

Decision Notification

Application Details

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| Application no. | 210650, 210651 |
| Licence No. | 57318844 |
| Licence Class | Restaurant & Catering |
| Premises Name | Mylk Bar North Adelaide |
| Premises Address | 53 Tynte Street North Adelaide SA 5006 |
| Applicant | AA Investments (SA) Pty Ltd, The Ayoubi Stag Trust |
| Application Type | Application for a Liquor Licence, Application for Extension of Trading Area (S 69) |

Outcome

| | |
|----------------|-------------|
| Decision | Granted |
| Effective Date | 13 May 2022 |

Procedural

I allow the applicant to vary their application as follows:

Under section 51(3) of the *Liquor Licensing Act 1997* I allow the Applicant to vary the application to reduce the proposed capacity sought in the application.

Requirements

The following requirements in support of the application have been satisfied:

- Landlord's consent has been obtained
- The application has been advertised
- All approvals, consents or exemptions have been obtained

People

Licensee

The following persons are approved to hold the licence:

- Amin Ayoubi (30147)

Premises

New Premises

The licensed area is outlined in red on the approved plan.

Capacity

The capacity of the venue is set at 42.

Licence Plan

The licensee is authorised to sell and supply liquor in an area adjacent to the premises for consumption in that area, as outlined in red on the approved plan.

Licensee

I note that the applicant will hold the licence as trustee for The Ayoubi Stag Trust .

Conditions

The following conditions are added to the licence

- The approval to sell liquor in an outdoor dining area shall lapse and become of no effect if the permit issued by the local council lapses, or is cancelled, withdrawn or revoked.

Authorisations

The following authorisations/restrictions are added to the licence

- Sale of liquor for consumption on the licensed premises authorised
- Sale of liquor for consumption at the site of a function off the licensed premises authorised
- Sale of liquor in an approved place adjacent to the licensed premises authorised

Trading hours

The following are the approved trading hours

| | Consumption on premises | Consumption off premises |
|-----------|-------------------------|--------------------------|
| Monday | 10:00 am to 10:00 pm | - |
| Tuesday | 10:00 am to 10:00 pm | - |
| Wednesday | 10:00 am to 10:00 pm | - |
| Thursday | 10:00 am to 10:00 pm | - |
| Friday | 10:00 am to 10:00 pm | - |
| Saturday | 10:00 am to 10:00 pm | - |
| Sunday | 10:00 am to 10:00 pm | - |

Reasons for Decision

AA Investments (SA) Pty Ltd, The Ayoubi Stag Trust (the Applicant) has applied for a Restaurant and Catering licence in respect of premises situated at 53 Tynte Street, North Adelaide and to be known as Mylk Bar North Adelaide.

Pursuant to section 77 of the *Liquor Licensing Act 1997* (the Act) the following persons have lodged submissions opposing the grant of this application:

Danielle Taylor

Dr Stephen Fitzgerald

Felice and Lyn Zaina

John Roberts

Kerran Dall

Gillian Martin

Stuart Lindsay

Nicola Spehr

Shirley Heinrich

Section 77 of the Act states:

(1) If an application has been advertised under this Part, a person may, by notice lodged in a manner and form approved by the Commissioner, at least 7 days before the day appointed for the determination or hearing of the application (or such lesser period as the licensing authority may allow), make written submissions to the Commissioner in respect of the application.

(2) Subject to subsection (3), written submissions under this section may be made on 1 or more of the following grounds:

(a) that the grant of the application would not be consistent with the objects of this Act or would be contrary to this Act in some other way;

.....

(e) in the case of an application for the grant or removal of a licence—that the position, nature or quality of the premises renders them unsuitable to be licensed, or to be licensed under a licence of the kind to which the application relates;

(f) that if the application were granted—

(i) undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises or proposed premises to which the application relates would be likely to result; or

(ii) the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises or proposed premises to which the application relates would be likely to be prejudiced; or

(iii) the amenity of the locality in which the premises or proposed premises to which the application relates are situated would be adversely affected in some other way.

