

SILVER SANDS BEACH CLUB

Application for a General and Hotel Licence

Silver Sands Beach Club Pty Ltd (**the Applicant**) has applied for a General and Hotel Licence (**GHL**) in respect of a premises proposed to be situated at Norman Road, Aldinga Beach SA 5173 (**the Site**), to be known as the Silver Sands Beach Club.

As the application was a designated application for the purposes of s 53A of the *Liquor Licensing Act 1997* (**the Act**), the Applicant submitted a Community Impact Assessment Form (**CIAF**), with supporting attachments, which included various letters of support for the Application. The Licensing Authority (**the Authority**) also received submissions from numerous parties objecting to the application.

As a result of the interest the application attracted, I determined to hold a hearing in the matter which was held over two separate dates on 21 February 2022 and 3 March 2022 respectively.

For ease of reference the following submissions and documents are referred to throughout the decision with the abbreviations noted below:

- Applicant's Submissions / Community Impact Assessment Form (**CIAF**);
- The Hearing Tender Bundle containing documents pertaining to the application presented by the Applicant at the 21 February hearing (**Hearing Bundle**);
- Letters/submissions of support from various parties contained at [8] of the hearing bundle and set out as follows (collectively referred to as **the Support Letters**):
 - Letter from Peter Symons, Aldinga Bay Surf Life Saving Club, dated 13 January 2021 (hearing bundle 8.1);
 - Letter from Paul Hibbird, Aldinga Bay Surf Life Saving Club, undated (Hearing Bundle 8.2);
 - Letter from Jennifer Lynch, McLaren Vale Group Wine and Tourism Association, dated 26 November 2021 (Hearing Bundle 8.3);
 - Letter from Joanne Chadwick, South Australian Tourism Commission, dated 26 November 2021 (Hearing Bundle 8.4);
 - Letter from Chester Osborn, d'Arenberg, undated (Hearing Bundle 8.5);
 - Application Summary Submission Gill Gordon-Smith, Fall From Grace, dated 12 January 2022 (Hearing Bundle 8.6);
 - Application Summary Submission Milton Wordley, Southlight Pty Ltd, 15 January 2022 (Hearing Bundle 8.7);
 - Application Summary Submission Ross Stanley, dated 17 January 2022 (Hearing Bundle 8.8);
 - Application Summary Submission Ross Ganf, dated 12 January 2022 (Hearing Bundle 8.9);
 - Application Summary Submission Lesley Ganf, dated 17 January 2022 (Hearing Bundle 8.10);
 - Application Summary Submission Karena Armstrong, Salopian Inn, dated 10 January 2022 (Hearing Bundle 8.11);
 - Application Summary Submission Surahn and Jessica Sidhu, Papershell Pty Ltd, dated 10 January 2022 (Hearing Bundle 8.12);
 - Application Summary Submission Nicholas Dugmore, The Stoke Wines, dated 10 January 2022 (Hearing Bundle 8.13);
 - Application Summary Submission John Retsas, First Drop Wines, dated 11 January 2022 (Hearing Bundle 8.14);

- Application Summary Submission Ian Lyckholm, dated 11 January 2022 (Hearing Bundle 8.15);
- Application Summary Submission Sam Dunlevy and Chloe Fitzgerald, Berg Herring Wines, dated 13 January 2022 (8.16);
- Application Summary Submission Andrew Van Essen, dated 13 January 2022 (Hearing Bundle 8.17);
- Application Summary Submission Henry Jock Walker, dated 13 January 2022 (Hearing Bundle 8.18);
- Application Summary Submission Jane Ravesi, dated 14 January 2022 (Hearing Bundle 8.19);
- Application Summary Submission Patricia Sprague, dated 11 January 2022 (Hearing Bundle 8.20);
- Application Summary Submission Noonie Noonie Scharling, dated 11 January 2022 (Hearing Bundle 8.21);
- Application Summary Submission Travis and Felice Kalendra, dated 14 January 2022 (Hearing Bundle 8.22);
- Letter from Hon Leon Bignell MP to Dini Soulio, Commissioner for Consumer and Business Affairs dated 17 December 2021 (Hearing Bundle 8.23);
- Letter from Hon Leon Bignell MP to Hon Josh Teague MP, Attorney General, dated 17 December 2021 (Hearing Bundle 8.24);
- Letter from Matt Head, Big Easy Radio, dated 1 December 2021 (BER1)
- Australian Hotels Association (SA) submissions dated 14 January 2022, objecting to the application (**AHA1**);
- Applicant's response to AHA (SA) submissions (**AHA1R, 9.3 Hearing Bundle**);
- Letter from Doug Govan, The Victory Hotel in support of the application (withdrawn) (**VH1**);
- Application Summary Submission Brenton Schoemaker, Kick Back Brewing Company objecting to the application and dated 10 January 2022 (**KBB1**);
- Applicant's response to Kick Back Brewing Company submissions (**KBB1R, 9.2 Hearing Bundle**);
- Application Summary Submission behalf of Chinbiya Pty Ltd, licensee of the Aldinga Hotel objecting to the application, dated 14 January 2022 (**CB1**);
- Applicant response to Chinbiya Pty Ltd submissions (**CB1R, 9.4 Hearing Bundle**);
- Application Summary Submission by Matt Johnston, Sourc'd Pty Ltd objecting to the application, dated 19 January 2022 (**S1**);
- Applicant response to Sourc'd Pty Ltd submissions (**S1R, 9.5 Hearing Bundle**);
- Applicant's further submissions dated 20 February 2022 (**A2**);
- AHA further submissions on planning and tenure, dated 3 March 2022 (**AHA2**);
- AHA planning tender book, presented at the 3 March 2022 hearing (**AHA Planning Tender Book**);
- Submissions by the City of Onkaparinga Council in response to planning issues raised by the AHA, dated 23 March 2022 (**COC**);
- Applicant's response to planning submissions of the AHA, dated 23 March 2022 (**A3**).

This application may only be granted if the Authority is satisfied that the grant of the application is in the community interest. In determining this application under section 53A(2) of the Act, I must have regard to:

- the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor;
- the cultural, recreational, employment or tourism impacts; and
- the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
- the nature of the business conducted or to be conducted under the licence (as prescribed).

I must also apply the Community Impact Assessment Guidelines (**the Guidelines**), which state: *“The onus is on the applicant to satisfy the licensing authority that the grant of the application is in the community interest and to provide relevant evidence and submissions to discharge this onus.”*

The Guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that, if relevant, is expected to address a range of matters, including: the applicant’s products/services in terms of key features and potential customers; business/professional experience, in particular relevant knowledge, experience and competency in relation to the service of liquor; general description of facilities and services; relevant construction details (e.g. materials, finishes, acoustic treatment, etc.); details of any food, including menu; liquor services (e.g. bar) and range of liquor; types of entertainment; types of accommodation; a statement as to whether the community supports the proposed business, including providing evidence of such support; and a statement as to why the granting of the application is in the community interest.

Applicants are also required to provide, where applicable: a map and report regarding the locality generated through Consumer and Business Service’s **(CBS)** Community Impact Portal; a business plan/plan of management; and a site or property plan, floor plan and/or photographs/artists impressions of the site/building.

Pursuant to section 3(2) of the *Liquor Licensing Act 1997* (**the Act**), when deciding whether or not to grant this application, I must have regard to the objects of the Act as set out in section 3(1) of the Act.

Section 3(1) of the Act provides that:

- (1) The object of this Act is to regulate and control the promotion, sale, supply and consumption of liquor—
 - (a) to ensure that the sale and supply of liquor occurs in a manner that minimises the harm and potential for harm caused by the excessive or inappropriate consumption of liquor; and
 - (b) to ensure that the sale, supply and consumption of liquor is undertaken safely and responsibly, consistent with the principle of responsible service and consumption of liquor; and
 - (c) to ensure as far as practicable that the sale and supply of liquor is consistent with the expectations and aspirations of the public; and
 - (d) to facilitate the responsible development of the licensed liquor industry and associated industries, including the live music industry, tourism and the hospitality industry, in a manner consistent with the other objects of this Act.

(1a) For the purposes of subsection (1)(a), harm caused by the excessive or inappropriate consumption of liquor includes—

- (a) the risk of harm to children, vulnerable people and communities (whether to a community as a whole or a group within a community); and
- (b) the adverse economic, social and cultural effects on communities (whether on a community as a whole or a group within a community); and
- (c) the adverse effects on a person’s health; and
- (d) alcohol abuse or misuse; and
- (e) domestic violence or anti-social behaviour, including causing personal injury and property damage.

The Applicant must also satisfy the Authority that the pre-requisites in s 57 of the Act have been met, in relation to such matters such as: the suitability of the premises; the potential for them to cause undue offence, annoyance, disturbance or inconvenience to nearby residents, workers and worshippers in the vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools in the vicinity of the premises; and whether the appropriate approvals, consents and exemptions, in respect of the proposed premises have been obtained.

Additionally, s 53 of the Act gives the Authority “*an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application)*”, and s 53(1a) provides that the authority must refuse an application if it is satisfied that granting the application would be contrary to the public interest.

