Goodlife Modern Organic Pizza **[2012] SALC 100**

LICENSING COURT OF SOUTH AUSTRALIA

GOODLIFE MODERN ORGANIC PIZZA

JURISDICTION: Application for alterations to licensed premises and redefinition of licensed premises

FILE NO: 1563 of 2012

HEARING DATE: 29 June 2012;
further submissions received 3 September 2012

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 16 October 2012

Application for approval to licensed premises - Applicant proposes to erect a deck area at the rear of premises in Hutt Street - Residents occupying houses in a laneway at the rear of the premises object - Council approval obtained and expert evidence establishes that the proposal achieves the minimum requirements regarding acoustic protection - Even though planning approval has been obtained the Court cannot abdicate its responsibility to be satisfied that what is proposed is reasonable - Given the proximity of the residents the level of acoustic protection and visual screening is inadequate - Applicant is given leave to revise its application - Further consideration adjourned - Ss 43, 53 and 68 Liquor Licensing Act 1997

O'Sullivan v Faeer and Another (1989) 168 CLR 210
Vandeleur v Delbar Pty Ltd (1988) 48 SASR 156
Pimp Pad [2011] SALC 125

REPRESENTATION:

Applicant:	In person
Objectors:	Ms J Boisvert, Ms L Burslem and Mr A Kalali on behalf of themselves and also on behalf of Mr D Braid, Ms S Edwards, Mr D Boisvert and Ms C Braid

1 This is an application made pursuant to s 68 of the *Liquor Licensing Act 1997* that seeks the Court's approval for alterations to licensed premises known as Goodlife Modern Organic Pizza, a restaurant situated at 170 Hutt Street Adelaide.

2 The premises comprise of an old residence that has been converted into a restaurant. It is on the eastern side of Hutt Street, a few doors south of the General Havelock Hotel. The premises extend to the rear to the western side of Corryton Street, a small laneway that is immediately to the east of and is parallel to Hutt Street that connects Carrington Street to the north and Halifax Street and beyond to the south.

3 In that area of Corryton Street, on the eastern side, are a series of 120 year old heritage houses. The objectors are the residents of those houses.

4 For planning purposes the premises are located within the Main Street Zone. This zone is intended for neighbourhood shopping, leisure and community facilities.

5 The houses occupied by the objectors are located in the Residential Zone. This zone promotes residential use only.

6 The premises are licensed to trade from 7.00am to 12 midnight, Sunday to Thursday and 7.00am to 1.00am on Fridays and Saturdays. It presently trades during lunchtime from Monday to Friday and during dinner time seven days a week. The kitchen closes at 9.30pm on all days except Friday and Saturday, when it closes at about 10.30pm.

7 The applicant, Mpire Enterprises Pty Ltd, seeks approval to build a rooftop deck within the premises so as to offer its customers a unique dining experience by enabling them to effectively eat outdoors. It proposes erecting the deck at the rear of the premises. The deck will be just over six metres wide at the rear and about five metres long. It is proposed that the deck will accommodate up to about 27 customers. It will have a stair permitting access adjoining the southern boundary. There is a solid wall that already exists on the southern boundary. It is proposes that the deck will be constructed with hardwood, as will the eastern and southern walls.

8 The proposal has been approved by the Adelaide City Council. It has granted development plan consent, building rules consent and development approval.

9 The development plan consent is subject to a number of conditions. It requires the deck area to be closed from midnight to 7.00am. It stipulates that music noise shall not be above L10 43 dB (a) when measured at the

nearest residence in Corryton Street. It stipulates that there shall be no entertainment on or in the deck area.

10 In support of the application the applicant tendered a report from Resonate Acoustics. It concludes that the proposed development could operate within acceptable noise limits. It contends that the proposed acoustic screening to the north and the east ought to be sufficient.

11 Mr Mathew Stead, the author of the report, agreed that if there were a screen on the southern side that was of the same height as the proposed screen to the east, that is 2.1 metres, it would reduce noise emission and would make it quieter for houses south of the premises.

12 Mr Stead said that the proposed screening was reflective. He accepted that if it were made of absorptive material less noise would emanate from the premises.

