

LICENSING SUB-COMMITTEE C

A meeting of the Licensing Sub-Committee C was held on 27 February 2015.

PRESENT: Councillors B E Taylor (Chair); M Hudson and J A Walker

ALSO IN ATTENDANCE: Representing the Applicant:

R Botkai - Legal Representative
R Ainsworth - Rontec

OFFICERS: B Carr, C Cunningham, J Hodgson

DECLARATIONS OF INTERESTS

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

14/8 **APPLICATION FOR PREMISES LICENCE - CORONATION SERVICE STATION, 245 ACKLAM ROAD MIDDLESBROUGH TS5 7BW - REF: PR0145 - FURTHER INFORMATION**

At the meeting of the Licensing Sub Committee C held on 30 January 2015, to consider an application for a Premises Licence in relation to the Coronation Service Station, 245 Acklam Road, Middlesbrough TS5 7BW, Ref No: PRO145, the Committee decided to adjourn the matter under Regulation 12 of the Licensing Act 2003 (Hearings) Regulations 2005 until Friday 27 February 2015 at 10.00am, in order for the Applicant to provide further information requested under Regulation 17 of the Licensing Act 2003 (Hearings) Regulations 2005.

The Committee considered that the submission of the following information was necessary in order for it to fully determine the application:

1. The provision of details of transactions over a period of four weeks or such longer period so as to establish intensity of use, as recent as possible, at the Premises as follows:

- a) transactions showing fuel and convenience goods sales together;
- b) transactions showing fuel sales only;
- c) transactions showing convenience goods sales only.

2. The provision of a floor plan of the store area showing the areas displaying alcohol areas, other convenience goods and late night refreshments. The plan was requested to assist Members in assessing the potential impact of the licensable activities, if any, on the licensing objectives raised by the representations received.

The Chair invited the applicant's legal representative to present the information requested.

The applicant's legal representative clarified that the licensing application was in respect of the shop only, it did not include the garage. A plan was produced and the applicant was invited to mark on the plan, the areas of the premises where the alcohol would be displayed.

The applicant's legal representative pointed out that the premises itself were small compared to the whole area. The spirits would be displayed behind the counter so they couldn't be accessed by customers. There would be a small shelved area comprising of a couple of shelves. The applicant was invited to mark on the plan where he proposed to display any alcohol so that Members could compare the shelf space for alcohol in comparison to the shelf space for convenience goods.

The applicant's legal representative passed the marked plan back to Members and clarified the layout of the premises in relation to the display of convenience goods and alcohol.

The Committee was advised that the shelf to the left of the door would be used for displaying chilled beers and alcohol and the right would be used for the display of wine. The chillers

would be located at the back of the shop. In response to a query with regard to the percentage of space taken up at the premises by alcohol, the applicant's legal representative advised that in his view it would be less than 10%.

The Chair requested that the applicant produce the data in respect of details of transactions at the store.

The applicant's legal representative advised that the original hearing was called to consider representations against the grant of the licence. The original representations did not raise the issue of primary use and there was no request prior to the hearing for evidence of primary use.

The applicant's legal representative stated that the Council's legal representative had raised the issue of primary use of her own volition. The Council's legal representative advised that it was actually the Chair of the Licensing Sub Committee who had raised the issue of primary use. A Member of the Sub Committee advised that he recalled that the Chair had raised the issue of primary use when he raised the issue of footfall at the premises.

The applicant's legal representative advised that he had approached a barrister with specific expertise in licensing matters for an opinion on this issue. The opinion was written after the Guidance was issued and after the *Murco Petroleum Limited v Bristol City Council* licensing case. A copy of the legal opinion was circulated to Members of the Committee.

The opinion gave example of different scenarios:

- where no relevant representations had been made - Section 18(2) imposes a mandatory requirement on the licensing authority to grant the licence;
- where relevant representations had been made that did not raise the issue of primary use, the barrister advised that the issue of primary use could possibly be raised, however the legal representative pointed to Section 19 of the Licensing Act 2003 and advised that this section would have included primary use if Parliament had intended it to be considered.

