

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: PLAYHARDER PTY LTD

PREMISES: HENRY ON EIGHTH

PREMISES ADDRESS: SHOP 4, 43 - 53 EIGHTH AVENUE, MAYLANDS

APPLICATION ID: A000057311

NATURE OF APPLICATION: **APPLICATION FOR CONDITIONAL GRANT OF A
TAVERN RESTRICTED LICENCE**

DATE OF DETERMINATION: 19 JUNE 2015

Introduction

1. This is an application by Playharder Pty Ltd (“the Applicant”) for the conditional grant of a tavern restricted licence for premises to be known as *Henry on Eighth* and situated at Shop 4, 43 - 53 Eighth Avenue, Maylands.
2. The application is made pursuant to ss 41 and 62 of the *Liquor Control Act 1988* (“the Act”) and was advertised in accordance with instructions issued by the Director of Liquor Licensing (“the Director”), which resulted in the lodgement of a notice of intervention, pursuant to the provisions of s 69 of the Act, by the Commissioner of Police (“the Commissioner”).
3. The Applicant also seeks the grant of an extended trading permit, pursuant to the provisions of s 60(4)(h), to authorise the sale of liquor in an extended area that would not otherwise be authorised.
4. Accordingly, pursuant to the provisions of ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which are briefly summarised below.

Submissions of the Applicant

5. To support its application for the grant of the licence, the Applicant lodged a Public Interest Assessment (“PIA”) and other submissions, in which it submitted that the proposed licensed premises will provide another destination for the local community, and in particular, one that will trade into the late evening, providing activity and “eyes on the street.”
6. In relation to the proposed premises’ location on Eighth Avenue, the Applicant submitted that:

“Maylands local café strip on Eighth Avenue has seen interesting changes over the last few years, and has been transformed from a relatively quiet area to a bustling and thriving cafe strip.

Eighth Avenue offers an interesting and eclectic mix of retail shops and eateries. Browsing through the strip, you'll find restaurants offering tasty culinary delights from all over the world, trendy cafes, specialised retail shops, and essential services."

7. The Applicant also submitted that the food and beverage businesses that have "sprung up" near or on Eighth Avenue is a direct result of the planning framework put in place for the locality by the City of Bayswater.
8. According to the Applicant, the proposed business will take advantage of the building's two levels, accommodating diners upstairs, whilst offering space downstairs for events, such as exhibitions, book launches, poetry readings and private parties.
9. It was submitted that the downstairs area will also:
 - (a) have a major focus on a "coffee experience" for patrons, with a takeaway window to serve customers on the street;
 - (b) offer additional drinks, including hot and iced chocolate, chai latte, milkshakes, packaged juices, water and Italian sodas;
 - (c) have a food menu, including an all-day breakfast, lunch and snacks;
 - (d) trade from 6.30 a.m. seven days per week;
 - (e) sell pastries, muffins, biscuits and sweet pies; and
 - (f) offer daily or *ad hoc* specials, depending upon produce sourced by the chef.
10. The Applicant further submitted that the upstairs area will facilitate food and wine appreciation evenings, birthday breakfasts, business meetings, ladies lunches and private parties, such as engagement parties.
11. In respect of the maximum accommodation numbers, the Applicant submitted that the venue will accommodate up to 180 people at one time, including staff, with:
 - (a) 120 people in the upstairs area; and
 - (b) 60 people for downstairs, both inside and in the alfresco area.
12. In terms of seating, the Applicant undertook to provide a minimum of 20 seats for patrons in the downstairs area and 75 seats in upstairs area, in place at most times, as there may be times when some seats are removed or rearranged for functions, events or depending on the demands of patrons.
13. While the Applicant noted its intention to trade the full spread of hours prescribed in s 98(1) of the Act, it indicated that liquor sold before 11 a.m. will be ancillary to food; and also indicated that entertainment at the premises will be in the form of pre-recorded background music, albeit with some live acoustic performances.

