

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicants:** Mr Tyrrell G Gardiner and Mrs Jennifer Gardiner
- Mr Brian G Humphreys
- Mr Michael R Bell and Mrs Irene A Bell
- Mr Stephen Miller and Mrs Catherine Miller
(represented by Mr Michael Swift)
- Respondent:** Mr Grant McClintock
(licensee, Moody Cow Brewery)
- Commission:** Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Mr Alex Zilkens (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to grant an application to vary a condition of licence No 6020129610, to increase the number of patrons who may be ordinarily accommodated on the premises at any one time from 120 to 200.
- Premises:** Moody Cow Brewery
791 Ferguson Road, Ferguson
- Date of Hearing:** 12 November 2014
- Date of Determination:** 20 January 2015
- Determination:** The applications are approved and the decision of the delegate of the Director of Liquor Licensing is quashed.

Background

- 1 On 18 June 2013, the licensee lodged an application to vary a condition of the licence for the Moody Cow Brewery (“the premises”) to increase the number of patrons who may be ordinarily accommodated at any one time, from 120 to 200.
- 2 On 26 November 2013, a Public Interest Assessment (“PIA”) with letters of support from Ferguson Valley Marketing and Promotions, Wellington Forrest Cottages and Ferguson Hart Estate were lodged, together with a number of certificates of appreciation from community groups, for support of local charities.
- 3 Following advertising of the application, objections were received from:
 - Mr Tyrrell G Gardiner and Mrs Jennifer Gardiner (“the Gardiners”)
 - Mr Brian G Humphreys (“Mr Humphreys”)
 - Mr Michael R Bell and Mrs Irene A Bell (“the Bells”)
 - Mr Stephen and Catherine Miller (“the Millers”)
- 4 Submissions were subsequently lodged by all parties encompassing a document exchange process to enable each party to have a reasonable opportunity to present its case.
- 5 On 25 June 2014, the delegate of the Director of Liquor Licensing (“the Director”), pursuant to sections 13 and 16 of the *Liquor Control Act 1988* (“the Act”), determined the matter on the papers and approved the application.
- 6 On 23 July 2014, the objectors lodged an application for a review of the decision of the Director under section 25 of the Act. The objectors are now the applicants in the proceedings before the Liquor Commission (“the Commission”).
- 7 Submissions were lodged by all parties and a hearing of the Commission was held on 12 November 2014.

Preliminary matter at the hearing

- 8 The licensee questioned the inclusion, under section 25(2)(c) of the Act, of two attachments to the submission lodged on 29 October 2014 by Mr Humphreys and the Bells. The Commission agreed that these attachments were not before the Director when making the decision and therefore the Commission would not consider them.

Submissions on behalf of the applicants

- 9 In general terms, all of the applicants have based their objections on the following grounds:
- that the proposal does not have the required approvals of the Local Government (sections 39 and 40 of the Act);
 - that the proposal will have a detrimental impact on the amenity of the locality (section 74(1)(g) of the Act);
 - that the proposal would not be in the public interest (section 74(1)(b) of the Act.

The Gardiners

- 10 The Gardiners gave evidence that noise was an ongoing issue and nothing was being done to mitigate this problem which was particularly acute to those properties to the north of the premises. Aside from the day to day issues with music noise and traffic/parking problems, the licensee holds a number of large events at the premises which accentuate the detrimental effects of the premises on the amenity, quiet and good order of the locality.
- 11 The premises are situated on a 2.2 hectare block which is not suitable for a medium to large scale tourist venture and the business has evolved from the initial approval of micro-brewery to a tavern, a function centre and a venue for large events for up to 1000 people.
- 12 It was submitted that the site of the premises is simply too small and not a location suited for the type of business development proposed by the licensee and the fact that very little has been done by the licensee to mitigate the problems further emphasises the fact that the application to increase the patron level should not be accepted.
- 13 It was submitted that the expansion plans put at risk accepted practices for primary producers such as raising stock, running machinery and conducting hazard reduction burns in what has traditionally been a farming area.

Mr Humphreys and the Bells

- 14 A detailed submission was presented reiterating the issues raised earlier by other applicants and emphasising that the local government section 39 certificate for the increase to 200 patrons has not been provided and therefore there is no evidence that the proposal is compliant with the *Health (Treatment of Sewerage and Disposal of Effluent and Liquid Waste) Regulations 1974*.
- 15 With regard to the licensee's claim that the musicians that play at the premises generally play acoustic, background type music that allow customers to carry

out a conversation at a normal volume, the fact is that there is a regular playing of amplified music at volumes between 30 and 60dl, impacting on the amenity of the locals.

- 16 It was submitted that it was also important to recognise that the business of farming starts at the property boundary, not at some residential structure, consequently there is zero distance between the two properties and 7.8 metres to a third and a fourth immediately across the road.
- 17 The location of the licensed premises is on a floodplain alongside a creek, hence at a low point with respect to the rest of the valley. This makes it effectively an amphitheatre with resultant high level noise impacts on the residences in the locality.
- 18 For the reasons stated and supported by all of the objectors to the application to vary the conditions of the licence, the Commission should quash the Director's decision to allow the licence variation to increase the maximum patronage level from 120 to 200.

The Millers

- 19 It was submitted that the licensee has not obtained the required planning consent to use the premises to accommodate 200 people. Neither a local government section 39 nor section 40 certificates for the approved development of a restaurant or brewery or for the proposed development to allow an increase from 120 to 200 patrons has been submitted with the application to vary the licence as required by sections 39(1) or 40(1) of the Act.
- 20 The undated certificate of approval issued under the *Health Act 1911* provided to the licensee is not a planning consent for the use of the site for the purposes proposed.
- 21 The Millers gave evidence that they have for 23 years lived on their property which is used as a training area for competitive horse riding and also for agistment of horses.
- 22 The Millers are not seeking to close down the business of the Moody Cow Brewery. Rather they seek to have its operations conducted in a manner that is conducive to maintaining the amenity of the locality so as to allow for the ongoing traditional rural use by others adjacent to the premises.
- 23 It was submitted that five comprehensive objections have been made on behalf of 8 people in relation to the proposal to vary the licence. The submissions represent all adjoining/adjacent landowners to the licensed premises, being those people most affected by the existing operations and the proposed intensification of the use of the premises.

- 24 The premises adjoins properties used for fairly conventional rural practices in a rural area. The two dwellings situated within 140 metres of the premises, and closer to the outdoor entertainment and drinking areas, require assessment in terms of potential impacts associated with the operations of the Moody Cow Brewery and the proposal to increase the level of patronage by 66%.
- 25 It was submitted that the small size of the land on which the licensed premises is situated is a major contributing factor to the problem of off-site impacts and that the maximum intensity of land use appropriate to its land area has already been reached and any further intensification of land use would represent over-development of the site.
- 26 The potential for additional annoyance, disturbance and inconvenience to residents in regard to normal rural use of properties abutting and adjoining the premises arising from the variation of the licence is demonstrable by extrapolation of documented experience, including the management style of the licensee who has made minimal effort to mitigate the problems.
- 27 It was submitted that the licensee has shown little acceptance of responsibility for the actions of his patrons, especially once they leave the premises and it would seem that he has failed to keep an incident register as required by section 116A of the Act.
- 28 There is the potential, if not the likelihood, that intensification of the use of the premises, as proposed, will only exacerbate existing conflicts and problems and therefore it would be in the public interest to approve this application and quash the Director's decision to allow the licence variation to increase the maximum patronage level from 120 to 200.

Objection by Mr R and Mrs A Verbrugge

- 29 Whilst not lodging an application for review of the Director's decision, Mr and Mrs Verbrugge were objectors to the application to vary the Moody Cow Tavern licence before the Director to increase the maximum patronage level from 120 to 200.
- 30 Their objection was lodged on the ground that undue offence, annoyance, disturbance or inconvenience would be caused to persons who reside or work in the vicinity (section 74(1)(g)(i) of the Act).
- 31 Concerns were also raised about hazards relating to Ferguson Road and traffic, as well as potential fire risks.

Submissions on behalf of the licensee

- 32 The licensee submitted that the initial application to vary the conditions of the licence was to simply increase the maximum number of patrons from 120 to

200 and whilst at the maximum level this represents an increase of 66%, this does not mean a commensurate increase in noise levels.

- 33 The premises only provide live music on a Sunday, generally consisting of 3 x 45 minute sets between the hours of 12 noon and 4:00pm – the peak period of patronage being between 12 noon and 2:00pm on weekends and public holidays. Whilst a small number of one-off concerts have been held, these are subject to a rigorous approval process that involves the Shire and the Department of Racing, Gaming and Liquor (“the Department”) and as such are not relevant to the application.
- 34 With the increase in patron numbers there is no proposal to change the premises’ current mode of operation, therefore there will be no change in timing, type or volume of the music provided.
- 35 With regard to the requirement for new local government section 39 and section 40 certificates, as there is no development associated with the proposed licence variance, there is no requirement for these certificates to be re-issued. The licensee had confirmed this with the Department which advised that there is no requirement on the basis that no changes were made to the structure of the buildings.
- 36 It was submitted the initial building always had the area and toilet facilities to accommodate 200 patrons, so no development needed to take place other than to comply with the car parking requirements of local government laws – 50 bays.
- 37 The following submissions were also made:
 - a) we have a current certificate of approval for 200 patrons issued by the Shire of Dardanup under the *Health Act 1911, Health (Public Buildings) Regulations 1992*;
 - b) our approval by the Department aligns with the Shire of Dardanup approval for patrons;
 - c) we have constructed an additional car park, with the number of parking bays exceeding the Shire requirements for 200 patrons;
 - d) Moody Cow Brewery operates in compliance and within the planning consent conditions as determined by the Shire of Dardanup;
 - e) we have had no prosecutions from the Department;
 - f) we have never had the police attend our premises regarding an operational matter since we opened our doors to the public;
 - g) since our approval of numbers up to 200 we have had no parking issues, nor have the police attended our premises in any capacity.

