



**WESTERN
AUSTRALIAN
GOVERNMENT**
Gazette

ISSN 1448-949X

PRINT POST APPROVED PP665002/00041

131



PERTH, FRIDAY, 24 JANUARY 2014 No. 9 SPECIAL

PUBLISHED BY AUTHORITY JOHN A. STRIJK, GOVERNMENT PRINTER AT 12.15 PM

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LOCAL GOVERNMENT ACT 1995

**SHIRE OF
DONNYBROOK-BALINGUP**

**OUTDOOR EATING AREAS
LOCAL LAW 2013**

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LOCAL GOVERNMENT ACT 1995

SHIRE OF DONNYBROOK-BALINGUP

OUTDOOR EATING AREAS LOCAL LAW 2013

Under the powers conferred by the *Local Government Act 1995* and under all other powers enabling it, the Council of the Shire of Donnybrook-Balingup resolved on 27 November 2013 to make the following Local Law.

PART 1—PRELIMINARY

1.1 Citation

This local law may be cited as the *Shire of Donnybrook-Balingup Outdoor Eating Areas Local Law 2013*.

1.2 Commencement

This local law comes into operation 14 days after the date of its publication in the *Government Gazette*.

1.3 Purpose and effect

(1) The purpose of this local law is to provide for the regulation, control and management of outdoor eating areas in any public place within the district.

(2) The effect of this local law is to control outdoor eating areas so that they do not interfere with the safe and reasonable movement of pedestrians and vehicles as well as to encourage high quality outdoor dining to enhance amenity, vitality and ambience of towns within the district.

1.4 Repeal

The following local laws are repealed on the day that this local law comes into operation—

(1) *Shire of Donnybrook-Balingup Eating Areas in Streets and Other Public Places Local Law 2002*, published in the *Government Gazette* on 13 August 2002; and

(2) *Shire of Donnybrook-Balingup Eating Areas in Streets and Other Public Places (Amendment) Local Law 2003*, published in the *Government Gazette* on 6 June 2003.

1.5 Transitional

A licence issued in accordance with the *Shire of Donnybrook-Balingup Eating Areas in Streets and Other Public Places 2002*—

- (a) is to be taken to be a licence granted under this local law;
- (b) is to be valid for the period specified in the licence; and
- (c) may be either cancelled or suspended under this local law.

1.6 Application

This local law applies throughout the district.

1.7 Interpretations

In this local law, unless the context otherwise requires—

Act means the *Local Government Act 1995*;

outdoor eating area means an area in which tables, chairs and other structures are provided for the purpose of the supply of food or beverages or both by the public or the consumption of food or beverages or both by the public;

outdoor eating means outdoor dining or drinking or both in a public place;

applicant means a proprietor of a food business who applies for a licence issued by the local government under this local law to set up and conduct an outdoor eating area;

authorised person means the CEO or any other person authorised by the local government under section 9.10 of the Act to be an authorised person for the purposes of enforcing the provisions of this local law;

CEO means the Chief Executive Officer of the local government;

Schedule means a schedule to this local law;

local government means the Shire of Donnybrook-Balingup;

local government property means anything except a thoroughfare—

- (a) which belongs to the local government;
- (b) of which the local government is the management body under the *Land Administration Act 1997*; or
- (c) which is an “otherwise unvested facility” within section 3.53 of the Act;

Council means the Council of the local government;

district means the district of the local government;

food business has the same meaning as in the *Food Act 2008*;

fee means a fee or charge imposed under sections 6.16 to 6.19 of the Act;

furniture means chairs, tables, waiters’ stations, planter boxes, umbrellas, screens, barriers, awnings, portable gas heaters and any other structure set up in the outdoor eating area;

Health Act means the *Health Act 1911*;

licence means a licence issued by the local government under this local law to set up and conduct an outdoor eating area;

licence period means the period referred to in clause 2.9;

licence plan means a plan attached to and forming part of a licence depicting the parts of a street or public place within which an outdoor eating area may be set up and conducted;

licensee means a proprietor of a food business who holds a valid licence;

Liquor Control Act means the *Liquor Control Act 1988*;

local public notice has the meaning given to it in section 1.7 of the Act;

month means calendar month;

no smoking area means an outdoor eating area where smoking a tobacco product is not permitted and no smoking signs are displayed;

no smoking sign means a sign displaying the phrase “no smoking” or “smoking prohibited” in letters that are at least 20mm in height or the symbol designated in ISO 7010 : 2003 indicating smoking is prohibited and having a diameter of at least 70mm;

pedestrian mall means any road or portion of a road that is gazetted as a pedestrian mall;

public place means any thoroughfare, pedestrian mall or local government property;

proprietor has the same meaning as in the *Food Act 2008*;

