

AGENDA ITEM

LICENSING SUB COMMITTEE 30 January 2015

REPORT OF THE HEAD OF HUMAN RESOURCES AND DEVELOPMENT

REVIEW OF PREMISES LICENCE OF TOMATO CAFÉ / BAR

REASON FOR REPORT

1. An application has been received from Devon and Cornwall Police to review the premises licence of Tomato Café / Bar, Tiverton.
2. The Council is obliged to hold a hearing to determine such applications.

RECOMMENDATIONS

1. That the Licensing Sub Committee determines this application in accordance with the licensing objectives

RELATIONSHIP TO CORPORATE PLAN

1. None

FINANCIAL, LEGAL AND RISK ASSESSMENT IMPLICATIONS

Any financial, legal and/or risk assessment implications are set out below:

Financial	A decision that does not stand up to potential challenge in the Magistrates' Court could leave the Council open to a costs order.
Legal	Decisions must be lawful
Risk Assessment	If the decision is not properly and reasonably made it could be subject to appeal

CONSULTATION CARRIED OUT WITH:

1. The process of applying for a review of a licence under the Licensing Act 2003 is prescribed by regulation and requires the applicant to copy the application to all of the responsible authorities. These are the police, fire service, Weights and Measures, body responsible for health and safety (Environmental Health in this case), Environmental Health for nuisance, the planning authority, the body responsible for child protection, the health authority and the licensing authority itself.
2. On receipt of the application the licensing authority is obliged to advertise it by displaying a notice prominently on the Council offices and at the premises so passers by may read it. A notice must also go on the Council's website.

1.0 INTRODUCTION

- 1.1 The Licensing Act 2003 introduced a new concept into licensing legislation – that of a review and it is a key part of the licensing process. At any stage following the grant of a premises licence, a responsible authority such as the Police or Environmental Health, or any other person, such as a resident living in the vicinity of the premises, may ask a licensing authority to review a licence because of a matter arising in connection with one or more of the licensing objectives. The licensing objectives are:
- the prevention of crime and disorder
 - public safety
 - the protection of children from harm
 - the prevention of public nuisance
- 1.2 The applicant for the review must copy the application to the licence holder and all of the responsible authorities. The licensing authority must then advertise the review by way of a notice on the Council offices and at the premises in question. A notice must also go on the Council's website. Any of the responsible authorities and any other interested parties then have 28 days to make any representations.
- 1.3 Representations can be positive or negative and must be made in writing. They can be amplified at the hearing (which the licensing authority must hold) or may stand in their own right. Additional representations, which do not amount to an amplification of the original representation, may not be made at the hearing.

2.0 PREMISES AND HISTORY

- 2.1 Tomato Café / Bar is a single floor premises on William Street, Tiverton, Devon, EX16 6BJ.
- 2.2 The premises licence was converted and varied in 2005 during the introduction of the Licensing Act. Mr Ahmad Babolhavaeji has been both the Premises Licence holder and the Designated Premises Supervisor since before this time.
- 2.3 A copy of the current premises licence is attached to this report as Annexe 1. It contains details of the licensable activities authorised, the times permitted and the conditions to which the premises must operate.
- 2.4 A copy of the current plan for the premises is attached to this report as Annexe 2.
- 2.5 The premises licence has had a number of variations since 2005. The following two are highlighted as they directly relate to points raised in the current review application.
- 2.6 In August 2013 a minor variation application was submitted and subsequently granted. Prior to submission it was discussed between the applicant (Mr Ahmad Babolhavaeji) and both the Police and Licensing Authority. The minor variation application requested the following:
- Amendment of CCTV conditions in accordance with Mid Devon requirements
 - Amendment of age verification policy in accordance with Mid Devon Policy
 - Amendment of the plan in order to remove the first floor area from the premises licence
 - Amendment and clarification of the SIA door supervisor conditions
 - Addition of condition to stop customers from drinking outside after 11pm. This was supplemented with an accompanying plan which highlighted the outside area and stated *'Area set aside for consumption up to 23:00 hours'*.

- 2.7 In November 2014 a minor variation application was submitted and subsequently refused. It requested the removal and in some cases replacement of conditions which it stated was to make them 'clear, proportionate and enforceable'. This was an application submitted in conjunction with advice from Tom Jones, Licensing Officer of Mid Devon District Council. The application is summarised below.