- 38 It was submitted that the grounds for requesting a review of decision A224124, as listed by the applicants, are either not relevant, have no supportive evidence as required under the Act or fall outside the jurisdiction of the licensing authority.
- 39 Therefore the applicants have failed to lodge any valid reasons for the increase to 200 people not to be approved and their applications should be refused.

Determination

- 40 As summarised in paragraph 9 earlier in this determination, the grounds of the applications for review are non conformity with the planning laws and adverse impact on the amenity of the area as a result of the grant of the increase in number of patrons from 120 to 200 at this licensed premises.
- 41 Both sections 39 and 40 relevantly provide an application for a change in the use of any premises shall be accompanied by, in the case of section 39, a certificate from the local government and, in the case of section 40, a certificate from the authority responsible for planning matters, in the district where the premises are situated. The requirement for the certificates is mandatory unless the licensing authority otherwise determines.
- 42 The certificates allow the licensing authority to assume that all specified local government and food and health laws and regulations (section 39(2)) and planning laws (section 40(2)) have been or will be complied with without having to take any evidence in that regard.
- 43 Whilst submissions were made on behalf of the objectors regarding deficiencies in complying with planning laws, the material before the Director included a report by the Senior Premises Inspector of the Department summarising the status of the current section 39 and 40 certificates. This report was appropriately relied upon by the Director.
- 44 The Commission therefore does not consider it necessary to deliberate further in this regard.
- 45 Essentially this application is a review of the change of conditions of an existing licence. Whatever the outcome, the existing licence will remain.
- 46 The applicants, who reside in the vicinity of the premises, argued persuasively that they suffer offence, annoyance, disturbance and inconvenience from the presence of the premises, but they acknowledge they have to live with that at least insofar as the conduct of the licensee is within the terms of his licence and he otherwise does not breach any other laws.
- 47 The applicants' case is, in effect, that the offence is caused by the patrons of the premises (not all but some) and the licensee's inability or unwillingness to control them both on and off the premises. Increasing the number of patrons

permitted on the premises by 66% from 120 to 200 will inevitably add to the offence that they have to endure so that the granting of the application (and the resultant increase in number of patrons) means that undue offence is likely to occur where previously there was just offence.

- 48 The same argument can and is applied by the applicants in respect of the lessening of the amenity, quiet and good order of the locality in which the premises are located that is, a greater number of patrons will add to traffic (amenity), noise (quiet) and the risk of unacceptable behaviour (good order) in the locality of the premises.
- 49 The licensee offered little more than what could be described as superficial observations concerning the impact of the increase in patron numbers. The only step taken by the licensee was the provision of additional parking which only addresses one part of the amenity and annoyance issues.
- 50 The Commission recognises that the premises are located in what is primarily an agricultural environment, with adjacent properties engaged in a range of rural activities that can be adversely affected by intense traffic movements and accelerated noise factors. The evolution of the business from a micro-brewery/small restaurant facility to a larger entertainment outlet, including the hosting of large functions, has changed the dynamics of the business operation. The Commission is persuaded that an increase in the maximum number of allowed patrons, as proposed will, on the balance of probabilities, further exacerbate the conflict of use situation that currently applies in this locality.
- 51 The Commission therefore accepts the evidence of the applicants in relation to the likelihood that undue offence etc would occur to persons who reside in the vicinity of the premises and that the amenity, quiet and good order of the locality in which the premises are located would be lessened if the number of permitted patrons were to increase from 120 to 200. Furthermore, the licensee has given little indication of recognising the applicants' concerns, or how they could be ameliorated to the benefit of all parties.
- 52 Accordingly, in the circumstances, the applications are granted and the Director's decision granting the application to vary the condition of licence no 6020129610, to increase the number of patrons who may be ordinarily accommodated on the premises at any one time from 120 to 200 is quashed.



JIM FREEMANTLE
CHAIRPERSON