JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	:	KAPINKOFF NOMINEES PTY LTD -v- DIRECTOR OF LIQUOR LICENSING [2010] WASC 345
CORAM	:	HALL J
HEARD	:	28 JULY 2010
DELIVERED	:	26 NOVEMBER 2010
FILE NO/S	:	GDA 7 of 2009
BETWEEN	:	KAPINKOFF NOMINEES PTY LTD Applicant AND DIRECTOR OF LIQUOR LICENSING Respondent

ON APPEAL FROM:

Jurisdiction	:	THE LIQUOR COMMISSION OF WESTERN AUSTRALIA
Coram	:	MR E WATLING (DEPUTY CHAIRPERSON) MS H COGAN (MEMBER) MR G JOYCE (MEMBER
File No	:	LC 18 of 2009

Catchwords:

Administrative law - Liquor licensing - Review by Liquor Commission of decision by Director of Liquor Licensing - Whether prohibition on having regard to new material was breached - Relevant considerations - Public interest considerations - Turns on own facts

Legislation:

Liquor Control Act 1988 (WA), s 3, s 5, s 8, s 9I, s 13, s 16, s 25, s 28, s 32, s 33, s 37, s 38, s 40, s 62, s 69

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Applicant	:	Mr J C W Skinner
Respondent	:	Ms M J Paterson

Solicitors:

Applicant	:	Jackson McDonald
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Hancock v Executive Director of Public Health [2008] WASC 224
Palace Securities v Director of Liquor Licensing (1992) 7 WAR 241
Vandeleur v Delbra Pty Ltd (1988) 48 SASR 156

HALL J:

Introduction

1 On 6 June 2008 the appellant, Kapinkoff Nominees Pty Ltd, applied for the conditional grant of a tavern licence under the *Liquor Control Act 1988* (WA) (the Act) in respect of premises to be situated on the corner of Joondalup Drive and Cheriton Drive, Carramar and to be known as the Carramar Family Pub. The appellant sought the licence conditional on the construction or completion of the premises.

2 On 14 April 2009 the Director of Liquor Licensing refused the application. The appellant then lodged an application pursuant to s 25(1) of the Act for a review of the Director's decision by the Liquor Commission of Western Australia (the Commission). The Commission conducted a hearing on 14 July 2009. At that hearing submissions were made on behalf of the appellant, the Director and by a number of local residents who had been objectors in the proceedings before the Director. On 20 August 2009 the Commission confirmed the Director's decision and refused the application. Reasons for that decision were published on 28 August 2009.

3 The appellant now appeals to this court from the decision of the Commission. The appeal notice was filed on 18 September 2009. Whilst that was 21 days from receipt of the Commission's reasons for decision it was in excess of 21 days from receipt of notice of the decision on 20 August 2009. In those circumstances the appellant sought an extension of time. Given that the delay was minor and was occasioned by the need for the appellant's solicitors to examine the reasons before being able to determine whether there were grounds for appealing, an extension of time was justified. The respondent did not oppose an extension. Accordingly, I granted an extension of time at the hearing of the appeal.

4 At the hearing of the appeal counsel for the appellant advised that the appeal papers had not initially been served on the objectors, who had been parties in the proceedings both before the Director and the Commission. This position had been rectified prior to the hearing, with all objectors having been served. Counsel advised that the hearing date had also been made known to the objectors and they were asked to contact the appellant's solicitors if they wished to take part in the appeal process. No responses had been received.

5 In these circumstances I proceeded to hear the appeal. In deciding to do so I took into account that the Director was represented and opposed

the appeal, that all of the submissions (both written and oral) made by the objectors to the Director and the Commission were included in the appeal papers and that this was an appeal confined to questions of law.

Grounds of appeal

6 The appeal notice included a number of paragraphs recounting the background facts and extracts from the relevant statutory provisions in addition to setting out a number of grounds of appeal. Extracting the grounds from that surrounding material, they are as follows:

1. The Commission erred in law in having regard to material from the objectors to the applicant's application for a tavern licence that was not before the Director of Liquor Licensing when making the decision to refuse the application, contrary to s 25(2c) of the Act.

2. The Commission erred in law in its determination of the public interest test by having regard to an irrelevant consideration, namely that the zoning of the site of the proposed tavern 'did not specifically provide for a tavern development on the site until the City of Wanneroo's approval in August 2007' and that this gave rise to a 'public perception of other potential commercial uses'.

2a. The Commission erred in law in making a finding in regards to the public perception as to the potential commercial use of the site when there was no evidence upon which a conclusion could be based.

3. The Commission erred in law in its determination of the public interest test by having regard to an irrelevant consideration, namely whether the proposed licence had potential for a greater impact on amenity that could be approved under the zoning for the site.

3a. The Commission erred in law in that there was no evidence upon which a conclusion as to the comparative impact of a tavern as opposed to other uses could be made.

4. The Commission erred in law in its determination of the public interest test by having regard to an irrelevant consideration namely that 'the Commission was required to balance the competing interests of the right[s] of the applicant under planning regulations to develop a tavern on the site and the rights of local residents to

live in an environment that they had expected would be available to them in a residential location'.

5. The Commission erred in law in its determination of the public interest test by having regard to an irrelevant consideration, namely that the proposed shared parking arrangement with a nearby shopping centre was 'far from ideal' without relating those findings to any of the relevant considerations set out in the Act.

5a. The Commission erred in law in making findings in relation to the shared parking arrangement without having regard to the approval of that arrangement by the City of Wanneroo or the uncontested expert evidence on the operation of that arrangement produced by the applicant.

6. Having regard to the findings made by the Commission and the provisions of the Act, the Commission should have found, and erred in law in not finding, that the grant of the application was in the public interest.

7 At the hearing of the appeal the appellant's counsel argued grounds 2 to 6 together on the basis that these were said to be manifestations of a failure on the part of the Commission to properly apply the public interest test as set out in the Act.

Proceedings before the Director of Liquor Licensing

8 As I have noted earlier, the appellant made an application for a tavern licence on 6 June 2008. The application was advertised for 28 days as required by s 67. Objections from 12 local residents were received.

9 The appellant was provided with the objections and given an opportunity to respond. That response was made in writing in a document dated 23 January 2009. The Director decided to determine the application on the written submissions. In this regard he took into account a 'public interest assessment' lodged by the appellant, the 12 objections, the appellant's response to the objections and the submission of the appellant dated 16 March 2009 in response to a letter from the Department of Racing, Gaming and Liquor.

10 The Director made a decision to refuse the application in reasons dated 14 April 2009. In those reasons the Director noted that the objectors had raised concerns about what they considered to be likely offence, annoyance and disturbance to the residents if the proposed tavern

was permitted to operate on the site. He also noted that the objectors had claimed that granting the application would not be in the public interest or that the consequential use of liquor would cause harm or ill-health to people.

11 The Director noted the appellant's response to the objections and then said, whilst the objectors' concerns about possible impact on amenity, noise, offence and disturbance were understandable, the Act placed the burden on the objectors to establish the validity of any objection, which he held they had not done.

12 The Director then referred to s 38(2) of the Act. That section refers to some of the matters that the licensing authority, in this case the Director, can have regard to. One such factor is that harm or ill-health might be caused to people due to the use of liquor. The Director took into account the material submitted by the appellant and concluded that harm or ill-health might be caused and that offence, annoyance and disturbance might also be caused. Thus, whilst not finding the objections proved, the Director appeared to find that some of the issues raised by the objectors were sufficiently proven by other material.

13 The Director then considered whether the proposed tavern would adequately cater for the requirements of future consumers. In this regard he took into account increased traffic flow, whether parking facilities were adequate, the likely increase in noise and antisocial behaviour and the predominantly residential nature of the surrounding area. He then concluded that the possibility of harm due to use of liquor if the application was granted outweighed the desirability of catering for the requirements of consumers and related services. On this basis he refused the application.

Proceedings before the Liquor Commission

14 Section 25 of the Act provides that a party who is dissatisfied with the decision made by the Director may apply to the Commission for a review of that decision. The section sets out some limitations on how such a review may be conducted. The only one that is presently relevant is a limitation on the material that the Commission can have regard to. This limitation is relevant to one of the grounds of appeal and I will return to it later.

15 The appellant exercised its right to seek a review. It submitted on that review that the Director had attributed too much importance to the objective of minimising harm or adverse health effects and given

insufficient weight to the objective of catering for the requirements of consumers of liquor and related services. Both of these are objects referred to in s 5(1) of the Act. It was further submitted that the Director had placed undue weight on the 'possibility of harm' to the exclusion of other factors relevant to the exercise of the discretion to grant or refuse an application in the public interest.

16 The Director intervened in the review proceedings pursuant to s 69(11) of the Act. He was represented in the proceedings before the Commission and submissions were made on his behalf, both in writing and orally.