The following conditions requested to be removed:

- *SIA registered door supervisors will be employed at the premises from 23:30 hrs to the close of the premises on Fridays and Saturdays. This will include Christmas Eve and New Year's Eve.*
- *The licensed area will be marked with a permanent red line (in relation to the outside are)*
- *No customers will be permitted to take open containers of alcoholic or soft drinks from the building after 23:00 hrs.*
- *The only drinks permitted outside will be served in polycarbonate glasses and no bottles will be served outside.*
- *The outside furniture will provide a maximum of 12 covers and will be of the type where the seats are attached to the tables.*
- *All of the outside furniture will be removed from the area by 23:00 Monday to Sunday.*

The following conditions to be added:

- *SIA registered door supervisors on duty at the premises from 23:00 hrs to the close of the premises on Fridays, Saturdays, Christmas Eve and New Year's Eve.*
- *All drinks will be provided to the customer in plastic or paper containers after 23.00 hours until close of business that day.*
- *All tables and chairs will be removed from the area marked on the plan as 'additional seating area' by 23:00 hours Monday to Sunday*

- 2.8 The decision to refuse this minor variation was essentially a result of objections from the Police and Environmental Health which questioned the impact of allowing consumption outside the premises after 23:00 hours in an undefined area.

- 2.9 It is important to note that the decision to refuse this minor variation application has no bearing on the current application to review the premises licence. Each application must be judged on its own merits and the minor variation process operates under a specific set of criteria which is different to other licensing decisions. Firstly, the test is a strict one - where there is any doubt as to the possible effect of any part of the variation on the licensing objectives the licensing authority has no choice but to refuse the application in its entirety. Secondly, the decision is one delegated to officers.

3.0 REVIEW APPLICATION SUBMITTED BY DEVON AND CORNWALL POLICE

- 3.1 The application to review was received by the Licensing Authority on 10 December 2014. It included some supporting documents (referenced as Appendix A – F) and all of this is attached as Annexe 3. The review states that it relates to the following licensing objectives:

- the prevention of crime and disorder
 - public safety
 - the prevention of public nuisance
- 3.2 As part of the supporting documents are statements from Jane Alford-Mole (Inspector, Devon & Cornwall Police) and Lesley Carlo (Licensing Officer, Devon & Cornwall Police). Parts of both of these contain information on what the review is essentially requesting. For ease they are reproduced below.
- 3.3 Jane Alford-Mole: *'I would ask that with any review consideration is given that Mr Babolhavaeji has conditions placed on him that the premises close at midnight. I am concerned that during the Winter months patrons will mainly stay inside due to the cold and rain but again in the Spring and Summer, persons will be outside and the area outside will become crowded again and unmanageable. A roped area would be suitable for the Winter months'.*
- 3.4 Lesley Carlo: *'I would therefore encourage the Committee to consider a reduction in the licensed hours at this venue and consider a condition that increases the number of doorstaff at Tomato, with doorstaff starting earlier in the evening to monitor customers entering the venue. This would restrict the entry to persons who were drunk which in turn would have a positive effect on the licensing objectives'.*
- 3.5 Alongside the application to review the Police provided a spreadsheet which contained 57 points documenting visits and communications they have had with the premises since August 2013. These were only in summary form and documents in support of this spreadsheet (i.e. L10 police licensing inspection reports) were received by the Licensing Authority on 6 January 2015 and subsequently forwarded to the licence holder, Mr Babolhavaeji, and his legal representative on 7 January 2015. This is an important evidential bundle as it is in essence the 'meat on the bone'. They are circulated to members of the sub-committee as Annexe 4 to this report in order for them to be examined.

4.0 RESPONSIBLE AUTHORITIES

- 4.1 The application to review is copied to all of the responsible authorities by the applicant and they may make representations.
- 4.2 No representations were received from other responsible authorities.

5.0 OTHER PERSONS

- 5.1 The Licensing Act allows 'other persons' to make representations provided they are relevant to one or more of the licensing objectives. Representations may be positive or negative in that they can either be in support of the application to review or alternatively, in support of the premises subject of the review.
- 5.2 The Licensing Authority received eight positive representations in support of the premises. These are attached as Annexes 5 – 12.
- 5.3 They essentially request that the licence times are not changed. Amongst them, they go on to state how the premises in their view is working to promote the licensing objectives.
- 5.4 Some of the representations mention the closing time for Tomato Café / Bar alongside Remedies. This is another premises in Tiverton which is located on Gold Street. For the benefit of the sub-committee these premises have the same closing times on Friday and

Saturday. For both, the sale of alcohol must stop at 02:30 and the premises must be shut by 03:00.

