

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

*All reference to legislation are to the 2005 Act unless otherwise specified.*

<b>1. Name and address of Licensing Board:</b>
North Ayrshire Licensing Board, Cunninghame House, Irvine
<b>2. Date of Licensing Board meeting:</b>
Monday 9 November 2015
<b>3. Name and address of agent</b>
For Applicant Mr. Javid Iqbal: Mr. Stewart Gibson, Solicitor, GP Retail Services Ltd., 4 Brecon Close, Grantham, Lincolnshire NG31 8FX.
<b>4. Name and address of premises (if applicable)</b>
"Pennyburn Stores Ltd.", Unit 5, Station Plaza, Kilwinning, KA13 6NT (NALB Ref. 471)
<b>5. Materials before the Board</b>
<p><u>Board's documents</u></p> <ol style="list-style-type: none"> <li>Licensing Policy Statement (adopted 19 November 2013) (hereafter "LPS");</li> <li>Application for the Grant of Premises Licence dated 7 August 2015 (including Operating Plan, Layout Plan and Site Location Plan);</li> <li>Report on Application prepared by Solicitor (Licensing);</li> <li>Overprovision Assessment Report based on data as at 28 October 2015;</li> </ol> <p><u>Certificates etc.</u></p> <ol style="list-style-type: none"> <li>Building Standards Certificate</li> <li>Planning Certificate</li> <li>Food Hygiene Certificate</li> <li>Certificate of Display of Site Notice.</li> <li>Notice from Chief Constable under Section 21(3) confirming Applicant has no 'relevant convictions';</li> </ol> <p><u>Objections, Representations and Reports</u></p> <ol style="list-style-type: none"> <li>Samantha McCrae, 4 Rowallan, Pennyburn, Kilwinning, KA13 6NF.</li> <li>Agnes Charles, 23 Winton Avenue, Kilwinning, KA13 6LH.</li> <li>James Grant, 63 Sundrum Place, Pennyburn, Kilwinning, KA13 6SS.</li> <li>Susan McConnell, 41 Glenapp Place, Pennyburn, Kilwinning, KA13 6TF.</li> <li>James B McColl, 35 Sundrum Place, Pennyburn, Kilwinning, KA13 6SS.</li> <li>Patricia Kenna, 78 Culzean Place, Pennyburn, Kilwinning, KA13 6TL.</li> <li>The Occupier, 158 Sundrum Place, Pennyburn, Kilwinning, KA13 6SX.</li> </ol>

8, Lesley Yates, Cambusdoon Place, Kilwinning, KA13 6SL, NO HOUSE NO..  
 9, Mary Gather, 127 Sundrum Place, Pennyburn, Kilwinning, KA13 6SU.  
 10, Michelle McConnell, 145 Glenapp Place, Pennyburn, Kilwinning, KA13 6TD.  
 11, Mr & Mrs E Cursley, 3 Coodham Place, Pennyburn, Kilwinning, KA13 6SG.  
 12, Mr A Singh, KK Stores, 52 Main Street, Kilwinning, KA13 6AQ.  
 13, Danny Strachan, 119 Cambusdoon Place, Pennyburn, Kilwinning, KA13 6SW.  
 14, Billy Greig, 17 Sundrum Place, Kilwinning, KA13 6SS.  
 15, Edward Woods, 73 Culzean Place, Kilwinning, KA13 6TN.  
 16, John Kilpatrick, 73 Culzean Place, Kilwinning, KA13 6TN.  
 17, Patricia Kilpatrick, 73 Culzean Place, Kilwinning, KA13 6TN.  
 18, Paul Frearson, 73 Culzean Place, Kilwinning, KA13 6TN.  
 19, Nicola Frearson, 73 Culzean Place, Kilwinning, KA13 6TN.  
 20, Mrs N Walker, 43 Coodham Place, Pennyburn, Kilwinning, KA13 6SG.  
 21, Sukhbinder Sanghera, 79 Fergushill Road, Corsehill, Kilwinning, KA13 7LW.  
 22, Linda Scott, 60 Cambudsoon Place, Pennyburn, Kilwinning, KA13 6SL.  
 23, Claire Hodge, 76 Glenapp Place, Kilwinning, KA13 6TE.  
 24, Murray, Gillies & Wilson, Solicitors, 22 Bank Street, Irvine , KA12 0AG.  
 25, Anne Travers, 77 Sundrum Place, Pennyburn, Kilwinning, KA13 6SU.  
 26, Anne Robertson MBE, Pennyburn Community Association, Cranberry Moss Community Centre, Pennyburn, Kilwinning, KA13 6SU.

