

*The Cheltenham Sports and Community Club [2014] SALC 32*

**LICENSING COURT OF SOUTH AUSTRALIA**

**THE CHELTENHAM SPORTS AND COMMUNITY CLUB**

**JURISDICTION:** Application for Club Licence with Extended Trading  
Authorisation and Entertainment Consent

**FILE NO:** 2173 of 2014

**HEARING DATES:** 18, 19 and 24 June 2014

**JUDGMENT OF:** His Honour Judge W D Jennings

**DELIVERED ON:** 18 July 2014

**REPRESENTATION:**

Counsel:

Applicant: Mr J Firth with Mr D Tillett

Objector: Mr T White

Intervener: Mr B Allen

Solicitors:

Applicant: Duncan Basheer Hannon

Objector: Cheltenham Park Residents Association

Intervener: Wallmans Lawyers

## **Background**

- 1 Horse racing commenced at the Cheltenham Racecourse in 1878 and it ceased operating as a racecourse in February 2009.
- 2 Pursuant to a variety of contractual arrangements the subject land of the former racecourse is being “redeveloped primarily as an integrated urban infield project by a consortium of interests”<sup>1</sup>.
- 3 The South Australian Jockey Club (the SAJC) has for some time (since March 1999) operated licensed premises pursuant to a Special Circumstances Licence at Cheltenham known as “The Lucky Horseshoe”. Prior to that time it had operated licensed premises there (from 1991) pursuant to a General Facility Licence. The first gaming licence at this venue was granted in September 1988 and has continued ever since. These premises are situated at the site of the old library and abut what was the old betting ring of the former Cheltenham Racecourse.
- 4 The SAJC on 13 January 2014 applied for a new Club Licence with Extended Trading Authorisation and Entertainment Consent on vacant land situated at Allotment 6005 DP 91439 Cheltenham Parade St Clair. The premises are to be known as “The Cheltenham Sports and Community Club” (the Club).
- 5 The site for the proposed Club Licence is approximately 270 metres by road or 207 metres as the crow flies from The Lucky Horseshoe.
- 6 The SAJC applied for planning consent for the Club. On 5 October 2011 the Charles Sturt Council (the Council) granted development and planning consent subject to a number of conditions which included the following:

“14. Capacity

The patron capacity of the facility shall be limited as follows:

- Lounge bar and sports bar – total capacity of 250 persons
- Outdoor courtyard – total capacity of 70 persons
- Gaming room – maximum 40 machines
- Dining facility – total capacity of 140 patrons.

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<sup>1</sup> Dr Graham Ashley Burns’ report dated 14 June 2012.

The maximum capacity of the facility will be 500 persons at any one time.

*Reason:* To preserve the amenity of the locality.

15. Hours of operation

The hours of operation for the premises shall be as follows:

- Outdoor courtyard on eastern side - 7am to 11pm
- Dining Facility – 7am to 12am
- Lounge Bar / Sports Bar – 7am to 2am
- Gaming Room – 8am to 2am

on any day.

*Reason:* To preserve the amenity of the locality.

...

17. Music within premises

The licensee will not at any time provide live entertainment by way of discotheque or unduly noisy or heavy metal style music. There shall only be low ambient background music played within the premises.

*Reason:* To preserve the amenity of the locality.

18. Acoustic Treatments

The Acoustic Treatments outlined within page 9-11 and Appendix B of the Sonus Report dated August 2011 (reference number S3635C7) shall be incorporated into the building design and shown on the final building rules consent plans submitted to Council for approval.

*Reason:* To preserve the amenity of the locality.

19. Land Use

The approved premises is not to be used as a Hotel as defined within Schedule 1 of the Development Regulations 2008.

*Reason:* To ensure the premises operates in accordance with the approved plans and details.”

- 7 The Cheltenham Park Residents Association Inc (the Association) appealed that Council decision to the Environment, Resources and Development Court of South Australia (the ERD Court).
- 8 On 30 November 2012 the ERD Court dismissed the appeal and confirmed the decision of the Council.
- 9 The Association has objected to the SAJC’s application for a Club Licence to this Court and the Council somewhat belatedly has intervened in these proceedings.
- 10 The Council now seeks that the Licensing Court impose the following conditions in relation to hours of trading (more restrictive than those previously approved by it) and garbage collection:
  - “1. Trading Hours
    - Outdoor courtyard on eastern side – 9am to 11pm
    - Dining facility – 8am to 12 midnight
    - Lounge bar/sports bar – 8am to 12 midnight
    - Gaming room – 8am to 12 midnight.
  - ...
  7. Garbage or refuse, including empty bottles and cans, is not to be available for collection by waste disposal or similar operations (other than operators employed or organised by the City of Charles Sturt) between the hours of 11pm and 7am the following morning (to reduce disturbance to residents).”<sup>2</sup>
- 11 Mr Firth, counsel for the SAJC, advised the Court that the application before it was a “first stage” and that “the second stage” (assuming this application succeeds) is for the SAJC to apply to the Office of Liquor and Gambling for a Gaming Licence. It was not possible, he said, to apply for the removal of the existing Gaming Licence to the proposed premises pursuant to the provisions of the *Gaming Machines Act 1992*. Mr Firth advised the Court that the Certificate sought for the new Club Licence was in any event a more appropriate licence for what is sought than a Special Circumstances Licence.

