



REPORT OF:	HEAD OF ENVIRONMENTAL SERVICES
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TO:	LICENSING & REGULATORY COMMITTEE
DATE:	14 APRIL 2004

AGENDA ITEM NO:	5	WARD(S) AFFECTED:	REIGATE HILL
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SUBJECT:	APPLICATION FOR SEX ESTABLISHMENT LICENCE.
PURPOSE OF THE REPORT:	TO DETERMINE THE APPLICATION FOR A SEX ESTABLISHMENT LICENCE FOR THE SHOP TRADING AS TABOO INTERNATIONAL, 2 THE FAÇADE, HOLMESDALE ROAD, REIGATE.
RECOMMENDATIONS: 1. That the Committee determine the application.	

Background

- Under Part 2 section 2 of the Local Government (Miscellaneous Provisions) Act 1982 ("the Act") a local authority may resolve to adopt Schedule 3 of the Act ("the schedule") to control the licensing of sex establishments. The Council did so on 11 November 1982. [Minute 49, page 530].
- An application for grant of a sex establishment licence was made by Mrs S I L Glanville on 15.1.04 for the premises to be used as a sex shop. The trading hours requested for the shop are 9.30am–6.00pm on Monday–Thursday and Saturday; 9.30am–8.00pm on Friday.
- The shop opened on 28 February 2004 and does not require to be licensed in its current state as the sex articles sold do not consist "to a significant degree" of the business. The level of degree is for the Council to determine and generally "significant" will mean more than 10% of the total area used for the display of goods for sale. In this case officers have permitted a display area for the sex articles which is 10% of the total display area. The definition of sex articles is given in paragraph 24.

Factors for Consideration

- Paragraphs 10(7)-(11) of the Schedule requires the applicant to place a public notice advertising the application in a local newspaper and to display a notice of the application for renewal on or near the premises in a place

where it can be conveniently read by the public. Officers are satisfied that these requirements have been met.

5. A location plan of the premises is attached at Annex 1. The plan also shows schools and churches referred to in objection letters at paragraphs 11 and 12 below.
6. Holmesdale Road is on the route of the "Walking Bus" for approximately 12-18 children who walk to and from Micklefield School in Somers Road. 2 The Façade is in the catchment area for Holmesdale School and Reigate Priory School.
7. Objectors have referred to Holmesdale Road being a residential area. However, the part of Holmesdale Road where Taboo International is situated is in the Holmesdale Road Area for Small Businesses as identified in the adopted Borough Local Plan. A locality plan showing the Area for Small Businesses, Town Centre Small Business Area and Retail Warehouse Area is attached at Annex 2.
8. Annex 3 shows the use of premises in the vicinity of 2 The Façade.
9. A letter has been received (Annex 4) in support of granting a licence. The writer considers the location of the shop is inappropriate but would prefer the business to be licensed so that the Council could impose conditions.
10. The applicant has forwarded 47 letters of support with identical text. The letters have been individually signed and an example is attached at Annex 5. The original letters are held by Licensing Officers and are available for inspection. In addition a petition has been provided by the applicant with 57 names and addresses which is attached at Annex 6.
11. 173 letters of objection have been received from residents of the Borough. In addition 3 petitions have been received. 289 names and addresses are given on the petitions. The majority of the objectors live in Reigate although 3 letters did not include the address of the writer. The letters and petitions are attached at Annex 7. Where requested by the objectors, their names and addresses have been withheld.
12. 32 of the objectors who have written letters have also signed one or two petitions. This means that 39 names and addresses on the petitions are duplicates.
13. The schedule allows a period of 28 days after the date of application for written objections to be received and this period expired on 3.3.04. As of 1.4.04, 27 letters have been received which were out of time and one part-petition of 9 names, and one petition of 126 names. These have not been counted in paragraph 11 above. A copy of the letter, attached at Annex 8, has been sent to the writer of each letter received after 3.3.04.
14. The objectors have been invited to attend the meeting and have been requested to give advance notification if they wish to address the Committee.

15. A summary of the reasons for objection to the application and causes for concern given in the letters are as follows. (The numbers in brackets indicate the number of times the objections are made in the letters.)

