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| Licensing Board of Tasmania | Decision |
| Legislation: | <i>Liquor Licensing Act 1990</i> |
| Applicant: | Darrell Eaves |
| Nature of application: | For an on licence |
| Premises: Name | The Butter Factory |
| Premises: Address | 32-34 Marine Terrace, Burnie |
| Name of decision: | Butter Factory On Licence |
| Date and place of hearing: | 25 July 2011, Launceston and 21 September 2011, Burnie |
| Date of decision: | 26 September 2011 |
| Members of the Board: | PA Kimber (chairman), K Sarten and D Logie (members) |

Reasons for decision:

Application

Darrel Eaves applies for an on-licence for premises known as the Butter Factory, 32-34 Marine Terrace, Burnie.

The application was lodged with the Commissioner on 15 June 2011. The Commissioner's interview with the Applicant and inspection of the premises indicate the following:

The premises are yet to be renovated. The Applicant advised he would engage consultants regarding building issues and would liaise with the Council regarding proposed use. The aim of the venture is stated to be to develop the property, and to target a 'wider aged customer demographic'. No specifics of intended renovation were provided. The Applicant stated that he expected the cost of development to be 'in the hundreds of thousands of dollars'. The Applicant has experience in developing or renovating properties.

The premises are in the Burnie City, near the waterfront, across from the train tracks and wharf area, and within 50 metres either way of Greens Hotel and Bayside Motel. It was used formerly as government offices. It is now vacant. The Applicant had not completed an RSA course.

A six page application document was submitted, directed toward addressing the information the Commissioner requests be provided in the application form for an on licence.

The Applicant describes the proposal as to establish a lounge piano bar with tapas food and late night music. He says that there is a void in Burnie for an establishment for entertainment, relaxation and late night music activities. He says there is no other establishment in Burnie like that proposed.

The venture is more specifically stated, by the Applicant, to include:

- Happy hour and mocktails.
- Lounge and piano bar with light meals, tapas, wood fired pizzas, coffee and wine – ‘yet to be determined’. An area designed for ease of conversation and relaxation.
- Band and live performances moving into late night music with DJ.
- Open mike nights.
- Security in and outside the premises.

The Applicant referred to ‘facebook’ requests from a 22 year old asking for someone to open a late night music venue in Burnie. During the hearing there was further mention of ‘facebook’ and ‘hits’, but no details were provided. We will return to this.

The application indicates that marketing will be via ‘facebook’, website and newspapers. No further detail was provided.

The application stated that ‘membership is a good option and needs to be investigated further but would include collecting details of patrons, analysis of the types of people patronising the venture, messages can be sent to members advertising events and giving advice on the code of conduct, and would employ SMS messaging’. A dress code was referred to at the hearing.

Renovations would include meeting building code requirements regarding toilets and washrooms, removal of carpet and polishing cement, meeting regulations regarding fire, exit doors and liquor licensing hours, capacity, and providing an external smoking area and prohibition or directive advertising. Decor was described to be intended to be clean, fresh, retro, modern, with feature rock walls and special atmospheric lighting.

As to intended employment, the Applicant stated that there would be six security staff (although that was described at the hearing as being external contracted rather than employees), seven bar staff, a cook, cleaning staff and barista.

Future expansion was said to include possibility of ‘function/multipurpose area upstairs’ and pool tables area.

The description of the premises indicates that noise made within the premises would be contained within the premises. The venue size is 420 square metres.

There is on site car parking and in the application it is said that is available. However at the hearing the Applicant said that parking would not be available to patrons.

Evidence at the hearing and objections

The Applicant and his wife Geraldine Eaves gave evidence. Objectors who had made submissions also gave evidence. They also filed written submissions indicating their concerns.

We can dispense with some of the evidence which did not amount to anything of any persuasion at the outset;

1. Generic outlet density material is of interest, but was not linked to the premises and the locality. There is no doubt that ease of access to alcohol is a significant factor in adverse impact from consumption, and consequently is linked to the number, nature and position of licensed premises. However, deliberate targeted information properly and effectively collated is relevant. Scientifically verifiable conclusions from data methodically collected may well be relevant to whether or not a licence should be granted, but without that, mere provision of information about how such information can be gathered, or what conclusions have been made on such data in other places does not assist the Board. That said, it is accepted that the nature of these premises and intended use has the capacity to contribute to harm associated with consumption of liquor, and that the Applicant has stated he will adopt measures to endeavour to limit that harm.
2. Unemployment data indicating that Burnie has a rate of unemployment of approximately 10 per cent does not take us anywhere in the decision making.
3. Assertions that the neighbourhood 'is to some extent disadvantaged' do not take us anywhere. Significantly more relevant and targeted demographic information would be of assistance.
4. A statement or paper indicating the name and address of every licensed premises within the Burnie City does not help us in our decision making. Some general knowledge of the locality is helpful, but a description of premises by name and address does not of itself support an objection that 'there are too many licences'.
5. Although financial viability or adverse financial impact on nearby licensed premises is not generally relevant, the owner's plans and impact on the community are relevant, including financial plans, improvements/changes, and the consequent nature of the service intended to be provided.

Acoustic engineering information and building survey information are useful to support the assertion that the venue would contain sound and would be built to building code requirements. They indicate the premises would be amenable to 600 persons, but the Applicant indicated a desired minimum number of 175 people three nights a week for financial viability. Alterations to exits and doors would be required to permit more than 175 people. We are not sure whether such alterations are intended. The implication is that it is, otherwise there would have been no need for the building surveyor to address the point.

The building surveyor's conclusion is that conversion to a lounge piano bar with tapas food will require the owner to consider his report carefully, in particular re access, number of occupants required to make the venue economically viable and manageable, as well as required sanitary facilities and fire fighting equipment, and that such matters are commercial decisions that need to be made by the owners prior to moving to design phase.

Objectors to the application were predominantly led by the owners or operators of adjacent licensed premises. On one count that might militate against the sincerity of the objections, as it might be assumed they are principally concerned with financial adverse impact. However, genuine concerns relating to the amenity of the neighbourhood can be relevant. In particular concerns about the noise which would arise from the egress of patrons from the venue late at night for 3 nights a week, and the contest between those persons and others wishing to sleep or rest in nearby premises is of relevance. Also concern about patrons outside to smoke cigarettes at late hours indicates that containing noise inside the premises is not the only noise consideration.

Consideration of the application

The on licence category is one which can be either of minor intrusion or have the capacity to be of major intrusion into the amenity of the neighbourhood. It might be associated with premises providing day time service or only until the middle of the evening, or it might be intended to be a 24 hour operation, with sale of liquor as a primary focus.

The Board's obligation is to make a decision which is in the best interests of the community.

The onus of proof as to whether the application, if granted, will provide benefits which outweigh the risk of detriment, is on the Applicant.

The Applicant has not met that onus in this application.

The Applicant did not present a comprehensive application with sufficient information and detail to enable the Board to be confident about the nature and style of the venue and the service to be provided, the audience to be targeted, how adverse factors external to the premises created by the use (principally ingress, egress, and smokers) would be dealt with in a satisfactory manner.

There was no clarity about the development to be undertaken. There was no 'business plan' to give confidence that there was indeed a market which required service and that the Applicant would be providing that needed service. In the absence of suitable evidence about that, the Board is asked to guess that there is an audience requiring the service, and that the Applicant's proposals will provide that service. That is not to say that 'need' per se is a relevant criteria. However in a potentially high end licence operating possibly late into the early morning (no

certainty was expressed by the Applicant as to operating hours, leaving it likely that the premises would be operating under an out of hours permit to 2 or possibly 3 or 4am).

The Applicant's evidence was that he would 'see how it goes'.

Whilst the evidence provided gives a model for starting renovation of a building and inserting into that renovated space the fabric for an entertainment venue, there is no detail or costing, nor link of that information to that which it is said the public wish to have.

The only information from the public we had were vague assertions about what was put on 'facebook'. That is not evidence sufficiently cogent or probative to indicate anything.

The responses to the objectors concerns about adverse impact to sleeping patrons were not sufficiently well dealt with. The prospect of future discussions with police and taxi operators did not give the Board confidence that there is any cohesive plan in place now to deal with that. More likely it would be a matter of 'seeing how it goes' and making amendments at that time if there is complaint. That is not an adequate response to the concerns.

Even the number of patrons to be encouraged into the premises was lacking in definition. The premises would be capable of taking 175, but could be expanded to take 600. What will be provided? What will the kitchen look like? What level of consumption of food will be part of the business plan, will be encouraged? What will be the layout and design in the floor space to either encourage drinking or provision of quality attractive food service? All this has been left for later.

What will be the true demographic of actual patrons? It seems the application is to set up the premises and advertise (something) and see who arrive and manage them. With potential significant impact on consumption of liquor, the Applicant's statement that he will have 'zero tolerance' does not give confidence there is a feasible plan for managing the risks associated with provision and consumption of liquor in and around the premises.

The assertion that the recent closure of late night music venue 'Siroccos' does not of itself justify the grant of a new licence to replace that – if that is the intention. More information about the conduct of those premises, the reason for closure, the intentions in regard to replicating that service, or varying from it, would have been relevant to the Board's consideration.

Evidence from the community as to their perceptions about the proposed venture would potentially have been relevant.

The Applicant's reaction to questioning by an objector over use of the car park was indicative. In the application document the implication was that the car park would be

of value to the venue, and patrons. However, as it appears that the car park is closer to the Bayside Motel, and the concern about noise on egress was raised, the Applicant stated that the car park 'would not be used' at night.

Statements that security personal (six) and CCTV would be employed, whilst good in the management of venues which carry risk in the manner of provision of service, does not answer all the questions about managing that risk.

It may be that there will be benefits from the use of presently vacant premises, and that there will be employment provided in renovation and the ongoing business, but that is not sufficient – in the context of the vague information provided, to justify the grant of an on licence in these circumstances.

As one objector stated:

'the Applicant has not demonstrated that an additional venue will be for the betterment of the community'. There is no evidence that there is a demand for whatever it is the Applicant wishes to provide: facebook page hits are not market research, not scientific, and not evidence of anything. Indeed, the evidence of whatever was said or done was not even presented. The hearsay inadequacy of this for supporting the application is obvious. Community consultation and addressing concerns in specific ways should have been conducted earlier.'

We direct the Commissioner to refuse the licence application.

26 September 2011

P Kimber, Chairman

K Sarten, Member

D Logie, Member.