESBROUGH - REF. NO. MBRO/PRO351

A report of the Assistant Director Community Protection had been circulated outlining an application for a Premises Licence in relation to Elite Fuels Ltd, Fleet Point Services, Cambridge Road, Middlesbrough, Ref No: MBRO/PRO351.

Summary of proposed Licensable Activities and Licensing Hours

Sale of alcohol (Off Sales)	24 hours	Daily
Late Night Refreshment	11.00pm – 5.00am	Daily

Full details of the application and accompanying Operating Schedule were attached at Appendix 1 to the submitted report.

The Chair introduced those present and outlined the procedure to be followed at the meeting. The applicant's legal representative confirmed that copies of the report and Regulation 6 Notice had been received.

Details of the Application

The Principal Licensing Officer presented the report in respect of an application for a Premises Licence, received on 7 November 2011, in relation to Elite Fuels Ltd, Fleet Point Services, Cambridge Road, Middlesbrough, Ref No: MBRO/PRO351 as outlined above.

Members were advised that Section 176 of the Licensing Act 2003 prohibited the sale of alcohol from premises that were primarily used as a garage, or were part of premises that were primarily used as a garage. Where there was insufficient evidence to establish primary use of the premises based on intensity of use, Members had to consider whether to grant the licence and deal with any issues through the enforcement procedures or to defer granting the licence until the primary use of the premises was resolved to the satisfaction of the licensing authority.

The report provided background information in relation to the premises which, operated as a 24 hour refuelling filling station and forecourt dispensing petrol and diesel together with a convenience store, motor vehicle washing and valeting area. The premises were not located in close proximity to any residential properties.

Details of representations on the grounds of the prevention of crime and disorder, public safety and the prevention of public nuisance received from Cleveland Police on 1 December 2011 (attached at Appendix 2), were circulated with the submitted report.

Copies of additional evidence from the applicant in terms of a transaction analysis in relation to shop and fuel sale counts, a copy of case law in relation to the interpretation of Section 176 of the Licensing Act 2003 and a copy of Elite Fuels management accounts profit and loss account for the year ending 30 September 2011 were also circulated to Members of the Committee. Members had also undertaken a site visit to the premises on 16 January 2012.

The Council's legal adviser advised Members of the Committee that as a considerable amount of information had been submitted in relation to the application it would be prudent to clarify whether the applicant intended to rely on footfall or accountancy evidence when presenting the case. The applicant's legal representative confirmed that he intended to rely primarily on footfall evidence and the evidence contained in the report from Mr Scott from Project Retail Ltd.

Applicant in Attendance

The applicant's legal representative presented the case in support of the application. He referred to Section 176 of the Licensing Act 2003 and advised that Section 176 of the Act presupposed that a premises licence already existed.

Reference was made to the case law, in particular the two high court cases in respect of Green v Justices for the Inner London Area – 13 June 1994 and R v Liverpool Crown Court, ex parte Kevin John Goodwin – 17 December 1998.

The Committee heard evidence from Ms Ellis, the Area Manager of Elite Fuels with regard to the proposals for the refurbishment of the premises. Ms Ellis explained to the Committee how the back office system was able to produce a transaction analysis in relation to both shop and fuel sales to demonstrate how the premises were being used. The Committee was advised that the doors of the premises were closed at 10pm and sales from the shop were carried out through a hatch until 5am in the morning. Members were advised that the premises had been trading with NISA since December 2011 and the advantages of being a part of the NISA group were outlined to Members. Copies of advertising literature from the NISA group in terms of promotional offers available within NISA stores were appended to the report for information.

The Committee heard evidence from Mr T Scott, Director of Project Retail Ltd with regard to the potential turnover and profitability that could be achieved as a result of refurbishing the store and the advantages achieved through the premises relationship with NISA, the independent buying consortium. A copy of the proposed layout for the refurbished premises was appended to the report for information.

The applicant's legal representative also referred to the evidence contained in the appendices to the report in respect of the credentials of D & B Licensing Consultants and the content of the training literature provided by the company.