Objection	Whether or not it is a lawful ground for objection
The presence of children and young children nearby or passing the shop. (148) The number of people passing the shop due to the proximity of the railway station (82)	Yes. See 32 (d) (i) and (ii)
The proximity of schools in the vicinity (102)	Yes. See 32 (d) (ii)
The likelihood of undesirable people being attracted to the area. (50)	No, as this is a “moral objection” and under case law not valid.
The location of the shop being unsuitable due to the residential nature of the area. (41)	No. See para. 7.
The proximity of the tattoo and body-piercing studio which already attracts undesirable people. (30).	No, as this is a “moral objection” and under case law not valid.
The good reputation of the area being affected and becoming known as the ‘sleazy’ part of Reigate. (24)	No, as this is a “moral objection” and under case law not valid.
Unsuitable location due to the proximity of the New Blackborough Club which caters for a vulnerable section of the population. (20)	Yes. See 32(d)(ii)
Objections on ground of moral and social harm. (13)	No, as this is a “moral objection” and under case law not valid.
Nearby property being devalued. (8)	No. See para 21.
Increased parking problems in Holmesdale Road. (7)	No. (More parking spaces should be available after 1.6.04, when council Parking Attendants will enforce waiting times – following de-criminalisation of parking. Currently some of the 2-hour waiting spaces outside the shops are used by residents for long term parking which will be made available when these vehicles are moved on.)
General objection to the application, but no details given. (8)	No, as the applicant will have no idea of the case she has to answer and applying the principles of natural justice this is not a valid ground. In addition as a matter of policy the Government has, by the setting the provisions in the Act, approved the general acceptability of sex establishments. Such a general objection is not therefore valid.

16. The East Surrey Licensing Officer of Surrey Police, in a letter dated 2.2.04, advises that the Police have no objection to this application.

Resource Implications

17. An initial application fee of £1448 has been received, the balance being payable on final determination. If granted, the licensed premises would be routinely monitored and if necessary enforcement action taken by Licensing Officers.

Human Rights Assessment

18. Members are aware that the Human Rights Act 1998 came into effect on 2 October 2000 and although not mentioned in representations, it is prudent to consider relevant parts of the Act in the following manner:

- a description of the human rights issue raised;
- identifying whether, and if so which, human rights article has been engaged;
- advice as to whether the breach is nevertheless in accordance with the law and complies with any justification required under the individual articles, by reference to the article's actual restrictions;
- advice as to the "significance" or extent of the human rights issue and therefore the appropriate method for determination;
- advice as to whether a breach of the article is nevertheless proportionate (namely "no greater than is necessary"), and fair in terms of Section 14.

19. Article 6 must be complied with in all circumstances. However, Article 8 and Article 1 of the first protocol are restrictive articles. This means that even if there is a recognised breach of them, if it can be argued that one of the exceptions set out applies, the breach can be considered as justifiable. The detail of the exceptions is set out below.

20. Article 6 states, *inter alia*:

"In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

Response: It can be argued that the Licensing & Regulatory Committee is an impartial tribunal and that its proceedings are carried out in public and that the information put forward by the applicant has been put forward to and properly considered by the committee. Moreover, it can be argued that the committee procedure of allowing both the applicant and objectors to speak is such a procedure. In addition the applicant has a right of appeal albeit on limited grounds against the committee's decision to the Magistrates' Court and potentially to the Crown Court should the application be refused, and other interested parties also have rights of legal challenge.

21. Article 8 states:

“Everyone has the right to respect for his private and family life, his home and correspondence.”

Response: Paragraph 2 of Article 8, sets out the cases where breach of the article can be justified. A public authority may interfere with the right where that interference is lawful and necessary in a democratic society in the interest of:

- national security;
- public safety;
- the economic wellbeing of the country;
- preventing disorder or crime;
- protecting health or morals;
- protecting the rights and freedoms of others.

In this case it can be argued that the interference is lawful in the protection of the rights and freedoms of others, since the licensing legislation is designed to balance the interests of the general public with those of applicants.

In this case the rights of the applicant to use her premises for a lawful purpose, and those of the community that would utilise the proposed facility must be considered and balanced against those of others in the area who are affected. In this case, Members can specifically take into account the character of the locality which includes the presence of children. However, the inability to see into the premises is also a relevant consideration as children will only be aware of the use of the shop by going inside, which they are not permitted to do.

A number of residents have raised concerns that this type of use may devalue their properties. This is a legitimate concern under the Human Rights Act but members need to identify clear and specific evidence of devaluation before they can rely upon this concern to interfere with the applicant's human rights. None has been provided. In addition members should take into account that the shop is in a designated Area for Small Businesses. Therefore the value of properties in the area will already reflect the proximity of commercial premises. (See Annexes 1, 2, 3).

Members need to weigh whether any interference with either the applicant's or objectors' rights is justifiable as being lawful and necessary for one of the reasons stated above, and having taken into account the full circumstances of the application set out in the committee report and as is presented in oral evidence.

A further part of the assessment under the Human Rights Act, is to determine whether the interference of an individual's rights by reliance on a

reason in the Article is “proportionate”. This means that any interference must be no greater than is necessary.

This means, is such interference reasonable and fair in all the circumstances? Members need to seriously consider whether refusal is the only option because there are powers to impose conditions. Members therefore need to consider whether refusal is the appropriate course since conditions may overcome their concerns and refusal may be a disproportionate response.