(3) Written submissions in respect of an application that relate to a matter that is, or should be, dealt with or addressed under the law relating to planning or carrying out building work may only be made by or on behalf of a council if a combined assessment panel has been established under the Planning, Development and Infrastructure Act 2016 to be involved in the assessment of the application under this Act (at the same time as acting as a relevant authority under that Act).

(4) A person who makes written submissions under this section must ensure that the Applicant is given a copy of the written submissions at least 7 days before the day appointed for the hearing or determination of the application (or such lesser period as the licensing authority may allow).

.....

On 14 April 2022, Stuart Lindsay withdrew his submission against the application, that submission will not be considered when determining the application.

Submissions were also lodged by Jane Mitchell, Marilyn Pitt and Sandra Eccles in support of the grant of the application for Restaurant and Catering licence. This is inconsistent with the grounds for lodging a submission against an application. I will therefore not have regard to them.

Section 77(4) of the Act requires a person who makes written submissions under this section to ensure that the Applicant is given a copy of the written submissions at least 7 days before the day appointed for the hearing or determination of the application (or such lesser period as the licensing authority may allow).

I note that there is no evidence that Shirley Heinrich has complied with the requirements of 77(4) of the Act.

I further note that the licensing authority (the Authority) has sought to confirm this requirement has been met. I have exercised my discretion to provide the relevant documents to the Applicant after the date appointed for determination, but prior to me making a decision on the application.

The concerns raised in the submissions have been made on quite similar grounds and therefore I will summarise collectively and address them together.

Approved use of the premises

A number of Objectors have submitted the proposed licensed premises being located in a residential area is inconsistent and incompatible with the existing character of a residential precinct.

The Applicant has provided information from council that has satisfied the Authority of the requirements under section 57(2) of the Act.

Capacity

A number of Objectors have raised concerns with the proposed capacity of 100 for the premises stating that the premises would be unlikely to accommodate that many persons. There were also concerns raised with the outdoor space being heavily utilised due to the premises being unable to adequately accommodate 100 persons.

The Applicant had applied for a capacity of 100 persons. Under section 51(3) of the Act, I have allowed the Applicant to vary the application, to reduce the proposed capacity of the premises to 42. This is consistent with the planning approval provided by the Adelaide City Council. It is to be noted that the outdoor dining portion of the licence application is not included in the number of persons accommodated in the calculation for the building rules assessment and consent.

The Applicant has sought approval under section 69 of the Act. This provision allows the Authority to extend the authority conferred by the licence so that the licensee is authorised to sell liquor in a place adjacent to the licensed premises for consumption in that place.

Section 69(3) of the Act, provides that an authorisation cannot be granted under this section unless, if the relevant place is under the control of a council - the council approves the application. As this area is under the control of the council, the council is responsible for setting trading hours for the use of the area and a capacity for the area.

Amplified and live music

A number of Objectors have raised concerns with amplified music being played from the premises, noting that a sound system including external speakers had been installed at the premises.

In relation to music emanating from the premises, section 57(1a) of the Act, requires me to disregard entertainment when considering whether the proposed premises will likely result in any undue offence, annoyance, disturbance or inconvenience to those who reside in the vicinity of the premises.

Parking and traffic

A number of the Objectors have submitted that there is inadequate parking available in the area. One objector has

submitted that more 'hoon' traffic is not required.

In relation to the concerns raised in the submissions about potential parking issues at the premises this is a planning related matter and therefore, in accordance with section 77(3) of the Act I am not required to consider this.

In regards to the concerns raised in the submissions about the potential issues of the misuse of a motor vehicle, this is a road transport related matter and is regulated by SAPOL.

Litter

One objector has submitted that more litter is not required. Another has submitted that they have previously lived in the vicinity of licensed premises that was the cause of littering in the street.

Littering does not fall within the jurisdiction of the Commissioner and is managed by local councils under the *Local Nuisance and Litter Control Act 2016*.

Planning notifications

An objector has submitted that planning notifications for changes in use are generally restricted to adjoining properties and have no consideration of the impact on the local amenity beyond adjacent properties. The objector also submits properties beyond those immediate to the Applicants premises have not been afforded any notice of the intention by the Applicant to seek a 7day per week, 12 hours per day liquor licence.