6.0 LICENCE-HOLDER RESPONSE

- 6.1 The licence holder's legal representative has responded to the application on his behalf and this is attached at Annexe 13.
- 6.2 It provides a comment in response to each of the 57 points raised by the Police in the spreadsheet which accompanied the application to review. It goes on to state, amongst other things, that there is no credible reason for the Police to seek closure of the premises at midnight, that the premises licence holder has taken steps to promote the licensing objectives and that the licence needs to be changed so it is practical and understandable.
- 6.3 Further comments will be provided by the licence holder's legal representative and these will be circulated to the sub-committee and the Police once they are received.

7.0 LICENSING POLICY

- 7.1 The Licensing Act requires the Council as the Licensing Authority to formally adopt a policy setting out how it will deal with its duties under the Act. That policy must be reviewed every five years and this Council formally adopted the current policy on 18 December 2013 and it came into effect 7 January 2014.
- 7.2 Members must have regard to the policy when making their decision. A copy will be available at the hearing and it is also available on the Council's website here: <http://www.middevon.gov.uk/CHttpHandler.ashx?id=21330&p=0>. It contains the following pieces of information.
- 7.3 The Licensing Authority has a duty to carry out its licensing functions with the aim of promoting the four licensing objectives. (Paragraph 3.1)
- 7.4 The overriding principle adopted by this Authority will be that each application will be determined on its merits. (Paragraph 5.3.1)
- 7.5 The central purpose of the licensing function is to promote the licensing objectives through the effective regulation of licensed premises, qualifying clubs and temporary events. The Authority is keen to foster a safe and vibrant leisure economy and will work with applicants and licence holders to encourage and sustain well managed premises which make a positive contribution to the community. The Authority will expect applicants and licence holders to demonstrate that they have given thought to and have in place adequate measures to ensure that the operation of their premises will not have an adverse effect on the quality of life of persons living and/or working in the vicinity of the premises. (Paragraph 4.1.4)
- 7.6 Any application for a review should be treated seriously. Responsible authorities will aim to give licensees early warning of any concerns identified at a premises, and talk to the licence or certificate holder to establish whether there are any steps they may be willing to take to rectify the situation. (Paragraph 9.2.2)
- 7.7 When considering a review of a premises licence or club premises certificate, the Authority will expect the applicants for the review to provide evidence of infringements of licensing regulations, failure to comply with licence conditions and/or of failure to promote the licensing objectives. (Paragraph 9.2.4)

- 7.8 Following a review, the Authority will focus any remedial action directly on the concerns identified in the representations. In all cases, action will be appropriate, reasonable and proportionate to the nature of the problems giving rise to the review. (Paragraph 9.2.5)

8.0 GOVERNMENT GUIDANCE

- 8.1 Licensing authorities must also have regard to the Government Guidance issued under Section 182 of the Licensing Act and the current version is that which was issued by the Home Office in October 2014. A copy will be available at the hearing and it can also be viewed here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363262/GuidanceS182web.pdf. It includes the following:

- 8.2 In their role as a responsible authority, the police are an essential source of advice and information on the impact and potential impact of licensable activities, particularly on the crime and disorder objective. The police have a key role in managing the night-time economy and should have good working relationships with those operating in their local area. The police should be the licensing authority's main source of advice on matters relating to the promotion of the crime and disorder licensing objective, but may also be able to make relevant representations with regard to the other licensing objectives if they have evidence to support such representations. The licensing authority should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives. However, it remains incumbent on the police to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing. (Paragraph 9.12)
- 8.3 Where authorised persons and responsible authorities have concerns about problems identified at premises, it is good practice for them to give licence holders early warning of their concerns and the need for improvement, and where possible they should advise the licence or certificate holder of the steps they need to take to address those concerns. A failure by the holder to respond to such warnings is expected to lead to a decision to apply for a review. (Paragraph 11.10)

9.0 DETERMINATION

- 9.1 The procedure that will be followed at the hearing is attached at Annexe 14.
- 9.2 Government Guidance issued under Section 182 of the Licensing Act states:
- 9.3 The authority's determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve. (Paragraph 9.42)
- 9.4 The licensing authority may decide that the review does not require it to take any further steps appropriate to promote the licensing objectives. In addition, there is nothing to prevent a licensing authority issuing an informal warning to the licence holder and/or to recommend improvement within a particular period of time. It is expected that licensing authorities will regard such informal warnings as an important mechanism for ensuring that the licensing objectives are effectively promoted and that warnings should be issued in writing to the licence holder. (Paragraph 11.17)
- 9.5 However, where responsible authorities such as the police or environmental health officers have already issued warnings requiring improvement – either orally or in writing – that have failed as part of their own stepped approach to address concerns, licensing

authorities should not merely repeat that approach and should take this into account when considering what further action is appropriate. (Paragraph 11.18)

9.6 Where the licensing authority considers that action under its statutory powers is appropriate, it may take any of the following steps:

