

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: STRICTLY STRAWBS PTY LTD

PREMISES: PERENNIAL

PREMISES ADDRESS: 23 RAILWAY ROAD, SUBIACO

APPLICATION ID: A000057238

NATURE OF APPLICATION: APPLICATION FOR CONDITIONAL GRANT OF A
SMALL BAR LICENCE

DATE OF DETERMINATION: 21 MAY 2015

Introduction

1. This is an application by Strictly Strawbs Pty Ltd (“the Applicant”) for the conditional grant of a small bar licence for premises to be known as *Perennial* and situated at 23 Railway Road, Subiaco.
2. The application is made pursuant to ss 41 and 62 of the *Liquor Control Act 1988* (“the Act”) and was advertised in accordance with instructions issued by the Director of Liquor Licensing (“the Director”), which resulted in a notice of intervention being lodged by the Commissioner of Police (“the Commissioner”), pursuant to the provisions of s 69(3) of the Act.
3. Pursuant to the provisions of ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which are summarised below.

Submissions of the Applicant

4. The Applicant submitted that *Perennial* will be a unique and vibrant small bar that provides three discrete areas for patrons to socialise in, comprising a casual eating space on the ground floor; together with a more intimate space and a roof top bar on the first floor. The Applicant also submitted that the premises will:
 - (a) retain the heritage listed ground floor façade of the premises; and
 - (b) form part of a mixed use development, which includes a residential component.
5. To support its application, the Applicant lodged a Public Interest Assessment (“PIA”) and other submissions, in which it submitted that *Perennial* will encourage patrons to socialise with one another, in a venue that will not have wall mounted television screens broadcasting sports and/or playing loud or overbearing music, but will instead utilise a “unique system... that will encourage patrons to ‘disconnect’... from their mobile phones to facilitate socialisation, conversation and interaction between patrons.”

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6. To further facilitate social interaction, the Applicant submitted that:
 - (a) the menu will be centred around a range of smaller, communal dishes ideal for sharing between friends, with food being simple, seasonal and prepared in an open concept kitchen, enabling customers to observe food preparation; and
 - (b) the venue has been designed and styled in a casual, warm and inviting way.
 7. In relation to the role of music at the premises, the Applicant submitted that music will generally be background in nature, although live entertainment, such as an occasional jazz band or solo acoustic artist, may be offered fortnightly or monthly.
 8. To help establish that the grant of the application will further the Act's object of catering to the requirements of consumers for liquor and related services, the Applicant undertook a public questionnaire of 256 people between the dates of 29 July 2014 and 24 August 2014, with 97% of respondents indicating they would attend the venue if a licence is granted.
 9. The Applicant further submitted that the results of the questionnaire should also be considered in light of the fact that there were no objections to the application to detract from the positive consumer support for the proposal.
 10. It was also submitted that the grant of the licence will assist with the proper development of the State's tourism industry, primarily because:
 - (a) Subiaco is commonly regarded as a tourist destination in Western Australia; and
 - (b) the Applicant intends to only stock produce sourced within 450 kilometres of Subiaco, with the origin of food and beverages noted on the menus and drinks lists, to assist in the promotion of local producers.
 11. Submissions were also made that the hospitality industry more broadly will benefit from the opening of the proposed venue, as Subiaco is in need of re-invigoration and of establishing itself as a vibrant cultural hub, before losing its primary attraction, Subiaco Oval, in 2018.
 12. The Applicant's PIA also addressed those matters prescribed in s 38(4) of the Act. In this regard, while freely acknowledging that the premises will form part of a mixed use development and therefore has the potential to negatively impact on its immediate neighbours (refer s 38(4)(c)); the Applicant also recognised the importance of operating the licensed premises without disturbing nearby residents or businesses.
 13. Accordingly, the Applicant recommended that imposition of the following conditions on the licence, if granted, would reinforce its commitment to its business model and the minimisation of alcohol-related harm or ill-health:

- (a) Seating for at least 35 people on the ground level and 20 people on level one shall be set-up during all trading hours, except for private functions or special events.
- (b) A range of food shall be available during all trading hours.
- (c) The licensee shall not promote or sell drinks which offer liquor by virtue of their 'emotive' titles such as (but not exclusive to) 'laybacks', 'shooters', 'slammers', 'test tubes' and 'blasters'.
- (d) No energy drinks may be mixed with liquor or sold in any other form on the premises. For the purposes of this condition, "energy drinks" has the same meaning as formulated caffeinated beverage within the Australian New Zealand Food Standards Code with a composition of 145 mg/l of caffeine or greater.
- (e) Drink options that contain mid-strength alcohol content as well as a range of non-alcoholic drinks.
- (f) Music will be played at levels that permit conversation to occur, except for private functions or special events.
- (g) A Closed Circuit Television ("CCTV") system that records continuous images throughout the premises including all entrance and exit points to the premises shall be installed.

Representations of the Commissioner

14. The Commissioner made representations and submissions that the grant of the application would result in public harm and/or disturbance, if conditions are not imposed on the licence; and on other matters relevant to the public interest.
15. The Commissioner submitted that demarcation of the small bar over two levels may pose logistical problems with the monitoring, supervision and management of patrons. The Commissioner also observed the Applicant's policy in its Management Plan "to avoid physical confrontation or contact with patrons and to instead call the police, whenever possible" and submitted that while police are required to assist in evicting patrons, these requests often coincide with peak demand and occasionally overwhelm police resources, particularly on Friday and Saturday nights. Therefore, the Commissioner recommended that the use of crowd controllers at the proposed premises may mitigate the demands on police resourcing in all but the most serious incidences.
16. The Commissioner also submitted that while mixed use developments may be an exciting prospect, they can be fraught with potential police issues, particularly with regard to the concerns of residential neighbours about noise and disturbance.
17. As such, the Commissioner submitted that a cautious approach should be taken in regard to noise abatement conditions, given that historically; and despite the good

intentions of licensees, commercial considerations often become the overriding concern of licensees. Accordingly, the Commissioner recommended the imposition of a condition to prohibit the playing of amplified music at the premises in order to reduce the likelihood of such annoyance and disturbance.

18. The Commissioner also noted that a random selection of the Applicant's survey responses revealed that five respondents were Facebook friends of one or more of the Applicant's directors; and therefore questioned whether there was bias in the results of the consumer evidence.
19. The Commissioner also made representations that outlaw motorcycle gangs ("OLMGs") are known to frequent venues in Subiaco and therefore recommended the imposition of a condition on the licence to prohibit persons from entering the premises who are wearing gang related insignia, as provided for in the Director's *Dress Standards for Licensed Premises* policy.
20. The Commissioner also submitted that the imposition a set amount of seating, together with a limit on the number of patrons for each floor space, would assist in minimising aggression that regularly occurs on licensed premises and in ensuring that the number of persons on the premises does not exceed the maximum number of 120 persons at any one time.
21. In conclusion, the Commissioner submitted that imposing conditions for the employment of licensed crowd controllers during peak trading times will support and assist the licensee in managing the venue to:
 - (a) prevent the attempted incursion of OMCG members;
 - (b) ensure compliance with:
 - (i) the *Health (Public Buildings) Regulations 1992* Certification; and
 - (ii) proposed patron limits under the Liquor Control Act;
 - (c) mitigate alcohol related harms and anti-social behaviours;
 - (d) manage the rooftop area in accordance with the Act; and
 - (e) assist the licensee mitigate concerns with the refusal or removal of patrons.
22. Other licence conditions recommended by the Commissioner related to trading hours, drink standards and some more general trading conditions.

Determination

23. An applicant for the grant of a small bar licence must, pursuant to section 38(2) of the Act, satisfy the licensing authority that granting the application is in the public interest. The Act as a whole establishes a regime for the control and regulation of the sale, supply and consumption of liquor; and does not proceed on the basis that there is any

presumption in favour of the grant of a licence, but rather the reverse: that an applicant must demonstrate that it is in the public interest that the application should succeed (refer *Woolworths Ltd -v- Director of Liquor Licensing* [2012] WASC 384).