Section 53(1b) of the Act requires that the Authority must refuse an application for a licence if it is satisfied that granting the application would be inconsistent with the Objects of the Act.

Background/Nature of the Proposed Offering

The Applicant is proposing to operate a premises to be known as the Silver Sands Beach Club, which is located proximate to the foreshore at Silver Sands Beach – situated to the north of Sellicks Beach and to the South of Aldinga Beach. The proposed premises is located on Norman Road, which runs in an east-west orientation between Main South Road and Silver Sands Beach.

The proposed premises is situated on land which the City of Onkaparinga (**the Council**) is the proprietor of, pursuant to a Crown lease. The Council has granted a licence over that land with Aldinga Bay Surf Life Saving Club (**ABSLSC**). The old clubrooms of the ABSLSC were destroyed by storm damage in 2018, leading to that building being demolished and a new construction being erected. ABSLSC has entered into a licence agreement with the Applicant in respect of the new building after seeking expressions of interest in a partnership to operate the club’s kiosk and restaurant to provide meals for members and non-members of ABSLSC (7.1, Hearing Bundle). Photos displaying the constructed premises are located at Tab 3, Hearing Bundle. A detailed plan and layout of the premises is found at Tab 4 of the Hearing Bundle. The intention of ABSLSC is for the proposed premises to become their primary source of revenue by way of rent for the land paid to the club directly.

The premises have been constructed in accordance with a Development Approval (7.2 – 7.3, Hearing Bundle) and a Certificate of Occupancy (7.6, Hearing Bundle) has been issued. The premises have been constructed as a stand-alone hospitality venue located on the seaward side of the rescue and training facility, from which the ABSLSC will continue to carry out their surf lifesaving operations from a building immediately to the rear of the proposed licensed premises (4, Hearing Bundle).

The Silver Sands Beach Club aims to deliver a community focused food and beverage offering that caters to registered members of the ABSLSC, the residents of the Aldinga and Sellicks Beaches, as well as visitors from metropolitan Adelaide, greater regions of South Australia, and beyond. The CIAF states the following in relation to the proposed premises:

one bar, located inside the club, will service the licenced area. The drinks offering at this bar will focus on locally made products particularly wine and beer. We note that these are not bulk products and express our desire of sourcing and retailing local products. We aim to engage with local wine and beer enthusiasts in an effort to become a hub of quality and interesting drinks... A range of quality and interesting non-alcoholic drinks (including beer) will also be stocked for persons under 18, and for those that do not wish to consume alcohol (3.2, CIAF).

The alcohol offering will reflect the premises location in respect to McLaren Vale, in that it will showcase local and other South Australian wines among others (22, A2).

By way of food offering, the kiosk will offer early morning coffee and all-day snack trade, as well as takeaway food in the evening. The main food offerings within the restaurant will consist of traditional pub meals such as burgers, schnitzels, pizzas, fish and chips, and salads as the core meals being accompanied by dishes “*driven by seasonality, availability, and chef creativity*” (3.3, CIAF). The kiosk will provide for a ‘stripped back’ takeaway menu. The kiosk takeaway is designed to be eaten at the beach, on the grass, or taken away elsewhere. Coffee service is expected to be available from the kiosk at typical morning hours (3.3, CIAF).

The business will operate as a kiosk from early in the morning, with the restaurant proper trading from lunch time through to dinner time. The evening trade will include a take-away food offering, with the take-away food available through the Kiosk, closing at dusk (21, A2). The Applicant has provided an indicative menu and wine list (5, Hearing Bundle).

The Applicant submits that an important aspect of their business includes a tailored take-away liquor offering as an adjunct to the dine-in and events trade, allowing customers who are interested in stocked products to be able to purchase small quantities to take away with them for consumption off premises, however it is submitted that it is not anticipated that the take-away offering would appeal to those looking to make bulk purchases of alcohol for consumption (24-25, A2). Further emphasising this point, the Applicant states that critically there will be no display or browsing section (26, Hearing Bundle), and that in order to address any concern that the offering may have unintended consequences the Applicant proposes conditions with respect to the sale of take-away, namely (at 27, A2):

- that sales be made only to customers who have purchased or are purchasing food; and
- that in respect of any sale of wine or beer, a sale be limited to a maximum purchase of six bottles; and
- there will be no sale of alcohol through the Kiosk facility.

The packaged liquor aspect of the proposal is described as a ‘critical adjunct’ to the business model insofar as:

“(1) it is envisaged that in promoting the best McLaren Vale and other wines (and other beverages) in the on-premises consumption trade, there will be a significant opportunity to engage customers who wish to purchase (and take away) something they have tried and enjoyed, and which they may not readily find elsewhere;

(2) it will be of great convenience and attraction to customers purchasing a take-away meal from the restaurant to be able to purchase a beverage to take with them to consume with their meal; and

(3) in connection with wine focussed events and other special events, it will be critical to be able to engage in direct sales (by delivery) of the alcoholic beverages being sampled or promoted, and for small quantity sales to be effected on the spot for consumption off-premises. (47, A2).

The proposed premises will offer low level entertainment provided at the venue which would incorporate quiz nights, low-level live music, bingo nights, and stand-up comedy and other events hosting winemakers (3.4, CIAF).

Locality

The Guidelines provide a guide for applicants in relation to the ‘locality’ applicable to their application, and state that applicants are required to identify the geographic area from which they expect to draw customers having regard to the intended nature of the business of the licensed premises.

The Guidelines speak of the locality as referring *“to the area surrounding the licensed premises / proposed licensed premises and is the area most likely to be affected by the grant of the application”*.

The Guidelines suggest as a guide that the locality of licensed premises outside the Adelaide metropolitan area will be the area within a 5km radius of the proposed offering:

Outside the Metropolitan Area: With regards to country cities, town or communities, unless remotely located, the locality of the premises is the area within a 5km radius of the site of the relevant premises (pg6, Guidelines).

The locality of the proposed premises is identified as encompassing the suburbs of Sellicks Beach and Aldinga. the population of Aldinga is listed as 10,557 people, and Sellicks Beach 2,616 people (5.1, CIAF; 34, A2).

The Applicant submits that they expect to draw the majority of their customers from within a 10km radius of the venue but submit that their intimate knowledge of the area suggests customers will come from across the state and, with COVID-19 border restrictions easing, it is expected that interstate tourism will bring further interstate visitors to the premises (3.1, CIAF).

In the case of *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 (**the Liquorland Park Holme decision**), Gilchrist J observed at [20] that:

“.....locality is now focused upon the local community and is much more focused on primary trade catchment areas, as opposed to secondary catchment areas.”

As the Applicant submits, they expect to draw a wide range of customers from well outside the immediate locality of the proposed premises, and this is supported due to the general regional appeal of McLaren Vale as a visitor and tourist destination. However, as is made clear by the Park Holme decision, the Authority’s focus for considering impact on the locality

in this matter is the Primary Trade Area (i.e. the 5km radius from the premises as stipulated by the Guidelines).

When the licence search area is set to 5km from the premises, there is a total of 27 licences in the area (Table 1, 3.1 CIAF). It is submitted by the Applicant that only one of these venues is a mixed product takeaway venue, being a BWS located at Aldinga Shopping Centre. I note comments made by objector Matt Johnston, Licensee of Sourc'd who disputes the listed licences as Sourc'd was not included and they are the holder of a General and Hotel Licence and consider themselves a mixed product takeaway venue. The Applicant, in response to the Sourc'd objection provided a response that the business name 'Sourc'd' returned no results when searched on the CS data base (S1R). Inclusive of the Sourc'd licence, the total liquor licence number in the locality is 28.

The Applicant submits that none of the licences in the locality provide liquor to a level that could contribute to an increase in reported problems with drunkenness (4.1, CIAF).

Potential Harm

The Applicant has identified two key groups who could be identified as 'at-risk' groups. These 'at-risk' groups comprise those from lower socio-economic groups, and children under the age of 19 (4.1, CIAF). Table 2 at 4.1 of the CIAF shows that the local government area of Onkaparinga (in which the proposed premises is located) has a higher SEIFA Index of Relative Socio-Economic Disadvantage (i.e. higher than the South Australian mean). However, both Sellicks Beach and Aldinga Beach have a lower index than their local government area, and the Applicant notes that Aldinga Beach importantly has a lower index than the South Australian mean (4.1, CIAF). The Applicant has identified that both Sellicks Beach and Aldinga Beach have a higher percentage of people under the age of 19 in comparison with the rest of South Australia (4.1, CIAF).

It is noted that there are no drug or alcohol rehabilitation centres in the locality of the premises (4.1, CIAF).

The nearest community building to the proposed premises is the adjacent ABSLSC, which shares the land by way of sub-lease to the Applicant. The ABSLSC currently hold a club licence and intend to continue to operate with that licence in its current name and conditions.

