

ITEM NO:6

DECISION-MAKER:	LICENSING (GENERAL) SUB-COMMITTEE		
SUBJECT:	APPLICATION FOR RENEWAL OF A SEX SHOP LICENCE – HIDDEN ASSETS, 439 MILLBROOK ROAD WEST		
DATE OF DECISION:	6 MAY 2009		
REPORT OF:	SOLICITOR TO THE COUNCIL		
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STATEMENT OF CONFIDENTIALITY

Not applicable.

SUMMARY

The Sub-Committee is requested to determine the application for renewal of a sex shop licence from Mr. Matthew Barry Caplen Smith in respect of 439 Millbrook Road West.

RECOMMENDATIONS:

- (i) For the Sub-Committee to consider the application and subsequent objection before deciding whether to grant renewal of the licence as requested by the applicant.

REASONS FOR REPORT RECOMMENDATIONS

1. One objection letter has been received from a residential address within the period of notice (See appendix 3).

CONSULTATION

2. Applicants for the renewal of a sex shop licence are required to display a notice on the premises to be licensed for 21 days and advertise in a local newspaper circulating in Southampton.
3. Applicants for the renewal of a sex shop licence are required to supply a copy of the application to the Chief Constable of Hampshire Constabulary.
4. Any person objecting to an application for the renewal of a sex shop licence shall give notice of in writing to the local authority, not later than 28 days after the date of the application.

ALTERNATIVE OPTIONS CONSIDERED AND REJECTED

5. None

DETAIL

BACKGROUND INFORMATION

6. Southampton City Council first adopted the provisions of Part II of the Local Government (Miscellaneous Provisions) Act 1982 with effect from 16th March 1983.

7. In April 1984, the Council determined the relevant localities in respect of the premises then under consideration.
8. The plans of the two areas showing the relevant localities are held by the Licensing Team at Southbrook Rise, with the first area being Kingsland Place/St. Mary Street and the second area being East Street.
9. Following High Court challenges to other local authorities' adoption of the legislation, the City Council was advised by Counsel in 1995 that it would be appropriate to readopt the provisions. The Council resolved the adoption of schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 on 10 April 1995, with the provisions coming into effect from 3 July 1995. Notices setting out the effect of the provisions were published in the Southern Daily Echo on 5 and 12 May 1995.
10. No further applications were made for sex shop or sex cinema licences until 2002, when an application was received for premises at 131 Above Bar. The Licensing and Public Safety Panel agreed to the grant of a licence in respect of those premises, subject to conditions, on 5 February 2003.
11. The Licensing and Public Safety Panel subsequently considered two applications in respect of premises in Millbrook Road West in July 2003 and resolved to grant both licences subject to conditions. An application was also granted for 103 St. Mary Street in December 2004.

THE APPLICATION AND RELEVANT LOCALITY

12. An application (attached as Appendix 2) has been received for renewal of a sex establishment licence in respect of the premises at 439 Millbrook Road West.
13. The Committee (or its predecessors) has not previously considered the issue of determining an appropriate number of sex establishments within a relevant locality which would include these premises.
14. However two such areas (not including these premises) had previously been decided by the Council, and the background information relating to this is set out above.

APPLICATION DETAILS

15. The application is for the renewal of a sex shop licence in respect of 439 Millbrook Road West. No changes to the current licence conditions are requested in this application. A copy of the application form is attached as Appendix 2 to this report.
16. The applicant is Mr. Matthew Barry Caplen Smith, of whom further details are given in the application.
17. Notice of the application was placed in the Southern Daily Echo on 26th March 2009.
18. On 24th March 2009, the Licensing Officer witnessed that the notice of the application, dated 19th March 2009, was exhibited on the front window of 439 Millbrook Road West. The applicant has confirmed that this notice was exhibited on the front window of 439 Millbrook Road West for 21 days.

19. The Licensing Officer can confirm that regular inspections of the premises have taken place throughout the past year to ensure that the licence conditions are being adhered to. No issues have been identified as a result of these inspections.

20. The applicant has been invited to attend the Sub-Committee's meeting.

PROPOSED TRADING ACTIVITIES

21. This is an application for renewal of a sex shop licence. Mr. Matthew Barry Caplen Smith has indicated he wishes to sell by retail goods including lingerie and other clothing items, videos, DVDs, magazines and other marital aids.

