

## **Item: 3**

**Orkney Islands Area Licensing Board: 1 February 2023.**

**Premises Licence Review Application.**

**Report by Clerk to the Board.**

### **1. Purpose of Report**

To consider an application by Police Scotland for review of a premises licence.

### **2. Recommendations**

**It is recommended:**

#### **2.1.**

That the Board determine, in the first instance, whether the application:

**2.1.1.** Is vexatious or frivolous, or

**2.1.2.** Does not disclose any matter relevant to any ground for review,

And, if not so determined,

#### **2.2.**

That the Board hold a hearing to review the premises licence.

#### **2.3.**

That, if satisfied at the hearing that a ground for review is established, the Board determine whether to:

**2.3.1.** Issue a written warning to the licence holder;

**2.3.2.** Make a variation of the licence;

**2.3.3.** Suspend the licence for such period as the Board may determine;

**2.3.4.** Revoke the licence; or

**2.3.5.** Take no further action.

#### **2.4.**

That the Board determine whether to make a finding that any personal licence holder who is, or who was, working in the licensed premises may have acted in a manner

which was inconsistent with any of the licensing objectives and, in the event of such a finding being made, hold a hearing in order to consider further action against such personal licence holder.

### **3. Background**

#### **3.1.**

A premises licence is in place for the relevant premises. The company holding the premises licence has a sole director. The sole director holds a personal licence.

#### **3.2.**

In terms of the premises licence, there is a premises manager. A premises manager must be a personal licence holder. The premises manager for the licensed premises referred to in the application also holds a personal licence. The premises manager is legally responsible for authorising the sale of alcohol on the licensed premises. They are also obliged to ensure that the premises are run in accordance with the terms of the premises licence.

#### **3.3.**

The premises are currently licensed for on and off-sale operating hours as follows:

- On-sale operating hours, as follows:
  - 11:00 to 24:00 on Mondays to Thursdays inclusive.
  - 11:00 to 01:00 Fridays/Saturdays.
  - 10:00 to 01:00 Saturdays/Sundays.
  - 10:00 to 24:00 Sundays.
  - Terminal on-sale operating hour of 01:00 any morning for private functions; and functions held on the premises relating to a local festival or agricultural show.
  - Terminal on-sale operating hour of 01:30 any morning for weddings and in respect of the festive season on 24, 25, 26 and 31 December and 1 and 2 January each year.
- Off-sale operating hours as follows:
  - 11:00 to 22:00 Mondays to Fridays inclusive.
  - 10:00 to 22:00 Saturdays and Sundays.

#### **3.4.**

Section 63(1)(b) of the Licensing (Scotland) Act 2005 (the Act) provides that, subject to subsection (2), a person commits an offence if, outwith licensed hours, the person allows alcohol to be consumed on licensed premises.

### **3.5.**

Section 63(2)(a) of the Act provides that it is not an offence under Section 63(1)(b) for a person to allow alcohol to be consumed on licensed premises at any time within 15 minutes of the end of any period of licensed hours if the alcohol was sold during that period.

### **3.6.**

Section 63(3) of the Act provides that it is a defence for a person (the accused) charged with an offence under Section 63(1)(b) of allowing alcohol to be consumed on any licensed premises outwith licensed hours to prove that the accused, or an employee or agent of the accused, took all reasonable precautions and exercised all due diligence not to commit the offence.

## **4. Premises Licence Review Application**

### **4.1.**

Police Scotland submitted a premises licence review application dated 3 January 2023 in respect of the licensed premises. A copy of the premises licence review application shall be circulated to Board Members prior to the Meeting.

### **4.2.**

The application states that it has been made in terms of Section 36(3)(a) of the Act, that is that one or more of the conditions to which the premises licence is subject has been breached.

### **4.3.**

All premises licences are subject to a mandatory licence condition in terms of Schedule 3 to the Act which provides:

“(1) Alcohol is to be sold on the premises only in accordance with the operating plan contained in the licence.

(2) Nothing in sub-paragraph (1) is to be read as preventing or restricting the doing of anything referred to in section 63(2).”

