

Licensing Board of Tasmania

In the matter of an Appeal by Lynn Frances Archer for a review of a decision of the Commissioner for Licensing refusing the grant of an out of hours Permit

In the matter of the Mount Nelson Tavern.

REASONS FOR DECISION

This appeal was heard in Hobart on the 19th October 1999.

APPEAL DETAILS

The Commissioner's position for refusing the application in the first instance, was put forward by Mr D Thomas of the Commissioner's office.

In essence that was that the onus is on the Applicant to satisfy the Commissioner (and, on appeal, the Board) that an out of hours permit can be granted and hence to demonstrate that the sale of liquor on the premises during the hours sought will not cause undue annoyance or disturbance (s34 of the Liquor).

The Appellant did not give evidence. That was curious, as she was obviously the person most proximate to the situation, most aware of the circumstances that occur on the premises, and most likely to have a relevant perception of the result of actions on the premises viz a viz neighbours.

The Appellant's business partner, Mr Danny Williams did give evidence, however it was apparent that he was not fully aware of the day to day operations at the premises, nor was he in a position to have effective control over the sale and consumption of all liquor from the premises. Mr Williams is responsible for other licensed premises, and there it is apparent that he has an unblemished record in regard to the conduct of licensed premises.

1. OBJECTIONS

Apart from written objection not supported by the presence of the writer (about which we are not able to give substantial weight), evidence was given in person by Mr Stuart McLean, Ms Carole Cash and Mr Paul Ashton; all from nearby premises.

Mr McLean expressed the view that the hotel was not in keeping with the local community, not serving that community, and trying to attract people in from outside the area, to the detriment of the amenity of local residents.

He did comment that the music was “much better than the past”. The impression given was that Mr McLean did not have any particular evidence about undue annoyance or disturbance emanating from the premises; but rather a concern that there had been some in the past, and that he felt there was no overall benefit in taking the risk in having the premises capable of being open until late at night. In the context of the appeal, Mr McLean’s evidence would not be sufficient to determine the issue against the appellant.

Ms Cash objected to the late licence because of the prospect of music emanating from the premises late at night. She gave evidence that the noise of music has disturbed her in recent times in her residential premises adjacent to the hotel. Notwithstanding some evidence to the effect that there was no noise emanating at particular times, the Board concludes that Ms Cash’s evidence is credible and cogent, and indicates that, in very recent times, undue noise has emanated from the licensed premises, to the disturbance of her household.

Against this background, the onus on the Appellant to demonstrate that, with an out of hours permit, she will not cause undue disturbance or annoyance, would require some specific policies of containment. There was not sufficient evidence in weight or clarity to satisfy the Board that this was the case.

Mr Ashton confirmed the evidence given by Ms Cash, and added that, for example, on the 14th October, at 3.18am, he had been awoken or kept awake by patrons leaving the licensed premises. He said that loose gravel in the car park contributed to the noise of cars leaving. Of course the premises should not have been open for sale of liquor at that time, given that they do not have an extant out of hours permit. There was no evidence from the Appellant to contradict Mr Ashton’s evidence in this regard, and he was not cross examined about what he had to say. We must accept what he said in this regard.

That is not to say that the noise of cars leaving an hotel car park at 3.18am will always be sufficient to justify refusal of an out of hours permit, but in the absence of other material advanced at this hearing, the Board is left with the impression that the noise is, in context, undue.

Mr Ashton also made the point that there was no effective noise monitoring equipment employed by the Appellant. It must be remembered that the onus is on the Appellant. Whilst she (through Mr Williams) indicated that she had sought the assistance of the Hobart City Council officer concerned with noise abatement, the responsibility to ascertain the level of noise emanating and the degree of adverse affect, remains with the applicant for an out of hours permit, or the Appellant in the case where the Commissioner’s decision is not accepted. Further, that Officer was not called by the Appellant, and there was no expert evidence as to the noise put forward by the Appellant.

Of course, it could be case where it is impossible to prove a negative, but against a background of consistent complaint, and in the absence of

an apparently satisfactory overview, at this stage, the Board is left unpersuaded as to the Appellant's case.

It may be that sufficient evidence can be garnered to demonstrate that the escaping noise is not such as would be in conflict with s34; but neither the Commissioner nor the Board should be left to guess.

2. LIQUOR AND ACCOMMODATION ACT

Out-of-hours permit

12. An out-of-hours permit authorizes the sale of liquor -

(a) on the licensed premises; and

(b) between the times (being times after midnight and before 5 a.m. on any day); and

(c) subject to compliance with any condition - specified in the permit.

And:

Restriction on grant of out-of-hours permits

34. The Commissioner shall not grant an out-of-hours permit in respect of licensed premises unless the licensee satisfies the Commissioner that the sale of liquor on those premises in accordance with the permit sought would not -

(a) cause undue annoyance or disturbance to -

(i) people living or working in the neighbourhood of the premises; or

(ii) customers or clients of any business in the neighbourhood of the premises; or

(iii) people conducting or attending religious services in the neighbourhood of the premises; or

(b) cause the occurrence of disorderly conduct -

(i) in the premises; or

(ii) in the neighbourhood of the premises.

All parties were aware of s216:

Policy to be followed when considering an application for a licence or permit

- 216** (1) *When considering an application for a licence or permit the Commissioner or the Board shall make a decision which, in the opinion of the Commissioner or the Board, will best aid and promote the economic and social growth of Tasmania by encouraging and facilitating the orderly development of the hospitality industry in the State.*
- (2) *While, in coming to that decision, the Commissioner or the Board may have regard to any legitimate interests and concerns of any section of the community the Commissioner or the Board shall have greater regard for the legitimate interests and concerns of the community as a whole.*

3. CONSIDERATION AND CONCLUSIONS

The Board accepts that the concerns of the objectors regarding residential amenity are genuine and the evidence of the applicant is not sufficient to satisfy us that there would not be adverse effect on the interests of the community in the area.

In particular:

There is insufficient evidence that the considerations of the neighbours regarding noise emissions have been taken into account, or that measures will be taken to ensure there are no (or limited) emissions which would trouble neighbours.

Assertions as to noise containment within the premises were inadequately developed, lacked sufficient cogency and persuasion, and were not backed by independent expert support.

It was apparent that impressions of the nature of the neighbourhood (as to the residential and business needs) were overstated and under investigated. Assertions by the applicant of consultation were not supportable when tested

The measures to ensure no or satisfactorily limited adverse effect on the interests of the community (principally amenity of neighbours) were not adequately developed.

4. DECISION

Whilst it may well be that adequate measures could be taken or indeed may have been taken to ensure that s34 is satisfied, the Board is not satisfied at this time. Therefore, the appeal is rejected, and the Commissioner's decision stands.

Dated: 16 November 1999

PA Kimber, Presiding Member.
W Morris, Member.
L Finney, Member.

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