22. In addition, it is understood that the applicant also intends to stock and sell British Board of Film Classification (BBFC) Restricted 18 (R18) classified video recordings at the premises (such video recordings may contain pornographic images). The Video Recordings Act 1984 makes it an offence to supply an R18 classified video recording except in a licensed sex shop and also makes it an offence to supply an unclassified video recording.

23. Members should note that a sex establishment licence does not permit the sale of any goods that are prohibited in law, in particular by the Obscene Publications Act 1964.

24. Although no indication has been given in the application, it is likely that the applicant will wish to show BBFC R18 classified trailers on a television monitor within the display area. Such trailers would contain pornographic images and would be in the form of a loop (continuous) videocassette or DVD containing short clips advertising various films for sale in the premises. It would be likely that the television monitor would be sited close to the sales assistant's desk at the premises.

25. The applicant is also currently the manager of "Hidden Desires," a licensed sex shop on St. Mary Street.

26. If the Sub-Committee grant the application for renewal of the licence, it may be on such terms and conditions and subject to such restrictions as the Sub-Committee may specify.

THE LEGISLATION – DEFINITIONS

27. Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 sets out the framework for the consideration of applications for sex shop licences.

28. The legislation requires that no person shall, in any area in which the sex establishment licensing provisions have been adopted, use any premises, vehicle, vessel or stall as a sex establishment except under and in accordance with the terms of a licence granted by the appropriate authority.

29. A "sex establishment" is either a sex shop or a sex cinema. This report concerns an application for a licence to use premises as a sex shop.

30. A “sex shop” is defined by the legislation as follows: “any premises, vehicle, vessel or stall used for a business which consists to a significant degree of selling, hiring, exchanging, lending, displaying or demonstrating sex articles or other things intended for use in connection with, or for the purpose of stimulating or encouraging sexual activity or acts of force or restraint which are associated with sexual activity”.
31. A “sex article” is defined as: “anything made for use in connection with, or for the purpose of stimulating or encouraging—
- a) sexual activity; or
 - b) acts of force or restraint which are associated with sexual activity; and
 - c) to any article containing or embodying matter to be read or looked at or anything intended to be used, either alone or as one of a set, for the reproduction or manufacture of any such article; and
 - d) to any recording vision or sound, which is concerned primarily with the portrayal of, or primarily deals with or relates to, or is intended to stimulate or encourage, sexual activity or acts of force or restraint which are associated with sexual activity; or is concerned primarily with the portrayal of, or primarily deals with or relates to, genital organs, or urinary or excretory functions.”

THE LEGISLATION – NOTICES AND OBJECTORS

32. Applicants are required to display a public notice at the premises for 21 days and, in addition, publish in a local newspaper a notice inviting written objections.
33. The names and addresses of objectors must be kept confidential unless the objectors indicate otherwise.
34. The Act does not provide objectors with a right to be heard in person by the Sub-Committee. Those persons from whom valid objections have been received have been advised of the date and time of the meeting and have also been advised that they may only address the meeting at the invitation of the Sub-Committee.
35. If granted, sex shop licences are in force for one year or for such shorter periods specified in the licence as the Sub-Committee may think fit.
36. Under the Council’s current scheme of delegation, the renewal of any such licence would be a matter for the Sub-Committee.

THE LEGISLATION – APPLICATION PROCEDURE

37. Paragraph 10 of Schedule 3 to the Act requires an application to be made in writing to the appropriate authority and to state the full name of the applicant, his permanent address and his age. In the case of an application made by a body corporate or an unincorporated body, the full name of the body, the address of its registered or principal office and the full names and private address of the directors or other persons responsible for its management are required to be provided.

38. In addition, the full address of the premises must be given.
39. The applicant is required to send a copy of the application to the Chief Officer of Police within seven days of the date of the application and any objections to the application must be made in writing to the City Council not later than 28 days after the date of the application.
40. The City Council is required, before considering the application, to give notice in writing of the general terms of any objection to the applicant. The Licensing Officer has forwarded transcripts of each objection (without identifying the objector, unless consent has been given) to the applicants.
41. The Act requires that, in considering any application for the grant of a licence, the Sub-Committee shall have regard to any observations submitted to them by the Chief of Police, and any objections of which notice has been sent to them within the 28-day period referred to above.
42. The City Council is required to give an applicant an opportunity of appearing before and being heard by the Sub-Committee before the application is determined.
43. A note of the procedure that the Sub-Committee has adopted for consideration of applications of this kind is attached as Appendix 1.