24. In determining whether the grant of an application is “in the public interest”, I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O’Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).
25. The licensing authority should, when determining whether the grant of an application is in the public interest (refer s 38(4)), consider both the positive and negative social, economic and health impacts that the grant of the application will have on the community (refer s 19 of the *Interpretation Act 1994* and Parliamentary Debates, WA Parliament, Vol 409, p 6342). In this regard, advancing the objects of the Act as set out in s 5, is a mandatory public interest consideration (refer *Palace Securities* supra).
26. In my view, the grant of the application will promote one of the primary objects of the Act, namely object 5(1)(c), which relates to catering to the requirements of consumers for liquor and related services. Furthermore, the evidence also suggests that object 5(2)(a) is also relevant, which relates to facilitating the use and development of licensed facilities reflecting the diversity of consumers in the State.
27. In addition to the subjective support from the public for the grant of the licence, which includes the results of the questionnaires and letters of support, I have also noted the following positive aspects of the proposal:
 - (a) the provision of food on the premises;
 - (b) the provision of seating for 35 people on the ground level and 20 people on level one;
 - (c) the voluntary installation and maintenance of a CCTV system that is compliant with the Director’s *Safety and Security at Licensed Premises* policy; and
 - (d) the retention and preservation of the heritage listed façade of the ground floor.
28. The Applicant seeks the grant of a small bar licence, which will have a strong focus on socialisation between patrons, but also freely acknowledges that the premises is located in a mixed use development and that it must “operate without disturbing the other cohabiters of the development”, which includes other businesses and residents. Consequently, the Applicant proposed a number of conditions to address this matter, many of which are similar to those proposed in the intervention by the Commissioner, although the Applicant has raised issue with two conditions recommended by in the intervention, namely the proposed prohibition on the presence of members of OMCs and the requirement for licensed security staff.

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29. In this regard, the Applicant noted that there is no evidence before the licensing authority to suggest that there is any likelihood of members of OMCG attending the proposed premises and that the Director's *Dress Standards for Licensed Premises* policy does not state that licensees must prevent OMCG members from entering licensed premises, but rather they may reserve the right to do so.
30. The Applicant also submitted that if the licence is granted, it will be required to ensure that no more than 120 persons are on the licensed premises at any one time, a factor that will assist in the monitoring and control of the premises. Accordingly, it is the view of the Applicant that these factors, together with its voluntary commitment to install a CCTV system, should be sufficient to ensure that the premises will be responsibly managed, without any mandated requirement to engage crowd controllers.
31. While security at licensed premises is an important issue for liquor merchants, I have noted that:
- (a) small bar licences are generally recognised as being of lower risk than some other licence types (refer the Director's *Public Interest Assessment* policy); and
 - (b) neither the Applicant's proposed manner of trade, nor the Commissioner's representations, have established a connection between the premises and OMCGs.
32. Therefore, while I do not propose to impose the relevant condition at this time, it is a matter that can be revisited in the future, should it be necessary. However, the Applicant should note that the setting of an appropriate standard of dress can influence patron attitudes and behaviour and also be an effective control strategy in managing licensed premises.
33. In relation to the issue of music played at the premises, I note that the acoustic report provided by the Applicant fails to adequately address issues regarding noise from the proposed premises affecting nearby residential tenancies and does not provide any assessment or modelling against the *Environmental Protection (Noise) Regulations 1997*.
34. In the circumstances, I consider it appropriate to impose a condition on the licence to restrict the playing of recorded music to a level that will permit conversation to occur, with any live entertainment at the premises to be restricted to acoustic performances. This condition will apply to the entire premises, including the roof top bar.
35. It is important to appreciate that as an intervener, the Commissioner carries no burden of proof (see Greaves J, *Gull Petroleum (WA) Pty Ltd* (1998) LLC No. 13/98), but rather provides submissions and evidence in order to assist the licensing authority in making an informed decision.

