



June 4, 2012

Job # 2298728-36

Harbans Randhawa
Three Gables Hotel
360 Martin Street
Penticton BC V2A 5K4

Dear Harbans Randhawa:

**Re: Application for a Transfer of Location – Licensee Retail Store (LRS)
Request for Discretion to Branch Policy, Section 4.4.5
Licensee/Applicant: Randhawa, Harbans
Establishment Name: Three Gables Hotel, LRS #193061
Current Location: 360 Martin Street, Penticton
Proposed Site: 1196 Fairview Road, Penticton**

Introduction

The licensee, Harbans Randhawa, has requested the General Manager of the Liquor Control and Licensing Branch (the Branch) to exercise discretion under Section 14 of the Liquor Control and Licensing Regulations (the Regulation) and Policy 4.4.5 of the Licensing Policy Manual (the Policy), which prohibits a Licensee Retail Store (LRS) from relocating within 1 km of an existing LRS or LRS application.

On February 28, 2012, the Branch received an application to relocate the subject LRS licence from 360 Martin Street, Penticton to 1196 Fairview Road, Penticton. In making her application, the licensee requested an exercise of discretion to Section 14 of the Regulation and Policy 4.4.5 which prohibits an LRS from relocating within 1 km of another LRS.

Branch staff's initial review of the relocation application included plotting the proposed LRS site on a map using Streets & Trips. This revealed one licensed LRS within a 1 km radius: Government Street Liquor Store & Wine Shoppe (GSLs), LRS #195446.

On April 26, 2012, 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. The licensee was given until May 9, 2012, to provide a submission if they wished to comment. On May 8, 2012, the licensee provided LCLB with a submission in response to the staff report.

A review of the licensee's request for discretion, the staff report and the licensee's response to the staff report is now complete.

Liquor Control and
Licensing Branch

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Issue for Consideration

Has the licensee met the conditions under which the General Manager may approve the relocation of a LRS to a location within 1 km of an existing LRS or LRS application as set out in section 14(5) and (6) of the Regulation and Policy 4.4.5?

Legal and Policy Framework***Liquor Control and Licensing Act (the "Act")*****Transfer of licence**

21(1) a licence must not be transferred or otherwise dealt in or disposed of without the written consent of the General Manager.

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 1 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 1 km.

Notwithstanding the above, the conditions under which the General Manager may approve the relocation of an LRS to a location within 1 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 1 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's arguments presented for the General Manager's consideration are summarized as follows:

- A) The site plan reveals there is a natural barrier located between the proposed site and GSLS. The natural barrier, being Main Street, is a major thoroughfare that divides the city.
- B) Although the proposed LRS site is within 1 km of GSLS, the fact that it is .94 km away would not pose any threat of market certainty to GSLS and provide no market saturation, as GSLS is in a different area of town.
- C) There are 4 existing and operating LRS's located in the downtown core of Penticton, one of which is the applicant's. All four LRS's are within a 1 km radius, and one of those LRS's is located immediately across the street from the applicant's current site. The licensee's move out of the downtown core will allow the remaining LRS's to have more market certainty and to operate independently of each other.
- D) The current LRS location is housed in an old building and is not cost effective to renovate and needs to be torn down in the near future. The new location will give the licensee more of an opportunity to have a new building.
- E) The proposed relocation is close to the 1 km criteria, and measured by driving distances is greater than 1 km
- F) The licensee has an ongoing financial commitment to the proposed property which was purchased prior to the 1 km regulation coming into effect.

The following is a summary of the licensee's response to the Staff Report:

With regard to Main Street, although there are no meridians, it serves as a divider of the city into east and west. The new location will have its own westerly district target market to serve as no one is serving it right now.

Although the licensee agrees that it is not possible to know for sure what impact the relocation of the LRS would have on GSLS, customers in the City of Penticton generally go to their neighborhood liquor or beer and wine store. GSLS is in a different part of Penticton with its own customer base.

Analysis

Section 4.4.5 of Branch Policy sets out the circumstances under which the General Manager may exercise discretion to the policy. The General Manager must consider whether there are relevant circumstances that are sufficiently distinct to warrant an exercise of discretion.

The rationale for the 1 km separation requirement is to prevent further market saturation and to provide greater certainty for LRS operators.

It is not sufficient for the licensee to simply argue that they do not like the policy or the policy impairs their ability to do business in a manner that they would prefer. This type of submission

does not usually provide sufficient reasons for the general manager to exercise discretion to Branch policy.

I have considered the reasons put forward by the licensee and will address them in turn.

A) Main Street is a natural barrier.

A natural barrier is a mountain, a river, a lake, etc. An artificial barrier might include a divided highway. It is my view that a barrier means there is no means of access because the way is barred.

Main Street is only a street. There is no meridian, and there are ample intersections and crossings. Main Street is not a barrier.

I am unable to conclude that the two sites attract different markets and are therefore analogous to a physical or natural barrier separating the two LRS's. It does not seem unreasonable that people would use both LRS's, for different reasons, and there is no physical or natural barrier that prevents them from doing so.

B) The proposed LRS site does not pose any threat of market certainty to GSLS.

The regulations state that an LRS cannot relocate within 1 km of another LRS except if approved by the general manager. Government increased the distance restriction from .5 km to 1 km in February 2010 to provide greater market certainty to LRS operators. Industry continues to generally support the distance restriction set down in regulation.

C) I have considered the fact that there are 3 other LRS's within close proximity to the licensee's current site and that the 1 km rule came into effect after these LRS's were licensed.

At the time all LRS applications were originally accepted, by regulation, an LRS had to be on or appear to be on the same property as their associated liquor primary (LP) establishment. This resulted in LRS's being grouped together because LP's were generally grouped together, particularly in downtown cores.

This is not a unique situation as it applied to all LRS's at the time they were originally licensed. It is not a reason for exercising discretion to allow this LRS to move within 1 km of another one.

D) I have considered that the current LRS is housed in an old building and, according to the licensee, would be expensive to renovate.

This is not unique. The licensee would like to move to a better location and to a better building. This is a business decision. Absent the regulation requiring a distance restriction of 1 km between LRS's, she would be able to do that. Unfortunately, her situation is not unique as many licensees would like to move to more attractive locations. The regulations allow the licensee to relocate her LRS as long as it is not within 1 km. of another LRS.

- E) The proposed relocation is close to the 1 km criteria, and measured by driving distances is greater than 1 km.

The LCLB consistently measures distances "door to door" and "as the crow flies". By this measure, the proposed LRS location is within the 1 km restriction set down in regulation.

- F) There was a previous financial commitment.

There is no evidence provided by the licensee that there was a financial commitment made prior to the regulations changing in February 2010. According to the licensee, s.22 purchased the new property in 2007; however, the licensee was not on the title.

Decision:

I have considered the regulations, the policy, the reasons put forth by the licensee, and the staff report.

I have determined that the arguments put forth by the licensee are not sufficiently distinct to warrant an exercise of discretion.

I have decided that the proposed relocation is therefore denied.

Yours sincerely,



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

Copy: Lesley Metcalfe, Senior Licensing Analyst
Randy Brown, Liquor Inspector