#### **4.3.1.**

Section 63(2)(a) of the Act is referred to at section 3.5 above.

#### **4.3.2.**

There is no condition in the premises licence prohibiting the consumption of alcohol on the premises outwith the licensed hours.

#### **4.3.3.**

The operating plan sets out the licensed hours of the premises. It appears to be alleged by Police Scotland in the premises licence review application that the

mandatory condition of the licence referred to at section 4.3 above was breached and that the circumstances of the breach were that:

- At 01:30 on Sunday 11 December 2022 and at 01:18 and 01:20 on Saturday 17 December 2022, alcohol was being consumed on the premises in spite of the fact that the period of licensed hours as set out in the operating plan had ended at 01:00 and the additional period of fifteen minutes allowed for consumption in terms of Section 63(2)(a) of the Act had elapsed at 01:15.

#### **4.4.**

Notice of a premises licence review hearing was accordingly intimated to the applicant (Police Scotland) on 6 January 2023.

#### **4.5.**

On the same date, notice of a premises licence review hearing and a copy of the premises licence review application were intimated to the premises licence holder and the Licensing Standards Officer.

#### **4.6.**

Notice of the premises licence review hearing and a copy of the premises licence review application were subsequently also intimated to the premises manager on 10 January 2023.

#### **4.7.**

The Licensing Standards Officer was requested to submit a report on the premises licence review application by 18 January 2023. The Licensing Standards Officer duly submitted a report and a copy of the Licensing Standards Officer's report shall be circulated to Board Members prior to the Meeting.

#### **4.8.**

The premises licence holder and the premises manager were given an opportunity to submit responses in writing on the matter by 18 January 2023. A copy of the response submitted on behalf of the premises licence holder shall be circulated to Board Members prior to the Meeting.

#### **4.9.**

The premises licence holder and premises manager have each been requested to attend the review hearing on 1 February 2023 and have each been advised to seek independent legal advice and that they may be accompanied by a legal or other representative.

### **5. Report by Licensing Standards Officer**

With reference to section 4.7 above, the Licensing Standards Officer submitted a report on the premises licence review application by email dated 9 January 2023. The Licensing Standards Officer's report shall be circulated to Board Members prior to the Meeting.

## **6. Submission on behalf of Premises Licence Holder**

With reference to section 4.8 above, a response to the premises licence review application was received from a representative of the premises licence holder, by letter dated 18 January 2023. A copy of the response shall be circulated to Board Members prior to the Meeting.

## **7. Financial Implications**

There are no financial implications arising as a result of this report.

## **8. Legal Aspects**

### **8.1.**

In terms of Section 36(3) of the Act, the grounds for review of a premises licence are:

- (za) That, having regard to the licensing objectives, the licence holder is not a fit and proper person to be the holder of a premises licence, or
- (a) That one or more of the conditions to which the premises licence is subject has been breached, or
- (b) Any other ground relevant to one or more of the licensing objectives which are:
  - (i) Preventing crime and disorder
  - (ii) Securing public safety
  - (iii) Preventing public nuisance
  - (iv) Protecting and improving public health, and
  - (v) Protecting children and young persons from harm.

### **8.2.**

Any grounds relevant to the licensing objectives mean that there has to be a direct and material link thereto brought about through the sale of alcohol.

### **8.3.**

The Board must firstly determine whether the application is frivolous or vexatious or does not disclose any matter relevant to any ground for review. If the Board determines that the application is not vexatious or frivolous or does disclose any ground for review, then the Board must go on to hold a review hearing. If this is not so determined, the Board would not require to hold a hearing and no further action ought to be taken.

### **8.4.**

Where a review hearing is to be held, the Board must, in the case of a premises review application, give notice of the hearing to:

- (a) The applicant,
- (b) The licence holder, who must also receive a copy of the premises licence review application, and
- (c) Any Licensing Standards Officer for the area in which the premises concerned are situated.