The nearest school to the proposed premises is the Southern Vales Christian College which is 5.7km from the premises by road and 3.5km as the crow flies (4.2, CIAF). The closest kindergarten/child care venue is the Aldinga Kinder Haven, which is a 5.6km drive or 3.4km as the crow flies (4.2, CIAF). The closest medical facility is Rhylyn Medical Centre which is 3.9km as the crow flies (4.2, CIAF). The closest hospital is the McLaren Vale and Districts War Memorial Hospital, 13.08km as the crow flies (4.2, CIAF). The closest place of worship is the Kingdom Hall of Jehovah's Witnesses, 5.16km as the crow flies (4.2, CIAF). According to the Consumer and Business Services portal, there are no dry areas in the locality of the premises (4.2, CIAF). The Applicant submits that the granting of this application will not have any negative impacts on persons visiting the community locations mentioned above. Using Aldinga Road as a reference, there are currently 13 licensed premises in the locality, all of which are closer to the aforementioned community facilities (4.2, CIAF).

All staff who are part of Silver Sands Beach Club will be required to have current RSA accreditation and all managers will be designated Responsible Persons where required. The Applicants' Mr. Stock and Mr. Kamleh possess extensive experience in this regard and are both current approved Responsible Persons. As the liquor offering will not involve bulk purchases or any marketing or advertising that may present as attractive to at risk groups,

the Applicant submits that the licensing authority may take comfort that the grant of the licence would not encourage excessive or inappropriate consumption of liquor (4.3, CIAF; 52 – 53, A2).

I note that South Australia Police have not objected to the application.

Cultural, recreational, employment or tourism impacts

The Applicant submits that the grant of the application is in the interests of both the local community and the South Australian community. The venue will provide significant employment opportunities and job training opportunities to members of the club as well as their families and friends, with the Applicant looking to employ locals to return money into the community (42, A2). The proposal will also provide a secure rental stream to the ABSLSC, which will allow for them to continue to provide their services to the local community and visitors to the beach for years to come (42, A2). As the proposed premises are leased from the ABSLSC, the Applicant is mandated to serve the needs of the club and its members by way of securing employment opportunities and job opportunities to members and/or their family and friends where possible (6.1, CIAF).

The venue will promote the interests of local businesses both in the local community and to tourists from further afield by making the focus of the offering squarely on local produce and beverages as a foundation of their business planning and philosophy (6.1, CIAF; 43, A2). The Applicant's aim is to deliver a world class food and wine experience to locals and to tourists and envisages that the beachside location will become an iconic regional destination (45, A2). It is expected that the proposed offering will draw patronage from interstate tourists travelling to the region given its South Australian offering and unique coastal vistas (3.1, CIAF). The Applicant has a vision that includes locals celebrating their birthdays, anniversaries, and even weddings at the proposed premises (6.1, CIAF).

The Applicant submits that the cultural, recreational, employment, and tourism impacts are "clearly positive" as the venue will add substantially to the amenity and attraction of living in the community in which it operates (49, A2).

Social impact and impact of the amenity of the locality

The Applicant submits that the premises "*will add substantially to the amenity and attraction of living in the local community in which it will operate*" (49, A2). The presence of an additional liquor outlet in the locality will bring additional convenience to residents as well as local employment opportunities. For residents and for tourists in the Silver Sands area, the proposed premises will be walking distance and a place for residents and families alike to enjoy quality food and beverages in a beachside setting (7.1, CIAF). Further, the combination of a relaxing, accessible, and family friendly offering with a high-quality approach is said to be a very valuable addition to the local landscape (7.1, CIAF).

The Applicant submits that the proposed premises will provide a convenient and local on and off premise supply of liquor. The next closest off-premise liquor outlet is said to be the BWS at Aldinga Shopping Centre, which provides a very different offering to what is proposed. The range of liquor that will be provided by the Applicant will be locally driven with a focus on quality and local sourcing over "value for money". The Applicant submits that their vision for the proposed premises includes the delivery of "*a world class food and wine experience to locals and to tourists and we envisage our beachside location will become an iconic regional destination for tourists to the area*" (7.1, CIAF).

The business will closely integrate with other local businesses and service providers and create indirect benefits by up-skilling the local community that they serve and employ, as well as directly supporting the local businesses by way of purchase from them as suppliers (7.1, CIAF).

The Applicant submits that the crime statistics do not suggest any particular issues (36, A2). I note that in respect of the instances of reported crime for 2020/2021 in Sellicks Beach the most common offence was 'serious assault not resulting in injury' with 18 reported offences, followed by 'other property damage and environmental' with 14 reported offences (Table 6, CIAF). The reported crime statistics for 2020/2021 for Aldinga Beach showed 'other property damage and environmental' as the most common offence with 107 reported offences, with 'serious assault not resulting in injury' the second most common offence category, with 56 reported offences (Table 8, CIAF). I note that the crime statistics are not shown relative to the averages of the state as a whole or represented relative to the population of the locality. I also note that the crime statistics do not indicate which proportion of crime (if any) involved the consumption of alcohol.

Socio-Economic Indexes for Areas (**SEIFA**) is a product developed by the Australian Bureau of Statistics (**ABS**) that ranks geographic areas in Australia according to relative socio-economic advantage and disadvantage. The indexes are based on information from the five-yearly Census and include indexes such as 'relative socio-economic disadvantage', 'index of relative socio-economic advantage and disadvantage', 'economic resources' and 'education and occupation'.

The Applicant notes that the SEIFA Index for Sellicks Beach and Aldinga Beach have a lower index than their local government area of Onkaparinga. Further, Aldinga Beach has a lower SEIFA index than the South Australian mean (4.1, CIAF; 35, A2). The Applicant submits that 'generally speaking' there is no reason to consider the community to be 'at risk' in relation to the excessive or inappropriate consumption of alcohol (36, A2).

The unemployment rate for the SA2 suburb of Aldinga is 10% (smoothed) from 2018 data (4.1, CIAF). Sellicks Beach and Aldinga Beach both have a higher percentage of the population aged 19 and younger in comparison to the rest of South Australia (Table 3 and Table 4, CIAF).

Community support for the proposed business

The Applicant has provided a number of letters of support for the application. This included the following:

- letter of support from Paul Hibbird, president of the ABSLSC, which states total support for the facility (8.2, hearing bundle);
- letter from Jennifer Lynch, McLaren Vale Grape Wine & Tourism Association, which endorses the proposal and the likely positive impact on the region, as well as character support for Applicant Nick Stock (8.3, hearing bundle);
- letter of support from Chester Osborn, d'Arenberg endorsing character support for Nick Stock and Mark Kamleh (8.5, hearing bundle).
- letter of support from Matt Head, Big Easy Radio endorsing character support for the Applicants and support for the proposal (BER1)

In addition to the letters of support, the Applicant received 17 submissions in support of the proposal, all of which more or less set out general character support for the Applicants (8.6 – 8.22, hearing bundle).

The ABSLSC – who are sub-leasing the land to the Applicants – provided a submission in support of the application which stated the club’s support for the application. The ABSLSC did however note that the most contentious area of the application was the takeaway alcohol aspect of the licence. They do however continue to support the proposal so long as the Applicant’s vision remains in line with that of the ABSLSC, in that:

- the business operates safely and is family friendly / community focused;
- they do not support selling bulk packaged liquor;
- they do not support any form of bottle shop or dedicated retail liquor sales area;
- they do not support the supply of liquor to people walking in off the beach for consumption on the beach;
- they do not support the sale of liquor for people to consume in public spaces (8.1, hearing bundle).

Further, the club do not support take away sales of liquor without a set of reasonable restrictions on the sale of liquor for consumption off premise (8.1, Hearing Bundle).

I note that there was initially a letter of support from Doug Govan of the Victory Hotel, who subsequently withdrew his letter of support upon learning it was a GHV being sought.

Submission of the Aldinga Hotel

Submissions objecting to the grant of the application were made on behalf of Chinbiya Pty Ltd, the licensee of the Aldinga Hotel on 14 January 2022, on the grounds that the grant of the application would not be consistent with the objects of the Act, would not be in the community interest, and that the amenity of the locality in which the proposed premises would be adversely affected (CB1).

The objector makes general submissions on the community interest test pursuant to s53A of the Act and the ABSLSC and its current licence (4.1 – 4.9, CB1). The Aldinga Hotel go on to emphasise the dedication of the Crown land is to recreation purposes pursuant to the *Crown Lands Act 1929* (4.11, CB1). The Aldinga Hotel submits that the current styling and fit out of the proposed premises, including the bar within the proposed premises would lead to visitors assuming that the premises are being conducted by the ABSLSC (4.17, CB1).

With respect to the letters of support submitted with the application, the objector submits that the letters essentially go to the experience and reputation of the Applicants’ as respected wine critics and members of organisations that promote the food and wine industry in South Australia, and they do not deal in any respect with the nature, style, and purpose of the business within the context of the current legislative scheme of the granting of liquor licences in South Australia (5.1, CB1). There is one mention of a local resident and nearby licensee, Matt Head of Big Easy Radio, who provided a letter of support for the application. Multiple local businesses were not in support of the application (CB1, 5.2 – 5.4).

The Aldinga Hotel submit that ‘*there appears to be no reason that the objects of proposed licensed venue could not be achieved by the SLSC simply extending its Club Licence to include the newly constructed premises*’ and that the nature and style of the proposed premise would be more suitable for an On Premises Licence or a Restaurant and Catering Licence (6.3 – 6.4, CB1).

