



January 20, 2012

Job # 2301838-015

SD-35 Ventures Ltd.  
163 – 2111 Main Street  
Penticton, BC V2A 6W6

Dear Mr. William Irvine:

**Re: Licensee Retail Store Liquor Licence No. 195308**  
**Establishment: Cherry Lane Liquor Store**  
**Current Location: 163 – 2111 Main Street in Penticton**  
**Proposed Location: 131 – 2111 Main Street in Penticton**

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### Introduction

The licensee, SD-35 Ventures Ltd., has requested the General Manager of the Liquor Control and Licensing Branch (the Branch) to exercise discretion under the Liquor Control and Licensing Regulation (the Regulation) Section 14 (5) and Policy 4.4.5 of the Licensing Policy Manual (the Policy), which prohibits a Licensee Retail Store (LRS) from relocating within one km of an existing LRS or LRS application.

On August 24, 2011, the Branch received an application to relocate the subject LRS licence from # 163 – 2111 Main Street in Penticton to 131 – 2111 Main Street in Penticton. In making his application, the licensee requested an exercise of discretion to Regulation 14(5) and Policy 4.4.5 which restricts an LRS from relocating within one km of another LRS.

Branch staff's initial review of the relocation application included plotting the current and proposed LRS site on a map using Streets & Trips. This revealed one licensed LRS within a one km radius: Barley Mill Cold beer & Wine Store, LRS # 191859.

On December 21, 2011, the Liquor Control and Licensing Branch sent a staff report to the licensee relating to this application. The licensee was provided with an opportunity to respond to the information contained in the staff report package before it was submitted to the Deputy General Manager for consideration. On December 22, 2011, the licensee submitted an email to Branch staff confirming that he had no comments regarding the staff report.

A review of the applicant's request for discretion and the staff report is now complete.

### Issue

Has the licensee met the conditions under which the General Manager may approve the relocation of a LRS to a location within one km of an existing LRS or LRS application as set out in Policy 4.4.5 or demonstrated that the licensee's circumstances are unique or otherwise warrant an exercise of discretion under the Section 14(6) of the Regulation.

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**Legal and Policy Framework*****Liquor Control and Licensing Regulation (the "Regulation")***

- 14(5) Subject to sub-Section (6), an application to transfer a licence in respect of a licensee retail store to a new establishment must not be approved unless
- (a) the proposed new establishment is at least 1.0 km from
    - (i) the site of any existing licensee retail store; and,
    - (ii) the site of any establishment to which an application referred to in sub-Section (2) relates; and,
  - (b) the proposed new establishment is:
    - (i) located within the jurisdiction of the same local government or First Nation as the site of the existing licensee retail store; or,
    - (ii) within five km of the site of the existing licensee retail store.
- (6) The General Manager may approve an application that does not comply with sub-Section (5) (a).

**Licensing Policy Manual (the "Policy")**  
**Policy 4.4.5**

Applications to relocate a LRS will not be approved by the General Manager if the proposed site is within one km of an existing LRS or the site of an LRS application in progress. Applications to relocate made prior to February 15, 2010, are not subject to this policy. Licensees with relocation applications currently in progress who decide to seek a different location for their LRS will be required to apply for a new LRS location or revert to the location of their original LRS application. If they choose to apply for a new location, the relocation application will be subject to the distance criterion of one km.

Notwithstanding the above, the conditions under which the General Manager may approve the relocation of an LRS to a location within one km of another LRS include, but are not limited to, the following circumstances:

- Where a store loses their leased location due to circumstances beyond their control and the only reasonable location is within one km of another store, and where it would not be contrary to the public interest to allow the relocation; or,
- Where there is a re-development on the same site as the LRS or LRS application and the licensee needs to move on that site as a result; or,
- Where there is a large natural or artificial barrier between the stores, (e.g. a river or divided highway); or,
- Where someone entered into a lease or an offer to purchase for a new site prior to the regulation coming into effect, and has an on-going financial commitment as a result of that transaction.

**Licensee's Reasons for Request for Discretion**

- The licensee is being forced to relocate their LRS to another site as they have lost valid interest at their current location.
- Cherry Lanes Shopping Centre, the landlord, notified the licensee on December 15, 2011 of their intent to convert Unit 163 into a gas station convenience store.
- Article 13.01 of the lease agreement allows the landlord to move the LRS from their current site to another site within the shopping complex.
- The landlord is offering Unit 131 to the licensee which allows the licensee to remain on the same property thereby maintaining their existing customer base.
- Unit 131 will be created, at the landlord's expense, from unwanted space currently used by Save On Foods grocery store.
- The proposed space will be a fully contained unit, completely separated from the grocery store with one exterior entrance and one mall entrance.

### Analysis

Section 4.4.5 of Branch policy sets out examples of when the general manager may exercise discretion to policy. Discretion has been exercised under narrow circumstances in order not to undermine the purpose of the distance criterion itself.

