

Earl of Leicester Hotel [2021] SALC 26

LICENSING COURT OF SOUTH AUSTRALIA

Earl of Leicester Hotel

JURISDICTION: Referral from Commissioner

FILE NO: 6260 of 2017

HEARING DATE: 23 February 2021

JUDGMENT OF: His Honour Judge Burnett

DELIVERED ON: 22 April 2021

CATCHWORDS:

Referral of an application for redefinition of licensed area pursuant to s 68(1)(b) of the Liquor Licensing Act 1997 (SA) by Fomo One Pty Ltd as holder of a hotel licence in respect of the premises situated at 85 Leicester Street, Parkside 5065 and known as the Earl of Leicester Hotel – the redefined area to include area of land outside the front of the hotel where 4 tables and 8 chairs are to be placed – area owned by the applicant and not the council – objector opposes application on the grounds that if the application for redefinition was granted, undue offence, annoyance disturbance or inconvenience to people who reside in the vicinity of the premises would be likely to result. Principles governing applications and objections considered are discussed – what is meant by “undue” – privacy, safety and security, noise, smoke, general litter and increased traffic concerns of objector discussed, relevant considerations include current use of new area by applicant.

Held – application granted - objection dismissed. Conditions imposed, as agreed between the licensee and the Council.

Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd [2002] SASC 17; (2002) 81 SASR 337

Murray Bridge Hotel [2009] SALC 7

Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207

The Holdfast Hotel [2008] SALC 29

Queens Head Hotel [2012] SALC 79

The Village Tavern [2016] SALC 56

Victoria Hotel [2011] SALC 98

Goodlife Modern Organic Pizza (No 2) [2013] SALC 16

REPRESENTATION:

Counsel:

Applicant: Mr E Belperio, with him Mr R D'Aloia
Objector: in person
Respondent: Mr B Allen

Solicitors:

Applicant: Clelands Lawyers
Objector: N/A
Respondent: Wallmans Lawyers

Introduction

- 1 By application dated 12 April 2017, Fomo One Pty Ltd, as the licensee of the Earl of Leicester Hotel (the applicant), applied, pursuant to s 68(1)(b) of the *Liquor Licensing Act 1997* (SA) (the Act) for a redefinition of the licensed premises of the Earl of Leicester Hotel (the Hotel). The applicant sought, in substance, an extension of the licensed premises, to include an area immediately outside the front of the Hotel (and adjacent to the footpath in the front of the Hotel). For the sake of convenience, I will refer to this area as the proposed new licensed area.
- 2 Ms Victoria Maselli, a nearby resident, by a Notice of Objection filed on 26 May 2017, objected to the application for the redefinition of the licensed premises. Pursuant to s 77(5)(g) (as the Act then was) an objection may be made on the ground that if the application were granted, undue offence, annoyance, disturbance or inconvenience to people who reside in the vicinity of the premises would be likely to result. These were the grounds of objection relied upon by Ms Maselli.
- 3 Other objectors filed Notice of Objections, but none of those objectors proceeded with their objections or participated in the trial.
- 4 The City of Unley initially intervened in the proceedings. However, just prior to the hearing of this application, the applicant and the City of Unley resolved their differences on the basis that the City of Unley withdrew its intervention in the proceedings, subject to the imposition of the following conditions which were agreed upon by the applicant:
 1. Authorised hours for the sale of liquor in the new area are from 11.30am to 10pm on any day.
 2. There are to be no more than 4 tables and 8 patrons permitted in the new area.

3. No tables or chairs are to remain in place in the new area after 10.15pm on any day.
4. The licensee is to paint and to maintain a clearly visible line on the ground to indicate the extent of the new licensed area.
5. On about 7 June 2020, the applicant was granted a short-term liquor licence over the new area pursuant to s 40 of the Act. The short-term licence was granted because of the COVID-19 health emergency and expires on the expiry or revocation of the declaration of the public health emergency made pursuant to s 87 of the *South Australian Public Health Act 2011* (SA). That licence authorises the licensee to sell liquor on the proposed new licensed area.

The Statutory Framework

6. The application for a redefinition of the licensed area was made in April 2017. It must be determined according to the Act as it then was. The application predated the commencement of the *Liquor Licensing (Liquor Review) Act 2017* (the 2017 Amending Act).¹ Section 8 of Schedule 2 of the Amending Act provides such an application must be determined as if the amendments had not come into operation. Section 51 of the Act (as at April 2017) provides that an application may be made to a licensing authority. Section 53(1) provides (inter alia):

(1) Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).