Mrs. Robertson also referred to a Petition bearing 147 signatures which had been lodged with the Board (see below).

## **6. Type of application**

Application for Grant of Premises Licence

## **7. Names of all parties present**

For Applicant: Mr. Stewart Gibson, Solicitor, with Mr. Javid Iqbal (Applicant) and Mr. James Carroll, Business Development Manager of "One-Stop".

For Police Scotland: Chief Inspector Shaw and Sgt. Griffiths

Persons making Objections or Representations:

Mr. Gordon Robertson, Solicitor, Murray Gillies & Wilson, 22 Bank Street, Irvine, KA12 0AG on behalf of Ms. Rupinder Dillon (also present) (objector 24).

Mrs. Anne Robertson MBE for Pennyburn Community Association (objector 26)

Ms. Mary Gavin

The Board consisted of Councillors Clarkson (Convenor), Marshall (Vice-Convenor), Bruce, MacMillan, Barr, Reid, McLean, McNicol and Easdale.

The Board were accompanied by William O'Brien (Solicitor (Licensing)), Kenzie Starkey (Solicitor (Contracts and Licensing)), Chris Pollock (Licensing Administrative Officer), Michelle Champion (Administration Assistant) and Grace Cullen (Licensing Standards Officer).

## **8. Preliminary issues**

(a) The Convenor had, under the Scheme of Delegations approved by the Board, considered the possibility of requesting a report from the Chief Constable detailing all cases of Antisocial Behaviour ("ASB"), and all complaints or other representations made to Police which had taken place on, or in

the vicinity of, the Premises, in the previous year (2005 Act, Section 24A, as added by the Criminal Justice and Licensing (Scotland) Act 2010). The Convenor had decided not to request such a report.
(b) the requisite Certificate of Display of Site Notice was lodged before the Board considered the case.
<b>9. Summary of submissions made</b>
See below
<b>10. Decision(s) taken</b>
See below
<b>10a. Reasons for decision</b>
See below
<b>11. Legal powers used to come to decision</b>
Section 23
<b>12. Date statement of reasons issued</b>
24 November 2015
<b>Name of Representative of Clerk</b>
<b>Print Name</b>
William O'Brien, Solicitor (Licensing)

## **9. Summary of submissions made**

### **Introduction**

The proposal related to an existing Convenience Store in Kilwinning, near the railway station. The shop was already trading, and the proposal now was to grant an alcohol licence. This was related to the shop-owner, Mr. Iqbal acquiring a franchise to operate as part of the "One-Stop" chain, selling a range of food, fruit and other groceries for consumption off the Premises. The proposal was to include an off-sales alcohol display of 10.45 square metres, with Licensed Hours of 10.00 - 22.00, 7 days a week.

The Board started at 10.00 a.m., and this case was the first one considered.

### **Submissions**

#### **Mr. Gibson (for Applicant)**

He said that the plan was that the shop would become part of the "One-Stop" franchise, and he invited Mr. Carroll to speak.

Mr. Carroll said that "One-Stop" was a well-established operation in England and Wales, with 10,000 staff over 800 locations, with the majority of Premises south of the Border. The firm was a member of the British Franchising Association and was a wholly-owned subsidiary of Tesco, which had three divisions: "One-Stop", "Tesco Metro", and "Tesco Express". "One-Stop" stores were mini-"Tesco Express" stores. It was not a typical 'convenience store'. The firm would control everything about the Premises. The firm did need alcohol sales. Since June 2015 Mr. Iqbal had operated another "One-Stop" franchise elsewhere in Scotland. Mr. Carroll said that the firm had

"Challenge 25" till prompts. He got monthly reports of these, as the firm itself had the legal responsibility for under-age sales.