The applicant's legal representative referred Members to paragraph 30 of the barrister's opinion where an applicant applies for a licence for a petrol station under construction. In those cases, at that stage primary use would not be able to be demonstrated however the Act provides that any licence would be ineffective if the primary use of the premises was as a garage once it was trading.

The applicant's legal representative advised the Committee that he could provide data, however it would be meaningless because the situation with regard to sales could change on a daily basis. If petrol prices decreased or the government increased duty on fuel it could affect the primary use of a premises.

The applicants legal representative circulated an extract from the law in relation to the following:

S17 of the Licensing Act 2003 with regard to an Application for premises licence;

S18 of the Licensing Act 2003 with regard to Determination of an Application for a premises licence;

S176 of the Licensing Act 2003 with regard to the Prohibition of alcohol sales at service areas, garages etc.;

S5.21 - 5.23 - Guidance issued under section 182 of the Licensing Act 2003 with regard to Garages and motorway service areas;

S5 and S20 of The Licensing Act 2003 (Hearings) Regulations 2005 with regard to the Period of time within which a hearing must be held; and

S26 Determination of applications.

The applicant's legal representative advised that S17 of the Licensing Act 2003 states what an applicant is required to do when submitting an application. S18 states what the Licensing Authority is required to do when considering an application. The opinion of the barrister stated that if primary use was supposed to be considered, it would be included under S17 and S18 of the Act.

The Committee was advised that prior to the submission of a licensing application, applicants did not usually submit data with regard to primary use. The applicant's legal representative advised that the Committee was not allowed to refuse a licence on the grounds that it considered the premises was primarily a garage as it was not a ground for refusal and the applicant would be unable to appeal and would have to initiate a judicial review.

The Committee was advised that S176 states that premises must be monitored throughout the life of the licence. The applicant's legal representative submitted a copy of two proposed primary use conditions for Members consideration which could require the applicant to produce data at regular intervals. A copy of a list of stores where a primary use condition was included on the licence was circulated to the members of the Committee.

Members were reminded that the authority did have other garages in the area that held premises licences. The Chair asked the applicant's legal representative if he had brought the data to the meeting that had previously been requested by the Committee. The legal representative advised that he had brought the data but he advised that the legal opinion of the barrister was that the guidance was incorrect as it sought to introduce a new test.

The Chair advised that Members of the Committee were required to follow the Guidance when considering licensing application. The applicant's legal representative pointed out that the guidance was clearly incorrect. The Council's legal representative advised that the Guidance had only been reviewed in October 2014 following which a few minor changes particularly in respect of 5.23 had been made. The guidance had been put before Parliament and she queried whether the applicant's legal representative's submission was that the Guidance was incorrect.

The Chair advised that legal representatives usually advised Members to follow the Guidance. The Council's legal representative asked the applicant's representative if he had current information with regard to intensity of use. The Committee was advised that projected data from January 2015 onwards was available.

The applicant's legal representative referred to Paragraph 17 of the Licensing Act 2003 and advised that the Sub Committee had a duty to act as appropriate in order to promote the licensing objectives. He highlighted that the objections that had been received were submitted under the crime and disorder objectives.

The legal representative referred to the Murca case where the applicant had provided data to a Committee prior to the hearing date however the Committee had requested additional data. The applicant had refused and the case related to whether the Committee was entitled to request additional data.

The Committee was advised that the applicant's legal representative had obtained a legal opinion from Philip Kolvin QC regarding whether a local authority had the power to ask questions regarding primary use or defer a decision where there had been no relevant representations with regard to primary use and whether the authority had the power to ask questions and impose conditions in relation to matters going beyond the scope of the relevant representations. A copy of the legal opinion was circulated to Members of the Committee.

In response to a query whether the data provided by the applicant was actual data or projected data, the Committee was advised that the information provided in relation to the month of January included actual and projected data. The applicant had projected what the January figures were likely to have been if alcohol had been on sale in the store.

