

Minutes

LICENSING SUB-COMMITTEE

23 March 2017

Meeting held at Committee Room 5 - Civic Centre, High Street,
Uxbridge UB8 1UW



	<p>Committee Members Present: Councillors Dominic Gilham (Chairman) David Yarrow Lynne Allen</p> <p>Responsible Authorities Present Ian Meens, Regulatory Services</p> <p>Respondents Present Mr Robert Botkai, Solicitor Ms Nicky Law, Applicant (Malthurst Petroleum Limited) Mr Milan Patel, Applicant (Malthurst Petroleum Limited)</p> <p>LBH Officers Present: Nicole Cameron, Legal Advisor Jhini Mukherjee, Licensing Officer Neil Fraser, Democratic Services Officer</p>
1.	<p>APOLOGIES FOR ABSENCE (<i>Agenda Item 1</i>)</p> <p>None.</p>
2.	<p>DECLARATIONS OF INTEREST IN MATTERS COMING BEFORE THIS MEETING (<i>Agenda Item 2</i>)</p> <p>None.</p>
3.	<p>TO CONFIRM THAT THE ITEMS OF BUSINESS MARKED PART I WILL BE CONSIDERED IN PUBLIC AND ITEMS MARKED PART II WILL BE CONSIDERED IN PRIVATE (<i>Agenda Item 3</i>)</p> <p>It was confirmed that all items were Part I and would be considered in public.</p>
4.	<p>MATTERS THAT HAVE BEEN NOTIFIED IN ADVANCE OR URGENT (<i>Agenda Item 4</i>)</p> <p>None.</p>
5.	<p>APPLICATION FOR THE GRANT OF A PREMISES LICENCE (<i>Agenda Item 5</i>)</p> <p>At the commencement of the hearing, the Chairman requested that the Legal Advisor provide an introduction to section 176 of the Licensing Act 2003. The Legal Advisor provided the requested overview as follows:</p> <p>Statement by the Legal Advisor:</p>

Section 176 of the Licensing Act 2003 prohibited the sale or supply of alcohol from premises used primarily as a garage, with premises defined as 'used as a garage' if they were selling petrol or diesel. Although the applicant had confirmed that the premises would sell petrol and diesel, the premises would include a convenience store.

The word 'primarily' had not been defined in the Act. However, the concept of a premises being primarily used as a garage had been before the Courts. Arguments had concerned whether primary use was an enforcement, rather than an eligibility, issue when deciding upon an application for a premises licence. It had been made clear that the Sub-Committee had representations before it that questioned the sale of alcohol from what might become a garage for the purposes of section 176.

The premises were currently under construction and therefore the applicant was unable to advise whether the garage or the convenience store would be the primary use, although the applicant believed that it would be the convenience store. There were two main methods of establishing primary use: number of transactions (i.e., how many sales for fuel and how many sales for goods within the convenience store) or the transactional value of these transactions. There had been debate over which of the two methods was most appropriate and this matter had been before the courts:

- Green v Justices for Inner London Area (1993): If the transactional values of transactions were used, then duty and VAT must be stripped out of all sales.
- Liverpool Crown Court ex parte Goodwin (1998): The question had to be 'what was the intensity of use by customers?'
- R (Murco Petroleum Ltd) v Bristol City Council (2010): It was a matter for each Licensing Authority to decide whether it would decide primary use on the basis of numbers of transactions or evidence of turnover. The case further confirmed that, where there was insufficient information about primary use, the Authority may defer the matter to another date until the question was resolved to its satisfaction.

The approach generally adopted by the courts since Murco 2010 seemed to have been a focus on the numbers and whether the premises were used more intensely by customers for sales of fuel than for the sale of other products such as food.

The Legal Advisor noted that Members had the following options:

1. Refuse to grant the premises licence;
2. Defer the hearing to another date until the applicant was able to provide information that confirmed primary use;
3. Insert a condition to the premise licence that related to section 176; or
4. Decide the primary use was an enforcement rather than an eligibility issue and grant the premises licence without a condition relating to section 176.

Members were reminded that their decision must be based on all written and oral evidence, with the intention of upholding the licensing objectives. The applicant was unable to provide information about primary use and had therefore suggested a condition to address the lack of information and to overcome the representation. The Legal Advisor understood that there had been an attempt to agree a condition, and potentially an agreement. In general, the use of an appropriate condition was a sensible way to avoid deferral of a matter that had the potential to overcome the representations. It would be a matter for Members to decide whether the condition was appropriate based on all the evidence presented orally and in written form, always with the intention of upholding the licensing objectives. Members would hear from all

parties as to their position and they would need to make their decision based on that. This was an outline of the law.