Mr. Gibson continued: sales of alcohol were a very small proportion of the selling floor. He was asking for 10.4 sq.m.. The store's turnover of alcohol would not exceed 10%. Alcohol had a high ticket price. Buckfast-type products were not in the firm's range. The firm wanted to retail Beers, Wines and Spirits to existing customers. The shop would sell fresh and frozen food, and would be an asset to the Pennyburn area.

Mr. Gibson referred to the objectors. Turning to the Petition, he had concerns. He referred to the heading:

*"to prevent another off-sales/grocers opening at the Station Plaza within the walking distance of our local shops"*

He asked "what are we objecting to?" The Premises were already trading. The Petition did not refer to any of the 5 Licensing Objectives. He referred to the Report prepared by the Solicitor (Licensing). He invited the Board to reject the Petition.

Turning to the letters of objection, he noted that there were no objections or representations from the Police or any other authority. Some of the objectors were raising the "Crime and Disorder" Licensing Objective, but their speculations were not facts. If there was a real risk, the Police would have made comment. Many of the objectors were saying there were too many off-sales, but this was not a basis for objection. This store would provide a choice for customers.

There was mention of an incident at "Premier Stores": this was a matter for Premier, not for his Premises.

He dismissed the fear that people would buy drink in the shop and get on the train at the nearby station. He said that people could get alcohol anywhere.

The complaint "this is harmful to business" did not relate to any Licensing Objective. The reference to the risk of suicide was just speculation.

He said that 5 of the letters were a *pro forma* style.

One said there would be a 10-minute walk. That was, he said, quite a significant distance.

Regarding the Licensing Objective 'protecting & improving public health', he said that no sale of alcohol in Scotland could ever be said to improve public health. The proper question was, he said, "will the new Licence make things worse?"

On Overprovision, Mr. Gibson said that alcohol sale needed to be part of the business model. His stores ("One-Stop") were different from all the other shops in Kilwinning, barring the existing "Tesco Express". Once the Subject Premises were part of the "One-Stop" franchise, they would stay that way. They would not be like other Premises, which might be a "Spar" today but a "Cost Cutter" next week. The Applicant was a responsible retailer, and had the backing of a major firm under a longterm franchise agreement

The store would be a benefit to the community.

He said that he would accept a condition that the store should remain a "One-Stop" store.

Mrs. Robertson

She said she was representing "Pennyburn Community Association" and "Pennyburn Residents' Association".

Referring to Mr. Gibson's statement about the area given over to alcohol sales, she said that a small amount to a retailer is a large amount to the community. The Pennyburn area was already "blighted" by AntiSocial Behaviour ("ASB") and under-age drinking. For the past 15 to 20 years the Associations had worked with Police and Trading Standards to deal with this. The existing store operated CCTV and bottle-marking, to combat under-age and agent sales. Things had improved so much that the Associations no longer had to. The current shop in Pennyburn already challenged repeat purchasers (repeat purchases may indicate agent purchases) and sought ID.

She asked why Kilwinning needed a second Tesco, and said the area already had enough.

Ms. Mary Gavin

It was not just young people who were drinking. She'd experienced a drunk and abusive adult. She was a resident, with two daughters aged 16 and 17. The proximity of the railway station was an issue. At the Premises was a car park where people would loiter, waiting for the train. There were steps to sit on. She herself did not drink. She said that there was no need to sell alcohol with groceries, and selling them together sent the wrong message.

Mr. Gordon Robertson (Solicitor for Ms. Rupinder Dillon, also present)

His clients (Pennyburn Premier Supermarket) had 7.9 sq.m., so the present proposal for 10.45 sq.m. would double the provision locally and add 5% to the provision for Kilwinning as a whole.

He said that the incident at his clients' shop was attempted robbery.

He reminded the Board that in March 2015 they had refused an Application for another off-sales in Kilwinning: "Dirrans Store" (24b Seymour Avenue, KA13 7PQ, NALB ref. 465, Board decision 2 March 2015).

He said that, however the present Applicants dressed it up, their shop was still a grocer's shop. It might appear "shinier", being backed by Tesco, but otherwise nothing had changed.

He said that in 2004 there had been an off-sales Application under the Licensing (Scotland) Act 1976 for the same Premises. That had been refused. He said that the present Applicant had taken over a successful business knowing that it did not have a Licence. He had acted in the 2004 case and the comments from objectors then were much as they were now.

