

SOUTH HAMS DISTRICT COUNCIL

NAME OF COMMITTEE	Licensing Sub-Committee
DATE	Wednesday 22 January 2014
REPORT TITLE	Application for a new Premises Licence
Report of	The Business Support / Licensing Manager
WARDS AFFECTED	Erme Valley

Summary of report:

To determine an application for a new Premises Licence at **Shell Carew, A38, South Brent, TQ10 9ER**, firstly in accordance with Section 176 of the Licensing Act 2003 to determine the 'primary use' of the premises. If the premises are primarily used as a 'garage' selling petrol or diesel then the applicants are prohibited from selling alcohol. If determined the primary use of the premises is not a 'garage' but a 'shop' that also sells fuel, to state the reason(s) why and continue to determine the application in accordance with Section 18 of the Licensing Act 2003. If determined the 'primary' use of the premises is that of a garage to state the reason(s) why and then continue to determine the 'late night refreshment element' of the application.

Financial implications:

There are no direct financial implications to the Council from this Report.

RECOMMENDATIONS:

That the Sub-Committee consider the application for a new Premises Licence and make determinations in respect of this application, namely to:

- a) **consider whether premises would be "excluded premises" as defined under Section 176 Licensing Act 2003 as:**
 - i) **premises used primarily as a garage or which form part of premises which are primarily so used.** (If so determined then (b) below for the late night refreshment element of the application. If determined that premises are not primarily a garage and therefore not 'excluded premises' to continue with (b) below for both the retail sale of alcohol for consumption off the premises and the provision of late night refreshment).

- b) i) grant the application as submitted, subject to any Mandatory Conditions required;
ii) modify the conditions of the licence;
iii) exclude any of the licensable activities to which the application relates;
iv) to refuse to specify a person in the licence as the premises supervisor;
v) reject the application,

in line with the licensing objectives (Section 4) contained within the Licensing Act 2003.

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1. BACKGROUND

- 1.1 The Licensing Authority has received an application for a new premises licence from Lockett & Co on behalf of Shell UK Oil Products Limited for **Shell Carew, A38 South Brent, TQ10 9ER**. A copy of the application is attached (**Appendix 'A'**).
- 1.2 The application is for the sale and supply of alcohol for consumption off the premises daily between 5am and midnight. Also for the provision of late night refreshment daily from 11pm to 5am
- 1.3 The Sub-Committee are reminded these premises already have a premises licence granted in 2005 for late night refreshment (daily between 11pm & 5am) and this licence will continue irrespective of the outcome of the current application. Should this application be granted, whether in whole or in part, it will be up to the applicants to decide whether to keep both licences or to surrender one
- 1.4 The applicant included a document with the application named 'Analysis of Intensity of Use' providing data showing the number of customer transactions from the premises relating to fuel and number of transactions relating to convenience store items over the period 1st June to 31st August 2013 (**Appendix 'B'**).
In order to assist the Licensing Sub-Committee in establishing the 'Primary Use' of this site an email was sent Shell UK on 10th December 2013 asking for the average price per litre profit made by Shell of fuel sold at one of their owned filling stations (**Appendix 'C'**). A reply is still awaited.
Also to assist in establishing whether or not the premises may be 'excluded premises' (and prohibited from selling alcohol) a more detailed letter raising a number of important questions was sent to the applicant's representatives on 13 December 2013, the intention being to assist the Licensing Sub-Committee in determining 'Primary Use' (**Appendix 'D' with question 4 about fuel sales redacted from public view**). A reply is awaited.
- 1.5 As the applicants wish to sell alcohol and provide night refreshment, under the Licensing Act 2003 they require a premises licence. As regards to this application responsible authorities and any other persons may make representations.

