

Licensing Board of Tasmania	Interim decision
Legislation:	<i>Liquor Licensing Act 1990</i>
Applicant:	Jason Timothy Bresnehan
Nature of application:	For a general licence
Premises: name	Hadspen TBA
Premises: address	28 Main Street, Hadspen
Name of decision:	Main Street Hadspen
Date & place of hearing:	20 <sup>th</sup> May 2010 at Launceston
Date of decision:	1 <sup>st</sup> June 2010
Members of the Board:	PA Kimber (chairman) and D Logie (member)

F:\Data\PAK\LICENSING\Bresnehan 28 Main Street Hadspen decision June 2010

### **Licensing Board of Tasmania: Decision**

The application was made to the Commissioner on 22<sup>nd</sup> February 2010.

The applicant is the freehold owner of the property the subject of the application, at 28 Main Street, Hadspen.

Notice advertising was placed and invited representations in writing by 12<sup>th</sup> March 2010.

Commissioner's representative Mr Krushka inspected the premises and gave a written report dated 30<sup>th</sup> March 2010. In summary he says

- The application is to redevelop a disused service station as a bar, café and bottle shop with an investment of \$868,000.
- Premises unused since closed as a service station 2 years ago. It had operated for about 40 years.
- Mr Krushka states that there is reasonable expectation from the plans and submission that the premises when refurbished would be suitable for the intended purpose.
- Location is central Hadspen with residences on all boundaries and across the road. Carpark at the rear. Hadspen is generally a residential area and considered a satellite suburb to Launceston, being 7km from the outskirts of Prospect.

- Rutherglen is general licensed premises 2km just outside the township, and a special licence at the Red Feather Inn is in place.
- The Board granted an off licence at the Hadspen Shopping Centre last month (April 2010).

The Commissioner provided a letter to the Board of 10<sup>th</sup> March 2010 stating that she is content the applicant is qualified to hold a liquor licence.

The written submission received by the board prior to the hearing for 20<sup>th</sup> May 2010 (ie the week prior) states (in summary):

- It sets out Mr Bresnehan's working history.
- His most recent history has been 5 years managing the 'Tasmanian Events Calendar' for Tourism Tasmania.
- His plans or view in the application show a graphical representation of a block like sharp and angular building with trees and people shadows distributed through the plan. It is apparent they are simply architect or plan drawer's indications and not actual landscape plans.
- Indicates the intention to remove the 2 bedroom house, renovate and fit out an existing 269m<sup>2</sup> building, construct a new building of 26m<sup>2</sup>, construct new alfresco dining area and outdoor beer garden of 91.39m<sup>2</sup>, construct new vehicle entrance and 40 space car park, construct new landscaping, and develop 2 drive through bottle shop lanes.
- Describes the intended construction method, using existing and some new areas. Descriptions are in some areas general and without detail: for example "a range of contrasting timber, colour bond and other materials will be used" and "extensive landscaping".
- Description of facilities is split into logical areas: exterior, interior, bathrooms and toilets, outdoor areas and landscaping, vehicular access, acoustics.

- Meals to be provided are described as 'café style' using wood fired pizza and toasted focaccia, dips, sandwiches and nachos. Evidently not a comprehensive food menu of a restaurant style, but rather a light café style menu.
- Costings: land \$350,000
- Construction and renovation \$318,000
- Stock and equipment \$200,000.
- Liquor sales will be from the bar for consumption on the premises, and the bottle shop for consumption off the premises.
- Entertainment: video display, digital music and pool table with occasional live acoustic acts.
- No accommodation will be provided.
- Planning approval: the application states that no planning approval was sought prior to seeking the general liquor licence. The applicant asserts confidence that planning approval will be granted. The application states that the site is zoned 'business' with intent of 'providing community or business services in defined activity centres'. Licensed establishment and restaurant are, it is asserted by the applicant, specifically referred to in tables within the 'business' zone. No expert or independent evidence or evidence from council was provided in support of this.
- Under a heading 'best interests of the community' the application notes that there is no a bar/café/bottle shop in central Hadspen, and that the facility will provide a central place for the Hadspen community to gather for 'a drink, to dine, for entertainment, for clubs to meet and people to socialise'.
- 2,000 people are asserted to reside in Hadspen. It is stated that the population is growing.
- Employment will be provided in the business, with operating hours 11am to 10pm on average, 7 days per week with 2 permanent and 3 casual staff.
- Refurbishment of a site which is currently an eye-sore has benefits.

Numerous submissions objecting and submissions supporting the application were received by the Commissioner and provided to the applicant and the board.

Approx 12 objections were received and 21 supporting letters.

The flavour of the objections was that

- Residing nearby (if not adjacent), that the business would be in a residential area.
- That it is inappropriate to have a business selling liquor and open the hours which are planned in the vicinity of residences, as such would 'cause problems'.
- There is currently ready access to liquor from a bottle shop nearby which is more suitable for that purpose, being close to other shops.
- Hadspen is well catered for with existing liquor retail services.
- Property values will drop.
- Large influx of traffic and people around until late at night will cause trouble and noise, especially with young intoxicated people.
- Litter, noise, theft and damage will increase. The current peaceful nature of the area will change.
- Fear of drunken behaviour, vandalism, violence increase.
- Proximity to residential houses makes a bar and bottle shop an inappropriate development.
- Children and elderly people living nearby should not be subjected to drunken behaviour.

A hearing was convened and commenced at Launceston on the 20<sup>th</sup> May 2010.

The applicant appeared and gave evidence and made submissions. He did not call any other evidence.

None of those people who lodged submissions expressing support for the development were present at the hearing (they were advised of the date and time of hearing).

A number of local residents appeared and gave evidence. They did not call any other evidence. They were:

- Ann Leslie of 26 Main St, Hadspen
- Darren Russell of the same address
- Jenny Colquhoun of 30 Main St
- Robyn Anderson of 35A Main St
- Denis Anderson of the same address

Mr Reg Green of Laura St also attended the hearing but did not give or call evidence, save for his written submission in favour of the grant of licence, lodged earlier, which was taken into account.

The Board explained that the requirements of the *Liquor Licensing Act* include that procedural fairness must be applied, and that in the circumstances, the applicant was invited to state his evidence, advised that he would be available to be cross examined by any objector, and that he may call evidence, that each objector would have the right to cross examine any witness so called, that then the objectors would be entitled to give their evidence, that they would be obliged to be answer relevant questions from the applicant, and then that each person who appeared would have the right to sum up their case with a short verbal submission.

The applicant and the objectors appeared to understand that intended procedure.

The applicant described his intentions briefly at the hearing and was available to be cross examined by the objectors.

He acknowledged that he had no intention of applying for an out of hours permit, and the likely hours would be 10am to 10pm, with later hours possible on Friday and Saturday nights.

The objectors affirmed their written statements. The predominant theme of their objection was their residential amenity would suffer from a business/commercial premise commencing and in particular from the activities of a business licensed to sell liquor from a bar type situation, and also from motor vehicle ingress and egress to the rear of the premises, and in traffic flow due to patronage of the bottle shop.

The objectors evidenced some emotion and personal concern about the potential impact of the grant of the licence application, and the consequent commencement of a licensed bar, café and bottle shop adjacent or nearby to their residences. The applicant further explained his application in response to these expressions of concern, with general assurances of ensuring intrusion would be managed and controlled to be minimised. It was evident that the application was not well understood by some of the objectors, and the hearing process gave them the opportunity to establish the applicant's intentions. For example, concern was expressed regarding traffic flow into the rear of the property relevant to customers for the bottle shop, whereas the plan is for the front drive to provide for that access to the bottle shop (which will be placed at the front of the premises, not the rear), and such is shown on the plan provided at the hearing.

The hearing was adjourned.

The Board determined that the town planning aspects, not being the core purpose of liquor licensing board hearings and determinations, had been under-developed by the applicant, and in the absence of a planning permit or expert or objective evidence, and in the face of concerns by the objectors about amenity and intrusion, the issues needed

to be dealt with by the planning authority first before the board could conclude that the granting of the application would be in the best interests of the community.