Introduction by Licensing Officer:

The Licensing Officer, Jhini Mukherjee, introduced the application and report to the Sub-Committee, confirming that the Sub-Committee had been convened to assess an application for a new premises licence in respect of MRH Eastcote, High Road, Eastcote, HA5 2ET. The application was for a 24 hour licence to sell alcohol and late night refreshment. The entrance to the shop would be closed to customers between the hours of 2300 and 0500, and any sales during those hours would be made through a late night pay window. The addendum was highlighted, which included additional clarifications, plans and amended conditions.

Ms Mukherjee confirmed that representations had been received from two interested parties, neither of whom were in attendance, and one from a Statutory Authority. The two interested parties were local residents, whilst the Statutory Authority was Hillingdon Licensing Authority. All representations could be found as appendices within the report. Ms Mukherjee confirmed that since the report had been published, Hillingdon Licensing Authority had agreed conditions with the Applicant that had resolved their concerns, and therefore they wished to withdraw their interest.

The Chairman requested clarification from Ms Mukherjee that the plan attached to the addendum sheet was not to be considered as part of the application. Ms Mukherjee confirmed that to be the position. Ms Mukherjee confirmed that the regulations did not require the CCTV positions to be identified on the plan and further confirmed that the additional plan was only for information.

Representation by the Applicant:

Mr Botkai, representing Malthurst Petroleum Limited, confirmed that the additional plan was included for information purposes only, as the plan included CCTV locations and should the Applicant ever wish to move the location of a CCTV camera, the Applicant would be required to submit additional requests to amend the premises licence. The Chairman highlighted this could be dealt with by way of a minor amendment. Mr Botkai responded that this was not necessarily correct.

Mr Botkai confirmed that the Responsible Authority's representation had been withdrawn, and was therefore concerned that the Sub-Committee was dealing with section 176 as part of the hearing. The Legal Advisor highlighted that paragraph 9.32 of the Section 182 Guidance confirmed that where less than 24 hours notice is given, any withdrawal must be made orally, and that the Responsible Authority was yet to orally withdraw their representation given the order of proceedings. The Legal Advisor further explained that it was open to the Members to consider the agreed condition and ensure it was to their satisfaction. The Chairman requested that Mr Botkai make his application and evidence how the Applicant will prove primary use once the shop opens.

Mr Botkai stated that section 176 was not a pre-test to getting a licence and that this is in contrast to the Licensing Act 1964, where an Applicant would have to apply and prove primary use. In 2003 there was a change in position, but there remained confusion and Applicants were inserting data regarding primary use which was not necessary. It was stated that section 17 specified what an Applicant must do to get a licence, and that this did not require proof of primary use. Section 18 confirmed what the Licensing Authority and a Committee must do to determine an application and there

was no reference contained therein in relation to section 176.

Mr Botkai asserted that section 176 took effect once a licence had been granted, and went on to state that the Committee were entitled to ask the Applicant how the Applicant would monitor it to make sure it was not disqualified under section 176, once the licence was granted. Mr Botkai confirmed that the Applicant had 278 petrol stations that had premises licences to sell alcohol, and that they monitored such sales.

Mr Botkai stated that there was no actual test to establish primary use. Following confusion, the section 182 Guidance had been amended and now referenced section 176 at paragraphs 5.21 to 5.23 of the guidance. Mr Botkai read paragraph 5.22 of the section 182 Guidance and stated that the matter of primary use followed the grant of the licence, and there was no remit to refuse the application for lack of information on primary use.

Mr Botkai highlighted that discussions had taken place in relation to a condition, and that this was not unknown to the Applicant, as the Applicant had 17 premises licences that included conditions relating to section 176. Mr Botkai stated that during ongoing dialogue with the Local Authority, various versions of the conditions had been suggested with agreement, but that agreement had now been reached as set out in the addendum.

Mr Botkai referred the Sub- Committee to the case of **Green v Justices for the Inner London Area (13 June 1994) QBD (Divisional Court)** and stated that when looking at one set of figures for sales of fuel, any reviewer would need to compare similar figures for sales within the shop. The accident in the **Green** case was that one side of the equation had duty and the other did not, and therefore the case did not say that the test was turnover. Instead, it stated that you must apply the same test for one side of the equation as the other.