17 Some of the objectors who had filed objections to the original application made further submissions on the review. Five of the original 12 objectors chose to do this in writing. For present purposes it will only be necessary to refer to one of these, a letter filed by Mrs Helen Maher dated 30 May 2009. This letter contained a number of attachments, including a photocopy of a marketing brochure for the Carramar Golf Course Estate. The brochure included the plan of the estate on which the relevant location of the proposed tavern was designated as 'service station'.

18 The appellant made written submissions in response to those filed by the objectors on the review. In those responsive submissions it was stated that:

> Insofar as the further submissions raise new matters or rely on new information that was not before the Director of Liquor Licensing, the Commission is not entitled to have regard to that information (s 25(2c) of the Liquor Control Act).

19 The responsive submissions particularly referred to the attachments to Mrs Maher's letter and state that those attachments were not material that had been before the Director.

20 The Commission held a hearing on the review on 14 July 2009. The appellant and the Director were represented by counsel and some of the objectors appeared personally. At the commencement of the hearing the Chairman read out the terms of s 25(2c) of the Act. He then noted that the appellant had made submissions that some material put forward by objectors on the review had not been before the Director. The Chairman then said:

> We will sort in our examination through what material we believe may be additional to what was before the Director but in most cases it would seem

> that a lot of it is just an expansion of what was said earlier, but we will take that into consideration (ts 2).

21 During the course of the hearing the issue of what residents had been led to believe regarding land use was raised. One of the objectors, Ms Beswick, was asked:

> The Chairman: What did you envisage might go on that location, being zoned a centre?
>
> Ms Beswick: When we first purchased our house we were advised that there was going to be a petrol station in that area and that was what we got advised by the developers when we purchased our property.
>
> The Chairman: And you felt that was acceptable?
>
> Ms Beswick: We were quite comfortable with that.
>
> The Chairman: Who was it that gave you that advice? Was it the land agent people?
>
> Ms Beswick: It was the real estate agent that we purchased the house from. He had made inquiries with the company and that was what we were advised (ts 29).

22 Another objector, Mr Collins was asked:

> The Chairman: Thank you Mr Collins. Again, what did you envisage was going to go on that location?
>
> Mr Collins: I received a flyer from Peet & Co from friends that stayed in Cheriton Street that actually indicated this area as a filling station, a service station, and it was on a Peet flyer. It indicated it was a filling station (ts 32).

23 The Commission confirmed the Director's decision on 20 August 2009 and delivered its reasons on 28 August 2009. The relevant part of the reasons is [43] - [51]. Those paragraphs read as follows:

> The Commission has weighed the competing interests of Sections 5(1) and 5(2) of the Act and has addressed whether the application is in the public interest in accordance with Section 38(4) of the Act.
>
> While considerable emphasis has been placed by the Applicant on the 2001 zoning of the site as (town) 'Centre' the Commission is of the view that while such zoning would permit tavern use, there are other considerations which must be taken into account.
>
> The lack of a designated 'Tavern' use for the site in the planning documents gazetted on July 6, 2001 has created a public perception of

other potential commercial uses - a situation fuelled by a brochure issued by the property developer, Peet Limited, showing the site as 'service station'.

Residential objectors have stated that their decision to purchase residential land in the area was influenced by this information and that had it been indicated that 'tavern' use was proposed, they would not have purchased residential property in the area. The Commission recognises the different land use implications between 'service station' and 'tavern' and accepts that the residents near the site would have a more concerned view to the tavern development option.

The Commission has also considered the Applicants submission that the zoning of (town) 'Centre' allows for a tavern development and that the required approvals have been received from the planning authorities. The proposed car parking arrangements and the management initiatives to address resident concerns have been considered.

In reaching its determination the Commission was required to balance the competing interests between the right of the Applicant under planning regulations to develop a tavern on the site and the rights of local residents to live in an environment that they had expected would be available to them in a residential location. The following matters were considered relevant:

In support of the Applicant:

a. The Applicant in operation of the tavern business will offer a range of services and facilities not presently available in the immediate area of the proposed tavern:

   - sale and consumption of liquor and food and entertainment in pleasant well managed premises.

   - availability of liquor for sale and consumption off the premises at times when there are no other such facilities in the immediate area;

b. All planning approvals are in place and the zoning allows for a tavern development;

c. There were no intervening notices by the Commissioner of Police and the Executive Director of Public Health.