(1aa)

(1a) An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.

(2) A licensing authority should not grant an application as a matter of course without proper inquiry into its merits (whether or not there are objections to the application).

7. Although s 53(1) clearly gives the court a wide discretion to grant or refuse an application, the exercise of the discretion is constrained in that the discretion must be exercised for a purpose consistent with the Act. In *Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd*, Doyle CJ held:²

In short, the discretion must be exercised for a purpose consistent with the Act, and to advance or to maintain principles and policies found in the Act, or which the Court in its experience finds appropriate or necessary in

¹ South Australian Act, No 49 of 2017.

² [2002] SASC 17; (2002) 81 SASR 337 at 343. Cited in *Murray Bridge Hotel* [2009] SALC 7 at [17].

the proper application of the Act. On the other hand, the Court must be careful not to use the discretion as a basis for imposing views about what is desirable, unless those views are firmly linked to the principles on which the Act operates or is administered.

8 Section 3 of the Act provides:

- (1) The object of this Act is to regulate and control the sale, supply and consumption of liquor for the benefit of the community as a whole and, in particular-
 - (a) to encourage responsible attitudes towards the promotion, sale, supply, consumption and use of liquor, to develop and implement principles directed towards that end (the responsible service and consumption principles) and minimise the harm associated with the consumption of liquor; and
 - (b) to further the interests of the liquor industry and industries with which it is closely associated - such as the live music industry, tourism and the hospitality industry - within the context of appropriate regulation and controls; and
 - (c) ensure that the liquor industry develops in a way that is consistent with the needs and aspirations of the community; and
 - (d) to ensure as far as practicable that the sale and supply of liquor contributes to, and does not detract from, the amenity of community life; and
 - (e) to encourage a competitive market for the supply of liquor...
- (2) In deciding any matter before it under this Act, the licensing authority must have regard to the objects set out in subsection (1).

9 The specific power to redefine licensed premises is provided for by s 68(1)(b) of the Act. Section 68 of the Act provides:

- (1) The licensing authority, may, on the application of a licensee –
 - (a) approve an alteration or propose alteration to the licensed premises;
 - (b) redefine the licensed premises as defined in the licence;
 - (c) designate a part of licensed premises as a dining area or a reception area;
 - (d) in the case of a producer’s licence - remove a production outlet or retail outlet from the licensed premises.

10 An objection may be made on a variety of grounds under s 77(5) of the Act. Section 77(5)(g) of the Act (as it was at April 2017) provides that:

(5) An objection may be made on one or more of the following grounds:

(g) that if the application were granted-

(i) undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises or proposed premises to which the application relates would be likely to result....

11 It follows that it would not be in accordance with the purposes and principles of the Act to grant an application if it would likely result in undue offence, annoyance, disturbance or inconvenience to a resident who lives in the vicinity of the premises.

12 The phrase “undue offence, annoyance, disturbance or inconvenience” to residents or workers in the vicinity (or similar phrases) is used throughout the Act including in respect of an application for a new licence (s 57), an application to remove a licence from premises (s 60), the addition of outlets to a producer’s licence (s 62B) and in respect of noise complaints (s 106).

13 The question of what is meant by the term “undue offence, annoyance, disturbance or inconvenience” has been the subject of judicial consideration. In *Hackney Tavern Nominees Pty Ltd v McLeod*,³ Zelling J observed that the concept of unduly disturbing or inconveniencing persons who reside in the vicinity of licensed premises goes well beyond the legal concept of nuisance.⁴ In *The Holdfast Hotel*,⁵ Judge Soulio held (in the context of s 44 of the Act where the phrase also appears in the context of an extended trading authorisation):

In the context of s 44 “undue” means not appropriate or suitable, or going beyond what is appropriate, warranted or natural, or excessive.

What is undue must be considered in the context of the activities of licensed premises. Any resident living near a hotel must expect a certain amount of necessary or usual noise from people arriving at or departing from the premises. It will often be necessary to expect residents to tolerate a degree of disturbance or inconvenience, even annoyance or offence in the interests of the community’s need for licensed premises.⁶ (citations omitted)

14 Wells J in *Hackney Tavern Nominees Pty Ltd v McLeod*⁷ emphasised the need to consider what was “undue” in the context of the nature and activities of licensed premises. Wells J quoted with approval the words

³ (1983) 34 SASR 207.