The applicant's legal representative emphasised that once a store was granted permission to sell alcohol, other shop sales usually increased. The Committee was advised that the licence would not take effect if the primary use was as a garage. The figures produced showed where a customer had purchased petrol only or a mix of petrol and goods from the store. An overview of the products sold in the store was provided.

The Committee was advised by the applicant's legal representative that if they chose to grant the application, they still had protection because as soon as the store started to sell more petrol than goods, the licence would no longer be in force.

The Chair advised that there were still issues with anti-social behaviour in the area and the Committee would have to consider the evidence of the Police and the impact that the proposed sale of alcohol could have on residents.

The Chair advised that in his view there were two issues for the Committee to consider; the representations from the Police and primary use. The applicant's legal representative stated that the premises would not sell strong beers or single cans. In his view, the evidence from the Police had not demonstrated that there would be an impact on anti-social behaviour in the area if the licence was to be granted.

The applicant listed different areas in the country where licences had been granted to premises of varying sizes and where primary use was required to be monitored. He emphasised that primary use did not have to be proved before those applications were granted. In response to a query from a Member with regard to how many of the premises had retained their licence, the Committee was advised that all of them had retained their licence. Some premises (mainly those located within residential areas) were required to send data in periodically to the Licensing Authority.

A Member referred to the data information provided by the applicant and queried whether the figure of 50.8 related to transactions from the store only. The applicant's legal representative advised that the figure referred to a mix of transactions and petrol and transactions only. The fuel transactions were separate. A Member queried whether data from December was available. The applicant's legal representative advised that his applicant did not wish to use past data as S176 of the Act applied throughout the life of the licence and not before.

The Committee was reminded by the applicant's legal representative that the Guidance did not over-ride the law. The Council's legal representative advised that the objections to the application referred to the petrol station selling alcohol. The applicant's legal representative advised that there was no evidence that a petrol station selling alcohol would lead to drink driving.

The cashiers were trained to deal with all restricted products. The premises had very good CCTV and the sale of alcohol was much safer from these types of premises. With the proposed range of alcohol which would be available at the premises and the suggested restrictions the premises owners had proposed on the licence, the sale of alcohol would not add to any existing problems in the area. There would be no single cans available for sale.

The Chair asked if the applicant's legal representative had anything further to add to his case. The legal representative stated that he did not wish to add any further information.

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

All interested parties were called back into the room and the Chair announced that as the Committee had received a lot of information which they needed to consider, the decision of the Committee would be sent to all parties within the next five working days.

Decision

The Committee resolved that the application was granted in part in relation to the provision of

late night refreshment from 11.00pm until 5.00am daily subject to the conditions in the operating schedule modified by the addition of the following condition:-

Sales of late night refreshment between the hours of 11.00pm and 5.00am shall take place through the serving hatch or night pay window of the Premises.

It was noted the police did not object to the provision of late night refreshment, but concerns were raised by residents however the committee considered that the conditions would be appropriate to meet the resident's concerns and uphold the Licensing Objectives.

The Committee decided to exclude from the scope of the Licence the licensable activity of the sale or supply of alcohol off the premises.

The Committee carefully considered the applicant's submissions and documentation presented regarding whether the committee could consider primary use in accordance with Section 176 of the Act at the determination of the application, whether trading information could be requested and whether a condition submitted by the Applicant would meet the requirements of Section 176.

Section 176 of the Act states in summary "No premises licence.....has effect to authorise the sale by retail or the supply of alcohol on or from excluded premises". Excluded premises include premises used primarily as a garage where the primary use is the retail sale of petrol.

The Applicant submitted that Section 176 relates to Premises Licences that are in effect and there is no provision in Section 17 or 18 of the Act or any other part of the Act which empowers the Committee to consider primary use as part of its determination of an application. It submitted that a condition in either of the terms would be sufficient to meet the requirements of Section 176 and that the statutory guidance is wrong.

