Licensing Board of Tasmania

In the Matter of an application by **Tony Jackson**
For an off-licence for premises at **191 Gilbert St, Latrobe**

In the matter of the **Liquor Licensing Act 1990.**

Hearing date: 8th February 2006 at Devonport.
Date of decision: 14th February 2006.

Gilbert Street Latrobe Off-licence No 2

Decision

This is the 2nd application by Mr Jackson for this site[1] and business. See decision "Gilbert Street Latrobe Off licence No 1" of 26th November 2004.[2]

The application has 2 hurdles to surmount:

The first is s24A(2) of the Act; that the Applicant must satisfy us that the primary activity will be the sale of liquor. He wishes to combine that activity with the sale of motor vehicle fuel from what might be called a 'service station'.

The second hurdle is to demonstrate that the granting of the application would be in the best interests of the community.

We received significant written evidence and heard verbal evidence and submissions from the Applicant, his counsel, and objectors.

The Applicant's difficulty is that the integrated business he intends to run on the property will be the continuation of his existing petrol sale business. He calls it a 'service station', but his intentions indicate no service, except self use bowsers and a cashier to take the price of fuel sold.

The law says we must be satisfied that the principal activity to be carried on will be the sale of liquor.

Will it? A number of factors indicate that it will not so be.

Look and Feel:
Bowsers on the tarmac, self serving patrons filling their petrol tanks, and walking back and forth to the cashier: will give a more heightened impression to fuel sales compared with liquor sales.

On the other hand, the applicant says he will remove all signage regarding fuel sales, and replace it with advertising of the liquor sales business. He says that car parking on site will be available for bottle shop customers only.

We consider that notwithstanding the applicant's expressed intentions regarding advertising, the premises will retain a significant impression of being a fuel depot, and

that so far as this criteria is concerned, there is not sufficient evidence for us to conclude that the 'look and feel' will indicate a principal activity of sale of liquor.

***Admixture*:**
That there will be two significant business components do not help to give a firm impression that one or other is the principal activity. That they are apparently mutually dependent to enable the enterprise to be viable does not assist the Applicant in demonstrating that sale of liquor is the principal activity.

The evidence provided for the applicant by Mr Warren Moore, MBA, B. Ec., Dip. Ed., MIMC, was based on reasonable assessments and estimates of likely turnover and profit. However, we must exercise caution in accepting the direction in which that financial data tends to project. All the figures are variable. Indeed, the applicant's own figures on estimated net income from the current business have proven overly optimistic, with the reality being a loss not a profit for the first 15 months of trading.

Gross Turnover:
These figures have been discussed at length. Apparently the vast majority of sales revenue is to come from fuel, not liquor. Whilst not determinative[3], it is relevant. Figures to which we refer are set out in the two documents tendered on behalf of the applicant by Mr Moore A1 and A2. We do not set them out in full here, but they should be read with this decision, and in particular, the financial tables.

Net Profit:
Figures presented indicate significant potential for variation from 30% to 20% gross margin, and at the lower end, the net profit from liquor would not be predominant. There is no certainty in the top end estimate, and the onus is on the Applicant.

While there were breakdowns supplied for estimates of revenue from each type of liquor to be sold (beer, wine & spirits), it appears that the majority of the turnover will be coming from sale of beer. The profit margin for each component was not given, nor were details given as to how this compared with other bottleshop business turnover (benchmarks or comparative data) and therefore whether the overall net profit margin put forward would be more or less likely at either end of this scale.

Against this background, the figures detailed have to be treated as estimates, and if adjusted significantly, as may happen in reality, the greater proportion of net profit may not necessarily come from liquor.

Number of visitors/patrons:
Information provided does not indicate with any certainty that the use of the premises will be predominantly by people attending to purchase liquor compared with petrol. Some may be both, some either one or the other, but to the extent that figures were given (see Mr Moore's "Business Plan" A2 at page 6) the assumptions are generous, and do not compare easily with assumed numbers of fuel sale customers. Whilst useful benchmarks have been taken into account, there was little demographic community evidence about this particular town (Latrobe) to back up the number of customers likely to attend. We reached the conclusion that whilst not intending to be evasive or inaccurate, the figures for projected activity for the proposed bottle shop were more likely than not to be exaggerated.

This does not help the Applicant in meeting the onus of demonstrating that the principal activity will be sale of liquor.

Staffing levels:
It is difficult to accept any definitive split of human resources between use in meeting fuel sales compared with meeting requirements for liquor sales.

Tables of data were presented at pages 7 and 8 of the Business Plan (A2). The allocation of staff resources is based on the assumed turnover, and applies assumptions, which are to our mind bold. 85,800 customers a year, averaging 15 customers an hour with a range of 0 to 35 customers per hour (depending on time of day and day of week). The conclusion derived by the applicant's consultant is not backed by any particular knowledge evinced by the applicant himself. It is raised from benchmarks, and assumptions and extrapolation from those assumptions.

Whilst of some persuasion, it is a matter in our consideration and discretion as to the weight to be given, and the reality of some significant variability in fact.

Overall, notwithstanding the assumptions put to us, we felt that the staffing level allocation remains somewhat uncertain. We conclude that a cashier (for example) accepting money from customers from both segments of the business, either separately or jointly, can not easily have their overhead cost allocated proportionately to the projected assumed net profit, for the purposes of reaching a conclusion as to the principal activity.

This does not assist the Applicant in meeting his onus.

Capital investment:
Apart from $75,000 clearly identified in the financial data provided for a cool room, other expenditure is shared and necessary for both parts of the enterprise. Whilst it may be (and was) said that the majority of the expenditure would be towards the liquor side of the enterprise, that seems to us to follow only if it is accepted that the principal activity is sale of liquor. Hence, this would be a self serving conclusion. The result is that it is difficult to tease the capital expense apart and allocate segments to fuel sales on the one hand and liquor sales on the other. This does not assist the Applicant in meeting his onus.

Interior appearance:
We accept that part of the internal premises used for the bottle shop would be exclusively for use as a bottle shop.

Loss leader:
It was, to our mind, left open that fuel might be sold with minimal profit simply to attract custom for the more profitable liquor sale segment of the enterprise. It is supported by the Applicant's figures for sale of fuel since September 2004 to date, which disclose a net loss.

Mr Moore in cross examination said it was not the applicant's plan to run the fuel side as a loss for this purpose. It still remains that this could be the result; if not

strictly as a “loss” leader then as a component with minimal contribution to profit but as a significant attractor for customers to the liquor component.

This does not support the proposition that the principal activity is sale of liquor.

If a large component of the activity is sale of one item (in this instance fuel) to help to attract patrons only some of whom will purchase liquor, whilst liquor contributes a better / higher gross profit percentage, then that does not indicate with any clarity or certainty that the sale of liquor is the principal activity.

In conclusion

Various tests have been applied in similar circumstances and under similar legislation in other States, which assist in considering what is relevant to making the decision as to whether the principal activity will be sale of liquor.

In *FP (Somerton) Pty Ltd – Fasta Pasta Restaurant, Liquor Licensing Commission, Victoria, 14th June 1998* at page 6 Commissioner Horsfall, referring to an early decision of the same commission *Euro Café,* and in the context of a legislative prohibition on grant of a licence to premises used ‘primarily as a petrol station’ indicated three tests:

- The Practical Test: Whether they are the one premises in terms of physical and legal criteria;
- The Reasonable Person Test: Whether the objective observer would perceive them to be continuous or separate premises, and;
- The Purposive Test: Whether in construing the legislation and considering the context in which the words appear in the section and are used elsewhere in the Act, a certain interpretation is to be preferred.

We have taken account of these ‘tests’, and in reaching our conclusion, based on the decisions we have made as to the factual background, and the need to make conclusions about uncertain projections. We do not say they are determinative in this matter, but some comment on application of them is useful to fill out the matrix of relevant considerations;

Practical test: The premises and the business will, to our mind, continue to have some domination by the facilities used for sale of petrol. There remains the real prospect that there is inter-dependency of the operation of the bottle shop and fuel sale components; that must be why the applicant presses this matter for decision. Separate patronage is not a persuasive proposition, and no split of asserted separation is given. There is no doubt in our mind that the applicant hopes many customers to buy fuel and liquor. Use of car parks on site will be taken by customers of both components, notwithstanding the assertions that they will only be available for liquor customers. It is not likely that any practical arrangements could or would prevent a customer for fuel from then parking on site (if a position is available) and then getting liquor, or vice versa. Whilst they would not be a fuel customer at the time they went to buy the liquor, they would nevertheless have been, in much the same transaction, a customer for both services.

Purposive test: S24A(2) intends to prohibit easy and ready access to liquor for off premises consumption at mixed businesses, where the principal activity is not sale of liquor. There are exceptions to this policy (in regard, for example, to special licences for sale of Tasmanian wine). We do not see that it is necessarily a part of the policy behind the provision that it is to somehow consider sale of petrol and sale of liquor form the one or practically the one premises as inherently undesirable. Indeed, there are premises in Tasmania where that occurs already: see for example the TRC Hotel in Launceston, where a liquor licence is held 'cheek by jowl' with a fuel outlet. Also, if it be thought that it is because of some link between liquor and driving, that should be dispelled by the reality that many (and likely the majority in sense of overall sales volume) of off-licence premises have a drive through or car facility.

The government through its legislation indicates that with off sales of liquor (apart from minor exceptions) the principal activity should be sale of liquor. This limits the premises, by nature and style and hence number, which may sell liquor, to those dedicated to the task. That is a legislative policy judgment which places a limit on the availability of alcohol (recognised by the World Health Organisation in their "Global Status Report - Alcohol Policy" report, 2004 as a strategy in alcohol policy). The number and range of premises can not rapidly increase as mixed businesses (including petrol stations) are simply not amenable to grant of a licence (see for example *Bladerunner – Haircutters matter 15th April 2003).*

It should be noted that the purpose of that policy is the containment of harm associated with the consumption of liquor. It is not to protect the business interests of existing operators seeking to prevent a new operator from commencing business in the business of selling liquor.

The principal proponent for the proposition that this licence should not be issued (the Australian Hotels Association – Tas Branch) may clearly be representing the business interests of existing operators (and there was evidence to that effect), and particularly those in the locality most likely to be adversely affected from competition (The Goodstone Group Pty Ltd with their interests in the Latrobe Hotel "Mackey's" – the only bottle shop in the town), we are obliged to deal with this discrete matter in the context of the particular application, and the law.

An issue regarding the Applicant's onus in regard to this prohibition on mixed businesses selling liquor is that once granted, the mix percentage of activities could shift, without apparent repercussion – based on the legislative provisions, and hence greater caution needs to be exercised to ensure the implicit legislative policy is met.

We are not however dictated by a perception of the policy behind the s24A(2) provision, but interpreting the legislative provision involves consideration of what parliament meant in setting out that provision. Our view is that the present application does not meet the requirement of s24A(2).

In the previous decision (Gilbert Street Latrobe Off licence No 1" of 26th November 2004) we went on to discuss community interest issues. In this instance we do not propose to work through those issues. Whilst there is some change in evidence regarding the aspects to community interest, much of the comment made in that earlier decision remains appropriate now.

We are not satisfied that s24A(2) is met, and we refuse the application.

Phillip Kimber; Chairman. Louise Finney: Member. Kerry Sarten: Member

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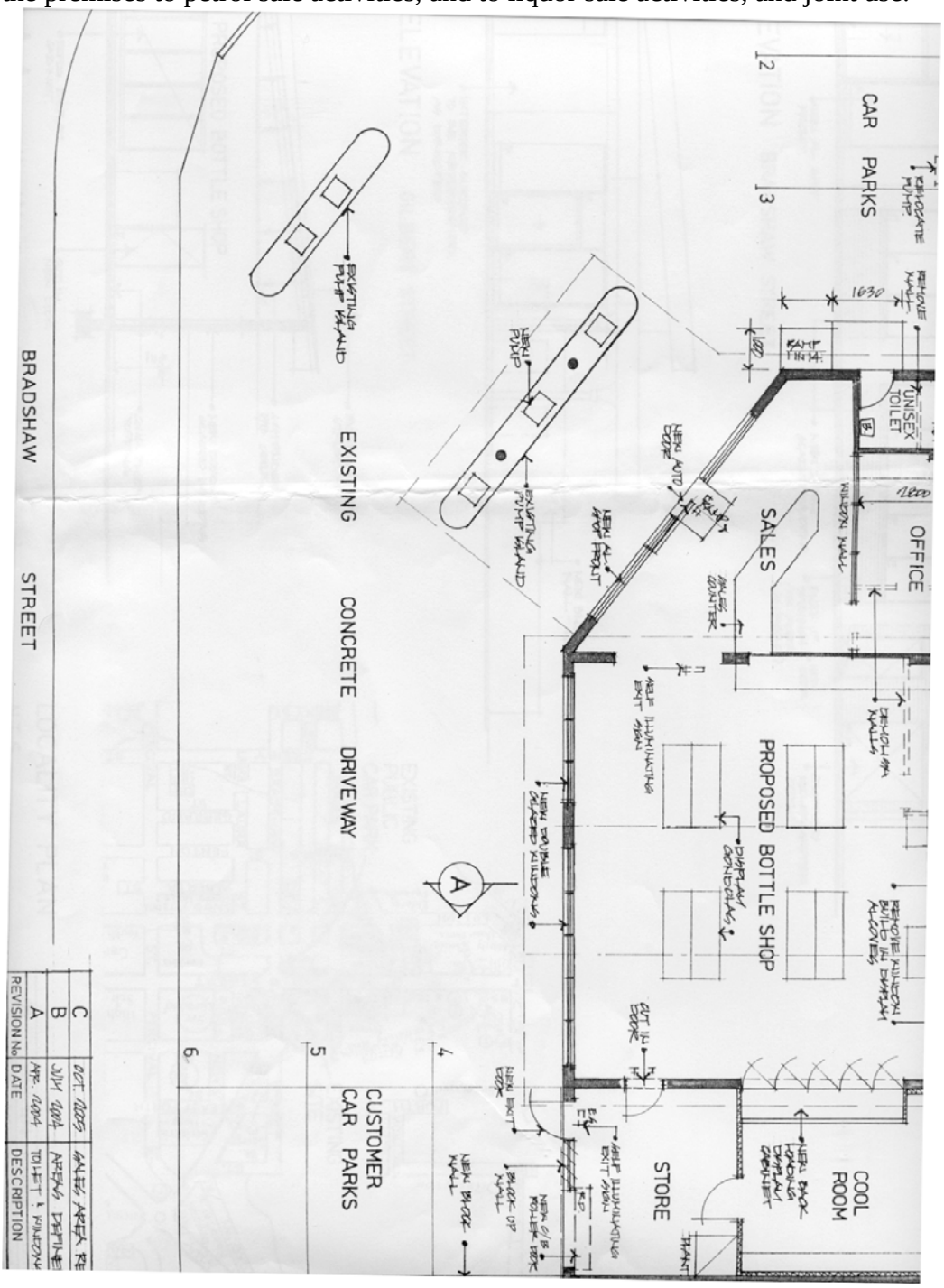
Footnotes:

[1] Here is a copy of the plan of the site evidencing the degree of allocation of parts of the premises to petrol sale activities, and to liquor sale activities, and joint use.



[2] There are some judicial comments indicating that a Board in our position should be slow to agree to direct the grant of a licence is such circumstances: see
LAVAL PTY LTD & ORS v HACKHAM PLAZA INVESTMENTS PTY LTD [2004] SASC 111 (Full Court of Supreme Court of SA):
Debelle J at paragraph 5: "The grant of the licence was made after two prior unsuccessful applications. The Licensing Court should be slow to depart from a previous decision, if a second application is made for a licence in respect of premises which are the same as those for which an earlier application has been refused: *Harding Hotels Pty Ltd v Jatadd Pty Ltd* (2001) 81 SASR 222 at 227 where Doyle CJ said:

> "The Licensing Court should be slow to depart from a previous recent decision, if a second application is made for a licence in respect of premises after a refusal of an application. In the ordinary course of things one would expect the Court to grant a second application only if there is good reason to think that there has been a change in the public demand for liquor in the locality, or in the ability of the licensed premises in the locality to cater for that demand."

I would qualify those remarks by saying that, assuming no error in the first decision, the Licensing Court should grant the second application only if there has been a material change in relevant circumstances. It is not enough merely to prove that change has occurred. The changed facts and circumstances will have to be of sufficient weight to justify a different conclusion. See also *Nuriootpa Vine Inn Hotel and Motel Pty Ltd v Licensing Court* (Perry J, 13 December 1999, [1999] SASC 512, Unreported). [17], affirmed on appeal in *Angas Park Cellars v Nuriootpa Vine Inn Hotel Motel Pty Ltd* (Full Court, 4 September 2000, [2000] SASC 302, Unreported) [15]. As the Licensing Court is concerned with the public interest and not private interest, an application does not give rise to a *lis inter partes* so that there is no room for the application of the principles of *res judicata* or issue estoppel."

[3] **The Returned and Services League of Australia (Victorian Branch) Inc (Pascoe Vale Sub-Branch) v Liquor Licensing Commission** [1998] VSC 87 ("RSL").
On primary purpose, and analogous concept to principal activity:
O'Bryan J: "[Counsel] submitted that the Full Commission did not take into account sufficiently the proportion of revenue to be earned from the food and drink consumed by gaming visitors and patrons as against non-gaming club members. I note, however, that the Full Commission did find that revenue from gaming would be about 48% and that revenue from the sale of food and beverages would be about 51%. I am not persuaded that the "primary purpose" of the business of a club can be determined simply by considering the amount of revenue provided by a particular sales centre. A golf club may provide a course for members, food and beverage and gaming machines. Should the revenue from golf be exceeded by the revenue from gaming in my opinion that circumstance alone would not prove that the primary purpose of the business of the golf club is gaming. The primary purpose or principal object of the golf club would be golf and secondary objects, such as food and beverage and gaming facilities which are recreational or social, would be ancillary."