The objector submits that there are risks with respect to the sales of takeaway liquor, namely:

- (a) *the risk of customers buying takeaway liquor to be consumed in the adjacent car part, which will likely tend to result in a congregation of persons in the car park*

consuming liquor (adjacent to the children's playground);

- (b) the risk of customers on foot purchasing takeaway liquor which would be taken on to the Silver Sands Beach (with attendant unruly behaviour, litter, broken glass and the like);*
- (c) notwithstanding the dry zones in force, the risk of the licensed premises becoming a convenient stop for the purchase of liquor by persons accessing the Silver Sands Beach by vehicle from Norman Road;*
- (d) the previous two scenarios likely requiring increased monitoring and enforcement as preventative/deterrent control (6.6, CB1).*

The objector also notes that in its letter to the ABSLSC dated 10 November 2021, consenting to the grant of the licence at the proposed premises, the City of Onkaparinga did so subject to conditions including that consumption remained within the licensed area and no glass products to be permitted outside of the building. The objector submits that the CIAF does not appropriately address how it would comply with those conditions (6.7, CB1).

The Applicant provided a direct response to these submissions (CB1R) as well as the general submissions presented at the 21 February hearing (A2). The Applicant submits that the assertion that the proposed trading would be inconsistent with the dedication of the Crown Land for "recreational" use is without substance, as a facility offering food and beverages which also operates as a facility for surf lifesaving club members is plainly recreational use of the land (77, A2).

The Applicant's staff and responsible persons present will complete training prior to their employment. This training will have an emphasis on ensuring that alcohol sold for consumption on the premises is not to be taken off the premises. This will be further supported by large signage for patrons to ensure clarity with respect to the boundaries of the licensed premises (6.7, CB1R).

The Applicant concludes by submitting that the CIAF has been completed in line with the requirements of the Act and has provided substantiation that the application is in the community interest and that the application would not adversely affect the amenity of the locality in which the proposed premises are located, as evidenced by the 17 submissions of support during the notice of advertising period for the application (6.8, CB1R).

Submission of Kick Back Brewing Company

Brenton Schoemaker, on behalf of Kick Back Brewing Company, objected to the grant of the application by way of Application Summary Submission on 10 January 2022 (KBBC1). Mr Schoemaker submits that:

The licence type is incorrect for the proposed development. The Aldinga Bay Surf Life Saving Club was rebuilt to home the club and its members. There is NO requirement for a General and Hotel Liquor Licence. An appropriate licence for this location and the proposed restaurant is either a Restaurant and Catering Liquor Licence OR a Club liquor licence.

I also have great concerns about granting any form of takeaway licence at this location. This location is directly on the beach front. This location is at the entrance to the drive on section of the Silver Sands Beach. This will result in a significant increase in the sales and takeaway of alcohol to beach goers both local and tourists.

As this area is a dry zone this would be irresponsible for Liquor and Gaming to allow (KBBC1).

In response to the submission that the licence type is incorrect, the Applicant submits that they have applied for the appropriate liquor licence applicable to the proposed business operation. The Applicant is not a club as defined by the Act and as such has no grounds to make an application as such (KBBC1R). The Applicant also has no objection to the imposition of conditions limiting the sale of liquor for consumption off premise to direct sales and to those who have purchased food (KBBC1R). The Applicant further corrects the assertion made by the objector with respect to the existence of dry zones, providing a link outlining dry areas within the local government area of the City of Onkaparinga, which relevantly shows no long-term dry areas have been gazetted for Aldinga or Aldinga Beach (KBBC1R).

Submissions of Sourc'd

Matt Johnston, Licensee of Sourc'd, objected to the application. Mr Johnston submitted that:

First and foremost, the safety of beachgoers due to increased risk of intoxication on the beach, which according to the Licensing Manager of Onkaparinga Council, is a designated dry zone. I believe that this will only increase the work load for the Surf lifesaving club, and jeopardise the safety of all beachgoers whether in the surf, on the sand, or driving along the beach. There is also a risk of damage to the sand dune area which is home to nesting wildlife, especially in the Dolf Wayne Reserve which has been cited by the applicant.

Second, this model will create unfair competition to other licenced venues in the area including us. We currently have a General & Hotel licence and are only 3.1km from this proposed development, making us the closest impacted business in that category (SD1).

Mr. Johnston further submits in relation to the CIAF showing 27 licences in the area, with only one as a mixed product takeaway venue (BWS Aldinga Shopping Centre), that the business model of Sourc'd is based exactly on that premise. Mr. Johnston goes on to submit that this omission is erroneous, and further to that, their business was not consulted; and questions whether the Applicant deliberately omitted the business model and licence structure of Sourc'd.

Mr. Johnston further submits that it is his belief that:

...this is a deceptive proposal disguising itself as the Surf Lifesaving Club with a community focus. In addition to this, the Surf lifesaving club intends to keep its liquor licence with a 200 person capacity, meaning there will be two licences on the one premise with a combined capacity of 360 people and alcohol consumption available from 5am to midnight. (SD1).

Finally, Mr Johnston concludes by stating that Council had not been notified of the proposal, and that several letters of support for the development had been withdrawn, including that of the Surf Life Saving Club, indicating that the community is not behind the proposal (SD1).

In response to this submission, consistent with its responses to other submissions relating to the existence of a dry zone, the Applicant respectfully corrects the assertion as to the

existence of a long term dry zone and confirms via web link that no such dry zone is in force (SD1R).

With respect to the unfair competition submission, the Applicant submits “*it ought be uncontroversial, having regard to numerous authorities and the language of s 53, that no credence can be given to concerns about competition (and assertions of “unfair competition”*” (78, A2).

The Applicant submits that it could not ascertain the business offering of Sourc’d while undertaking the CIAF, as the Applicant was unable to extract any details from the CBS database, and during community consultation was informed that the future of the premises was unknown due to a prolonged closure (SD1R). The Applicant references the multiple letters of support and the 17 submissions in support in respect of the application as evidencing the community consultation and support with respect to the application (SD1R).

With respect to the assertion of “two licences on one premise” the Applicant submits that the proposed premises are separate to that of the existing club licence. The proposed premise is a separate offering and business to the public. Further, it is not uncommon nor is it in breach of the Act to have two licensed premises immediately adjacent to each other (SD1R).

In the absence of any evidence of the letters of support having been withdrawn, the Applicant directs attention to the letter of support received from ABSLSC (SD1R).

Submissions of the AHA and Applicant’s submissions in reply

Submissions were received from the AHA opposing the grant of the application on 14 January 2022 (AHA1). The Applicant provided a response to these submissions at the 21 February hearing (A2).

AHA1 Submissions

The AHA filed submissions on 14 January 2022 opposing the grant of the application. The AHA assert that the GHL is the peak category of licences, and that it is critical that the hierarchy of licences be maintained – referencing *Bratcas Pty Ltd t/as The Olive Tree Fine Food and Wine* [2019] SALC 71 and *Mitcham Cinemas and Piccadilly Cinemas* [2021] SALC 99. The AHA further submit that the Applicant’s business model can be supported with a different category of licence, and that “*for reasons of public and community interest, lack of clarity in the application and lack of appropriate community consultation, the inability to sell unrestricted take away is not a factor that militates in favour of the GHL application*” (2, AHA1).

The AHA further assert that they do not oppose the refurbishment and licensing of the renovated premises of the ABSLSC and submit that the most appropriate pathway would be a redefinition of the club’s existing licence (3, AHA1). Further, it is submitted that the material accompanying the application is ‘*opaque*’ on the basis that the use of the word “Club” in the name is intended to mislead the casual reader, the new building is a matter of metres from the existing licensed premise, all of the accompanying documents supporting the application do not specifically refer to a GHL being sought, and that a Sunday Mail article attached to the submissions displays significant confusion by use of the words “liquor licence” “restaurant”, and “club” (4, AHA1).

The AHA submit that a change of use from a club licence to a GHL requires development approval pursuant to the relevant provisions of the Planning and Design Code, and no such application has been made (5, AHA1).

Further, Aldinga Beach is accessible by motor vehicle, and the beach is a popular area for families, swimmers, and surfers. The AHA submit that:

It is not in the interest of the public generally, or of the local community in particular to allow unrestricted sales of take-away liquor in such close proximity to the water and to vehicles on the beach. The risks posed by a combination of glass bottles, intoxicating liquor, water, motor vehicles and the presence of people who may be behaving less sensibly than usual is simply too high (8, AHA1).

The presence of a children's playground in the immediate vicinity of the proposed licensed area is also noted.

Applicant's Response A2

The Applicant provided a specific response to the AHA Submissions (9.3, Hearing Bundle), and a more general response in submissions presented at the 21 February hearing (A2). The Applicant submits that they have applied for the appropriate liquor licence that is available and relevant to the proposed business operation/ model, and that with regard to the objections they generally either (56, A2):

- (1) *raise concerns which have been or can be adequately addressed by the fashioning of conditions;*
- (2) *appear to be based upon or driven by considerations (such as the impact on competition) that are not consistent with the scheme and objects of the Act.*

The Applicant disagrees with the assertion that the grant of the application would not be in the community interest and the allegation of a lack of community consultation; as this is evidenced in the Community Impact Assessment completed and submitted with the application and the Development Approval received for the proposed land and premises use from the City on Onkaparinga, further, the applicant received 17 submissions of support in addition to the letters of support uploaded with the application (2, AHA1R).