⁴ *Ibid* at 208.

⁵ [2008] SALC 29.

⁶ Approved in *Queens Head Hotel* [2012] SALC 79 at [95].

⁷ (1983) 34 SASR 207 at 212-213.

of the Acting Judge of the Licensing Court who heard the matter at first instance:⁸

Any resident who lives nearby a hotel must expect a certain amount of necessary or usual noise from people either arriving at or, more likely, departing from the premises. From time to time one or more of the patrons might be expected to be noisier than others - calling out, even yelling and screaming might occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents.

15 Wells J went on to say:⁹

Let me hasten to say that disturbance such as loud talking, swearing, perhaps even the odd screaming, perhaps even a fight or two, even on a relatively regular basis might not in many cases be classed as undue. As I have said, people who live in the vicinity of a hotel must accept some disturbance. But where as here people are attracted to this hotel by, among other things, the lateness of its closure, the disturbance, coupled as it is with the late hours of such disturbance, can only be classed as undue. It is to my mind quite unacceptable that residents in the vicinity of this hotel should have to tolerate noise which disturbs at these unreasonably late hours, even though incidents of it be only intermittent.

16 It is apparent from these authorities that the question of what constitutes an undue offence, annoyance, disturbance or inconvenience must be determined objectively. It is not sufficient that a particular resident suffers from such an affect.¹⁰

Trial and witnesses

17 The Court conducted a review of the Hotel and also of the locality. As I made clear to the parties at the view, the purpose of the view was to understand the evidence that was to be given at the trial. The observations made at the view were not in themselves evidence in the trial.

18 The applicant called two witnesses, Mr Brian Hamilton and Mr Piers Schmidt. The objector, Ms Maselli, gave evidence.

19 Mr Hamilton, until very recently, lived next door to the objector, Ms Maselli, and across the road from the Hotel. He gave evidence that during the approximately six or seven years that he lived across from the Hotel, he did not experience any issues in terms of noise or disturbance

⁸ Ibid at 213.

⁹ Ibid.

¹⁰ *The Village Tavern* [2016] SALC 56 at [20], [28]; *Victoria Hotel* [2011] SALC 98.

emanating from the Hotel. His observations extended over the period since June 2020 when there have been three tables and six chairs placed out the front of the Hotel pursuant to the short-term liquor licence. Mr Hamilton further gave evidence that he did not notice any increase in noise after the tables and chairs were placed out the front. He said that the majority of the time he observed one or two people sitting at the tables, but not so many people at night.

- 20 I accept the evidence of Mr Hamilton and consider him to be a truthful witness. However, the weight that is given to his observations, particularly as they might suggest that the impact of the noise and loss of privacy experienced by him was equivalent to that experienced by Ms Maselli, is lessened by the fact that Mr Hamilton lived at the rear of the premises. He lived in a group of three units, but lived in the third unit, which was the furthest from the street. The units were joined together. The first unit was nearest the street. Behind that unit was the garage to the first unit, followed by the second unit and then the garage to the second unit and then the third unit where Mr Hamilton lived. Privacy and noise concerns would therefore not be expected to impact on Mr Hamilton.
- 21 Mr Schmidt is the sole director of the applicant. He gave evidence about the operations of the Hotel. He is a very experienced hotel operator, having been in the hotel industry for over 20 years. In addition to the Earl of Leicester, he is involved in the operation of the Union Hotel and the Sussex Hotel and has just sold an interest in the Franklin Hotel. Mr Schmidt gave evidence that the applicant had been operating the Earl of Leicester Hotel for about five years. The owners, a syndicate of investors, during this period had spent about one million dollars renovating the Hotel. Mr Schmidt also described the tables and chairs in the area out the front of the Hotel, which I will return to later in these reasons. He said that the applicant had received only two noise complaints, one from Ms Maselli and another from another objector to this application, but who has not proceeded with his objection. Mr Schmidt described the Hotel as a food focused hotel, not a late-night venue.
- 22 I accept the evidence of Mr Schmidt. I consider him to be an honest witness. His evidence was largely uncontroversial and concerned the operation of the Hotel and the use of the proposed new area. His evidence was not seriously challenged.
- 23 Ms Maselli gave evidence about the impact the proposed redefinition of the licensed area would have on her. She lived opposite the Hotel, directly across a relatively narrow street, Leicester Street. She had lived there for 19 years. She described her concerns as relating to her privacy, security and safety. She also referred to noise concerns and smoke.