The applicant was given that opportunity. The alternative would be to refuse the application. The Board's interim decision was to leave the matter adjourned, and to indicate to the applicant that (in summary):

1. Much of the concern by neighbours was about adverse impact on their (residential) amenity.
2. Planning controls are best placed to protect against adverse impact on residential amenity adjacent to or nearby to commercial development;
3. The applicant was not well prepared to answer the criticisms of the neighbours about such things as intrusion by lighting, ingress and egress of vehicles, landscaping, and containing sound within the premises.
4. The response at the hearing that the premises 'would substantially be used as a café' was simplistic, and ignored the reality that the liquor licence would enable a bar and bottle shop. His menu as described was light and insubstantial, so the impression the Board had was that food would not be the predominant focus. In such a case, protecting residential amenity is a significant concern of the Board – often dealt with in advance by the planning authority consideration, but in this instance, it had not been dealt with in that way.
5. That it is not an inflexible requirement or pre-requisite that a planning approval or expert or objective evidence of management of planning issues is provided, however, it is a matter for the Board's proper consideration when planning or amenity issues are raised by those living or working in the neighbourhood of the application premises. These issues can be made more significant because the grant of the liquor licence may carry with it the risk that the very concerns expressed by the neighbours in this matter may eventuate.
6. The Board relies on the planning process and planning authority to deal with many issues of amenity in the neighbourhood of intended licensed premises.

This may be through the zoning of property, or the development application process resulting in appropriate conditions to safeguard. In many instances issues which would be of concern to the Board are already dealt with by planning permit conditions. However, if that process has failed in any particular instance, or if (as in this case) the evidence is insufficient to deal with all issues comprehensively and /or objectively, then the Board's options include to reject the application or to adjourn to await the result of the planning application.

7. In this instance, without that planning approval (as evidence of due consideration of residential amenity issues) and without the benefit of seeing what if any conditions the Council or planning authority may place on the development approval, we indicated inclination to determine that the onus of proof had not been met by the applicant. However, with that material, it may well be that the application should be granted.
8. We gave the applicant opportunity to deal with that issue.

In response the applicant asserted, so far as is relevant and with our response to those submissions set out:

1. The application process states that it is not necessary to have a planning permit before coming to the Board.

Response: the issue is dealt with above. In many instances it may well be that planning issues are irrelevant or adequately dealt with by evidence of intention, likelihood etc, or by expert objective planning social impact evidence. The decision for an applicant is *'what will be necessary in this particular instance to evidence that it is in the best interests of the community that the licence be granted?'* – not by an adherence to the framework of an application form. That the form may indicate areas for which evidence will be of relevance is not intended to limit, but rather to guide the applicant.



It is a rare application which does not include a planning permit. Normally an applicant will provide a copy of the permit, and address the conditions in the application, indicating that many concerns which the Board may have are already controlled and safeguarded by the planning process and permit terms. However, what the applicant provides is a matter for his/her judgment. Greater weight should be placed on areas of logical concern, as raised by the objectors. Applicants must answer the objectors, and persuade the Board that the grant would remain in the best interests of the community.

The Commissioner for Licensing provides, for the assistance and guidance of applicants, general information about the legislation, application and Board hearing process. It should not be ignored that the Commissioner and the Board are separate and distinct entities. Each has different duties in the liquor regulation process. Certain requirements must be met with the Commissioner before an application can legally be placed before the Board for determination. Then the Board is required to make a decision on relevant factors. The overall consideration expressed in the legislation for the Board to take into account is whether the grant of the licence will be in the best interests of the community. It is readily evident that this is an over-arching and extremely wide criterion, bringing with it anything which is relevant.

Information given by the Commissioner in guides or forms is designed to assist applicants, objectors, the community generally, to direct attention to those things which are relevant. They should not be seen as the only requirements, but rather as indicating the direction of what is likely to be relevant. An applicant will supplement their application documents with further material where it is likely to be a matter of concern.

For example, as in this application, if it is apparent that the issues of concern to people living and working in the locality is residential amenity and minimising intrusion of the noise and business of a licensed premises, then that should be comprehensively dealt

with as the applicant considers appropriate – not limited to the framework of a guide from the Commissioner.

The applicant should not consider that the Licensing Board seeks to usurp the function of the planning authorities: it should be recognised that there is an overlap of relevant factors, and the broad criterion of *'in the best interests of the community'* may mean that planning issues will be relevant to a determination whether or not to direct the grant of a liquor licence. On the other hand, in many instances if an applicant demonstrates the planning issues have been adequately and appropriately dealt with by the planning authority, then the Licensing Board will have little further interest in those issues.

2. The neighbours' concerns were with planning but that they ignore that they purchased their property adjacent to a 12 hour a day fully functional service station, and now they seek to avoid the premises again being used for a business.

Comment: The Board is aware of this and will take that into account in the decision.