22. Article 1 of the First Protocol states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law”.

Response: Paragraph 2 of Article 1, sets out the cases where breach of the Article can be justified. The preceding provisions, shall not, in any way impair the right of the State to enforce such laws as it deems necessary:

- to control the use of property in accordance with the general interest; or
- to secure the payment of taxes or other contributions or penalties.

In this case the first justification would apply. The peaceful enjoyment of the residential and business amenity of the area can be protected by licensing conditions.

Again the rights of the applicant and the community that would utilise the proposed facility have been considered and balanced against those of others in the area who are affected. It is felt that any interference with the latter’s rights is justifiable and being lawful and necessary for the reason stated above, and having taken into account the full circumstances of the application set out in this report.

The comments as to whether the breach of these rights is “proportionate” applies also.

In addition to the above a licence has been deemed to be a possession and therefore the applicant should not be deprived of such unless it is in the public interest to do so.

Legal Implications

23. Sex shop is defined under the Act as any premises, vessel, vehicle or stall used for a business which consists to a significant degree of selling, hiring or exchanging, lending, displaying or demonstrating sex articles or other things intended for use in connection with or for stimulating or encouraging sexual activity or acts of force or restraint which are associated with sexual activity.
24. Sex article means anything for use in connection with or for stimulating or encouraging sexual activity or acts of force or restraint which are associated

with sexual activity. A licence is not required for the sale, supply or demonstration of birth control items.

25. Paragraph 8 of Schedule 3 allows the licence to be granted or renewed on such terms and conditions and subject to such restrictions as may be so specified.

Comment - The only licensed sex shop in the borough has been granted a licence with conditions as set out in Annex 9. Members may feel that appropriate conditions may address the objectors' concerns.

26. Paragraph 9 of Schedule 3 indicates that if granted, a licence shall remain in force for twelve months or such a shorter period as the Council may determine.

27. A Council should decide whether or not the applicant is a fit and proper person to be granted a licence. This is a matter for the committee to determine in each case.

Comment - The applicant has declared that she has no convictions recorded against her. A copy of the application was sent to the Chief Officer of Police, who has raised no objections (see paragraph 16 above).

28. In the case of sex establishments there is a right of appeal against the Council's decision (paragraph 27 Schedule 3) to the Magistrates Court and thereafter to Crown Court subject to exceptions. Only those grounds set out below might be appropriate in this case.

- i) Where the number of sex establishment in the relevant locality is equal to or exceeds the number which the Council has determined is appropriate.

Comment - No such restriction was imposed when the provisions of the Act were adopted. To do so now is a change in policy and requires a decision at Full Council. This ground cannot therefore be applied in this case.

- ii) There is also no right of appeal if an application is refused on the following grounds namely that;

- a) the grant or renewal of a licence would be inappropriate because of the character of the locality; or
- b) the use to which any premises in the vicinity are put or;
- c) because of the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made

Comment - Even though there is no right of appeal in these circumstances the Council's decision can still be challenged by way of

Judicial Review, if it is not based on evidence given to the committee, or is otherwise unreasonable.

29. In law, persons should not be deprived of their ability to earn their living except for just cause and in accordance with natural justice, particularly when dealing with applications for grant of licences. Failure to comply with this requirement would leave the council's decision on the application open to challenge by way of appeal or judicial review.
30. A similar right of appeal exists against any condition attached to a licence.

Comment - Should the Committee decide to attach conditions they need to bear this right in mind. The conditions attached in Annex 9 have been previously used.

Options

31. The Council may grant the application on such terms and conditions and subject to such restrictions as may be so specified. Any licence so granted, unless cancelled or revoked, will remain in force for one year or for such shorter period specified in the licence as the Council may think fit.
32. The Council may refuse the application for the grant of the licence on one or more of the grounds set out in paragraph 12(3) of the schedule namely:-
 - (a) that the applicant is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reason;
 - (b) that if the licence were to be granted, the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant of such a licence if he made the application himself;
 - (c) that the number of sex establishments in the relevant locality (i.e. in the locality where the premises are situated) at the time the application is made is equal to or exceeds the number which the Council considers is appropriate for that locality (nil may be an appropriate number);
 - (d) that the grant of the licence would be inappropriate, having regard –
 - (i) to the character of the relevant locality; or
 - (ii) to the use to which any premises in the vicinity are put; or
 - (iii) to the layout, character or condition of the premises in respect of which the application is made.

Appeal Procedure

33. Where the right of appeal exists, an applicant may appeal to the magistrates' court within 21 days from the date on which the person was notified of the decision or became aware of the condition.

Recommendations

34. Members need to consider the Human Rights aspects of the application and decide whether they wish to decide in favour of the applicant or the objectors and to make their views known as to where they see the balance lying in relation to the Human Rights issues.
35. Members are requested to determine the application for a sex establishment licence. It is not considered appropriate for officers to make recommendations but Members' attention is drawn to the comments in the report, highlighting the particular issues Members need to consider in this case.

Background Papers: None