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<sup>2</sup> Exhibit A18.

### **The evidence**

- 12 The SAJC called as its sole witness, **Mr Brenton Wilkinson**, the Chief Executive Officer of the SAJC. His evidence was:
- 13 He has been the CEO since 27 August 2009. Prior to that and since 2 December 2002 he had been employed by the SAJC as its Operations and Facilities Manager.
- 14 He attends all board meetings and sits on the SAJC's governance committee.
- 15 The SAJC is incorporated under the *Associations Incorporations Act*.
- 16 It has in excess of 1800 members.
- 17 It loses \$3m a year and the gaming venues contribute over \$1.1m to the revenue streams of the SAJC. The SAJC's licenced clubs have from a financial point of view propped up horse racing.
- 18 He described the proposed Club Licence as a larger version of that which the SAJC operates at Morphettsville and which is known as "The Junction". The proposal will not however have a function room.
- 19 The new premises will have its own car park, a bistro, sports bar and entertainment area.
- 20 The Junction sponsors local sporting bodies and the SAJC proposes to do the same with the Club. He described the customers who frequent The Junction as middle-aged to older people "because it's not like a hotel" and "it doesn't have a real front bar trade". He described The Junction as family orientated. It attracts trade from a range of 2½ to 3 kilometres. It is profitable. He described the food and beverage sales at those premises as of equal importance. It is open 7 days a week from 8.30am until 3am the next day. It was previously open for breakfast (from 2002 to 2007). He described the proposed early start for the Club (ie 7am) as being an important part of the operation of the proposed business.
- 21 He described the history of horse racing at Cheltenham as an important part of the theme of the new proposal, and that theme would feature historic pictures and photographs of horses like Tulloch. They have some 300 to 400 pictures stored. The whole St Clair development includes horse racing related names such as John Letts Place.
- 22 The Lucky Horseshoe is open seven days a week from 8.30am until 3am the next day.

- 23 The Lucky Horseshoe was not purpose-built and is on the site of the old library of the grandstand. The SAJC wanted larger premises and facilities. He described the proposed premises as being similar to the Eagles Club and the Adelaide Juventus Sports and Social Club. There will be ample toilets provided for in the proposal as well as ample on-site parking which is important. The Council had approved or fixed the capacities and trading hours for the various areas and the SAJC were happy with the same.
- 24 The construction of the new premises will cost between \$6.5-7m. Once building consent has been obtained it will take about a year to build the facility.
- 25 The deadline to vacate The Lucky Horseshoe premises is 30 June this year and the SAJC will attempt to get an extension to the end of July.
- 26 If the application to the Court is successful the SAJC will seek a gaming licence for 40 gaming machines from the Liquor and Gambling Commissioner. That process involves compulsory community consultation.
- 27 The SAJC wanted to stay at the site of The Lucky Horseshoe and to modernise it in larger premises but the Land Management Authority and Council in discussions with the Government required that they operate a licensed venue from the proposed site.
- 28 The Outer Harbour railway line runs alongside the Coles shopping centre or town centre (the town centre) which abuts the proposed site to the south. Free public transport is provided for patrons to the Adelaide Oval for AFL matches. They expect to get trade before and after the AFL matches.
- 29 The town centre has been operating for some 18 months and the list of tenancies contained therein includes:
  - Coles Supermarket
  - Take away chicken and seafood shop
  - Wok-in-a-Box
  - Liquorland
  - Baker's Delight
  - Michel's Patisserie
  - Standom Butchers & Smallgoods
  - Newsagent
  - Flight Centre
  - Amcal

Sushi Train  
Uniq Nails (Beauty salon)  
Café/restaurant (opening early July 2014)  
Hair salon (expect to open early in FY 2015)  
Indian take-away (expect to open early in FY 2015).<sup>3</sup>

- 30 The St Clair development includes extensive wetlands and aqua facilities.
- 31 The proposed residential building which is underway will involve some 1200 living units and some 3500 residents. At present that residential development is 20-25% built and “has started to take off”. The St Clair development includes approximately 35% open space and also includes, as well as the wetlands, playing fields. The residential buildings and their designs are in accordance with the Council and joint developers’ requirements.
- 32 The Club will comply with certain acoustic related recommendations made by the Sonis group. Some of the conditions of the Council are noise-related. The Club which is not an entertainment venue will not have bands, loud music or discotheques but may have low level acoustic background music. They are happy to comply with the Council’s condition regarding loud speakers.
- 33 He listed capacity of the various areas of the proposed premises, eg lounge/sports bar 250 people; outdoor courtyard 70 persons; diningroom 140 people, with a maximum of 500 people in all parts of the premises at any one time. He said that that number of patrons at any one time would however be unlikely.
- 34 The clientele of the Club will be family orientated and “children friendly”. He envisages the clientele would include local residents and members of sporting clubs together with those patrons who wish to use the TAB which will be transferred from The Lucky Horseshoe.
- 35 The Association opposed the planning consent and is an objector in these proceedings. His view is their concerns relate primarily to the gaming licence and noise aspects of the Club. In this context he said that patrons of The Junction were policed diligently by staff. There is prominent signage encouraging people to leave quickly and quietly. This would be replicated at the Club. The planning approval by the Council was subject to 16 conditions which include patrons leaving the premises in an orderly

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<sup>3</sup> Exhibit A24.

- manner and causing no undue disturbance: that happens at Morphettville and he was happy for it to be a condition of any approval granted by this Court.
- 36 A wine list and menu of The Junction was tendered<sup>4</sup> and similar food and wine will be available at the Club. Staffing will be: 14 full-time, 9 part-time and 17 casual, totalling 40 staff<sup>5</sup>.
- 37 The Junction deliberately trades differently from a hotel and that is the intention for the Club.
- 38 They want to trade from 7am to provide breakfast (for commuters and local residents).
- 39 As to closing at midnight rather than 2am during the week he said the SAJC has been through the planning process and had already accepted earlier finishing times. The Lucky Horseshoe used to close at 4am (when there was horse racing) but now closes at 3am. They trade at The Junction until 3am, subject to the number of people there: if no-one is there they close earlier. Late trading is a productive time for the SAJC at The Junction and he envisaged the same for the Club.
- 40 They have never had problems with school children attending The Junction or The Lucky Horseshoe. Children however are welcome with their parents but are not allowed in the gaming areas.
- 41 During the planning process it was never suggested by the Council that they were seeking a reduction in the hours of operation that they had previously approved: he first learnt of that when they intervened in these proceedings. The SAJC had previously agreed in a cut-back in closing hours from 3am to 2am.
- 42 The Club will have 98 car parking spaces with access to Cheltenham Parade which he described as having “extensive traffic volume”.
- 43 Landscaping is proposed once the facility is built. There will be a set back from Cheltenham Parade of some 17 metres.
- 44 The back of the proposed premises faces west. The SAJC is very concerned to minimise the escape or emission of sound from the premises. The exit for late evening patrons is on the southern side of the building, ie facing towards the shopping centre.

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<sup>4</sup> Exhibit A25

<sup>5</sup> Exhibit A30

- 45 The restaurant is designed to be family oriented and there will be a separate children's play area. The provision of food/meals is an integral part of the business. The bistro area can be divided and will be made available for local community groups to conduct meetings. All Board members of the SAJC have been approved by the Independent Gaming Authority in respect of its totaliser licence and the gaming licence.
- 46 They have stopped spending money on the design aspects because of the delays they have experienced. They have already invested about \$385,000 on the project.
- 47 The capacity of The Lucky Horseshoe is 200. The Club will have an overall capacity of 500 with a provision for smoking areas.
- 48 In cross-examination he was asked if he would be prepared to accept a condition that liquor be served at 9am rather than 7am and whilst he said he would be prepared to take it to the Board he said that for Melbourne and Adelaide Cup Days and on other "events" they would like to serve champagne breakfasts. When asked whether he would oppose a 12 midnight closing time during the week for the lounge sports bar he said he would like a 2am closing time so all areas closed at the same time. No capacity has been set for the gaming room but given there will be 40 machines at its busiest there would be likely to be 30-40 people in that area.
- 49 The operation of the Club will be "more restrictive" than a hotel licence. They will not have discotheques or loud music. It will be more family friendly oriented rather than having a hotel "front bar aspect". The demographic of the people that they want to attract is different to that of a hotel. He agreed that the proposed site is in a residential zone and that currently the only non-residential development is the town centre to the south of the subject site.
- 50 He has only recently become aware of the Council approval for 59 residential apartments to the east of the proposed site. They do not propose any regular security or staff patrolling the car park area but they have a "very good track record" monitoring crowd behaviour at both The Lucky Horseshoe and The Junction. In light of the 59 apartments approved they will be more diligent in relation to patrons leaving the premises after midnight. He did not agree with the proposition that "the later a venue trades the greater the likelihood of disturbance to neighbours": particularly in the context of a 2am closure.

- 51 He was opposed to the earlier closing time of the venue earlier in the week and said “the SAJC wished to proceed with the planning or development approvals given by the Council”.
- 52 Mr Allen, counsel for the Council, called three residential witnesses and Ms Vanco, the Council’s Manager of Planning and Development.
- 53 **Mr Allan Shelly** resides at A41 Cheltenham Parade Cheltenham which is opposite the new shopping centre. He received notification of the proposed development but did not lodge a notice of objection. He thought trading until 2am on seven days a week might have an impact on his sleeping patterns. He normally rises at 6am and starts work at 7am. Whilst he is not opposed to the licence he would prefer a 12 midnight closure from Sunday through to Thursday with a 2am closure on Friday and Saturday.
- 54 He has shopped at the St Clair Village Shopping Centre and it is convenient for him. The shops there close at 9pm. He agreed that cars from the new residential development come in and out of that development even after the shopping centre is closed. He would expect that when the St Clair development is completed (even without the Club) there will be night time traffic going in and out opposite his home. He said that Cheltenham Parade is “extremely busy” during the day with “truck movements and cars”. He can hear the trains which operate until midnight. He was not aware that if the Club caused unreasonable noise and disturbance that he could complain to the Council who could lodge a complaint with the licensing authority.
- 55 **Mr Steven Elliott** resides at 17 Charles Matthews Circle St Clair which is some 700 metres from the Coles Shopping Centre. He has lived there since January of this year. He thinks the proposed trading hours until 2am are “a bit excessive”. He would prefer no development at all, but would prefer that if there is to be one that the closing time be 12 midnight. Being as far away from the proposed premises as he is, he would not expect a direct impact other than some vehicular impact.
- 56 He agrees that the new shopping centre is good. He does not play poker machines. He was not aware that the Council had given the SAJC approved trading until 2am.
- 57 **Mr Robert Beaton** lives at 43 Cheltenham Parade Cheltenham which is directly opposite the proposed site and St Clair Avenue. He has lived there for 61 years. His concerns about the proposal are the hours, the noise, and also people leaving in the early hours of the morning who, if they are intoxicated, could lose control and crash through his front yard

and hit his house. He would prefer that there be no licensed premises there at all but would prefer 12 midnight rather than 2am closing time if it is to be there.

- 58 The current level of traffic from St Clair Avenue affects him as the car lights come in through the front of his house. That he said would be exacerbated with vehicles from the proposed premises. He agreed that the volume of traffic on Cheltenham Parade has become busier and busier and a less peaceful place to live than it used to be. He agreed that the whole St Clair development is making the traffic worse already. He is a member of the Port Adelaide Football Club, is aware that it trades until 2am and is surrounded by residential properties.
- 59 The lights from traffic are worse since the St Clair Avenue intersection, and as the St Clair development has commenced to develop it has got worse and will continue to get worse (with the continued development of up to some 3000 residents).
- 60 **Ms Julie Vanco** has worked for the Council for about 11 years in different roles. She is currently its Manager of Planning and Development. She was shown Exhibit 18 and confirmed it reflected a schedule of proposed Council conditions, some of which were “not agreed” and she confirmed that it summarised the current position of the Council as to the licence conditions that it sought. She explained the Council’s liquor licensing policy which sets out a framework for trying to minimise impacts of licensed venues on local residents.
- 61 She said the proposed site is in a “noise sensitive” residential zone and that trading hours for licensed premises in such a zone typically encourage closing at 11pm during weekdays and midnight on Fridays and Saturdays.
- 62 The 59 apartment (five-storey) development to be east of the subject site was approved by Council on 6 November 2013.
- 63 She also explained aspects of the Council’s development plan which was consolidated on 15 May 2014. She acknowledged that the hours of trading as approved by the Council are those now sought by the SAJC.
- 64 She also acknowledged in cross-examination that a number of clubs/hotels which were in close proximity to residential properties traded past midnight.
- 65 The Association was represented by one of its Members, Mr White.

- 66 He called **Ms Carol Faulkner**, the Treasurer of the Association, to give evidence.
- 67 Her evidence was:
- 68 There are approximately 50 members of the Association and members can live anywhere in South Australia.
- 69 Ms Faulkner had prepared an affidavit with some 22 exhibits (which included articles, correspondence, newspaper surveys, reports and petitions). The tender of the affidavit and most of the exhibits were objected to by Mr Firth. The affidavit was not admitted into evidence and Ms Faulkner gave evidence on oath.
- 70 The Association's preference was that the land, the subject of the St Clair development be developed as wetlands (by the Government) or be retained as a racecourse. They have concerns about the circumstances surrounding the sale of the land by the SAJC and are concerned the community has not got what they expected by way of the wetland development and open space.
- 71 Ms Faulkner said they were not, in pursuing this objection, being vexatious or frivolous but they have real concerns about the proposed poker machines. The effect of her evidence was this application is the first stage of the development and because poker machines are an integral part of it, they thought it appropriate to object to the application before the Court.
- 72 Ms Faulkner said that the Association was concerned that the proposal is not a legitimate sporting and community club. The Association's view is that "a genuine sports and community club would be a real asset" in the St Clair development.
- 73 The licence sought by the SAJC is different to that at the Eagles Club which does not have many nearby residents.
- 74 Faced with the reality of what is now happening, ie the St Clair development, she agreed that the town centre would be used by people residing in that development. The Association did not object to the town centre.
- 75 The Association "is against the pokies" and "pokies just don't belong in a new residential areas". If the club was to be built "without the pokies, I think we probably would not be here today". She confirmed it is the poker machines that have led the Association to lodge and continue with this objection.

- 76 She agreed that Cheltenham Parade “is a very busy road” and that it is heavily trafficked: “heavier – much heavier during the day. During peak hour it’s a basket case”.
- 77 She equated the licences held by the Sturt Football Club (known as Bazaar) and its hours of trading and poker machines and the Eagles Club (and by implication the Club) as hotels and not as community sports clubs.
- 78 She agreed with the proposition that if the liquor licence is granted the restricted hours as sought by the Council would be a better outcome for the community as residents do not want to be disturbed after midnight on week nights. There is no reason why a genuine sports and community club would need to be open for the hours sought by the SAJC particularly in light of the new 59 apartments to be built right next to the Club.

### **Consideration**

- 79 There are three applications by the SAJC before the Court; the application for a new Club Licence, an application for an Extended Trading Application and an Application for Entertainment Consent.
- 80 As to the primary application, ie the application for the Club Licence, the SAJC must establish pursuant to s 57(1)(b)(i) of the *Liquor Licensing Act 1997* (the Act) that:
- “An applicant for a licence for premises or proposed premises must satisfy the licensing authority—
- ...
- (b) that the operation of the licence would be unlikely—
- (i) to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises; or ...”.

- 81 As to the entertainment aspect, s 105(2) of the Act provides:

- “(2) The licensing authority may only grant its consent if satisfied that—
- (a) the giving of the consent would be consistent with the objects of this Act; and

- (b) the entertainment is unlikely to give undue offence to people who reside, work or worship in the vicinity of the premises.”

82 The SAJC in order to trade past midnight must satisfy the provisions of s 44(2) of the Act which provides:

“(2) An extended trading authorisation cannot be given unless the licensing authority is satisfied that—

- (a) the grant of the authorisation would be unlikely to result in undue offence, annoyance, disturbance, noise or inconvenience to people who, for example, reside, work, study or worship in the vicinity of the licensed premises; and
- (b) the licensee will implement appropriate policies and practices to guard against the harmful and hazardous use of liquor.”

83 If the Court decides to grant a licence, s 43 enables the Court to impose certain conditions to ensure that the noise emanating from the licensed premises is not excessive; and conditions to minimise offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the licensed premises, or to minimise prejudice to the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the licensed premises, resulting from activities on the licensed premises, or the conduct of people making their way to or from the licensed premises.

84 Section 53 of the Act provides:

“(1) Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).

(1aa) Subject to this Act, the Commissioner has an absolute discretion to grant or refuse an application for a small venue licence on any ground, or for any reason, the Commissioner considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).

- (1a) An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.
- (2) A licensing authority should not grant an application as a matter of course without proper inquiry into its merits (whether or not there are objections to the application).
  - (2a) A licensing authority may—
    - (a) grant an application on an interim basis;
    - (b) specify that a condition of a licence, permit or approval is to be effective for a specified period,and, in consequence, may give any necessary procedural directions in the matter.
- (3) A licensing authority may, on such conditions (if any) as it thinks fit, vary or waive compliance with formal requirements relating to an application or the payment of fees relating to the grant of the application. (4) If a licensing authority considers that an applicant should satisfy the licensing authority as to a certain matter for the purposes of determining the application, the licensing authority may, if the licensing authority thinks fit, nevertheless grant the application on the condition that the applicant satisfies the licensing authority as to the matter within a period determined by the licensing authority.
- (5) If a licence, permit or approval is granted on a condition under subsection (4), the licensing authority may, on failure by the applicant to comply with the condition, revoke the licence, permit or approval, or suspend the licence, permit or approval until further order.
- (6) A licensing authority may in proceedings accept an undertaking from a party in relation to the conduct of the proceedings and, on failure by the party to fulfil the undertaking, refuse to hear the party further in the proceedings subject to any further order of the licensing authority.”

85 As to the issue of the Court’s discretion and the objects of the Act it is worth repeating what I said in *Liquorland* (Athelstone)<sup>6</sup> at paras 95 and 96:

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<sup>6</sup> [2013] SALC 51

“95. In *Liquorland v Lindsey Cove Pty Ltd* Doyle CJ said this about the exercise of the Court’s discretion:

‘27. I have already set out the statutory provision that confers a discretion on the Court. **It is well established that the discretion is a very wide one.** In support of that proposition, it suffices to refer to the reasons of King CJ in *Waiata Pty Ltd v Lane* (1985) 39 SASR 290 at 293-294. In his reasons in that case King CJ made the point that the legislative history showed that the predecessor of the present provision **had been created as a means of protecting the public interest**, when local option polls and memorials were abolished as a means of protecting the public interest in relation to the sale of liquor. He said (at 294):

“When this is appreciated, it can be seen that at least one purpose, and without doubt the primary purpose, for which the discretion is conferred, is the protection of that general public interest, which is to be distinguished from the public need or demand for liquor facilities, in the number, type, location and standard of liquor outlets and in the conditions under which they are to be permitted to operate. **The s 61 discretion is the means by which the Licensing Court is enabled to promote the shaping and development of an orderly and harmonious system of liquor facilities designed not only to meet the public need for liquor facilities but also to protect the wider public interest in the preservation of the community from adverse social effects.**”

He then went on to outline the basis on which the discretion is to be exercised (at 294-295):

“The language of the section enables the Court to exercise the discretion on grounds or for reasons which commend themselves to the Court and irrespective of the grounds which may be relied upon by the parties to the proceedings. These grounds or reasons include any proper principles or policies which the Court has developed for the

attainment of the purposes of the Act. Such principles or policies may relate to the undue proliferation of licences or of certain types of licences. They may relate to the promotion and maintenance of a suitable balance between the various types of liquor facility available in a locality. The Court is authorized by s. 6b to inform itself in any manner in which it sees fit and that includes informing itself by reference to its own records and its own knowledge of liquor facilities which have been granted or promised by the Court and to the previous history of proceedings relating to particular premises. The Licensing Court must act judicially, but there is an unmistakably administrative element in its task of promoting, encouraging and maintaining a system of liquor facilities to meet the public need for liquor facilities and the wider community interests.”

Subject to some comments which I will make in a moment, I consider that what King CJ said is still appropriate, and that nothing in s 3 of the Act setting out the objects of the Act, conflicts with what he said.

28 In short, the discretion must be exercised for a purpose consistent with the Act, and to advance or to maintain principles and policies found in the Act, or which the Court in its experience finds appropriate or necessary in the proper application of the Act. On the other hand, the Court must be careful not to use the discretion as a basis for imposing views about what is desirable, unless those views are firmly linked to the principles on which the Act operates or is administered.

(my emphasis)’

96. The objects of the Act include:

“3 – Objects of this Act

- (1) The object of this Act is to regulate and control the sale, supply and consumption of liquor for the benefit of the community as a whole and, in particular—

- (a) to encourage responsible attitudes towards the promotion, sale, supply, consumption and use of liquor, ...; and
- (b) to further the interests of the liquor industry ... within the context of appropriate regulation and controls; and
- (c) **to ensure that the liquor industry develops in a way that is consistent with the needs and aspirations of the community;** and
- (d) **to ensure as far as practicable that the sale and supply of liquor contributes to, and does not detract from, the amenity of community life;** and

....”

(my emphasis)”

86 Consideration in this matter must be given to the objects of the Act and in particular the objects contained in s 3(1)(c) and (d) referred to above. The evidence of Mr Wilkinson, which is set out in some detail earlier and which I accept, is pertinent. The Club will provide a convenient port of call for the current and potential residents of the St Clair development and other existing residents as well as commuters. It will offer a range of services and amenities, eg wining, dining and gaming facilities in new and modern premises for those people, and also a venue for local community groups to conduct meetings. Based on Mr Wilkinson’s evidence those matters are “consistent with the needs and aspirations of the community” and will contribute to rather than “detract from the amenity of community life”.

87 A matter the Court needs to address in this case is the interaction between the planning aspects of this case and the operation of the Act.

88 Mr Firth referred to a number of passages in the decision of the ERD Court<sup>7</sup>, being matters which clearly were and still are topics of concern to members of the Association. They were:

“12. The proposal was more particularly described by the Council as an integrated community and sporting club development comprising the construction of a new building to accommodate licensed premises including lounge bar and

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<sup>7</sup> [2012] SAERDC 64

sports bar, gaming room, dining facilities, cool room, offices, storage, kitchen and courtyard with associated car parking and landscaping.

13. Details of the proposal (which we gratefully adopt) were outlined by Ms Mader in her statement namely:

- The development includes the construction of a new building to accommodate activities to be licensed under the Liquor Licensing Act. The building will be of modern and contemporary design with a total height of 7.6 metres. The design will incorporate cantilevered canopies, aluminium louvers, timber column and feature blades for articulation. The materials and finishes to the facades will be predominantly timber, glazing and painted texture coated fibre cement.
- The facility will include a lounge bar and sports bar with a combined floor area of 177m<sup>2</sup> and a total capacity of 250 persons, an outdoor courtyard with a floor area of 60m<sup>2</sup> and a capacity of 70 persons, a gaming room containing 40 machines, and a dining facility for up to 140 patrons. The maximum capacity of the facility will be 500 persons.
- The proposed hours of operation are Monday to Sunday – 7am to 3am with the gaming area open from 8am to 2am.
- The proposal also incorporates a cool room, offices, storage area and kitchen.
- A total of 98 carparking spaces are proposed on site and two additional access points created from the approved public roads to the north and south.
- A delivery area on the south western side of the building is proposed to be incorporated into the design to allow for service vehicles to provide deliveries separate from the public carpark area.
- Landscaping is proposed to be provided surrounding the building, within the carpark area and around the perimeter of the site.

...

28. Prior to making a determination as to the true nature of the proposal it is appropriate to indicate what the proposal is not.

29. Contrary to the appellant's primary submission the proposal is not for a hotel. Although the characteristics, in terms of form and function, of a hotel are similar in many respects to those of a licensed club, the Council made it quite clear in its conditions of consent that the 'approved premises is not to be used as a hotel as defined within Schedule 1 of the Development Regulations 2008'.

...

32. In determining the true nature of the proposal we have had regard to the following factors:

- the proposal is to be owned and operated by the Club;
- the Club proposes to remove its existing liquor and gaming licences from the existing site on Torrens Road to the subject land and to cease using those existing premises;
- the proposal will be open to members of the community generally;
- a reasonable expectation is that the section of the community living and working in the surrounding locality will use the proposed premises;
- part of the premises will have a sporting focus with particular emphasis on the presentation of horse racing;
- approximately 300 members of the Club live within three kilometres of the subject land; and
- members of the public will patronise the facility for the purposes of dining, drinking, watching sport and/or gaming all of which are recognised and accepted forms of recreation.

33. Taking these matters into account we are satisfied that the proposal is appropriately characterised as a licensed community sport and recreation club and that as such, it is a form of land use expressly contemplated within this Policy Area.

34. In so saying we would reject the notion that the term 'licensed community sport and recreation club' should be read down or limited (as counsel for the appellant submitted) to those kinds of clubs which, inter alia, channel funds from their activities to various groups within the community. To

interpret the phrase in this way would be to subject the Development Plan to the kind of treatment reserved for statutes.

...

39. Accordingly even if the proposal is not correctly characterised as a licensed community sport and recreation club, we would characterise it as a licenced club run by a sporting body providing recreational facilities for dining and drinking together with facilities to watch and, if required, gamble on the sport of horse racing. Characterised in this way we would regard it as an acceptable kind of development in this Zone and Policy Area 22.

...

41. Potential impacts identified by the appellants related to noise disturbance, traffic disturbance, design and siting considerations, stormwater and site contamination.
42. As part of the assessment process the Council sought specialist acoustic reports detailing an environmental noise assessment and a music noise assessment for the proposal.
43. We are satisfied, based upon these reports, that the proposal will operate in a manner which will not detrimentally impact on the amenity of the residents in the locality.
44. We are satisfied that the proposal meets the relevant provisions of the Development Plan as they relate to traffic, access and parking matters generally.
45. On this issue [Design and Siting] we are satisfied that the proposal complies with the relevant provisions of the Development Plan.”

