

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: Barrio Enoteca Pty Ltd
(represented by Mr Cristofer Leal, Company Secretary)

Intervener: Commissioner of Police
(represented by Mr James Bennett of State Solicitor's Office)

Observers: Ms Sarita Leal and Mr Daniel Morris
(Directors, Barrio Enoteca Pty Ltd),
Mayor Trevor Vaughan- Town of Victoria Park
Councillor Adam Vilaca- Town of Victoria Park
Mr Benjamin Wyatt MLA – Member for Victoria Park

Commission: Ms Helen Cogan (Member, Acting Chairperson)
Mr Alastair Bryant (Member)
Dr Eric Isaachsen (Member)

Matter: Application for review of a decision of the Director of
Liquor Licensing pursuant to section 25 of the *Liquor
Control Act 1988*

Premises: The Precinct Bar and Restaurant

Date of Hearing: 2 April 2012

Date of Determination: 1 May 2012

Determination: The application is refused

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health and Others* (2008) WASC 224
- *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241
- *Busswater Pty Ltd v Mr KV House and Mrs L V Verhoog* (LC 17/2010) at [36]
- *Element WA Pty Ltd v Director of Liquor Licensing* (LC 32/2010) at [28,29]
- *Executive Director of Public Health vs Lily Creek International Pty Ltd and Others* [2000] WASCA 258;

Background

- 1 On 4 October 2011 an application was lodged by Barrio Enoteca Pty Ltd (“the applicant”) for the conditional grant of a small bar licence for premises to be known as The Precinct Bar and Restaurant, located at 834 Albany Highway, East Victoria Park.
- 2 The application was advertised to the general public in accordance with instructions issued by the Director of Liquor Licensing. On 14 November 2011, a notice of intervention was lodged by the delegate of the Commissioner of Police (“the Police”). There were no other objections or interventions.
- 3 In decision A219821 (“the decision”), dated 17 January 2012, the Delegate of the Director of Liquor Licensing (“the Director”) refused the application.
- 4 On 14 February 2012, the applicant lodged an application for a review of the decision pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”).
- 5 On 17 February 2012, pursuant to section 69(11) of the Act, the Police lodged a notice of intervention in respect of the review proceedings.
- 6 Further submissions by the parties were lodged with the Liquor Commission (“the Commission”) during March 2012.
- 7 A hearing before the Commission was held on 2 April 2012.

Submissions on behalf of the applicant

- 8 The applicant believes that there was indeed a public interest in granting this application and that it was not made clear enough that submitting evidence of public interest was a compulsory requirement. In its view it has provided evidence of public support and the application has been refused primarily on the basis of some unknown level of expectation that is not apparent in publicly available material.
- 9 The applicant submitted that there was insufficient clarity in the interaction with the Department during the application process. In particular, submissions were made in respect of insufficient information being provided in the Department’s letter dated 24 October 2011 alleging that the Department was not supportive or clear about what was required, and that the applicant had not been given the opportunity to submit further evidence of support.
- 10 This application was considered in detail by the Council of the Town of Victoria Park at its meeting on 20 September 2011.
- 11 In the documentation before the Director, the applicant had provided a letter of support from Councillor Adam Vilaca of Town of Victoria Park. It was submitted by the applicant that there had been a misinterpretation of this letter and that Mr Vilaca specifically supported this business as well as endorsing similar small bars down ‘the Albany Highway strip’.
- 12 It was submitted by the applicant that it had provided editorials from local newspapers and these had not been included in the material before the Commission, nor was their ‘Alcohol

Management Plan'. In addition there were notes of support on the social media associated with the applicant.

Submissions on behalf of the Commissioner of Police

- 13 The Police intervened on the question of:
 - (a) the nature of the evidence to be provided by an applicant to discharge the onus cast on an applicant by section 38(2) of the Act, and
 - (b) if the application was granted, public disorder or disturbance would be likely to result.
- 14 After outlining the legal principles governing the review, the Police commented on the applicant's Public Interest Assessment ("PIA"). Twelve sample statements from the PIA were provided to illustrate the types of services proposed to be offered by the facility. It was submitted that these assertions were not supported by market research or any other evidence. No submissions were produced from tourists, consumers or locals in the region stating that the proposed development would meet their requirements for liquor and related services.
- 15 In the intervention notice the Police provided evidence relied upon in the form of data from incident reports and the data from CAD (Computer Assisted Dispatch). It was submitted that the number and nature of attendances of Police in the immediate vicinity of the proposed premises is a relevant consideration regarding the likely public disorder or disturbance that the proposed premises may cause.

Submissions by Adam Vilaca, Councillor, Town of Victoria Park

- 16 Councillor Adam Vilaca of Town of Victoria Park, submitted that his support for the application was both personal and backed by views obtained by him in his role as a local government representative. He had been an advocate for small bars over a three year period and supported this particular applicant.

