

NORTHERN TERRITORY LIQUOR COMMISSION
DECISION NOTICE

MATTER: 9DLS APPLICATION FOR VARIATION OF CONDITIONS OF LICENCE [2023] NTLiqComm 34

REFERENCE: LC2023/029

LICENCE: FLL1078

APPLICANT: 9DLS Pty Ltd

PREMISES: 9 Daly Street
DARWIN NT 0800

LEGISLATION: Part 4 Division 5 of the *Liquor Act 2019*.

HEARD BEFORE: Mr Russell Goldflam (Chairperson)
Ms Elizabeth Stephenson (Health Member)
Ms Katrina Fong Lim (Community Member)

DATE OF HEARING: 13 October 2023

DATE OF DECISION: 13 October 2023

Decision

1. For the reasons set out below and in accordance with section 112 of the *Liquor Act 2019* (NT) (**the Act**) the Northern Territory Liquor Commission (**the Commission**) has determined to grant the application by 9DLS Pty Ltd as trustee for DLS Unit Trust (**the licensee**) to vary the conditions of liquor licence FLL1078 (**the licence**).
2. The following condition of the licence is varied by omitting “four (4) years” and substituting “eight (8) years”:

This licence will lapse within four (4) years from the 22 October 2019 being the date of the decision to grant a licence, unless the Licensee has erected the premises and commenced trading under the licence or unless the Licensee satisfies the NT Liquor Commission that it would be in the public interest to grant it an extension of time to enable it to complete the building works and obtain the necessary approvals.

3. The following condition is added:

The licence is subject to probity checks by and to the satisfaction of the Director of Liquor Licensing of any person who becomes a person of influence or potential beneficiary within the meaning of s 54 of the Act.

Reasons

Background

4. In 2014, Mr Theofilos Kalidonis (**Mr Kalidonis**), the sole proprietor and director of the licensee, acquired what is currently a vacant block of land in the Darwin Central Business District at 9 Daly Street (**the premises**). Ever since, Mr Kalidonis's vision has been to develop the premises as an upmarket multi-storey accommodation venue including a public bar, restaurant and gaming area. As circumstances have changed over the last seven years, the proposed scope, substance, details, branding, financing, ownership and operation of the "Kalidonis Boutique Apartments" as they were originally to be called, have evolved. The projected construction costs for the project run to tens of millions of dollars.
5. On 22 October 2019, the Commission issued the licensee with a liquor licence with a public bar authority and lodging authority. The licence included the conditions set out at paragraph 2 above, requiring the opening of the premises by 22 October 2023 (**the time limit condition**).
6. Three months after the licence was issued, the COVID-19 pandemic reached Australia, leading to widespread and profound disruption of economic activity. The licensee's planned development of the premises stalled, primarily as a consequence of the pandemic.

The 2022 application

7. On 23 June 2022, the licensee applied for an extension of time to commence and complete the development (**the 2022 application**). Three aspects of this application are noteworthy.
8. Firstly, although the time limit condition expressly provided that any extension of time would need to be considered and determined by the Commission, the application was made instead to the Director of Liquor Licensing (**the Director**).
9. Secondly, the application in effect, was to utilise the licence to operate a "social club" at other premises in Mr Kalidonis's Darwin property portfolio. At that time, it appears that Mr Kalidonis had indefinitely postponed his planned development of the Kalidonis Boutique Apartments development at 9 Daly Street.
10. Thirdly, as the Commission subsequently found, the sole underlying purpose of the application was to enable the licensee to retain the electronic gaming machine licence (**the gaming licence**) over the premises that had been

granted to the licensee on 20 August 2020 by the Director of Gaming Machines.¹

11. The application was referred to the Commission. The radical changes proposed to the licensee's plans were unsupported by material capable of satisfying the public interest and community impact requirements of the Act. Unsurprisingly, the Commission refused the application. In its decision notice dated 3 October 2022, the Commission observed that the application "should probably have proceeded as an application pursuant to section 110 of the Act to vary the conditions of licence."²

The current application

12. On 11 July 2023, the Director took the commendable initiative of writing to the licensee reminding it of the time limit condition. By way of response, on 21 July 2023, Mr Peter Walsh, the Managing Director of Spot-On Finance Group Pty Ltd, which was apparently providing financial services to the applicant, wrote to the Director, requesting "a further extension of the liquor licence".
13. On 6 September 2023, the licensee's solicitors wrote to the Director "to apply to the Liquor Commission for extension of time to erect premises and commence trade pertaining to Licence Number FLL1078...". The letter was supported by a detailed chronology of Mr Kalidonis's efforts to get the development off the ground, together with documentation from stakeholders and service providers currently or potentially involved in the project.
14. On 18 September 2023, the Director referred this letter to the Commission, which scheduled the application to be heard on 27 September 2023.
15. Two days prior to the scheduled hearing, the licensee sought and was granted an adjournment of the hearing to 13 October 2023, so that it could lodge an application to vary the conditions of the licence pursuant to s 110 of the Act, in accordance with the Commission's suggestion referred to at paragraph 11 above.
16. On 4 October 2023 the licensee lodged an application to vary licence conditions with the Director and the Commission.
17. In conjunction with the application the licensee lodged an affidavit deposed by Mr Kalidonis dated 28 September 2023 declaring that there were no persons who could influence or would expect a benefit from the applicant if the licence were issued.

¹ *Application For An Extension Of Time To Erect Premises And Commence Trade* (LC2022/043, 22 October 2022), [19]

² *Application For An Extension Of Time To Erect Premises And Commence Trade* (LC2022/043, 22 October 2022), [15]

18. In addition, the licensee provided a summary of evidence in support of the application suitable for publication, the substance of which was as follows:

[A] number of events in the period from October 2019 to the present has delayed and prevented the applicant from obtaining finance and commencing to erect the premises. COVID-19 had the effect increasing the cost of materials and labour, increasing the cost of borrowing, and decreasing interest from prospective tenants of the development. Negotiations with a number of stakeholders broke down as a result.

The applicant has since entered serious negotiations with a tenant of the development ~ and reached a stage beyond which they cannot move without security as to the liquor licence. Obtaining finance through investors or otherwise is dependent on furthering negotiations with the tenant. The licence is the key to both finance and a successful tenancy.

There is a real possibility of obtaining finance if the licence does not lapse, and then of finalising negotiations with the tenant. Other tenancies will then follow such as a restaurant, supermarket and others.

Consultation

19. Section 111(2) of the Act provides that the Director may require an applicant for a variation of licence conditions to publish notice of the application, if the Director considers it to be in the public interest. In this instance, the application was lodged at such a late stage, it was impracticable for the Director to require the licensee to publish notice of the application without having to put off the hearing until after the expiry of the period fixed by the time limit condition.

20. Similarly, the Director was effectively precluded from complying with s 111(3) of the Act, which requires the Director, as soon as reasonably practicable after receiving an application to vary the conditions of a licence, to inform various identified stakeholders.

21. The Director faintly submitted that the consultation provisions were not engaged in the circumstances of this application, because there had been stakeholder consultation in 2019, when the Commission heard the licence application and issued the licence.

22. The Commission does not accept that submission. The terms of s 111 are clear: the Director “must” consult with stakeholders. However, the Commission accepts that in 2019 notification and consultation had been undertaken, and that the project then proposed was similar to the current proposed project.

23. In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, the plurality stated:³

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

24. Applying this approach, the Commission considers that in the circumstances of this matter any non-compliance by the Director with s 111 (which, as has been observed, was not the fault of the Director) is not such as to deprive the Commission of its jurisdiction to hear and determine this application.

The hearing

25. On 13 October 2023, the application proceeded as a hearing. Dr Ford of counsel, instructed by De Silva Hebron, appeared on behalf of the applicant. Mr Kalidonis attended and gave oral evidence. Mr Timney, the Director of Liquor Licensing, appeared on behalf of his office.

26. Having formed the opinion that because of the need to protect commercial-in-confidence information it would not be appropriate in the circumstances to conduct the hearing in public, the Commission directed that the hearing be conducted in private in accordance with s 21 of the Act.

27. The material previously provided by the applicant to the Commission in September and October 2023 was tendered and admitted into evidence without objection, as well as additional documentation in relation to the proposed development. The Commission considers that it would not be appropriate in the circumstances to publish details of this material.

28. At the outset of the hearing, the Director indicated that he neither supported nor opposed the application, the merits of which were for the Commission to determine.

Assessment of the application

29. The Commission accepts the Director's submission that if the Commission were to refuse this application, the associated gaming licence over the premises would in due course be cancelled, and the licensee would in all likelihood be precluded from obtaining another gaming licence because of the existing Northern Territory Government cap on electronic gaming machine licences.

30. The Commission accepts the licensee's submission that the profit it plans to make from operating the liquor licence (and the associated gaming licence) are

³ At [91], per McHugh, Gummow, Kirby and Hayne JJ

critical to the financial viability of the project, and therefore to the prospects of raising the funds and securing the equity partners required.

31. It is of concern to the Commission that, as the deadline of 22 October 2023 loomed, the licensee's dealings with the Director and the Commission as summarised above, were so casual and cavalier. The licensee's case was based in no small part on the contention that an adverse response by the Director or the Commission would cause its project to fail. It would have been of greater assistance to the Commission had the applicant focussed more on compliance with the procedural requirements of Part 4 Division 5 of the Act, and the substantive requirements of s 49 of the Act, the public interest and community impact tests.
32. Section 110(2) of the Act requires a licensee who is applying to vary the conditions of a licence to satisfy the Commission that varying the conditions is in the public interest and would not have a significant adverse impact on the community. The usual course taken by applicants is to prepare and submit a detailed public interest and community impact analysis. In this instance, the licensee elected not to do so. Instead, in its written submissions, the licensee contended (with the support of the Director) that in the circumstances of this application, the Commission should not revisit the issues of public and interest and community impact that it had determined in 2019, but confine itself to the question of whether or not the proposed extension of four years would be in the public interest and have a significant adverse impact on the community.
33. With some hesitation, the Commission accepts that submission. It does so because it accepts that the proposal currently before the Commission is, broadly speaking, similar to the proposal that was considered and approved by the Commission in 2019, as distinct from the radically different plans presented to the Commission in the 2022 application. The development as now proposed will have fewer storeys than the 2019 version, but it will offer a similar number of hotel rooms, and provide similar facilities and services.
34. The Commission is satisfied that the proposed extension of four years is in the public interest, and will not have a significant adverse impact on the community. In reaching that view, the Commission has given particular weight to s 49(1)(e) of the Act, which identifies "increasing cultural, recreational, employment or tourism benefits for the local community area" as one of the public interest objectives the Commission must consider. Similarly, the Commission has given particular weight to s 49(3)(e) of the Act, which requires the Commission to consider "the effect on culture, recreation, employment and tourism" when determining the community impact of the proposed extension of four years. The Commission is satisfied that demand for tourism accommodation in Darwin is likely to increase, and that the construction of a substantial number of additional hotel rooms is consistent with and supportive of the Northern Territory Government's tourism strategy.
35. As noted above, stakeholders have not been consulted and no notification of the application has been made to the public in relation to the instant application.

The Commission has considered whether, pursuant to its powers conferred by s 314 of the Act, to cause consultation and notification to be carried out. The Director submitted that the Commission not do so, because the currently proposed project is sufficiently similar to the one brought before the Commission in 2019, negating the need to repeat the consultation and notification processes that were undertaken in 2019. The Commission accepts that submission.

36. Section 112(1)(a) of the Act requires the Commission to consider an applicant's affidavit of potential beneficiaries and persons of influence. As stated above, Mr Kalidonis's affidavit declares that there are no such persons. That is because the licensee is in negotiation with, but has not yet entered into contracts with equity partners, tenants, facility managers or financiers. The clear purpose of this provision is to ensure that appropriate steps are taken to ensure that stakeholders in licensed premises are fit and proper persons to be associates of the licensee. Accordingly, the Commission has determined to impose the condition set out at paragraph 3 above.

The objects of the Act

37. Section 3(4) of the Act provides that in performing its function to decide whether to grant the application to vary licence conditions, the Commission must have regard to the primary and secondary purposes of the Act.
38. The Commission considers that the variation of conditions it has determined to approve is consistent with the purposes of the Act.
39. At the conclusion of the hearing of this matter, the Commission announced that it had determined to grant the application, with reasons to follow.

NOTICE OF RIGHTS

40. Section 31(1) read with section 112(3) of the Act provide that the decision set out in this decision notice is reviewable by the Northern Territory Civil and Administrative Tribunal. Section 94(3) of the *NTCAT Act* provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

41. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for a review of this decision are the Director and the licensee.



Russell Goldflam

CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
19 October 2023

On behalf of Commissioners Goldflam, Stephenson and Fong Lim