- 1.6 We have received representations from six District Councillors plus the South Brent Parish Council in respect of this application. These can be found in **Appendix 'E'**. The representations relate to all four of the licensing objectives: prevention of crime and disorder; public safety; prevention of public nuisance; protection of children from harm.
- 1.7 It has not been possible for the Licensing Department to mediate with all parties therefore a satisfactory conclusion has not been possible.

(Please note that due to the amount of paperwork contained within these appendices, full copies have only been circulated to the Sub-committee Members. Anyone who would like to receive full (or part) copies are asked to contact Member Support Services on (01803) 861273.)

2. ISSUES FOR CONSIDERATION –

- 2.1 As mentioned above, representations have been received from six District Councillors and the local Parish Council. Their representations are attached (**Appendix 'E'**) and relate to all four of the licensing objectives.
- 2.2 Under Section 176 Licensing Act 2003 alcohol is prohibited from being sold or supplied at motorway service areas and from premises used primarily as a garage, or are part of premises used primarily as a garage. Premises are used as a garage if they are used for one or more of the following:
- the retailing of petrol;
 - the retailing of derv;
 - the sale of motor vehicles; and
 - the maintenance of motor vehicles.
- 2.3 National guidance issued under Section 182 Licensing Act 2003 (see 5.1 - 5.4 below) states that to establish primary use, the approach so far endorsed by the courts is based on intensity of use, although that has been somewhat widened, see background documents.
- 2.4 We have received from the applicant an 'Analysis of Intensity of Use' (**Appendix 'B'**) which presents data representing the number of customer transactions for convenience store items, number for fuel and total number of transactions over the period 1st June to 31st August 2013. It appears that when both shop items and fuel items were purchased, a transaction is logged under both categories. Clarification has been requested in letter dated 13th December (**Appendix 'D'**).
- 2.5 During a previous application in 2011/12 to sell alcohol from this site (and subsequently withdrawn after three adjournments), the same applicant was asked to provided information regarding gross margin on fuel and convenience sales for the period 1st March to 31st May 2011. It was confirmed then that the shop was a franchise and as such makes a profit of "0.005 pence" per litre on fuel which equates to ½p per litre. Profit made on convenience store items at this time was 22%. The email (**Appendix 'C'**) to Shell and letter (**Appendix D**) to the applicant's representatives are intended to explore this further, and to assist the Licensing Sub-Committee to establish the 'primary use' of the premises.

2.6 The Licensing Department has requested that further information be provided before the hearing, showing the breakdown of customer transactions purchasing fuel only, purchasing convenience store items only and number of mixed transactions for both fuel and convenience store items.

2.7 The Sub Committee will now need to consider this application.

3. STATUTORY BODIES' RESPONSE

3.1 Devon & Cornwall Constabulary
No representations have been received.

3.2 Devon & Somerset Fire & Rescue Service
No representations have been received.

3.3 Area Child Protection Committee and Local Safeguarding Children Board
No representations have been received.

3.4 Devon Trading Standards
No representations have been received.

3.5 South Hams District Council, Environmental Health Department (Pollution)
No representations have been received.

3.6 South Hams District Council, Environmental Health Department (Health & Safety)
No representations have been received.

3.7 South Hams District Council, Planning Department
No representations have been received.

3.8 Primary Care Trust / Local Health Boards, Devon Drug and Alcohol Team
No representations have been received.

4. RELEVANT LICENSING POLICY CONSIDERATIONS

Licensing Objectives

4.1 Section 2.1 of the Policy states: The Licensing Authority has a duty under the Act to carry out its licensing functions with a view to promoting the four licensing objectives.

(These objectives are the only matters to be taken into account in determining the application and any conditions attached must be appropriate to achieve the licensing objectives).

(This is having first determined whether the premises are 'excluded' or not).

4.2 Section 2.2 of the Policy states: A licence will only be granted where the Licensing Authority is satisfied that these objectives have been met.

4.3 Section 2.3 of the Policy lists the kind of measures the Licensing Authority will be expecting to see taken into account to promote the objectives.