In support of the Objectors:

d. The planning process did not specifically propose the site for tavern purposes. This is evidenced by the need to find off-site parking to meet the planning requirement;

e. The proposed shared parking arrangement with the shopping centre opposite is far from ideal, necessitating patrons of the tavern to have to cross Cheriton Drive and with no certainty that there will not be overcrowding conflict with shopping centre patrons, particularly at peak times;

f. The area is primarily residential with the nearest residential premises being approximately 25 metres from the tavern site;

g. While it can be argued that a service station use might create more traffic movement than a tavern, there is the potential for a greater impact on the amenity of the area through the establishment of the proposed licensed premises;

h. There is a liquor store in the shopping centre opposite the tavern site which caters for the sale and consumption of liquor off the bottle shop premises, albeit during restricted hours. There are also hotel, restaurant and additional bottle shop facilities within comparatively easy reach of the locality.

In balancing these competing interests in accordance with the primary objects of the Act as prescribed in sections 5(1)(b) and 5(1)(c) and in considering all of the above circumstances the Commission finds that it is not in the public interest to approve the application, taking into consideration sections 38(4)(b) and 38(4)(c) of the Act which require the licensing authority to have regard to:

- Section 38(4)(b)- The impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be situated, and

- Section 38(4)(c)- Whether offence and annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or the proposed licensed premises.

The circumstances under which the planning processes have evolved since 2001 and did not specifically provide for a tavern development on the site until City of Wanneroo approval in August 2007, have strongly contributed to the application not being successful.

The Commission accordingly affirms the Director's decision and the Application is refused.

Statutory provisions

24 The licensing authority constituted by the Act is made up of the Director and the Commission. The licensing authority is required to have regard to the primary and secondary objects of the Act as specified in s 5. The primary objects are to regulate the sale, supply and consumption of liquor, to minimise harm or ill-health caused to people or any group of

people due to the use of liquor and to cater for the requirements of consumers for liquor and related services.

25 The Commission is established by s 8 of the Act. Section 9I of the Act provides that a decision of the Commission is to be given in writing and authenticated in accordance with the rules of the Commission. Each party to the proceedings is to be given a copy of the decision. There is no express provision in the Act either dealing with the content of the written decision or requiring the Commission to give reasons for its decision.

26 Section 13 of the Act provides that the Director is responsible for the administration of those aspects not relating to the Commission. The Director may determine any application or matter without conducting a hearing.

27 Section 16 contains a number of provisions related to proceedings before either the Director or the Commission. These provisions permit the Director and the Commission to act without undue formality and permit the obtaining of information as to any question that arises for decision in such manner as it thought fit and to make any determination on the balance of probabilities. The licensing authority, however constituted, is not bound by the rules of evidence or any practices or procedures applicable to courts except to the extent that the licensing authority adopts those rules, practices or procedures.

28 Section 16 also provides that the licensing authority is to act according to the equity, good conscience and substantial merits of the case without regard to technicalities and legal forms, and as speedily and with as little formality and technicality as is practicable: s 16(7). Subsection 16(11) provides that parties to proceedings are to be given a reasonable opportunity to present their case and in particular to inspect any documents to which the licensing authority proposes to have regard in making a determination in the proceedings and to make submissions in relation to those documents.

29 Section 25 of the Act provides that a person who is a party to the proceedings before the Director and is dissatisfied with the decision made by the Director, may apply to the Commission for a review of that decision. When carrying out such a review, the Commission is to be constituted by three members if the decision of the Director relates to an application for the grant or removal of a licence. Section 25(2c) provides that when conducting a review the Commission is to have regard only to the material that was before the Director when making the decision. On a

review the Commission may affirm, vary or quash the decision subject to the review, make a decision that should in the opinion of the Commission have been made in the first instance and give directions as to any question of law reviewed or to the Director: s 25(4).

30 Section 28 provides that a party to proceedings before the Commission who is dissatisfied with the decision of the Commission may appeal. In the case of the decision of the Commission constituted by three members, no appeal lies except to the Supreme Court on a question of law. The powers of the Supreme Court on appeal include the power to:

a. affirm, vary or quash the decision appealed against; or

b. make any decision that the Commission could have made instead of the decision appealed against; or

c. send the decision back to the Commission for reconsideration in accordance with any directions or recommendations that the court considers appropriate.

31 There is also a power to make ancillary or incidental orders that the court considers appropriate.

32 Section 33 of the Act provides that the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers to be in the public interest. The section further provides that an application may be refused even if the applicant meets all the requirements of the Act, or may be granted, even if a valid ground of objection is made out. Section 38(4) provides that without limiting the matters to which the licensing authority may have regard in determining whether granting an application is in the public interest, the authority may consider:

a. the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and

b. the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and

c. whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and

d. any other prescribed matter.

33 Section 62 provides that a conditional grant of a licence may be given where premises have not been completed.

Ground 1 - additional material

34 Section 25(2c) of the Act provides:

> When conducting 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.

35 In ***Hancock v Executive Director of Public Health*** [2008] WASC 224 [53] Martin CJ suggested a rationale for the restriction in s 25(2c).

> The fact that the Parliament has restricted the materials available to the Commission for the purposes of such a rehearing to those which were before the Director, can be explained by a desire to avoid a situation in which parties to proceedings before the Director 'keep their powder dry' and save their evidence and arguments for presentation to the Commission on review.

36 Whatever the rationale may be, the fact is that this restriction exists. No doubt parties will also rely upon it being complied with. Thus, non-compliance may raise not only an issue of breach of a statutory provision but an issue of fairness of the proceedings.

37 The appellant did not identify in the grounds of appeal what material it asserted that the Commission had had regard to that was not before the Director. The ground merely referred to material 'from the objectors'. In written submissions on this appeal the appellant referred to there being further material before the Commission on the hearing of the review, written submissions from the appellant and the Director who intervened in the review proceedings and also submissions and attachments thereto from a number of the objectors.

38 However, as I have noted earlier, the Commission held a hearing on the review and the fact that it received written submissions in regard to that review was unsurprising. Indeed, it was entirely proper that it should receive such submissions from parties to those proceedings, which included the objectors, and that course is permitted by the Act: s 16(1)(d). Persons who lodge an objection to an application and do not withdraw it are parties to a proceeding: s 25(6)(a) (see also the definition of 'party to proceedings' in s 3 of the Act). The Commission was also obliged to ensure that each party to the proceedings before it was given a reasonable opportunity to present its case: s 16(11). Accordingly, the mere fact that the Commission received written submissions from the parties on the

review does not in itself indicate that there has been any failure to comply with s 25(2c). Rather it is necessary to identify with some precision the new material that was before the Commission which it had regard to on the review.

39 On the hearing of this appeal the appellant identified three items of material that it said fell into the category of additional material that had not been before the Director. The first of these was information that there was a public perception that the land might be used for purposes other than a tavern. Paragraph 45 of the reasons of the Commission stated as follows:

> The lack of a designated 'Tavern' use for the site in the planning documents gazetted on July 6, 2001 has created a public perception of other potential commercial uses - a situation fuelled by a brochure issued by the property developer, Peet Ltd, showing the site as 'service station'.

40 It was common ground on this appeal that the brochure referred to was attached to the submission made by Mrs Maher, one of the objectors, dated 30 May 2009, a submission that was made to the Liquor Commission. That brochure was not amongst the material that had been before the Director.

41 There was, however, other material that was before the Director that residents did have the perception as described. In particular, in the written notice of objection of Mr and Mrs Neale of 21 July 2008 the following statement was made:

> This neighbourhood was marketed as an estate for families to grow in a safe environment with parks, a local school and community centre, at no stage since we have purchased the land in 2001, built the house and resided here, were we or any of the other residents advised that the proposed petrol station for that particular site had changed zoning to a proposed hotel site. We received no written notification/communication either via mail or local newspaper from the Wanneroo Council or the Developer. The first time that we were made aware of this change was during last year, when the signage was erected on the block.

42 Similarly, a written notice of objection from Mrs Maher that was before the Director and dated 22 July 2008 stated:

> When we built this home we were assured by Peet and Co that a medical centre or gas station or childcare facility would be built there. Over the past 6 months we have tried unsuccessfully to sell the home and have now taken it off the market. Our Real Estate salesperson has advised that we definitely will not sell it while the application for a liquor licence is on the site.

43 The mere fact that the brochure was included in the submissions filed by an objector on the review by the Commission does not mean that the prohibition in s 25(2c) has been breached. It is unsurprising that laypersons representing themselves on review proceedings would not necessarily appreciate the distinction to be made between submissions and the provision of additional material.

44 That the Commission appreciated, however, that it could not have regard to new material is apparent from the statement made by the Chairman at the commencement of the proceedings on 14 July 2009. That statement appears to make a distinction between wholly new material and material that was an 'expansion' on what had been put before the Director. Such a distinction may not always be sound. Material that added in a significant way to a contention made before the Director could be new even though the contention itself was not. However, my understanding of what the Chairman meant was that it was important to look to the substance of the material and not merely the form in which it was provided.