Ms Maselli also gave evidence that she had similar concerns and had suffered similar impact when stained-glass windows were removed from the front of the Hotel in 2017.

- 24 I accept that Ms Maselli genuinely held the concerns about which she gave evidence. However, I do consider that she did tend to exaggerate those concerns. For example, she gave evidence that she was affected by smoke from patrons who were outside. I do not accept that given that her door was some 17.4 metres from the outside tables and chairs. I also do not accept that patrons from that location could easily look into her house given the position of her car in front of the house and the small amount of glass through which there might be visibility. Ms Maselli also suggested in her evidence that patrons might be able to look into her bedroom when in fact her bedroom was not in the front of the house, but was the second bedroom. Ms Maselli denied that she said “my bedroom”, but I consider that the clear impression derived from her statement that there was “a lack of privacy and security as outdoor patrons have a direct view of my front yard, front door and bedroom” was that her bedroom was at the front of the house. I also consider that Ms Maselli exaggerated the issues arising from the removal of the stained-glass windows from the front of the Hotel in 2017.

Background

- 25 The Earl of Leicester is a moderately large suburban hotel. It fronts onto Leicester Street, Parkside, a relatively narrow, suburban street. The old part of the Hotel is two-storied. The new additions such as the bistro and the gaming room are one storey. The Hotel is a very old hotel, having been in its current location since some time in the 1800s. I accept, as I have said, that the Hotel places an emphasis on food and is not a late night or entertainment venue. I accept also the evidence from Mr Schmidt, and supported by Mr Hamilton, that the Hotel is well run.
- 26 The licensee holds a General & Hotel Licence which licences it to sell liquor for consumption on the licensed premises. A map of the Hotel, including the licensed area, was tendered in evidence (exhibit A2). It shows the features, described below, which are relevant to this application.
- 27 First, the front bar of the Hotel is at the front of the Hotel, immediately adjacent to Leicester Street. It is from this area that the stained-glass windows were removed in 2017. The front bar area is directly across the road from Ms Maselli’s house. Secondly, adjacent to the front bar, also fronting on to Leicester Street, are male and female toilets. Adjacent to these toilets is a walkway to the rear of the Hotel, which is used for access to the lobby and beer garden. Mr Schmidt gave evidence, which I accept, that this walkway is sometimes used by patrons as a smoking

area. The walkway extends to Leicester Street. Thirdly, adjacent to the front bar on the western side and also fronting onto Leicester Street is a carpark for the use of patrons of the Hotel. Fourthly, immediately behind the front bar is a restaurant/dining area of about the same size as the front bar. The restaurant/dining area is joined to a further eating area named the bistro dining area. These two areas support the evidence of Mr Schmidt that the main focus of the Hotel is on food. Fifthly, towards the rear of the Hotel on the eastern side is a relatively small beer garden. Sixthly, at the rear of the Hotel on the western side is the gaming room. Seventhly, the upstairs region comprises a function room with a bar. Eighthly, and critically, is the area in respect of which this application is made. That area is marked in yellow on exhibit A2. The applicant seeks to extend the area of the licensed premises by including an outside area on Leicester Street, immediately outside the front bar, which I have referred to as the proposed new licensed area. This area is part of the Hotel in the sense that it is owned by the owners of the Hotel and not the Council. In essence, this area forms part of the footpath of Leicester Street, which is widened at this point. It is in this area that the applicant seeks to place 4 tables and 8 chairs so that patrons can drink outside. The tables are about 500mm x 500mm in size. The area extends across the width of the front of the Hotel, which is about 13.2m wide. The area is about 1.4m wide. Under the current licence, patrons are not able to drink outside, although, as the area forms part of the Hotel, they can eat there. However, the short-term liquor licence allows the licensee to sell alcohol in the new area.

