

Decision Notification

Application Details

Application no.	209146
Licence No.	57102073
Licence Class	On Premises
Premises Name	Mitcham Cinema
Premises Address	Princes Road MITCHAM SA 5062
Licensee	Mitcham Cinema Pty Ltd
Application Type	Variation to Conditions (Upgrade)

Outcome

Decision	Determined
Effective Date	23 Aug 2021

Reasons for Decision

The licensee formerly held a special circumstances licence, having satisfied the Commissioner's delegate that the applicant met the relevant criteria to be granted a licence of this class, subject to a condition.

As part of the application for special circumstances licence, the licensee sought a condition to be added to the licence restricting the sale and supply of liquor to persons who had a cinema ticket or voucher for the premises or to persons who were attending a pre-booked function or reception at the premises. This condition formed the basis of "special circumstances".

On 18 November 2019 the *Liquor Licensing (Liquor Review) Amendment Act 2017* (the Amendment Act) came into operation, resulting in a significant number of amendments to the *Liquor Licensing Act 1997* (the Act), including the abolishment of the special circumstances licence class.

In line with the transitional provisions set out in Schedule 2 of the Amendment Act this licence transitioned to an on premises licence on 18 November 2019. The condition outlined above was retained, albeit varied slightly under clause 5 of Schedule 2 of the Amendment Act.

The licensee has lodged an application with this office to remove this condition, which remains the only condition on the licence.

In considering whether it is appropriate to remove this condition, I note the licensee did not seek to be able to sell liquor for consumption on premises without the condition, as part of their original application for a special circumstances licence.

It could reasonably be said that, had this condition not been sought, the special circumstances licence would likely not have been granted as the requirements under section 40(2) of the Act, as it stood at the time of determination, would not have been met given the trade sought, being the ability to sell and supply liquor for consumption on, could adequately be covered under a hotel licence.

Had the applicant sought a hotel licence in order to trade in this manner they would have had to satisfy the licensing authority that the licence was necessary in order to provide for the needs of the public in that locality (the 'needs test') for the licence to be granted. However, they did not seek a hotel licence; instead they sought a special circumstances licence with condition.

An application for an on premises licence is a designated application (unless the proposed licence is for a conveyance or the primary service is the provision of accommodation) and requires an applicant to complete a community impact submission. A community impact submission is required to ensure that it is in the community interest to grant such a licence.

As a result of the amendments to the Act on 18 November 2019, the licensee now holds an on premises licence, without having been required to satisfy the community interest test. Varying the conditions of an on premises licence is not a designated application and therefore, the community interest test does not need to be satisfied as part of this application. However, in determining the application consideration must be given to the objects of the Act and the public interest.

The Commissioner of Police has lodged an intervention against the application, pursuant to section 28AA(2)(c) of the Act, that to grant the application would be contrary to the public interest. The Commissioner of Police has made the following submissions in their intervention:

- The nature of the application is such that if approved, would enable the venue to operate in effect as a small venue bar outside of the Adelaide Central Business District. Section 37 of the Act does not permit such businesses to operate outside of the Adelaide Central Business District, and should this application be granted, this would be inconsistent with this legislative provision.
- The application is inconsistent with the objects of the Act, specifically, section 3(1)(c), in that, such a variation if granted, would be inconsistent with the expectations and aspirations of the public. The public, it is submitted, have an expectation that the primary function of the business is that of a cinema, with the sale and supply of liquor, ancillary to the cinematic experience. Enabling the business to trade as a bar, open to members of the public who are not attending a cinematic screening, is not consistent with such expectations and as such, contrary to section 3(1)(c).

The Commissioner of Police submits the following in relation to the provisions of section 4 of the Act, in terms of what constitutes 'public interest' and 'public order and safety':

- That should the application be granted, the potential exists for adverse social impact in, and the impact on the amenity of, the locality of the premises. There are already multiple licensed premises within the immediate catchment of the subject premises, and as such, enabling unrestricted consumption on the premises to the members of the public, who are not resorting to the premises for a cinematic experience, is deemed not to be in both the public or community interest and is at serious variance as to what the general public would expect to occur at a cinema, namely the unconditioned sale and supply of liquor to the general public.
- The variation sought by the applicant is inconsistent with other like venues and as such, should not be granted. Clearly, it is reasonable to conclude that the Liquor and Gambling Commissioner (the Commissioner) has seen fit to take a consistent approach when it comes to such venues and the sale and supply of liquor to members of the public frequenting such. Police submit that the precedent exists, and the community has an expectation that, when attending a cinema, that is licensed to sell and supply liquor, that liquor shall only be sold or supplied to persons who have purchased a cinema ticket.

The applicant was provided with a copy of the intervention and an opportunity to respond. The applicant submits the following in response to the intervention:

- The application was listed for determination in early July 2021 and received no opposition on or prior to the determination date. The intervention lodged by the Commissioner of Police was received in early August 2021. The applicant submits that the Commissioner does not have power under section 76 of the Act, to extend the time so as to allow the notice of intervention to be accepted and that the intervention must be disregarded.
- The applicant also points out that no extension of time was sought by the Commissioner of Police (even though one could not be granted) and no reasons have been advanced either for the delay or for the purported grant of the extension. Reference is made to *Cellarbrations Mannum* [2021] SALC 42 as to the requirement to afford an applicant natural justice and procedural fairness in the determination process. It is submitted that even if the Commissioner could extend the time for the notice of intervention, it ought not to have done so without allowing the applicants the opportunity to respond to the extension of time application. Hence, that decision is both beyond power and in breach of the natural justice obligations pertaining to the applications.