14. The Applicant further submitted that:
 - (a) liquor will be largely promoted as an accompaniment to high quality food, following its major investment in kitchens, chef and produce;
 - (b) patrons will always be encouraged, or at least invited to, dine at *Henry on Eighth*;
 - (c) food, coffee and tea will be available throughout the liquor service period; and
 - (d) happy hours will not be offered; the discounting of liquor will not be promoted and the advertising of alcoholic products will not be promoted outside of the bar area.
15. The Applicant's PIA also included consideration of those matters prescribed in s38(4) of the Act and included 47 witness questionnaires and 25 letters of support, in order to establish that the grant of the application is in the public interest in order to meet the requirements of consumers for liquor and related services (see s 5(1)(c) of the Act).
16. In conclusion, the Applicant submitted that:
 - (a) there are no significant "at-risk" groups within the locality of the proposed premises which might be unduly affected by the grant of the licence and extended trading permit;
 - (b) food will be a major focus of the premises; and
 - (c) patrons will be able to enjoy a very relaxed atmosphere in comfortable surrounds.
17. In submissions dated 30 April 2015, the Applicant requested that the Director's usual document exchange process (refer s 16(11)) be waived.

Representations of the Commissioner

18. The Commissioner made representations and submissions that the grant of the application would result in public harm and/or disturbance, if conditions are not imposed on the licence; and on other matters relevant to the public interest.
19. While the Commissioner acknowledged the intent of the application and the Applicant's voluntary harm minimisation strategies, as well as noting the apparent community demand for the establishment of the premises, the Commissioner also submitted that it is also in the public interest to ensure that licensed premises trade in a manner that minimises disturbance or public disorder.
20. Accordingly, the Commissioner recommended the imposition of conditions relating to trading hours, the establishment of a Closed Circuit Television ("CCTV") security system; type of entertainment, the provision of food and seating, as well as general conditions relating to the responsible service of liquor, etc.

Determination

21. An applicant for the grant of a tavern restricted licence must, pursuant to section 38(2) of the Act, satisfy the licensing authority that granting the application is in the public interest. The Act as a whole establishes a regime for the control and regulation of the sale, supply and consumption of liquor; and does not proceed on the basis that there is any presumption in favour of the grant of a licence, but rather the reverse: that an applicant must demonstrate that it is in the public interest that the application should succeed (refer *Woolworths Ltd -v- Director of Liquor Licensing* [2012] WASC 384).
22. In determining whether the grant of an application is “in the public interest”, I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O’Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).
23. The licensing authority should, when determining whether the grant of an application is in the public interest (refer s 38(4)), consider both the positive and negative social, economic and health impacts that the grant of the application will have on the community (refer s 19 of the *Interpretation Act 1994* and Parliamentary Debates, WA Parliament, Vol 409, p 6342). In this regard, advancing the objects of the Act as set out in s 5, is a mandatory public interest consideration (refer *Palace Securities* supra).
24. In my view, the grant of the application will promote one of the primary objects of the Act, namely object 5(1)(c), which relates to catering to the requirements of consumers for liquor and related services. Furthermore, the evidence also suggests that object 5(2)(a) is also relevant, which relates to facilitating the use and development of licensed facilities reflecting the diversity of consumers in the State.
25. Whilst the Applicant accepted most of the conditions recommended by the Commissioner, it expressed concern with two proposed conditions that related to entertainment and food, submitting that:
 - (a) the condition seeking to prohibit live entertainment in the form of electronic ‘Disc Jockey’ music is too restrictive, given that the Applicant would occasionally like to offer live “Disc Jockey” (DJ) performances and other nearby licensed premises have DJ performances on Saturdays; and
 - (b) the recommended condition relating to “meals (food) being available for purchase at the licensed premises during trading hours” is also too restrictive and recommended that it be amended to “food shall be available for purchase at the licensed premises during trading times, until one hour before closing”, with the Applicant submitting that the “one hour before closing time will give enough time for customers to finish their meals without having to rush.”
26. In respect to both of these conditions, I am mindful:

- (a) of the Applicant's submission in its PIA that entertainment to be offered at the premises will be in the form of pre-recorded background music, albeit with some live acoustic performances. Therefore, while I do not propose to prohibit performances by DJs, I would nonetheless restrict all entertainment at the premises to low level background music only, sufficient to allow normal conversation to occur, with any live entertainment to be acoustic in nature; and
 - (b) that this is an application for the conditional grant of a tavern restricted licence and there is no requirement imposed by the Act in relation to the provision of meals by such a licensee. While the word "meal" is defined in the Act (see s 3) and there is no similar definition of the word "food", it is generally acknowledged that the provision of food at licensed premises is an important harm minimisation initiative and, in this regard, the Applicant freely has volunteered that food will be a major focus of the premises.
27. As such, conditioning small bars, taverns (including tavern restricted licences) and other licence types with a requirement for food to be made available by the licensee during trading hours is a fairly consistent requirement and the imposition of such a condition would not impose an obligation on the Applicant that is novel, unique or otherwise unworkable.
28. Accordingly, I am satisfied that the applicant has complied with all the necessary statutory criteria requirements and conditions precedent to the application being granted and that the grant of the application is in the public interest.
29. Therefore, the licence is conditionally granted, subject to the following conditions:
- (a) a certificate under s 39 of the Act being lodged before the operation of the licence;
 - (b) compliance with the *Local Government Act 1960*, *Health Act 1911* and any written law relating to the sewerage and drainage of these premise;
 - (c) all work being completed within 12 months in accordance with the plans and specifications dated 13 March 2015;
 - (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements dated 23 February 2015 being satisfactorily completed and the Director of Liquor Licensing being notified in writing at least 21 days prior to applicant wishing to trade under the licence;
 - (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed; and
 - (f) the applicant seeking confirmation of the grant on or before 18 June 2016, pursuant to s 62(4)(c) of the Act.