The licensee's argument for granting discretion claims they have lost valid interest due to circumstances beyond the licensee's control. In reviewing the licensee's submission the following is noted:

- Supporting documents submitted by the licensee includes a copy of their lease agreement and a letter from the landlord. Written notification from the landlord confirms their intent to move the LRS from its current location in order to accommodate a gas retailer with a new convenience store. Article 13.01 of the lease agreement allows the landlord to relocate the LRS to another unit on the same property. Therefore I'm satisfied the licensee did lose valid interest through no fault of their own.
- The proposed location is approximately 95 metres from the current location. In cases where a licensee has lost valid interest through no fault of their own, it is reasonable for the licensee to relocate in the same general area so as not to lose their customer base.
- Branch staff identified one LRS store, LRS # 191859, within 1.0 km of the proposed location. The current site of the licensee's LRS is approximately 0.62 kms from LRS # 191859. These two stores are currently operating within 1.0 km of each other therefore moving to the proposed site will not increase market concentration in the area.
- The landlord's written notification confirms their intent to create a new unit for the licensee. The unit will be constructed from space currently used by Save On Foods grocery store. Regulation and policy for licensee retail stores requires separation between licensed and unlicensed areas. The licensed establishment cannot appear to be associated with any other business as per Section 6.9.5 of Branch policy.

### Decision

The purpose of the regulations is to prevent further market saturation and to increase certainty for other LRS operators. I have considered the regulations, the policy, the reasons put forth by the licensee, and the staff report.

Having established that the licensee has lost valid interest, I have determined that the applicant has satisfied the criteria under which the general manager may grant discretion. I have also considered that the LRS is moving a minimal distance from its current site and would not increase market concentration in the area.

Based on the foregoing, I have decided that the proposed relocation is not contrary to the public interest. I am therefore approving this request for discretion and the application to relocate the subject LRS may proceed subject to meeting the requirements of Policy 6.9.5.

Yours sincerely,



Cheryl Y. Caldwell  
Deputy General Manager  
Licensing and Local Government Liaison

cc: Chandra Morrison, Senior Licensing Analyst  
Erica Owsianski, Case Manager

### 6.9.3 Standalone requirements where an LRS is owned by a different legal entity than the associated LP, LRS, or licensed hotel (including associated FP).

#### 1. Location and Physical Requirements

- LRS locations approved by the general manager prior to this policy taking effect may continue;
- Use of an existing approved common staff door may continue but no new common staff doors will be approved; and
- Common liquor storage areas with the associated business are not permitted.

#### 2. Naming and Appearance Requirements

- The LRS may use a common name and other visual identifiers of the associated business (e.g. logos, trademarks, signage, colour schemes).

#### 3. Separation of Business Requirements

- LRS must maintain and have available upon request separate business and financial records (e.g. bank accounts, credit accounts) for each LRS licence; and
- LRS must not operate as a loss leader in support of any other business.

#### 5. Advertising and Promotional Requirements

- Joint advertising and promotions between the LRS and any associated LP, LRS, or licensed hotel (including associated FP) are permitted. The LRS may:
  - a) Sell trademarked or brand name non-liquor products of the associated business;
  - b) Conduct joint advertising with the associated business;
  - c) Offer discounts by or in an LRS, based on purchases in the associated business;
  - d) Offer gift cards that are associated with or redeemable by the associated business; and
  - e) Operate a customer loyalty program with the associated business.

### 6.9.4 Standalone requirements upon the transfer of ownership, relocation, or structural change of an LRS

The specific nature of the associations between LRS and any associated LP, LRS, or hotel (including associated FP) is affected by ownership transfers, relocations, or structural changes.

For standalone requirements related to ownership transfers, refer to section 4.3. For standalone requirements related to relocations, refer to section 4.4.5. For standalone requirements related to structural changes, refer to section 6.5.6.

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### 6.9.5 Prohibited associations for licensee retail stores

LRS are prohibited from appearing to be associated with any other business that is not an LP, LRS, or licensed hotel (including associated FP). Standalone policy for LRS not associated with an LP, LRS, or licensed hotel (including associated FP) is as follows:

#### 1. Location and Physical Requirements

- LRS must be located in
  - A permanent, free standing building that does not contain another business; or

- If in a building in which there are other businesses, the LRS must have its own entrance and exit separate from any other business and a solid floor-to-ceiling wall between the LRS and any other business.
- A separate and dedicated public entrance must be maintained for both the LRS and the shared or adjoining area with no public entrance to either facility from the other, although they may share a common public thoroughfare such as a lobby;
- Common staff door links with any other business are not permitted; and
- Common liquor storage areas with any other business are not permitted.

## **2. Naming and Appearance Requirements**

- An LRS may not use a name or other visual identifier (e.g. logos, trademarks, signage, colour schemes) of another business.

## **3. Separation of Business Requirements**

- LRS must maintain and have available upon request separate business and financial records (e.g. bank accounts, credit accounts) for each liquor licence; and
- LRS must not operate as a loss leader in support of any other business.

## **4. Advertising and Promotional Requirements**

- Selling trademarked or brand name non-liquor products of another business is prohibited in an LRS, unless these products are also available for wholesale purchase by other licensees and do not share the other business' name.
- LRS may advertise the products sold in the LRS, but joint advertising involving an LRS and another business is prohibited.
- Offering discounts by or in an LRS based on purchases in another business is prohibited.
- Gift cards may not be associated with or redeemable by another business.
- Operating a customer loyalty program in an LRS which recognizes purchases made in another business is prohibited.

### ***Authority References***

[Liquor Control and Licensing Regulations, section 14(3) and 14(3.1) and Liquor Control and Licensing Branch Policy]