- 28 The Hotel is licensed to midnight seven days a week. On Sundays, it closes at 10pm, although it is licensed to midnight. The Hotel generally closes at about 10pm on Monday, 10.30pm on Tuesday and 11pm on Wednesday. It will generally open to about midnight on Friday and Saturday. The maximum capacity of the premises is 555.
- 29 Ms Maselli's residence is directly across Leicester Street from the Hotel. That side of the road is residential and consists of houses, maisonettes or flats, generally on small allotments. Ms Maselli's house is single fronted with a hall running down one side of the house.
- 30 Ms Maselli had made a series of measurements about the location which I accept. The distance from the front of the Hotel building (i.e. the front of the front bar) to the kerb of Leicester Street is 3.2m. This distance comprises the area where the licensed premises is to be extended and also the footpath. Leicester Street is about 8.35 metres wide. The footpath on Ms Maselli's side of Leicester Street is about 1.75 metres wide. The front yard of Ms Maselli's house is about 5.5 metres long (i.e. from her house to the footpath).

31 In 2017, the licensee of the Hotel removed the stained-glass windows at the front of the Hotel (in the front bar region). Ms Maselli objected to their removal on the grounds of privacy but her objection was not sustained. Her evidence was that her lack of privacy began when the stained-glass windows were removed in 2017.

Determination of the application

32 The task of the Court, in exercising its discretion whether or not to grant the application is to balance the legitimate interest of the applicant in seeking to improve its premises, with the legitimate interests of resident objectors who wish to avoid being subject to undue offence, annoyance, disturbance or inconvenience by the proposed changes.¹¹

33 I am satisfied that the licensee has obtained all approvals or consents necessary to permit the sale of alcohol in the new area. In this regard, I note that the City of Unley consents to the application on the conditions that it has agreed with the licensee.

34 I consider that the licensee has a legitimate interest in seeking the redefinition of the licensed area to include the outdoor area, so that alcohol can be served in that area. The extended area in my view, provides a further service to patrons, utilising the area that is owned by the hotel owners. It is part of the licensee's legitimate efforts to improve the services it offers to patrons. Outdoor eating and drinking enhances the general ambiance of a hotel and is likely to be attractive to some patrons. Mr Schmidt gave evidence, which I accept, that persons driving along Leicester Street will see patrons utilising the outdoor area and that will tell people that the hotel is open.

35 Provided it strikes the right balance between the legitimate interests of the licensee and the interests of nearby residents so that they will not suffer from undue offence, annoyance, disturbance or inconvenience it is likely that there will be good grounds for the Court to exercise its discretion and approve the application.

36 Any offence, annoyance, disturbance or inconvenience to nearby residents, is, on the evidence before me, minimal and is certainly not "undue". The conditions which have been agreed to by the licensee and the City of Unley strike an appropriate balance between the interests of the licensee and the interests of nearby residents.

37 Ms Maselli claims that she will suffer "undue offence, annoyance, disturbance or inconvenience" if the licence is extended to include the proposed new licensed area for a variety of reasons. As there is a public

¹¹*Goodlife Modern Organic Pizza (No 2)* [2013] SALC 16 at [12] and [14]; *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 34 SASR 207 at 208 per Zelling J.

interest in determining the application, I will consider not only whether there is undue offence, annoyance, disturbance or inconvenience caused to Ms Morelli if the application is granted, but also consider whether there is such an effect on other nearby residents.

- 38 The reasons for Ms Maselli's concerns relate to her privacy, her safety and security, noise, smoke, general litter, including bottles and increased traffic along Leicester Street, including patrons blocking her driveway.
- 39 These concerns must be assessed in the context of the activities of licensed premises where nearby residents might be expected to experience a certain amount of disturbance or inconvenience from the activities of a hotel. They are also to be assessed objectively, that is what a reasonable resident in the position of Ms Maselli might experience, rather than what she personally feels. There must also be a causative effect of the application: that is, there must be undue offence, annoyance, disturbance or inconvenience if the application is granted. The word "if", in my opinion imports this causative requirement. This requires a comparison of the effect on nearby residents from the current operations of the Hotel and the effect on these residents if the application is granted. If the matters complained of already exist or are only increased in severity by a relatively small amount, that causative element will not be satisfied.
- 40 The present application must be determined in light of the following matters and circumstances. First, the Hotel is in a suburban area and has been in its current location for a very long time. Secondly, the increase in numbers of patrons that might be caused by the licensed premises extending to the proposed new licensed area is minimal in the context of the total number of patrons permitted at the Hotel. Thirdly, the owners of the Hotel already own the proposed new licensed area and are entitled to place tables and chairs in that area. They can serve meals in the proposed new licensed area, but except for the short-term liquor licence, cannot serve alcohol. Fourthly, the stained-glass windows to the front bar were removed in about 2017 such that patrons could look across Leicester Street from the front bar. Fifthly, patrons who smoke currently use outdoor areas near the front of the Hotel to smoke as smoking is prohibited indoors (as it is prohibited in all hotels). Sixthly, a short-term liquor licence was granted to the proposed new licensed area in about June 2020, permitting the sale of alcohol in that area. This permits some analysis to be undertaken of the objective effect of the licensing of this area. Seventhly, the Hotel is not a late-night or entertainment venue and is primarily a food venue.
- 41 Ms Maselli's first complaint relates to the impact that the proposed new licensed area will have on her privacy. I accept that there will be some impact on her privacy. Patrons using the outside area will look across the

