

**Licensing (Scotland) Act 2005 - Statement of Reasons
The Licensing (Procedure) (Scotland) Regulations 2007 No. 453,
Regulation 15(3) and Schedule 4**

1. Name and address of Licensing Board:
North Ayrshire Licensing Board, Cunninghame House, Irvine
2. Date of Licensing Board meeting:
18/05/15
3. Name and address of agent
For Applicant: Lanes at Largs Ltd. (the Premises Licence Holder, hereafter "PLH") Mr. Archie MacIver, Solicitor, Brunton Miller, Herbert House, 22 Herbert Street, Glasgow, G20 6NB
4. Name and address of premises (if applicable)
Currently "Lanes", proposed "Wetherspoon's" KA30 8BG (NALB Ref. 224)
5. Materials before the Board
Board's documents
<ol style="list-style-type: none"> 1. Licensing Policy Statement (adopted 19 November 2013) (hereafter "L.P.S."); 2. Application for Variation and Transfer of Premises Licence; 3. Report on Application prepared by Solicitor (Licensing); 4. Overprovision Assessment Report based on data as at 20 April 2015; 5. Supplementary Report on Application prepared by Solicitor (Licensing); 6. Plan of Largs lodged by Mr. Blair, showing licensed premises in Largs; 7. Menu for Wetherspoon's (Irvine) "Auld Brig", lodged by Mr. Blair. <p>Items 3, 4 and 5 appeared on the Agenda.</p> <p><u>Objections and Representations</u></p> <p>Written communications numbered 1 to 107 and 118 to 132 on the "List of Objectors" included with the Agenda. Objection 118 included the Alcohol Focus Scotland publication "Re-thinking alcohol licensing".</p>
6. Type of application
Application for Variation and Transfer of Premises Licence (Sections 33 and 35)
7. Names of all parties present
For Applicant: Mr. Archie MacIver, Solicitor Mr. Taylor of the Premises Licence Holder ("PLH") Ms. Helen Dumbreck, Area Manager of the PLH.
Persons making Objections or Representations:
Communication 118: Mr. Scott Blair, Advocate, and Mr. James Russell, Solicitor, James Patrick & Muir, 3 Frazer Street, Largs KA30 9HP for the parties named there ("Largs

Hospitality Providers");

Communication 26: Mr. Archie Burleigh.

The Board consisted of Councillors McNicol (Convenor), Marshall (Vice-Convenor), MacMillan, Reid, Barr, McLean and Bruce. The Board met in Council Chambers, Cunninghame House, Irvine.

Chief Inspector Brian Shaw and Sergeant Donnie McIntosh of Police Scotland were present.

The Board were accompanied by
William O'Brien (Solicitor (Licensing))
Kenzie Sharkey (Trainee Solicitor)
Chris Pollock (Licensing Administrative Officer)
Grace Cullen (Licensing Standards Officer).

8. Preliminary issues

See below

9. Summary of submissions made

See below

10. Decision(s) taken

See below

10a. Reasons for decision

See below

11. Legal powers used to come to decision

Sections 30 and 33

12. Date statement of reasons issued

01/06/15

Name of Representative of Clerk

Print Name

William O'Brien, Solicitor (Licensing)

8. Preliminary Issues

Mr. MacIver submitted that the objections and representations numbered 128 to 132 were late and should be disregarded. He made the same submission in relation to a letter from "Largs Bid", which had been delivered to the Licensing Office at around 4.30 p.m. on Friday 15 May 2015 and which he had only seen this morning.

Mr. Blair confirmed he had no issue with any of that.

The Convenor considered each letter. An objection or representation may be:

- (a) treated as 'not made' if it is lodged late (The Licensing (Procedure) (Scotland) Regulations 2007 No. 453, Reg. 10);
- (b) rejected as "frivolous or vexatious" under Section 22(4),

but otherwise the Board are obliged to have regard to it (Section 22(3)(b)), whether or not the person making it attends the Board.

In this case, the last day by which objections and representations might be made was 8 May 2015. The communications referred to had been received by the Board after then, and no explanation for the lateness was supplied.

The Convenor enquired of the Board if these particular objections should be treated as 'not made' and disregarded, commenting that these shared general themes with other objections. The Board unanimously agreed to treat these objections as 'not made', and accordingly these particular objections were not further discussed.

9. Summary of submissions made

Introduction

The Board meeting commenced at 10.00 a.m.. This was the first case on the Agenda. The Board took almost 2 hours to hear submissions, retire, return and state a decision, before moving to the next case on the Agenda at 11.54 a.m..

The PLH had requested two things of the Board:

- (a) Variation of the Licence.
- (b) Transfer, if the Board agrees to the proposed Variation.

