

# Licensing Board of Tasmania: Decision

## Application

Applicant: Miss Cecile Graham

Type of Application: General Licence (Section 7, *Liquor Licensing Act 1990*)

Premises: New Norfolk District Football Club, 21 Back River Road, New Norfolk

Decision: 20 March 2014

## Background

Appearing before the Board were the applicant, Miss Cecile Graham (current club licensee and long term employee of the New Norfolk District Football Club) represented by her legal counsel, Ms Samantha Masters, and accompanied by Mr Leon Kemp, Chair, Licensed Premises Committee and Mr Cody Burdon, Treasurer of the New Norfolk District Football Club; and an objector, Mr Carlton Dixon represented by his legal counsel, Mr Phillip Kimber, and accompanied by Ms Irene Duckett of Ireneinc Planning.

Miss Graham's application was accompanied by a submission plus attachments (including a petition containing names, addresses and signatures of 269 supporters of the application) (dated 6 January 2014) prepared by her legal representative.

Ms Irene Duckett submitted a representation plus appendix (dated 22 January 2014) on behalf of the objector, Mr Carlton Dixon.

The applicant's legal representative made further submission (dated 4 February 2014) in response to Ms Duckett's submission.

Both Ms Masters and Mr Kimber sought leave from the Board to appear on behalf of their respective clients. Section 213(6) of the *Liquor Licensing Act 1990* states that:

A person is not entitled to be represented at a hearing unless the Board is satisfied that injustice could otherwise result.

The Board granted leave for both counsel to appear.

During and following the hearing, the Board received additional material:

- Further submission from P. and C. Dixon (objectors) dated 11 February 2014 and tabled at the Board hearing on 13 February 2014;
- Further submission (dated 14 February 2014) by counsel for Mr Carlton Dixon attaching an email communication from Mr Martin McCance, Planner, Derwent Valley Council to Ms Irene Duckett of Ireneinc Planning;
- Letter from applicant's counsel (dated 20 February 2014) seeking an extension to response time granted by the Board and making other submissions;

- Response from counsel for the applicant (dated 26 February 2014) to Mr Dixon's submission of 11 February 2014;
- Email dated 3 March 2014 from counsel for Mr Carlton Dixon (objector) in response to the above response from Ms Masters.

The Board has perused all of this information in making its decision. However, the extent of the weight given to individual submissions will be discussed below, where relevant.

The applicant seeks a general licence to sell liquor for the New Norfolk District Football Club for which she already holds a club licence.

There are a number of licensed premises in New Norfolk – three hotels, two bottle shops, six clubs and ten restaurants.

### **The applicant's submission**

Through her counsel, Ms Samantha Masters, the applicant submits that it is in the best interests of the community to have a general liquor licence granted for these premises (Section 24A (1) *Liquor Licensing Act* 1990).

The New Norfolk District Football Club management desires to make available its facilities and provide services beyond club members to the wider community, particularly those on the northern side of the Derwent River. The current club licence, it is submitted, is restrictive and creates the perception that only football club members and associates are welcome or permitted at the premises.

A general licence would dispel this perception and open the premises to all members of the community, particularly those north of the Derwent River, providing diversity of choice. There is only one other licensed premises on this side of the river – a club licence for the New Norfolk Golf Club.

The Football Club is the only licensed premises on the northern side of the river that offers Keno and Tote facilities. It also offers a beer garden, a large function room for catered social events and a children's play area. The Club has a full commercial kitchen and the only wood fired pizza area in New Norfolk, both of which are under-utilised due to the restrictive nature of the club licence. A general licence would make all of these services available to a broader community client base.

The grant of a liquor licence would allow the Club to broaden its customer base and help to ensure the financial viability of the Club which has been in existence since 1947. Income from the Club supports the football team whose sustainability is threatened if the Club cannot remain profitable in the long run.

Under a proposed general licence, the Club would operate the same hours as at present; there is no intention to change this. Its current hours are from 9.00 a.m. to 9.00 p.m. Monday to Thursday, 9.00 a.m. to 10.00 p.m. Friday and Saturday and 9.00 a.m. to 8.00 p.m. on Sundays and public holidays. It would offer the same range of products as now but in competition with

other licensed premises would increase the choice available in the area. It would operate from the same premises and there are no plans for refurbishment.

In essence, the New Norfolk District Football Club would operate very much the same as now but a general licence would remove the restrictions on patrons and make the facility accessible to all members of the community.

The applicant submits that the Club has demonstrated a commitment to and ability to comply with the requirements to maintain a liquor licence and has a strong and lengthy record of compliance with liquor regulations.

The applicant rejects the argument raised on behalf of the objectors that the Derwent Valley Planning Scheme does not allow the New Norfolk District Football Club to operate under a general licence in the manner proposed. Counsel for the applicant submits that the Club would continue to operate under the same use category if granted a general liquor licence which would not trigger a change in use of the premises.

Counsel for the applicant submits that the planning related matters raised on behalf of the objector cannot and should not be determined by the Board and are outside the ambit of considerations that should be taken into account in determining an application for a liquor licence. This will be explored further below.

### **The objectors' submissions**

Through counsel, the objectors submit, based on their expert planning evidence, that the zoning of the present Club premises does not permit the use of the premises for a general liquor licence. This evidence was provided by Ms Irene Duckett, consultant town planner.

The submission by Ms Duckett posits that the New Norfolk Planning Scheme makes a distinction between a "place of assembly" and a "liquor licensed establishment". Ms Duckett submits that the proposed application of the New Norfolk District Football Club would change the use from place of assembly to liquor licensed establishment, which effectively changes it from a place where alcohol is ancillary or an incidental component of the use to one where it is the primary purpose of the use. It is Ms Duckett's submission that the subject site is zoned "service industry" under the New Norfolk Planning Scheme 1993 and that a liquor licensed establishment is a prohibited use within this zone.

Ms Duckett submits that the New Norfolk District Football Club does not have and could not be granted approval for the operation of a liquor licensed establishment and consequently there is no basis for the Board to direct the grant of a general licence. Further to this, the objectors submit that the Board should not direct a grant which would be futile or indeed illegal.

In the written submission of P. and C. Dixon it is argued that in many cases the determination of what is in the best interests of the community can include a consideration of planning issues. The criterion is overarching and extremely wide and thus must include a consideration of anything that is relevant. It is argued that where it is evident that the proposed use is

prohibited in the zone, the granting of the liquor licence sought would be futile. It is contended by Mr Kimber, counsel for the objectors, that, in such circumstances, the Board lacks jurisdiction to direct the grant of the licence. It is submitted that the correct approach would be for the Board to either reject or adjourn the application until the planning issues have been considered and determined by the planning authority.

Ms Duckett maintains that this proposed operation would reside in close proximity to an established residential area with attendant adverse impacts on the residents from noise, behaviour of patrons, vehicular traffic and safety due to an increase in patronage. She states that such issues would be detrimental to the amenity of the neighbourhood.

Following the hearing, submission was made by counsel attaching an email from Mr Martin McCance, Planner, Derwent Valley Council to Ms Duckett advising that, after an approach from the New Norfolk Football Club and after taking legal advice, he had advised the Club that a change of use from a place of assembly to a liquor licensed establishment would be required. Additionally, he advised the Club that Council could not support any application for a change of use to a liquor licensed establishment as it is a prohibited use in the zone.

### **Considerations by the Liquor Licensing Board**

The Liquor Licensing Board of Tasmania is called upon to determine this application for a General Licence (Section 7) authorizing the sale of liquor for consumption on and off the premises.

The principal test for the granting of any licence is if it is in the best interests of the community to do so.

In considering an application for a liquor licence, the Commissioner or the Board must make a decision which, in the opinion of the Commissioner or the Board, is in the best interests of the community (24(A) (1)).

Firstly, the Board rejects the submission of Ms Masters that Mr Kimber's representation on behalf of the objectors is inappropriate and constitutes a conflict of interest due to his past experience as a Licensing Board chair. The basis of the objection is not articulated in the submission nor does Ms Masters explain the contended conflict of interest. However, the Board's view is that Mr Kimber is entitled to make a living and if clients wish to call on his knowledge and experience in licensing matters, that is to his advantage. Two members of the current Board were not members when Mr Kimber chaired the Board; they have no professional or personal relationship with him whatsoever. The Board is not swayed one way or another by his representation of clients.

The Board received substantial documentation after the hearing on 13 February 2014 (listed above). We have perused all of this material. However, the email of Mr McCance was given little weight in our considerations for the following reasons. The Derwent Valley Council did not make a submission on this application, one way or another. Mr McCance, an employee, does not purport to represent either the Council or even the General Manager of the Council. Much of the information contained in the email is disputed by the applicant and, as

Mr McCance was not present at the hearing, there was no opportunity to test his evidence. The Board does not rely upon this information in making its decision.

