



Mr Neil Linstrom
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Dear Mr Linstrom

**Application for Review under section 36A of the
Gaming and Liquor Administration Act 2007
Stonebridge Golf Club, Cessnock**

The Independent Liquor and Gaming Authority (Authority) has completed its consideration of an application for review made to the Authority under section 36A of the *Gaming and Liquor Administration Act 2007* dated 22 July 2015 (Review Application) on behalf of Cessnock City Golf Club Limited.

The Review Application seeks the variation of a decision dated 1 July 2015 (Reviewable Decision) made by Mr Dominic Herschel in his capacity as a delegate of the Secretary of the NSW Department of Justice.

In the Reviewable Decision, Mr Herschel decided to issue the Stonebridge Golf Club, located at 26 Birkdale Boulevard, Cessnock (Club) a direction *not* to enter into a proposed management contract pursuant to section 41O(7) of the *Registered Clubs Act 1976*.

The Authority considered the Review Application at its meeting of 26 August 2015 and has decided to *confirm* the Reviewable Decision.

Under section 36C of the *Gaming and Liquor Administration Act 2007*, the Authority is required to publish statements of reasons with respect to those types of decisions prescribed by clause 6 of the Gaming and Liquor Regulation 2008. The attached statement of reasons has been prepared in the context of a high volume liquor jurisdiction that requires the publication of statements of reasons as soon as practicable.

Yours faithfully

Micheil Brodie
Chief Executive

- 8 OCT 2015

STATEMENT OF REASONS

INTRODUCTION

1. I refer to an application for review dated 22 July 2015 (Review Application) of a decision dated 1 July 2015 (Reviewable Decision) made by Mr Dominic Herschel in his capacity as a delegate (Delegate) of the Secretary of the NSW Department of Justice (Secretary) to issue the Stonebridge Golf Club, located at 26 Birkdale Boulevard, Cessnock (Club) a direction *not* to enter into a proposed management contract pursuant to section 41O(7) of the *Registered Clubs Act 1976*.
2. The Review Application was filed with the Independent Liquor and Gaming Authority (Authority) on 22 July 2015 by Mr Graham Donaldson, the Club President, on behalf of the Club (Review Applicant).
3. The Review Application is made under section 36A of the *Gaming and Liquor Administration Act 2007* and seeks a "variation" of the Reviewable Decision. Neither the Review Application Form nor the later submissions made by the Review Applicant's solicitors specifies what variation is sought.
4. The Reviewable Decision arose in response to a letter from Mr Graham Donaldson, Club President, to the Compliance and Enforcement Division of the Office of Liquor, Gaming and Racing (OLGR) dated 27 May 2015 advising that, in accordance with section 41O of the Act, the Club proposes to enter into a management agreement (Agreement) with an external company, Stonebridge GC Operations Pty Limited (Stonebridge GC Operations).
5. After providing the Review Applicant with an opportunity to make submissions on a bundle of all material that was before the Delegate when the Reviewable Decision was made, the Authority completed its consideration of the Review at its meeting of 26 August 2015.
6. The Authority has decided to confirm the Reviewable Decision.
7. This letter serves to provide a formal record of the decision on the Review Application with a statement of reasons that is required to be published pursuant to section 36C of the *Gaming and Liquor Administration Act 2007*. This letter is prepared in the context of the Authority's high volume liquor jurisdiction and in light of a requirement that reasons for review decisions be published as soon as practicable.

MATERIAL BEFORE THE AUTHORITY

The OLGR File

8. When considering the Review Application, the Authority had before it a copy of the entire bundle of material before the Delegate at the time the Reviewable Decision was made (OLGR File).
9. In summary, the OLGR File comprises the following material:
10. *Memorandum prepared by OLGR Compliance and Enforcement staff* making recommendations to and signed by Mr Dominic Herschel, Acting Executive Director, OLGR dated 1 July 2015 (OLGR Memo). Briefly, the OLGR Memo notes that on 28 January 2015, the Club submitted a report about a proposed loan contract to OLGR in

accordance with the requirements of section 41O of the Act. The contract was entered into on 1 February 2015.

11. The OLGR Memo notes by way of background that on 11 May 2015, the Club was notified that Mr Dominic Herschel, OLGR Acting Executive Director, in his capacity as a delegate of the Secretary, had decided *not* to exercise his power to require the Club to amend or terminate the proposed loan contract pursuant to section 41O(8) of the Act.
12. On 1 June 2015, a further application was made by the Club to the Secretary under section 41O of the Act, advising that the Club now intends to enter into a management agreement (Agreement).
13. The OLGR Memo notes that the proposed management agreement is between the Club and a private company, Stonebridge GC Operations Pty Limited. The Memo notes that Mr David Ross Mingay is the sole director and shareholder of this entity, and Mr Mingay has previously been involved with the Club in his capacity as a lender.
14. The OLGR Memo observes that, if the proposed Agreement were entered into, Mr Mingay would:

...immediately have a conflict of interest in his competing roles as the Club's mortgagee and manager.
15. The OLGR Memo notes the Club's submission that "the alternative option to this course of action considered would be to wind up operations as it was deemed that neither the Board nor the Club had the financial capacity to continue operations".
16. However the OLGR Memo observes that the unaudited financial statements provided by the Club with the proposed Agreement "indicates [*sic*] healthy cash flow and asset reserves".
17. The OLGR Memo recommends that based on this evidence, it does not appear that the Club would experience any "significant financial concerns in the short to medium term" if the Agreement is not entered into.
18. The OLGR Memo recommends that the Delegate exercise his discretion under section 41O (7) of the Act to issue the Club with a direction not to enter into the proposed management contract.
19. Attachment A to the OLGR Memo – letter from the Club to OLGR advising of the proposed Agreement dated 27 May 2015. This letter provides a brief description from the Club of the circumstances leading up to the proposal to enter into the Agreement. It notes that the purpose of the Agreement is to:

...provide the Club and its members operational and financial stability in order to place the Club in a position that it may continue to operate in the future.
20. Attachment B to the OLGR Memo – the proposed *Stonebridge Golf Course Management Agreement* (the Agreement) between Stonebridge GC Operations Pty Limited and Cessnock Golf Club Limited (undated).
21. Attachment C to the OLGR Memo – an ASIC company extract for Stonebridge GC Operations Pty Limited, ACN 605 283 109, dated 4 June 2015. This ASIC extract indicates that Mr David Ross Mingay is the sole director and shareholder of that company.

22. Attachment D to the OLGR Memo – briefing memo to Mr Dominic Herschel, OLGR Acting Executive Director, dated 11 May 2015 in relation to a previous assessment of a proposed loan agreement under section 41O of the Act in respect of the Club, recommending that a direction to amend or terminate the proposed loan agreement *not* be issued.

Review Application Material

23. Review Application Form – signed by Mr Graham Donaldson, Club President on behalf of the Review Applicant dated 22 July 2015. In this form, the Review Applicant seeks a variation of the Reviewable Decision. No stay of the Reviewable Decision is sought. The Review Application Form also attaches a copy of the Reviewable Decision.
24. Letter from the Club to OLGR dated 27 May 2015 – advising of the proposed Agreement. This letter provides a brief description by the Club of the circumstances leading up to the proposal to enter into the Agreement. It notes that the purpose of the Agreement is to "provide the Club and its member's operational and financial stability in order to place the Club in a position that it may continue to operate in the future".
25. The letter refers to the following attachments:
- (a) a members' notice as placed on the Club noticeboard and website
 - (b) a copy of the proposed Agreement
 - (c) copies of the Club's financial statements for 2014
 - (d) a copy of the Club's Constitution
 - (e) members' petition requesting that the application to enter into the Agreement be approved
 - (f) a letter dated 17 July 2015 from The Hon. Joel Fitzgibbon MP, Federal Member for the Hunter Region, advising his support for the proposal to enter into the Agreement.
26. The Authority notes that the members' notice, the Club's 2014 financial statements and the Club's Constitution referred to in the Club's letter dated 27 May 2014 were not provided in the OLGR File, the Review Application or the further submissions from the Review Applicant.
27. Copy of the Agreement – entitled *Stonebridge Golf Course Management Agreement* between Stonebridge GC Operations Pty Limited and Cessnock Golf Club Limited (undated).
28. Submission from Mr Graham Donaldson dated 22 July 2015 – whereby Mr Donaldson, the Club President, provides a submission letter stating that it "details the needs of the members to have the Agreement in place to ensure the ongoing operation and survival of the Club".
29. Briefly, Mr Donaldson contends that the specific objectives of the Agreement include:
- (a) Maximising property development and land value
 - (b) Servicing the interests of the Club members
 - (c) Daily financial control, in order to address the "lack of financial stability".
30. Mr Donaldson submits that Mr Mingay is a "successful business person" who has always "shown a positive commitment to the Club".
31. Mr Donaldson submits that "the Board remains commitment [*sic*] to adopting the right business strategies to achieve the long term survival of the Club and provide services to