road into her house and might be expected to linger for a longer period in this area if alcohol is served. However, for the following reasons I do not consider that undue offence, annoyance, disturbance or inconvenience to Ms Maselli's privacy will be caused if the application is granted. First, Ms Maselli's house is some 17.4 metres from the outdoor tables. Her house is obscured by her car which is parked in the front yard of her house. The inside of her house is, only marginally visible, depending on the placement of the tables. Further, there are two glass panels either side of the front door, but these are narrow and it would be very hard to see through them from the Hotel. Secondly, Ms Maselli accepted that she did not use the front room as her bedroom, using it instead as a guest room. Thirdly, irrespective of the granting of this application, Ms Maselli has suffered some loss of privacy as a result of the usage of the Hotel. That loss of privacy arises when patrons come and go from the Hotel. It arises, on Ms Maselli's own evidence, from the removal of the stained-glass windows in the front bar area in 2017, although in my opinion, the loss of privacy from that act is minimal. It arises from patrons smoking outside. It will also arise in any event, even if the application is not granted, from patrons using the outside area for eating, even if they cannot consume alcohol, although I accept that they will likely remain in the area for a longer period of time if they are able to consume alcohol. Fourthly, other than a general concern for her privacy, since the granting of the temporary licence, Ms Maselli has not given evidence about any particular occasion on which her privacy was compromised. For all of these reasons, I do not consider that there will be undue offence, annoyance, disturbance or inconvenience to the privacy of Ms Maselli if the application is granted.

- 42 The second complaint of Ms Maselli relates to her safety and security. This appears to me to be related to her objection about her loss of privacy. That is, because she claims that her privacy has been affected, it follows that her safety and security have also been compromised. I have already expressed my reasons as to why I do not consider there to be undue offence, annoyance, disturbance or inconvenience in relation to the privacy of Ms Maselli if the application is granted. For the same reasons, I also do not consider there will be undue offence, annoyance, disturbance or inconvenience in relation to the safety and security of Ms Maselli if the application is granted. I also take into account that, since the granting of the short-term licence, there has not been any incident that has given rise to a cause for concern about Ms Maselli's safety or security. In my opinion, the concerns of Ms Maselli in relation to her safety and security arising from the use of the outdoor tables (and the increased time patrons might spend there if alcohol is served) do not rise above mere speculation.

43 The third substantial complaint made by Ms Maselli relates to the noise produced by patrons of the proposed new licensed area. It would be expected that there would be some noise from such patrons. However, I do not consider that noise would be undue. The patrons are, for the most part, sitting at tables of two. As such, they could be expected to be talking in normal tones. I do not consider that this noise would be readily heard inside Ms Maselli's home, which is some 17.4 metres away (see below). Ms Maselli gave evidence that there was one occasion when she could hear noise from a patron sitting outside (who was sitting by herself), but I consider that to be very much the exception. It is to be expected that there will be some noise generated from a hotel. In this case, the noise will also occur from patrons of the Hotel using other areas of the Hotel. There will be noise from patrons as they come to the Hotel and as they leave the Hotel. There will be noise from patrons who are using the outdoor area for smoking, although again such noise will not be intrusive. There is likely to be some noise from patrons inside the Hotel or in the beer garden. In my opinion, the noise from all of these sources, including the noise from the outside areas is the sort of inconvenience that arises from living near a hotel. Mr Schmidt gave evidence, which I accept, that apart from Ms Maselli and one other objector to this application (who has not proceeded with his objection), the licensee has not received noise complaints. Ms Maselli did not adduce any independent or objective evidence in support of her complaint about noise.¹² Instead, she relied on her own subjective assessment of noise levels. In my determination, the noise in totality, cannot on the evidence, be characterised as "undue" or causing undue offence, annoyance, disturbance or inconvenience. The noise coming from the proposed new licensed area certainly cannot on any view be characterised as "undue".