Given the submissions of the objectors and their planning consultant, all of which relate to planning matters, the Board must first decide whether it has jurisdiction to make a decision.

Counsel for the applicant strongly argues that the grant of a general licence would not trigger a change of use. Ms Masters maintains that the granting of a liquor licence does not of itself amount to “development of the premises” within the meaning of a “liquor licensed establishment” under the Scheme. She contends that there is no trigger under the Scheme for the applicant to obtain further planning permission as a result of being granted a general liquor licence and that the Club will continue to operate under the same use category as a “place of assembly”.

We do not find the Hadspen decision 2010, referred to by the objector, of much assistance in our deliberations. The issues raised in that case were mainly concerned with residential amenity which were yet to be considered by Council as a planning application had not been determined; the New Norfolk District Football Club already has planning approval to operate a licensed premise and residential amenity issues would have been considered as a part of that process.

We note also that the Derwent Valley Council has not sought to be heard by the Board nor has it submitted an objection.

It is clear that the Board does not have the remit to determine whether additional planning approval is required by the grant of a general liquor licence. Clearly, the matter is contested and we rightly leave that consideration to another forum. On the face of the material that we have before us, it is not apparent that the grant of a general licence would necessarily amount to a change of use which would be prohibited under the planning scheme such as to deprive us of jurisdiction. In any event, there are other avenues available to the objectors to pursue with respect to a non-conforming use and any alleged breach of the New Norfolk Planning Scheme.

The applicant makes a strong case for the grant of a general licence being in the best interests of the community. The Club would still operate in accordance with the opening hours specified under the existing approvals pursuant to the New Norfolk Planning Scheme with little expected additional adverse impact on residential amenity. There is evidence of sufficient parking being available and a good access road that would lessen any traffic concerns. Despite the concerns of Ms Duckett, on behalf of the objectors, in relation to adverse impacts on residential amenity, there were no objections received from residents, nearby or otherwise. Most of the amenity issues raised by Ms Duckett were on the basis of an alleged change of use and the requirements for a liquor licensed establishment which we do not need to consider for the above reasons.

We can see clear advantages for the community in increasing access to the Club’s facilities for all members of the community. It has excellent facilities that have the capacity to be

utilised further and enjoyed more broadly by all, but particularly those who live on the northern side of the river.

We also accept that a Club which appeals to a broader clientele could presumably bring greater custom and therefore turnover which in turn would contribute to enhanced sustainability for its future. We see this as a really important aspect of the applicant's submission. It would most definitely, in our view, be in the best interests of the community for the New Norfolk Football Club, which was established in 1878, and has been a licensed premises for nearly 40 years, to continue to support the community through a range of activities, facilities and services. If a changed business model helps to achieve this, then this is a very good thing.

We make these findings without attributing much weight to the petition provided by the applicant. While this is one of the more robust petitions we have seen in recent times, providing as it does names, addresses and signatures, petitions are, by their nature, not entirely compelling and need to be considered cautiously.

Mr Dixon indicates that he has a commercial interest in a number of licensed establishments in New Norfolk and we conclude a potentially more direct competitor of the Football Club should a general licence be granted to it. As such, his submission against the Club is largely an anti-competitive one. The Board has said many times before (Rokeby 2013; BWS Port Sorrell 2013) that consumers make decisions about where they wish to spend their money and it is not up to the Board to manage competitive market forces. Generally, the Board has not found arguments focussed on the commercial interests of competitors compelling.

Having considered all issues, the Board is satisfied that, on balance, it would be in the best interests of the community to direct the grant of this licence.

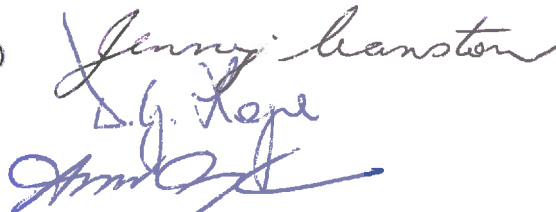
### **Decision**

The Board directs the Commissioner to grant the licence to the New Norfolk District Football Club as applied for.

Jenny Cranston (Chairperson)

David Logie (Member)

Ann Cunningham (Member)



20 March 2014