the members" and that the Agreement "provides the best alternative to provide a stronger management approach to the Club's operation".

Further Submission from Review Applicant dated 4 August 2015

32. A copy of the OLGR File provided to the Authority was sent to the Review Applicant on 4 August 2015. On 18 August 2015, Mr Paul O'Sullivan of the law practice *O'Sullivan Saddington Lawyers* provided a further submission on behalf of the Review Applicant. The covering email from Ms Karen Barry noted that "the Club has its general meeting on 30 August 2015". The correspondence includes the following:
33. Submission letter from Mr O'Sullivan dated 18 August 2015 - Mr O'Sullivan submits on behalf of the Review Applicant that the debt owed to Mr Mingay in the amount of \$10,228,104.32 "cannot be repaid" unless the Club completes an ongoing development of residential land at the Club.
34. Mr O'Sullivan refers to the Club's "perilous financial position". The Review Applicant contends that the Club is "likely to be placed into administration" should the Agreement not proceed.
35. The Review Applicant submits that the proposed Agreement is in the best interests of the Club and its members and that "no member has raised objection" to the Agreement despite the required statutory notice having been published on the Club's noticeboard and website. The Review Applicant advises that Mr Mingay and a representative of the Club are "willing to appear before the Authority if required to do so".
36. Statutory declaration of Mr Darren John Robson, Company Secretary, Stonebridge GC Operations Pty Limited, dated 18 August 2015 – whereby Mr Robson states that he is the Group Financial Controller of the Daracon Group and the company secretary of Stonebridge GC Operations.
37. [The Authority notes that the Daracon Group is an entity with which the Club has entered into a separate project delivery agreement for the development of residential land at the Club in 2006.]
38. Mr Robson submits that in his capacity as Group Financial Controller of the Daracon Group, he has had "significant exposure to the financial affairs" of the Club because of the project delivery agreement between the Club and Daracon Property Pty Limited, and because of Mr David Mingay's "continued financial support of the Club".
39. Mr Robson makes no further submissions, but attaches the following annexures to his statutory declaration:
40. Annexure A to Mr Robson's statutory declaration dated 18 August 2015 – being the Club's Financial Report dated 17 August 2015, under the hand of Mr John Craft, the Finance Director of the Club.
41. Annexure B to Mr Robson's statutory declaration dated 18 August 2015 – comprising plans outlining the remaining stages to be developed pursuant to the Club's project delivery agreement with Daracon Property Pty Limited.

STATUTORY OBJECTS AND CONSIDERATIONS

42. Section 36A(1)(c) of the *Gaming and Liquor Administration Act 2007* prescribes a decision made under section 41O of the *Registered Clubs Act 1976* to be a reviewable decision.
43. Section 36A(4) of the *Gaming and Liquor Administration Act 2007* provides that, in determining an application for review, the Authority may confirm the decision, vary the decision or revoke the decision under review.
44. Section 41O of the *Registered Clubs Act 1976* contains requirements relating to loan contracts and contracts involving the management of clubs by private businesses, as follows:

41O *Requirements relating to loan contracts and contracts involving the management of clubs by private businesses*

(1) *In this section:*

"loan contract" means a contract under which the core property (within the meaning of section 41J) of a registered club is used as security for a loan of money to the club, but does not include any such contract with a bank, authorised deposit-taking institution or person or body (or class of persons or bodies) prescribed by the regulations.

"management contract" means a contract under which a person who is not a member of the governing body of a registered club, or the secretary or a manager or employee of a registered club, exercises functions in relation to the management of the business or affairs of the club.

- (2) A registered club must not enter into any loan contract or management contract with any person unless the requirements of this section are complied with.
- (3) At least one month (or such other period as may be prescribed by the regulations) before a registered club enters into any proposed loan contract or management contract, the club must notify the members of the club of the proposed contract by means of a notice:
 - (a) displayed on a notice board on the club's premises, and
 - (b) published on the club's website (if any).
- (4) Any such notice is to be in a form approved by the Director-General.
- (5) At least one month before a registered club enters into any proposed loan contract or management contract, the club must provide the Director-General with a report on the proposed contract.
- (6) Any such report is to be provided in a form approved by the Director-General and comply with such standards and requirements as the Director-General determines.
- (7) If the Director-General is of the opinion that the proposed contract does not comply with the requirements of this Act or is not in the interests of the club or its members, the Director-General may, by notice in writing given to the club, direct the club:
 - (a) not to enter into the proposed contract, or
 - (b) to amend the proposed contract in accordance with the Director-General's direction before entering into the contract.
- (8) If the Director-General is of the opinion that a loan contract or management contract entered into by a registered club does not comply with the requirements of this Act or is not in the interests of the club or its members, the Director-General may, by notice in writing given to the club, direct the club:
 - (a) to amend the contract, or
 - (b) to terminate the contract,in accordance with the terms of the direction.

Note: A direction by the Director-General under subsection (7) or (8) is reviewable by the Authority under section 36A of the *Gaming and Liquor Administration Act 2007*.

- (9) The need to protect the interests of the club and its members is to be the paramount consideration in making any decision for the purposes of subsection (7) or (8).
- (10) A registered club must comply with a direction given to it by the Director-General under this section.

- (11) *Any costs incurred by the Director-General in reviewing a report under this section are required to be paid by the registered club that provided the report unless the Director-General determines otherwise. Any such costs that are due to be paid may be recovered by the Director-General in a court of competent jurisdiction.*

REASONS

45. The Authority considered the Review Application at its meeting of 26 August 2015 and decided to confirm the Reviewable Decision.
46. The Authority is satisfied, on the basis of the Authority's *OneGov* licensing record, that the Club holds a club licence under the *Liquor Act 2007* and is licensed to sell liquor for consumption on the premises between 5:00am and 12:00 midnight seven days per week. The Club is licensed to sell liquor for takeaway between 5:00am and 10:00pm Monday through Saturday and from 7:00am to 10:00pm on Sunday.
47. The licence record further discloses that the Club has a gaming machine threshold of 15 and holds 15 gaming machine entitlements.
48. The Authority is satisfied, on the basis of the letter from Mr Graham Donaldson, Club President, to OLGR dated 27 May 2015 that the Club proposes to enter into the Agreement, being a management contract with an external entity, Stonebridge GC Operations.
49. The Authority is satisfied, on the basis of the letter from Mr Donaldson to OLGR dated 27 May 2015, that a minority of Club's members (87 of the 753 members) have signed a petition in support of the proposed management Agreement.
50. The Authority is satisfied, on the basis of the ASIC extract for Stonebridge GC Operations, that its sole director and shareholder is Mr David Ross Mingay.
51. The Authority is further satisfied, on the basis of the OLGR Memo dated 11 May 2015 and the letter from OLGR to Mr Neil Linstrom, the Club's General Manager that on 1 February 2015 the Club entered into a loan contract with Mr Mingay, with a total amount owing of \$10,228,104.32. The Authority is satisfied that this loan agreement remains in effect and has not been the subject of an adverse direction from the Secretary.
52. The Authority is also satisfied that Mr Mingay, through his companies in the Daracon group (including Daracon Property Pty Limited), holds substantial mortgages over Club core property as collateral for the money lent to the Club. This finding is made on the basis of the OLGR Memo dated 11 May 2015 and the letter from *O'Sullivan Saddington Lawyers* to the Authority dated 18 August 2015.
53. The Authority is satisfied, on the basis of the OLGR Memo, that the current secured loan arrangements between the Club and the Daracon Group are arm's length commercial relationships.
54. However, the Authority is satisfied that the proposed Agreement would give Stonebridge GC Operations, a related entity to the Daracon Group controlled by Mr Mingay, a high level of control over not only the delivery of specific services by the Club, but capital improvements to Club property, the sale of liquor and the operation of gaming machines and the day to day financial control of the Club.

55. The Authority agrees with the observation made by OLGR's Compliance and Enforcement Division in the OLGR Memo that the mortgagee of the Club property would no longer be in an arm's length relationship with the Club – in that the developer (Daracon Property Pty Limited) and the proposed Manager (Stonebridge GC Operations) are associated entities.
56. The Authority is satisfied that, if the Agreement is entered into, a related entity to the Club's major lender and mortgagee will also have substantial financial control of the Club through a related entity, Stonebridge GC Operations.
57. The Authority is also satisfied that the following provisions of the Agreement will tend to compromise the ability of the Governing Body to exercise direct control over the business of the Club and ensure its compliance with the Act and related legislation, for a prolonged period:
 - (a) Clause 2, which provides that with the appointment of Stonebridge GC Operations as Manager of the Club, "the Board delegates all of its functions under the constitution to operate the Golf Course to the Manager"
 - (b) Clause 4, which provides that the Term of the Agreement is five years with an option of a further three years
 - (c) Clause 14, which appears to contemplate that the Club's liquor licence may be held by a party other than the Club – which would mean that the Club would no longer be a registered club within the meaning of the Act
 - (d) Clause 15, which provides that Stonebridge GC Operations, as Manager, must appoint Operating Managers and such other persons as are from time to time required by the *Gaming Machines Act* 2001 and that Stonebridge GC Operations must do all things necessary to apply for and obtain any gaming licence, permit, approval or authorisation required by OLGR with respect to the Club within 60 days of the commencement date of the Agreement
 - (e) Clause 18.1, which provides that the right of the Club and its officers to access the Golf Course is subject to the provision of reasonable notice to the Manager
 - (f) Clause 18.2, which provides that Cessnock Golf Club Limited, as Owner, "is not entitled to alter, modify, add to, replace or refurbish any part of the Golf Course without the prior written consent of the Manager"
 - (g) Clause 19.1, which provides that "all employees, including Executive Staff" are to be employed by the Club "but will be under the day to day control of the Manager". Clause 19.2, which provides that the Manager "is responsible for the hiring, promotion, training supervision and dismissal of all employees". Clause 19.4, which requires that Club concerns about the competency of employees are to be dealt with through the mechanism of the Consultative Committee. The provisions in Clause 19, considered together, are likely to fetter the scope and ability of the Club Board to directly control and be responsible for the Club's compliance with the Act, including but not limited to compliance with section 10 and Parts 4 and 4A of the Act
 - (h) Clause 20, which provides that all "replacement, repairs and maintenance to the Golf Course and its contents", any "capital improvements" and any "emergency repairs" are the responsibility of Stonebridge GC Operations as Manager.
58. The Authority notes that "Capital Improvements" is a term defined in the Agreement as "any program of capital improvement to the Golf Course, involving addition, extensive renovation or refurbishment to the Golf Course designed substantially to upgrade or change the nature or image of the Golf Course (as opposed to the normal or cyclical upkeep of the Golf Course)".
59. The Authority notes that "Golf Course" is defined to include not only the land and all structures on the land, but the "business of golf" on the land, the "operation of the

Clubhouse, including gaming, bistro, bar sales and the pro shop" on the land; and the "business of bowls" on the land.

60. The Authority is satisfied, on the basis of the undated *Stonebridge Golf Course Management Agreement* document, that the proposed Agreement would give Stonebridge GC Operations extensive control over both the entire business of the Club and the land on which the Club is located, with inadequate control as to the Club's affairs by the Club's governing body and secretary, whose functions and input will be mediated through the mechanism of the Consultative Committee and subject to arbitration in the event of dispute.
61. By reason that the proposed Agreement involves vesting significant managerial and financial control over the Club in a related entity to a major lender and mortgagee to the Club, the Authority is satisfied that there is substantial scope for a conflict of interest to arise between the interests of the proposed management company, the lender/ mortgagee and the Club and its members.
62. The Authority notes that the protection of the interests of the Club and its members is the "paramount consideration" under section 41O(9) of the Act when considering whether to issue a direction not to enter into a relevant loan or management contract with respect to a registered club.
63. The Authority is satisfied that the complete delegation of the Club Board's responsibilities to Stonebridge GC Operations as Manager in the proposed Agreement is likely to frustrate the operation of provisions of the Act, including but not limited to section 10 and Parts 4 and 4A of the Act, which require the governing body to be in actual control of and exercise actual responsibility over a registered club's business, management and the accountability of its officers, executives and employees.
64. By excluding the Club governing body from oversight of Club operations, the Agreement potentially exposes the Club to inadvertently breaching other related legislative requirements, such as section 73 of the *Gaming Machines Act 2001*, which prohibits a hotel or club from sharing the receipts from the operation of an approved gaming machine, or the making of payments by way of commission or allowance from any such receipts. The scope of this Agreement also gives rise to some cause for concern as to the degree to which the governing body will actually have control of the sale or supply of liquor by the Club (as licensee) for the purposes of section 92 of the *Liquor Act 2007*.
65. The Authority further notes that the Agreement is silent as to the role of a Club secretary, who, as provided for by section 32 of the Act, is the chief executive officer of a registered club.
66. The Authority notes, by way of example, that under section 57F of the Act, disciplinary action may be taken by the Authority against a registered club on the grounds that, *inter alia*, the club has not complied with section 10(1) of the Act; the supply of liquor on the premises of the club has not been under the control of the governing body of the club; the club has contravened a provision of the Act; or that a rule of the club specified by section 30(1) or otherwise has been habitually broken.
67. The Authority is not satisfied that the delegation of management power provided by the Agreement would leave the Club, operating through its governing body and secretary, in a sound position to ensure compliance with the Act and related legislation. Nor would the governing body and secretary be in a sound position to protect the interests of its members, should they diverge from the financial interests of the proposed Manager or its related entities.

68. The Authority observes that it is possible for a contract to be agreed between a registered club and a company providing management services, whereby defined services are provided in consideration for specified remuneration, without compromising the control of the club's affairs by the club's governing body and secretary and the ability of those officers to give paramount consideration to the interests of the club and its members.
69. The Authority has considered the Review Applicant's submissions on the Reviewable Decision, including its submissions that the Club is in a difficult financial position and that the purpose of the Agreement is to facilitate the development of the Club and its golf course for the purpose of maximising the prospects of the residential development project underway involving the Daracon Group.
70. While there is recent evidence from 2013 of a decline in the Club's financial position, evidence from 2014 of some improvement in the Club's financial position, the Authority understands that the purpose of the Agreement is to not only allow the Club to merely sustain its operations but to improve its performance.
71. On the material before the Authority, and in the absence of any comprehensive independent financial analysis presented by the Club or OLGR, the Authority is *not* satisfied that the Club is not financially viable unless a management agreement *in the terms specified by this Agreement* is entered into.
72. Nevertheless, it is open to the parties to make appropriate arrangements to maximise the development of the Club's core assets (its Golf Course and the Club premises) without the governing body and Secretary relinquishing control over the Club's affairs to the extent provided by this Agreement.
73. While the Review Applicant has sought the variation of the Reviewable Decision, it has not explained how it proposes the decision be varied. On the material before it the Authority is *not* satisfied that the Agreement as presently drafted represents the only viable option for the Club.
74. Section 41O of the Act contemplates that registered clubs may enter into management contracts with third parties, but the Authority is not satisfied that it is in the public interest, in respect of the Act, nor in the interests of a club or its members, for a club to continue to operate with all the statutory privileges that are conferred upon a registered club if that entity in practice operates in the mode of a privatised business.

CONCLUSION

75. The Authority has decided to **confirm** the Reviewable Decision pursuant to section 36A(4) of the *Gaming and Liquor Administration Act 2007*.
76. The Authority's Chief Executive is open to meeting representatives of the Club to discuss alternative means by which services, including management services, may be delivered by a third party in a manner that does not give rise to the concerns identified by the Authority in this decision.



Micheil Brodie
Chief Executive

DATED 8 / 10 / 2015