

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Floreat Beach Investments Pty Ltd, Licensee.
(Represented by Mr Rod Maslin, Director, Ms Natalie Oberman, Director and Ms Karen Lee Wild, Approved Manager)

Other Parties: Director of Liquor Licensing
Mr Ewan Gunn, Complainant
Mr John Lukey, Complainant
Town of Cambridge
(Represented by Mr Steven Sullivan , Environmental Health Officer)

Commission: Mr Jim Freemantle (Chair)
Mr Greg Joyce
Mr Eddie Watling

Date of Hearing: 19 January 2009

Date of Determination: 30 January 2009

Premises Name: Floreat Tavern

Matter: Application for Review, Section 25 of the *Liquor Control Act 1988* ("the Act")

Determination: The Application for Review is allowed and the decision of the Director of Liquor Licensing is varied.

Background:

1. On 19 October 2006, Mr Ewan Gunn, a resident of 2 Kirkdale Avenue Floreat, and on 26 March 2007, Mr John Lukey, a resident of 92 The Boulevard Floreat, lodged complaints under the provisions of s 117(1)(b) of the *Liquor Control Act 1988* ("the Act") against the Floreat Tavern. They specifically complained of the following:
 - Noise from the outdoor courtyard area (music and patron noise) was disruptive and unacceptable;
 - Amplified bass noise was too loud when musicians or disc jockeys provided entertainment at the tavern; and
 - Anti social behaviour exhibited by patrons leaving the tavern was annoying and unacceptable.
2. Officers from the Department of Racing, Gaming and Liquor ("the Department") commenced a process of inspection, investigation and mediation. Some initiatives were introduced by the Licensee and there was a reduction in the level of anti social behaviour but complaints continued about the level of noise emanating from the tavern.
3. On 11 September 2007, Mr Peter Minchin, Deputy Director Licensing of the Department conducted a hearing to determine the complaints. Following submissions from the complainants and the licensee all parties agreed it was appropriate to monitor initiatives introduced by the Licensee. The strategies introduced consisted of the following:
 - A new sound system (installed May 2007);
 - Speakers in the beer garden to be turned off in the early evening;
 - A change in the type of entertainment to be offered – no live bands on Saturdays;
 - no live music on Sundays after 6pm;
 - entertainment to be offered by duos on Friday nights;
 - 11pm lockouts on Fridays;
 - Improved staff training for bar staff at the tavern.
4. Inspections conducted after the hearing has shown that the Licensee has changed the nature of the entertainment offered at the tavern. Noise levels have reduced significantly and the tavern now attracts a more mature demographic. The new sound system allows the Licensee to control the bass level of the audio equipment used by bands and disc jockeys.
5. In October 2008, prior to the hearing of the Director of Liquor Licensing on 15 October 2008, an attempt was made by the Department to negotiate an agreed outcome. The complainants indicated that whilst there had been a significant improvement there were still instances when the noise levels were too high particularly in the courtyard. No agreement could be reached on the proposed conditions.

6. At the same time, the Town of Cambridge also processed complaints on similar issues. In June 2007, Council received a petition signed by 147 residents with respect to noise and anti social behaviour. On 31 July 2007, the Town of Cambridge advised the Director of Liquor Licensing that the Council had resolved on 24 July 2007 to formally warn the Licensee that should sound levels not comply with *the Environmental Protection (Noise) Regulations 1997*, the Council would initiate legal action. On 27 February 2008, the Town of Cambridge advised the Licensee that if there was continued amplified music in the outdoor area it would issue Noise Abatement Directions pursuant to the *Environmental Protection Act 1986*.
7. The sound levels emanating from the Tavern have been measured on three separate occasions. Firstly by the Town of Cambridge (April/June 2007), secondly by Heggies, consultant to the Floreat Tavern (August 2007) and finally by the Department of Environment and Protection (December 2007). Analysis of all these sound level measurements suggested that the sound levels did not comply with established criteria pursuant to the *Environmental Protection (Noise) Regulations 1997*.

Preliminary Matters

8. The original complainants in this matter, Mr Ewan Gunn , resident of 2 Kirkdale Avenue Floreat, and Mr John Lukey, resident of 92 The Boulevard Floreat, were advised in writing and by telephone of the subject hearing and chose not to attend. Both complainants were sent a copy of the submission of the Applicant.
9. By correspondence dated 20th November 2008 addressed to the Chairman of the Liquor Commission, the Director of Liquor Licensing intervened pursuant to s69(11) of the Act and advised of his position on the grounds for review.
10. The Chairman advised all parties that pursuant to s25(2c) of the Act, the Commission may have regard only to the material that was before the Director when making the decision.