These Applications related to the large building on Largs seafront, near the Cumberae Ferry Terminal.

Under the Licensing (Scotland) Act 1976 the whole building had held an "Entertainment Licence". When that Licence was granted the whole building was operated by a single business, and was treated as a single entity. It consisted of a bowling alley, areas for gaming machines (licensed under the Gambling Act 2005 and its predecessors) and a small bar-restaurant. At Transition the 1976 Act Licence was superseded by a Premises Licence under the Licensing (Scotland) Act 2005.

The building had since been substantially altered and was now operated by different businesses. The building runs south-to-north and is divided into three parts:

South: this will be a reduced gaming machine area, appropriately licensed under the Gambling Act 2005;

Centre: on 21 August 2013 the Board granted a Provisional Premises Licence to Co-operative Group Food Limited for an off-sales display in a supermarket in the centre of the building. That PPL was Confirmed on 13 January 2015;

North: the present Applications for Variation and Transfer related to this part.

Before the present Application form was lodged, the P.L.H. also made a Minor Variation application, which sought to vary the Layout Plan so as to reflect a substantial rearrangement of the Premises (the bowling alley was retained, but the bar-restaurant would be reduced to accommodate toilets, and the alcohol-licensed area no longer extended to the gambling area).

In discussions between the Solicitor for the PLH and the Solicitor (Licensing), it was agreed that the capacity of the Licence would be reduced from its original value of 356 customers (based on the whole building) to reflect the reduced size of the on-sales area. Accordingly the Board approached the present Applications on the basis that the existing capacity was 82 customers. The Variation proposal before the Board involved 19 individual variations, with the overall effect being to change the existing Premises to the common Wetherspoon's operation, expanding the on-sales area, replacing the area occupied by the bowling alley, and increasing on-sales capacity to 350 customers.

The individual variation requests were ("OP" means the "Operating Plan" part of the Licence):

No.	Variation
1	<i>Amend description</i>
2	<i>Amend address by deleting "Lanes"</i>
3	<i>Amend OP1 from "on-sales" to both on- and off-sales</i>
4	<i>Amend on-sales hours</i>
5	<i>Add off-sales hours</i>
6	<i>Add seasonal variations (referring to Board "Festive Period" policy)</i>
7	<i>Amend OP so Premises will not have restaurant facilities</i>
8	<i>Amend OP so Premises will have bar meal facilities</i>
9	<i>Amend OP so Premises will cater for Club or other group meetings</i>
10	<i>Amend OP so Premises will not have dance facilities</i>
11	<i>Amend OP so Premises will not cater for indoor or outdoor sports</i>
12	<i>Amend OP so Premises will have televised sport</i>
13	<i>Add to OP early opening to serve food but no alcohol</i>
14	<i>Amend OP so as to delete "other activities"</i>
15	<i>Amend OP as to terms of under-18 access</i>
16	<i>Amend OP to increase under-18 access to 22.00</i>
17	<i>Amend OP as to parts of premises for under-18 access</i>
18	<i>Alter capacity</i>
19	<i>Substitute revised Layout Plan</i>

Submissions

(a) For Applicant

Mr. MacIver said that this was a proposal to convert part of the existing licensed premises into a traditional Public House.

Wetherspoons had about 60 outlets in Scotland, and in the Board's area had the "Auld Brig" in Irvine and the "Salt Cot" in Saltcoats. They did not cause any trouble and he commented that there was no Police objection to the Largs proposal. The Premises would serve food and drink in a safe environment. There would be no live music. In relation to the question on the Operating Plan about providing 'indoor/outdoor sports', this would be TV and sport. Wetherspoons did not subscribe to particular sporting events, but instead had TVs on with muted noise.

The company would invest £1.4 million and create 50 jobs.

Turning to the objections, these fell into several categories. A major theme was overprovision. There had been a well-organised campaign from the Trade. Many of the objection letters were *pro forma*.

Mr. MacIver said that the Board's overprovision policy inverted the onus, by placing it on the Applicant to address the Board on the Section 4 "Licensing Objectives". This was not new to Wetherspoons - even before the 2005 Act introduced "Licensing Objectives", Wetherspoons already operated a "Code of Conduct" which largely mirrored the "Licensing Objectives".

He addressed the "Licensing Objectives".

The Premises would offer a full food menu. The kitchen would be open to 11.00 p.m.. He questioned whether it was appropriate to treat these particular Premises as a 'public house'. The Premises would offer a 50/50 food/drink split. Sometimes the split in Scotland was 60/40, and in the case of one establishment in the north of Scotland, it was 70/30.

The Premises would be fully-tabled, and there would be little vertical drinking.