With respect to the "hierarchy of licences" the Applicant submits that (58 -59, A2):

Reference has been made from time to time in the Licensing Court of the desirability of maintaining the 'heirarchy' of licences, and even after the recent amendments to the Act, the Court has indicated that the Court will keep a watchful eye on ensuring that the hierarchy of the licensing regime is maintained.

*The proposition, and the cases that have referred to it, need to be carefully understood in their context. The cases (mainly decided before the recent significant amendments) certainly do **not** stand for a proposition that proponents for liquor licences must alter or recast their proposed businesses so that they perfectly conform to a business which exemplifies a particular licence category (at least as that licence category has traditionally operated).*

The Applicant goes on to submit that the cases, when understood properly in their context, stand for a much narrower proposition. Assuming the proposed business could not be operated under a different licence which is more appropriate, the relevant question is "*simply whether the proposed licence departs so far from the relevant category that it somehow alters its essential character*" (59 – 66, A2). In response to the assertion by the AHA that a redefinition of the club licence would be more appropriate, the Applicant submits that they are not a club as defined by the Act, and as such have no grounds to make an application

for a club licence and would be in breach of the Act should the premises be operated in such a way (3, AHA1R).

The Applicant acknowledges the use of the word 'club' in the proposed trading name. This was decided on via a marketing campaign. The applicant refers to the notice of advertising produced by CBS which explicitly states that it is a GHF being sought (4, AHA1R). Further, the Applicant submits that the 'casual reader' would not be misled, as the casual reader would not be well versed in the difference between a General and Hotel Licence and a Club Licence. If the reader *is* well versed in the difference between these licence types, then the interpretation of the displayed notice would provide sufficient clarity (4, AHA1R). The Applicant further submits that it would be wrong to suggest that they would be eligible for a club licence, or the club licence attaching to the ABSLSC, as the Applicant clearly does not fit the requirement for a club licence under s36(5) of the Act. Further to this point, the ABSLSC's first call for expressions of interest called for a commercially independent operator so that it would have a secure rental stream without relevant operational risk (67, A2).

A restaurant and catering licence under s35(1) would be inappropriate as it only allows for the consumption of alcohol with or ancillary to the provision of a meal and in any event the licence would not permit take-away liquor sales. Similarly, an on-premises licence would be inappropriate on the basis it only permits sales of liquor for consumption on premises, which is contrary to the 'critical adjunct' of selling take away liquor (67, A2).

In response to the assertion by the AHA that development approval is required for a GHF application, the Applicant submits that full development approval for the proposed land and premises has been received from the City of Onkaparinga Council (5, AHA1R). The Applicant re-affirms that they have not applied for a club or restaurant licence as these licences do not permit sales for consumption off the licenced premises and they have thus applied for the most appropriate licence for their proposed business model (7, AHA1R).

The Applicant has made clear that it has no objection to the imposition of appropriate restrictions placed on the ability to sell take away liquor to direct sales and to those who have purchased food from the licensee (9, AHA1R). The concern that it is not in the public or community interest to allow "unrestricted sales of take away liquor" (8, AHA1) is not pertinent to the issue given that, by reason of the proposed conditions, that is not what is proposed (75, A2).

The AHA concluded by submitting that a redefinition of the ABSLSC club licence would be the more appropriate pathway. In response to this point the Applicant submits that they were successful in securing the lease by responding to an expression of interest from ABSLSC (7.1, Hearing Bundle). The Applicant quotes from expression of interest "*The successful candidate will be able to operate and manage the Kiosk and the Restaurant independently and profitably in order to achieve the financial support/return ABSLSC requires to achieve its vision*" (10, AHA1R) and hence why a new and separate licence was sought, with the reasons behind the licence sought being a GHF relating to take-away liquor as described above.

Subsequent submissions of the AHA and the Applicant's submissions in response

The AHA made submissions relating to planning and tenure, presented alongside the AHA planning tender book at the 3 March 2022 hearing. The AHA make seven arguments in relation to planning, namely:

(1) *proposed use inconsistent with limited dedicated purpose under Crown Land Management Act*

The dedication of use limits the power to manage the land by reference to the dedication purpose, as the use must not be inconsistent with the dedicated purpose (8, AHA2). The AHA submit that the term “recreation purposes” is not defined by the *Crown Land Management Act 2009*, but that the Macquarie dictionary defines recreation as “(1) refreshment by means of some pastime, agreeable exercise or the like; (2) a pastime, diversion, exercise or other resource affording relaxation and enjoyment; (3) the act of recreating; (4) the state of being recreated; (5) of or relating to an area, room et cetera set aside for recreation”. (10, AHA2). It is submitted that it is clear that what is proposed is a privately operated restaurant and liquor and outlet that will be directed to the public at large for commercial profit. The venture does not fit under any definition of “recreation” for the purposes of the dedication and are therefore inconsistent with the dedication of public land for recreation purposes. The Council therefore does not have the power to permit the proposed use in absence of an alteration of the dedication by the Minister (16 – 18, AHA2).

(2) *No evidence of permission from Minister for lease*

Section 22 of the *Crown Land Management Act* provides that “*subject to this section, a lease granted by a person other than the minister in relation to dedicated land is of no in effect unless the minister has consented, in writing, to the grant of the lease.*” (19, AHA2). The AHA submit that none of the exemptions from that requirement contained withing s22(5) apply, and that no evidence of any Minister consent has been produced (19 – 22, AHA2).

(3) *Proposed use not permitted by Council CLMP*

The AHA submit that the proposed use of the land is not permitted by the Council’s Community Land Management Plan (**CLMP**). The land is identified in the CLMP in the AHA Planning Tender Book at 15 which lists the land under the sub-category of “Service and Social Facilities”, defined as “*a broad range of informal and formal pursuits such as leisure and recreational activities, hobbies, artistic endeavours and social functions*” (Page 10, AHA Planning Tender Book). The AHA submit that none of the permitted uses or circumstances for leasing the land extend to a privately operated restaurant and liquor sales outlet and therefore the Council cannot permit the use and cannot grant a lease for the use of the land in the absence of a variation to the CLMP (25 – 26, AHA2).

(4) *Application proposes a change in use from any existing use*

The AHA assert that the application proposes a change in use from any existing use. The AHA submit that it is uncertain whether there are any existing use rights, but assuming that they did exist, they would be no more than for a surf clubroom. In no way could the existing use of “a modest club rooms” be said to extend to a “world class food and wine experience for tourists”, the takeaway sale of liquor, or events (27 – 32, AHA2).

(5) *The development approvals do not authorise any change in use*

The AHA submit that:

The only substantive development approval was granted on 13 August 2020 (**2020 DNF**) and appears at TB56-TB74. It was varied in 2021 to alter the hours by the variation consent at TB81.

The 2020 DNF is simply for the erection of a building. By its terms, it does not refer to nor permit any change in use. At TB56 the development is simply “construction of surf life saving clubrooms”.

The reference to “surf life saving clubrooms” does not refer in any way to any restaurant, hotel, shop or any other form of liquor outlet despite those terms being commonly understood and defined in the Development Regulations in force at the time.

The application drawings are vague and make no reference to any change of use. The use of the term “recreation” does not expressly refer to any defined terms used in the Development Act, Regulations or Development Plan (eg “restaurant”, “hotel”, “shop” etc). The ambiguity in the term on the drawings means that they do not definitively state that any change in use is proposed (especially given that the same term is used in reference to the former “existing” building) (37 – 40, AHA2).

Further, the AHA assert that the Council assessed the application on the basis that it was merely for the reconstruction of the building and not any change of use, apparently evident based on references to the Council assessment report (36, AHA Planning Tender Book) such as *“this proposed facility replaces an existing facility which was demolished due to damage.”* The AHA submits that there is nothing in the development approval that suggests in any way a change in use was proposed or approved (43, AHA2).

(6) *The area subject to the 2020 DNF does not cover the area sought in the licence application*

Paragraph 44 of the AHA submissions provides:

The application drawings make it clear that the element of the site subject to the 2020 DNF is limited to the footprint of the building (including the deck). That is evident from –

TB84 and TB94 where the area to the north is marked “by club” (eg by the club and not part of this application) in contrast to the word “Proposed” beneath the floor plan of the building proper;

TB85 where the area to the north is marked along a diagonal line “potential future grass area” (eg speculating about what may be proposed or sought in future, but not expressly seeking consent therefore in the application);

TB86 which shows no ground floor works north of the building proper;

The absence of any reference to the area to the north of the building in the planner’s delegated assessment report at TB36

(7) *Building not classified for restaurant or shop (liquor sales) or hotel purposes under the Building Code*

Finally, the AHA conclude by submitting that the building is not classified for restaurant or shop (liquor sales) or hotel purposes under the Building Code. The classification of the building appears in the Building Rules Consent (64, 67, AHA Planning Tender Book) as a classification that would be applicable to a surf club with an office component; that is, a class 9b and a class 5.