13 In answer to a question from me about whether it was important that there be no gaps in the screening walls he said:

> "Yes. It is reasonably important that it does - for this screen to prove a reasonable noise barrier that it is quite well sealed, and that there aren't any sort of what we'd normally call 'flanking paths'. So that's that there aren't any gaps and holes where the sound can travel around. I think the only thing is where it bridges from the structure's southern boundary there is a hole underneath it at that point."[1]

14 The primary contentions of the objectors focussed upon three things.

15 The first was that the grant of this application could lead to a proliferation of like premises. There are a number of eating facilities in the block that contains the premises. The objectors are concerned that the grant of this application will set a precedent and that the other facilities in the area will be able to rely upon it to make similar applications.

16 I can allay that concern immediately. Just because an application is granted it does not follow that a similar application will succeed. Indeed, the success of an application such as this might have the opposite effect. The Court might conclude that to allow one application might be appropriate, but when it came to dealing with a similar but later application it might consider that one is enough.

17 The second is that they are concerned that the level of acoustic protection will prove to be inadequate and that they will be unduly affected by patron noise.

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[1] Tr 41

18 The third is that they are concerned that the visual screening on the southern boundary of the premises is inadequate and that residents living south of the premises will be unreasonably affected by the visual impact of patrons dining in the proposed are.

19 In addition to these the objector, Ms Boisvert, raised a number of specific matters. She said:

> "… we would like … no external heating or cooling devices, …because it would reduce the number of days or evenings on which the deck could be used.
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> We would like all the walls to be treated with an absorptive acoustic material. We would like the southern boundary to have the same treatment as the eastern boundary so that there was no line of sight between any of the residences or the residence on Corryton Street and the people sitting down dining… We want no live music or entertainment. We would like no music at all after a particular time…
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> …let's close it at 5 pm along with Maria's restaurant, along with the Queen of Tarts, along with Biga. Let's close this at 5 o'clock so that it's a nice place to sit during the day. If it was only going to be used during the day, we might even think that umbrellas would be reasonable. The next time that you might consider it being closed would be 10.00 or 10.30, in line with other liquor licensing applications by other restaurants, remembering that those restaurants all have - are either closed currently at 5 pm or put their noise out to Hutt Street. They're not emanating their noise into our street.
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> What we would like is for the cleanup after the restaurant closes to be for no longer than 15 minutes after closing. So there's no point in closing at half past 10 if you're still taking your bottles down the stairs at midnight. So we would like it conditioned as to how long they have for cleanup after that. We would like to be assured that the bottle management from upstairs requires the bottles to be removed individually, either - well, they're not allowed to be put out at night in any case, but we don't want large numbers of bottles being moved up and down the stairs after closure, because clearly that was going to make a lot of noise.
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> And the other condition that you might consider is that the outdoor dining area remains open no longer than one hour after the kitchen closes. And I think we heard that the kitchen closes at 9.30 Monday to Friday and 10.00, maybe, Monday to Thursday and 10.30 on Fridays and Saturdays. So if the kitchen closed at 10.30, it would be done and dusted by 11.30. So there are a range of closing times that are gradually going to affect the residents more and we would like to start with we don't want it. It sets a precedent

> that's unacceptable in our street, but if you do see fit to approve it, we need this to be very heavily conditioned and probably some significant modifications to the building rules consent that already exists."[2]

Consideration

20 The only qualification that s 68 of the Act provides is that the proposal must achieve all approvals, consents or exemptions required by law. That appears to have been met. It does not, however, follow that the application can succeed as of right. The application is subject to the general discretion provided for by s 53 of the Act. That section relevantly provides as follows:

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

21 I also need to make reference to s 43(1) which provides:

> "The licensing authority may impose licence conditions the authority considers appropriate."

22 Within that provision certain examples are provided that include the following:

> "Conditions to minimise offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the licensed premises, or to minimise prejudice to the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the licensed premises, resulting from activities on the licensed premises, or the conduct of people making their way to or from the licensed premises."