The provision of food softened Premises. The Premises would stock a wide range of soft drinks, and the strength of alcoholic drinks was stated. The company showed responsibility when marketing. The Trade objectors made a big issue about pricing: according to them, Wetherspoon's was "pile it high, sell it cheap", but this was just not so. The company sold at reasonable prices.

Staff were trained, and training was not just the statutory minimum at the start, but was ongoing. The Company tended to retain its staff - its staff turnover was 12% less than the Trade average, and about 75% of the Company's managers had started lower down the promotion ladder.

One of the Company's policies for staff was "Don't do drunk" - customers would be told when they would not be served any more.

The Premises would be fully covered by C.C.T.V., and the recordings retained for 30 days. The Premises would always use toughened glass.

The Company was prominent in the "Pubwatch" scheme nationally and would help set one up locally if there was none.

Re the "preventing public nuisance" Licensing Objective:

- (a) Towards closing time the Premises raised lighting levels;
- (b) There was a customer dispersal policy. Customers would be directed away from the Premises. The Premises would start the "drinking-up" earlier than the statutory time;
- (c) There would be between 15 and 60 mystery visits by senior staff or independent assessors each year. All Premises get at least 5 such visits per month. The employees know how important it is to comply with Company policies, because staff bonuses are linked to favourable reports: the rate is 40% for staff generally, rising to two-thirds for bar staff;
- (d) Any Outdoor Drinking Area would also be covered by CCTV.

Mr. MacIver reserved the right to reply after Mr. Blair's comments.

Turning to the other objectors:

Pricing policy was not an issue for the Board. There was no "Minimum Pricing" legislation.

On the point raised about off-sales (Variations 3 and 5): for the avoidance of doubt this facility would be used to enable customers who had already purchased a bottle to drink with their meal to have the bottle re-sealed so that they could take it home. He said that he would remove this part of the request if the Board had an issue with it.

Referring to the Solicitor (Licensing)'s Report and the proposal to have on-sales from 10.00 a.m. instead of the Board Policy of 11.00 a.m. (Variation 4), he confirmed that the Premises would comply with Board Policy.

(b) For objection 118

Mr. Blair said that he adopted the written objection.

The focus, he said, was on Overprovision. It was not enough to meet the "Licensing Objectives". Even if an Applicant did that, there might still be Overprovision.

At the heart of the issue was the risk of creeping erosion of the Licensing Objectives over time. This was especially the case with the Licensing Objective "protecting and improving public health". He said that Mr. MacIver did not touch on that.

The effects of alcohol were, he said, "insidious". The Board had already said that the "North Coast" Locality was overprovided. Even the best-run establishment eventually causes harm.

He agreed that price was not an issue for the Licensing Board. He said he could go through the menu, and pick out examples of alcohol-related discounting, e.g. Kronenbourg for £1.00 if with a meal, but with a normal price of £2.99.

The Board had to look at the underlying policy, and the evidence for it. The Board had had information from the N.H.S. and M.E.S.A.S. ("Monitoring and Evaluating Scotland's Alcohol Strategy"). Andrew Fraser of West Dumbartonshire (now of North Ayrshire) had estimated harm. Wetherspoon's "Salt Cot" in Saltcoats opened in 1999, and in the following 10 years the hospital discharge rate for alcohol-related conditions increased 50%.

What was proposed here was a 350 customer Public House. It lacked substance for Mr. MacIver to estimate. It was easy to assert, and more difficult to prove. Wetherspoons would surely themselves keep comprehensive data on what they were selling, and yet Mr. MacIver did not produce a till-roll. Mr. Blair commented that the Board's own Policy was evidence-based, but there was no evidence for Mr. MacIver's assertions. Even if the Applicant could satisfy the Board that the principal activity was the provision of food, he did not see Mr. MacIver disputing the Board's approach that it was a 'Public House' rather than a 'Restaurant' (treated differently in the Board's Overprovision Policy - Function Type 3 vs. Function Type 4).

Mr. Blair submitted that Mr. MacIver did not address issues. Mr. Blair accepted that the Board had, in their Overprovision Policy, treated the 'North Coast' Locality as having less serious alcohol-related problems from much of the rest of North Ayrshire, but the Board's Policy also recognised that people would travel to one Locality from another 'poorer' area. Largs did serve a wider area.

Mr. Blair said price was relevant, in that reduced prices would create a downward spiral. Wetherspoons were a large capacity operation. The effect would be less if they had a capacity of only, say, 100. Mr. Blair suggested that Mr. MacIver should say more than "We're not the cheapest, nor the dearest". He should produce cogent material, as otherwise the Board was making a decision in the dark.

As to food, Mr. Blair said that the Board should have clear information - how many meal customers would go on to order a drink, and how many would just order drink. He accepted that Wetherspoon's promotions were not technically "Irresponsible Drinks Promotions" (in the sense of the mandatory Licence Condition in Schedule 3, Paragraph 8), but they were, he said, "sailing close to the wind". They were doing these things day in, day out.

Mr. Blair said that, if the Board granted the Variation now, there would be a clear risk of a loss of control. If an issue with the Licensing Objective "preventing crime and disorder" arose, one could readily identify it, since there would be Police statistics, but it was different when it came to assessing health. In the course of the preparation of the Licensing Board's L.P.S. in 2013, the Health Board had looked at data from years ago, especially the period 2005 to 2010. It already showed that there were issues, albeit not yet so bad in "North Coast". It had taken the Health Board a long time to identify a trend. It was, said Mr. Blair, simply impossible for the Applicant to assert that erosion would not continue.

He agreed that the Board could not limit price, but the Board could limit availability.

He referred to the scale of the proposal. The Premises were simply too big. They were anonymous. They might be given a name with local connotations, like "King Haakon" or "The Pencil", but once you were inside you might as well be anywhere in Scotland. There was caselaw which made this relevant. The proposal offered Largs nothing different. There were already 8 pubs in Largs selling pub food.

(c) Applicant's reply

Mr. MacIver reminded the Board that Mr. Blair represented the Trade. He had represented Wetherspoon's at many Boards across Scotland, and he wished he had a £1 for every time he'd heard such objections. The Company were always likened to "men in black Stetsons".

If anything, the introduction of a Wetherspoon's might actually lead to upgrading, as it would force neighbouring licensees to, as he put it, "look to their laurels". He recalled that a Wetherspoon's opened in Helensburgh and other Premises which had been closed re-opened.

He pointed out that there was not here an objection from the Health Board. He knew there had been N.H.S. objections in other cases where Overprovision was an issue.

He commented that N.A.L.B. were at an advantage, since there were already two Wetherspoon's in the Board's area.

In response to Mr. Blair's comments about the menu, he pointed out that it would not just be alcohol that would be served with meals. The menu also contained lots of soft drinks.

Wetherspoon's were founder members of the "Drink Aware" Trust, and the menus contained an internet link to the Trust. They produced a newsletter called "Wetherspoon's News" which included responsible drinking guidance. All meals on the menu were made with organic food.

Mr. MacIver pointed out that the Board was not there to protect other Trade.

He said that West Dunbartonshire Licensing Board (despite their strong Overprovision Policy) had agreed to grant a Wetherspoon's in High Street, Dumbarton, 2 years ago.

He commended the present proposal. This was, he said, a first-rate opportunity for Largs. The Premises would be attractive to the eye.

The Overprovision Policy created a rebuttable presumption.

The Convenor referred Mr. MacIver to the reference to Variation 15 on page 4 of the Report. This was the proposal to amend the OP as to terms of under-18 access; the proposed new wording would permit access to both "Children" (aged 0-15 years) and "Young People" (16-17), with "Children" being accompanied by a responsible adult, but removing the existing requirement for an adult with "Young People". Mr. MacIver said that the Applicant was in the Board's hands. Wetherspoon's had in the past asked the Board to vary this, but he would delete that request here.

(d) For objection 118 (further remarks)

Mr. Blair described this Application as "opportunistic".

He referred to the fact that there was no representation from N.H.S. Ayrshire and Arran (the "Relevant Health Board" - in terms of Section 21(1)(ca) of the 2005 Act, as inserted by Alcohol (Scotland) Act 2010). There was, he said, a mundane explanation for the absence of a Health Board comment. He suggested that that could be explained by fact that the person there who usually dealt with alcohol licensing had left and had not been replaced.

Mr. O'Brien explained that the Application was intimated to the Health Board as usual. Since the Health Board had made comments in other cases, and knowing that the person previously engaged had left, he had contacted the Health Board, thinking that the case might have been overlooked. He had been answered by Dr. Sonya Scott, Public Health Consultant, who had confirmed that the Health Board were not making any representations here.

Mr. O'Brien also told Mr. Blair that he had seen a letter from his instructing agents at about 9.30 a.m. that day introducing a submission based on Section 28. Mr. O'Brien enquired if that submission was being pursued, and Mr. Blair said it was not.

(e) Other objectors

Addressing the public benches, the Convenor enquired of those present if they had anything to add. The Convenor said that the Board would have regard to written comments anyway.

Mr. Archie Burleigh (objection 26) spoke to his objection.

(f) Questions from Members

Cllr. Barr referred Mr. MacIver to what he had said about re-sealing a bottle to allow a customer to take it away, and asked if this would not be illegal, since it is illegal to have an opened alcohol container in a public place?

Mr. MacIver said that the container would be re-sealed but the issue was not one that the Applicants would push.

Cllr. Marshall suggested to Mr. MacIver that he should drop the off-sales part of the proposal, and that he should drop the proposal to open before 11.00 a.m..

Cllr. Marshall enquired of Mr. MacIver what reduced capacity would be accepted? Mr. MacIver said that he could not give a figure and that that would be up to the Council's Building Standards office.

Cllr. Marshall pointed out that Mr. Blair had referred to risk to health. The Cllr. suggested that the risk should be reduced.

The Convenor advised Mr. Blair that he himself represented the area including the "Salt Cot", and he said that the town of Saltcoats had only lost one Licensed Premises since the "Salt Cot" had opened.

Mr. Blair agreed that these were indeed commercial issues, but the Scottish Ministers' Guidance was that the Board was supposed to look at the wider health issues. For every extra job that new Premises created, there was an extra person with health issues.

Mr. Blair referred to Cllr. Marshall's point about "capacity". This was defined by Section 147. The Applicant could not change it. In his opinion, Mr. MacIver was using a lot of guesswork, and it was for the Applicant to quantify risk. The Board should apply the "precautionary principle", and err on the side of caution.

Deliberation

At 11.10 the Board retired to Members Lounge with the Solicitor (Licensing). The Board returned to the public meeting at 11.47.

10. Decision(s) taken

Cllr. Reid moved that the Variations should be granted as described below (following the numbering of the individual variations in the Report). Cllr. McMillan seconded this Motion. The Motion was:

No.	Variation	Motion
1	<i>Amend description</i>	<i>Grant</i>
2	<i>Amend address by deleting "Lanes"</i>	<i>Grant</i>
3	<i>Amend OP1 from "on-sales" to both on- and off-sales</i>	<i>Grant, but only so as to permit 'on-sales' (refusing off-sales)</i>
4	<i>Amend on-sales hours</i>	<i>Grant with qualification, the hours to start at 11.00 a.m., on all 7 days</i>
5	<i>Add off-sales hours</i>	<i>Refuse as unnecessary</i>
6	<i>Add seasonal variations (referring to Board</i>	<i>Grant</i>

	<i>"Festive Period" policy)</i>	
7	<i>Amend OP so Premises will not have restaurant facilities</i>	<i>Grant</i>
8	<i>Amend OP so Premises will have bar meal facilities</i>	<i>Grant</i>
9	<i>Amend OP so Premises will cater for Club or other group meetings</i>	<i>Grant</i>
10	<i>Amend OP so Premises will not have dance facilities</i>	<i>Grant</i>
11	<i>Amend OP so Premises will not cater for indoor or outdoor sports</i>	<i>Grant</i>
12	<i>Amend OP so Premises will have televised sport</i>	<i>Grant</i>
13	<i>Add to OP early opening to serve food but no alcohol</i>	<i>Grant</i>
14	<i>Amend OP so as to delete "other activities"</i>	<i>Grant</i>
15	<i>Amend OP as to terms of under-18 access</i>	<i>Grant, but requiring both 'Children' and 'Young People' to be taking food.</i>
16	<i>Amend OP to increase under-18 access to 22.00</i>	<i>Grant</i>
17	<i>Amend OP as to parts of premises for under-18 access</i>	<i>Grant, with the condition that no under-18s should be allowed within 1.0 metre of the bar.</i>
18	<i>Alter capacity</i>	<i>Grant, but restricting capacity to 225, not 350.</i>
19	<i>Substitute revised Layout Plan</i>	<i>Grant, but with a condition that a barrier should be built on the Promenade side, adjacent to the external drinking area, measuring 2.0 metres from pavement level.</i>

As an amendment, Cllr. Barr moved to refused all the Variations. The Premises were too large, and there were also health grounds. Cllr. McLean seconded this, referring to Overprovision and health. The proposal was not suitable for Largs.

There was then a roll-call vote:

For the Motion: Cllrs. Bruce, Marshall (Vice-Convenor), McNicol (Convenor), Reid and MacMillan.

For the Amendment: Cllrs. McLean and Barr.

Accordingly the Variation application was determined following Cllr. Reid's Motion.

Since some of the variations requested were granted, but some were refused or granted with qualifications, a question arose under Section 35(3), since Mr. MacIver had previously intimated to the Board that the Transfer Application in favour of J. D. Wetherspoon (Scot) Ltd. was contingent on the grant of the Variation Application. The Convenor therefore enquired of Mr. MacIver if he accepted the Board's decision. He confirmed that he did.

Accordingly, the Board then turned to the Transfer part of the Application. The Convenor moved that this be granted, and this was seconded by Cllr. Bruce. As an amendment, Cllr. Barr, seconded by Cllr. McLean, moved refusal.

Without a vote all Members expressed the same position as they had done in relation to the Variations. The Transfer Application was held granted '*qui tacet consentire videtur*'.

Mr. Blair requested a Statement of Reasons.

10a. Reasons for Decision

(a) Board's approach to Objections and Representations

The Board was satisfied that the Objections and Representations they had received were competent and did not fall to be rejected as "frivolous or vexatious" under Section 22(4). The Board had regard to all of them, other than those excluded (see "8. Preliminary Issues").

(b) Forum

The Licensing Forum did not give any advice or make any recommendation to the Board in relation to the particular Application, and accordingly the duty on the Board created by Section 12 did not arise.

(c) Potential Grounds for Refusal

In relation to Variation, Section 30(5) is:

"The grounds for refusal are—

(a) that the Application must be refused under section 32(2), 64(2) or 65(3),

(b) that the Licensing Board considers that the granting of the Application would be inconsistent with one or more of the Licensing Objectives,

(c) that, having regard to—

(i) the nature of the activities carried on or proposed to be carried on in the Subject Premises,

(ii) the location, character and condition of the Premises, and

(iii) the persons likely to frequent the Premises,

the Board considers that the Premises are unsuitable for use for the sale of Alcohol in accordance with the proposed Variation,

(d) that, having regard to the number and capacity of—

(i) Licensed Premises, or

(ii) Licensed Premises of the same or similar description as the Subject Premises (taking account of the proposed Variation),

in the locality in which the Subject Premises are situated, the Board considers that, if the Application were to be granted, there would, as a result, be Overprovision of Licensed Premises, or Licensed Premises of that description, in the locality."

The Board was satisfied that none of Grounds for Refusal (a), (b) or (c) applied:

There were no mandatory refusal grounds present so Ground (a) did not arise;

The issue of inconsistency with one or more Licensing Objectives did not arise, except in so far the Public Health Licensing Objective ("protecting & improving public health") was concerned. The Board was satisfied that their approach to Overprovision addressed that L.O., and did not consider (b) further;

The Board had no reason to suppose that the Premises would be unsuitable for the sale of alcohol, and did not consider (c) further.

The Board considered that issue (d) (Overprovision) arose.

(d) Overprovision

1. There are two factors in assessing the relationship between alcohol and health: availability and price.

(a) Availability:

The Board's Overprovision policy was directed to this, but it was only a Policy, creating a rebuttable presumption of refusal, not an absolute rule. The application of the Policy was in the Board's discretion, and required a consideration of the circumstances of the particular proposal. It was always open to the Applicant to seek to persuade the Board to make an exception to the Policy in the particular case, and this is what Mr. MacIver had done.

(b) Price:

As was accepted by both Mr. MacIver and Mr. Blair, price was not a matter for the Board. The Alcohol (Minimum Pricing) (Scotland) Act 2012 has not been implemented due to a legal challenge and the Board had no regard to Minimum Pricing. There are statutory Licence Conditions relating to multiple packs, price variations and "Irresponsible Drinks Promotions" (Schedule 3), but if Premises comply with those Conditions the Board have no powers to intervene. Mr. Blair accepted that Wetherspoons were not breaking the I.D.P. Conditions. The Board attached no weight to Mr. Blair's observation that Wetherspoons were "sailing close to the wind" - if whatever they did was not illegal, they were entitled to do it.

2. The Board's approach to Overprovision was set out in its L.P.S. and in the Report prepared by the Solicitor (Licensing).

3. There was a rebuttable presumption of refusal due to Scottish Government guidance issued under Section 142 (Paragraphs 54 to 57). The Board must, in the exercise of their functions under the Act, have regard to any Guidance issued by Scottish Ministers, and if the Board decide not to follow the Guidance they must give the Scottish Ministers notice of their decision together with a statement of the reasons for it. By Section 6(4), in exercising their functions under the Act the Board must have regard to their L.P.S.. In this case, the relevant part was L.P.S. 2013-2016, Annex E.

4. In adopting the Overprovision Policy, the Board were aware that it is not a rigid rule and must admit of exceptions. It is always open to the particular Applicant to seek to persuade the Board that the Application should be granted. Therefore, whenever an Application is made which raises a Policy issue, the Board Report alerts the Applicant, so that submissions can be made with a view to persuading the Board to make an exception. However, it is not necessary, for the presumption of refusal to apply, for there to be any objection made by a third party.

5. For the purpose of the L.P.S.:

(a) Under Section 7(2) it is for the Licensing Board to determine the relevant 'Localities'. The Board have decided to divide their area into 6 'Localities' (coinciding with the 6 'Neighbourhood Areas' used by the North Ayrshire Community Planning Partnership). The Subject Premises are in Locality 1 (North Coast: Skelmorlie, Largs, Isle of Cumbrae, Fairlie, Seamill & West Kilbride);

(b) Premises are distinguished by 'Function Types'. The Board considered the submissions and had no doubt that the proper designation of the proposed Premises was Function Type 3 ("On-sales Premises (other than those whose principal function is the provision of entertainment" e.g. 'Public Houses') as opposed to Function Type 4 (e.g. 'Restaurants').

6. In determining any particular application, the Board had regard to those factors, and also to:

(a) the 'Locality' of the Premises;

(b) the 'Function Type' of the Premises;

(c) any 'Additional Factors' (see below);

(d) other similar Premises in the Locality (the Board had an "Overprovision Assessment Report").

7. Additional Factors: As indicated in the L.P.S., the likelihood that the Application will be granted or refused will be influenced by the 'Locality' and the 'Function Type':

(a) Locality: the Premises were not in one of 4 'Localities' where Applications are especially unlikely to be granted regardless of the 'Function Type' (these Localities are

“Three Towns”; “Kilwinning”; “Irvine etc.”; or “Garnock Valley”). Therefore the Additional Factor related to Locality did not apply;

(b) Function Type: The presumption of refusal applied here as it would for most Premises (Annex E, Paragraph 4.5(c)), although it was not increased as it would had the Premises been off-sales (Function Type 1).

8. The Board proceeded with the following presumptions:

(a) the existing number and capacities of Premises in that 'Locality' and in that 'Function Type' was already sufficient,

(b) Overprovision would result if the Application was to be granted, and

(c) the Application should be refused.

9. The L.P.S., Annex E, Para. 4.6 includes:

"The Board will expect Applicants who are seeking the grant of a Variation which increases the capacity under an existing Licence to provide robust and reliable evidence as to why the benefit to each of the Licensing Objectives outweighs the apparent detriment to those Licensing Objectives. The Board will expect to be addressed on the way the promotion of each Licensing Objective will be achieved by granting the Application."

10. The L.P.S., Annex E, Para. 4.5(d) includes:

"... the Board accepts that the consumption of alcohol in any circumstances has the potential to injure health, and endorses the view that “alcohol is not an ordinary commodity” ..."

11. The Board considered that the L.P.S. continued to be a reliable guideline, and recalled that extensive statistics, both on health and other matters, had been considered prior to it being adopted. The Board were already familiar with the Alcohol Focus Scotland publication "Re-thinking alcohol licensing" produced by Mr. Blair. The Board had been kept informed on more recent developments. At the meeting on 19 January 2015 the Board had received a Report from the Solicitor (Licensing) on two further health reports produced since the current L.P.S. was prepared:

(a) "Alcohol-related illness and death in Scottish neighbourhoods: is there a relationship with the number of alcohol outlets?" - Report for Alcohol Focus Scotland produced by the "Centre for Research on Environment, Society and Health" of the Universities of Glasgow and Edinburgh, published 2 October 2014 ("CRESH");

(b) "Monitoring and Evaluating Scotland's Alcohol Strategy", Report published by NHS Health Scotland, 4th Annual Report, published 8 December 2014 ("MESAS 4").

The Board had noted that the author of the CRESH report, while saying that there was a correlation between the number and density of alcohol outlets, acknowledged that it could not be said on the basis of the information available that there was a causal link:

"The alcohol-related hospitalisation results suggest the existence of outlet availability thresholds – over 6 off-sales, 9 on-sales, or 14 total outlets within 800 m – below which hospitalisation rates did not differ, but above which rates increased significantly.

... while [the CRESH study] suggested significant associations between outlet availability and alcohol-related harm we cannot conclude that the relationship is causal."

A.F.S. had also published local authority factsheets, and the one for North Ayrshire noted that a significant positive relationship was found between outlet density (on-sales premises) and alcohol-related deaths and hospitalisations. It stated:

"Alcohol-related harm

In North Ayrshire as a whole there is:

- An annual average of 35 alcohol-related deaths (26 deaths per 100,000 adults). This is similar to the Scottish average of 25 deaths per 100,000.

- An average alcohol-related hospitalisation rate ratio of 148. This is 48% higher than the Scottish average of 100."

The factsheet had a caveat recognising the correlation vs. causal link distinction:

"This study shows a relationship between alcohol outlet density and alcohol-related health harms, but does not definitively conclude that there is a causal relationship. Proving something is "causal" with population level data is difficult because of the ethical and financial constraints in conducting the studies needed to prove a causal relationship. Often it is necessary to use the best possible population level evidence we have to determine what is likely, probable or reasonable in the absence of the studies that would provide "causal" evidence."

The Board appreciate the distinction, and acknowledge that it is likely to be impossible to say, pointing at particular Premises, "the operation of these Premises is inconsistent with the 'protecting and improving Public Health' Licensing Objective". It is particularly difficult to say that where the Premises are not trading.

It is legitimate to consider the whole 'Locality' generally when assessing Overprovision, and that is what the Board have done. The Board were satisfied that throughout North Ayrshire there is a significant negative causal link between alcohol provision and Public Health. This leads to a presumption of refusal against any grant of either a new Licence or the increase in capacity in an existing Licence.

12. The Board accepted that hospital discharge rates had increased in the period that the "Salt Cot" had been open, but did not understand what Mr. Blair wanted them to make of this coincidence. He appeared to have accepted that correlation does not imply causation. The Board agreed with him that a difficulty with the P.H.L.O., as opposed to all the other Licensing Objectives, is that one cannot point at particular Premises and say 'The operation of those Premises is inconsistent with the P.H.L.O.'. In contrast, if (for example) the Board had many complaints from Police about incidents of disorder in a particular public house, the Board might have no difficulty in concluding that the operation of those Premises was inconsistent with three L.O.s:

- (a) preventing crime and disorder,
- (b) securing public safety,
- (c) preventing public nuisance.

It might well be that overall alcohol consumption in the area containing the "Salt Cot" had increased in the years since those Premises had opened, but that did not imply that on-sales Premises, still less any particular Premises, were to blame. The Board knew that over many years, in North Ayrshire and across Scotland, the balance of trade had shifted from the on-sales trade to the off-sales trade, and that a greater proportion of alcohol was now sourced from off-sales than on-sales. The Board had recognised this by wording their Overprovision policy to make the presumption of refusal especially strong if the proposal related to Premises whose principal function was off-sales (what the Board called "Function Type 1").

Trends might take many years to become apparent. Alcohol-related medical conditions do not normally happen overnight: it might be that, over years, a correlation between an increase in the number of alcohol outlets and alcohol-related harm might be detected.

Information about trends and alcohol consumption would be reviewed when the Board next carried out an Overprovision Assessment in the course of revising the L.P.S., but the Board were obliged to look at the situation as it was now. The Board were not prepared to speculate that at some point in the future alcohol-related health harm might increase in the "North Coast" Locality, or that, if it did, Wetherspoon's should shoulder the blame. They did not accept Mr. Blair's submission that the cost of an extra job would be an extra person with health issues.

13. The Board carefully considered the comments from Mr. MacIver, Mr. Blair and from the many authors of written representations, but were not satisfied either that the Applicant had entirely overcome the presumption of refusal, or that the various objections should be entirely dismissed. The Board considered that the combined decisions made on the 19 individual Variation requests struck a reasonable balance between competing factors.

This was particularly the case with Variation 18, where the Board had allowed a capacity of only 225, as against the Applicant's request of 350. It appeared to be the Applicant's position that capacity was simply a matter for Building Control to determine. The Board did not accept that that was the case. While Building Control would set an occupancy figure, that should be seen as a maximum figure. The Board were not faced with an all-or-nothing decision, and did not accept that there were only two options open to them: refuse entirely or grant entirely. It was appropriate to consider whether something between the two extremes would be a reasonable balance.

14. The Board was not convinced that many of the letters provided a reliable basis for concluding that the Applications should be refused. As was noted in the Supplementary Report, many of the letters shared common themes. While this might be expected, it appeared that some of the letters were *pro forma* letters based on trade objections, differing only in signatures and addresses. While such letters could convey a general opposition to the proposals, it was extremely unlikely that all the signatories of an identical letter would have exactly the same set of objections and place exactly the same weights on the various factors in their opposition. The letters were akin to a petition. The Board were not prepared to reject these objections as unspecific, but gave them little weight.

15. Some of the objectors contended that the Premises would be the cause of nuisance and disorder, but the Board noted that the Chief Constable had not made any representations. The Board considered that these objections were too speculative and remote to be given effect to. The Board were aware that if it turned out later that the objectors' fears about nuisance and disorder appeared well-founded, either they or the Police could raise the issue with the Board by Review Application under Section 36.

The Board were themselves concerned, as they had been with Wetherspoon's "Auld Brig" in Irvine, with the proximity of an external drinking area (in Largs, the terrace on the seaward side) to a busy pedestrian thoroughfare, and considered that these concerns were best addressed by the barrier described in the decision on Variation 19.