Mr Botkai referred to the case of **R v Liverpool Crown Court, ex parte Kevin John Goodwin(17 December 1998) QBD (Divisional Court)** and stated that this case was based on transactional data, asserting that it was the intensity of the use that was important. Mr Botkai stated that the reason turnover was not considered when looking at primary use was that it resulted in a difficult and complex calculation. Tax could be changed, which in turn changed how the premise was going to be used. All of the Applicant's stores that had been dealt with since 1998 only dealt in transactional data and the intensity, as per the **Goodwin** case. Mr Botkai asserted that it was the responsibility of the licence holder to ensure primary use was not as a garage, and confirmed that the Applicant would monitor primary use. If transaction numbers showed that the primary use was as a garage, then the Applicant would ensure that the premises would stop selling alcohol, a scenario which had occurred on several previous occasions. However, it was pointed out that the proposed convenience store was a large store and therefore that it was highly unlikely that transactional data would show it to have a primary use as a garage, rather than as a shop.

Mr Botkai highlighted that he had requested confirmation from officers as to whether other, similar, premises licences had conditions relating to section 176, without receiving a response. Instead, the Applicant had checked and found that other similar local premises did not have primary use conditions. Mr Botkai stated that there would be no significant hot food served and such sales had not been an issue at other stores.

Mr Botkai stated that the representation from the Responsible Authority had been withdrawn and therefore the only two representations before the Sub-Committee were the two resident objections.

Mr Botkai highlighted that the local residents had raised an objection in relation to anti-social behaviour, but asserted that there was no evidence of current anti-social behaviour or a real risk of anti-social behaviour in the future. Mr Botkai stated that the Police were happy with the night pay window, and had not raised any concerns over potential crime issues at the site. It was highlighted that the Police were the experts on crime and disorder.

Mr Botkai highlighted that the resident representation had raised parking as an issue. Mr Botkai asserted that consideration had been given to parking provision by way of the planning process, and that planning permission had been granted. Mr Botkai highlighted that the other objection related to the potential increase in litter, and that it had questioned the need for 24 hour operation at the site, but again asserted that this has been dealt with by way of the planning process.

Mr Botkai stated that the premise was not located within a community impact zone, and that its operation would not be contrary to the licensing objectives.

Mr Botkai recited paragraph 21.5 of the Hillingdon Statement of Licensing Policy and confirmed that the section 182 Guidance supported this position, before stating that there were no representations from any of the Responsible Authorities.

It was confirmed that Ms Nicola Law was the current DPS but that this would change.

Representation by the Responsible Authority:

Mr Ian Meens, Licensing Officer, stated that the application concerned a new building and that the Local Authority had to consider whether it could assess the ability of the premises to decide primary use. As the premises was large (of a similar size to a nearby convenience store) the shop would likely fall within the primary use, but that the Authority sought to qualify this position with a condition.

Mr Meens explained that through mediation, a condition had since been agreed. It was highlighted that usually, when a condition was agreed, it was added to the licence. As such, the Committee would not normally hear that condition. Mr Meens explained that as agreement of the condition was only agreed late on the night before the hearing, the final condition was around footfall, similar to that seen in the **R (on application of Murco Petroleum Ltd) v Bristol City Council (2010) EWHC 1992 (Admin)** case. Mr Meens confirmed that he was happy with the condition on footfall as it was simplistic, with the condition verified by the Court in the case of **Murco**. Mr Meens stated that he understood that section 9 of the Section 182 Guidance confirmed that the Committee had the ability to withdraw the matter.

The Chairman requested confirmation from Mr Meens as to whether the Council had an adopted policy relating to primary use. Mr Meens confirmed that the Council did not have such a policy.

The Chairman asked Mr Meens whether, as a Responsible Authority, would he expect to see the night pay window in a plan to the application? Mr Meens stated he had not seen this in many applications.

Discussion:

The Chairman asked Mr Botkai to clarify his statement that it would be problematic to measure on net or gross turnover, as there was an assumption that it would be easy to

measure on gross. Mr Botkai responded explaining that to measure on gross would be wrong in law, as it would not determine the use of the Premises, it would only determine the primary sales.

The Chairman referred to Mr Botkai's statement that other similar premises did not have conditions relating to section 176. The Chairman highlighted that each application was based on its own merits and there were no standardised conditions.