A copy of the gross profit figures from trading data in relation to 1 October 2010 to 30 September 2011 (£249k for non fuel income) together with the anticipated projections for non fuel income which had been estimated at £325,000 following the shop refurbishment were also attached to the report. The legal representative advised that the primary use of the premises was very close to being that of a store. Reference was made to the analysis of customer transactions broken down into the categories of fuel, shop only and fuel and shop appended to the report in respect of a six month trading period. The Committee was advised that the figures demonstrated that a shift of between 0.8 and 1.6% would change the primary use from that of a garage to a shop.

Questions to the Applicant

Members of the Committee and the Police asked questions of the applicant. The following responses were given to the issues raised:

- It was confirmed that the figures attached at Tab 2 to the report in respect of the £284k were based on the cost to the company for the fuel.

- In response to a query regarding the impact on the sale of fuel due to the opening of the Tesco store Mr Scott advised that there would be an impact initially as there could be a difference of 4 – 7 pence in the price of fuel. Supermarkets also carried out promotions where if a customer spent over a certain amount on groceries they were given a voucher entitling them to a reduction in the price per litre of fuel.
- Members were advised that the main doors to the premises closed at 10.00am and service of groceries was carried out through a hatch which closed at 5am in the morning. The sale of hot food ended at 2pm-3pm.

The Council's legal representative advised that as far as the Committee were concerned the important figure in determining the application was the amount of footfall at the premises although the statistical figures provided were useful as corroborative evidence. Members were advised that Section 176 of the Licensing Act 2003 could be used as a means not to disqualify premises from holding a premises licence. The legislation could also be used to grant a premises licence however the premises could be excluded from using the licence.

The Council's legal adviser asked the Police legal adviser how the Police viewed the operation of Section 176 of the Licensing Act 2003. The Police legal adviser stated that having read the wording of the sub section it accorded with the above literal meaning of it. The applicant's legal representative referred to the survey carried out by the Police at the premises and advised that the 6 hour survey was not representative of trading over a 24 hour period. It was highlighted that the survey did not contain statistics in relation to sales at the shop and purchase of fuel combined.

The Police legal representative advised that the Police objections were based on the fact that the premises were primarily a garage and therefore should be classed as an "excluded premises". The Council's legal representative asked the Police legal representative if he accepted that the premises did not fall within the definition of "excluded premises".

At this point the Committee adjourned while the Police legal representative sought instructions.

Relevant Representations

Cleveland Police

Subsequently all the parties returned and the Police legal representative advised that the premises were primarily a garage and therefore should be classed as "excluded premises". PC Arbuckle advised that the police were concerned about the location of the premises as it was situated in an isolated area near to the busy A66 road. He advised that currently there were no 24 hour off licences in Middlesbrough. PC Arbuckle referred to the data in respect of Middlesbrough contained in the Local Alcohol Profiles for England Study carried out by the Centre for Public Health and advised that to grant the licence would undermine the licensing objectives.

Sgt Higgins referred to the survey carried out by the Police which demonstrated that there were more fuel transactions than shop transactions and advised that the premises were being used primarily as a garage.

Summing Up

Cleveland Police

The Police legal representative stated that Members should consider the primary use of the premises by considering the statistics in respect footfall, the accounting data and the information contained in the survey carried out at the premises by the Police. The Committee was advised that according to the survey 69% of customers had visited the premises to purchase fuel.

The legal representative referred to Tab 3 of the papers and advised Members that the accounting information was more compelling. If V.A.T. and duty were taken off sales it would leave a figure of £3.5m in respect of fuel sales in comparison to less than £1m for shop sales; which demonstrated that at the present time the primary use of the premises was as a petrol filling station.

The Council's legal representative queried whether the Police considered that Section 176 of the Licensing Act 2003 would act as a bar to the application. The Police legal representative advised that it would be a recipe for disaster to grant a licence to premises that did not meet the criteria.

The Premises Licence Holder

The applicant's legal representative summed up by stating that the Licensing Act 2003 presupposes that a premises licence exists. Members were advised that the survey that was carried out by the Police only covered a six hour period, therefore it was not representative of trading at the premises as a whole. The figures submitted by the applicant were fact and the legal representative advised that he disagreed with the evidence submitted by the Police as parts of it were flawed.

The legal representative referred again to the Goodwin case 1998 in respect of the intensity of use of the premises by customers and advised that the applicant had provided the required evidence in respect of customer lists. Members were requested to consider the evidence and the impact that the proposed refurbishment of the premises would have on the number of customers to the shop.

