

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

Applicant: Kapinkoff Nominees Pty Ltd trading as Carramar Family Pub
(*represented by Mr Julius Skinner of Jackson McDonald Lawyers*)

Intervener: Director of Liquor Licensing
(*represented by Ms Megan Ashford of State Solicitor's Office*)

Objectors in Attendance: Ms Heather Beswick
Mr Sean Greenacre
Mr Ernst Collins

Others in Attendance: Mr Dragan Kapinkoff (Director, Kapinkoff Nominees Pty Ltd)

Mrs Vasilka Kapinkoff (Director, Kapinkoff Nominees Pty Ltd)

Commission: Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan
Mr Greg Joyce

Date of Hearing: 14 July 2009

Date of Determination: 20 August 2009

Date of reasons published: 28 August 2009

Premises: Carramar Family Pub – development site cnr Joondalup Drive and Cheriton Drive Carramar

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

Legislation: *Liquor Control Act 1988*
Interpretation Act 1984
Liquor Control Regulations 1989

Determination: The Director's decision is affirmed and the Application for a conditional grant of a Tavern Licence is refused.

Authorities referred to by the Applicant:

- *Hancock v Executive Director of Public Health (2001) WASC 224 at [53]*
- *Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA 258 ("Lily Creek No. 1")*
- *Executive Director of Public Health v Lily Creek International Pty Ltd and Others [2001] WASCA 410 ("Lily Creek No. 2")*
- *Palace Securities v Liquor Licensing (1992) 7 WAR 241 at p.249*
- *Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356*
- *Re Charlie Carter (Kununurra) Pty Ltd (1991) 8 SR (WA) 169*

Authorities referred to by the Intervener:

- *Hancock v Executive Director of Public Health (2000) WASC 224 at [53]*
- *Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356 at [37]*
- *Palace Securities v Liquor Licensing (1992) 7 WAR 241 at p.249 and p.263*

Background

- 1 On 6 June 2008, the Applicant made application for the conditional grant of a liquor licence pursuant to sections 41 and 62 of the Act for premises to be known as the Carramar Family Pub and to be situated at the corner of Joondalup Drive and Cheriton Drive, Carramar.
- 2 Notices of Objection to the application were lodged by 12 residents in the area of the premises. It is noted that no objections were lodged by either the Executive Director of Public Health or the Commissioner of Police.
3. On 16 February 2009, the Director of Liquor Licensing (Intervener) wrote to the Applicant's then Solicitors offering an opportunity to comment on the matters raised in the letter that may have the prospect of an adverse

finding against the Applicant. The matters raised were detailed under the following headings:

- History of Zoning of proposed Premises Site
 - Parking
 - Proximity to Main Roads
 - Potential anti-social behaviour/ harm or ill health
4. On 16 March 2009, the Applicant made submissions in response to the Director's letter dated 16 February 2009.
 5. By his decision made on 14 April 2009, the Director refused the application for a conditional grant of a tavern licence.
 6. On 13 May 2009, the Applicant lodged an application for review of the Director's decision (No. A192699) dated 14 April 2009.
 7. On 19 May 2009, the Director lodged a Notice of Intervention in the matter for the purpose of making submissions.
 8. On 14 July 2009, the application for review was heard by the Commission.

The Review Process

9. The Application for Review was treated as a re-hearing of the matter on the basis of all the evidence and other materials which were before the Director when making the decision on 14 April 2009 and which were available to and considered by the Commission.
10. The Applicant's grounds for review of the Director's decision were detailed and were available to and considered by the Commission. The Commission has not considered it necessary to repeat or summarize the grounds in the determination as it considers that the Applicant's written submissions and responsive submissions and oral submissions at the hearing dealt comprehensively with the matters raised in the grounds.

The Hearing

General

11. The written submissions to the Commission by the Applicant and the Intervener were detailed, thorough and useful and the Applicant and the Intervener each made oral submissions to the Commission. The written submissions by all the Objectors and the oral submissions made by those Objectors who appeared at the Hearing, namely Ms Beswick, Mr Greenacre and Mr Collins, were also detailed, thoughtful and considered.
12. The Commission accepts that essentially there are no issues between the Applicant and the Intervener and the Objectors in relation to the following matters:
 - The relevant provisions of the Act are:
 - Section 5 (Objects)
 - Section 16 (Procedure)
 - Section 25 (Application for Review)
 - Section 33 (Absolute discretion of Licensing Authority – subject to the Act)
 - Section 38(1)(b), (2) and (4) – (Requirement for Applicant for a Licence to satisfy the Licensing Authority that certain applications – [including an application for a tavern licence] are in the public interest)
13. The proposed premises are opposite a shopping centre which has a bottle shop and parking space which could serve as “overload” parking for the proposed tavern.
14. The proposed premises are in proximity- in some cases close proximity (in one case 25 metres) to residential properties.
15. The site for the proposed premises is on the corner of Joondalup Drive, currently an undivided two lane road with a posted speed limit of 70km per hour and Cheriton Drive a wide two lane divided carriageway with a flush median and which operates under an un-posted speed limit of 50Km per hour.
16. The history of the zoning of the site for the proposed premises is as follows:

