

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Lano (WA) Pty Ltd
(represented by Mr Dan Mossenson and Ms Jessica Patterson of Lavan Legal)

Intervener: Director of Liquor Licensing
(represented by Mr David Leigh of State Solicitor's Office)

Observer: Mr W.G Stacey
(Lano (WA) Pty Ltd)

Commission: Mr Jim Freemantle (Chairperson)
Ms H Cogan
Mr G Joyce

Date of Hearing: 14th December 2009

Date of Determination: 18 December 2009

Date reasons published: 8 February 2010

Premises: Lancelin Liquor (Proposed)

Matter: Application for review of decision of the Director of Liquor Licensing to strike out the application by Lano (WA) Pty Ltd for the conditional grant of a liquor store Licence for the premises to be known as Lancelin Liquor.

Legislation: *Liquor Control Act 1988*

Determination:

The decision of the Director dated 29 September 2009 be quashed and the Application by Lano (WA) Pty Ltd be remitted to the Director to determine on its merits subject to:

- (a) such conditions as the Director sees fit particularly as to the time any approval granted shall remain extant pending gazetting of the required amendment to the relevant Town Planning Scheme (Amendment 8) and the time permitted to obtain a certificate pursuant to section 40(1) of the *Liquor Control Act 1988* in place of the Certificate currently held pursuant to section 40(2).
- (b) the time allowed by the Director to effect the planning requirements in (a) above shall be reasonable in the circumstances.

List of Authorities Referred to by the Applicant:

- *Re Con's Liquor Store Baldivis*;
- *PDJ Holdings Pty Ltd v Northview Pty Ltd t/as Baldivis Liquor Store & Anor* [2005] WALLC 3.
- *Decision of the Director Liquor Licensing A30448 dated 12th April 1999 in respect of the Marina Hotel, Jurien Bay.*

List of Authorities Referred to by the Intervener:

- *Morrison v Peacock* [2002] HCA 44; 210 CLR 274.
- *Coleman v Power* [2004] HCA 39; 220 CLR 1.
- *Saraswati v R* (1991) 172 CLR 1.
- *Project Blue Sky v ABA* [1998] HCA 28; 194 CLR 355.

1. Background

- 1.1 On 29th August 2008, the Applicant applied to the Director of Liquor Licensing ("the Director") pursuant to section 68 of the *Liquor Control Act 1988* ("the Act") for a conditional Liquor Store licence for Lancelin Liquor on Lot 13 on the corner of Walker Avenue and King Street, Lancelin. The proposed premises had not been constructed nor was the appropriate zoning in place.
- 1.2 The Application included a certificate of the Local Planning Authority, the Shire of Gingin, pursuant to section 40 of the Act dated 15th October 2007. The certificate was signed by the Principal Planner and stated "*It is known that the authority may give consent subject to final approval of Town Planning Scheme No.9 and Council approval*".
- 1.3 On 10th October 2008, the Applicant was issued with a Schedule of Requirements by the Compliance Officer of the Department of Racing and Gaming ("the Department"), which included the following: "*Before this Application may proceed submit an unconditional Section 40 Certificate from the Shire of Gingin*".
- 1.4 On 28th November 2008, the Administrative Officer of the Department advised the Applicant that documents referred to in the Schedule of Requirements included an unconditional section 40 certificate from the Shire of Gingin.
- 1.5 On 23rd December 2008, Lavan Legal advised the department inter alia, that "*An unconditional section 40 certificate will be obtained as soon as possible and prior to the unconditional grant of the licence. The certificate which was lodged with the application complies with the licensing authority's requirements for lodgement formalities.*"
- 1.6 On 9th January 2009, the Director advised the Applicant that "*section 40 conditional certificate is cause for concern and does not meet the requirements for the applicant to demonstrate statutory planning approval for its application*".

The Director, by operation of section 40(4) of the Act, indicated the Applicant had until 30th January 2009 to advise why the Application should not be struck out.

- 1.7 On 27th January 2009, Lavan Legal responded to the Director, opposing the proposed strike out and attached correspondence from the Shire of Gingin dated 30th December 2008 in which the Shire advised that Council at its meeting of 24th September 2009 had resolved to "*Support the merits of rezoning the subject lots from an industrial zone to a "commercial" zone.*" This would require a scheme amendment for the subject land.
- 1.8 On 6th February 2009, the Director responded to Lavan Legal stating that "*there is no evidence that an unconditional section 40 certificate will be obtained in the near future*" and that the Applicant had until 29th August 2009 (being 12 months from the date of the original application) to produce an unconditional section 40 certificate or failing this the Application would be struck out.
- 1.9 On 1st May 2009, Lavan Legal responded to the Director, enclosing correspondence from the Shire of Gingin dated 20th April 2009 which stated that the Shire had prepared two scheme amendments, Nos 101 and 102, for the rezoning of the subject land from industrial to commercial which would be advertised in the West Australian and the Advocate newspapers on 22nd April 2009.
- 1.10 On 31st August 2009, Lavan Legal advised the Director that the proposed amendments required Ministerial consent and sought an extension of time beyond 29th August 2009 to submit the unconditional section 40 certificate.
- 1.11 On 29th September 2009, the Director advised the Applicant that as it had not submitted an unconditional section 40 certificate the Application was struck out pursuant to section 69(14) of the Act.
- 1.12 On 30th October 2009, the Applicant lodged an Application to the Liquor Commission ("the Commission") for review of the decision by the Director pursuant to section 25 of the Act.