However, the Committee was not persuaded by these submissions and considered they were obliged to determine the question of primary use in accordance with Statutory Guidance.

The Committee considered that Section 176 was in force and had not been amended or revoked during a review of and changes to the legislation which came into force in 2012.

The Committee considered that under Section 4(3)(b) of the Act it must have regard to the Guidance issued by the Secretary of State under Section 182 of the Act when determining an application for a premises licence.

This Guidance had been revised and put before Parliament as recently as October 2014. Paragraph 5.22 of the Guidance is clear in that the licensing authority must decide whether or not premises are used primarily as a garage.

Representations were received against the grant of the application from the police, residents and Councillors. Those representations engaged the crime and disorder and public nuisance objectives. Two residents made direct representations against the sale of alcohol from a petrol garage.

The Committee considered that the authority laid down by Mr Justice Cranston in R (on the Application of) Murco Petroleum Limited v Bristol City Council 2010 applied. Mr Justice Cranston confirmed the Committee was bound to consider primary use of the premises and the guidance regarding deferment if insufficient information is received was correct.

The Applicant submitted to the Committee only projected data information should the premises be able to sell alcohol. The Applicant advised the Committee that it projected that the sale of alcohol would increase the sale of other convenience goods. The Committee was informed that the projected transactions that included a shop purchase also included the retail sale of petrol. Therefore it appeared to the Committee that in order for the Premises to not be an excluded premises it has to sell alcohol in order to increase sales of the other goods so that the primary use is not the retail sale of petrol.

The Applicant did not supply actual transaction figures of fuel sales, convenience goods sales

and fuel and convenience sales together which were requested by the committee. The Applicant informed the committee that it looks at such figures before making an application. Members were concerned why the Applicant did not produce straightforward actual trading information and believed that the reason may be that such figures would not assist its case.

Therefore the Committee took the view it did not have sufficient evidence before it to determine the question of primary use of the premises. The premises is a small store situated in a petrol pump forecourt near to a parade of shops. The Committee considered on the face of it the premises primary use appeared to be the retail sale of petrol, however, could not be satisfied this was not its primary use as the Applicant failed to supply the information.

Members considered that they were under a duty to act within the law as it stood at the time of their determination. The Committee did not feel able to grant that part of the licence in relation to the supply of alcohol when the exercise of that activity may have been unlawful under Section 176 of the Act thereby undermining the promotion of the prevention of Crime and Disorder. The proposed condition would not alter this as, if granted, the Committee may be granting permission for the sale of alcohol from premises where it is unlawful to do so, nor would it enable the Committee to assess what impact there may or may not be on the Licensing Objectives.

The Committee also considered, in accordance the evidence provided by the Police, the premises were situated in an area blighted by anti-social behaviour and disorder, where numerous complaints had been made by the public and shop owners. The problem had been so serious that dispersal orders have been made for that area.

In accordance with its Policy Members noted that a survey suggested Middlesbrough has one of the highest levels of alcohol related problems among under 19s in the Country. It is one of the highest in the Country for the three groups of crimes particularly associated with alcohol and is amongst the highest in the County for adult alcohol related harm. Police evidence shows the area where the premises are situated to have such problems of anti-social behaviour and disorder.

Although the premises are not situated in an area which attracts a special policy in relation cumulative impact of licensed premises, the Committee considered the area is saturated with licensed premises for the on and off sale and supply of alcohol.

The Committee considered that it was not appropriate for the promotion of the prevention of crime and disorder and the prevention of nuisance, to grant a licence for the sale of alcohol in such an area blighted by anti-social behaviour and disorder currently saturated with licensed premises to premises which may be excluded under Section 176 of the Act and where potential impact cannot properly be assessed.

The Committee also considered, based on the evidence provided, that another premises selling alcohol in the area would be likely to give rise to a negative cumulative impact of the promotion of the prevention of crime and disorder and the prevention of public nuisance. It considered that the proposed conditions would not resolve the likelihood of the premises adding to the problems in the area.