- The Carramar South/ Tapping Structure Plan was adopted in 2001 and was subsequently reflected in the City of Wanneroo District Planning Scheme No. 2 (“Scheme”).
- The Scheme was gazetted on 6 July 2001 and has been (and remains) the planning scheme governing land use in Carramar.
- Under both the Structure Plan and the Scheme the site was designated for (Town) “Centre” use. Under the Scheme the “Centre” zoning permits a range of commercial uses, including “Tavern” use.
- “Tavern” use is a discretionary use for the “Centre” zone which requires the grant of planning approval after advertising. The proposed use of the site as a Tavern has received planning approval from the City of Wanneroo after public comment and discussion.

Applicant’s Submission

17. The Applicant made submissions:
 - On 23 January 2009, in response to objections by Residents to the Application.
 - On 16 March 2009, in response to the letter dated 16 February 2009 from the Director to the Applicant’s then Solicitor.
 - On 2 July 2009, in relation to the Application.
 - On 10 July 2009, in response to the Intervener’s and Objectors submissions.
 - Orally at the hearing before the Commission.
18. The Applicant stated that in the Director’s Decision the Director summarized the concerns raised by the Objectors, extracted some comment by the Applicant from the Applicant’s response to the objections and concluded that the Act places the burden on Objectors to establish the validity of any objections, which they have not done.
19. That the Director correctly concluded that that the Objectors had not established the required validity and correctly dismissed the objections.

20. The Applicant relies on its response to the objections in which the Applicant analysed the objections identifying six categories of issues (adopted by the Director) and responds to each of the categories as follows:

- Generic concerns about liquor in the community;
- Car parking facilities;
- Noise (and refers to three environmental Noise Assessment Reports by Herring Storer Acoustics);
- Anti- social behaviour and harm/ ill health;
- Traffic related issues (and refers to a Traffic Impact and Assessment Report by Transcore Pty Ltd);
- Lack of demand or need for premises.

21. Under the heading "Section 38(2) Determination" the Applicant referred to the Director's reference in his Decision to the relevant provisions of section 38(2) of the Act and to certain extracts from the PIA, the Applicant's response to objections and response to concerns (in the Director's letter of 16 February 2009) and quoted the "only" comments or conclusions by the Director, relevantly that:

- The Director found that on a balance of probabilities if the Application were to be granted;
 - I. Harm or ill- health might be caused to people or any group of people due to the use of liquor.
 - II. Offence, annoyance, disturbance or inconvenience might be caused to people who reside in the vicinity of the proposed tavern and accordingly and having regard to the impact on the amenity of the locality in which the tavern is to be situated the Applicant had not satisfied the Director that the granting of the Application was in the public interest.

The Applicant stated that the fact that the 'public interest' test in section 38(2) is a broad test and needs to be considered and determined having regard to section 38(4) of the Act and the objects of the Act set out in sections 5(1) and 5(2) of the Act.

22. The Applicant referred to the Public Interest Policy which identifies issues relevant to section 38(4) (a) of the Act, being:

- the existence of 'at risk' groups who may be affected by the operation of the proposed premises;
- social health indicators for the locality in question, including the incidence of alcohol related crime; and,
- the rates and trends of alcohol related hospital presentations and admissions.

The Applicant stated that these issues were addressed in the PIA and further submitted that there is a low level of "at risk" elements within the local community.

23. In relation to 'social health indicators' the Applicant re- iterated:

- i. the low alcohol related hospitalization rates for the City of Wanneroo and North Metro Health sub-region, and
- ii. the low levels of crime in the area; and
- iii. the level of crimes per head of population being significantly lower than the State level;
- iv. by comparison with other areas within the relevant Police District, Carramar and the relevant locality are relatively free of crime and anti-social behaviour;
- v. the social health indicators for the locality of the proposed tavern indicate that the grant of the Application is not likely to increase the incidence of crime or anti-social behaviour in the area;
- vi. there are presently no significant levels of anti- social behaviour or alcohol related harm or ill health in the area caused by the use of liquor;
- vii. the existing levels of harm or ill health in the area are less than levels commonly accepted by the community in the State;
- viii. re- iterated that in relation to the Application there had been no intervention by either the Commissioner of Police or the Executive Director of Public Health.