- modify the conditions of the premises licence (which includes adding new conditions or any alteration or omission of an existing condition), for example, by reducing the hours of opening or by requiring door supervisors at particular times;
- exclude a licensable activity from the scope of the licence, for example, to exclude the performance of live music or playing of recorded music (where it is not within the incidental live and recorded music exemption);
- remove the designated premises supervisor, for example, because they consider that the problems are the result of poor management;
- suspend the licence for a period not exceeding three months;
- revoke the licence. (Paragraph 11.19)

9.7 In deciding which of these powers to invoke, it is expected that licensing authorities should so far as possible seek to establish the cause or causes of the concerns that the representations identify. The remedial action taken should generally be directed at these causes and should always be no more than an appropriate and proportionate response. (Paragraph 11.20).

9.8 Licensing authorities should also note that modifications of conditions and exclusions of licensable activities may be imposed either permanently or for a temporary period of up to three months. Temporary changes or suspension of the licence for up to three months could impact on the business holding the licence financially and would only be expected to be pursued as an appropriate means of promoting the licensing objectives. So, for instance, a licence could be suspended for a weekend as a means of deterring the holder from allowing the problems that gave rise to the review to happen again. However, it will always be important that any detrimental financial impact that may result from a licensing authority's decision is appropriate and proportionate to the promotion of the licensing objectives. But where premises are found to be trading irresponsibly, the licensing authority should not hesitate, where appropriate to do so, to take tough action to tackle the problems at the premises and, where other measures are deemed insufficient, to revoke the licence. (Paragraph 11.23)

9.9 Conditions can only be attached to a premises licence if they are considered appropriate for the promotion of the licensing objectives. If consideration is being given to amending or attaching conditions, the following extract of Section 182 guidance must be taken in to account.

9.10 The use of wording such as “must”, “shall” and “will” is encouraged. Licence conditions:

- must be appropriate for the promotion of the licensing objectives;
- must be precise and enforceable;
- must be unambiguous and clear in what they intend to achieve;

- should not duplicate other statutory requirements or other duties or responsibilities placed on the employer by other legislation;
- must be tailored to the individual type, location and characteristics of the premises and events concerned;
- should not be standardised and may be unlawful when it cannot be demonstrated that they are appropriate for the promotion of the licensing objectives in an individual case;
- should not replicate offences set out in the 2003 Act or other legislation;
- should be proportionate, justifiable and be capable of being met, (for example, whilst beer glasses may be available in toughened glass, wine glasses may not);
- cannot seek to manage the behaviour of customers once they are beyond the direct management of the licence holder and their staff, but may impact on the behaviour of customers in the immediate vicinity of the premises or as they enter or leave; and
- should be written in a prescriptive format. (Paragraph 1.16)

10.0 ADDITIONAL INFORMATION

10.1 The licensing authority has sent the applicant, licence holder's legal representative and all of those who have made representations a notice of hearing. As part of this notice the licensing authority may specify any particular points which it requires clarification on for the hearing.

10.2 In this case, the following was requested from the Police:

Any additional information / evidence you are able to add which is in support of the relevant points that you have already made in your representation. It would be useful if you could also state clearly what specific conditions / amendments you wish to see to the premises licence.

10.3 The following was requested of the licence holder's legal representative:

Any additional information / evidence you are able to add which is in support of the relevant points that you have already made in your representation. You have mentioned in your response that the licence needs to be changed so that it is practical and understandable. It would be useful if you could state clearly what specific conditions / amendments you wish to see to the premises licence in order to achieve this.

11.0 TIMESCALE

11.1 If Members are unable to make a decision at the conclusion of the hearing they have a further five working days to come to a decision. Once that decision has been formally notified to all parties to the hearing they have 21 days in which to appeal to the Magistrates' Court

11.2 The determination will not take effect until the end of the period given for appealing against the decision, or, if the decision is appealed against, until the appeal is disposed of.

12.0 CIRCULATION OF REPORT

- 12.1 This report and all of its annexes have been circulated hard copy to the applicant, the licence holder, the licence holder's legal representative and members of the sub-committee.
- 12.2 Other parties who have made representations have been sent a hard copy of the report and Annexe 14 (procedure for hearings). They can access the additional Annexes at the following web page: <http://www.middevon.gov.uk/index.aspx?articleid=5482>.

Contact for any more information	Tom Keating (01884) 244618 Lead Licensing Officer
Background Papers	MDDC Licensing Policy & S.182 Guidance
File Reference	Licensing/reviews/Tomato
Circulation of the Report	Premises licence holder Review Applicant Any other Persons who made representations