

## LICENSING COURT OF SOUTH AUSTRALIA

### FAIRVIEW PARK CELLARS

**JURISDICTION:** Licensing Court of South Australia  
Liquor Licensing Act 1997

**CASE NO/S:** 58 of 2022

**HEARING DATE:** 16 November 2022

**JUDGMENT OF:** His Honour Judge Gilchrist

**DELIVERED ON:** 7 March 2023

### CATCHWORDS:

*Application seeking a review of a decision made by the Commissioner for Liquor and Gambling granting an application for a packaged liquor sales licence in respect of proposed premises in the Fairview Green Shopping Centre – The shopping centre is in Fairview Park, a suburb in the foothills on the fringe of Adelaide, about twenty kilometres northeast of the Adelaide CBD of approximately 5,715 square metres in size and is anchored by a full line independent Romeo’s Foodland Supermarket that attracts around 16,000 customers a week – The applicants seeking review are the proprietors of hotels in the general vicinity of the proposed premises – They contended that the Commissioner made several errors and that he wrongly concluded that it was in the community interest and the public interest to grant the application – They contended that he erred in respect of his identification of the relevant locality, he erred in finding that the grant of the application would create additional employment, he erred in finding that the grant of the application would result in increased convenience because there was an insufficient evidentiary basis to support that finding; that if the finding was based upon the outcome of the survey conducted at the nearby Blue Gums Hotel, it was flawed and in any event the Commissioner failed to take into account the ease with which those residing in the relevant community could combine their liquor purchases with their grocery shopping at other shopping centres in and about the locality – They contended that there was a serious issue in connection with planning approval and the evidentiary chain of proof was deficient – **Held** that although the Commissioner may have erred in connection with the identification of the relevant locality any error was immaterial – **Held** that the Commissioner was correct to find that the application was in the community interest and that*

*the public interest did not warrant refusal of the application – **Held** that the application for review is dismissed – Liquor Licensing Act 1997, Planning, Development and Infrastructure Act 2016, Planning, Development and Infrastructure (General) Regulations 2017, Development Regulations 1993.*

*BWS Woodcroft* [2022] SALC 108

*Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37

*Liquorland McLaren Vale (No. 2)* [2022] SALC 53

*Hove Sip 'n' Save* [2021] SALC 7

*Eblen Investments Pty Ltd v City of Holdfast Bay (No 2)* [2005] SAERDC 74

*Shannahan & Anor v District Council of Yorke Peninsula & Anor* [2013]  
SAERDC 6

*Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern and Others* [2000] SASC  
116

*Hoban's Glynde v Firle Hotel* (1973) 4 SASR 503

*Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors* [2018] SASCF 31

*KSM Liquor Pty Ltd* [2019] SALC 1

*Cellarbrations Mannum* [2021] SALC 42

*Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516

*Liquorland McLaren Vale (No. 3)* [2023] SALC 2

## **REPRESENTATION:**

Counsel:

Applicant: Mr S Henry KC with Ms S Legoe

Respondent: Mr M Roder KC

Solicitors:

Applicant: Piper Alderman Lawyers

Respondent: Mellor Olsson Lawyers

- 1 This is an application seeking a review of a decision of the Commissioner for Liquor and Gambling wherein he granted an application made by Blue Sky Investment Holdings (SA) Pty Ltd (Blue Sky) for a packaged liquor sales licence in respect of proposed premises in the Fairview Green Shopping Centre.
- 2 On review it is contended that the Commissioner made several errors and that he wrongly concluded that it was in the community interest and the public interest to grant the application.

### **Background**

- 3 The Fairview Green Shopping Centre is located on Hancock Road, Fairview Park, a suburb in the foothills on the fringe of Adelaide, about twenty kilometres north-east of the Adelaide CBD. It is approximately 5,715 square metres in size and is anchored by a full line independent Romeo's Foodland Supermarket. Romeo's Foodland Supermarket is a large and popular supermarket that attracts around 16,000 customers a week.
- 4 The Fairview Green Shopping Centre also contains smaller tenancies offering a range of products and services. It is supported by approximately 420 car parks over two levels, one underneath the centre, the other abutting the southern boundary. Nearby, to the north along Hancock Road, is a Fitness Centre, a Coles Express, and the Blue Gums Hotel. The Blue Gums Hotel is owned by an entity related to Blue Sky.
- 5 Blue Sky's application was based on it creating a bottle shop trading under the Cellarbrations badge carrying around 1,400 lines of liquor in an existing part of the Fairview Green Shopping Centre, directly adjacent to the Romeo's Foodland Supermarket.
- 6 Under the *Liquor Licensing Act 1997* an application for a packaged liquor sales licence is a designated application and as such it can only be granted if the relevant licensing authority is satisfied that granting the application is in the community interest. In determining that issue s 53A(2)(a) of the Act requires the authority to have regard to:
  - the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor; and
  - the cultural, recreational, employment or tourism impacts; and
  - the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
  - any other prescribed matter; and

- must apply the community impact assessment guidelines.
- 7 The community impact assessment guidelines (the guidelines) stipulate that at the time of lodgement, a designated application must be accompanied by a submission addressing how the application is in the community interest. The guidelines contemplate that the submission will be made after the applicant has consulted with the relevant key stakeholders and interest groups in the community. The guidelines provide that ‘applicants are required to show, as part of their application, that they have engaged with members of the community and any relevant stakeholders.’ They provide that ‘[e]vidence of this may include petitions, survey results and/or letters of support.’
  - 8 The guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that if relevant is expected to address matters such as: ‘the applicants products/services in terms of key features and potential customers; business/professional experience, in particular relevant knowledge, experience and competency in relation to the service of liquor; general description of facilities and services; construction details (e.g. materials, finishes, acoustic treatment, etc.); details of any food, including menu; liquor services (e.g. bar) and range of liquor; types of entertainment; types of accommodation; a statement as to whether the community supports the proposed business, including providing evidence of such support; and a statement as to why the granting of the application is in the community interest. Applicants are also required to provide, where applicable: a map and report regarding the locality generated through the Community Impact Portal; a business plan/plan of management; and a site or property plan, floor plan and/or photographs/artists impressions of site/building.’
  - 9 The applicant also needs to satisfy the authority that the pre-requisites of s 57 of the Act have been met. Section 57 concerns matters such as the suitability of the premises; the potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools; and whether the appropriate approvals, consents and the like, pertaining to the proposed premises, have been granted.
  - 10 Finally, the authority must be satisfied that it is in the public interest to grant the application and the authority has a wide discretion to refuse it even if the other stipulated criteria have been met.<sup>1</sup>

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<sup>1</sup> Section 53(1) grants a licensing authority an unqualified discretion to grant or refuse an application under the Act. Section 53(1a) requires the authority to refuse an application if it is satisfied that to grant it would be contrary to the public interest.

- 11 The application before the Commissioner was supported by a Community Impact Report dated October 2021 prepared by the planner, Mr Graham Burns from MasterPlan (the Report), a community consultation survey (the survey), and submissions addressing various matters including the issue of community impact.
- 12 Golden Gateway Tavern Pty Ltd and Winona Way Pty Ltd (the objectors) filed submissions in opposition to the application. They are the proprietors of hotels in the general vicinity of the proposed premises.
- 13 Following an invitation by the Commissioner submissions were received from Associate Professor Michael Livingston, who has conducted extensive research examining the relationships between the availability of alcohol, alcohol consumption and alcohol related harm, the Royal Australasian College of Surgeons (RACS), and Australia's National Research Organisation for Women's Safety (ANROWS).
- 14 Blue Sky filed submissions in response to these.
- 15 The Report noted that the guidelines suggest, as a guide, that the locality of licensed premises that must be considered in an application for a packaged liquor sales licence in the Adelaide Metropolitan Area is the area within a two-kilometre radius of the site of the relevant premises. The Report stated that this did not accurately capture the locality relevant to the proposed premises. It stated that the identification of the relevant locality can be influenced by natural and artificial barriers and the location of other proximate liquor outlets. In connection with the proposed premises, it noted that there was a quarry to the north of the proposed premises, a park and large reserves to the west, and the Hill Face Zone to the east. It noted that to the north-west is the Grove Shopping Centre, which amongst other offerings has a First Choice and a Dan Murphy's liquor store and to the south is the St Agnes Shopping Centre which has within it a Liquorland liquor store. It stated that these matters were significant and warranted a slight variation to suggested two-kilometre radius of the site of the proposed premises. The locality identified in the Report was bounded by the barriers just noted and excluded the Grove Shopping Centre and the St Agnes Shopping Centre.
- 16 The Report noted that within its suggested locality there were no premises trading under a packaged liquor sales licence, but there were two hotels offering take away liquor, the nearby Blue Gums Hotel, and the Golden Grove Tavern, which is about 1.6 kilometres west of the proposed premises.
- 17 The Report noted that the Blue Gums Hotel trades under the Sip'n Save badge and it has a small drive through and a small walk-in area. It stated that access was steep and would be difficult for patrons with mobility

issues. It noted that the Golden Grove Tavern is adjacent to the Surrey Downs Shopping Centre and that it also trades under the Sip'n Save badge. It has a drive through and has two walk in areas. It described the take away liquor facility on offer there as well lit and well maintained. The Court's view of these premises confirms this. By hotel standards it is a very good take away liquor facility.

- 18 The Report noted that the St Agnes Shopping Centre and its Liquorland liquor store were just outside the locality, as was the Tea Tree Gully Hotel, being 2.4 kilometres to the south-west. It noted that this hotel has a detached drive through trading under the Thirsty Camel badge. It noted that 2.4 kilometres to the north-west were the First Choice and the Dan Murphy's liquor store in the Grove Shopping Centre and added that these were irrelevant because they were destination stores.
- 19 The Report contained the development approval for the Fairview Green Shopping Centre. The approval took effect from 23 January 2008 and stated that '[t]he development must be undertaken and completed in accordance with the amended plans dated 25 May 2007 and information detailed in Application No 070/90631/06 except where varied by a conditions(s) listed below'.
- 20 The Report noted two kindergartens, a community children's centre and a primary school in the vicinity of the proposed premises but contended that there was no risk that the proposed premises would harm or endanger children attending these establishments.
- 21 The Report noted that there were no hospitals, drug rehabilitation centres, aged care facilities or dry areas within the suggested locality. It referred to crime statistics that indicated that the locality has a significantly lower rate of crime by comparison with the State average. It stated that the Socio-Economic Indexes for Areas indicated that the locality has an average socio-economic standing by Greater Adelaide standards and is higher than the national average. It stated that the unemployment rate is significantly lower than the Greater Adelaide unemployment rate.
- 22 The Report stated that the proposed premises would result in some increased employment opportunities. It concluded by stating that the proposed premises would provide an obvious benefit to those using the Fairview Green Shopping Centre.
- 23 The survey comprised of a series of questions and answers completed by some of the patrons of the Blue Gums Hotel. The questions asked whether the application for the proposed premises was supported and whether it was thought that undertaking grocery shopping and liquor shopping in the one location would be more convenient. Some fifty-nine patrons completed the survey. Over 90% of these supported the application and

over 80% said that they would find it more convenient to do their grocery shopping and liquor shopping in the same location.

- 24 Blue Sky's submissions made the point that its application involved no more than the creation of a modest sized bottle shop in an existing shopping centre. It submitted that it would not lead to any detriment to the local community and that it would have a positive impact in terms of convenience, choice and economic impacts.
- 25 The submissions filed by the objectors contended that Blue Sky had not adequately dealt with the potential for harm that could ensue if the application were granted. They made the point that there is already a take away liquor facility in close proximity to the Fairview Green Shopping Centre and submitted that it was not in the community interest to have another take away liquor facility so close to one that is already conveniently located. They added that there was no discernible difference in the range and price of products on offer as between the proposed store and the take away liquor facility attached to the Blue Gums Hotel. They challenged the assertion that the grant of the application would add to employment opportunities. They noted that the proposed trading hours of the proposed store exceeded the trading hours of other stores within the Fairview Green Shopping Centre. They submitted that the grant of this application could create an undesirable precedent and lead to an undue proliferation of retail liquor facilities, and it should be refused on public interest grounds.
- 26 The submissions advanced by Professor Livingston, RACS and ANROWS were summarised by this Court in *BWS Woodcroft*<sup>2</sup> as follows:

Professor Livingston submitted that there was a clear association between the density of liquor facilities and alcohol related harm including violence.

RACS asserted that the Covid-19 pandemic was associated with an increased incidence of domestic violence. It also asserted that there was increased alcohol consumption in 2020 and an increase in domestic violence in the same period. The inference being that the two were connected. It asserted that Covid-19 had resulted in increased stress, pressure and uncertainty. It submitted that allowing further saturation of liquor outlet density would be to send the wrong message and would set a dangerous precedent for future applications.

ANROW's asserted that alcohol is involved in around half of all domestic and family violence and that there was a clear association indicating that alcohol increases the severity of that violence. It asserted that a study in May 2020 conducted by the Australian

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<sup>2</sup> [2022] SALC 108

Institute of Criminology, that examined the impacts of the Covid-19 pandemic on domestic violence, reported an increase in alcohol consumption in the three months from February 2020. It also asserted that another study ‘highlighted that the changes to alcohol consumption during large-scale disasters may increase harm to families’.

Underpinning RACS and ANROW’s submissions is the contention that the impacts of the Covid-19 pandemic included a noticeable increase in alcohol consumption.<sup>3</sup>

- 27 Blue Sky submitted to the Commissioner that these submissions did not deal with specific local issues pertinent to its application and were therefore of limited relevance.

### **The Commissioner’s decision**

- 28 The Commissioner commenced his decision with a consideration of the locality and stated that Blue Sky’s expert had nominated a two-kilometre radius which he adopted as correct.
- 29 He reasoned that the majority of those who shopped at the Fairview Green Shopping Centre lived within that locality. He found that the proposed premises would increase the convenience for those using the shopping centre who wish to purchase take away liquor as part of that shopping experience. He did note that notwithstanding this, the range of facilities on offer in the shopping centre were not as such that the Fairview Green Shopping Centre was a one-stop shop experience.
- 30 The Commissioner noted the results of the survey conducted at the Blue Gums Hotel. It can be inferred that he regarded the survey results as supportive of the application.
- 31 The Commissioner noted that the application had not drawn any objection from the local council or the police. He accepted by reference to the observations in this Court in *Liquorland (Australia) Pty Ltd (Park Holme)*<sup>4</sup> that the grant of the application carried some risk of harm. He noted that the population profile of the relevant community had a lower level of crime compared to the State as a whole. Having regard to the existing take away liquor facilities within the locality he reasoned that the locality was not awash with such facilities. Despite the generality of the submissions of Professor Livingston, RACS and ANROWS, he thought that he could and should give them some weight. He found that the grant of the application would lead to some employment opportunities. He concluded that the grant of the application was in the community interest and was not

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<sup>3</sup> Ibid at [34]-[37].

<sup>4</sup> [2020] SALC 37 at [43]-[44].



satisfied that grounds existed to refuse the application on public interest grounds.

### **The application for review**

#### *An application to tender fresh evidence*

- 32 At the commencement of the review hearing, Mr Henry KC, counsel for the objectors, sought leave to adduce evidence of the trading figures of the Golden Grove Tavern and the Tea Tree Gully Hotel. That application was refused. The stated purpose of this evidence was to demonstrate that the trading figures for take away liquor at these hotels had increased over the course of the COVID-19 pandemic and that this was a relevant consideration in determining whether it was in the community interest and the public interest to grant the application. This was based on observations made by this Court in *Liquorland McLaren Vale (No. 2)* to the effect that if there was evidence that an impact of the pandemic was increased alcohol consumption this might warrant the taking of a cautious approach and that for the time being it might be in community interest and the public interest to refuse an application for a new packaged liquor sales licence.<sup>5</sup>
- 33 It seemed to me that the proposed evidence was of little probative value. As was observed by this Court in *BWS Woodcroft*, without more, such sales figures do no more than demonstrate that the particular venue has enjoyed an increase in sales which could be explicable for a variety of reasons. Of themselves they do ‘not establish that there has been an overall increase in alcohol consumption indicative of a State-wide trend or of a trend within the local community’.<sup>6</sup> As was further observed in that case which is of relevance here, had there been a discernible increase in problem drinking in the relevant locality, it might have expected that this would have been brought to the attention of the Commissioner by the police or the local council. It is notable that in this case neither made any objection to this application.
- 34 Moreover, when the hearing was scheduled the Court was advised that no fresh evidence would be adduced.
- 35 Having regard to the limited value of the proposed evidence and the late application to adduce it, I resolved not to allow its tender.

#### *Submissions on review*

- 36 Mr Henry submitted that the Commissioner erred in connection with his identification of the relevant locality. He noted that the Commissioner stated that the locality was within a two-kilometre radius of the proposed

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<sup>5</sup> [2022] SALC 53 at [157]-[158].

<sup>6</sup> [2022] SALC 108 at [104].

premises but he also stated that he adopted the locality proposed by Mr Burns. Mr Henry submitted that the two were not the same. I understood him to contend that the error was potentially significant in that depending upon which locality was applied the number of take away liquor facilities within the locality could vary by some margin.

- 37 Mr Henry submitted that the Commissioner erred in finding that the grant of the application would create additional employment. He noted that the proposed premises are presently occupied and trading. He submitted that to replace one trading entity with another within the same shopping centre would have no net impact upon employment. He submitted that the Commissioner appears to have overlooked this.
- 38 Mr Henry submitted that there was little if any evidence to support the Commissioner's finding that the grant of the application would result in increased convenience.
- 39 He submitted that if the finding was based upon the outcome of the survey conducted at the Blue Gums Hotel, it was flawed. He noted that the survey was very small. Mr Henry provided an analysis of those surveyed and stated that only eighteen of those surveyed lived in the relevant locality and only three stated that they shopped at the Fairview Green Shopping Centre. He submitted that it was telling that there was no survey conducted of the patrons of the supermarket to ascertain what percentage of them would use the proposed store.
- 40 Mr Henry submitted that the Commissioner failed to take into account the ease with which those residing in the relevant community could combine their liquor purchases with their grocery shopping at other localities such as the St Agnes Shopping Centre, the Surrey Downs Shopping Centre and the Golden Grove Shopping Centre.
- 41 I understood Mr Henry to contend that when the results of the survey are put to one side, and these other shopping centres are taken into account, the finding that the proposed premises would significantly benefit those using the Fairview Green Shopping Centre was unsustainable.
- 42 Mr Henry contended that there was a serious issue in connection with planning approval. Section 57(2)(b) of the Act expressly provides that a licensing authority must not grant an application for a licence unless satisfied 'that any approvals, consents or exemptions that are required by law for the carrying out of building work before the licence takes effect have been obtained'.
- 43 Mr Henry submitted that the proposed premises, although earmarked to be within the Fairview Green Shopping Centre, are not presently in existence and will inevitably require 'building work' before being ready to trade as a bottle shop.

- 44 He referred to the *Planning, Development and Infrastructure Act 2016*, and noted that within the definition of ‘development’ in that Act’ is the expression ‘building work’ which in turn is defined as ‘work or activity in the nature of construction, demolition or removal of a building’.
- 45 He submitted that the creation of a bottle shop within the Fairview Green Shopping Centre will require an amendment to the development authorisation that had previously been granted. He accepted that such amendment could be sought and might be granted. His submission was that without it, there was no valid application before the Commissioner and that the only decision available to the Commission was to dismiss the application. He submitted that this Court has no capacity to permit Blue Sky to remedy the deficiency. He said: ‘The Court does not have jurisdiction to breathe validity into an invalid decision of the Commissioner’.<sup>7</sup>
- 46 Finally Mr Henry submitted that the application should have been refused on public interest grounds. He submitted that the grant of this application would set an undesirable precedent for the reasons explained by this Court in *Hove Sip’n’Save*.<sup>8</sup> In that case the Court observed that if it is sufficient to establish grounds for the grant of a packaged liquor sales licence upon proof that a relatively small number of the local community who visit a small shopping centre would find it convenient to have the option of purchasing take away liquor as part of their visit to that centre, an undesirable precedent would be established and that would enliven the public interest discretion to refuse the application.
- 47 Mr Roder KC, counsel for Blue Sky, submitted that this was a modest application for a small bottle shop in a busy shopping centre and that the Commissioner’s decision to grant the application was unremarkable and should be confirmed. He noted that the first hint that the argument about inadequate proof of planning approval was to be pursued was on the evening before the hearing of the application for review, and that no issue about this was raised by the objectors in the hearing before the Commissioner. He submitted that if there was any merit in the argument this could have easily been addressed earlier and that it is unfair for the objectors to raise this at such a late stage.
- 48 Mr Roder submitted that in any event, it should not be assumed that the initial approval involved an approval of individual tenancies such that there is no basis to infer that further approval for internal works within existing tenancy areas was required. Next, he submitted that it should not be assumed that what is involved here is ‘building work’ for the purposes of the *Planning, Development and Infrastructure Act*. He submitted that it

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<sup>7</sup> Objectors’ written submissions filed 23 November 2022, para 33.

<sup>8</sup> [2021] SALC 7

was notable that within its definition of building work there is the following: ‘but does not include any work or activity that is excluded by regulation from the ambit of this definition’. He then took me to cl 4(4) of sch 4 of the *Planning, Development and Infrastructure (General) Regulations 2017* which amongst other things excludes from the definition:

Other than in respect of a local heritage place, the repair, maintenance or internal alteration of a building -

- (a) that does not involve demolition of any part of the building (other than the removal of fixtures, fittings or non load-bearing partitions); and
- (b) that will not adversely affect the structural soundness of the building or the health or safety of any person occupying or using it; and
- (c) that is not inconsistent with any other provision of this Schedule.

49 Mr Roder noted that a similar exclusion was contained in the *Development Regulations 1993* and in *Eblen Investments Pty Ltd v City of Holdfast Bay (No 2)*<sup>9</sup> it was held that the exclusion applied to internal alterations with an existing building and that this approach was endorsed in *Shannahan & Anor v District Council of Yorke Peninsula & Anor*.<sup>10</sup>

50 Mr Roder submitted that if in fact approval is required and the existing proof is insufficient this Court should enable Blue Sky to correct any deficiency.

51 Finally he submitted that this case was to be decided on its own facts such that the public interest did not require the application to be refused.

### **Consideration**

52 Mr Henry might be right in contending that there appears to be an error in the Commissioner’s identification of the relevant locality. But nothing turns on it because there is no indication that the Commissioner’s identification of the locality affected his conclusions.

53 Whilst the identification of the relevant locality is important it needs to be understood that ‘locality’ is not a bright line concept. The observations made by Debelle J in *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern and Others* to the effect that ‘locality’ is a somewhat artificial concept and its purpose ‘is not to fix lines on a map but rather to focus attention upon

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<sup>9</sup> [2005] SAERDC 74 at [14]

<sup>10</sup> [2013] SAERDC 6 at [59]-[62].

the local, as distinct from the purely general, character of the public demand'<sup>11</sup> remain valid, notwithstanding that they were stated in connection with the former 'needs' test. Whether the take away liquor facilities are just inside or just outside the identified locality is of no real significance in the sense that they all must be taken into account. But the nature of the facility, the distance from the proposed premises, and the ease or otherwise with which they can be accessed, will influence the extent to which they are relevant.

54 In this case the geographic area from which the proposed premises might expect to draw customers will be of the order of that area within two kilometres. That was the area that the Commissioner considered. The Commissioner identified the take away liquor facilities within his nominated locality. But he also was aware of those just outside his nominated locality. He noted that the Liquorland at St Agnes was described as a well-appointed and maintained store that provided one stop shopping within the St Agnes Shopping Centre. He noted that the Tea Tree Gully Hotel was described as a drive through with a reasonable selection. He noted that the Dan Murphy's and First Choice stores at the Golden Grove Shopping Centre were described a destination stores with large product lines and variety that attracted customers from a wide catchment area. There is no reason to think that in coming to his ultimate conclusion, he did not take them into account.

55 Mr Henry's submission regarding the finding of additional employment in connection with the proposed premises might also be technically correct. But again nothing turns on it. In his reasons after he stated that the proposed premises will likely provide some employment opportunities the Commissioner added:

... I placed limited weight on this given that in the event the application is refused, some other business would likely be established and operate out of the premises which could also provide additional employment opportunities in the locality.

56 It follows that the finding was of only marginal relevance to the Commissioner's ultimate conclusion.

57 Mr Henry's criticisms of the survey conducted at the Blue Gums Hotel are well made. The shortcomings of such surveys in the context of an application for a liquor licence were discussed by Bray CJ in *Hoban's Glynde v Firle Hotel*.<sup>12</sup> Despite the many changes to liquor licensing regulation in this State since that judgment was delivered, those identified shortcomings remain valid. In the case of a small survey, without knowing why those surveyed support the application, how regularly they patronise

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<sup>11</sup> [2000] SASC 116 at [48]; (2000) 76 SASR 290 at 299.

<sup>12</sup> (1973) 4 SASR 503 at 509-10.

the shopping centre that is to contain the proposed premises, and how often they would purchase take away liquor, the results tell very little.

- 58 But it does not follow that the Commissioner was unable to find that the grant of this application would result in added convenience to many living in the relevant locality. Whilst there are limits on the extent to which the Commissioner and this Court can make findings without direct evidence as noted by this Court in *Liquorland McLaren Vale (No. 2)*,<sup>13</sup> some matters are so notorious that findings can be made without formal evidence and proof. The convenience associated with the co-location of a bottle shop and a supermarket falls within this category. As Kourakis CJ observed in *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors*:

**It is notorious** that there are many people who shop as and when needed, adapting the “just in time” business model to their domestic requirements. There are many who no longer undertake a larger weekly, or fortnightly, grocery or alcohol shopping expedition.

**As a matter of common experience**, the categories of shoppers who, on occasion, may wish to purchase alcohol together with their groceries include the following. First there are parents, more commonly women, who visit a supermarket to purchase ingredients for afternoon snacks and the evening meal after, or before, picking up children from school or sports grounds. Making a special additional trip to purchase alcohol for parents with children in their care is not always an easy matter.

Pensioners, again many of whom shop as required, whether travelling by bus or car, may be put out significantly by having to make a special trip to purchase alcohol...

Young adults, married or single, on the way home from working long hours, or engaging in after-work exercise or social activities, are another significant group of shoppers who have pressing reason to purchase alcohol and ready to eat food or groceries in the same location.<sup>14</sup> (Emphasis added mine)

- 59 As noted earlier, the Romeo’s Foodland Supermarket contained in the Fairview Green Shopping Centre is a large and popular supermarket. In this case direct evidence was not necessary to establish that many members of the relevant community shop at the Fairview Green Shopping Centre and the supermarket within it. The size of the car park and the number of visitations to the supermarket enable that inference to be drawn. It can be taken as a given that many of these ‘share the values of many

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<sup>13</sup> Ibid at [152].

<sup>14</sup> [2018] SASFC 31 at [3]-[6].

contemporary Australians for whom the ability to undertake ‘one-stop shopping’ is very important’.<sup>15</sup>

- 60 To travel by car from Fairview Green Shopping Centre to the Liquorland store at the St Agnes Shopping Centre involves a journey of about 2.3 kilometres. Although most of that journey involves a straight drive, south along Hancock Road, it then requires traversing North East Road, entering the large, and at times congested car park, adjoining the shopping centre and finding a car park.
- 61 To travel by car from Fairview Green Shopping Centre to the hotel located in the Surrey Downs Shopping Centre involves a journey of about 2 kilometres. That journey commences with a short straight drive, south along Hancock Road. But it then requires turning right into Grenfell Road and negotiating the large car park attached to that shopping centre.
- 62 As for the Grove Shopping Centre, the Court is permitted to know that it is a very large shopping centre surrounded by a very large car park. To travel to it by car from Fairview Green Shopping Centre involves a journey that by road is well beyond 2 kilometres. That journey commences with a straight drive, north along Hancock Road. It then requires turning left into Yatala Vale Road across Golden Grove Road, continuing along the Grove Way, before entering the car park adjoining the shopping centre and finding a car park.
- 63 As Kourakis CJ observed in *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors*: ‘Members of the South Australian public are entitled to a measure of convenience in balancing their busy lives and, if they are less mobile, in negotiating urban congestion and other obstacles.’<sup>16</sup> To borrow the words he used in that case, for those who shop at the Fairview Green Shopping Centre who would prefer not to purchase take away liquor from a hotel,<sup>17</sup> this cohort must negotiate busy roads and intersections, either to make a special trip to a stand-alone retail liquor store, or shop for their groceries in other supermarket locations at the edges of the relevant locality where they can purchase both alcohol and groceries.<sup>18</sup>
- 64 In my opinion the degree of inconvenience that the journeys to the shopping centres identified by Mr Henry involve, even if undertaken by car, is beyond that which many members of the relevant community who would otherwise shop at the Fairview Green Shopping Centre would think is reasonable. For those of these who do not have access to a car, most would regard the journeys as excessively burdensome.

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<sup>15</sup> *Liquorland (Park Holme)* ibid at [37].

<sup>16</sup> Ibid at [13].

<sup>17</sup> This Court has repeatedly accepted that a proportion of the public do not purchase takeaway liquor from a drive through and would prefer to make their purchases from a dedicated retail facility. See, for example *KSM Liquor Pty Ltd* [2019] SALC 1.

<sup>18</sup> Ibid at [2].

- 65 In my opinion the Commissioner was right to conclude that the grant of the application would result in increased convenience for many members of the relevant community.
- 66 As for the issue regarding the necessary planning approval, the fact that the originating documents might have been deficient does not render the application invalid. As I noted in *Cellarbrations Mannum* ‘the Commissioner is expected to act without undue formality’ and ‘proceedings before the Commissioner are less formal than a court and that parties are often either unrepresented or represented by persons other than lawyers.’<sup>19</sup> Whilst in connection with applications that are contested, licensing authorities must be careful in their dealings with the parties and maintaining the appearance of impartiality is vital,<sup>20</sup> it is important to recognise that ultimately they are always guided by what is in the public interest and in respect of an application such as this, what is in the community interest. In conformity with this, the ‘sporting theory of justice’<sup>21</sup> has no place in their rulings and applications should not be defeated on technical grounds. Thus in a case where there was a deficiency in the chain of proof regarding a matter such as the requisite planning approval, once the licensing authority becomes aware of it, subject to being open and transparent about it, it would be expected that the applicant would be given an opportunity to correct the deficiency.
- 67 As it is, in this case, I do not think there is a deficiency in the chain of proof. The proposed alterations in this case are internal alterations and in my opinion cl 4(4) of sch 4 of the *Planning, Development and Infrastructure (General) Regulations* excludes them from the definition of building work. It is therefore not a development for the purposes of the *Planning, Development and Infrastructure Act* such that further approval is not required.
- 68 I now turn to consider the issue of public interest.
- 69 A licensing authority must always be concerned about the precedents it might set. For the reasons explained in *Liquorland McLaren Vale (No. 3)*:<sup>22</sup>

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<sup>19</sup> [2021] SALC 42 at [80].

<sup>20</sup> *Cellarbrations Mannum* *ibid*.

<sup>21</sup> The ‘Causes of Popular Dissatisfaction with the Administration of Justice’, reproduced in Glenn R Winters (ed), *Handbook for Judges*, (1975), 280 at 288: ‘It [the sporting theory of justice] creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived.... The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverse judgments, or sustains demurrers in the interest of regular play.’ This was discussed by Gummow and Hayne JJ in *Jackamarra v Krakouer* (1998) 195 CLR 516.

<sup>22</sup> [2023] SALC 2 at [79]-[85].



If I considered that the grant of this application would create a precedent that irrespective of the number, nature and proximity of other take away liquor facilities, an application for a packaged liquor sales licence to enable the creation of a bottle shop adjacent to a large full line supermarket must succeed, I would refuse this application on public interest grounds.<sup>23</sup>

- 70 But in this case the Fairview Green Shopping Centre is a relatively unique shopping centre in that it is bounded by the barriers that Mr Burns spoke of in the Report. Whilst it must be acknowledged that the take away facility contained in the Blue Gums Hotel is only a short distance away, it is a facility attached to a hotel and as such will be unattractive to many. The other take away facilities are on the fringe of the locality, which as was noted above, would for many involve some degree of inconvenience in being accessed. With these matters in mind I do not consider that the grant of this application will create an undesirable precedent that warrants its refusal on public interest grounds.

### **Conclusion**

- 71 Whilst some of the complaints made by the objectors regarding the Commissioner's decision have been made out, they do not vitiate his conclusions.
- 72 Given the social profile of the relevant community and the limited number of take away liquor facilities in the immediate vicinity of the proposed premises, I think it is unlikely that the grant of this application will result in a worrying level of increased harm due to the excessive or inappropriate consumption of liquor, either to the relevant community as a whole, or to any group within that community. It will plainly provide a convenient option for those using the Fairview Green Shopping Centre who wish to purchase liquor as part of that visitation and who would prefer not to purchase take away liquor from a hotel. I agree with the Commissioner's conclusion that the grant of the application is in the community interest. I agree with his conclusion that the grant of the application is in the public interest.
- 73 The application for review is dismissed and the Commissioner's decision to grant the application is confirmed.

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<sup>23</sup> Ibid at [79].