THE LEGISLATION – OBJECTIONS

44. The legislation requires the Sub-Committee, in considering an application, to have regard to any observations made by the Chief of Police and to any objections of which proper notice has been given.
45. The Sub-Committee has the discretion, subject to the restrictions mentioned below, to invite objectors, who have given written notice of their objections, to address the Sub-Committee.
46. At the hearing itself the Sub-Committee has a discretion to allow objections to be heard subject to:
47.
 - a) only those objectors whose written objections have been received before the end of the 28 day period may be heard (subject to (e) below);
 - b) those objections confined to putting forward only points which are relevant to consideration of the grounds of refusal and which were contained in written objections referred to in (a) above;
 - c) if the objectors are heard this should precede the hearing afforded to the applicant and the applicant should be given the opportunity of hearing and noting what the objectors say.
 - d) The objectors and the applicant may not ask questions of each other.
 - e) The Sub-Committee may, at their discretion, consider objections or representations made out of time. Such discretion can only be exercised if the applicant has been afforded reasonable time to consider the content prior to the hearing.

48. Members are encouraged to approach this application in three steps:
- a) Identify an area of reasonably consistent character within which the premises falls, and consider this application on its own merits.
 - b) Consider whether the grant of a licence to the applicant for this use of the premises would be inappropriate given the character of that area.
 - c) Consider the location of other licensed sex shops given the area's nature and environs and the resultant effect.

THE LEGISLATION – LICENCE CONDITIONS

49. The City Council has a power under the Act to make regulations prescribing standard conditions on or subject to which sex shop licences are, in general, to be granted. The City Council has made such regulations.
50. These may include the hours of opening and closing of sex establishments, displays or advertisements on or in such establishments, the visibility of the interior of sex establishments to passers-by and any change of a sex cinema to a sex shop or vice versa. All such conditions are presumed to apply to every licence granted unless they have been expressly excluded or varied.
- A copy of the standard conditions made by the City Council appears at Appendix 4 to this report.
51. In addition, the Indecent Displays (Control) Act 1981 prohibits the public display of any indecent matter unless access is only on payment or the display is in a shop that can only be accessed by passing beyond a warning notice. No person under the age of 18 may be permitted to enter.
52. The warning notice must contain the following words: "WARNING - persons passing beyond this notice will find material on display which they may consider to be indecent. No admittance to persons under 18 years of age".
53. The applicant has indicated that they wish to continue to trade on Mondays to Saturdays between 9:00 a.m. and 8:00 p.m. on each of those days.

THE LEGISLATION – CRITERIA

54. Written reasons must be given to the applicant within seven days of the applicant requesting the information from the City Council.
55. Paragraph 12 of Schedule 3 to the Act sets out both mandatory and discretionary grounds for the refusal of an application for a licence.
56. A licence shall not be granted:
- a) to a person under the age of 18; or
 - b) to a person who has had such a licence revoked, within 12 months of that revocation; or
 - c) to a person other than a body corporate who is not resident in the United Kingdom or was not so resident throughout the period of 6 months immediately preceding the date when the application was made; or
 - d) to a body corporate which is not incorporated in the United Kingdom; or
 - e) to a person who has, within the period of 12 months immediately preceding the date when the application was made, been refused the grant

or renewal of a licence for the premises in respect of which the application is made, unless the refusal has been reversed on appeal.