Regulations means the *Local Government (Functions and General) Regulations 1996*;

smoke has the same meaning as the *Tobacco Products Control Act 2006* and “smoking” has its correlated meaning;

thoroughfare has the meaning given to it in the Act;

tobacco product has the same meaning as the *Tobacco Products Control Act 2006*;

utility means any public or private body which provides an essential service, such as electricity, gas, water, drainage, sewerage, telecommunications or traffic control, and has equipment on, in or under a public place for that purpose;

valid, in relation to a licence issued under this local law, means current and for which all the associated fees have been paid in full; and

vehicle crossing means a crossing used by vehicles to allow access from a thoroughfare to private land or a private thoroughfare.

PART 2—LICENCE

2.1 Licence required

Unless exempt under clause 2.2, a person shall not set up or conduct an outdoor eating area in any public place—

- (a) other than in a portion of a public place adjoining a food business;
- (b) unless the person is the proprietor of a food business or is acting on behalf of the proprietor of a food business referred to in paragraph (a);
- (c) unless the person is the holder of valid licence issued under this local law; and
- (d) other than in accordance with the licence plan and any terms and conditions set out in, or applying in respect of, the licence.

2.2 Exemptions

(1) The local government may exempt a person or class of persons in writing from the requirement to have a licence.

(2) Any exemption in subclause (1) may be exercised—

- (a) on the application of a person; or
- (b) at the local government’s discretion.

(3) An exemption in subclause (1) may be given subject to any conditions the local government sees fit.

- (4) An exemption may apply to, or in respect of—
- (a) a particular event, street festival, carnival or activity approved by the local government;
 - (b) particular goods or services; or
 - (c) a period of time.

2.3 Application for a licence

- (1) A person who is required to obtain a licence under this local law shall apply for the licence in accordance with subclause (2).
- (2) An application for a licence under this local law shall—
- (a) be in the form determined by the local government;
 - (b) be signed by the proprietor of a food business adjacent to the portion of the public place to which the application relates;
 - (c) provide the information required by the form; and
 - (d) be forwarded to the CEO together with any fee imposed and determined by the local government.
- (3) The local government may require an applicant to provide additional information reasonably related to an application before determining the application.
- (4) The local government may give local public notice of the application for a licence.
- (5) The local government may refuse to consider an application for a licence which is not in accordance with subclause (2) or where the applicant has not complied with subclauses (3).

2.4 Relevant considerations in determining application for licence

In determining an application for a licence, the local government is to have regard to—

- (a) any relevant policies of the local government; and
- (b) any other matters that it considers to be relevant.

2.5 Decision on application for licence

- (1) The local government may, in respect of an application for a licence—
- (a) approve the application unconditionally or subject to any conditions; or
 - (b) refuse to approve the application.
- (2) Without limiting the scope of the local government's discretion under subclause 1(b), the local government may refuse an application for a licence if, in its opinion—
- (a) the proposed outdoor eating area does not conform with the requirements of the Health Act or any other written law;
 - (b) the proposed outdoor eating area is undesirable;
 - (c) the proposed furniture is unsuitable, in any respect, to the location in which the licence is to operate;
 - (d) the applicant has been convicted during the preceding five years of an offence against—
 - (i) this local law;
 - (ii) the Shire of Donnybrook-Balingup *Eating Areas in Streets and Other Public Places Local Law 2000*;
 - (iii) the Shire of Donnybrook-Balingup *Eating Areas in Streets and Other Public Places (Amendment) Local Law 2003*;
 - (iv) the Health Act;
 - (v) the Liquor Control Act; or
 - (vi) any other written law which affects outdoor eating; or
 - (e) the applicant is not a fit and proper person to hold a licence.
- (3) If the local government approves an application for a licence, it is to issue to the applicant a licence in the form determined by the local government.
- (4) If the local government refuses to approve an application for a licence, it is, as soon as practicable after the decision is made—
- (a) to give the applicant written notice of, and written reasons for, the refusal; and
 - (b) inform the applicant of his or her rights, under Part 9, Division 1 of the Act, to object to, and apply for a review of, the decision.
- (5) Where a clause of this local law refers to conditions which may be imposed on a licence or which are to be taken to be imposed on a licence, the clause does not limit the power of the local government to impose other conditions on the licence under subclause (1)(a).
- (6) Where a clause of this local law refers to the grounds on which an application for a licence may be or is to be refused, the clause does not limit the power of the local government to refuse the application for a licence on other grounds under subclause (1)(b).