89 As beforementioned the appeal to the ERD Court by the Association was dismissed.

90 Mr Allen correctly pointed out the decisions of *Vandeleur v Delbra and Liquor Licensing Commissioner*<sup>8</sup> and *Lane v Duxsel Pty Ltd and District Council of Stirling*<sup>9</sup> are authorities for the proposition that the Licensing Court cannot abdicate its responsibilities or function because those matters or consequences may have been considered and determined by the relevant planning authority. I agree. However it is apparent that some

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<sup>8</sup> 48 SASR 156

<sup>9</sup> 143 LSJS 454

of the heartfelt concerns of the members of the Association which have been articulated in this case were squarely litigated and determined by the ERD Court. Those matters whilst they clearly are matters of concern for the Association were matters for the planning authorities to hear and determine and should not be re-litigated before this Court. Those findings of the ERD Court, a specialist planning Court, are relevant (and of some significant weight in this matter) though not binding on this Court.

- 91 Matters which must however be determined by this Court are issues such as capacities and trading hours. In that context, in my view, regard must be had to the original Council's planning consent which had fixed capacities of the relevant areas and which also fixed the hours of trading.
- 92 Here the Court is faced with the rather unique situation where the Council granted planning permission subject to certain conditions and then some time later, effectively just before this hearing, changed its position and has asked the Court pursuant to the Council's relevant policies to impose more restrictive trading hours and a condition in relation to garbage collection. The SAJC not surprisingly did not accede to those new conditions.
- 93 Judge Rice said in *St Paul's Reception and Function Centre (Heaven)* delivered on 13 October 2011:
- “Although the ACC has a policy position, obviously I am not bound by it and must determine the matter myself, but it remains a relevant factor”.
- 94 As beforementioned here the Council granted planning approval to the SAJC with conditions relating to trading hours. That in my view entitled the SAJC to proceed (as they clearly did, based on Mr Wilkinson's evidence) on the basis those conditions would remain unchanged. That carries more weight in the present circumstances than acceding to the Council's changed position. It also seems somewhat incongruous that the Council, having now approved the construction of the 59 apartment buildings at the back of the proposed site, is effectively expressing concern that the hours they previously approved might cause problems for the new residents of the yet to be built apartments.
- 95 I sympathise with the sentiments and concerns of Mr Shelley and in particular Mr Beatton. Their current concerns however relate more to the existing heavy vehicular traffic on Cheltenham Parade and the increase in traffic caused by the St Clair development which no doubt will become more pronounced as that development continues.

- 96 Those concerns are no doubt well-founded but they exist now, ie before the Club has been built. Any concerns the residents currently have about noise emanating from the premises or traffic generated by it is at this time purely speculative. If those concerns turn out to be well-founded remedies exist for complaints to be made to the Council and for it to pursue the matter. Based however on the evidence of Mr Wilkinson (who I found to be an impressive and truthful witness and whose evidence I accept) namely the training of staff, acoustic treatment of the proposed premises, landscaping, the setting back of the premises from Cheltenham Parade, and the demographic and family orientation of the proposed clientele, and based on the history of the operation of The Junction and The Lucky Horseshoe, both of which have been running for some time without any apparent problems, the residents should feel less apprehensive than might otherwise be the case.
- 97 Ms Faulkner's evidence did not really advance the issues to be determined by this Court a great deal. As with the residents however, one can sympathise with members of the Association if there was a realistic expectation on their behalf that the racecourse would be converted into wetlands and open space (much in the way the Victoria Park racecourse has been developed). That is not however a matter for the jurisdiction of this Court. Much of Ms Faulkner's evidence relates to the historic progress of the planning development (much of which has been determined by the ERD Court) and the Association's vehement opposition to poker machines. Those again are not matters within the jurisdiction of this Court.
- 98 Part of the Association's objection to the application initially included an assertion that the SAJC was not a fit and proper body to hold a liquor licence. That objection, after the Association received legal advice during an adjournment afforded by the Court in the course of the hearing, was not pursued. Based on the evidence of Mr Wilkinson and the material tendered by him, and in the absence of any evidence suggesting otherwise, I find that both he and all current members of the Board are fit and proper persons.
- 99 There is no evidence before the Court which would form a proper basis for refusing the applications before it.
- 100 Based on the evidence of Mr Wilkinson and the Council's original consent, there is no basis to further restrict the hours of trading from that approved in the original planning approval.

- 101 As to the Council's proposed condition as to garbage collection I find that the net effect of all of Mr Wilkinson's evidence (whilst a concession was made in cross-examination) is that rather than a strict liability situation the SAJC would prefer a "best endeavours" qualification as proposed by the SAJC.
- 102 I grant the application and invite the SAJC to submit a draft of the relevant certificate with the appropriate conditions.