I acknowledge that the Commissioner of Police has failed to lodge the intervention seven days prior to the date appointed for determination or such lesser period determined by the Commissioner in accordance with section 76 of the Act. However, I exercise my discretion to allow the intervention to be considered under section 18 of the Act.

Section 18 of the Act states:

In proceedings under this Act, the Commissioner—

(a) must act without undue formality; and

(b) is not bound by the rules of evidence but may inform himself or herself on any matter as the Commissioner thinks fit.

I am of the view that the applicant has been provided with natural justice and procedural fairness. The applicant was advised the intervention would be considered when determining the application and the intervention was provided to the applicant along with the opportunity and time to respond to it.

The applicant goes on to state that the concerns of the Commissioner of Police are speculative. The applicant submits that the premises are not a drinking venue but rather a cinema and disagrees with Police's suggestion that the premises would become a small venue in the suburbs. The capacity is 1572, as opposed to a 120-person limit for a small venue. The cinema operates as an entertainment venue offering food and the applicant wishes to offer the opportunity for liquor as well, in circumstances where people may not wish to view a movie, as follows:

- Family meals or get togethers where some but not all of the attendees wish to view a film;
- Drop-offs or collections from films where a parent, guardian etc. wishes to remain at the cinema but not to view the film.

The applicant submits that the cinema has a fully equipped and staffed commercial kitchen and areas set aside for restaurant use. This further distinguishes them from the "small venue" analogy.

The applicant submits that the cinema is located in gentrified and affluent area. According to SEIFA statistics, the City of Mitcham has a SEIFA ranking of 86. By comparison Greater Adelaide has a ranking of 39: the higher the number, the lower the financial disadvantage. In the applicant's submission, these figures would be critical in determining an application for a designated licence and should therefore be persuasive in the determination of this application.

The applicant has submitted that they are prepared, to reduce the current trading hours for the premises. In addition to this, all consumption will be seated.

The applicant asserts that this will alleviate the concerns of the Commissioner of Police, although those concerns are not accepted. The closing times of midnight, the ambience and presentation of the venues and the affluence of the surrounding areas ought to allay any concerns as to the interest of the public.

The applicant, in closing, has stated that the last 18 months have been devastating for licensed premises and for

cinemas. As they operate as both, the applicant has suffered greatly during the COVID-19 pandemic (the pandemic), and cinemas face challenges from other avenues such as online and streaming entertainment providers. The success of these applications is critical to the ongoing development and viability of the cinemas and to the jobs of the hundreds of people employed by the applicant.

The licensing authority has been mindful of the impact of the pandemic on licensees and has afforded financial relief in relation to annual licence fees to assist licensees during a difficult time. The pandemic and the challenges of running a viable business and the potential competition it may be subjected to, is not the primary matter for the Commissioner to consider when determining an application. The Commissioner must have regard to the objects of the Act and the public interest.

Irrespective of the intervention lodged by the Commissioner of Police, I would have refused the application for the reasons outlined below.

I have had regard to the SEIFA data provided by the applicant, however this information is not in my view persuasive. Cinemas are considered family friendly locations, as they show a range of movies appealing to varying age groups. Going to see a movie is entertainment, a leisure experience enjoyed by many in the community.

A member of the public has a reasonable expectation that when they go to see a movie there will not be persons on the premises consuming liquor that is unrelated to the purchase of a cinema ticket or the business primarily conducted by the licensee. I note that there are many other licensed premises within the community which primarily cater for the consumption of liquor on site.

If the condition were to be removed from the licence it creates the potential for members of the public to go the cinema for the sole purpose of consuming liquor. It also creates the potential for members of the public (patrons that had or had not purchased a movie ticket) to remain on site for the sole purpose of consuming liquor. Patrons that wished to continue to consume liquor while out would ordinarily have needed to move onto a licensed premises dedicated to this purpose such as a hotel.

This also creates the potential risk for movie goers to witness anti-social behaviour related to the consumption of liquor. I do not believe a member of the community indulging in a social, entertainment outing at the movies should reasonably be expected to be exposed to this risk in what should be a family friendly environment.

Consideration must also be given to the potential harm to children, given cinemas are a location at which young adolescents are attracted to and congregate at, as a social outing with friends. If the application to remove the condition were granted, it increases the likelihood of minors being exposed to the consumption of liquor and creates the potential for the consumption of liquor to be attractive to minors. It is also undesirable to remove the condition, given that it could enable intoxicated adults to loiter while drinking in an environment where unsupervised children

may be present.

The reduced trading hours and the seated consumption of liquor proposed by the applicant are insufficient to address the licensing authorities concerns regarding the application.

I do not believe removing this condition will assist to facilitate the responsible development of the liquor industry in a way that is consistent with the objects of the Act.

For the reasons set out above, I believe it would be contrary to the public interest to remove this condition from the licence.

Under section 43 of the Act, I vary the condition of the licence to allow liquor to be sold or supplied to a parent or guardian accompanying a minor who has a cinema ticket or voucher.

The condition of the licence is updated as follows:

Liquor shall only be sold or supplied to persons who have a cinema ticket or voucher, or to a parent or guardian accompanying a minor who has a cinema ticket or voucher or to persons attending a pre-booked function or reception at the premises.

Under Delegation from the Liquor and Gambling Commissioner



Jane Widdowson
Hearings Delegate
23 Aug 2021