30. On confirmation of the conditional grant, the following conditions will be imposed on the issue of the licence:

(a) Trading Hours:

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

(b) Trading Conditions:

(i) The service of liquor must be ancillary to the provision of food prior to 11 a.m. on any day.

(ii) The licensee is authorised to sell and supply liquor in accordance with the provisions of s 41 of the Act as it relates to a tavern restricted licence.

(iii) During the permitted trading hours specified above, the licensee is authorised to sell and supply liquor for consumption on the licensed premises.

(iv) The sale of packaged liquor for consumption off the licensed premises is prohibited.

(v) The maximum number of persons permitted to be on the licensed premises at any time is 180.

(vi) Seating and associated table arrangements for at least:

(1) 20 patrons in the downstairs area; and

(2) 75 patrons in the upstairs area,

must be provided at all times the premises are open, although there may be times when some seats are removed or rearranged for functions or events.

(vii) Food must be available during trading hours.

(viii) All entertainment at the premises is restricted to low level background music only, sufficient to allow normal conversation to occur, with any live entertainment to be acoustic in nature.

(ix) No liquor is to be supplied mixed with energy drinks. For the purposes of this condition "energy drink" has the same meaning as formulated caffeinated beverage within the Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.

(x) The licensee shall not promote or sell drinks which offer liquor by virtue of their 'emotive' titles such as (but not exclusive to) 'laybacks', 'shooters', 'slammers', 'test tubes' and 'blasters'.

(xi) A video surveillance system must be in place and operational. The system must comply with the minimum requirements identified in the *Minimum Standards - Closed Circuit Television (CCTV) Security System Policy* (or with requirements otherwise approved by the Director). In accordance with the Policy, the system is required to be able to provide continuous vision / footage that enables identification, as defined by the current Australian CCTV Standards, of all people entering and exiting the

licensed premises, during all hours of trade and until 1 hour after trading ceases.

- (xii) Images recorded via the system must be retained for a period of 28 days and must be made available for viewing or removal by the Police or other persons authorised by the Director.

(c) Entertainment Condition:

- (i) A person resorting to, or on the premises, including the licensee or manager, or an employee or agent of the licensee or manager, shall not:

- (1) be immodestly or indecently dressed on the licensed premises, and/or
- (2) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

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

- (1) exhibiting or showing, or causing, suffering or permitting to be exhibited or shown, on the licensed premises any classified "R 18+", "X 18+" or "RC" classified publication, film or computer game or extract therefrom; or
- (2) causing, suffering or permitting any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises; or
- (3) causing, suffering or permitting any person to take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

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

- (1) which is appurtenant to the licensed premises; or
- (2) in respect of which an extended trading permit granted to the licensee is for the time being in force,

but does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access.

(d) Compliance With Harm Minimisation Policy:

The licensee has lodged a copy of the House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.

31. Item four on the Schedule of Requirements (see paragraph 29 (d) above) relates to the application for the grant of the extended trading permit pursuant to s 60(4)(h) of the Act and requires the Applicant to lodge:

- (a) a copy of the Outdoor Eating Licence (or equivalent approval) from the Local Government Authority, including all conditions of approval; and
 - (b) a plan showing the area to be approved.
32. Therefore, if the Applicant lodges the specified items prior to the confirmation of the conditional grant, an appropriately conditioned extended trading permit will also be issued contemporaneously with the grant of the tavern restricted licence.

General

33. Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
34. The applicant is reminded that trading may not commence without the prior written approval of the licensing authority.
35. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
36. This matter has been determined by me under delegation pursuant to s 15 of the Act.



Brett Snell
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING