

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: DREAMFOOD (DUNS) PTY LTD

PREMISES: ARTEZEN ESPRESSOR BAR

PREMISES ADDRESS: SE 1 234 NATURALISTE TCE DUNSBOROUGH WA 6281

APPLICATION ID: A000057243

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

DATE OF DETERMINATION: 31 March 2015

Introduction

1. On 24 October 2014 an application was lodged by Dreamfood (Duns) Pty Ltd (“the applicant”) for the conditional grant of a small bar licence in respect of premises to be known as Artezen Espresso Bar and situated at 234 Naturaliste Terrace, Dunsborough.
2. The application is made pursuant to ss 41, 62 and 68 the *Liquor Control Act 1988* (“the Act”).
3. The applicant, in accordance with section s 17 of the Act, is represented by counsel (Lane Buck & Higgins, Barristers and Solicitors).
4. Pursuant to s 67 of the Act, the application was required to be advertised by way of a notice published in *The West Australian* newspaper; by way of a notice on the site of the premises for a period of 28 days commencing on 18 November 2014; by way of a notice to residents and businesses located within a 200 metre radius of the premises; and a general notice to educational, health care and local and regional government institutions, as well as community and church groups, within the locality.
5. No objections were lodged. However, the Commissioner of Police (“the Commissioner”) lodged a Notice of Intervention pursuant to s 69(6)(c) of the Act.
6. Pursuant to ss 13 and 16 of the Act the application will be determined on the papers and by me under delegation pursuant to s 15 of the Act. The submissions of the parties are briefly summarised below.

Submissions on behalf of the applicant

7. The applicant seeks the conditional grant of a small bar licence for premises to be located at 234 Naturaliste Terrace, Dunsborough.
8. The applicant’s Public Interest Assessment (PIA) lodged in support of the application, among other things, includes the introduction and the persons involved with the

application; the location of the premises; description of the premises; intended manner of trade; patronage and consumer requirements; the locality; and submissions addressing the matters set out in s 38(4) of the Act.

9. The applicant's proposes to license an existing cafe style premises, which has been trading as the *Artezen Espresso Bar* for approximately 7 years, following customer and local community feedback expressing frustration with the lack of dining and liquor related services in Dunsborough.

10. In regards to the Applicant's intended manner of trade it was submitted:

The Venue's evening dining operation will consist of a "tapas" or small plate style menu, focusing on shared dining offering a social experience and offering patrons the opportunity a range of dishes in the \$7 - \$18 range.

The Applicant aims to create a casually sophisticated venue which combines fresh local produce with a highly skilled chef and contemporary surroundings. This relaxed and "low key" style of evening dining and venue operation is a marked departure from the current selection of evening venues in the town of Dunsborough, and will be successful in providing quality food and a social atmosphere for the target demographic.

The Applicant, with the assistance of local designers, is proposing to create a unique modern restaurant experience focussing on increased patronage, a more efficient use of space and improvements to patron comfort.

11. The proposed small bar will comprise:

- a goods delivery and storage area;
- a new washroom/toilet facility, including disabled access;
- a kitchen/pot-washing area;
- a serving/kitchen area;
- patron seating area of approximately 93m²; and
- an alfresco dining area of approximately 40m².

12. It was submitted that the applicant aims to create a venue with features which include quality, contemporary interior design with an artistic focus; high quality cuisine as a priority; premium beverage offer, with a focus on local wines; strict adherence to responsible service of alcohol; conversational music volume, or "low key" entertainment; and high standard evening dress code.

13. In regards to any impact on the amenity of the area, it was submitted that it would be unlikely that the grant of the application would contribute to the level of alcohol related harm or ill health in the locality given:

- the size and layout of the premises;

- the quality and character of the fit out of the premises;
 - the professionalism and responsibility of persons associated with the applicant;
 - the “low risk” character of the intended patrons; and
 - the applicant’s intended manner of operations.
14. It was also submitted that the grant of the application will positively contribute to the amenity of the locality by:
- supporting the development of the Dunsborough Town Centre in the manner sought by the City of Busselton;
 - providing additional services for residents, workers and visitors who wish to enjoy liquor, dining and light entertainment services at the venue;
 - increasing the appeal of the Town Centre as a Tourist destination through the provision of high quality hospitality experience;
 - increasing the vitality of the Town Centre by increasing the area of active frontage to Naturaliste Terrace; and
 - implementing appropriate operational controls and procedures to ensure that the venue operates in peaceful co-existence with its neighbours at all times.
15. To demonstrate public support for the application, the applicant lodged a petition signed by some 94 persons. Letters of support were also lodged from Grant Henley, Councillor & Deputy Mayor, City of Busselton and Rob Zdravevski, President, Dunsborough Yallingup Chamber of Commerce and Industry Inc.

Submissions of the Commissioner

16. The notice of intervention dated 12 December 2014 lodged by the Commissioner makes representations that if the application was granted or conditions not imposed, public disorder or disturbance would be likely to result, or as to any other matter relevant to the public interest.
17. The notice of intervention included an analysis of the application; the intended manner of trade; and seeks a range of conditions to be imposed including the installation of CCTV and the applicant joining and participating in the Dunsborough/Busselton Liquor Accord, if the application is granted.

Responsive submissions by the applicant

18. In responding to the matters raised by the Commissioner in his intervention the applicant, other than disagreeing with the reduction in the permitted trading hours as contained in s 98 of the Act did not raise any objection with the imposition of the other suggested trading conditions of the Commissioner if deemed appropriate by the licensing authority.

Determination

19. In accordance with s 38 of the Act, the onus is on the applicant to satisfy the licensing authority that the grant of the application is in the public interest. In this regard, the licensing authority, however constituted, makes its determination on the balance of probabilities.
20. In determining whether an application should be granted “in the public interest” consideration must be given to the objects of the Act as specified in s 5 and the provisions contained in s 38 of the Act.
21. In considering the public interest, the licensing authority needs to consider both the positive and negative social, economic and health impacts, and exercise a discretionary value judgement as to whether the application should be granted (refer section 19 of the *Interpretation Act 1994 and Parliamentary Debates, WA Parliament, Vol 409, page 6342; Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*).
22. In *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 Tamberlin J* said:

The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.

23. In accordance with s 5 of the Act the primary objects are:
 - to regulate the sale, supply and consumption of liquor;
 - to minimize harm caused to people, or any group of people, due to the use of liquor; and
 - to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

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24. Pursuant to s 33 of the Act, the licensing authority has an absolute discretion to grant or refuse an application for any reason that the licensing authority considers in the public interest, but must deal with an application on its own merits within the scope of the Act (refer *Woolworths Ltd v Director of liquor Licensing* [2012] WASC; *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).
 25. The applicant seeks the conditional grant of a small bar licence pursuant to s 41 of the Act in respect the proposed premises which currently operates as a non licensed cafe/restaurant.
 26. The applicant presented a well prepared application together with a petition and letters from members of the public to demonstrate support for the application and the establishment of a small bar licence at the proposed premises.
 27. The applicant proposes to license its current food focused premises and establish thereon licensed premises trading under a small bar licence. The applicant, while remaining food focused, seeks a small bar licence which provides greater flexibility than a restaurant licence to meet the requirements of consumers for liquor and related services.
 28. The Commissioner submitted that the application, if granted, public disorder or disturbance would be likely to result. In this regard, the Commissioner as an Intervener to the application carries no burden of proof (per Greaves J. *Gull Petroleum (WA) Pty Ltd (1998) LLC No. 13/98*).
 29. The Commissioner also submitted that if the application is granted, conditions should be imposed and suggested possible trading conditions, for consideration, which would assist to minimise the impact the grant of the licence would have on the amenity of the area; and be in line with the applicant's intended manner of trade.
 30. In this regard while the applicant agreed with the Commissioner in respect of most of the suggested trading conditions the applicant did not agree with the Commissioner in regards to reducing the permitted trading hours as allowed under the Act.
 31. In considering all of the information presented, I am satisfied that the grant of the application would not impact unduly on the amenity of the locality and would be in keeping with object 5(1)(c) of the Act and in the public interest.
 32. Therefore, I am prepared to exercise my discretion under s 33 of the Act and grant the application for a small bar licence, subject to trading conditions which reflect the applicant's intended manner of trade.
 33. In respect of the trading conditions to be imposed, I do not consider that it is necessary, at this time, to impose as trading conditions, initiatives which may be regarded as good management practices of the licensee, such as dress standards or joining and participating in the local liquor accord.
 34. Accordingly, as I am satisfied that the grant of the application is in the public interest and that the applicant has complied with all necessary statutory criteria requirements

and conditions precedent to the application being granted, the application for a small bar licence is conditionally granted subject to the following conditions:

CONDITIONAL GRANT

- (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 premise;
- (c) all work being completed within 12 months in accordance with the plans and specifications dated 24 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 prior to applicant wishing to trade 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 31 March 2016 pursuant to s 62(4)(c) of the Act.

When the licence commences operation, the following conditions to be imposed on the issue of the licence:-

TRADING HOURS

The permitted trading hours are those prescribed in s 98(1) of the Act for a hotel licence.

TRADING CONDITIONS

1. 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.
2. The sale of packaged liquor for consumption off the licensed premises is prohibited.
3. The maximum number of persons permitted to be on the licensed premises at any time is 120.
4. The licensed premises must always be set up with tables, or a fixed structure used as a table and chairs to accommodate no less than 100 persons except for prearranged private functions or special events.

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5. Meals must be available at traditional meal times being, breakfast between 7 a.m. and 9 a.m.; lunch between 12 noon and 2 p.m.; and dinner between 6 p.m. and 9 p.m. except during prearranged private functions or special events.
 6. Food must be available during trading hours.
 7. 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.
 8. A closed circuit television video (“CCTV”) surveillance system, able to identify individuals and showing times and dates must be in place and operational. The CCTV system must comply with the requirements as identified in the Director’s Policy ‘Security at Licensed Premises’. It is expected that the system will provide and record continuous images of the entrances and exits to the premises during the normal trading hours and until one (1) hour after trading ceases. Images recorded via the CCTV system must be retained for, at least, twenty eight (28) days (or such other period as the Director of Liquor Licensing specifies) and must be made available for viewing or removal by the Police or other persons authorised by the Director.
 9. All entertainment is restricted, to entertainment played at a level to enable normal conversation between persons to occur.

ENTERTAINMENT CONDITION

(a) 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:

(i) be immodestly or indecently dressed on the licensed premises, and/or

(ii) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

(b) The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:

(i) 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;

(ii) 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

(iii) 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.

(c) In this condition "licensed premises" includes any premises, place or area:

(i) which is appurtenant to the licensed premises, or

(ii) 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.

COMPLIANCE WITH HARM MINIMISATION POLICY

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.

Application for an Extended Trading (area) Permit

35. As part of the application for a small bar licence, the applicant also sought approval for an extended trading (area) permit pursuant to s 60(4)(h) of the Act, in respect of part of the common property adjacent to the proposed licensed premises, to allow the sale, supply and consumption of liquor in an alfresco dining area.

36. I am satisfied that the relevant approvals have been obtained from the freehold owner. Accordingly, the application is granted pursuant to s 60(4)(h) of the Act, and an extended trading permit to be issued on the confirmation of the grant of the conditional small bar licence.

37. On the confirmation of the grant and the issue of the small bar licence the extended trading permit will be issued subject to the following conditions:-

1. The permit authorises the licensee to sell and supply liquor to a person within the area outlined in yellow on the plan dated 24 October 2014 for consumption while seated at a dining table and not elsewhere.
2. The serving of liquor is limited to table service by staff of the licensee.

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3. The permit will be valid and will remain in force for a period of 5 years from the date of the confirmation and issue of the small bar licence provided the approvals of the freehold owner and the City of Busselton for use of the alfresco dining area remain current.

 38. The licensee is reminded that trading contrary to the conditions of the permit may result in the permit being modified or withdrawn.

 39. Also the licensee must note that liquor cannot be sold or supplied under this licence on a Sunday prior to 10 a.m. without an extended trading permit granted pursuant to s 60(4)(g) of the Act. The normal permitted trading hours of a small bar licence on a Sunday are from 10 a.m. to 10 p.m. (S 98 refers).

 40. 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.



Eric Romato

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

31 March 2015