Conditions

- 4.4 Sections 2.5 & 2.6 of the Policy sets out additional legislation, strategies, policies and guidance that the Licensing Authority will have regard. Section 4 of the policy sets out what the Sub-Committee should consider before imposing conditions on a licence.
- 4.5 The Guidance issued under Section 182 Licensing Act 2003 which was revised and re-published in June 2013 states:
- 4.6 The Licensing Authority may not impose any conditions unless its discretion has been engaged following receipt of relevant representations and it is satisfied as a result of a hearing (unless all parties agree a hearing is not necessary) that is appropriate to impose conditions to promote one or more of the four licensing objectives (paragraph 10.8 of the guidance).
- 4.7 Where applications have given rise to representations, any appropriate conditions should normally focus on the most sensitive periods. In certain circumstances, conditions relating to noise immediately surrounding the premises may also prove appropriate to address any disturbance anticipated as customers enter and leave (paragraph 2.22 of guidance).

Licensing Hours

- 4.8 Sections 6.1 & 6.2 of the Policy states: The Licensing Authority will deal with the issue of licensing hours on the individual merits of each application. When the Authority's discretion is engaged, consideration will be given to the individual merits of an application but the presumption will be to grant the hours requested unless there are objections to those hours raised by Responsible Authorities or other persons on the basis of the licensing objectives. However, when dealing with licensing hours beyond midnight it is more likely that relevant representations will be made unless there are higher standards of control included within operating schedules to promote the licensing objectives, especially for premises which are situated near residential areas or in areas where anti-social disorder takes place.
There is no presumption within the legislation for longer opening hours.
- 4.9 Section 6.5 of the Policy states: The terminal hours will normally be approved where the Applicant can show that the proposal would not adversely affect the licensing objectives unless, after hearing relevant representation the Licensing Authority believe it appropriate (necessary), proportionate and reasonable to restrict the hours required. The Licensing Authority may set an earlier terminal hour where it considers this is appropriate to the nature of the activities and the amenity of the area.
- 4.10 Paragraph 10.13 of Guidance issued under Section 182 of the Licensing Act 2003 states: shops, stores and supermarkets should normally be free to provide sales of alcohol for consumption off the premises at any times when the retail outlet is open for shopping unless there are good reasons, based on the licensing objectives, for restricting those hours

Children

- 4.11 Section 7.1 of the Policy states: The Licensing Authority recognises the great variety of premises for which licences may be sought. These will include theatres, cinemas, restaurants, pubs, nightclubs, cafes, takeaways, community halls and schools. Access by children to all types of premises will not be limited unless it is considered necessary to do so in order to protect them from harm.
- 4.12 Section 7.2 of the Policy states: When deciding whether to limit access of children the Licensing Authority will judge each application on its own individual merits. Examples which may give rise to concern in respect of children include premises: -
- where entertainment of an adult or sexual nature is provided
 - where there is a strong element of gambling taking place
 - with a known association with drug taking or dealing
 - where there have been convictions of the current management for serving alcohol to minors
 - with a reputation for underage drinking
 - where the supply of alcohol for consumption on the premises is exclusive or primary purpose of the services provided at the premises.

5. LEGAL IMPLICATIONS

- 5.1 Section 176 of Licensing Act 2003 prohibits the sale of alcohol at motorway service areas and restricts the circumstances in which alcohol may be sold at garages. The sale and supply of alcohol is prohibited from premises that are used primarily as a garage, or are part of premises used primarily as a garage. Premises are used as a garage if they are used for one or more of the following:
- the retailing of petrol;
 - the retailing of derv;
 - the sale of motor vehicles; and
 - the maintenance of motor vehicles.

- 5.2 National Guidance issued under Section 182 Licensing Act 2003 paragraphs 5.22 -5.23 states:

The Licensing Authority must decide whether or not premises are used primarily as a garage. The accepted approach is based on “intensity of use” to establish “primary use”. For example, if a garage shop in any rural area is used more intensely by customers purchasing other products than by customers purchasing the products or services listed above (see 5.1), it may be eligible to seek authority to sell or supply alcohol.

Where there is insufficient evidence to establish primary use, it is for the Licensing Authority to decide whether to grant the licence and deal with any issues through enforcement action and it may be able to use its case management powers to enable further evidence to be obtained.

5.3 The Act requires mandatory conditions to be imposed on the licence, the wording of which is prescribed by the Act but may be summarised as follows:

(a) Section 19 - Mandatory conditions relating to the supply of alcohol

No alcohol may be supplied unless there is a Designated Premises Supervisor who also holds a personal licence.

Every supply of alcohol under a premises licence must be made or authorised by a personal licence.

(b) Section 19A - Age verification policy

(1) The premises licence holder or club premises certificate holder shall ensure that an age verification policy applies to the premises in relation to the sale or supply of alcohol.

(2) The policy must require individuals who appear to the responsible person to be under 18 years of age (or such older age as may be specified in the policy) to produce on request, before being served alcohol, identification bearing their photograph, date of birth and a holographic mark.

(c) Section 21 - Door Supervision

Where door supervisors are specified by condition, those individuals must be licensed by the SIA.

5.4 As there have been relevant representations in respect of the new premises application, this hearing must be held. (Relevant representations are about the likely effect of the grant of the application on the promotion of the licensing objectives, by responsible authorities or any other persons). The sub-committee must disregard any information or evidence not relevant to the licensing objectives.

5.5 The sub-committee must consider this application firstly in accordance with Section 176 of the Act and make a determination whether the premises are used primarily as a garage selling petrol or diesel or are part of premises used primarily used for selling petrol or diesel. If this is so determined then there is a prohibition on selling alcohol. If the determination is the premises are a shop that sells petrol or diesel then the matter may proceed in accordance with Section 4 of the Licensing Act 2003, which requires that licensing functions must be carried out with a view to promoting the four licensing objectives. The Licensing Authority must also have regard to its own licensing policy and the Secretary of State's guidance, but may depart from both if it has good reason to do so. Those reasons should be stated.

5.6 The Act requires (Section 18) that in dealing with a new application, the committee takes any of the following steps which are appropriate for the promotion of the licensing objectives:

- (a) To grant the Licence subject to:-
 - i any Mandatory Conditions required;
 - ii modifying the conditions which have been specified in the operating schedule;
- (b) to exclude any of the licensable activities to which the application relates;
- (c) to refuse to specify a person in the licence as the premises supervisor;
- (d) to reject the application

The Sub-Committee must give its reasons for its decision to take any of these steps. Similarly, if the application is rejected, the Sub-Committee must give its reasons.

5.7 The Sub-Committee will need to consider the hours of operation proposed, the effectiveness of the operating schedule proposed by the applicant, the representations received, the location of the premises in relation to residential properties, the history of the management of the premises, the evidence produced of any problems in the past, and the likely impact of any extension of hours and activities, public transport, taxi availability, the right the applicant has to operate a business and balancing the rights of residents to the quiet enjoyment and privacy of family life. That South Hams relies on tourism, with the population in the district doubling in the summer months with holidaymakers both from this country and international visitors who are, in the main, families with young children and retired people – the very segment of society who would perhaps be deterred by anti-social behaviour. These issues, and any other relevant ones, may be explored at the hearing in so far as it reflects the four licensing objectives.

5.8 If the Sub-Committee rejects the application, determines the premises are primarily a 'garage retailing petrol or diesel' or modifies the conditions of the licence, the applicant or any person who made a relevant representation in relation to this appeal may appeal within 21 days of notification of the decision to the Magistrates' Court. Those making relevant representations may also appeal if they believe that the licence should not have been granted, or that, when granting the licence, the Licensing Authority ought to have imposed different or additional conditions, excluded licensable activities from the scope of the licence or refused to specify a person as the premises supervisor. The Magistrates' Court may dismiss the appeal, or substitute its own decision, or send back the case to the Licensing Authority with directions as to how the case is to be dealt with. The Magistrates' Court may make any costs order it thinks fit.


5.9 If extended hours/licensable activities are granted, the Licensing Act contains review provisions which enable a responsible authority or any other person to apply to this Licensing Authority for a review of the licence. A hearing follows which enables the sub-committee to use the normal powers at a hearing (set out above) but also to suspend the licence for a period of up to three months or to revoke it.

6. RISK MANAGEMENT

Corporate priorities engaged:	There is a link to the Council's priority of improving Community Life and developing the Local Economy.
Statutory powers:	Licensing Act 2003
Considerations of equality and human rights:	Compliance with the Human Rights Act 1998 – Article 6: Right to a fair hearing
Biodiversity considerations:	Not applicable
Sustainability considerations:	As above under corporate priorities engaged
Crime and disorder implications:	Section 17 of Crime and Disorder Act 1998 applies.
Background papers:	<p>2012 – 'Primary Use' Portsmouth Magistrates Court appeal (application by Shell for the Whichers Gate Petrol Station at Rowlands Castle)</p> <p>June 2012 – 'Primary Use' Leeds Magistrates Court appeal (relating to premises licence application at Shell Pool Bridge) – can take into account a wider range of factors when making a decision.</p> <p>Responses to Notices of Hearing</p> <p>Summary of Key Points</p> <p>Guidance on Meeting the Licensing Objectives</p> <p>The Licensing Act 2003</p> <p>Guidance issued under Section 182 of the Licensing Act 2003</p> <p>The District Council's Statement of Licensing Policy</p> <p>Section 109(2)(b) Police Reform and Social Responsibility Act 2011 that amended any conditions imposed on determining an application for a new premises licence under Section 18 (3)(b) Licensing Act 2003 from 'necessary' to read 'appropriate'.</p>

Appendices attached:	Appendix A - Application for new premises licence Appendix B - Analysis of Intensity of use Appendix C – Email to Shell average pence per litre profit at the pump. Appendix D - Letter to applicant's representative requesting further information to establish 'Primary use'. (Confidential information redacted). Appendix E - Representations
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STRATEGIC RISKS TEMPLATE

No	Risk Title	Risk/Opportunity Description	Inherent risk status			Mitigating & Management actions	Ownership
			Impact of negative outcome	Chance of negative outcome	Risk score and direction of travel		
1	Ensuring the Licensing Objectives are not undermined	<p>To review the application in line with: The Licensing Act; National Guidance issued by the Secretary of State, and The South Hams District Council Statement of Licensing Policy.</p> <p>To create an increased opportunity for employment in the district.</p> <p>An opportunity to maintain the districts distinctive environment whilst enabling access and sensitive development.</p> <p>To consider whether the proposal would promote tourism. The</p>	3	2	6 	<p>To be able to give consideration to representations in line with the Licensing Objectives, namely:- The prevention of Crime and Disorder; Public Safety; The prevention of public nuisance; and The Protection of children from harm.</p> <p>The Licensing Authority follows strict legislation in accordance with the Licensing Act 2003 and adheres to the statutory instruments contained within the Act.</p>	EH Business Support / Licensing Manager.

No	Risk Title	Risk/Opportunity Description	Inherent risk status			Mitigating & Management actions	Ownership
			Impact of negative outcome	Chance of negative outcome	Risk score and direction of travel		
		<p>population doubles in the summer months with tourists and international visitors who are, in the main, families with young children and retired people – the very segments of society who would perhaps be deterred by anti-social behaviour.</p> <p>Failure to adequately consider these issues could result in the Council facing an appeal to the Magistrates Court.</p>					

Direction of travel symbols ↓ ↑ ⇔