45 The reasons of the Commission are in comparatively short form. It is not clear from them whether the Commission appreciated that the brochure was not amongst the material that was before the Director. However, there had been material before the Director upon which a conclusion regarding public perception of the use to which the land would be put could properly have been made. The brochure appears to have done nothing more than confirm what had been previously said by objectors, including Mrs Maher, in material that had been before the Director.

46 To the extent that the brochure was relied upon by the Commission, it was to confirm a finding that was based on other material. However, what appears to be significant to the conclusion reached by the Commission is that such a perception existed. Even if the Commission was in error in referring to the brochure, there is nothing to suggest that it would not have reached the same conclusion in regards to the public perception as to the use of the land. It may be that the brochure gave that public perception enhanced weight, but if it did it was only because it served to confirm what was already contained within the material that was before the Director.

47 In these circumstances even if reference to the brochure constituted an error, the significance of that material was not such as to be likely to have affected the Commission's decision. It is open on this appeal to find

that the error was not material and that is the conclusion I have reached. That conclusion is reinforced by the following exchange that occurred during the course of the hearing of the appeal:

> HALL J: To what do you point in the commission's reasons that established that the commission had regard to that material?
>
> MR SKINNER: Primarily, sir, it is in the findings at paragraph 43 onwards of the commission's decision. There is a specific reference in paragraph 45 to the brochure. There is certainly reference to the brochure there.
>
> HALL J: Before you leave that one, just looking at exactly what the finding is, it would seem that the brochure is not the basis for the finding but the basis for concluding that the perception was fuelled, to use the word, by the brochure.
>
> MR SKINNER: Yes.
>
> HALL J: If the brochure was not had regard to, it would seem that that finding would have been reached in any event.
>
> MR SKINNER: Yes. I would accept that the brochure in that regard is perhaps the weaker of the three in that there was some reference in the material that was before the director to at least two of the objectors having been of the view that the site was going to be used for a service station.
>
> HALL J: Yes.
>
> MR SKINNER: And having been informed of that by real estate agents or friends or somehow or other through the leaks stemming back to the developer having published information to that effect. There were two objectors who had information before the director to that effect. That was the extent of the material before the director. Whether that is a public perception of other potential commercial uses - - -
>
> HALL J: That's another issue.
>
> MR SKINNER: That's another issue but, yes, there certainly was some information, I accept, that could result in that finding (ts 24 - 25).

48 The second matter raised by the appellant was in regard to material that the objectors had been influenced in their decision to purchase their properties by a belief that the land in question would be put to some use other than that of a tavern. This is similar to the last issue except that it relates to the effect of the residents' expectations as to use of the land, rather than what the basis of those expectations was. In this regard the Commission's reasons at [46] state as follows:

> Residential objectors have stated that their decision to purchase residential land in the area was influenced by this information and that had it been indicated that 'tavern' use was proposed, they would not have purchased residential property in the area. The Commission recognises the different land use implications between 'service station' and 'tavern' and accepts that the residents near the site would have a more concerned view to the tavern development option.

49 The appellant says that only one objector referred to this issue in writing; Mrs Maher in her submission to the Commission dated 8 July 2009. In that submission having referred to the range of commercial uses permitted by the zoning Mrs Maher said that 'the proposed tavern application was made in 2006, not 2001. We would not have bought the property if this was the case'. It is true that that submission was not before the Director having been prepared specifically for the review proceedings before the Commission. The appellant also notes that Mrs Maher did not attend the proceedings before the Commission and that it was, therefore, not open to test that suggestion or enquire as to its basis.

50 In response the respondent notes what was said by Mrs Maher in her submission to the Director of 22 July 2008 that I have quoted earlier. Given the reference to having tried unsuccessfully to sell her home and the reference to the reason for the difficulty being the pending application for a liquor licence, it was said to be implicit that her original belief that the land would be used for a medical centre, gas station or childcare facility was a relevant factor in the purchase of her home. Similarly, the reference in the Neale objection that was before the Director to the marketing of the estate is also supportive of an inference that a belief as to the use of the land influenced their decision to purchase. Thus, whilst it is true that residential objectors did not explicitly state in submissions to the Director that their reasons for purchasing were so influenced, there was material before the Director upon which such a conclusion could be reached. Accordingly, it is not possible to infer that the Commission had regard to new material in reaching its conclusion as to the concerns that residents would have had.

51 The third aspect of additional material submitted by the appellant is that the Commission took into account the relative effect that use of the land as a service station as opposed to a tavern would have upon surrounding residents. In this regard the appellant refers to [48(g)] of the Commission's reasons which read as follows:

> While it can be argued that a service station use might create more traffic movement than a tavern, there is the potential for a greater impact on the

> amenity of the area through the establishment of the proposed licensed premises.