57. The Sub-Committee may refuse an application for the grant of a licence on one or more of the following grounds:
58.
 - 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, renewal or transfer of such a licence if he made the application himself;
 - c) that the number of sex establishments in the relevant locality at the time the application is made is equal to or exceeds the number which the authority consider is appropriate for that locality;
 - d) that the grant or renewal 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.
59. The Act provides that nil may be an appropriate number of premises in “the relevant locality.”
60. The “relevant locality” is defined by the Act as meaning, in relation to the premises, the locality in which it is situated.
61. Although the Council has, in the past, determined appropriate numbers of sex shops for specific localities, it is considered advisable to merely deal with this application on its merits and not to embark on an additional exercise of determining a precise “relevant locality” and an appropriate number of establishments in it. Such an exercise is only recommended if after having regard to the area generally (and in accordance with paragraph 43 of this Report) it is felt that the number and / or proximity of premises may be inappropriate.
62. In assessing the application, Members should consider any objections in the light of the statutory grounds of refusal. In doing so Members may call on their own moral sense in reaching a view as to what is appropriate in any particular location.
63. Members, in determining the application, should consider each of these issues and determine whether grant or refusal is appropriate and, if so, why.
64. However, it would not be lawful to refuse the application merely because Members consider sex shops are immoral or should not be permitted. Further, there are discretionary grounds of refusal. Members have a residual discretion to grant an application despite it falling within one of these grounds, but Members should only do so in these circumstances for good reasons, which would need to be specified.

THE LEGISLATION – APPEALS

65. An applicant for the grant of a sex shop licence, whose application has been refused, may appeal within twenty-one days of the giving of written notice of the grounds of the refusal, to the Magistrates' Court.
66. However, there is no right of appeal if the refusal is on one of the mandatory grounds:
- a) applicant under 18
 - b) applicant disqualified
 - c) applicant not resident in the United Kingdom
 - d) body not incorporated in the United Kingdom
 - e) licence refused for the premises within 12 months
- unless the applicant seeks to show that the ground did not apply to him.
67. In addition there is no right of appeal against a decision by the Sub-Committee that the number of sex establishments in the relevant locality at the time the application is made is equal to or exceeds the number which the authority consider appropriate for that locality or that the grant of a licence would be inappropriate having regard to the character of the relevant locality, or to the use to which any premises in the vicinity are put, or to the layout, character or condition of the premises in respect of which the application is made.
68. Appeal against the decision of a Magistrates' Court may be made to the Crown Court.
69. Similarly, if a licence is granted, a right of appeal exists against any term, condition or restriction on or subject to which the licence is held.

FINANCIAL/RESOURCE IMPLICATIONS

Capital

70. There are no financial implications.

Revenue

71. Not applicable.

Property

72. Not applicable.

Other

73. The work involved for the licensing team in bringing this renewal to the committee is contained within existing budgets.

LEGAL IMPLICATIONS

Statutory power to undertake proposals in the report:

74. Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 sets out the City Council's power to consider and determine an application for renewal of a sex shop licence.

Other Legal Implications:

THE LEGISLATION - CRIME AND DISORDER ACT 1998

75. Section 17 of the Crime and Disorder Act 1998 places the Council under a duty to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area.

THE LEGISLATION - HUMAN RIGHTS ACT 1998

76. The Act requires UK legislation to be interpreted in a manner consistent with the European Convention on Human Rights. It is unlawful for the Council to act in a way that is incompatible (or fail to act in a way that is compatible) with the rights protected by the Act. Any action undertaken by the Council that could have an effect upon another person's Human Rights must be taken having regard to the principle of proportionality - the need to balance the rights of the individual with the rights of the community as a whole. Any action taken by the Council which affects another's rights must be no more onerous than is necessary in a democratic society. The matter set out in this report must be considered in light of the above obligations.

POLICY FRAMEWORK IMPLICATIONS

77. The decision to determine the application in the manner set out in this report is not contrary to the council's policy framework.

SUPPORTING DOCUMENTATION

Appendices

1.	Procedure for hearing the application
2.	Application for renewal of a sex shop licence for Hidden Assets, 439 Millbrook Road West, Southampton
3.	One letter of objection to the application for renewal
4.	Sex shop standard conditions

Documents In Members' Rooms

1.	None.
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Background Documents

Title of Background Paper(s)

Relevant Paragraph of the Access to Information Procedure Rules / Schedule 12A allowing document to be Exempt/Confidential (if applicable)

1.	Application for a sex shop licence	
2.	Response from Police	
3.	Objections (no consent to identification)	Paragraph 10. 4 – Categories 1 and 2

Background documents available for inspection at: Licensing Office, Southbrook Rise

FORWARD PLAN No: N/A **KEY DECISION?** N/A

WARDS/COMMUNITIES AFFECTED:	All
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