I cannot comment on the notification process of Councils, as this is beyond the jurisdiction of the Act. I note that as part of the requirements of the Act, for the grant of a licence, an applicant is required to display a notice of the application on the premises. This notice is also to be published on a website maintained by the Commissioner. The Applicant has complied with the requirements of section 52 of the Act.

Trading hours

I note that some parties have taken issue with the Applicants proposed trading hours.

The hours sought do not conflict with any development approvals the premises is subject to.

Proposed business to be conducted under the licence

A number of the Objectors have submitted concerns that the business to be conducted under the proposed licence will be more of a bar than a restaurant.

A number of Objectors have stated that everything the proposed premises will provide is available only a short distance away on O'Connell Street. Another submitted that while there are licences operating in residential precincts the owners and or occupiers of nearby residences were aware of the existence of the licences when they purchased/occupied their residences.

A restaurant and catering licence restricts a licensee to providing liquor only to persons with a meal, seated at a table, or attending a function. This licence class will not allow the Applicant to operate a 'bar'.

In addition to this section 35(2) of the Act states:

A restaurant and catering licence is subject to the condition that business must be conducted at the licensed premises such that the supply of meals is at all times the primary service provided to the public at the premises, except as otherwise allowed by a condition of the licence.

When determining an application for a restaurant and catering licence, I am not required by the Act to consider whether or not there are other similar business in the vicinity of the proposed licensed premises catering to the needs of the public.

In relation to the statement that land owners and occupiers are aware of the existence of licences when they purchase or occupy residences, it cannot reasonably be considered that no new licence applications are to be made to or considered by the Authority.

Safety and welfare of children

A number of the parties have raised concerns that the proposed licensed premises is in close proximity to a primary school.

One objector has submitted that the premises are within 50 metres and immediately opposite the North Adelaide Primary School and is therefore an unsuitable location for a licensed establishment with the associated risk to minors and the exposure to unruly and drunken behaviour of clients of the licensed premises. The objector goes on to state that the proposed licensed premises are within 20 metres of the controlled pedestrian crossing that provides safe access to and from the primary school.

Another objector has submitted that there would be an increased risk from the combination of traffic, alcohol and children. Although the objector does not stipulate what this risk may be.

The Applicant has applied for a restaurant and catering licence, therefore the primary business to be conducted at the premises is the provision of meals.

This licence class will not allow the Applicant to operate a 'bar' which may be associated with unruly or drunken behaviour.

In addition to this, a restaurant and catering licence does not permit the sale of alcohol for consumption off the licensed premises.

I do not consider that the grant of a restaurant and catering licence at the proposed location would likely prejudice the safety and welfare of children attending the primary school.

Noise and disturbance

A number of the objectors have submitted that the proposed licensed premises will likely or inevitably result in undue offence, annoyance or disturbance to people who reside in the vicinity of the premises and have a severe adverse effect on the local amenity.

This potential disturbance has been detailed by one objector as unwanted and disruptive noise pollution. Another party has submitted that there will be an increase of pedestrian traffic and an increase of lighting to outdoor areas.

One objector, in their submissions, has made statements relating to issues which they state are caused by persons frequenting O'Connell Street. One objector has submitted that their current experience is that patrons talk extremely loudly and linger considerably longer on the footpath on both sides of the street when returning to their vehicles from O'Connell Street on Friday and Saturday nights.

Another objector states that the effects of alcohol, increased noise, the possibility of aggression and violence that often accompany alcohol consumption pose a serious risk to the quality of life. Another submission made by an objector states that bad behaviour and disturbance from alcohol consumption all continue to contribute to a decrease in a quality of life one should expect from living in the area.

In relation to these statements there are mechanisms under section 106 of the Act to remedy situations where the behaviour of persons making their way to or from licensed premises, is unduly offensive, annoying, disturbing or inconvenient to a person who resides, works or worships in the vicinity. It is also noted that aggression and violence would warrant a response from the South Australian Police.

In relation to the concern raised about lighting to outdoor areas this is not within the jurisdiction of the Commissioner.

One objector submits that the proposed licensed premises will disrupt sleep of residents. Another party has submitted that there is a risk to quality of life, ability to sleep properly which could then infringe on their professional working lives.