52 In argument it was suggested that rather than this being an example of the Commission taking into account additional material, it was the making of a finding in respect of which there was no material. This argument is different to that raised by the ground of appeal. No application was made to amend the ground or add a new ground. Nonetheless, submissions were made by the parties and I will address the issue.

53 There had been reference in the objectors' submissions to the possibility that the land could be used for a service station. It was not disputed that the zoning permitted such use. It is correct that there was no material of any sort before the Commission or before the Director upon which a conclusion as to the amount and type of traffic movement that would be caused by a service station could be made. There was, however, expert evidence in regards to traffic movement that would be caused by a tavern.

54 The appellant submits that the Commission in the paragraph referred to, did not merely draw conclusions in regards to the effect of traffic movement upon public interest considerations but made a conclusion that was based on an apparent comparison. However, it should be noted that the appellant's counsel had invited the Commission to engage in such a comparison by making the following submission:

> The other issue in relation to the resident objectors is the petrol station. Again I would perhaps make the submission that I would suggest that the traffic and noise issues associated with the petrol station 25 metres away from the residents would be far worse than any associated traffic in particular, and noise as well, with a tavern. Petrol stations operate 24 hours a day. Cars are coming and going all through that period of time. We're dealing here with a completely different sort of operation which I would suggest would have a far lesser impact on nearby residences than a petrol station (ts 39).

55 These submissions invited a comparison which the appellant now says could not properly be made. If there was error here it appears to be the acceptance on the part of the Commission that there was a potential for a greater impact on the amenity of the area through the establishment of a tavern. Had the Commission specifically confined itself to consideration of the impact of a tavern, its finding would have been unexceptional. The problem is in any comparison.

56 However, when viewed in context it is difficult to see how this factor was in any way material to the final decision. The Commission referred to the argument that a service station might create more traffic movement as well as the potential for a tavern to have a greater impact. Reference to the argument regarding traffic movement was perhaps unduly favourable to the appellant given that there was no material to support such an argument. In my view, properly understood, what the Commission was saying is that, notwithstanding that it was argued that a service station would have an impact, there was material to support the view that a tavern would have a substantial impact on amenity. There was a proper basis for such a conclusion. Accordingly, ground 1 fails.

Grounds 2 to 6 - Planning considerations

57 The licensing authority, be it the Director or the Commission, has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest, even if the appellant meets all the requirements of the Act: s 33(1) and (2). An applicant who makes an application for a conditional grant of a tavern licence of the type in question must satisfy the licensing authority that granting the application is in the public interest: s 38(2). The reference to public interest in s 33(1) of the Act indicates that both s 5 and s 38 of the Act are relevant when making a decision: ***Palace Securities v Director of Liquor Licensing*** (1992) 7 WAR 241, 250 (Malcolm CJ).

58 The Act also provides that a licence shall not be granted by the licensing authority unless it is satisfied that any planning approvals required have been obtained: s 37(1)(f) and s 32(2) and s 40. It is clear from this that planning approval is a prerequisite but is not sufficient in itself.

59 In ***Vandeleur v Delbra Pty Ltd*** (1988) 48 SASR 156, 162 King CJ considered the requirement that an applicant for a licence under the legislation in South Australia must satisfy the licensing authority that the grant of the licence sought is unlikely to result in undue offence, annoyance, disturbance or inconvenience to those in the vicinity of the licensed premises. His Honour said:

> In considering what is 'undue' the court is entitled to have regard to the previous use of the land and as to the likely alternative uses if the licence is refused. As to the latter, relevant considerations may include zoning requirements and the fact that there has been planning approval for the licensed premises. The court is not entitled, however, to abdicate the

> function of determining the effect of any of the consequences of the grant of a licence simply because those consequences may have been considered by the planning authority.

60 In the present case the Commission accepted that the appellant had obtained all relevant planning approvals and took this into account in support of the application. However, it was then necessary for the Commission to go on to consider whether granting the application was in the public interest. In this regard the considerations in s 38(4) were matters that may well have been considered by the planning authority but that does not obviate the need for the licensing authority to consider those matters itself. A decision made by the licensing authority on a matter within its discretion including matters relating to amenity by simply applying a planning decision made by the planning authorities, rather than determining the merits of the application of the Act, would be invalid: ***Palace Securities*** (244) (Malcolm CJ).