He pointed out that the Board had granted a new off-sales Licence in Springside ("Scott's Corner", 35-37 Main Rd., Springside, NALB ref. 461, Board decision 19 January 2015), but that could be distinguished:

it was in a different Overprovision area (L4 : "Irvine and Area") and not L3 ("Kilwinning")

it was granted to a franchise taking over and renovating a derelict building

the renovation also created premises for two other businesses, and provided an ATM.

There were, he said, three issues:

1. There were already sufficient alcohol outlets in Kilwinning
2. Overprovision would be caused if this new Licence was granted
3. the Application was inconsistent with two Licensing Objectives:  
(c) 'preventing public nuisance'  
(d) 'protecting & improving public health'

### **Questions from Members**

#### **Cllr. Reid**

He said to Mr. Gibson that he was asking the Board to disregard 5 letters, but they were all from members of the same family; the Cllr. asked "do they not talk to each other?"; the Cllr. said that Mr. Gibson had spent longer attacking the objectors than dealing with Overprovision.

The Cllr. asked Mr. Carroll if the store would only stock Tesco-branded products. Mr. Carroll replied, no, One-Stop had their own supply line. The Cllr. asked if it was not like a Spar? Mr. Carroll likened the arrangement to a McDonald's fast-food franchise - the franchisee did not get to set the menu.

#### **Cllr. Marshall**

He said to Mr. Gibson that there were over 140 signatures on Mrs. Robertson's Petition, and she herself had said that the area was "blighted" by ASB. Should the Board not give some weight to the Petition?

Mr. Gibson replied that he was echoing the Board Report, and that a Petition must be tied to the 5 Licensing Objectives.

The Cllr. asked Mrs. Robertson about the suggestion that some of the signatures were in the same handwriting. She replied that some of the people in the area could not read and write, or had learning difficulty.

#### **Cllr. McNicol**

He asked Mr. Carroll what were the store's opening hours now. Mr. Carroll said he did not know, and that it was not yet a "One-Stop" shop.

The Cllr. asked Mr. Carroll if 10% of the store's sales would be alcohol. Mr. Carroll said that the figure would be 10-15%, based on One-Stop's 800 other stores. He said that One-Stop would not open a store without alcohol sales, and he suggested that neither would the Co-op or other firms.

The Cllr said that the nearby "Alton" and "Taylor's" public houses also had an off-sales facility. The Solicitor (Licensing) explained that Board Policy treated those premises as in a different "Function Type" for Overprovision purposes; that gantries in public houses were not taken into account by the Policy; and that the Overprovision Assessment Report which had been prepared for the Board listed only Premises in the same Function Type as the present Subject Premises (off-sales).

### **Further submissions**

#### **Mr. Gibson**

He said that the store would have CCTV and would operate "Challenge 25".

In relation to the suggestion by Mr. Robertson that the Applicant had taken on the store as a non-alcohol store, this was not true. The Applicant already had a One-Stop franchise at other Premises, and he always wanted to do the same at the Subject Premises.

One Stop would invest £50,000 when the Applicant signed the franchise agreement.

With reference to the 2004 Board decision, both the world and the community were different now.

The Applicant would, Mr. Gibson said, "set a standard" for Pennyburn and Kilwinning.

#### **Mrs. Robertson (Community Association)**

It is a very short walk to the existing off-sales in Whitehirst Park and Kilwinning Town Centre, and the "Challenge 25" Policy was already in place there.

#### **Ms. Mary Gavin**

That 10% could cause a lot of bother. The Subject Premises were on the main road. Kids would ask strangers to the area, passing through, to buy drink for them. She was herself a local resident, and could confirm from her own knowledge that there was violence and vandalism. Even now there were gangs of teenagers by 8 p.m. and older people did not go out.

### **Further comments from Members**

#### **Cllr. McNicol**

He asked the Applicant what hours he traded now. The Applicant answered 7am - 9 pm, but he wanted 10am - 10 pm. He already had Premises in West Lothian. He had engaged with the Police, a local school, and the community about agent purchases. He said that while his livelihood mattered, the community mattered too. He said "if people are not happy, then I am not happy".

The Cllr. asked if there would be a manager in the store. The Applicant said that initially it would be him, but he lives in Bothwell, so he would eventually employ local staff.

#### **Cllr. Easdale**

He pointed out to the Police that many of the objectors raised ASB, and wondered if the Police had any comments. The Solicitor (Licensing) advised that the Police had made no comment, beyond the necessary 'no conviction' Notice under Section 21(3), and that the Board had the option to seek an ASB Report under Section 24A.

### **Deliberation**

At 10.51 the Board retired to Members Lounge with the Solicitor (Licensing). The Board returned to the public meeting at 11.04.

### **10. Decision(s) taken**

The Convenor enquired if there were any Motions.

Cllr. Barr moved to refuse the Application, as there was Overprovision. Cllr. McNicol seconded this Motion.

The Convenor enquired if there was any other Motion. There was not.

The Convenor asked the Board if they agreed to Cllr. Barr's Motion. Cllr. Easdale said he wished to abstain. All the other Members expressed assent to the Motion.

The Motion was held carried by 8 votes to nil, with one abstention, and the Application was refused.

### **10a. Reasons for Decision**

#### **(a) Board's approach to Objections and Representations**

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.

There were no submissions on issue (a) in relation to any of the letters. Mr. Gibson made a submission on (b) in relation to the Petition. The Board were satisfied that the Objections and Representations they had received were competent and, with the exception of the Petition from Pennyburn Community Association, did not fall to be rejected as "frivolous or vexatious" under Section 22(4).

### **The Petition**



This consisted of several sheets of paper, headed by a statement:

*"to prevent another off-sales/grocers opening at the Station Plaza within the walking distance of our local shops"*

This was described in Part 2 of the Report, which noted that of the 147 signatures, most of them appeared to be by different people although from the handwriting it appears that the same person has written other people's names.

The Board had dealt with Petitions before and the Report quoted from the Licensing Policy Statement 2013-2016 (adopted 19 November 2013), Annex H ("Board Business etc."), Part (f) ("Third Party Comments and Complaints"):

*"2. It is not possible to raise issues with the Licensing Board which relate to legislation other than the Licensing (Scotland) Act 2005. For example, issues about parking and Planning Permission are dealt with by the Roads (Scotland) Act 1984 or the Town and Country Planning (Scotland) Act 1997, and the Licensing Board cannot deal with these.*

*However, the Board may accept that the issues raised are relevant to the Licensing Objectives or statutory Grounds for Refusal.*

*3. It is important that a comment should be specific. It is not enough to say "I object" or "I complain", without giving an explanation for that view.*

*For example, in an Application for a new Premises Licence, the Board must make a decision based on the "Grounds for Refusal" stated in Section 23(5) (the position is similar with Major Variations, where the "Grounds for Refusal" are stated in Section 30(5)). An O/R would have to state in what way the proposal would give rise to one or more of the "Grounds for Refusal".*

*If the O/R is insufficiently specific, the Board may reject it as "frivolous or vexatious" (Section 22(4)), and if the O/R is rejected then the Board may recover expenses from the person making it (Sections 22(5) and 22(6)).*

*For these reasons, a Petition is unlikely to be accepted as a valid O/R. If 100 people sign a Petition, they are unlikely to all have the same complaints. The Board has to determine the weight to be placed on individual comments. In the common example of an objection or complaint based on nuisance or Anti-social behaviour, the Board is likely to be more influenced by comments from immediate neighbours of the Premises than from residents further away. If a person signs a Petition without specifying his address his comment is likely to be disregarded."*

Accordingly there were two questions: whether or not:

- (a) the Petition was sufficiently specific or whether it should be disregarded entirely, and
- (b) if accepted, what weight (if any) should be attached to it.

The Board considered the Petition against their LPS and concluded that the Petition was not sufficiently specific, and disregarded it entirely. Therefore question (b) did not arise. The Board

considered that the comments made by the Community Association and the individual residents were sufficiently specific, and that the question of what weight should be given to each of them arose.

(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

Section 23(5) is:

*"The grounds for refusal are—*

*(a) that the Subject Premises are Excluded Premises,*

*(b) that the Application must be refused under section 25(2), 64(2) or 65(3),*

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

*(d) that, having regard to—*

*(i) the nature of the activities 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,*

*(e) 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,*

*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."*

(d) Consideration of Grounds for Refusal

The Board were satisfied that none of Grounds for Refusal (a), (b), or (d) applied. There were no mandatory refusal grounds present so Grounds (a) and (b) did not arise. The Board had no reason to suppose that the Premises would be unsuitable for the sale of alcohol, and did not consider (d) further.

The Board considered that the only issues to be considered were Grounds for Refusal:

- (c) inconsistency with Licensing Objective(s)
- (e) Overprovision

(e) Ground for Refusal (c): inconsistency with Licensing Objective(s)

The L.O.s which the Board considered were:

- (a): 'preventing crime and disorder'
- (c): 'preventing public nuisance'
- (d): 'protecting & improving public health'

In relation to L.O.s (a) and (c):

Several of the Objections referred to loitering and possible increase in crime. The Board regarded these Objections as too speculative. As part of the statutory procedure, Applications are routinely copied to the Chief Constable, and who can make representations concerning any L.O.s if he has any concerns. He had not done so here. If such concerns arose later then either the Police or residents could commence Review Application procedure under Section 36.

In relation to L.O. (d):

The Board were satisfied that their approach to Overprovision addressed that L.O., and did not consider the L.O. separately. The Board disregarded any suggestion that the Applicant's proposal might be commercially harmful to competitors.

(f) Ground for Refusal (d): Overprovision

1. The Board's approach to Overprovision was set out in their LPS and in the Report prepared by the Solicitor (Licensing).

2. 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 LPS. In this case, the relevant part was LPS 2013-2016, Annex E.

3. 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.

4. For the purpose of the LPS:

(a) Under Section 7(2) it is for the Licensing Board to determine the relevant 'Localities'. The Board has decided to divide its area into 6 'Localities' in its area (coinciding with the 6 'Neighbourhood Areas' used by the North Ayrshire Community Planning Partnership). The Subject Premises are in Locality 3 : "Kilwinning" (including Pennyburn, Blacklands, Whitehurst Park, Woodside).

(b) Premises are distinguished Premises by 'Function Types'. The Subject Premises are in Function Type 1 (Off-sales).

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

(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").

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

(a) Locality: the Premises are in a Locality where Applications are especially unlikely to be granted (regardless of the Function Type);

(b) Function Type: any Application for Premises in FT 1 (Off-sales) is especially unlikely to be granted (regardless of the Locality);

7. LPS Annex E, Para. 4.5 ("Additional Factors") includes:

"(b) *Function Type: the Board is aware:*

*- that a substantial proportion of alcohol is bought from off-sales shops and consumed in an unregulated environment (unlike a public house, there are no checks on the rate consumed, volume consumed, the consumer's state of intoxication, or the age of the consumer);*

*- that disorder in or near on-sales is often contributed to by customers 'front-loading' by drinking at home or in public places;*

*Accordingly any Application for Premises in Function Type 1 is especially unlikely to be granted (regardless of the Locality);"*

The system of 'Function Types' has been adopted by the Board to assess Overprovision, and the Board do not think it appropriate to compare Premises which have a different activity profile from

those under consideration. The "Overprovision Assessment Report" therefore concentrated on comparable Premises. The total:

- (a) had already been taken into account in setting the "Additional Factors", and
- (b) was stated in Part E of the O.A.R. (the Assessment excludes "Section 125" Clubs as these are excluded from Overprovision considerations: Section 125(2)(a), (c) and (e)).

8. The Scottish Government Guidance was that, once a Board had determined that Overprovision existed, there was a presumption of refusal. The Board had already concluded that the Locality was overprovided. The issue for the Board in the present case was whether or not an exception to their Policy should be made.

9. The Board proceeded with the following presumptions:

- (a) the existing number and capacities of Premises in the 'Locality' and in the 'Function Type' were already sufficient,
- (b) Overprovision would result if the Application was to be granted, and
- (c) the Application should be refused.

There were two factors here which made the presumption of refusal particularly strong, as both Additional Factors applied.

10. There was no suggestion during the Meeting that the Board's statistics were out-of-date, although the Board recalled that such a suggestion had been made in a recent Meeting (22 June 2015). The Board had rejected that suggestion then and remained satisfied that the LPS 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 had been kept informed on more recent developments. At their meeting on 19 January 2015 the Board had received a Report on two further health reports produced since the current LPS 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 (AFS) 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."*

AFS 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 appreciated the distinction, and acknowledged 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 have not yet opened.