24. In relation to the test as to "mere possibility of harm", the Applicant stated that if the Commission finds there is some possibility of harm or ill health due to the use of liquor if the Application is granted, consideration must be given to the relevance and weight to be given to any such finding and referred to the Directors reliance on the authorities Lily Creek 1 and Lily Creek 2. The Applicant submitted that the circumstances of the Lilly Creek authorities were completely different and therefore not relevant to the Application.
25. In relation to the finding in respect of the matter of whether offence, annoyance, inconvenience or disturbance might be caused by the proposed premises the Applicant stated:
- i. noise and anti- social activity are not currently a problem in the locality and this is unlikely to change if the Application is granted.
 - ii. design features of the proposed premises address the concerns of residents in the proximity, conditions of the Planning Approval address these issues, noise emissions will be minimised by the adoption of appropriate server practices and the issue of noise was addressed in the report by Herring Storer Acoustics.
26. In relation to the issue of the Planning history of the locality the Applicant:
- i. referred to the location of the proposed premises in what is becoming a major retail and services hub, including numerous shopping outlets and medical practice facilities. The "Centre" development will stretch along Cheriton Drive, directly opposite residential premises. Any potential offence, annoyance, disturbance or inconvenience caused to residents or workers in the vicinity should be viewed in this context;
 - ii. the Carramar/South Tapping Structure Plan was adopted in 2001 and was reflected in the City of Wanneroo District Planning Scheme No. 2, gazetted on 6 July 2001;
 - iii. Under both the Structure Plan and the Scheme the zoning permits of use of the proposed premises as a tavern;
 - iv. None of the Objectors commenced residing in their residences prior to 6 July 2001.
28. The Applicant submitted that in reaching the decision that "on the balance of probabilities, that the possibility of harm due to the use of liquor if the application for a tavern licence is granted, on balance outweighs the

granting of the application to cater for the requirements of consumers for liquor and related services” did not give sufficient recognition to section 5(1) (c) of the Act.

29. The Applicant stated that the Director relied upon two principal matters in relation to the section 33(1) determination, those being the impact of car parking and traffic flows and noise and anti-social behaviour and that these matters had been clearly addressed in the written submissions.
30. The Applicant also repeated previous submissions in relation to the Director’s interpretations of case law dealing with the relevance and importance of “the mere possibility of harm”.
31. In relation to car-parking and traffic flows the Applicant:
 - Referred to the mention of car parking in the PIA;
 - Referred to these matters as raised in the objections and as dealt with in detail in the Applicant’s response to objections;
 - Referred to the matters of parking and proximity to main roads mentioned in the Director’s letter and addressed by the Applicant in response to that letter.
32. The Applicant also referred to the mention in the Director’s Decision of the relevance and validity of assumptions in the Traffic Impact and Parking Assessment report. The Applicant then referred to the number of onsite parking bays, the number of parking bays available in the shopping centre opposite the proposed tavern and in some detail to the conclusion in the Traffic Impact and Parking Assessment report as to car parking arrangements which the report considered practical in the area. The Applicant also referred to the fact that Cheriton Drive is not hazardous and that there was no significant risk of harm to patrons of the Tavern as a result of some patrons potentially having to cross Cheriton Drive to use car parking facilities at the shopping centre. The Applicant also mentioned that there is no reasonable basis for concluding that there is a significant or quantifiable risk of patrons using the bottle shop (at the Tavern) and consuming liquor before or while driving.
33. With regard to “noise and anti-social behaviour” the Applicant:
 - Repeated previous relevant submissions in relation to the section 38(2) findings in the Decision.

- Noted that in considering noise and anti-social behaviour in the context of section 33(1) findings in the Decision, the Director placed considerable weight on the application of general research and testimony as referred to in pages 11-13 of the Decision and the Director made detailed references to that general research and testimony in the Director's letter. The Applicant had responded to the relevant matters in its response to the Director's letter.
- Stated that the Director had misconstrued *Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA 258* and *Re Charlie Carter (Kununurra) Pty Ltd (1991) 8 SR (WA) 169*.
- Stated that the Director's Decision in relation to that part of the Director's Decision concerning section 33(1) of the Act, the Director attributed too much importance to the object in section 5(1)(b) of the Act and not enough importance to the object in section 5(1)(c) of the Act which he found was not satisfied. The Director placed undue weight on the "possibility of harm" due to the use of liquor to the exclusion of other considerations relevant to the exercise of the discretion in the public interest.

Intervener's Submissions

34. The Director made:
- Written submissions
 - Oral submissions at the hearing before the Commission.
35. The Intervener referred to the fact that in considering whether the Applicant had satisfied that the Application was in the public interest, the Director must have regard to the primary objects of the Act (Section 5(1)) and has a discretion to consider when determining whether granting an application is in the public interest (s 38(4)). There is a need to place a weight on competing interests.
36. The following matters were relevant in the Director's Decision:
- The area in which the proposed tavern is to be located is predominately zoned residential and that it is in close proximity (in one case within 25 metres) to residential properties.

- The proximity of the proposed tavern to the Carramar Primary School and the Carramar Community Centre.
 - The proposed parking arrangements which would impact on the traffic flow along residential streets.
 - The academic research and expert testimony positively linking the availability of alcohol with increased alcohol consumption and social and health problems (including violence and road traffic incidences).
 - The onus on the Applicant to demonstrate that the conditional grant of a licence was in the public interest.
 - The demographics of the area- mostly young married couples with young families, home owners (not renters), a population which is a significantly larger section of the locality than at State level under 15 years of age and under 45 years of age.
 - The consideration that the location of the proposed tavern is a newly established area predominately zoned 'residential' and within 25 metres of one residence, was not in the public interest.
 - The consideration that, in this particular matter, in a locality where low levels of noise and anti-social behaviour currently exist, it is not in the public interest for the residents of Carramar to be expected to tolerate a degree of offence, annoyance, disturbance or inconvenience which may arise from the arrival of licensed premises in the vicinity of their residences.
37. Having taken into account the primary objects of the Act (in particular s 5(1)(a) and (b)) the Director exercised his discretion not to grant the Application and in doing so, correctly applied the provisions of the Act.

The Objector's Submissions

38. There were Notices of Objections lodged from 12 residents following the making of the application for a conditional licence all of which were before the Director when he made his Decision and were considered by the Commission.
39. Following the Director's decision and the lodging of the Application for Review some of the 12 original objectors made further written

submissions to the Director. These further submissions were received from:

- Ms H Beswick
- Ms H Maher
- Mr & Mrs Neale
- Mr Sean Greenacre
- Mr D I Gordon
- Mr & Mrs Escott
- Ms Sue Bosich
- Mr & Mrs Dexter

and were considered by the Commission.

40. As noted previously the following Objectors appeared at the Hearing before the Commission and made oral submissions:

- Ms Heather Beswick
- Mr Ernst Collins
- Mr Sean Greenacre

41. The written and oral submissions by the Objectors cover the same ground to a large extent and essentially can be summarized as objections to the grant of a Tavern Licence for the following reasons:

- Nature of locality in which the proposed tavern is to be situated.
- Predominately residential - tavern not appropriate.
- Predominately young population and family oriented - tavern not appropriate or needed.
- Availability of liquor from bottle shop in shopping centre - no further outlet necessary.

- Availability of liquor in other premises (e.g. restaurants) in nearby areas- no further outlet necessary.
- Zoning as Town Centre acknowledged but use as Tavern not appropriate in Town Centre.
- Main roads in proximity of proposed tavern- increase in traffic from use of proposed tavern- including exits and entrances with increased danger of traffic incidents.
- Residential streets in proximity of proposed tavern - increase in traffic- vehicular and pedestrian- from use of proposed tavern with, accordingly, increased danger of traffic incidents, noise and disturbance.
- The potential use of car parking bays in the shopping centre opposite the proposed tavern- increase in danger from necessity of use of Cheriton Drive as a pedestrian crossing between the proposed tavern and the shopping centre.
- Noise, disturbance, inconvenience, annoyance and anti-social behaviour.
- Increase in noise in locality due to use of proposed tavern - music, rowdy patrons especially at closing time and increased traffic noise.
- Increase in possibility of disturbance, annoyance and inconvenience to residents in proximity to proposed tavern- increased traffic with attendant noise and danger, increased danger from anti-social behaviour as a result of consumption of alcohol.

Findings

42. Having heard the parties and considering all of the material that was before the Director when making the decision, the Commission is not satisfied that the Applicant has demonstrated that circumstances exist whereby it would be in the public interest to approve the conditional grant of a liquor licence for the proposed Carramar Family Pub.

The application is therefore refused.

Reasons

43. 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.
44. 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.
45. 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".
46. 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.
47. 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.
48. 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.
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.

50. 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.

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



Mr Eddie Watling
DEPUTY CHAIRPERSON