It has also been submitted that there will be a disruption to school age children residing in the area. Another party has submitted that young children who will similarly be negatively impacted by the grant of the licence and the potential unruly behaviour of patrons exacerbated by alcohol, would have a negative impact on them and these families.

In addition to this it has also been submitted that there will be a negative impact of noise on their home environment and that the grant of the proposed licence would change the amenity of the locality.

The Act requires me to consider whether granting the application would result in undue offence, annoyance, disturbance or inconvenience to people who reside in the area, a prominent concern raised by all five residents. The Licensing Court has discussed 'undue noise' on many occasions, with it being held that for the noise to be undue it must be excessive or beyond what is appropriate or natural, and that residents should expect to tolerate a degree of disturbance or inconvenience in the interest of the community having access to a licensed premises. Applying the test in this scenario, I do not believe there is sufficient evidence to conclude that the granting of this application would cause undue noise to nearby residents.

Whilst the premises is located in a suburban area, the licence class sought is a Restaurant and Catering licence which restricts the licensee to providing liquor only to persons with a meal, seated at a table, or attending a function. This licence class will not allow the Applicant to operate a 'bar' which is commonly associated with noise. I do not consider the trading hours unreasonable either, with the Applicant only seeking to sell and supply liquor until 10pm, which is not unusual for a Restaurant in a suburban area.

Decision

Pursuant to section 78(1)(a) of the Act, the Commissioner may, in the Commissioner's absolute discretion, call for further written submissions to be made in relation to a particular application.

The Commissioners Delegates (Hearings Delegate) had concerns with the proposed business to be conducted under the Restaurant and Catering licence.

It was noted that the applicant for licence, currently has a General and Hotel licence at 57 Flinders Street, Adelaide known as Mylk Bar.

On the 14 April 2022, pursuant to section 78(1)(a) of the Act, the Hearings Delegate asked the Applicant to provide evidence as to how the proposed premise is to operate including a copy of the business plan.

On the 14 April 2022, the Applicant responded to the Hearings Delegate's request for information with a copy of a business plan. It is noted in the correspondence provided by the Applicant that the business plan relates predominantly to the Flinders Street site being the original site and pages 4 and 5 [sic pages 5 and 6] of the

business plan relate directly to the Tynte street site.

The business plan states that the concept of “The Mylk Bar hails from the early 1900’s delicatessens throughout Melbourne & Sydney. In those days, anything and everything could be purchased at Milk Bars from the morning newspaper to oil for the family car. In following from this era, we aim to deliver the same remarkable experience in the areas of service, decor & product.”

“Mylk Bar’s homage to a bygone era extends beyond the rustic décor and venue fit out. We will also present our mylk bites menu on old platters and wooden boards, with many drinks served in old fashioned glass & milk bottles.”

The business plan also states:

“Tynte street will be a baby venue to its sister at Flinders Street with the offer being a locale residential café that offers breakfast, Lunch & dinner while enjoying a glass of wine or a cold beer in a quite non-intrusive area where a casual dress code applies!”

“Tynte street will allow customers to experience and feel like your local Deli as it was once known as! Experience old fashioned service with a modern twist! Mylk Bar promises a magical dining experience. Vibrant chatter, corks popping, fish frying, chefs chopping, well-dressed waiters moving at lightning speed, delivering plates to tables of hungry patrons laughing, sharing and feeding off the energy of this exhilarating new venue.”

Section 35 of the Act sets out the criteria which must be satisfied before a Restaurant and Catering licence may be granted. It emphasizes that the consumption of liquor should be ancillary to a meal or at a function at which food is provided.

Section 35 of the Liquor Licensing Act 1997 relevantly provides:

(1) Subject to this Act and the conditions of the licence, a restaurant and catering licence—

(a) authorises the consumption of liquor on the licensed premises at any time with or ancillary to a meal provided by the licensee; and

(b) authorises the licensee to sell liquor at any time for consumption on the licensed premises—

(i) with or ancillary to a meal provided by the licensee or in prescribed circumstances; or

(ii) to a person—

(A) attending a function at which food is provided; or

(B) seated at a table; and

(c) authorises the licensee to sell liquor in accordance with a condition under subsection (3).

