

Gloucester City Council

Meeting:	Licensing Sub Committee	Date:	22 April 2013
Subject:	Application Under Section 17 of the Licensing Act 2003 by WM Morrison Supermarkets Ltd in respect of Morrisons, Metz Way, Gloucester		
Report Of:	Corporate Director of Services and Neighbourhoods		
Wards Affected:	Kingsholm & Wotton		
Contact Officer:	Rebecca Tuck – Licensing and Enforcement Officer		
	Email: Rebecca.Tuck@gloucester.gov.uk	Tel: 396678	
Appendices:	1. Copy of application from WM Morrison Supermarkets Limited		
	2. Plan showing layout of premises		
	3. Map showing location of premises		
	4. Copy of representation from Gloucestershire Constabulary		
	5. Morrisons' response to undertake security to a certain level during a trial period whilst risk assessment is carried out.		
	6. Procedure for Licensing Sub Committee		
	7. List of mandatory conditions		
Reference No.	ES21156		

FOR GENERAL RELEASE

1.0 Purpose of Report

1.1 To outline to Members an application made by WM Morrison Supermarkets Ltd in respect of Morrisons, Metz Way, Gloucester under Section 17 of the Licensing Act 2003. The application is for the retail sale of alcohol (off sales only) Monday to Sunday (inc) from 06:00 to Midnight.

2.0 Recommendations

2.1 Having considered the application, any relevant representations, the legislative provisions, the Council's Statement of Licensing Policy and the Home Secretary's Guidance, Members have the following options as considered appropriate to promote the Licensing Objectives.

- (a) To accept the application and attach conditions as consistent with the operating schedule.
- (b) To accept the application and modify the conditions of the licence which includes altering, omitting or adding new conditions.
- (c) To reject the whole, or part of the application.

2.2 The Licensing Objectives are :-

- (a) The prevention of crime and disorder
- (b) Public safety
- (c) The prevention of public nuisance
- (d) The protection of children from harm

3.0 Background

3.1 Members are advised that when considering an application for a new premises licence the following options are available to them by virtue of the Licensing Act 2003, Part 3, section 18, paragraphs 3 and 4:

- (3) *Where relevant representations are made, the authority must –*
 - (a) *Hold a hearing to consider them, unless the authority, the applicant and each person who has made such representations agree that a hearing is unnecessary, and*
 - (b) *Having regard to the representations, take such of the steps mentioned in subsection (4) (if any) as it considers appropriate for the promotion of the licensing objectives.*
- (4) *The steps are –*
 - (a) *To grant the licence subject to:-*
 - (i) *The conditions mentioned in subsection (2)(a) modified to such extent as the authority considers appropriate for the promotion of the licensing objectives; and*
 - (ii) *Any conditions which must under sections 19, 20 or 21 be included in the licence*
 - (b) *To exclude from the scope of the licence 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*

And for this purpose the conditions of the licence are modified if any of them is altered or omitted or any new condition is added.

If none of these steps are required the application must be granted.

3.2 Members should note that this application has policy implications as detailed in section 6 of this report.

3.3 Members are reminded that all applications must be considered on their own merits, and that findings on issues of fact should be on the balance of probability.

4.0 The Application

- 4.1 This is an application for a new premises licence made in accordance with section 17 of the Licensing Act 2003. The application was received by the licensing team on 26 February 2013, from WM Morrison Supermarkets Ltd, Hilmore House, Gain Lane, Bradford BD3 7DL, and was advertised on the premises in accordance with the regulations. The newspaper advert was published in the Gloucester Citizen on 1st March 2013. A copy of the application is attached as **Appendix 1**.
- 4.2 A plan showing the layout of the premises is attached at **Appendix 2**. **Appendix 3** is a plan showing the location of Morrisons. Members are respectfully advised to familiarise themselves with the area concerned.
- 4.3 There are no planning restrictions in relation to this application.
- 4.4 The application concerns the proposal to make provision for the retail sale of alcohol Monday to Sunday (inc) from 06:00 to Midnight.
- 4.5 The applicant has set out in the operating schedule the measures proposed to be taken to promote the four licensing objectives if the application is granted the measures are:-