The Chairman requested confirmation from Mr Botkai that the Police had seen the plan showing the location of the night pay window. Mr Botkai confirmed they had not, but asserted that this was unnecessary as it was clear that the siting of the window was near to the cashier point, which was highlighted on the plan.

The Sub-Committee requested confirmation of the number of the Applicant's various premises where primary use had been judged to be as a garage. Ms Law stated that she was unable to provide the exact numbers but confirmed that the company assessed all premises on a monthly basis, and that she believed that several premises had had their off-licence part of the premises removed after such a review.

The Sub-Committee requested confirmation regarding how many other convenience stores were in the vicinity of the premises application site. Mr Botkai stated the Applicant did not need to prove a need for a new licence. The Legal Advisor confirmed that to be the correct position.

The Sub-Committee sought clarity on the number of premises licence applications that had not been approved. Mr Botkai stated that in his exercised representing the Applicant, no licenses had been refused. Mr Botkai went on to reiterate that the Applicant monitored primary use once a month, and that the sale of alcohol was stopped, if required.

The Sub-Committee requested clarification from the Legal Advisor as to whether primary use was an item that could be used to refuse an application. The Legal Advisor confirmed that, as the representation by the Responsible Authority was withdrawn less than 24 hours before the hearing, it was at the Chairman's discretion whether to accept the request for withdrawal. However, it was confirmed as relevant that the Responsible Authority had withdrawn the representation. The Legal Advisor confirmed that the condition to overcome the issue was deemed to be a sensible way to overcome section 176, but that it was for the Sub-Committee to consider and agree that the condition was appropriate and whether it should be attached to the licence.

The Sub-Committee requested confirmation as to how the Applicant would assess a customer paying for fuel, which could be expensive, versus a customer paying for a comparatively cheap product such as confectionary. Mr Botkai stated that the perception of fuel was that it was a big thing and a snack bar was a small thing, but that that 78% of the price of fuel was duty. It was therefore complicated to assess transactional value. The **Goodwin** case confirmed that a tank of fuel and a snack bar were to be considered of similar weight.

The Sub-Committee highlighted that the Applicant had provided no evidence of primary use. Mr Botkai responded that the Responsible Authority had withdrawn the representation and it was at the Chairman's discretion to accept that request for withdrawal. Mr Botkai went on to request that this discretion be exercised reasonably.

Mr Botkai confirmed that, subsequent to the premises being in operation, if concerns remained that the site was primarily operating as a garage, then a prosecution under

section 136 (8), or a review of the premises licence, could be carried out. Mr Botkai highlighted that his practice had dealt with over 2,000 petrol applications by various operators and was yet to see a prosecution on primary use, or a review.

The Chairman referred Mr Botkai to page 26 of the document pack and the plan appended to the addendum, and highlighted that there were differences between the two plans in relation to where the alcohol would be sold. The Chairman requested confirmation that the CCTV cameras covered the entire shop. Mr Botkai responded stating that the alcohol would be in view of the CCTV or cashier, and that he was willing to show the night pay window on the plan attached to the premises licence.

The Responsible Authority, Licensing Authority and Applicant each summarised their case.

Mr Meens confirmed that he was happy with the condition agreed, that it would uphold the licensing objectives, and that he recommended it be added to the licence, if approved.

Ms Mukherjee confirmed that she had no further remarks.

Mr Botkai stated that he hoped that the Sub-Committee was satisfied with the condition as agreed with Mr Meens, and confirmed that the Applicant would work with the local Authority to provide any data requested in the future. Mr Botkai asserted that there was no evidence that the granting of the licence would be detrimental to the upholding to the licensing objectives, and requested that the licence be granted.

Committee Deliberation:

All parties were asked to leave the room while the Sub-Committee considered its decision.

All parties were invited back into the room for the Chairman to announce the decision of the Sub-Committee.

Decision:

RESOLVED: The Sub-Committee considered all the relevant representations made available to it and in doing so took into account the Licensing Act 2003, the Guidance issued by the Secretary of State under Section 182 of that Act, the Council's Statement of Licensing Policy, the Licensing objectives and the Public Sector Equality Duty.

The decision of the Sub-Committee was to GRANT the premises licence with the following times for licensable activities:

- Sale of Alcohol from 00:00 to 24.00 hours every day; and
- The sale of late night refreshment between the hours of 23:00 and 05:00 hours.