In addition to this section 35(2) of the Act states:

A restaurant and catering licence is subject to the condition that business must be conducted at the licensed premises such that the supply of meals is at all times the primary service provided to the public at the premises, except as otherwise allowed by a condition of the licence.

I am satisfied from the information before me that the proposed premises will operate in a different fashion to that of the Flinders Street site which has a general and hotel licence. I am also satisfied that the principal business to

be conducted at the premises will be the provision of meals.

The proposed premises name “Mylk Bar” raises the issue of whether the use of the word “Bar” for a restaurant and catering licence is appropriate. Consideration must be given to whether the use of this word in the name of a restaurant connotes an expectation in the mind of the public that the premises are trading in a manner inconsistent with their liquor licence. In my view, use of the word “Bar” in the name of a restaurant connotes an establishment where a patron may enter and obtain liquor in a manner that is inconsistent with the requirements pertaining to a Restaurant and Catering licence contained in section 35 of the Act as set out above.

The licensing authority has previously held the position that the use of the word “Bar” in respect of a restaurant and catering licence is generally inappropriate and may cause confusion in the minds of the public, except in circumstances where it appears in conjunction with a non-liquor related food activity – such as for establishments such as a pizza bar, noodle bar, sandwich bar, oyster bar or the like. On many occasions in the past the Commissioner has declined to make Orders enabling licensees to trade under names considered to be inconsistent with their liquor licence.

In the case of Belair Taverna, Licensing Court of South Australia, delivered 16 October 1987 the issue of whether that name was appropriate for a restaurant was considered. An objection was lodged to the original proposed name of “Belair Tavern”, which was accordingly amended to “Belair Taverna”. Counsel for the objector submitted that “confusion might arise in the public mind as a result of the use of the name “Belair Taverna”.

Judge Hume pointed out that whilst “...it is not for this Tribunal to concern itself with the prevention of general confusion between competing businesses as a result of similarities in trading names”:

“...the name under which a business holding a liquor licence trades should not be such as to create an expectation in the minds of the public that it was able to trade in a manner in which it was not legally able to trade – for example, that it is inappropriate in the public interest to allow the holder of a restaurant licence to trade under the name “Joe’s Bar”. As a matter of broad common sense there is some force in that point...

...In that event it seems clear that the intention of Parliament is that the only information which a licensee is obliged to give to the public as to the nature of the business conducted in licensed premises is by a sign over the door saying what the class of the licence is. The public is presumed to know what that is.”

After careful consideration and for the following reasons I do not disallow this trading name pursuant to my powers under section 53(1) of the Act, which gives me an unqualified discretion to grant or refuse an application on any ground for any reason I consider sufficient.

The menu offers all-day breakfast with additional food options available after 12pm which include a variety of wraps, sandwiches, salads and burgers. The menu also includes various coffees and teas and ‘mylk’ shakes and juices.

The business plan states that:

“Tynte street will be a baby venue to its sister at Flinders Street with the offer being a locale residential café that offers breakfast, Lunch & dinner while enjoying a glass of wine or a cold beer in a quite non-intrusive area where a casual dress code applies!”

The business plan states that the concept of “The Mylk Bar hails from the early 1900’s delicatessens throughout Melbourne & Sydney.” “In following from this era, we aim to deliver the same remarkable experience in the areas of service, decor & product.”

The website and social media pages for the Mylk Bar (both locations) show case photographs that replicate the look and décor of a milk bar from this era both internally and externally.

Having considered the above matters, on balance I hold the view that the name “Mylk Bar” is an alternate spelling for premises once known as milk bars. I am of the view that the look of the premise is a replication of this. I do not consider that the name suggests that patrons may go to the premises to consume liquor at a bar without being seated, and without the requirement that a meal be purchased such as would be required at a restaurant.

After considering the content of the application and the business plan and the concerns raised in the submissions opposing the grant of restaurant and catering licence, I am of the opinion that the application should be granted as sought.

Under Delegation from the Liquor and Gambling Commissioner



Jane Widdowson
Hearings Delegate
13 May 2022