Class 9b is defined under the Building Code as *“...a building of a public nature that includes...an assembly building including a trade workshop or laboratory in a primary or secondary school”*. Class 5 is defined as *“...an office building used for professional or commercial purposes”*. (46 – 47, AHA2). It is submitted that the current application would require a class 6, defined as *“...a shop or other building used for the sale of goods by*

retail...direct to the public including...an eating room, café, restaurant...dining room, bar area...shop or kiosk..." (49, AHA2). It is therefore submitted that the classification assigned is not consistent with the current proposed use by the Applicant.

Applicant Submissions in Response (A3)

The Applicant provided a response to the AHA submissions on planning and tenure on 23 March 2022 (A3). The Applicant begins with reference to the Licensing Court dealing with similar arguments that have been considered with reference to the presumption of regularity, recognising that the primary forum for raising planning arguments is in the planning jurisdiction – referencing *Woolworths Liquor – Harbourtown* [2009] SALC 8 and *Renmark Golf & Country Club* [2002] SALC 17. Turning specifically to each of the seven matters raised by the AHA, the Applicant relevantly submitted the following:

Response to First AHA submission

The Applicant submits that this argument should be rejected for four reasons (17 – 21, A3).

1. It is premised on an interpretation of the word 'recreational purposes' which is derived from an observation of Windeyer J in a case concerning the meaning of "public reserve" in a particular statutory context and where it was important to acknowledge and respond to the underlying purpose of the rating legislation (which was absent in that case).
2. In a rating context, the fact that private profit is derived on land does not in and of itself mean that the land is not being used for recreational or public purposes, where the derivation of private profit is incidental to and not inconsistent with the main use.
3. The AHA argument focuses solely upon the part of the land which is proposed to comprise the licensed premises, which is wrong in law, as confirmed by *Brighton Foreshore* [2021] VSCA 284. The requisite focus is on whether the entire parcel of land, housing as it does the other facilities of the surf club including change rooms and storage, is being used for recreation.
4. The test is not whether the conduct of the proposed premises involves recreational use, but is whether the part of the entire parcel of land in the manner proposed is inconsistent with the entire parcel being used for recreational purposes, with the definition being understood according to the natural meaning of the words and not in the context of taxation or rating policy.

The Applicant submits that in applying the *correct* test, the parcel of land is *open to the public*, involves *recreation, public benefit, and the promotion of the recreation by others*, and that a commodious facility for club members and members of the public alike cannot possibly be said to be inconsistent with the broader activities being carried out on the parcel of land as a whole (23, A3).

Response to Second AHA submission

The Applicant submits that this submission asserts that none of the exemptions under section 22(5) of the *Crown Land Management Act 2009* apply, however, contrary to this it is submitted that s22(5) does apply on the basis that the lease to the ABSLSC is from a Council and has been granted in accordance with s 202 of the *Local Government Act 1999* (SA) (25 – 27, A3).

Response to Third AHA submission

This submission is entirely misconceived because no question of granting a new lease arises. The existing lease in favour of the surf club is patently approved under and cannot possibly be contrary to the CLMP because the lease is referred to and recorded in the CLMP itself.

Response to Fourth and fifth AHA submissions

The Applicant submits that these related submissions involve (30, A3):

- (1) a misconception as to the previous use of the land and buildings prior to the storm damage (as noted above, and contrary to the AHA submission, there was a food and beverage offering (apart from the kiosk) in the old premises, and not just a “small bar area”. It is factually wrong to say that “This site has been used solely as a modest surf club room for the day to day training, storage and administration of the club”);
- (2) overlooking that the change rooms, surf sport storage and first aid elements remain on the same parcel of land but in an adjacent building (albeit that construction was conducted under a separate development approval);
- (3) misconceiving the concept of a change in use (in that the submission seems to assume that a change in quality of an offering (asserted to be a change from “modest” to “world class” somehow amounts to a change in use); and
- (4) misconstruing (by reading far too narrowly) the actual development approval which is in place.

The Applicant submits that only the last point need be elaborated upon. The essential submission of the AHA is that the constructed building is somehow different from “surf lifesaving clubrooms” on the basis that it includes a commodious bar and restaurant space and a kitchen facility, notwithstanding the fact that the venue has been constructed precisely in accordance with the very plans depicting such a layout at 85 of the AHA Planning Tender Book. As submitted orally by Mr. Victory, the Council does not regard the proposal, conditioned as it is proposed to be conditioned, as involving a change in use. There is therefore ample basis to be satisfied of the s 57(2) requirements (31 – 35, A3).

Response to sixth AHA submission

The Applicant submits that the point made in relation to the extent of the development approval, is of no significance as there is no relevant change in use of the portion of the land, and to the extent that the point relates to the location of the boundary, this matter was addressed in the hearing, where the Applicant made an oral representation that it acknowledged the licensed plan should follow the boundary (36 – 37, A3).

Response to seventh AHA submission

This argument relates to building classifications – the Applicant submits it is doubtful whether the classification assigned by a Council amounts to a relevant approval, consent, or exemption. However, even if it did, and even without the presumption of regularity, the argument fails because there is no basis to conclude that the building certifier or council wrongly assigned the class 5 and 9b to the building and that instead it should have been assigned a class 6 (39 – 40, A3).

In any event, the AHA failed to fully recite the contents of class 6 or class 9b. under the *National Construction Code*, a class 6 building includes a dining room, bar area that is **not an assembly building** (Applicant’s emphasis). Class 9 buildings are of a public nature, with 9b including an assembly building but, as the AHA submissions omit, includes

entertainment, recreational or sporting purposes including **a bar area of a hotel or motel** (Applicant's emphasis). The Applicant submits that the proposed premises are plainly a building for these purposes and that, in any event, the building certifier could have been under no misapprehension that the space would be used to provide food and beverages (41 – 48, A3).

Submission of the City of Onkaparinga Council

By way of letter dated 11 March 2022, and pursuant to s 78 of the Act, I invited the City of Onkaparinga Council to make submissions following the submissions of the AHA relating to planning issues. The Council were invited to make submissions addressing the following matters:

- 1) Does the Council consider the proposed use of the land to fall within the express dedication of Crown land for the limited purpose of use for recreation?
- 2) If Council does not consider that the proposed use of the land falls within the express dedication of Crown land for the limited purpose of use for recreation, please advise whether the relevant consents have been sought from the Minister pursuant to section 22 of the *Crown Lands Management Act 2009*.
- 3) Please advise whether the Council considers that the proposed use of the land complies with the Council's Community Land Management Plan's designation of the land for 'Service and Social Facilities'.
- 4) Please provide any other comments that Council considers to be relevant in relation to my consideration of this matter for the purposes of s 57 of the *Liquor Licensing Act*.

In response to question 1, the Applicant noted that section 57 requires me to be satisfied that the premises are of a sufficient standard for the purpose of properly carrying on the business under the licence and, moreover, I must be satisfied that the relevant 'approvals, consents or exemptions' have been obtained. The Council submit that consistency with the relevant dedication of land under the *Crown Land Management Act 2009* is not a matter that requires any 'approval', 'consent', or 'exemption' to be obtained. Even if the Applicant desired to seek out confirmation of consistency, there is no statutory process for it to apply for or obtain an approval, consent, or exemption as such. Therefore, this matter does not fall for consideration under section 57(2) and is not something which the licensing authority must concern itself with (1, COC).

In response to question 2, the Council submit that a lease from the Council (as custodian of the land) to the ABSLSC was entered into in 2006; at that time, the now repealed *Crown Lands Act 1929* did not require the Minister's consent prior to the granting of a lease of dedicated land as the repealed Act did not contain an equivalent provision of section 22(1) of the current *Crown Lands Management Act 2009*. The ABSLSC now proposes to grant a licence to Silver Sands Beach Club to operate the current application. A licence does not attract the operation of section 22(1), which only applied to a lease. This position has been confirmed by the Council contacting the Crown Lands team within the Department for Environment and Water, who indicated that there is no need for its involvement in the proposed licence arrangement (2, COC).

Question 3 was answered with reference to the same reasoning as question 1, insofar as the issue of consistency with the relevant community land management plan is not a matter

which requires any approval, consent, or exemption and as such, is not a matter which the licensing authority must be satisfied under section 57(2) of the Act (3, COC).

In relation to the final question, the Council relevantly provided the following comments:

- *as a matter of law, intensification of a lawful existing use does not constitute a change in use: see for example Caltex Petroleum Australia Pty Ltd v City of Holdfast Bay [2014] SASCF 59*
- *similarly, the fact that an existing use may evolve over time, in response to changing market conditions or for other reasons, does not necessarily result in a change of land use; it is a matter of fact and degree: Pejafs Pty Ltd & Ors v Bitmead & Ors [2012] SAERDC 13 at [83]-[91]. In this instance, the fact that the facilities may take on a different style – going from ‘modest’, to something other than ‘modest’ – does not amount to a change of land use*
- *the general approach to be taken is one of construing the ‘use’ broadly. Confining the user to precise activity is not required. What is required is the determination of the appropriate genus which best describes the activities in question: see Shire of Perth v O’Keefe [1964] HCA 37; Royal Agricultural Society of NSW v Sydney City Council (1987) 61 LGRA 305*
- *the way in which a particular activity is managed or, indeed, whether it is a separate profit centre, is not relevant to determining whether it is a separate land use: Eliza Jane Investments Pty Ltd v City of Playford [2009] SASC 260 at [32].*

The argument seems to be that notwithstanding that the ABSLSC is lawfully entitled to operate the proposed facilities as a commercial, profit-making enterprise under its own steam, it cannot outsource those activities pursuant to a licence or management arrangement. This cannot be the case. (4.1, COC).