In addition, the Sub-Committee determined to add the following conditions to the premises licence:

Primary Use Condition:

1. The licence holder will monitor the primary use of the premises on a monthly basis and if transaction data demonstrates that the premises are

an excluded premises pursuant to section 176 of the Licensing Act 2003 the sale of alcohol shall cease until such time as the data demonstrates that the premises are not so excluded. Such data will be maintained on a 6 months monthly basis and will be available on request to the Metropolitan Police and the licensing authority.

CCTV Condition:

2. A CCTV system shall:
 - 2.1 be installed and maintained in effective working order whenever the Premises are in use for the purposes of the license;
 - 2.2 all CCTV images shall be stored in a secure location for a minimum period of thirty (31) days;
 - 2.3 the images shall be available for inspection upon request by authorised officers of the licensing authority and the Metropolitan Police Service;
 - 2.4 the precise positions of the CCTV cameras are to be agreed in writing, subject to compliance with data protection legislation, with the licensing authority; and
 - 2.5 the approved CCTV system shall display the correct time and date of the recording.

Entrance Door and Night Time Transactions Condition:

1. The entrance door to the Premises shall be closed to all customers between the hours of 23:00 and 05:00 every day;
2. all transactions with customers between the hours of 23:00 and 05:00 must be via a night pay window; and
3. the specification of such night pay window shall be agreed in writing with the licensing authority prior to operation of the premises.

Storage of Alcohol Condition:

1. All alcohol above 35% ABV shall be stored behind the counter;
2. all alcohol products shall be displayed in direct line of sight from the cashier's position and not obscured by other displays or shelving or shall be in the view of a CCTV camera; and
3. no alcohol products shall be displayed within two (2) metres of the entrance door.

REASONS

The Sub-Committee noted the following reasons for its decision:

1. The Sub-Committee agreed that the Premises Licence should attach a condition relating to the primary use of the Premises although amended the agreed

Primary Use Condition as follows:

- a. The Sub-Committee inserted a requirement that the monitoring of primary use must be on a monthly basis to provide clarity as to the process of monitoring and such a process shall assist with ensuring that the Premises does not operate as a garage for the purposes of section 176 of the Licensing Act 2003. Furthermore, Ms Law and Mr Botkai confirmed during the hearing that monthly monitoring is already a practice undertaken by the Applicant.
 - b. The Sub-Committee removed the sentence: *'The data will show how customers use the premises comparing the number of fuel only transactions with non fuel transactions'*. The Sub-Committee noted that in the case of **Murco** the Court found that it is a matter for each licensing authority to decide whether it will decide primary use on the basis of the number of transactions or evidence of turnover. The deletion was further made as the London Borough of Hillingdon does not have an adopted policy regarding whether the monitoring data as to primary use should relate to the value of transactions or the number of transactions made at the Premises. The condition as amended allows the Applicant the option of monitoring by way of value of transactions or the number of transactions made at the Premises.
2. The Sub-Committee agreed that the Premises Licence should attach an Entrance Door and Night Time Transactions Condition and agreed that such a condition should be attached to the Premises Licence with the following amendment:
- a. The Sub-Committee inserted a requirement that *'the specification of such night pay window shall be agreed in writing with the licensing authority prior to operation of the premises.'* The Sub-Committee required this amendment as the exact location of the night pay window is yet to be agreed and has not been approved by the Metropolitan Police. The condition as amended further ensures that any specifications of the night pay window shall not be a nuisance to the local residents.
3. The Sub-Committee considered the objections of the two residents however found that there was no evidence of current nuisance or crime and disorder in the area, which was confirmed by the Metropolitan Police Crime Mapping Data. The Sub-Committee further found that there was no evidence that by granting the Premises Licence that future nuisance or crime and disorder would be caused.

RIGHT OF APPEAL

The Applicant for the premises licence or any other person who made relevant representations to the application may appeal against the Council's decision to the Justice Clerk at the Uxbridge Magistrates. Such an appeal may be brought within 21 days of receipt of this Notice of Decision.

The Applicant will be deemed to have received the Decision Notice, two days after the date on the accompanying letter, which will be posted by 1st class mail.

ADDENDUM

The meeting, which commenced at 2.10 pm, closed at 4.10 pm.

These are the minutes of the above meeting. For more information on any of the resolutions please contact Neil Fraser on 01895 250693. Circulation of these minutes is to Councillors, Officers, the Press and Members of the Public.

The public part of this meeting was filmed live on the Council's YouTube Channel to increase transparency in decision-making, however these minutes remain the official and definitive record of proceedings.