



Mr Bounchanh (Boon) Saenphoumy
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2 February 2018

Dear Mr Saenphoumy

Application No.	1-5548096861
Applicant	Bun Dan Sup Pty Ltd
Application for	Extended trading authorisation
Licence name	Siam House
Proposed premises	Shop 1, 4-10 Campbell Street HAYMARKET NSW 2000
Current trading hours	Monday to Sunday 10:00 am – 10:00 pm
Proposed trading hours	Monday to Saturday 10:00 am – 2:00 am Sunday 10:00 am – 12:00 midnight
Issue	Whether to grant an extended trading authorisation
Legislation	Sections 3, 49, and 51 of the <i>Liquor Act 2007</i>

**Decision of the Independent Liquor and Gaming Authority
Application for an extended trading authorisation – Siam House**

The Independent Liquor and Gaming Authority considered the Applicant's application for an extended trading authorisation at its meeting on 19 January 2018, and decided to **refuse** to grant the authorisation under section 49 of the *Liquor Act 2007*.

A statement of reasons for this decision is attached at the end of this letter.

If you have any questions, please contact the case manager at
carlos.mu@liquorandgaming.nsw.gov.au.

Yours faithfully

David Armati
Deputy Chairperson
For and on behalf of the Independent Liquor and Gaming Authority

Statement of reasons

Decision

1. On 6 February 2017, Bun Dan Sup Pty Ltd (“Applicant”) lodged an application (“Application”) with Liquor & Gaming NSW (“L&GNSW”), for determination by the Independent Liquor and Gaming Authority (“Authority”). The Application sought the granting of an extended trading authorisation (“Authorisation”) related to the Applicant’s existing on-premises liquor licence for the premises at Shop 1, 4-10 Campbell Street, Haymarket (“Premises”).
2. The Authority considered the Application and, at its meeting on 19 January 2018, decided to refuse to grant the Authorisation under section 49 of the *Liquor Act 2007* (“Act”), on the basis that the Application has failed to meet the procedural requirements under section 51 of the Act.
3. In reaching this decision, the Authority has had regard to the relevant material before it, and the legislative provisions in sections 3, 49 and 51 of the Act, and clauses 9 and 9C of the *Liquor Regulation 2008* (“Regulation”).
4. For the purpose of this decision, it was not necessary to, and the Authority did not, consider whether the other criteria for granting the Authorisation have been met.

Material considered by the Authority

5. The Authority has considered the Application and the information and submissions in relation to the publication of notices of the Application.
6. The Authority is satisfied that procedural fairness was afforded to the Applicant regarding this decision, as the Applicant has been provided with the opportunity to respond to and address all of the issues of concern in respect of the Application.
7. A list of the material considered by the Authority is set out in the Schedule.

Legislative framework

8. The Authority has considered the Application in the context of the following legislative provisions.

Objects of the Act

9. The objects of the Act, as set out in section 3, are to regulate the supply of liquor in line with the expectations and needs of the community, and facilitate the balanced and responsible development of the liquor industry and related industries.
10. In the pursuit of these objectives, section 3 requires the Authority to, in exercising its powers under the Act, have due regard to the need to minimise harm associated with misuse and abuse of liquor, encourage responsible liquor supply practices, and ensure that the supply of liquor does not detract from the amenity of community life.

Power to grant an extended trading authorisation

11. Section 49 of the Act provides the Authority with the power to grant an extended trading authorisation to a licensee to permit the sale or supply of liquor for consumption on the licensed premises during a specified period outside the standard trading hours.

Minimum procedural requirements

12. Section 51 of the Act prescribes the minimum procedural requirements for an application for a licence related authorisation.
13. Specifically, section 51(2)(c) requires an application for an authorisation to be advertised in accordance with the Regulation, if required by the Regulation to be advertised.

14. The advertising requirements are set out in division 1 of the Regulation, and according to the provisions under clauses 6(1)(e) and 9(5)(a), apply to the Application.
15. Relevantly, clause 9 of the Regulation requires a notice relating to the application to:
 - a) be fixed to the premises to which the application relates, in such a position that is legible to members of the public passing the premises, within two working days of the application being lodged, and
 - b) remain fixed to the premises until such time as the application is determined by the Authority.
16. Clause 9C of the Regulation further provides that:
 - a) an applicant is taken to have complied with the advertising requirements if the Authority is satisfied that the applicant has made all reasonable efforts to comply with the requirement, and
 - b) the Authority may disregard a failure to comply with the advertising requirement if it is satisfied that the failure is of a minor or technical nature.

Relevant facts

17. The Application was first presented to the Authority for its meeting on 19 April 2017. The Authority identified a number of deficiencies in the Application and the associated Community Impact Statement ("CIS"), and requested that the Application be returned to the Applicant for rectification of these deficiencies. The Authority noted at the time that the Application had already been returned to the Applicant on an earlier occasion due to other deficiencies in the CIS.
18. The Application was presented to the Authority for the second time for its meeting on 15 November 2017. The Authority noted at the meeting, from the documents before it, that:
 - a) as the Application was made on 1 November 2016, pursuant to clause 9 of the Regulation a notice of the Application was required to be fixed to the Premises by 3 November 2016 in a manner that renders it legible to all passers by, and remain fixed in that manner until such time as the Application is determined,
 - b) between 16 June and 8 July 2017, L&GNSW Licensing staff observed on multiple occasions that a notice of the Application was not posted on the window of the Premises or otherwise visible to a passer by, and on each occasion contacted the Applicant's legal representative, Mr Bounchanh Saenphoumy from VCD Lawyers, about the issue, and
 - c) Mr Saenphoumy advised L&GNSW by email:
 - i) on 8 July 2017 that the Applicant would soon meet with him and have the relevant documentation "posted on [the] shop front", and
 - ii) on 28 July 2017 that the Applicant had "placed [the] notice inside the shop, at counter areas on the day that [he] directed", and that he would "visit the shop on the weekend or Monday and have the Notice place[d] on the glass fac[ing] the street as directed".
19. Having regard to the above, the Authority resolved to invite the Applicant to provide a submission in respect of:
 - a) the Application's apparent non-compliance with the requirement under clause 9 of the Regulation, and
 - b) any reasons for which the Authority should consider exercising its discretion under clause 9C of the Regulation to treat the requirement as met or disregard the non-compliance.
20. By email response on 18 December 2017, Mr Saenphoumy advised that:
 - a) the Applicant had displayed the notice of the Application on the window of the Premises facing the street and at the front counter of the Premises where the cash register is located;

- b) the notice of the Application was mistakenly removed from the cash register when staff were instructed to remove the notice of the development application for the Premises by the architect responsible for that application;
- c) after being notified of the issue, the Applicant arranged for another notice of the Application to be fixed to the cash register at the Premises; and
- d) the Applicant did not intend to breach the requirement and was apologetic about the non-compliance.

Key findings

- 21. Having regard to the information before it, the Authority is satisfied that a notice of the Application was not posted on the street facing window of the Premises, or otherwise fixed to the Premises in a manner that rendered it legible to passers by, for at least the period between 16 June and 8 July 2017, and likely longer.
- 22. On this basis, the Authority finds that the Application has failed to comply with the advertising requirement under clause 9 of the Regulation.
- 23. The Authority finds the explanation provided by Mr Saenphoumy on the Applicant's behalf, which focused on the fixing of the notice to the cash register inside the Premises, to fall short of addressing such non-compliance. Even if the notice was fixed to the cash register at all relevant times, the clause 9 requirement would not have been met as a notice inside the Premises would unlikely be legible to people passing the Premises.
- 24. Mr Saenphoumy's emails on 28 July and 18 December 2017 referred to the Applicant's posting of the notice on the street facing window of the Premises, but provided no details as to when it was posted, or why it was not posted between 16 June and 8 July 2017. The purported inadvertent removal of the notice does not apply to this period as, according to Mr Saenphoumy, it occurred after the relevant development application for the Premises was approved on 8 September 2017.
- 25. The Authority is not satisfied that the Applicant has made all reasonable efforts to comply with the requirement under clause 9 of the Regulation. The evidence before the Authority indicates that the Applicant did not properly understand the requirement and did not take reasonable steps to ensure that the requirement was complied with, or that any non-compliance was rectified at the earliest opportunity.
- 26. The Authority also does not consider the Applicant's failure to comply with the requirement to be of a minor or technical nature. While the exact length of the period of the non-compliance is unclear, it is sufficiently long to constitute a real compromise of the community consultation process in respect of the Application. The Authority cannot be satisfied on the available information that, notwithstanding the non-compliance, the community has properly been made aware of the Application and the opportunity to make submissions about it.
- 27. Noting that the Application had been returned to the Applicant on a number of occasions for various deficiencies in the material presented, the Authority is satisfied that the Applicant has had abundant opportunities to identify and rectify the non-compliance.
- 28. In these circumstances, the Authority considers that exercising its discretion under the Regulation to overcome the non-compliance would be inconsistent with the objects of the Act and would not be in line with the expectations of the community.
- 29. The Authority therefore refuses to exercise its discretion under clause 9C of the Regulation to find that the Applicant has made all reasonable efforts to comply with the clause 9 requirement, or that the Applicant's non-compliance with the requirement is of a minor or technical nature.
- 30. Accordingly, the Authority refuses to approve the Application as it is not satisfied that the Application meets the advertising requirement under clause 9 of the Regulation.



David Armati
Deputy Chairperson

Important Information:

In accordance with section 13A of the *Gaming and Liquor Administration Act 2007* a relevant person (the Applicant or a person who was required to be notified of the prescribed Application and who made a submission to the Authority or the Secretary in respect of the prescribed Application) who is aggrieved by this decision may apply to NCAT for an administrative review under the *Administrative Decisions Review Act 1997*.

An application to NCAT must be made within 28 days of notice of this decision being published on the liquor and gaming website <https://www.liquorandgaming.nsw.gov.au/Pages/ilga/decisions-of-interest/decisions-of-interest.aspx> and be accompanied by the fee prescribed by the regulations.

For more information please contact the NCAT Registry at Level 10 John Maddison Tower, 86-90 Goulburn Street Sydney. The NCAT website is at <http://www.ncat.nsw.gov.au/>.

Schedule

Material considered by the Authority

1. Category B Community Impact Statement signed and dated 30 September 2016.
2. Completed application dated 6 February 2017.
3. Notice of determination issued by City of Sydney Council on 8 September 2017 approving the modification of development application D/2011/370 in relation to the Premises.
4. Certification of Advertising dated 10 October 2017.
5. Correspondence between L&GNSW Licensing staff and the Applicant's legal representative between 1 February and 18 December 2017.