Significantly, the council submit that the only ‘new’ activity that would be involved would be the sale of liquor for consumption off premises. In that regard, the Council submit that the operation of a ‘full-blown takeaway bottle shop would undoubtedly constitute the commencement of a new and unapproved land use, however this is not what is proposed and nor would it be supported by the Council (4.1, COC).

In relation to the building classification point, the Council submit that s57(2)(b) is prospective insofar as it looks to any proposed building works, and the licensing authority must be satisfied of the relevant approvals, consents or exemptions required for the carrying out of building work before the licence takes effect. Here, the relevant building has already been constructed and a certificate of occupancy issues by a private certifier, which confirms the building has been classified as a 9b. No further building work is proposed or required and therefore there is no basis for the Authority to have any concerns under s57(2)(b) of the Act.

The Council conclude that even if the Applicant were to apply for a reclassification of the building as a class 6 building (in part or in whole), it would easily be achieved because, under the National Construction Code, the required building matters such as toilets, amenities and fire safety are comparable between classes 9b and 6. It is submitted that, at best, this is a minor technical matter without any practical consequences (4.2, COC).

Decision

Community Interest Test

In determining this application, I must consider whether the grant of this application is in the community interest. This involves an evaluative exercise that weighs the positives and negatives that will come with the grant of a new General and Hotel Licence.

On the positive side, I accept that the premises will provide a local and unique offering for residents of the locality, with a beachside setting offering a range of beer and wine local to the region and will add to the amenity of the locality, providing a destination for both locals and tourists alike to have a casual drink or a meal whilst overlooking the beach. The premises will also provide convenience to residents and tourists wishing to have a casual drink close to the beach, with the premises within walking distance for many of those staying in the area.

The proposed offering will also likely result in employment for the local community, including members of ABSLSC and it is likely that this employment will benefit people residing within the locality. Additionally, it is likely that the proposed offering will result in some economic benefits to food and beverage suppliers, and will promote and increase the profile of local producers.

I have considered the potential for harm of granting the application in light of the risk mitigation policies, procedures and staff training the Applicant has identified that it will put in place to mitigate the risk of harm to the community.

Harm minimisation is a key component of the community interest test, underpinned by the first object of the Act: *“to ensure the sale and supply of liquor occurs in a manner that minimises the harm and potential for harm caused by the excessive or inappropriate consumption of liquor.”*

I am satisfied of the substantial hospitality experience of the Applicant as one of Australia’s most respected wine critics, as well as experience in hosting an events business and a significant involvement in events such as *Tasting Australia*. I am satisfied that the risk of harm will be appropriately mitigated by the policies and procedures that will be put in place by the Applicant noting that while the Applicant may ensure safe consumption on premise, they are unable to control where consumption occurs if selling alcohol for consumption off-premise, particularly in close proximity to the drive on section of Silver Sands beach.

The proposed offering, in the event the application is granted, will have a significant positive impact on ABSLSC by providing a consistent and primary source of revenue for ABSLSC through a steady rental income and would greatly reduce the requirement for ABSLSC to invest time and resources into raising funds to support their activities. That time and resources may instead be invested into the furtherance of the objects of the club, namely surf lifesaving and its youth programs.

On the negative side, this application attracted considerable attention due to the proposed takeaway sales, which the Applicant describes as a critical adjunct to the business model.

I take into account the Applicant has sought to address those concerns by proposing conditions with respect to the sale of take-away, namely (at 27, A2):

- that sales be made only to customers who have purchased or are purchasing food; and

- that in respect of any sale of wine or beer, a sale be limited to a maximum purchase of six bottles; and
- there will be no sale of alcohol through the Kiosk facility.

During the hearing, I understood the Applicant to submit that if necessary, sales of takeaway liquor could be further restricted to only those who have dined at the premises (as opposed to purchasing takeaway food).

In considering whether any takeaway sales from this venue is in the community interest, I take into account the submission of ABSLSC (although expressed as support for the application) that indicates ABSLSC:

- do not support the supply of liquor to people walking in off the beach for consumption on the beach;
- do not support the sale of liquor for people to consume in public spaces (8.1, hearing bundle).

I note that if I were to impose the conditions suggested by the Applicant, the ABSLSC's concerns would not be addressed, as the Applicant would have no control over where the liquor is consumed once sold, given the beach and playground area adjacent to the premises is not a dry zone.

Furthermore, given the takeaway food offering, patrons could freely consume takeaway alcohol with their takeaway food on the beach, even if they were required to walk into the venue to purchase the alcohol (noting there would be no sales of alcohol through the kiosk).

During the hearing, the Applicant submitted there are other General and Hotel Licences authorising the sale of liquor for consumption off premises with a beachfront location. I have considered this submission but note that Brighton, Seacliff and Glenelg beaches each have dry zones in front of the hotel areas thereby discouraging takeaway liquor being consumed on the beach in the immediate vicinity.

In relation to the consumption of takeaway alcohol at the beach, I take into account the remarks of Judge Gilchrist in *Hove Sip n Save* [2021] 7 SALC at [61] and [107]:

[61] I note in passing that not included in the discussion within the Community Impact Assessment was the fact that the proposed premises is also proximate to both Somerton and Brighton Beaches and is less than a kilometre from the Esplanade and foreshore more generally. The possibility of customers purchasing alcohol for consumption on the beach is apparent, which may have wider safety implications for both the consumer as well as the safety and enjoyment of other patrons of the beach.

...

[107] In this case it is of some significance that there are a number of schools near the proposed premises and some of their students might reasonably be expected to visit the Hove Shopping Centre, and perhaps even more so, if it contains a take away liquor facility. The potential for alcohol to cause harm to minors is well known. Unfortunately within this cohort binge drinking is not uncommon. Such drinking can cause brain damage or death. Intoxicated teenagers are known to place themselves in risky situations, such as drink driving, having unprotected sex, and placing themselves in vulnerable situations, that in the context of seaside suburbs, would include swimming when it is unsafe.

While there are no schools within the immediate vicinity of the proposed offering and the application under consideration in the case referenced above was a packaged liquor sales licence, I consider Gilchrist J's remarks are nonetheless relevant. The Aldinga Bay Surf Life

Saving Club is located immediately to the rear of the premises and being a surf life saving club, it runs a range of programs for young adults as well as younger children. It is a venue where minors and young adults are obviously encouraged to attend and plays a vital role in the community.

I am also mindful that both Aldinga Beach and Sellicks Beach have a higher percentage of people under the age of 19 in comparison to the rest of South Australia. While the premises will impact the Club positively in a number of respects that I have already highlighted, I must also ensure that it does not impact negatively on the safety of Club members, as well as other members of the public.

ABSLSC currently holds a Club licence which importantly, does not authorise 'consumption off' sales to the public. I am concerned that the introduction of takeaway alcohol sales to an area popular to beachgoers and surf lifesaving club patrons situated at the entrance to where the public may drive onto the beach may have wider safety implications. In the absence of a dry zone, I accept that the public may already bring alcohol with them to consume on the beach, however the grant of this licence will provide a facility in the immediate vicinity for takeaway alcohol to be purchased and taken on to the beach.

While I appreciate patrons of the Silver Sands Beach Club would derive enjoyment and convenience from being able to purchase and take away liquor they have tried and enjoyed while dining at the premises, or to purchase alcohol to take with them to consume with their meal, I am not satisfied that those benefits, or the other benefits of granting the application discussed above, outweigh the risk of harm that may flow from the excessive consumption of alcohol in that vicinity.

I accept that the Applicant would be a responsible licensee, however once alcohol is purchased and has left the premises the licensee has no control over where the alcohol is consumed.

It is not in the interests of community to provide takeaway facility, albeit with conditions, in an area where minors and younger adults are encouraged to patronise and attend for the purpose of community activity given the risks associated.

I have also considered whether what the Applicant is proposing derogates too far from the "essential character" of a GHL and therefore should not be granted. The Applicant submitted that that the relevant question in considering the grant of this licence is simply whether the proposed licence departs so far from the relevant category that it somehow alters its essential character. During the hearings, I note that the Applicant made several concessions to address concerns in relation to takeaway liquor. I am concerned that by granting a GHL restricting sales of liquor for consumption off premises to patrons who have consumed a meal on the premises, may depart so far from a GHL that it would alter its essential character.

However in view of my decision above that any form of takeaway sales is not in the community interest, I need not resolve these concerns.

Section 57 Issues

The AHA's s 57 objections and arguments have been canvassed in some detail above, and I will not repeat them here.

The Applicant and the Council have made submissions in reply addressing each the AHA's submissions in respect of s 57 of the Act.

The Council has submitted that the proposed use is not inconsistent with the dedication of the land for recreational purposes and that this is not something which the Authority can or should concern itself with:

More particularly, section 57(2) provides that the authority must be satisfied that 'approvals, consents or exemptions' that are relevant to, respectively, planning, building and the carrying out of the business, have been obtained.

