

**Liquor Commission of Western Australia
(*Liquor Control Act 1988*)**

Applicant: Jalwest Pty Ltd
(*represented by Stephen Butcher of Dwyer
Durack Lawyers*)

Observer: Mr John McDonald
(*Camross Nominees Pty Ltd*)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Dr Eric Isaachsen (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the Delegate of the Director of Liquor Licensing, to refuse an application for variation of condition on a special facility licence.

Premises: Underground Backpackers
268 Newcastle Street, Perth

Date of Hearing: 6 December 2012

Date of Determination: 26 February 2013

Determination:

The application to vary the condition to permit the sale and consumption of liquor in the outside areas of the premises until 10pm is granted from Monday to Saturday, inclusive, subject to prior compliance of the following conditions:

1. an updated management plan with particular reference to the management of noise and potential harm of liquor consumed around a swimming pool be submitted to and approved by the Director of Liquor Licensing;

2. double glazing and other means of noise attenuation satisfactory to the Director of Liquor Licensing are installed on all windows, doors and areas opposite the apartment complex known as the Boot Factory but in any event to no lesser standard than that submitted by the applicant in its correspondence dated 17 December 2012 to the Commission.

Authorities referred to and considered in the determination:

- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241 at 249 per Malcolm CJ

Introduction and Background

- 1 On 15 September 2011, Dwyer Durack Lawyers lodged an application pursuant to section 64 of the *Liquor Control Act 1988* ("the Act") before the Director of Liquor Licensing ("the Director") to vary the condition on its special facility licence that prohibits the sale and consumption of liquor and the playing of amplified music in the outside areas of the premises after 8pm. It sought to allow the sale and consumption of liquor in the outdoor areas throughout all the permitted trading hours under the licence i.e. to 12 midnight Monday to Thursday; to 1am Saturday and Sunday mornings, and to 10pm Sunday nights. The application did not seek to amend the condition requiring the cessation of playing of amplified music at 8pm each trading day.
- 2 Notice of the application was served on the Executive Director Public Health and the Commissioner of Police. No interventions were lodged.
- 3 The applicant lodged a locality map on 8 November 2011 and 2 letters of support on 16 November 2011.
- 4 A notice of objection from Camross Nominees Pty Ltd was lodged on 15 November 2011 along with an attachment.
- 5 A notice of objection from Gregory James McGuire and Coquessa Elizabeth Jones was lodged on 17 November 2011 along with an attachment.
- 6 On 17 April 2012 the applicant provided environmental acoustics reports dated 7 March 2012 and 12 March 2012.
- 7 The applicant lodged an outline of submissions on 6 July 2012.
- 8 Camross Nominees Pty Ltd also lodged submissions dated 6 July 2012.
- 9 The applicant's submissions and attachments dated 23 August 2012 were received on the same date.
- 10 On 18 September 2012 the Delegate of the Director refused the application.
- 11 The applicant lodged an application for review with the Liquor Commission ("the Commission") on 17 October 2012 along with submissions on 30 November 2012.
- 12 A hearing before the Commission was held on 6 December 2012.

Submissions on behalf of the applicant

- 13 The applicant submitted the application for a review of the Director's decision on the basis that:
 - the application and documentation provide consumer need evidence in support of the proposition that the application is in the public interest;

- the current condition encourages patrons to leave the venue and drink elsewhere thus increasing the movement and noise of patrons in the vicinity of the premises;
 - the environmental acoustic reports do not support an assertion that noise arises from the outdoor area and causes a disruption to the 'northern' neighbours at 117 Lake Street, Northbridge;
 - the environmental acoustic reports do recommend that noise reduction measures be introduced to reduce any noise emissions from the accommodation at the premises in relation to the adjoining residential apartments;
 - the objectors provide broad statements in relation to past and present levels of noise however they do not provide any specific evidence or meet the required standard of proof;
 - the specifically listed incidents – 8 and 23 August 2011 and 7 October 2011 relate to noise emanating from areas of the premises distinct from the outdoor area and at times when the licensed areas of the premises were closed;
 - the objectors have not provided any evidence that there is a connection between consumption of liquor in the licensed area of the premises (and the outside pool area) and any noise being made from the accommodation rooms of the premises.
- 14 The applicant further submitted that it may have been denied procedural fairness by not being provided with the objectors' responsive submissions dated 6 July 2012. When the submissions were indeed reviewed by the applicant it was noted that they relate to a proposition that was not part of this application and thus should not form part of the determination.
- 15 In response to questions from the Commission it was noted by the applicant's counsel that:
- the health and safety aspects of alcohol consumption and access to water (e.g. pool, swimming) did require consideration; and
 - the house management protocols would require amendment especially as to staffing in general and water safety.
- 16 The applicant submitted in conclusion that it had produced sufficient evidence demonstrating that the grant of the application is in the public interest, in accordance with the primary objects of the Act, particularly section 5(c) of the Act and the secondary objects referred to in paragraph 20(a) and (c) of its submissions.