3. That one of the objectors was a 'professional' and 'nutter' objector who "rambled on" about matters and that the applicant was "shocked" that the Board did not curb the delivery of irrelevant material.

Comment: The Board's obligation is to listen to evidence brought to it by the applicant and people who wish to make a representation either in support or objection. We are not able to judge the relevance of material until we have heard it. It is not always the case that parties to a hearing have professional qualifications or experience yet nevertheless their material must be given due weight and consideration. The hearing was not a long hearing. In all it lasted less than an hour. It was not the case that the objectors' presentation of their evidence and submissions was overly loquacious. It may have been unfair to curtail them in their presentation. The objectors were apparently

earnest and concerned. They had valid points to make, and although in some instances they did not speak with clarity or in a concise manner, they did address relevant factors, and it is the Board's duty to listen and take that into account.

It is essential to allow people giving evidence or making a representation to deliver their material before determining whether it is relevant or what weight to give to the material. To curtail their delivery may be unfair to them, be procedurally unfair, and may only exacerbate the hearing process as objections about procedure derail the delivery of what might otherwise have been relatively shortly put forward.

We have no indication that any objector was 'professional' (whatever the applicant may mean by that) – we presume he means vexatious, irrelevant or recurrent. We do not consider that any person who gave evidence should be treated as 'a nutter' as submitted by the applicant.

4. The applicant states he was not prepared (ie, ready) to answer town planning questions because he was at a licensing board hearing not a council meeting and that the Board should be considering the impact of alcohol on a community. He states that the Board does not understand its role if we think landscaping and traffic flows are criteria of concern.

Comment: for the reasons above, the impact that landscaping may have on minimising intrusion of a business or commercial activity on adjacent residential properties and the inhabitants is material to the Licensing Board's consideration of what is in the best interests of the community. Likewise, traffic flow is material. These issues can be satisfactorily 'answered' by planning determinations, permits and conditions, and ideally they are. But once raised as issues of concern, they must be dealt with. It is not always sufficient to say "that will be dealt with by planning, later".

5. The applicant notes, in his submission, that the Board has not inspected the site.

Comment: We are content to do so if relevant. Neither objectors nor the applicant at the hearing invited us to or suggested we should inspect the site. We will await the planning material and then decide if an inspection will assist.

6. The applicant says, in his own fashion, that our statement that once the planning material is in hand (including his application, the permit, conditions, and supporting evidence) that we would consider it is 'hilarious'.

Comment: the applicant is correct that the principal concern to the Board is the impact of premises serving alcohol on our community. That does not limit the Board's consideration just to the effect of consumption of alcohol. Of course, the principal concern is the prospect that particular *premises* conducted by *the applicant* in the manner in which it is intended to be conducted may contribute to the adverse impact of consumption of alcohol in our community.

Premises, applicant and alcohol, neighbourhood, and locality, and the community generally are all relevant. If in the *sale of and consumption of* liquor adverse impact will arise to those living and working in the neighbourhood, then that is of relevance. That may arise just because it is a business selling liquor because the premises will be open for hours 10am to 10pm or later. It could arise because of the level of business activity and the manner in which the premises are designed to be run (including delivery of stock, management and control, and supply of liquor).

Our decision is that the amenity issues have not been sufficiently explained and dealt with by the applicant in this particular case. The answers to (or material provided relevant to) those issues will be relevant then to how liquor will be consumed under the licence, if granted.

- 7 The applicant submits that the Board should make a decision based on the impact or otherwise that a licensed premises that serves alcohol 'under the responsible service of alcohol laws' will have on the 2,000 plus Hadspen residents.

Comment: that we will do. Either the applicant provides further information as suggested and allowed or we will determine to direct that the licence not be granted on the basis that there is insufficient evidence to satisfy us that it is in the best interests of the community that the licence should be granted. In that consideration we will not ignore, but rather will take into account as significant relevant considerations, the issues raised above.

We reiterate: It is a matter for the applicant to decide what he wishes to present to the Board.

We adjourn this matter until the next Board hearing date in June. If the applicant wishes to make further submissions or provide further evidence, he should indicate that to the Commissioner's representative who will arrange for the hearing to be reconvened on notice to the applicant and those who appeared at the commencement of the hearing. If such indication is not given then we will direct the Commissioner to refuse the application.

Dated: 1<sup>st</sup> June 2010.

PA Kimber - Chairman

D Logie - Member