

**MINUTES of MEETING of PLANNING, PROTECTIVE SERVICES AND LICENSING
COMMITTEE held in the COUNCIL CHAMBERS, KILMORY, LOCHGILPHEAD
on WEDNESDAY, 19 DECEMBER 2018**

Present: Councillor David Kinniburgh (Chair)

Councillor Robin Currie	Councillor Roderick McCuish
Councillor Lorna Douglas	Councillor Sandy Taylor
Councillor Audrey Forrest	Councillor Richard Trail
Councillor George Freeman	

Attending: Charles Reppke, Head of Governance and Law
Graeme McMillan, Solicitor
Allegra Evans-Jones, Trainee Solicitor
Remo Serapiglia, Applicant
Jane MacLeod, Applicant's Agent
Councillor George Freeman, Objector
Iain Brown, Objector
Fiona MacDonald, Objector

1. APOLOGIES FOR ABSENCE

Apologies for absence were received from Councillors Gordon Blair, Rory Colville, Mary-Jean Devon, Graham Archibald Hardie, Donald MacMillan and Jean Moffat.

2. DECLARATIONS OF INTEREST

Councillor George Freeman declared a non-financial interest as he is an objector to this application.

Mr Reppke advised Councillor Freeman that in terms of the Councillors' National Code of Conduct, he would be required to leave the room at the point when the Committee came to determine the Application.

3. CIVIC GOVERNMENT (SCOTLAND) ACT 1982: APPLICATION FOR RENEWAL OF A STREET TRADER'S LICENCE (R SERAPIGLIA, LARBERT)

The Chair welcomed everyone to the meeting and introductions were made. He then outlined the procedure that would be followed and invited the Applicant to speak in support of his application.

APPLICANT

Mrs MacLeod spoke on behalf of the Applicant. She advised that Mr Serapiglia was a member of a large Italian family. His father moved to Scotland in 1956 and has had an ice-cream van since 1957. No objections have been made in the past for Mr Serapiglia's previous applications for renewal and there have been no objections to him in the other Council areas he operates. Mrs MacLeod then read out the following statement on behalf of the Mr Serapiglia's Solicitor:

I have been asked by Patrick Campbell Corcoran of Miller Samuel Hill Brown to represent Mr Serapiglia at today's Hearing. I confirm that my instructions are to ask the Board to grant the Application but not to impose on the new Licence a newly worded condition which replaced a condition on Mr Serapiglia's previous Licence which prohibited trading within 100m of any establishment selling goods similar to those being sold by Mr Serapiglia.

The New Condition which I will read out shortly comes as a result of challenges made by Mr Serapiglia and his advisors who are not happy with the newly worded condition which they consider void from uncertainty and *ultra vires*.

I am accordingly asking the Licensing Authority to use the discretion referred to and not apply the New Condition to Mr Serapiglia's Licence.

Background

Mr Serapiglia trades in parts of Kilcreggan, Rosneath, Garelochhead, Rhu, Helensburgh, Cardross, Tarbet, Arrochar, Luss, Oban, Campbeltown, Cowal, Inveraray, Furnace, Lochgilphead, Ardrishaig and Tarbert.

Two Luss shop-keepers and a Councillor have been vociferous in their opposition to Mr Serapiglia's ability to trade in Luss and have relied upon Condition 17 of the currently extant Licence (the "100m Condition").

Mr Serapiglia instructed Miller Samuel Hill Brown to apply to vary his Street Trader's Licence by way of removing the 100m Condition. The Application to Vary was first heard on 24th January 2018, continued to 21st March 2018, 16th May 2018 and 20th June 2018 on which date the Committee refused the Application to remove the 100m Condition.

A Court challenge was raised by Mr Serapiglia's agents. The case did not proceed as it would not have concluded before this Hearing and it was agreed that this is the correct forum to debate the New Condition at the same time as renewing Mr Serapiglia's Licence.