It was confirmed that there were no further questions and all interested parties other than the Officers of Legal Services and the Members Office, withdrew whilst the Committee determined the application.

Subsequently all the parties returned and the Chair announced the Committee's decision.

Decision

That the Application for the Premises Licence in respect of Elite Fuels, Ref No: MBRO/PR0351 be granted in part subject to the following conditions:-

1. That the Applicant must provide statistical data on a quarterly basis to the Police to demonstrate that the primary use of the premises is that of a store (non garage). This data is to be based upon the measurement of footfall and must continue as long as the licence is in force.
2. That the Premises Licence is not become operational until the statistical data demonstrates that the primary use of the premises is that of a store (non garage).
3. That the agreed hours for licensing activities to be as follows:-

Sale of Alcohol (Off Sales)	8.00am – 11.00pm	Daily
Late Night Refreshment	11.00pm – 5am	Daily
4. That the premises be fitted with digital colour CCTV capable of monitoring the premises externally and internally including the area displaying alcohol for sale, the checkout / till area and the entrance and exits at all times. CCTV footage must be retained for a minimum of 31 days and CD Roms must be kept in a secure and locked cabinet at the premises.
5. That till prompts be incorporated into the checkouts which would prompt staff into requesting the proof of age whenever alcohol was purchased at the premises.

6. That a refusals record be kept at the premises and maintained at all times. The refusals record must show the date, time and reason for all refusals. The refusal record must specify if a refusal was made because an employee suspected a customer of buying alcohol for or on behalf of an underage person.
7. That a hard copy of the refusals records must be made available to the Police, Trading Standards or Enforcement Officers on request and or/during an inspection of the premises.
8. That the premises must operate a Challenge 25 policy. At least one notice to be placed in a prominent position advising customers of the Challenge 25 policy. All persons under the age of 25 must be challenged for identification and to be requested for proof of age. Ten year passports, photo driving licences or PASS logo identify cards only, to be accepted as proof of age.
9. That prominent notices must be exhibited in the premises advising that it is illegal to sell alcohol to persons under the age of 18.
10. That at least 2 prominent notices be positioned in the area where alcohol is displayed and at the checkouts informing customers that anyone found purchasing alcohol for or on behalf of a person under the age of 18 would be prosecuted and fined.
11. That the display of alcohol for sale must not be near the entrances to or exits from the premises and must be in sight of the checkouts / tills.
12. That all staff receive quarterly training in relation to the conditions applicable to the premises and training specific to Challenge 25, proxy sales and underage sales of alcohol. Documented training records relating to every employee employed at the premises (paid or unpaid) to be kept on the premises. The records should include but are not limited to the nature, content and frequency of any training and the employee's signature confirming he / she had received the training. These records would be maintained at the premises and must be made available to the Police, Trading Standards or Enforcement Officers on request and / or during an inspection of the premises.
13. That an incident book be kept at the premises and maintained at all times recording the time, date and details of all incidents of crime and disorder which must be made available to the Police, Trading Standards or Enforcement Officers on request and /or during an inspection of the premises.

Members had made their decision based on the following reason:-

The Committee considered the effect of Section 176 of the Licensing Act 2003 which prohibits the sale of alcohol from "excluded premises" that are used primarily as a garage, or are part of premises used primarily as a garage. Members determined that this section did not prevent the grant of a licence but the same could not become operational until the premises could be shown to be primarily a store rather than a garage based on footfall. The matter then becomes one of enforcement by the Police hence the requirement for footfall information to be provided by the applicant.

In reaching the above decision Members had considered the following:-

1. The application was considered on its own merits, taking into account the three licensing objectives of public safety, the prevention of crime & disorder and the prevention of public nuisance.
2. Consideration was given to the Government Guidance, in particular paragraph 2.32 onwards relating to the prevention of public nuisance, paragraph 2.19 onwards relating to public safety and paragraph 5.23 to 5.25 in relation to the prevention of crime and disorder.

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3. Consideration was also given to Middlesbrough Council's Licensing Policy, in particular pages 23 to 29 in relation to the prevention of public nuisance, pages 30 and 31 in relation to public safety and pages 32 to 42 in relation to the prevention of crime and disorder.
 4. Consideration was given to the case made by the Applicant and the Police.

The applicant was reminded of the right to appeal to the Magistrates Court within 21 days of the date of the decision.