- 1.13 On 10 November 2009, the Director advised the Chairman of the Commission that pursuant to section 69(11) of the Act he proposed to intervene in the review proceedings for the purpose of making submissions.

2. The Hearing

- 2.1 During the Hearing the Applicant sought to argue the substantive merits of the Application for the liquor store licence.
- 2.2 The Director argued that the review was solely concerned with the procedural decision of the Director to strike out the Application pursuant to section 69(14) of the Act. The Chairman adjourned the hearing to allow the Commission to consider the matter.
- 2.3 An examination of the papers indicated that the review was concerned solely with the strike out decision.

The Application for Review of Decision by the Director lodged by the Applicant dated 30th October 2009 states:

"The Applicant is dissatisfied with the decision of the Director of Liquor Licensing to strike out the Application in that:

- 2.3.1 *The Director erred in not listing the Application for an initial hearing within 12 months of the date of lodgement, or alternatively, erred by not approving the listing of the Application thereafter.*
- 2.3.2 *The Application should have been heard and determined on its merits, or at least adjourned sine die pending lodgement of an unconditional certificate pursuant to section 40 of the Liquor Control Act.*
- 2.3.3 *The Director has failed to take into account relevant facts and circumstances, and*

2.3.4 *The decision to strike out is not in the public interest.”*

- 2.4 An examination of the thorough and detailed submissions provided by the Applicant and the Director prior to the hearing indicated that the Application was only concerned solely with the strike out decision and the Chairman advised the parties that the hearing would continue on that basis.

3. Legal Principles

- 3.1 The following legal principles of the Act obtain:
- 3.1.1 Section 16(1)(a) requires the Commission to act without undue formality.
 - 3.1.2 Section 16(1)(b)(ii) requires the Commission to make its determination on the balance of probabilities.
 - 3.1.3 Section 16(7)(b) provides for the Commission to act according to equity, good conscience and the substantial merits of the case.
 - 3.1.4 By operation of section 25(2c) the Commission may have regard only to the material that was before the Director.
 - 3.1.5 The Commission has an absolute discretion pursuant to section 33 to grant or refuse any Application under the Act. Such discretion is only constrained by the Act itself. (*Water Conservation and Irrigation (NSW) v Browning (1947) 74 CLR 492 Dixon CJ at [505]*).
 - 3.1.6 Section 37(2)(a) provides that the licensing authority may not grant an application for a licence unless satisfied as to the matters referred to in a section 40 certificate.
 - 3.1.7 Section 40(2)(b) provides that an Application for a liquor licence shall be accompanied by a certificate from the authority responsible for planning matters stating that the use of the premises would comply with the requirements specified if consent were to be given by the specified authority.

3.1.8 Section 69(14)(b) provides the Director with power to strike out an Application under certain circumstances.

3.1.9 Section 62A contemplates the licensing authority granting conditional approval subject to a section 40 certificate being produced.

3.1.10 In conducting a review the Commission is not constrained by the need to find error on the Director's part but is to undertake a full review of the materials before the Director by way of rehearing and make its own determination on the merits of those materials. (*Hancock v Executive Director of Public Health* [2008] WASC 224 Martin CJ at [53]-[54])

4. Reasons for Decision

4.1 The Applicant has, at all times, acted with good intentions and used its best endeavours to deliver an unconditional section 40 certificate. The Application would, on the face of it, appear to have merit.

4.2 The Commission is enjoined to act without formality, according to equity, good conscience and the substantial merits of the case. If the Application was struck out the Applicant, through no fault of its own, would be required to submit another Application at its expense.

4.3 Similarly the Director has sought to manage a situation that cannot be allowed to go on indefinitely. The Director has used his powers under the Act, and in particular section 69(14), in a proper manner and, at all times, has acted reasonably.

4.4 As a matter of policy the Director should impose a time limit on conditional section 40 certificates to deter speculative applications and maintain the proper development of the liquor industry. Whether the Director does this by adjourning the application sine die or granting conditional approval pursuant to section 62A of the Act is a matter for him to decide on the merits of the case. It is the responsibility of the Applicant to be aware of the considerable time and uncertainties involved in rezoning applications and not make premature Applications. The risk lies with the Applicant not the Director.

4.5 It is suggested that all Applicants should be aware of a reasonable time limit at the commencement of the application process and that this will be applied uniformly. Local Government has a two year time limit for conditional development approval and similarly the West Australian Planning Commission has a two year limit for conditional

subdivisional approval. If the Director was to adopt this time limit as a matter of policy it would provide certainty to the Applicant.

- 4.6 There are issues of concern for the Director if an Application is deferred too long as circumstances can change quickly and matters such as the public interest assessment can lose their currency. It is not unreasonable for the Director to request that Applications are updated where the process has been adjourned or conditional approval has been given.
- 4.7 Accordingly it is the Commission's decision that the decision of the Director is quashed and the matter be remitted to the Director for further consideration in accordance with the determination above.

A handwritten signature in black ink, appearing to read 'J. Freemantle', is written above a horizontal line.

**JIM FREEMANTLE
CHAIRPERSON**