My instructions are to the effect that the 100m Condition and the New Condition are both *ultra vires* and separately void due to uncertainty. At earlier Hearings on this matter discussion centred on the reason for the 100m Condition with some Councillors accepting that it simply amounted to an attempt to unfairly protect local shops from competition. The Committee appears to have accepted one or both of those arguments, and have now decided upon the New Condition which is to the effect that:-

"A mobile Street Trader shall not trade in any one location for longer than 30 minutes before moving to another location, not less than 200 metres away and shall not return to a previous location within the same calendar day. If a Licence Holder requires to trade in any one location for a duration which is longer than 30 minutes, they must ensure they have obtained the necessary planning permission and have sought and obtained exemption from the provisions of this Condition from the Licensing Authority. This Condition shall not apply to mobile Street Traders who are operating in an area which has been defined as an "Economically Fragile Area" in terms of Argyll and Bute Council's Local Development Plan, adopted in March 2015 (a copy of the map detailing said Economically Fragile Areas is attached as Appendix 1 to these conditions)." (the "New Condition")

Luss is not an Economically Fragile Area.

Mr Serapiglia's advisors consider that the New Condition is also *ultra vires* and also void from uncertainty. The arguments made previously on Mr Serapiglia's behalf, and which appear to apply to the New Condition, are as follows.

Ultra Vires

The Sheriff court decision of *McCluskey v North Lanarkshire Council* 2016 SLT (ShCt) 31 is the leading authority. This case concerned a restriction on burger vans operating within 250m of any school. At paragraph 17, the Sheriff narrates that the licensing authority was of the view that it was acting within its powers by imposing the condition in so far as it was furthering the aim of reducing childhood obesity.

At para. 73, the Sheriff held that a similar condition to Mr Serapiglia's is "unqualified and amounts to a blanket ban". It goes on, at para. 75, to consider the terms of para. 10(1) of Schedule 1 to the 1982 Act, and at para. 76 the last sentence, the Sheriff holds that if "the effect of the condition is to require street traders to do more than a licensing authority is empowered to require of them the condition must be held to be *ultra vires* of the local authority."

At para. 77: "In analysing the condition the first question to be asked is what is the effect of the condition? This will depend upon what it requires the pursuer to do... The next question to be asked is what effect, if any, this has on the street trader's contracts or dealings with her customers."

As regard the first question, the effect of the New Condition will, given (1) the small size of Luss and (2) the limited roads that it is expected that Mr Serapiglia be allowed to trade from, amount to a severe restriction on the amount of time that Mr Serapiglia be able to trade in Luss. This will clearly be to the benefit of local shops, and reduce competition.

On the second question, the effect of the New Condition will be to restrict heavily the volume of customers that Mr Serapiglia could deal with.

Returning to *McCluskey*, at para. 83: "...the condition attached to the licence must be for a licensing purpose and not for any ulterior purpose."

At para. 85 the Sheriff concludes that the licensing purpose for street traders is "the preservation of public order and safety and prevention of crime".

At para. 87, the Sheriff quotes from a Government circular which notes that the "purpose of licensing is not to restrict trade or competition".

At para. 100: "I am satisfied that Parliament cannot have intended local licensing authorities to have the implied power to attach a condition with such a significant effect on the commercial contracts of street traders."

My submission would therefore be that the New Condition falls foul of *McCluskey*, in so far as it does not appear designed to address the "preservation of public order and safety and prevention of crime". In reality, the effect of the New Condition will instead be to restrict trade and restrict competition – something that *McCluskey*

explicitly warned against. In the circumstances, the New Condition is *ultra vires* and should not be applied to Mr Serapiglia's licence.

Void from Uncertainty

A separate challenge to the New Condition is that it should not be applied to Mr Serapiglia's licence because of how lacking in specification it is. Given that the breach of the condition could amount to an offence, and a loss of a licence, one would have thought that the Committee would have ensured that the New Condition was clear.

For example:-

"...shall not trade in any one location for longer than 30 minutes..."