### **8.5.**

Where a Licensing Standards Officer receives a copy of a premises licence review application, the Officer must, before the review hearing, prepare and submit to the Board a report on the application, and the Board must take the report into account at the hearing. The Licensing Standards Officer has submitted a report, and this shall be circulated to Board Members prior to the Meeting.

### **8.6.**

In terms of Section 38 of the Act, the Board may, for the purposes of the review hearing, obtain further information from such persons, and in such manner, as the Board thinks fit, and take the information into account. In particular, the Board may request the attendance at the review hearing of any person for the purpose of providing information, and the production at the review hearing by any person of any documents in that person's possession or under that person's control. The Board may take into account any information relevant to any ground for review even if it is not relevant to any circumstances alleged in the review application under consideration. For the purposes of the present review, the Board has requested the attendance at the hearing of the premises licence holder and the premises manager.

### **8.7.**

At the review hearing, the Board may, if satisfied that a ground for review is established (whether or not on the basis of any circumstances alleged in the premises licence review application) take certain steps as the Board considers necessary or appropriate for the purposes of any of the licensing objectives. Those steps are:

- (a) Issue a written warning to the premises licence holder.
- (b) Make a variation of the licence for such period as the Board may determine.
- (c) Suspend the licence for such period as the Board may determine.
- (d) Revoke the licence.
- (e) Take no further action.

#### **8.7.1.**

If the Board is satisfied that the ground noted at section 8.1 (za) above is established (that is, the fit and proper person test), the Board must revoke the licence.

## **8.8.**

Where the Board, at a review hearing, decides to take one of the steps mentioned in section 8.7 above, the Board must give notice of the decision to the holder of the premises licence and the applicant (in this case Police Scotland). Where any of the steps in section 8.7 (a) to (d) apply, the holder of the premises licence may, by notice to the Clerk of the Board, require the Board to give a statement of reasons for its decision.

## **8.9.**

If, in the course of the review hearing, the Board makes a finding that a person holding a personal licence, while working in the licensed premises to which the review hearing relates, may have acted in a manner which was inconsistent with any of the licensing objectives, then, in terms of Section 84 of the Act, the Board must hold a hearing in relation to that finding in respect of that person's personal licence. This requirement to hold a hearing only applies if the personal licence holder concerned is still working in licensed premises in the Board's area at the time of the finding.

## **8.10.**

If the Board believes that the person is working in licensed premises in the area of another licensing board, then the Board is required to give notice of its finding to the licensing board where the person is working.

## **8.11.**

At the review hearing, the Board may therefore wish to ask appropriate questions to establish which personal licence holder(s) may have been on duty when the incidents which led to the application for a premises licence review were alleged to have occurred. According to the premises licence review application, the premises manager is the holder of a personal licence and was present when Police Officers attended at the public bar of the premises at 0120 hours on 17 December 2022.

## **8.12.**

The provisions of Section 84 of the Act forge a connection between the premises licence and the behaviour of a personal licence holder by making provision for disciplinary proceedings where the review of a premises licence uncovers conduct on the part of the personal licence holder which is inconsistent with any of the licensing objectives.

## **8.13.**

At a hearing in terms of Section 84, the Board must give the personal licence holder concerned, and such other persons as the Board considers appropriate, an opportunity to be heard, and, if satisfied that it is necessary to do so for the purposes of any of the licensing objectives, the Board may then make an order:

- (a) Revoking,

- (b) Suspending for such period, not exceeding six months, as the Board considers appropriate, or
- (c) Endorsing,

the personal licence held by the licence holder concerned.

### **8.14**

Where the Licensing Board makes an order under section 8.13, the Board must give the licence holder concerned and, if different, the licensing board which issued the personal licence, notice of the order and of the reasons for making it.

### **8.15.**

In terms of Section 132 of the Act, a sanction in respect of a holder of a premises licence or holder of a personal licence will come into effect immediately. However, there is an exception whereby, on the application of an appellant, and, if satisfied on the balance of convenience that it is appropriate to do so, the Sheriff Principal may set aside a decision to suspend or revoke a premises licence pending determination of any appeal, thus permitting the premises licence holder to continue to trade in the interim.

## **9. Contact Officers**

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