The prevention of crime and disorder

1. All staff will receive suitable training (including refresher training) in relation to the proof of age "Challenge 25" scheme to be applied on the premises. The following forms of Identification are acceptable; Photo Driving Licence, Passport, Proof of Age Standards Scheme (PASS) Card and any other locally or nationally approved form of identification.
2. CCTV shall be provided on the premises and shall be kept in good working order.
3. All checkout operators will operate a refusal log.
4. The premises licence holder will continuously risk assess the need for SIA guards and act accordingly.

Public safety

The premises licence holder undertakes ongoing risk assessments in order to comply with Health & Safety legislation.

The prevention of public nuisance

The premises are responsibly managed and supervised. No additional measures are believed necessary.

The protection of children from harm

All staff will receive suitable training (including refresher training) in relation to the proof of age "Challenge 25" scheme to be applied on the premises. The following forms of identification are acceptable; Photo Driving Licence, Passport, Proof of Age Standards Scheme (PASS) Card and any other locally or nationally approved form of identification.

Till prompts are in use at the store.

- 4.6 The proposed Designated Premises Supervisor for the premises is Kelly Nichols who holds a personal licence number BD/PER2277 issued by Bradford Council.

5.0 Representations

- 5.1 A representation has been received from a responsible authority, namely, Gloucestershire Constabulary. This is attached as **Appendix 4** of this report. Members should be aware that prior to the end of the representation period the Police and the applicant were in discussions with regard to the recommended security level for this store should a licence be granted. Unfortunately an agreement could not be reached and the Police submitted their representation on 21 March 2013.
- 5.2 The Police representation seeks the following levels of security in order to promote the Crime & Disorder objective:

Opening time to 09:00	A minimum of one Security Guard
09:00 to Midday	A minimum of two Security Guards
Midday to Close	A minimum of three Security Guards

The representation goes on to say the Constabulary understands that Morrisons do not wish to have security levels set by condition, so will offer to accept an undertaking for these levels of security to be supplied for the first 3 months while the exact level of crime is determined and while Morrisons undertake their risk-assessment.

- 5.3 In response to the security levels set out above, and attached as **Appendix 5** of this report Morrisons through their legal representative proposed the following undertaking for a 3 month period:

Morrisons to carry out a risk assessment as to the need for SIA guards.

A minimum of one security guard to be on duty Monday to Sunday at times that the risk assessment dictates.

The security guard will be supported by the regional security officer working with the store and loss prevention specialists. Morrisons will keep the situation under constant review and increase the number of guards as and when the risk assessment dictates.

Morrisons response goes on to state:

Please note that if this is not acceptable and the matter proceeds to a hearing the above offer to provide an undertaking is withdrawn. As previously advised it is not usual for Morrisons to have conditions/undertakings relating to the requirements of guarding.

5.4 The Constabulary's representation concludes:

The Constabulary is not satisfied that the crime & disorder, nuisance and protection of children from harm issues have been properly addressed by Morrisons either in the application or during subsequent discussions.

Without appropriate levels of security, the Grant of this application will, in the view of the Constabulary, lead only to an unacceptable high level of Crime & Disorder, Public Nuisance (both on and off the premises) and increased risk of harm to children.

In addition extra responsibility would fall on the Constabulary as it would bear the burden for investigating avoidable thefts. This, along with stolen goods flowing into the local area would be to the detriment of the local community.

This application is, therefore, opposed by the Constabulary on the grounds related above.

5.5 No representations have been received by any other of the responsible authorities or other persons under the act in relation to this application.

5.6 The applicant and the responsible authority (Gloucestershire Constabulary) have been given a Notice of Hearing in accordance with the Licensing Act 2003 (Hearings) Regulations 2005.

6.0 The Licensing Policy Statement and Guidance

6.1 Sections 3, 4, 5 and 6 of Gloucester City Council's Licensing Policy Statement outline the authority's policy with regard to the licensing objectives. Section 7 refers specifically to licensing hours.