44 I do not find that Ms Maselli's concerns relating to experiencing smoke affect in her residence are established. Ms Maselli's home is about 17.4 metres from the new area (being the 1.8 metres from the new area to the kerb, the 8.35 width of Leicester Street, the 1.75 metres of footpath on Ms Maselli's side of Leicester Street and the 5.5 metres of her front yard). In these circumstances, I consider that it is inconceivable that Ms Maselli would be suffering from any smoke caused by patrons in the proposed new licensed area. Further, patrons already use the front of the Hotel for smoking as they are not permitted to smoke in the Hotel. There is no evidence that smoking in the proposed new area, as opposed to the existing smoking has caused any undue offence, annoyance, disturbance or inconvenience to Ms Maselli or other residents.

45 Ms Maselli's fifth complaint concerns general litter and bottles left on the street. This complaint is minor. Ms Maselli has taken a number of photographs which she says shows bottles and glassware on the tables

¹²*The Village Tavern* [2016] SALC 56 at [20] demonstrates the need for such evidence.

that have been placed in the proposed new licensed area. I do not consider that these photographs show any undue offence, annoyance, disturbance or inconvenience caused by not immediately clearing bottles and glasses from the tables. The offence or annoyance is at most minor or trivial. There is no evidence of any other litter being generated from the use of the proposed new licensed area by patrons of that area. I do not consider that if the application is granted, that there will be anything other than minor offence or annoyance caused by litter or bottles being left in the vicinity. Ms Maselli's evidence that there had been a problem with cigarette butts for a number of years, suggests that her complaint relates to generally living across the road from a hotel, rather than a specific complaint relating to this application and the effect that the granting of this application may have.

- 46 There is no evidence to suggest that traffic along Leicester Street will be increased if the application is granted or that users of the new area have or are likely to have blocked Ms Maselli's driveway by parking across her driveway. There are a number of reasons why I make such findings. First, since the temporary licence was granted in June 2020, there is no evidence that users of the new area, as opposed to other users of the Hotel, have parked across Ms Maselli's driveway. Secondly, the users of the proposed new licensed area have not increased usage of the Hotel, rather they are existing patrons who are using a new area of the Hotel. Thirdly, the number of patrons using the new area is very small compared to the other patrons of the Hotel. Any increase in traffic or obstruction of Ms Maselli's driveway, if it has occurred, is much more likely to have been caused by these other patrons. Ms Maselli did not adduce any independent evidence of an increase in traffic because of the application. In all of these circumstances, I do not consider that undue offence, annoyance, disturbance or inconvenience will be caused to Ms Maselli by either an increase in traffic or the obstruction of her driveway if the application is granted.
- 47 It follows that I do not consider that any of the matters raised by Ms Maselli have been substantiated. I also do not consider, on the evidence, that any other nearby resident would suffer from such undue offence, annoyance, disturbance or inconvenience.

Conclusion and Orders

- 48 I am therefore satisfied that there will not be undue offence, annoyance, disturbance or inconvenience to Ms Maselli or to other residents if the application is granted. I am therefore satisfied, balancing the legitimate interests of the licensee and the legitimate interests of the residents, including Ms Maselli, that it is appropriate to grant the application.

- 49 I propose to grant the application of the licensee to redefine the licensed premises by including the area marked yellow on the map of the Hotel (exhibit A2) as part of the licensed premises.
- 50 I will therefore redefine the licensed area pursuant to s 68(1)(b) of the Act to include that area.
- 51 I grant that application subject to the following conditions:
- 1 Authorised hours for the sale of liquor in the new area are from 11.30am to 10pm on any day.
 - 2 There are to be no more than 4 tables and 8 patrons permitted in the new area.
 - 3 No tables or chairs are to remain in place in the new area after 10.15pm on any day.
 - 4 The licensee is to paint and maintain a clearly visible line on the ground to indicate the extent of the new licensed area.
- 52 The licence will be varied to include the above conditions.