Submissions by John McDonald of Camross Nominees Pty Ltd

- 17 Mr McDonald outlined his long standing involvement with the "Boot Factory Apartments" and provided a comparison of the timing of the apartment conversion and the backpacker conversion from the earlier licensed premises.

- 18 He submitted that noise emanating from the backpackers had caused concern over a number of years. He indicated that the noise mainly emanated from the accommodation rooms of the backpackers premises and that those rooms were in a building closely adjacent to the apartment complex in Lake Street. He acknowledged that he was unaware of the location of the outdoor pool area.
- 19 Mr McDonald drew attention to the applicant's website which promotes "Party with us" and makes reference to the pool. This is an indication that it is proposed that this will be a highly active social area.


Determination

- 20 Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 21 On a review under section 25 of the Act, the Commission may –
- a. affirm, vary or quash the decision subject to the review;
 - b. make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance;
 - c. give directions –
 - i. as to any question of law, reviewed; or
 - ii. to the Director, to which effect shall be given; and
 - d. make any incidental or ancillary order.
- 22 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 23 In determining whether the grant of an application is "in the public interest" the Commission is required to exercise a discretionary value judgement confined only by the scope and purpose of the Act : *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241 at 249* per Malcolm CJ
- 24 The primary objects of the Act are as follows:
- a. to regulate the sale, supply and consumption of liquor; and
 - b. to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - c. to cater for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- 25 The submissions by the applicant went to considerable length to demonstrate that the development of backpacker facilities were a valuable part of the tourism industry with flow-on community benefits. The convenient availability of alcohol was seen as complimentary and the current application sought to enhance the current supply arrangements at the premises.

- 26 The location of the premises was the subject of the submissions by the applicant and the objectors. There is evidence that there are both commercial and residential neighbours – for the former there is little interference with their amenity during normal work hours whilst for the latter there is potential for interruption of their living and sleeping arrangements. It appeared to be common ground that the accommodation ‘wing’ immediately adjacent to the apartment complex was the source of most of the noise complaints. It was unclear as to the extent to which noise arises from the outdoor area under review, especially as no liquor supply currently occurs in the area beyond 8pm.
- 27 The Commission does not believe that the applicant has been denied procedural fairness by not having given the opportunity to lodge their responsive submissions to the submissions lodged by the objector Camross Nominees Pty Ltd on 6 July 2013 as by the applicant’s own admission and to which the Commission concurs *“such evidence is largely irrelevant for the purpose of determining this application.”*
- 28 There is little doubt in the Commission’s mind that there is an ongoing noise issue and consequent loss of amenity which detracts unreasonably on the lifestyle and amenity of nearby residents.
- 29 It is of some concern for the Commission that although complaints in respect of noise have been raised on a number of occasions with the management of the Underground Backpackers, little or no real effort has been made by the management to remedy the issue and in fact concerns expressed by residents have been largely ignored or, at best, lip service paid to them.
- 30 On 17 December 2012, the applicant submitted clarification of questions raised by the Commission at the hearing as follows:
- a. the applicant will be installing double-glazing to all windows in the accommodation rooms that are opposite the apartments at the “Boot Factory” situated at 117 Lake Street, Northbridge;
 - b. the applicant will update the house management policy and code of conduct to accommodate the consumption of alcohol in the outside pool area after 8pm, if the application is granted; and
 - c. the applicant employs two or three persons every evening during the course of trading hours for the premises.
- 31 It is very obvious to the Commission that action now proposed by the applicant is simply by virtue of the fact the applicant wants a concession from the licensing authority.
- 32 Given the history of unresponsive and less than adequate management of these premises, the Commission is aware of the risk in granting this licence.
- 33 However, in having regard to the objects of the Act, the imposition of preconditions which would mitigate against the evidence of loss of amenity emanating from the accommodation rooms coupled with the fact that the evidence before the Commission strongly supports the view that the noise and consequent loss of amenity emanates from the accommodation rooms

opposite the Boot Factory complex rather than the pool area the Commission is minded to partially grant the application in public interest.

- 34 The partial grant of this application to the extent that the special facility licence be varied to permit the sale and consumption of liquor in the outside area of the premises until 10pm from Monday to Saturday, inclusive, is however subject to completion of the following significant measures to improve the amenity of the residents surrounding the premises:
1. an updated management plan with particular reference to the management of noise and potential harm of liquor consumed around a swimming pool be submitted to and approved by the Director of Liquor Licensing;
 2. double glazing and other means of noise attenuation satisfactory to the Director of Liquor Licensing be installed on all windows, doors and areas opposite the apartment complex known as the Boot Factory but in any event to no lesser standard than that submitted by the applicant in correspondence dated 17 December 2012 to the Commission.
- 35 The Commission expects that the applicant in enjoying the benefits accruing to it out of this determination will demonstrate a far more responsive attitude to its neighbour's concerns rather than all but ignoring them as quite evidently has been the case in the past.

A handwritten signature in black ink, consisting of a stylized 'J' and 'F' followed by a horizontal line.

JIM FREEMANTLE
CHAIRPERSON