2.6 Conditions which may be imposed on a licence

The local government may approve an application for a licence subject to conditions relating to—

- (a) the area or location to which the licence applies;
- (b) the number, type, form and construction, as the case may be, of any furniture which may be used in the outdoor eating area;

- (c) the care, maintenance and cleaning of any furniture used in the outdoor eating area;
- (d) the removal and storage of furniture used in the outdoor eating area prior to the closure of the adjacent food business;
- (e) the requirement to maintain pedestrian access between the outdoor eating area and the adjacent food business;
- (f) the outdoor eating area not impeding or obstructing a public place used by either pedestrians or vehicles;
- (g) the requirement to maintain clear sight lines for vehicles entering or leaving a thoroughfare or a vehicle crossing;
- (h) the obtaining of public risk insurance in an amount and on the terms reasonably required by the local government;
- (i) the grant of another approval, permit, licence or authorisation which may be required under any written law;
- (j) the duration and commencement of the licence;
- (k) the placement of advertising within the outdoor eating area;
- (l) the payment of all fees, charges, rates and taxes levied or incurred as a result of the establishment and operation of the outdoor eating area;
- (m) the payment of costs associated with the local government preparing the public place for the use as an outdoor eating area including but not limited to the reshaping of footpaths and marking the boundaries of the outdoor eating area, if so required or agreed to.

2.7 Compliance with conditions

Where—

- (a) an application for a licence has been approved subject to conditions; or
- (b) a licence is to be taken to be subject to conditions under this local law,

the licensee shall comply with each of those conditions.

2.8 Amendment of licence conditions

- (1) A licensee may apply in writing to the local government to amend any of the terms or conditions of the licence.
- (2) The local government may, in respect of an application under subclause (1)—
 - (i) amend the licence, either in accordance with the application or otherwise as it sees fit; or
 - (ii) decline to amend the licence.
- (3) The local government may, at any time, amend any of the terms and conditions of the licence.
- (4) If the local government amends a licence under this clause, it is to notify the licensee in writing of the amendment as soon as practicable after the amendment is made and, unless otherwise specified in the amendment, the amended term or condition, or both, of the licence apply from the date of the notification.
- (5) If the local government amends a licence otherwise than in accordance with an application from the licensee, it is, as soon as practicable after the decision to amend is made—
 - (i) to give to the licensee written notice of, and written reasons for, its decision to amend; and
 - (ii) inform the licensee of his or her rights, under Part 9, Division 1 of the Act, to object to, and apply for a review of, the decision.

2.9 Duration of licence

A licence is valid for the period between the date of issue and 30 June of the following year unless it is—

- (a) otherwise stated in this local law or in the licence; or
- (b) cancelled under clause 2.12.

2.10 Renewal of licence

- (1) A licensee may apply to the local government in writing no later than two months before the expiry of a licence for the renewal of the licence.
- (2) The provisions of this local law relevant to the licence which is to be renewed shall apply, with such modifications as are required, to an application for the renewal of a licence.

2.11 Transfer of licence

- (1) An application for the transfer of a valid licence is to—
 - (a) be in the form determined by the local government;
 - (b) provide the information required by the form or by any other clause of this local law;
 - (c) be signed by the licensee and the proposed transferee of the licence; and
 - (d) be forwarded to the local government together with any transfer fee imposed and determined by the local government.
- (2) The local government may refuse to consider or determine an application for the transfer of a licence, which is not in accordance with subclause (1).

(3) The local government may approve an application for the transfer of a licence, refuse to approve it or approve it subject to such terms and conditions as it sees fit, and if it is approved, the proposed transferee shall become the licensee from the date of the approval.

2.12 Cancellation or suspension of licence

- (1) A licence may be cancelled by the local government on any one or more of the following grounds—
- (a) the licensee has not complied with—
 - (i) a condition of the licence; or
 - (ii) a provision of this local law or any other written law which may relate to the activity regulated by the licence;
 - (b) if it is relevant to the activity regulated by the licence—
 - (i) the licensee is an undischarged bankrupt, or is in liquidation;
 - (ii) the licensee has entered into a composition arrangement with creditors; or
 - (iii) a manager, administrator, trustee, receiver, or receiver and manager, is appointed in relation to any part of the licensee's undertakings or property;
 - (c) the proprietor of the food business changes;
 - (d) the setting up or conduct of the outdoor eating area, or the behaviour of customers within the outdoor eating area, is causing a nuisance.
- (2) The local government may cancel or suspend a licence if the local government or a utility requires access to or near the place to which a licence applies, for the purposes of carrying out works in or near the vicinity of that place.
- (3) If the local government cancels or suspends a licence under this clause, it is, as soon as practicable after the decision is made—
- (a) to give the licensee written notice of, and reasons for, the decision;
 - (b) inform the applicant of his or her rights, under Part 9, Division 1 of the Act, to object to, and apply for a review of, the decision; and
 - (c) the cancellation or suspension takes effect from the date on which the licensee is served with the cancellation or suspension notice.
- (4) On the cancellation or suspension of a licence, the licensee is, subject to subclause (5), to be taken to have forfeited any fees paid in respect of the licence.
- (5) Where a licence is cancelled or suspended through no fault of the licensee, the local government may refund to the licensee all or part of the licence fee in respect of what would otherwise have been the balance of the term of the licence.

2.13 Production of licence

A licensee shall produce to an authorised person his or her valid licence immediately on being required to do so by an authorised person.

2.14 Smoking and no smoking areas

- (1) An outdoor eating area licensed under this local law shall be deemed to be a no smoking area.
- (2) A licensee shall establish the outdoor eating area as a no smoking area.
- (3) A person shall not smoke a tobacco product in a licensed outdoor eating area.

PART 3—OBJECTIONS AND APPEALS

3.1 Application of Part 9 Division 1 of the Act

- (1) Where the local government makes a decision as to whether it will—
- (a) grant an application for a licence;
 - (b) vary, cancel or suspend a licence; or
 - (c) impose or amend a condition to which a licence is subject,
- the provisions of Division 1 of Part 9 of the Act and regulation 33 of the Regulations apply to that decision.
- (2) Under these provisions, an affected person may have the right to object to, or to appeal against, a decision of the local government.

PART 4—ENFORCEMENT

4.1 Direction of authorised person to be obeyed

- (1) A licensee who is given a lawful direction by an authorised person shall comply with that direction.
- (2) A licensee shall not obstruct or hinder an authorised person in the performance of that person's duties.

4.2 Notice to repair damage to public place

Where any portion of a public place has been damaged as a result of the use of that public place as an outdoor eating area, the local government may, by notice to the licensee, order the licensee to repair or replace that portion of the public place to the satisfaction of the local government.

4.3 Local government may undertake requirements of notice

If a person fails to comply with a notice under clause 4.2, the local government may undertake the works specified in the notice and recover from that licensee, as a debt, the costs incurred in so doing.

4.4 Removal and impounding of goods

Where an outdoor eating area is conducted without a valid licence or in contravention of a condition of a licence, any furniture may be removed and impounded by an authorised person under Regulation 29 of the Regulations.

4.5 Offences

- (1) A person who fails to do anything required or directed to be done under this local law, or who does anything which under this local law that person is prohibited from doing, commits an offence.
- (2) An offence against a clause specified in the Schedule 1 of this local law is a prescribed offence for the purposes of section 9.16(1) of the Act.
- (3) A person who commits an offence under this local law shall be liable, on conviction—
 - (a) in the case of a breach of clause 2.14, to a penalty not exceeding \$500;
 - (b) in the case of any other clause other than clause 2.14, to a penalty not exceeding \$1,000 and if the offence is of a continuing nature, to an additional penalty not exceeding \$50 for each day or part of a day during which the offence has continued.

4.6 Infringement and infringement withdrawal notices

For the purposes of this local law—

- (a) the form of the infringement notice referred to in section 9.17 of the Act is that of Form 2 in Schedule 1 of the Regulations; and
- (b) the form of the infringement withdrawal notice referred to in section 9.20 of the Act is that of Form 3 in Schedule 1 of the Regulations.

4.7 Offence description and Modified Penalty

The amount appearing in the final column of Schedule 1 directly opposite an offence described in that Schedule is the modified penalty for that offence.

4.8 Authorised persons

Unless expressly stated otherwise by the local government, a person appointed by the local government to be an authorised person for the purposes of this local law is taken to have also been appointed by the local government to be an authorised person for the purposes of sections 9.13 and 9.16 of the Act in relation to offences against this local law.

—————
Schedule 1
MODIFIED PENALTIES

(Clause 4.7)

Item No	Clause No	Nature of Offence	Modified Penalty \$
1	2.1	Set up or conduct an outdoor eating area without a valid licence	150
2	2.7	Failure to comply with a condition of licence	50
3	2.13(1)	Failure to produce to an authorised person a valid licence when requested to do so	50
4	2.14(2)	Failure to establish an outdoor eating area as a no smoking area	100
5	2.14(3)	Smoking in an outdoor eating area	50

Dated: 27 November 2013.

The Common Seal of the Shire of Donnybrook-Balingup was affixed under the authority of a resolution of the Council in the presence of—

STEVE DILLEY, Shire President.
 JOHN ATTWOOD, Chief Executive Officer.

—————