However, 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.

10. The LPS, Annex E includes:

*"4.5(d) ... 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" ..."*

*"4.6 ... 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."*

(g) Discussion

As Mr. Gibson himself conceded, his Application was inconsistent with the Licensing Objective 'protecting & improving public health', but this was not, in the Board's view, a reason on its own for refusing the Application. The Board acknowledged that the Act itself contained a contradiction:

(a) on one hand it restricted the sale of alcohol, e.g. imposing conditions, providing for "Overprovision" as a potential basis for refusal, limiting price variations and "irresponsible drink promotions", but

(b) on the other hand the fact that there was a possibility of over provision meant that there had to be the possibility that some state of affairs might not be overprovision. The Act was a licensing Act - the Law did not prohibit the sale of alcohol, but rather regulated an activity which was lawful provided that many requirements were fulfilled.

The Board considered that the problem for the Applicant was their Overprovision Policy. In the Board's view, nothing that had been said on behalf of the Applicant rebutted the presumption of refusal. The Applicant's position seemed to be "I want to sell alcohol, and there's no reason why I shouldn't". The Report which had been intimated to the Applicant, and which Mr. Gibson himself referred to, indicated that there was a Policy presuming refusal and the basis for the Policy. There was nothing in favour of the Application apart from the assertions made on behalf of the Applicant.

The presumption of refusal was strengthened by two factors - the Function Type of the Premises (Off-Sales) and their Locality (Kilwinning). The Board had carried out an Overprovision Assessment of its whole area, and had distinguished Function Types and Localities where the presumption might be stronger or weaker. It was conceivable that an Application might be made in a Locality where the presumption was not so strong, and in that case the Board might consider that the Licensing Objective 'protecting & improving public health' would stand alone and would not of itself be a reason for refusal. However, that hypothetical situation was not what faced the Board with the present Application.

The Board did not accept Mr. Gibson's suggestion that the proper question raised by the Licensing Objective 'protecting & improving public health' was "will the new Licence make things worse". This would be an invitation to the Board to indulge in the very speculation that an Appellant would criticise in Court if it went against him. Unlike the other Licensing Objectives, it is unlikely that a Board could ever establish a causal link between the operation of particular Premises and 'protecting & improving public health'. In contrast, if the Board were satisfied that there had been crime and disorder, or nuisance, involving particular Premises then action might be taken.

Mr. Gibson had asserted that "One-Stop" stores were different from all the other shops in Kilwinning, barring the existing "Tesco Express". The Board understood him as implying that the Board was using the wrong comparators in the "Overprovision Assessment Report". The Board did not accept this. The Board had, in their LPS, adopted a system of "Function Types" - they did not simply aggregate all alcohol outlets, taking pubs, shops, restaurants, hotels and nightclubs together, but instead sought to compare like with like. Having looked at the Layout Plan and hearing both Mr. Gibson and Mr. Carroll, there was no doubt in the Members' minds that the correct comparators had been chosen.

In the Board's view the Application had no merit and was simply being put forward because, in Mr. Gibson's words "alcohol sale needed to be part of the business model".

At the time of the Meeting the Board had no information about the 2004 decision apart from the brief summary contained in the Board Report and Mr. Robertson's reference to it. That decision had been under earlier legislation and the Board did not know what the reasons had been. The Board took no account of the decision, beyond noting Mr. Robertson's view that the objections then had been much as they were now.

(h) Conclusion

1. The Board had regard to all the submissions, objections and representations (other than the Petition), and in particular noted:

(a) the present Application had attracted 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 the Alcohol (Scotland) Act 2010);

(b) there was no representation from the Chief Constable (other than the Section 21(3) Notice).

2. In the Board's opinion:

(a) the presumption of refusal existed,

(b) no justification for an exception to their Policy had been established, and

(c) the "Ground for Refusal" related to Overprovision applied.

3. Given that the Board had determined that a "Ground for Refusal" stated in Section 23(5) applied, the Board refused the Application as they were obliged to do by Section 23(4).