6.2 The relevant parts of the Home Office guidance (amended October 2012) for this application are Chapter 2 on the four licensing objectives, Chapter 8 on applications for premises licences, Chapter 9 on determining applications and Chapter 10 conditions attached to premises licence.

6.3 Paragraph 9.11 deals with the role of responsible authorities and states that "Responsible authorities under the 2003 Act are automatically notified of all new applications. Whilst all responsible authorities may make representations regarding applications for licences and club premises certificates and full variation

applications, it is the responsibility of each responsible authority to determine when they have appropriate grounds to do so.

- 6.4 Paragraph 9.12 deals with representations from the Police and states that “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 regards 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 scrutiny to which they would be subject at a hearing.
- 6.5 Paragraphs 10.1 to 10.13 deal with the attaching of conditions to licences and states that only appropriate, proportionate conditions, which promote the licensing objectives, should be attached to the licence if it is granted. The Licensing Authority may then only impose such conditions as are appropriate to promote the licensing objectives arising out of the consideration of the representations. If other existing law already places certain statutory responsibilities on an operator of a premises it cannot be appropriate to impose the same or similar duties as conditions.
- 6.6 Paragraph 10.13 of the Guidance states that “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.
- 6.7 Paragraph 10.2 states that “The courts have made it clear that it is particularly important that conditions which are imprecise or difficult for a licence holder to observe should be avoided. Failure to comply with any conditions attached to a licence or certificate is a criminal offence, which on conviction would be punishable by a fine of up to £20,000 or up to six months imprisonment or both.”

7.0 Conclusions

- 7.1 Members should be aware of a case decided in the Court of Appeal. Daniel Thwaites v Wirral Borough Magistrates Court [2008] EWHC 838 (Admin) concerned an appeal against a decision by the Magistrates to impose restrictions on the hours of operation of a licensed premises without proper evidence and by giving their own views excessive weight. The resulting decision that it was necessary to do so in order to promote the licensing objectives was ruled unlawful and the decision was quashed. The wording of the Licensing Act 2003 has since been amended as set out at paragraph 3.1 above so that Members must now decide the steps to be taken that are “appropriate” for the promotion of the licensing objectives but the courts have not yet been called upon to explain the implications of substituting the word “appropriate” for “necessary” in the legislation.

7.2 Members should consider the relevant facts regarding the application, the guidance and representation received and make a decision in accordance with the options outlined in paragraph 2.1 of this report.

8.0 Financial Implications

8.1 There are no financial implications relating to this report.

(Financial Services have been consulted in the preparation this report.)

9.0 Legal Implications

9.1 The Licensing Sub Committee is asked to consider an application made under Section 17 for a premises licence to be determined under Section 18.

9.2 To consider the application, the Sub-Committee must be satisfied:

- The application is properly made.
- The applicant has given proper notice.
- The applicant has satisfied the advertising requirements.

9.3 The four licensing objectives are set out in paragraph 2.2 of the report and each should be considered of equal importance.

9.4 The Sub-Committee must, having regard to the application and any relevant representations, decide on any of the options set out in the report at paragraph 2.1(a) – (c).

9.5 The Sub-Committee has the power to adjourn and carry forward the hearing to additional specified dates.

9.6 For the purposes of determining an application, a “relevant representation” means a representation which:

- a) Is relevant to one or more of the licensing objectives.
- b) Is made by a responsible authority or other person within the prescribed period.
- c) Has not been withdrawn
- d) If having been made by an other person (who is not a responsible authority), that they are not in the opinion of the Licensing Authority frivolous or vexatious.

9.7 In deciding what action, if any, it should take, the Sub-Committee members must direct their minds to the causes and concerns the relevant representations identify. Any action should generally be directed to these causes and should always be no more than is an appropriate and proportionate response based on the evidence produced to the Sub-Committee. Any detrimental financial impact on the applicant of the Sub-Committees decision must be appropriate and proportionate. The Sub-Committee is required to have regard to the Home Office guidance when making its decision. However, the guidance is not legally binding and it does not cover every possible situation, so long as the guidance has been properly and carefully

understood, the Sub-Committee may depart from it if they have reasons to do so. Full reasons must be given if this is the case.