When does the clock start – when one arrives at a pitch, when customers begin to migrate toward the ice cream truck, or when the first transaction is entered into? If one arrives at a pitch, waits 30 minutes, and no customers attend, does that count as trading? Does the clock pause where there are no customers, or here the trader has to take a break from serving customers? What happens to transactions that are entered into before the expiry of the 30 minutes, but conclude afterwards? Given the hostility that Mr Serapiglia feels he has experienced from local shops, it does not seem outwith the realms of possibility that he may be timed by owners of local shops.

"...moving to another location, not less than 200 metres away..."

How does one measure 200m – is it as the crow flies, or as one drives?

One of the objections is that Mr Serapiglia traded on 30th June and 1st July 2018, in breach of the 100m Condition. Mr Serapiglia's position is that he was outwith the 100m as one drives. Whether that is a matter of opinion or not, what is argued is that (1) the 100m Condition is *ultra vires*, accordingly is void and, therefore, not capable of being breached, and (2) following advice from his solicitor that it was legal to do so, Mr Serapiglia traded in Luss on 30th June and 1st July 2018 for the first time in very many months.

The other objection appears to be one based on health and safety, given the narrow street. Photographs have been lodged in that regard. Mr Serapiglia's position is that when the photographs were taken he was in the midst of asking customers to move back in order that he could move his ice cream van and turn around, in order that customers were in a safer location. The photographs do, of course, prove a demand for his ice-cream.

In his letter of objection Councillor Freeman refers to trading in Murray Place. That part of the complaint is factually inaccurate as Murray Place is, along with School Road, part of the areas of trade allowed in the Schedule to the current Licence.

QUESTIONS FROM OBJECTORS

Councillor Freeman referred to Mrs MacLeod advising that Mr Serapiglia operated at Murray Place in line with his licence. He asked Mrs MacLeod if she could confirm that Mr Serapiglia did not have the permission of the landowner to operate in Murray

Place and that street traders do require the permission of landowners to operate on their land. Mrs MacLeod advised that she did not have instructions about that.

Councillor Freeman referred to the areas of trade listed by Mrs MacLeod and asked if she was indicating that Mr Serapiglia traded in these communities on a daily basis. Mrs MacLeod advised that she was reading out the list of areas where Mr Serapiglia was permitted to trade. Councillor Freeman asked if this was with the permission of the landowners and Mrs MacLeod replied yes.

Councillor Freeman asked Mrs MacLeod if she could confirm that the streets listed were the only areas where Mr Serapiglia actively traded. Mrs MacLeod advised that as far as she was aware Mr Serapiglia only traded in the areas permitted on his licence.

Councillor Freeman asked if Mr Serapiglia argued that he only traded on the streets listed on the schedule. Mrs MacLeod explained that he could be invited to an event like the Cowal Games and that would be allowed and in terms of his street trader's licence he could only trade in the areas listed on his licence.

Councillor Freeman referred to the McCluskey V North Lanarkshire Council case and asked if Mrs MacLeod would accept that this related to the promotion of healthy eating in school and was a different issue and did not apply to Mr Serapiglia. Mrs MacLeod advised that she had explained why she thought that it did apply. She referred to the commercial contracts of street traders not being restricted.

OBJECTORS

Councillor Freeman

Councillor Freeman advised that most Members of the Committee would be well aware of the history and well aware of the number of complaints he has received from his constituents and that there have been long standing issues. He said that Members would have been aware of the numerous complaints he has received over the past year or two relating to the operations of Mr Serapiglia at Luss and the view was that when he was operating in Murray Place he was in breach of the 100m rule which was part of the conditions attached to his licence. He indicated that there were a number of conditions attached to his licence. He said that Mr Serapiglia regularly failed to comply with Condition 3 which related to wearing a badge. He advised that his constituents have argued that Mr Serapiglia very seldom wore his badge as required by the Condition. He said that his constituents have argued that they have in the past requested to see Mr Serapiglia's licence which, Councillor Freeman said he believed they could do, and this request was refused. He said that his constituents have complained to the Police and that no action has been taken. Councillor Freeman advised that as far as the schedule was concerned, it was quite clear to him and others that Mr Serapiglia operated in many areas which were not included on his schedule. He said to the Committee that they may recall that this was raised in the past with Police Scotland but Police Scotland confirmed that the photos provided by one of his constituents were not dated and did not show Mr Serapiglia actually operating at that time. Councillor Freeman advised that over the past few months many photos had now been taken which he had copies of and that they did show Mr Serapiglia in his van. He indicated that they had clear evidence which could be taken to Police Scotland which showed Mr Serapiglia does not show his badge and operates on a number of streets not on his licence. Councillor

Freeman confirmed that the Objectors believed the new Condition 17 should apply to his licence. He said that he was not aware of any other street trader that has had that Condition waived.

Mr Brown

Mr Brown advised that he and his partner ran a reputable business which was established in 1970 and that they were the third owners during this time. He advised that they have 8 local employees and that their objection was due to the fact that the Applicant continued to trade within 40m of their business. He said that the only problem they had was with Mr Serapiglia continuing to trade against Condition 17.

QUESTIONS FROM APPLICANT

Mrs MacLeod asked Councillor Freeman how many complaints he had received. Councillor Freeman advised that he had received at least a dozen as well as from Luss and Arden Community Council.

Mrs MacLeod ask why there had been no more objections to this application. Councillor Freeman confirmed that the other objectors were happy for him to submit an objection on their behalf.

Mrs Macleod asked Councillor Freeman if he could name these objectors. Councillor Freeman advised that due to Data Protection he would be loathed to name anyone without their written consent. He advised that at least one of the named was produced to Legal Services along with the photos taken by an elderly constituent in Murray Place.

Mrs MacLeod referred to comments that Mr Serapiglia traded in areas outwith his areas of trade and suggested that he may have been parked up in these areas having lunch. Councillor Freeman advised that he would be happy to provide photos which showed the van, the registration of the van and Mr Serapiglia serving customers at the van. He advised that he would be happy to provide copies of these which were dated and provided the names of the streets.

Mrs MacLeod asked, if the Police Scotland had this evidence, why they had not objected to this application. Councillor Freeman advised that the reason Police Scotland gave was because the photos were taken by an elderly constituent and were not dated and did not show Mr Serapiglia operating from the van on these occasions. He said that the Police were commenting on the previous photos and not the new ones which had now been taken.

MEMBERS' QUESTIONS

Councillor Trail sought clarification on what the Committee were being asked to decide on today. Mr Reppke advised that this was an application for renewal of Mr Serapiglia's existing Street Trader's Licence. He pointed out that prior to the period of renewal the Council introduced new conditions across a range of licences including street traders and it was indicated to existing licence holders that the Committee would be likely to impose these new conditions. He confirmed that the Committee had before them an application for renewal and a submission from the Applicant's Agent that you should not apply Condition 17 to that licence. He advised

that it was at the discretion of the Committee to apply or not apply a standard condition to this licence.

Councillor McCuish asked the Objectors how long Mr Serapiglia had traded within 40m of their business. Mrs MacDonald advised that at times it had been up to 2 hours. She said that she had not gone out recently to time him as she had been working.

Councillor McCuish asked if there had been any objections to Mr Serapiglia from other parts of Argyll and Bute. Mrs MacLeod advised that these were the only objectors and that he had never had objections before. She confirmed that in other areas he had never received any objections.

Councillor Currie referred to a town such as Inveraray where there could be more than one shop close to each other selling ice cream. Mrs MacLeod advised that the more facilities we had the better it was for Argyll and Bute

Councillor Kinniburgh asked Mr Serapiglia if he ever had problems parking in Luss as since his current licence was granted there had been a parking review carried out in Luss and, although a Traffic Order was not taken forward, what did come out of it was the village experienced exceptional traffic in and out of it. Mr Serapiglia advised that he had not personally experienced any difficulty. Mrs MacLeod advised that the photos provided in the paperwork to the Committee showed Mr Serapiglia asking his customers to move so that he could move his van to a safer place.

Councillor Kinniburgh asked Mr Serapiglia if he had ever operated outwith the areas covered in his licence. Mr Serapiglia replied never. He indicated that there was only one occasion when he drove onto a street in Luss which he thought was School Road but was not and when he realised this he left. He said that was a genuine mistake at that time.

Councillor McCuish asked the Objectors what types of produce they sold. Mrs MacDonald advised that they sold hot and cold filled rolls, cakes, pies, hot and cold drinks.

Councillor McCuish asked Mr Serapiglia what types of produce he sold. Mr Serapiglia advised that he sold a selection of luxury Italian ice cream with many flavours and many toppings. He also sold slush puppies and candy floss and confirmed that there was a demand for his produce.

Councillor Kinniburgh referred to Condition 17 and asked Mrs MacLeod if she was asking for this to be removed completely from Mr Serapiglia's licence. Mrs MacLeod replied yes on the basis that it was ultra vires, vague and restricted competition. She asked that it be removed from all the areas referred to in his licence.

Councillor Kinniburgh referred to his concerns about Luss and the amount of traffic in and out of it which was a concern of the community too. Mrs MacLeod advised that Mr Serapiglia shared his concerns and that he would only trade if he was able to get parked. She advised that Mr Serapiglia was not going to waste time looking for a parking space.

Councillor Kinniburgh asked if there were other areas as lucrative as Luss. Mr Serapiglia advised that Luss was his first port of call and that if he could not get

parked there or if it was not busy he would move on. He confirmed that he was not there 7 days per week although his licence gave him the opportunity to do that. He said that he was not interested in working 7 days per week and that he just wanted to make a living and go home.

Councillor Kinniburgh asked Mr Serapiglia how often he traded. Mr Serapiglia replied that this was mostly at the weekends. Mrs MacLeod commented that Luss was popular in the summer time. She said that Mr Serapiglia was offering a discrete trade – Italian ice cream - and that tourists welcomed the provision of that facility in this area.

Councillor Kinniburgh asked Mr Reppke to comment on the interpretation of Condition 17 by the Applicant's Agent. Mr Reppke advised that the views expressed were not accepted by the Council and if needs be it would be debated at another time in a different forum.

Councillor McCuish asked the Objectors what difference it made to them whether Mr Serapiglia traded 40m away from their business or further. Mr Brown advised that they lost trade. He said that they were there all the time and that they had employees and suggested that Mr Serapiglia came in and took the cream. He said it was like Amazon in the High Street. He said that Mr Serapiglia was in and out with no overheads like they had.

Councillor McCuish asked, given that Mr Serapiglia was only there 2 days per week, how many days Mr Brown opened. Mr Brown advised that they were open 7 days per week from April till December.

SUMMING UP

Objectors

Councillor Freeman advised that to recap it was clearly his view that Mr Serapiglia operated on many streets that were not included on his licence and that he held evidence to that effect. He advised that as it has not been accepted today clearly his only route was to take this back to Police Scotland with a further complaint to investigate it. He said that he had also highlighted that Mr Serapiglia failed to comply with Condition 3 as he did not wear his badge and that he has refused to make it available to those that have asked which he is required to do under Condition 3. He commented that his constituents paid non-domestic rates the same as other businesses in Luss. He advised that another 3 businesses in Luss have been affected and they have all confirmed in the past in writing that they objected to Mr Serapiglia operating at Murray Place. He said that Mr Serapiglia operating in Murray Place went against the previous Condition 17. He said that Mr Serapiglia operated without the approval of the landowner ACHA and that ACHA had wrote to him and told him he could not operate on this land. He said that he believed Mr Serapiglia had not operated there since then. Councillor Freeman confirmed that they were not asking that Mr Serapiglia's Street Trader's Licence not to be issued but they were asking that Condition 17 should apply and that Murray Place should not be included on the licence.

Applicant

Mrs MacLeod referred to Councillor Freeman's comments about his constituents paying taxes and rates. She advised that Mr Serapiglia paid VAT and fuel duty and stressed that business competition should not be stopped. She advised that Mr Serapiglia displayed his badge at the front of his van and that on the occasion when he was asked to produce his licence he was serving a customer at the time and that he also had a large queue of people. She advised that she was asking the Committee to renew Mr Serapiglia's licence and she noted that she did not think there was any objection to it being renewed. She advised that the only objection related to the wish of Objectors that Condition 17 should be included on the licence. She said that she put it to the Committee that any condition attached must be for licencing purposes and not an ulterior purpose. She said that it was her view that the objection did not relate to a licensing purpose and that the Objectors wanted it applied so Mr Serapiglia would not affect their business. She said that the licensing purpose for street traders was "the preservation of public order and safety and prevention of crime". She pointed out that no objector was saying that Mr Serapiglia was causing a crime. She noted that the Objectors have advised that other businesses were not happy and she commented that they were not here today. She advised that the only objections were from competitors and she questioned if they were really competitors. She referred to Mr Serapiglia's description of the products he sold and she advised that she was not aware of the Objectors selling Italian ice cream in their shop. She said that the purpose of the licencing authority was not to restrict trade or competition. She said that Parliament would not have intended an authority to have the power to restrict a street trader. She commented that the wording of the Condition itself was vague and asked how it could be determined where 200m started and finished and when 30 minutes started. She advised that if the Condition was included it could attract an appeal. She asked the Committee not to apply the Condition. She advised that Mr Serapiglia ran an excellent business and that the photos lodged showed there was a demand for his service. She advised that Condition 17 would be a restriction on trade and was too vague to make sense.

When asked, both parties confirmed that they had received a fair hearing.

Councillor Freeman left the meeting at this point.

DEBATE

Councillor Trail advised that he had heard a good deal but a lot had been to the point. He advised that in principle he had not heard a good case for not applying Condition 17. He said that the Committee were not here to decide whether there was competition or not. He advised that he would have no hesitation in applying Condition 17 as the Committee had agreed the wording fairly recently.

Councillor McCuish advised that he thought the guidance they received was good and the guidance received was on the licensing purpose. He said that he did not think the licensing purpose had been met here. He advised that the Objectors were raising concerns about the effect on their business. He said that he could not find a reason to include this Condition.

Councillor Currie advised that normally when he said something he stuck with it. He said that he thought this was a stupid condition which was anti competition. He questioned how it could be policed. He also commented that it was vague. He said that it would be crazy to put this Condition on the licence. He asked why the

complaints were just from Luss. He referred to bigger areas like Inveraray. He commented that he often seen ice cream vans parked outside village shops and there were no objections. He commented that if there were that many people then surely there was enough to go round everyone. He said there was absolutely no need for the Condition.

Councillor Kinniburgh advised that he had his own view as to why it was only Luss. He referred to the amount of traffic that went in and out of Luss and that the Area Committee had picked this up in a report to them recently. He said that he thought that was why there was a problem in Luss. He said that he thought Condition 17 should remain quite simply because it had been discussed at length over a number of meetings. He advised that the Committee had asked Officers to go away and look at them again and that they came back with proposals which the Committee accepted. He advised that he could see no reason to remove Condition 17. He referred to Councillor Freeman's request to remove Murray Place from the licence. He advised that he could see justification from removing Murray Place or School Road based on the traffic management plan. Having said that, he advised that he thought the issue would be Mr Serapiglia getting parked in places he was supposed to park. He commented that he had heard from Mr Serapiglia today that if he could not get parked he would remove himself and go elsewhere. He said that if the Committee were to remove these places from his licence then this would be restricting trade.

Motion

That the application be granted and that Condition 17 remains and that Murray Place and School road remain on the Licence.

Moved by Councillor David Kinniburgh, seconded by Councillor Richard Trail

Amendment

That the application be granted as applied for and that Condition 17 be removed on the basis that the Objectors have not based their objection on licensing issues but purely for commercial reasons.

Moved by Councillor Roderick McCuish, seconded by Councillor Audrey Forrest

The Amendment was carried by 5 votes to 2 and the Committee resolved accordingly.

DECISION

The Committee agreed to renew Mr Serapiglia's Street Traders Licence and that standard Condition 17 be not applied to that Licence.

(Reference: Report by Head of Governance and Law, submitted)