Determination

- 17 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the materials before the Director and make its own decision on the basis of those materials (refer *Hancock-v-Executive Director of Public Health (2008) WASC 224*).
- 18 Pursuant to section 38(2) of the Act, an applicant for the grant of a small bar licence must satisfy the licensing authority that granting the application is in the public interest.
- 19 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations, (refer *Palace Securities Ltd v Director of Liquor Licensing [1992] 7 WAR 241*).
- 20 To discharge its onus under section 38(2) of the Act, an applicant must address both the

positive and negative impacts that the grant of the application will have on the local community (refer *Supreme Court proceedings in Executive Director of Public Health vs Lily Creek International Pty Ltd and Others [2000] WASCA 258*; and section 19 of the *Interpretation Act 1984* when read in conjunction with the *Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*).

- 21 It is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of its application. Such opinions and assertions must be supported by an appropriate level of evidence (refer *Busswater Pty Ltd v Mr KV House and Mrs L V Verhoog (LC 17/2010)* at [36]).
- 22 In this case, the applicant seeks to establish a small bar and restaurant to be located in the commercial centre of East Victoria Park. The applicant sees a market opportunity for an establishment that can offer contemporary food options with a European theme in a relaxed, funky and trendy setting rather than the usual restaurant style currently available nearby. This would provide an alternate option for the consumption of liquor in a setting that is favoured in suburban areas.
- 23 Assertions relating to the perceived benefits to the public of the grant of the application were supported by limited evidence. At the hearing, submissions were made as to the level of support from the Town of Victoria Park. The only evidence of the local council's participation in the proceeding before the Director and before the Commission was the resolution passed by the council in support of this application for the purpose of issuing a section 40 certificate. The material before the Commission does not identify any further additional submissions made by the local council in support of the application.
- 24 The lodgement of a certificate of the local planning authority pursuant to section 40 of the Act along with the application is a procedural formality that needs to be complied with at the time of the lodgement of the application with the licensing authority. It does not constitute a submission by the local authority supporting the merits of the application. The certificate simply states that the application will comply with all relevant planning (emphasis added) laws.
- 25 Comment in local newspapers, which was considered, was not viewed as providing sufficient or probative evidence to prove that the general public has a requirement for liquor and related services in the manner proposed by the applicant. The original application did not include any submission that comment in social media was to be considered; accordingly it cannot be considered in this application.
- 26 Further contrary to the applicant's assertions (refer para 12), the document entitled "Alcohol Management Policy" submitted by the applicant and which formed part of the Harm Minimisation documents was included at item 3 of the index of documents before the Commission.
- 27 The letter to the applicant, from the Department, dated 24 October 2011 has been the subject of submissions. It does list the public interest requirements, including examples of what could be included as objective evidence. It is noted on page 2, that the PIA submitted does not adequately address the requirements outlined in the policy guideline (enclosed) and further requests provision of a submission by a set date. It is significant that the general comments on page 1 of that letter in regards to section 5(l)(c) of the Act (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) precede the specific comments on page 2, as to the assessment by the Department on the adequacy of the PIA. The Commission does not agree that there has been a lack of clarity on the question of Public Interest and finds that opportunity was provided for the provision of supportive evidence.

- 28 In respect of this application, the observation of the Commission in *Element WA Pty Ltd* (LC 32/2010) at para 28 is relevant:

“The Commission must be satisfied, based on the evidence presented, that the grant of the application is in the public interest. Based upon the scant evidence submitted by the applicant, the Commission is unable to arrive at that conclusion. The applicant’s submissions are largely predicated on assertions which are not supported by any evidence, and therefore the Commission is unable to be satisfied about the veracity of those assertions.”

- 29 It further stated at para 29 that:

*“To grant a liquor store licence based upon a ‘good idea’ by an applicant is not consistent with the Act or the intent of Parliament. The proliferation of licences was not an intended outcome of the introduction of the public interest test under section 38 of the Act (see *Parliamentary Debates, WA Parliament, vol 409, p 6342*). As stated earlier in this decision (and previous decisions of the Commission), the public interest test under section 38(2) requires the licensing authority to consider the merits of an application based upon the positive and negative impact that the grant of the licence would have on the local community. In this context, an applicant needs to adduce sufficient evidence to support its claims, not just abstract generalisations. Otherwise, the granting of licences under the Act would become arbitrary and not in accordance with the objects of the Act. Needless to say, the level and quality of evidence to be submitted by an applicant will vary on a case by case basis. Whilst the Commission acknowledges the provisions of sections 16(1)(a) and 16(7)(a), this does not diminish an applicant’s obligations under section 38(2) of the Act.”*

- 30 Accordingly, the Commission must be satisfied, based on the evidence presented, that the grant of the application is in the public interest as required under section 38(2) of the Act.
- 31 On examination of all the material, the Commission finds that there is not sufficient objective and probative evidence that would make it possible to arrive at that conclusion. Accordingly, the application is refused.


HELEN COGAN
MEMBER