- 9.8 Following the case of *Daniel Thwaites v Wirral Borough Magistrates' Court* 2008, referred to in paragraph 7.1 of the report the Sub-Committee needs to avoid:
- a) Speculating of what might happen in the absence of evidence that harm would or could happen.
 - b) Not paying attention to Home Office guidance where failing to follow it requires good reasons to be given.
 - c) Imposing conditions that do not promote the licensing objectives.
- 9.9 There will inevitably be speculation as to whether or not the licensing objectives will be met by the licence conditions. Continued monitoring and the gathering of evidence allows for response planning and presents an opportunity for responsible authorities or other persons to make representations that could lead to a Premises Licence Review under section 51 of the Act.
- 9.10 Where the Sub-Committee determines an application it must notify the determination and reasons for making it to:
- a) the applicant
 - b) the Police, having made relevant representations
- 9.11 The Sub-Committee has its own procedure for determining applications that are attached to the report as Appendix 6.
- 9.12 In considering this application, the Sub-Committee is solely performing the role of Licensing Authority. The Sub-Committee sits in a quasi-judicial capacity and must act impartially. It must offer a fair and unbiased hearing of the application. The Sub-Committee needs to disregard the wider Council objectives and other statutory roles and must direct themselves to making a determination solely based on the licensing law, Home Office guidance and Council's Statement of Licensing Policy.
- 9.13 As a quasi-judicial body, the Sub-Committee is required to consider the application on its merits. It must take into account only relevant factors and ignore irrelevant factors. The decision must be based on evidence, that is to say material, which tends logically to show the existence or non-existence of relevant facts, or the likelihood or unlikelihood of the occurrence of some future event, the occurrence of which would be relevant.
- 9.14 Under the Human Rights Act 1998, the Sub-Committee needs to consider the balance between the rights of the applicant and those making representations to the application when making their decision.
- 9.15 The Sub-Committee has a duty under Section 17 of the Crime and Disorder Act 1998 when making its decision to do all it can to prevent crime and disorder in the City.
- 9.16 If the Sub-Committee was to grant the licence it would be subject to mandatory conditions required by the act. A copy of the mandatory conditions are attached at Appendix 7.

9.17 The responsible Authority and the applicant have the right to appeal the Sub-Committee's decision the Magistrates' Court within a period of 21 days beginning with the day on which they were notified of the decision to be appealed against.

(Legal Services have been consulted in the preparation this report.)

10.0 Risk & Opportunity Management Implications

10.1 There is a right of appeal to the Magistrates Court for both the applicant and all interested parties. Costs may be awarded against the Council on successful appeal if the Sub Committee has not acted reasonably in reaching its decision. In the case of Birch House Business Centre Ltd v Denbighshire County Council (8th December 2010) District Judge Shaw awarded costs in excess of £20,000 against the local authority for not scrutinising with greater care evidence presented to it.

11.0 People Impact Assessment (PIA):

11.1 The application was advertised in accordance with the regulations allowing for any concerns to be registered by interested parties.

11.2 The PIA Screening Stage was completed and did not identify any potential or actual negative impact, therefore a full PIA was not required.

12.0 Other Corporate Implications

Community Safety

12.1 The four licensing objectives of the Licensing Act 2003 are designed to support community safety and are dealt with in the body of the report.

Sustainability

12.2 As above – dealt with in the body of the report.

Staffing & Trade Union

12.3 No comments.

Background Documents: Gloucester City Council Licensing Hearing Procedure

Published Papers: Licensing Act 2003
Licensing Act 2003 (Hearings) Regulations 2005 Gloucester City Council Licensing Policy Statement Home Secretary (Home Office) Guidance issued under section 182 of the Licensing Act 2003 (April 2012)
Daniel Thwaites v Wirral Borough Magistrates Court (2008) EWHC 838 (Admin)