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36. While I have noted the representations made in the Notice of Intervention, it is my view, after weighing and balancing the evidence, that the grant of a small bar licence will cater for the requirements of consumers and provide a service that is consistent with consumer requirements.
37. Notwithstanding this view, I have some reservations about the Applicant's Management Plan and its preference of calling the police to manage incidents at the proposed licensed premises. Accordingly, I refer the Applicant to the provisions of s 115 of the Act, which clearly places an onus on licensees to responsibly conduct business under a licence, which incorporates managing its patrons, including drunken and quarrelsome or disorderly patrons (refer s 115 of the Act).
38. Ultimately however, I am satisfied that the Applicant has complied with all the necessary statutory criteria, requirements and conditions precedent to the application being granted and that subject to the following conditions, the conditional grant of the licence is in the public interest:
- (a) a certificate under s 39 of the Act being lodged before the operation of the licence;
 - (b) compliance with the *Local Government Act 1960*, *Health Act 1911* and any written law relating to the sewerage and drainage of these premises;
 - (c) all work being completed within 12 months (i.e. on or before 20 May 2016) in accordance with the plans and specifications dated 17 October 2014.
 - (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements being satisfactorily completed and the Director of Liquor Licensing being notified in writing at least 21 days before the Applicant wishes to commence trading under the licence;
 - (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed; and
 - (f) the applicant seeking confirmation of the grant on or before 20 May 2016 pursuant to s 62(4)(c) of the Act.
39. The following conditions will be imposed on the issue of the licence:
- (a) Trading Hours:
 - (i) The permitted trading hours are those prescribed in s 98(1) of the Act for a hotel licence.
 - (b) Trading Conditions:
 - (i) The maximum number of persons permitted to be on the licensed premises at any time is 120.

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- (ii) The licensee is authorised to sell and supply liquor in accordance with the provisions of s 41 of the Act as it relates to a small bar licence.
 - (iii) The sale of packaged liquor for consumption off the licensed premises is prohibited.
 - (iv) The licensee shall not promote or sell drinks which offer liquor by virtue of their 'emotive' titles such as (but not exclusive to) 'laybacks', 'shooters', 'slammers', 'test tubes' and 'blasters'.
 - (v) The licensee must provide drink options that contain low alcohol content as well as a range of non-alcoholic drinks.
 - (vi) No liquor is to be supplied mixed with energy drinks. For the purposes of this condition "energy drink" has the same meaning as formulated caffeinated beverage within the *Australia New Zealand Food Standards Code* with a composition of 145mg/l of caffeine or greater.
 - (vii) Food must be available during trading hours.
 - (viii) Seating for at least 35 people on the ground level and 20 people on level one must be set-up during all trading hours, except for private functions or special events.
 - (ix) All entertainment at the premises is restricted to low level background music only, sufficient to allow normal conversation to occur, with any live entertainment to be acoustic in nature.
 - (x) A CCTV system is to be installed and maintained in compliance with the Director's *Safety and Security at Licensed Premises* policy.
- (c) Entertainment Condition:
- (i) A person resorting to, or on the premises, including the licensee or manager, or an employee or agent of the licensee or manager, shall not:
 - (1) be immodestly or indecently dressed on the licensed premises, and/or
 - (2) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
 - (ii) The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:
 - (1) exhibiting or showing, or causing, suffering or permitting to be exhibited or shown, on the licensed premises any classified "R 18+", "X 18+" or "RC" classified publication, film or computer game or extract therefrom; or
 - (2) causing, suffering or permitting any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises; or
 - (3) causing, suffering or permitting any person to take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

- (iii) In this condition "licensed premises" includes any premises, place or area:
- (1) which is appurtenant to the licensed premises; or
 - (2) in respect of which an extended trading permit granted to the licensee is for the time being in force,

but does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access.

(d) Compliance with Harm Minimisation Policy:

- (i) The licensee has lodged a copy of the House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.

40. Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
41. The Applicant is reminded that trading may not commence without the prior written approval of the licensing authority.
42. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
43. This matter has been determined by me under delegation pursuant to s 15 of the Act.


Brett Snell

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING