

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Delissaville Store, Belyuen
Date of Hearing:	18 April 2002 and 29 May 2002
Date of Decision:	24 July 2002
Proceeding:	Application for new off-premises licence
Applicant:	Delissaville Social Club Inc
Nominee:	Mr Robert Caddies
Heard Before:	Mr John Withnall (Presiding) Ms Shirley McKerrow Mrs Barbara Vos
Appearances:	Mr Robert Caddies, for the Applicant Mr Chris Chaplin, for the Wagait Supermarket Mr Steven Brown, for Stanjon Pty Ltd

The Delissaville Social Club Inc seeks a licence to sell canned beer at its community store at Belyuen, on the Cox Peninsula on the western side of Darwin harbour.

The application was objected to by Mr Chris Chaplin, trading as the Wagait Supermarket, and by Stanjon Pty Ltd trading as Mandorah Beach Hotel.

An objection by the Northern Territory Police was withdrawn on the understanding that in the event of the application being successful, the Commission would implement the volunteered consent of the applicant to include conditions in the licence (i) establishing it as a twelve month trial at first instance, and (ii) requiring the licensee to use its best endeavours to establish a voluntary patrol akin to night patrols operating in other areas.

The application was received in the office of the Director of Licensing on 26 March 2001, but was not advertised until 9th and 11th January 2002. We were told that this long delay was at the behest of the applicant, who was not ready to proceed in the interim. Unfortunately sec. 27 of the *Liquor Act* requires the advertising to take place within 28 days of lodgement of the application, and at the hearing the Commission saw fit to make an order under sec. 127 of the Act extending the said period of 28 days to 11th January 2002.

At the hearing the application was presented by Mr Robert Caddies, the nominee proposed for the licence, with Mr Chris Chaplin appearing personally in objection and Mr Steven Brown representing the management of the Mandorah Beach Hotel.

Inasmuch as both of the continuing objectors hold take-away liquor licences in the area, the issue of the application of sec. 48 (1A) of the *Liquor Act* must once again be dealt with. That provision in popular parlance is said to prohibit objections by "commercial" objectors; what it actually prevents is an objection on the actual or substantive ground of adverse effect of the proposed new licence on any other licensed premises. It does not prohibit objections by existing licensees on other grounds, provided of course that the Commission does not regard the real substance of the other grounds as being nothing more than fear of competition however the objection may be worded.

More often than not, a licensee will object to a proposed new licence on the ground of licence saturation, claiming that the relevant community is already adequately serviced by liquor outlets, and alleging a lack of any real needs and wishes in the relevant community for the proposed new licence. While this was the basis of the written objection by Mr Brown, Mr Chaplain's written

objection was expressed as more broadly concerned with ensuring uniformity of licence conditions to better address known health issues.

It comes down in each case to whether the Commission views the “commercial” objector as having genuine concerns about the proposed new licence which are broader than a natural concern for the ongoing profitability of the objector’s own licensed premises.

Both Mr Brown and Mr Chaplin conducted themselves at the hearing in such a manner as to persuade the Commission that their broader concerns were genuinely held, and accordingly we find that their objections should not be disallowed as contravening sec. 48(1A).

It follows that the application for the new licence has therefore been considered together with the objections.

The Commission has no problem with Mr Caddies as proposed nominee; quite the contrary. The store would seem to owe its continuing existence over the last decade or so in no small measure to the staunch efforts of Mr Caddies; his commitment and managerial competence throughout that time would appear to be unquestionable. Ironically though, it is this very aspect that militates against the application. On the evidence, the Commission has insufficient confidence in the ability of the applicant Association to manage a liquor licence without Mr Caddies or other manager of equally effective experience and dedication.

We are sensitive to the argument that in reality the only managerial capacity the applicant ought need to demonstrate is an ability to appoint a reliable manager, but on the evidence we are not persuaded even at that basic level. We were told that in Mr Caddies’ periods of absence over the years the Belyuen community took advantage of replacement managers to rob the store, to the marked detriment of the store’s financial situation as a direct result. There is nothing in the evidence that might suggest that the outlook would now be any different if Mr Caddies was to again depart. The Commission is convinced that in terms of our consideration of the applicant’s managerial capacity both the applicant and the application are too dependent on the quality of the individual nominee.

An applicant cannot expect to discharge its onus in relation to managerial capacity by simply vowing to hire an appropriately experienced manager without being able to indicate that the capacity to ensure such professional management is itself within a framework of managerial competence. Such indications as there were in this case were of insufficient assistance to the application.

A consideration of the applicant’s dependence on Mr Caddies’ management raises a further dissatisfaction of the Commission with the licence proposal, touching on aspects both of financial capacity and the Commission’s historical view of the essential nature of what is conveniently referred to as a store licence. The core concept in licensing a store or supermarket in the NT to sell takeaway liquor has always been that the sale of liquor will be ancillary to the sale of general produce. This has always been emphasised in all published decisions in relation to applications for store licences. Typical of the Commission’s approach is what was said to the licensee of the *Moulden Supermarket* in a published decision dated 3rd March 2000:

The terms of your current licence are such as to constitute what is often referred to as a Store Licence, or Store Authority, and that is the basis on which your particular licence came into existence, that the sale of liquor is to be ancillary to the sale of what the licence refers to as groceries. In our view that means ancillary in two different ways: ancillary in terms of percentage of gross turnover, a historically well understood concept, but also ancillary in terms of the shopping environment, the look and feel of the shop and the way it operates. This type of licence is a liquor facility for people shopping in a store the main business of which is the sale of products other than liquor. That is what we regard as the core concept of this type of licence.

Mr Caddies candidly concedes that the viability of the Belyuen store “has always been a borderline situation”. He says that the store was earmarked for closure when he went there twelve years ago, and it has been very hard going. Without liquor, we are told, it will struggle to provide a service at

all, a pessimistic picture reinforced by Note 10 to the Club's 2000-2001 accounts. If the store does not get a liquor licence, Mr Caddies testified, it will eventually close. Indeed, Mr Caddies in summarising the application described the sale of liquor as a "lifeline" for the store.

The concept of liquor as a rescue package for the viability of a struggling neighbourhood store which will otherwise eventually but inevitably fail is seen by the Commission as an inappropriate foundation for a store licence.

We can have no confidence that the sale of liquor will be only an ancillary element in the transformed operation of a store the very viability of which will be dependent on its success as a takeaway liquor outlet.

The degree of success of the liquor side of the store required to overcome the store's decline has not been put to us. There is nothing other than expressions of desperate hope to lead the Commission to any expectation that the applicant will have the financial capacity to operate the store even if and as invigorated by the availability of beer in unlimited quantity.

There will be those who would query why a trial licence should not issue to see if the licensed operation could prove successful, but the same could be asked of every application with unsatisfactory fundamentals. Belyuen today is not a remote or outlying community with self-sufficiency or self-determination issues to be considered; the applicant is in the position of being a neighbourhood store that needs to sell beer (in as yet unestimated quantities) to attract sufficient neighbourhood patronage to survive. A corner store in any Darwin suburb in a similar acknowledged predicament would encounter the same initial dissatisfaction on the part of this Commission, a dis-satisfaction that might possibly be overcome by appropriate professional analysis and persuasive business planning in an appropriate case, but in all probability not otherwise. Fervency of hope is not enough.

The failure of the application on the foregoing fundamentals does not necessarily close the door to a licence for the Belyuen store. It is always open to the applicant to reapply for a licence at any time, with the benefit of having a clearer understanding of what issues need to be more effectively addressed. That being the case, although it is unnecessary for the Commission to rule on the sufficiency of the evidence as to community needs and wishes we offer the following comments by way of possible assistance to any renewal of the application.

We are told that the Belyuen community supports the application, and we note the petitions in evidence and the various letters of support. Such support is essential, of course, but in this instance not in itself determinative. Both objectors raise the issue of identification of the relevant community, and the Commission agrees that the relevant community in terms of the proposed liquor licence must be seen as being broader than just the Belyuen complex. On general principles (see *R v Liquor Commission; ex parte Pitjantjatjara Council Inc. (1984) 31 NTR 13* and *Tyeweretye Club Inc. v Northern Territory Liquor Commission (1993) NTSC 15*) the relevant community must be at least that comprised by the residents of the Cox Peninsula. Admittedly the applicant has come back to the Commission with evidence of general support for the application within the Cox Peninsula, but once the Cox Peninsula is seen as the relevant community, issues of licence proliferation arise.

There are many published decisions of the Commission outlining its approach to the statutory concept of community needs and wishes as being generally equitable with public support within the relevant community, but always sounding the caution that the Commission must nevertheless remain "sensitive to any undue proliferation of liquor outlets having regard to the location and nature of the particular precinct and the type of licence applied for". In several published decisions in recent times (see for instance the *Liquorland Mitchell Street* decision last year) the Commission has made reference to the changing liquor licensing climate and the likelihood of the issue of licence proliferation presenting an increasingly more difficult hurdle for applicants seeking to add to the number of licensed premises in a community. It is with takeaway outlets in particular that issues of licence density in a given community must be given careful scrutiny.

The Cox Peninsula, a community of only some six hundred persons or a little less, is already served by two takeaway outlets, the Mandorah Beach Hotel and the Wagait Supermarket, and on

the evidence the current respective managements of these two outlets appear to be operating with proper regard for responsible service. The preliminary view of the Commission is that the area would appear to be adequately serviced in terms of takeaway beer, and that other issues apart, an insufficient case has been made out for reducing the outlet per capita figure to something like a takeaway outlet for less than every two hundred people.

This view may well be susceptible to more detailed analysis and/or persuasive comparisons. It may be susceptible to special case evidence. It may be susceptible to geographic or topographic considerations not fully or fairly factored into our thinking. We simply indicate an aspect of our current thinking on needs and wishes that a renewed application would need to address.

Finally, we have concerns related to Exhibit 12, a report of the Belyuen Community Government Council on "An Alcohol Intervention Initiative At Belyuen" in 1993. This was an initiative of the Belyuen community itself in reaction to the graphic health statistics included in the report, and called for the assistance of the then Liquor Commission in relation to "dire" problems of alcohol abuse within the community.

In response the Commission negotiated with the then managements of the store and hotel for certain restrictions on supply to apply to Belyuen residents, and the availability of "bookup" was reduced (and progressively further reduced Territory-wide to the point of its recent elimination altogether). For their part the Belyuen Council agreed to undertake an alcohol education program in the community, evidence as to the implementation and outcome of which is seemingly unavailable. What was to be a nine month trial appears to have become open ended; no current health statistics were provided to inform of an improved situation to that previously detailed by the then Chairperson of Belyuen Community Government Council.

The current application for the community's own store to be able to sell beer is starkly at odds with the picture painted by the community itself in 1993. Situations change over time, of course, but there was no evidence as to what changes may have taken place. Any renewal of this application would need to integrate and distinguish the 1993 initiative and its outcomes in relation to the measure now being sought.

John Withnall
Presiding Member

24 July 2002