23 The effect of s 53(1a) of the Act is that to grant this application I must be satisfied that it is in the public interest to do so. In *O'Sullivan v Faeer and Another*, Mason CJ, Brennan, Dawson and Gaudron JJ, in the context of a case concerning liquor licensing legislation, stated:

> "…the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as

[2] Tr 67-8

> the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.' "[3] (footnotes omitted)

24 It follows that my task is to undertake a discretionary value judgment as to what is in the public interest that takes into account the legitimate interests of the applicant to seek to improve its licensed premises and the legitimate interests of the resident objectors who wish to avoid being unduly annoyed, disturbed or inconvenienced by the proposed changes.

25 With these matters in mind I now turn to consider whether the application should be granted.

26 None of the witnesses doubted the attractiveness of the proposed development. It is sufficient to record the evidence of one of the objectors, Ms Burslem, who said:

> "We love eating outside. It's what we love to do. If I went to his restaurant as with all the rest of us that dine out and we knew there was an outdoor rooftop, we'd be the first ones there."[4]

27 I find that the grant of this application will add to the attractiveness of the licensed premises and the Hutt Street precinct. This points towards exercising my discretion to grant the application. There are, however, matters pointing the other way.

28 I think the objectors are rightly concerned that the level of acoustic protection might prove to be inadequate. I also think that they are rightly concerned about the adequacy of the visual screening on the southern boundary of the premises.

29 I invited the applicant to consider placing further evidence before the Court as to measures that could be taken to address these issues and the relative cost. I did so because I was tentatively of the view that provided the costs was not prohibitive, for me to be persuaded to exercise my discretion in favour of the application, they should be undertaken.

30 I have been provided with some further material from the applicant, but it does not, in my view, go far enough.

31 I appreciate that the applicant has planning consent. But that is not decisive. I am independently obliged to give this matter consideration. As King CJ said in *Vandeleur v Delbar Pty Ltd*:

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[3] (1989) 168 CLR 210 at 216
[4] Tr 55

> "The court is not concerned only with such additional impact as the proposed premises might have over other uses of the land by reason of their being licensed premises. The grant of the licence will cause premises to come into existence which would not otherwise be there and all effects on those nearby resulting from the new use of the land must be considered. In considering what is "undue" the court is entitled to have regard to the previous use of the land and as to 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**.'[5] (emphasis mine)

32 Although this was in the context of an application for the grant of a licence I think these words are equally relevant to an application seeking the Court's approval for alterations to licensed premises.

33 The erection of a roof deck in the rear of the premises has the potential to interfere with the quiet enjoyment that the residents in Corryton Street are entitled to. That the proposed acoustic protection might satisfy the minimum requirements is, in my view, not enough. This development is close to a designated residential area and in my view more is required. There needs to be visual screening to the south and the screening generally should not contain any gaps.

34 Consistent with the approach that I took in *Pimp Pad*[6] I am prepared to allow the applicant to amend its proposal.

35 If the amended application provided for a screen on the southern boundary that was of the same height as the proposed screen to the east, that is 2.1 metres, and the screening was such that so far as is reasonably practicable all gaps are filled, my tentative view is that I would be inclined to grant the application.

36 In saying that I have not overlooked a number of the other qualifications raised by Ms Boisvert. The development plan consent provided for by the Adelaide City Council places some trading restrictions. I do not think it is reasonable to impose additional conditions that are calculated to further reduce the opportunities for the applicant to use the proposed deck area. I also think it is unreasonable to impose conditions that are not directly related to the proposal, such as changing the closing times for the restaurant generally and limiting the time between the closure of the kitchen and the closure of the restaurant.

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[5] (1988) 48 SASR 156 at 162
[6] [2011] SALC 125

37 As for her request that the acoustic screens be made of absorptive acoustic material apart from the evidence of Mr Stead that it provides better acoustic protection than the proposed material there is nothing else before me. Whilst I think that the level of acoustic protection needs to be greater than that presently proposed my tentative view is that the additional protection that I have suggested might be enough. If evidence was adduced that established that absorptive acoustic material was significantly superior but was not significantly more expensive than the proposed material I would be prepared to reconsider the matter.

Conclusion

38 I refuse the application in its present form. I grant the applicant liberty to file a revised application. I adjourn further consideration of this application and I grant the parties general liberty to apply.