Findings

The order of the Director is varied as follows:

- **When entertainment, whether by musicians or disc jockeys, is provided in the indoor function room, all doors and windows to the function room must remain closed after 7pm on any night.**
- **No amplified music to be provided by musicians or disc jockeys in the courtyard area after 7 pm on any night.**
- **“Piped” pre recorded music not to be played in the courtyard area after 11 pm on any night.**

Reasons for the decision

11. The Application for Review is based on two grounds. Firstly the details of the original complaints and the matters giving rise to the complaints as stated by the complainants are different to the details of the complaints stated in the Director's decision. Secondly, the Director was misled and in his reasoning was operating under an error of fact in respect to s117(4b) (d) of the Act.

Ground 2: Error of fact

12. It is common ground between the Applicant and the Director (by his intervention) that the Licence for the Floreat Tavern was first issued on 23 August 2003 and not as stated in the briefing note dated 13 October 2008 to the Director by the Senior Inspector, Compliance-Liquor of the Department of Racing, Gaming and Liquor, as "23 August 2006" and relied upon by the Director in his determination.

13. The transcript of proceedings of the subject hearing indicates, by admission of the complainants (see page 9), that at least one of them took up residence after the licence was issued. This is material and an incorrect application of s 117(4b) (d) of the Act.

14. In his opening remarks under "**DETERMINATION**" (see page 5 of the Decision of the Director, A190817) the Director states " In this instance I am mindful of the fact that the complainants resided in the area prior to the Floreat Tavern operating at its current location". "Mindful" is a strong adjective with a meaning of, in this context, of having taken into account that the complainants were residents prior to the issue of the Licence, which is not the case for at least one of them. Given the weight the Director placed on this erroneous assumption of fact, the decision should stand.

15. For these reasons ground 2 is upheld and the application is allowed.

Ground 1: Details of original complaints different to complaints stated in the Director's decision

16. Although the application for review can be disposed of on ground 2, out of deference to the submissions of the Applicant and the Director by intervention, it is appropriate that the Commission expresses a view on ground 1.

17. The original complaint was lodged in October 2006. Since that time there has been a great deal of discussion, negotiation and process between all parties to come to the position of today. This includes recognition by the Licensee that it

had to take remedial action across a range of issues to improve the situation. These issues were generalized and not specific to Friday night.

18. At the subject hearing of 15 October 2008 the details of the complaints were summarized for the Director by Mr Nick Toyne an officer of the Department. The complaints were not restricted to Friday nights. All parties present were given an opportunity to raise objections and no one did.
19. A primary responsibility of the Director is to settle complaints by conciliation or negotiation (s117(3a) of the Act). In this matter the Director has gone to great lengths to resolve the issues raised and the licensee has been a willing party to that process. Over time the issues have been refined and changed and the Licensee is estopped from arguing that broader issues have not been raised about the entire operation of the Tavern.
20. One part of the review process has included taking noise readings on three separate occasions by the Town of Cambridge, the Licensee and the Department of Environment and Conservation respectively. In none of those processes were the readings restricted to Friday nights.
21. For these reasons ground 1 is dismissed.

Variation of the Director's decision

22. The Commission was impressed by the amount of conciliation and negotiation that has taken place since the original complaint was lodged in October 2006. There has been a genuine attempt by all parties to find acceptable solutions to the issues raised. The Licensee has been particularly cooperative and given a good deal of ground in the process. Decline in turnover since the implementation of the several reforms has been significant.
23. The issue of noise abatement pursuant to the *Environmental Protection Act 1986* and the *Environmental Protection (Noise) Regulations 1997* is the jurisdiction of the Town of Cambridge and any alleged breaches of those regulations are a matter for that municipality. A review of the existing sound readings indicate they are of a highly technical nature and the subject of interpretation. Any contests about the readings should be decided by the Town of Cambridge pursuant to the *Environmental Protection Act 1986*.
24. In the negotiation between the parties prior to the subject October 2008 hearing, the licensee agreed to the first limb of the proposed Director's orders. This now becomes the first limb of the Commission's findings with the variation of "after 7pm on any night". This provides consistency with the second limb and allows the Licensee to manage the noise in an orderly manner. The Licensee sought a compromise on the remaining two limbs. In all the circumstances it is the Commission's view that the remaining two limbs can be varied to restrict

reasonable compromise that takes account of the views of all parties to the complaints and should allow the proper function of the Tavern into the future.

Costs

There is no order as to costs

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

Mr Jim Freemantle
CHAIRMAN