Plainly enough, consistency with the relevant dedication of land under the Crown Land Management Act 2009 (CLM Act) is not a matter that requires any 'approval', 'consent' or 'exemption' to be obtained. Indeed, even if the applicant desired to seek out confirmation of consistency, there is no statutory process for it to apply for, or obtain, any approval, consent or exemption as such. Therefore, this matter does not fall for consideration under section 57(2), and is not something which the licensing authority must, or indeed should, concern itself with.

For the reasons set out in the Applicant's Reply (of which we have been provided a draft copy), we maintain the proposed use is not inconsistent with the dedication of the land for Recreation purposes. (pgs1-2, COC).

Council adopts similar reasoning in relation to whether the proposed use of the land is consistent with the community land management plan applicable to the land:

..... the issue of consistency with the relevant community land management plan is not a matter which requires the grant of any 'approval', 'consent' or 'exemption'. As such, it is not a matter which arises for consideration by the licensing authority, or which the authority must be satisfied of, under section 57(2).

In any case, we consider that the proposed use of land is consistent with the relevant community land management plan applicable to the land.

The Council also submits that the proposal does not constitute a 'change of use' in the land as the only new activity is the sale of liquor for consumption off premise and contends that while a full-blown takeaway bottle shop would constitute a new and unapproved land use, the same activity limited by condition to direct sales or those who have purchased food from the premises is *not* a new and unapproved land use:

The argument seems to be that notwithstanding that the ABSLSC is lawfully entitled to operate the proposed facilities as a commercial, profit-making enterprise under its own steam, it cannot outsource those activities pursuant to a licence or management arrangement. This cannot be the case.

It is important to distinguish the current Club licence with the proposed licence. A Club licence can only be granted to a not-for-profit association (which ABSLSC is) or a company limited by guarantee. Any profits derived from the Club licence are therefore returned to the Club for the benefit of its objects and activities. The Applicant, on the other hand, is a proprietary limited company proposing to run a commercial venture. While the Club will derive benefit through a steady rental income, the premises will otherwise be a commercially run for-profit venture.

I generally agree with Council that I do not need to consider whether the proposed land use falls within the community land management plan, as this is not something that falls for consideration under s 57(2) of the Act.

I also agree with the Council's submissions about the 'Building Classification point' raised by the AHA:

As to the building classification issue, section 57(2)(b) is prospective in so far as it looks to any proposed building works; the licensing authority must be satisfied that any approvals, consents or exemptions required for the carrying out of building work before the licence takes effect have been obtained.

Here, the relevant building has already been constructed. A certificate of occupancy has been issued by a private certifier, which certificate confirms that the building has been classified as 9b (Clubrooms) and is suitable and safe to occupy in accordance with that classification and the terms of the relevant development approval (copy attached).

No further building work is proposed, or required, before the licence takes effect. Therefore, there can be no basis for the Authority to have any concerns or reservations under s 57(2)(b) of the LL Act.

At a broader level, there is simply no basis to suggest that the premises are not of a sufficient standard for the purpose of properly carrying on the proposed business under the licence, given that the business will be ostensibly the same as an equivalent business operated by the ABSLSC under the terms of the development approval.

Further, even if it were relevant for the licensing authority to consider the relevant building classification, we agree with the submissions put by the Applicant that class 9b is an appropriate classification for the building.

Finally, if the applicant were to apply for a reclassification of the building as a class 6 building (in part or in whole), this would be easily achieved because, under the National Construction Code, the required building matters such as toilet facilities, amenities and fire safety provisions are comparable between classes 9b and 6.

At best, we consider this to be a minor technical matter without any practical consequences.

Another s 57 related issue addressed by Council relates to whether the agreement between the ABSLSC and the Council requires Ministerial consent. Council is of the view that this is not required and liaised with the Crown Lands team within the Department for Environment and Water to confirm this position:

A lease from the Council (as custodian of the land) to the Aldinga Bay Surf Lifesaving Club Incorporated (ABSLSC), was entered into in 2006.

At that time, under the Crown Lands Act, 1929 (repealed), it was not a requirement to obtain the Minister's consent prior to granting a lease of dedicated land; the repealed Act did not contain any equivalent of section 22(1) in the current CLM Act. Nor did section 202 of the Local Government Act, 1999, pursuant to which provision the original lease was granted.

It is understood that the ABSLSC now proposes to grant a licence to Silver Sands Beach Club Pty Ltd to permit it to operate the bar and food services.

A licence does not attract the operation of section 22(1), which only applies to a lease.

To confirm that position, we have made contact with the Crown Lands team within the Department for Environment and Water, which has indicated there is no need for its involvement in the proposed licence arrangement. (pg2, COC).

I have reviewed the agreement between the parties, which is described as a “Licence Agreement”, with ABSLSC denoted as the “Licensor” and Silver Sands Beach Club Pty Ltd denoted as the “Licensee”.

I have some doubts as to whether the agreement described by the Applicant as a “licence” is in fact a licence agreement, and consider that there is at least a possibility that in reality it may constitute a “lease” given the terms and provisions of the agreement. For example, Clause 9.12 imports the *Retail and Commercial Leases Act 1995 (Leases Act)* as applicable to the agreement:

9.12 Leases Act

(a) The parties acknowledge and agree that the Leases Act has application to this License, and that to the extent of any inconsistency between the terms of this Licence and the Leases Act, the Leases Act will prevail.

(b) The Licensee acknowledges that on or before this Licence was entered into, the Licensor provided the Licensor (Sic) with a Disclosure Statement in compliance with clause 12 of the Leases Act.

The fact that the parties have described the agreement as a “Licence Agreement” is not determinative of whether it actually is, and the High Court’s decision in *Radaich v Smith* [1959] 101 CLR 209 is apposite:

The words “lease”, “lessor” and “lessee”, however, are entirely excluded from the document, and the term “licence”, and its appropriate mutations, are sedulously applied to the rights purported to be created. This fact is, of course, far from conclusive in favour of the respondents. It is the substance of the deed that matters. As Denning L.J. said in *Facchini v Bryson* (1952) 1 TLR 1386 “...the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it” [2].

This may be relevant as it appears that the Crown Lands section within the Department for Environment and Water advised that they did not need to have any involvement in relation to the proposed agreement/ arrangement on the basis that it was a “licence” agreement, and not a “lease” agreement. If the agreement, properly construed, is really a lease, the Department may have taken a different view and have given a different response.

It is not necessary for me to finally resolve this issue for present purposes given I am not satisfied that it is in the community interest to grant the licence as sought in any case, for the reasons outlined.

However, given that it is not clear whether the Crown Lands section within the Department for Environment and Water had the benefit of considering the terms of the “Licence Agreement” when advising as to whether or not they needed to have involvement in the proposed arrangement (i.e. whether Ministerial consent is in fact required to satisfy the requirements of s 22 of the *Crown Land Management Act 2009*), I propose to include a condition to address this issue on the grant of an On Premises Licence (in the event the Applicant consents to an On Premises Licence being granted instead of a GHL).

I also take this opportunity to highlight other concerns with respect to the branding of this venture. Photographs were submitted depicting signage on the proposed premises as

“Aldinga SLSC” and I note the website for Aldinga Surf Life Saving Club currently shows an image of the proposed premises with Aldinga SLSC branding.

I consider any such branding to be misleading to the public. The only connection between the two premises would be through rental income paid under the licence agreement. The current branding would mislead the public that by supporting the Silver Sands Beach Club they are supporting the ABSLSC, when in fact the Silver Sands Beach Club is a separate commercial venture. I have some reservations about the name Silver Sands Beach Club however on balance I consider that is sufficiently distinct from Aldinga Bay Surf Life Saving Club, and would be prepared to allow it under an On Premises licence provided the other branding I have mentioned above is removed, as discussed below.

I note the Court’s decision in relation to an application by the *Little Food and Beverage Company Pty Ltd* (Court file No. 00048/2020LL). In that matter the Applicant had applied for a Special Circumstances Licence, which was opposed. Gilchrist J conducted a mediation, and by consent, granted the Applicant a Restaurant and Catering Licence (instead of the Special Circumstances Licence, which would have converted to a GHL), and pursuant to s 53(3) of the Act, waived compliance with the formal requirement for the Applicant to file an application for that class of licence.

I am prepared to take a similar approach in this matter in the event the Applicant consents to this, but would make such a grant subject to the condition that the Authority is to provide the Crown Lands team within the Department for Environment and Water with a copy of the Licence Agreement, that the Department is to confirm in writing whether any additional requirements (such as the requirement for Ministerial consent), arises in light of the terms of that agreement once they have reviewed it. If not then on premises licence can be granted forthwith. If so, then an On Premises Licence shall issue upon the Authority receiving confirmation that the Department’s requirements have been met (i.e. Ministerial consent has been provided).

I therefore invite the Applicant to confirm whether it consents to the grant of an On Premises Licence, pursuant to the broad discretion available to me under s 53 of the Act, in lieu of a GHL, within 7 days, or alternatively, that it invites me to finalise my refusal of the GHL application.

Dini Soulio
Liquor and Gambling Commissioner

11 April 2022