61 In its reasons the Commission referred to factors in support of the application and in support of the objectors and stated as follows at [49]:

> In balancing these competing interests in accordance with the primary objects of the Act as prescribed in sections 5(1)(b) and 5(1)(c) and in considering all of the above circumstances the Commission finds that it is not in the public interest to approve the application, taking into consideration sections 38(4)(b) and 38(4)(c) of the Act which require the licensing authority to have regard to:
>
> - Section 38(4)(b) - The impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be situated, and
>
> - Section 38(4)(c) - Whether offence and annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or the proposed licensed premises.

62 However, the appellant suggested in ground 4 that at [48] the Commission applied the wrong test insofar as it stated:

> In reaching its determination the Commission was required to balance the competing interests between the right of the Applicant under planning regulations to develop a tavern on the site and the rights of local residents to live in an environment that they had expected would be available to them in a residential location.

63 If this had been understood to be the final test that was being applied by the Commission there might well be merit in the suggestion that it had applied the wrong test. However, seen in the context of the whole of the

reasons and in particular [49], it is apparent that the Commission was doing no more than referring to one aspect of its decision-making process.

64 The appellant sought to refer to the matters listed in grounds 2, 3 and 5 as being irrelevant because either they did not relate to the considerations in s 38(4) or because the Commission had not made such a connection itself. However, this appears to assume that the considerations in s 38(4) are not only necessary but exclusive. The wording of that section is contrary to any such conclusion. The suggestion that the Commission in listing the factors that it had taken into account in [48] was obliged to relate them to the factors referred to in s 38(4) misconceives the purpose of that section. The question was not whether the factors listed relate to those referred to in s 38(4) but rather whether those factors relate to the public interest.

65 Thus, in respect of ground 2 the suggestion that it was irrelevant that the planning process did not specifically propose the site for tavern purposes was because it did not relate to either amenity or offence and annoyance. It would appear that the relevance of this issue was to the expectations of the residents. In assessing factors like offence or annoyance or amenity it may be relevant for the licensing authority to take into account the expectations of surrounding residents. Concepts like offence, annoyance and disturbance are relative and may depend upon what might be reasonably expected by a resident. A person who buys a house next to a freeway might reasonably expect that there would be some traffic noise. Thus, whether there had been a specific proposal for a tavern might well be relevant in assessing public interest factors.

66 In regard to ground 3 the comparative impact on amenity of a service station as opposed to a tavern has been referred to earlier. This ground however relates not to whether there was material to support such a comparison on the specific basis of traffic flow, but whether such a comparison is relevant to the public interest test. Suffice to say in my opinion, ***Vandeleur*** supports an approach that the licensing authority can consider likely alternative uses for the site. There was material that indicated a service station was a possible alternative use. Thus, it would not be irrelevant to consider the impact on amenity of a possible alternative use.

67 In regard to ground 5 the appellant complained that the Commission failed to refer to expert evidence that was provided to the Director. It also complained that there was a failure to explain the conclusion that the parking arrangements were 'less than ideal'. I do not accept that this is so.

The conclusion that the parking arrangements were less than ideal was in fact explained at [48(e)] of the Commission's reasons when that quote is taken in context:

> The proposed shared parking arrangement with the shopping centre opposite is far from ideal, necessitating patrons of the tavern to have to cross Cheriton Drive and with no certainty that there will not be overcrowding conflict with shopping centre patrons, particularly at peak times.

68 Nor was the suggestion that the Commission failed to take into account the expert evidence of the applicant in this regard supported by a reading of the reasons. In [20] and [32] the Commission made references to the number of onsite parking bays and these were clearly references to the expert evidence. The appellant suggested that the conclusion in [48(e)] was flawed because it did not relate back to the considerations in s 38(4) of the Act. It was submitted that the parking issues did not obviously relate to amenity or disturbance matters and that there needed to be some reasoning that connected them. However, in my view whilst parking issues may in fact be relevant to amenity and disturbance it was entirely possible that the consequences as described in [48(e)] of the Commission's reasons of the need for patrons to cross Cheriton Drive was directly relevant to the public interest. Thus, I do not accept that the parking issues as described were an irrelevant consideration.

69 For the reasons that I have referred to, grounds 2, 3, 4 and 5 cannot succeed because the matters referred to could in fact be relevant considerations. Nor can grounds 2a, 3a and 5a succeed insofar as there was material that could support those conclusions.

70 Ground 6 does not allege a specific error of law. Rather it seeks a different outcome based on the perceived merits of the case. I do not accept that given the findings made by the Commission the only possible outcome was to conclude that a grant of a licence was in the public interest.

Conclusion

71 None of the grounds have succeeded. Accordingly the appeal must be dismissed.