

IN THE MATTER

of the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER

of an application by **FREE AND
CRAZY COMPANY LIMITED**
pursuant to s.100 and s.127(2) of
the Act for a renewal on-licence in
respect of premises situated at 14
Yewlett Crescent, Frankton,
Queenstown known as "Frankton
Arm Tavern"

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

Chairman: Mr E W Unwin
Members: Ms M W Rose
Mr J M Mann

HEARING at Queenstown on 4 March 2014

APPEARANCES

Mrs M N Rodgers and Mr M A Battaglia – representing the applicant company
Ms J J Mitchell – Queenstown Lakes District Licensing Inspector – to assist
Sergeant L K Stevens – N Z Police – to assist
Miss T J Surrey and Mrs J Macdonald - for Mrs J Waldren and Mr T and Mrs K
Hazlett - objectors
Mr B and Mrs J White - objectors

RESERVED DECISION OF THE COMMITTEE

Introduction.

- [1] This is an application by Free and Crazy Company Limited (the company) for the renewal of its on-licence in respect of premises situated in Yewlett Crescent, Frankton and known as the "Frankton Arms Tavern". There are no objections or concerns about the renewal of the licence per se. However in its application for renewal the company sought to extend its current closing hours for the outdoor courtyard area from 8.00pm to 10.00pm Monday to Saturday, and from 8.00pm to 9.00pm on Sunday. It is this aspect of the renewal application that has given rise to objections from members of the public and resulted in a public hearing.

- [2] The company took over the premises in October 2012 operating under a Temporary Authority. It applied for an on-licence with outside trading hours to 11.00pm. This proposal attracted opposition from the neighbours. However, prior to the hearing, it reduced the requested outside closing time to 8.00pm and the opposition was withdrawn, and the licence duly issued. Michelle Rodgers is the company's sole director. The fact that there have not been any concerns expressed about the way the business has been run is a credit to Ms Rodgers and confirms our impression of her. The Inspector's report notes that the business appears to be operating well. Of significance is the fact that there have been no complaints regarding noise or nuisance in the past 15 months.
- [3] Effectively therefore, this is an application to vary the trading hours. Accordingly, the criteria to which we must have regard are set out in s.105 of the Act. As stated above, the request to extend the outside drinking hours resulted in five objections (three couples and two single neighbours), being received. The basis of the objections was that the 8.00pm closing time had been settled after many years of complaints, meetings and resource consent issues. Two of the objectors (one couple and one single neighbour) either did not appear or were not represented.
- [4] The application was initially called on 10 February 2014, but adjourned to March at the request of Ms Surrey, (acting for three objectors), for the reasons set out in decision QLDC0008/14.

Background.

- [5] The processing of the application has not been without difficulty and we therefore set out a short historical background. The premises have been in existence for over 30 years. Initially the business traded as a hotel with accommodation, but in more recent times it has traded solely as a tavern. In 2005, resource consent was granted to enable building improvements to be made. These included a new courtyard wall, outside fireplace and a chimney and glass roof over a section of the courtyard. As a result of these alterations, numbers of patrons began making more use of the outside area. Consequently noise complaints began to be received from neighbours based primarily on noise. Consequently the owner requested an acoustic report from Marshall Day Acoustics Limited. Once the report was received a further application for resource consent was lodged in October 2006. This was to carry out building works associated with the installation of sound insulation, and to exceed the night time (ie after 8.00pm) noise limit of the District Plan by 5dBA.
- [6] A hearing took place before two commissioners in April 2007, and a decision was issued in July 2007. The 23 page decision granted the application, but with 10 quite complicated conditions. Included in the conditions was a requirement by the applicant to develop a noise management plan (in consultation with Mr and Mrs White who owned a holiday home over the road). The purpose of the plan was to deal with noise from the courtyard after 8.00pm. The plan was to address five stated objectives with the aim of

reducing the number of people using the outdoor area at night, and the length of time which people stayed outside.

- [7] In addition the tavern was required to obtain an acoustic report to demonstrate compliance with the approved extra night time noise level. A number of reports were received and reviewed during 2008 and 2009. These all showed compliance. However further noise monitoring was carried out in 2010, and a final report dated 12 March 2010, concluded that the noise levels did not comply with the Resource Consent. One of the consent conditions stated that if compliance could not be achieved, further physical mitigation works needed to be undertaken. We understand that these were not completed because of financial restraints. As a consequence, the then owners of the tavern agreed not to use the outdoor courtyard after 8.00pm.
- [8] In June 2010, the business was purchased by a company owned and operated by Mr K G Bradley. The company initially traded under Temporary Authority but then applied for an on-licence with internal hours of 11.00am to 1.00am the following day. Objections were received from Mr B and Mrs J White who owned a holiday home over the road. There were other neighbours who objected but did not appear. The issue was primarily the proposed trading hours inside the premises. The trading hours for the outside courtyard were to 8.00pm and there were no concerns about that.
- [9] The decision of the Liquor Licensing Authority [2011] NZLLA 1078 noted that the one of the issues raised by the Whites was that the noise management plan had not been adhered to. In the decision it was stated that some of the matters raised by the objectors related more to the Resource Management Act than the Sale of Liquor Act. The Licensing Authority confirmed that virtually all the allegations such as excessive noise, unruly patrons and live music occurred prior to the takeover of the business. In the event the application was granted but the closing time inside the premises was brought back from the requested 1.00am to 12.00 midnight.

The Present Application.

- [10] Mr Rodgers and her husband have been involved in the hospitality industry for most if not all their working lives. Neither have been refused a licence or a manager's certificate. In her evidence, Ms Rodgers advised that the reason for the request was to make the tavern more family orientated with families being able to dine outside and for children to play without upsetting patrons in the inside restaurant. She argued that there was limited outside dining in Frankton. We understood from the evidence that smokers also used the area rather than go outside on to the street. She said that her ambition was to make the tavern a community base where families and workers can meet in comfort.
- [11] Ms Rodgers was proud of the fact that with careful management over the past 18 months, there has been a change of patronage, and that there are no signs of any of the previous issues such as violence, intoxication, or loud

obtrusive patrons. Since being at the premises, she has never had cause to call the Police nor have there been incidents involving vandalism or graffiti. She stated that both she and the staff make a point of controlling the noise levels outside. It is of interest that the company does not employ security, and that Ms Rodgers has not received one complaint from any resident.

- [12] Ms Rodgers argued that the increase in hours would not result in adverse noise effects on the neighbours. She produced letters of support from the Kingview School sited above the tavern, as well as neighbouring businesses and residents, and the managers of the nearby Frankton Motor Camp. The letters from the Team Leader of Kingview stated "Since Michelle took on the management of the tavern there has been a total turnaround in the atmosphere and behaviour of clientele using the service."
- [13] In addition Ms Rodgers produced a petition signed by 354 people supporting her attempt to extend the outdoor closing hour to 10.00pm Monday to Saturday and to 9.00pm on Sunday. She also produced a report from Marshall Day Acoustics. This showed that measurements were taken between 6.20pm and 6.40pm on Saturday 1 March 2014, when there were about 12 people in the courtyard. The report showed that the noise from the courtyard comfortably complied with the night-time limit as granted by the resource consent in 2007. The report writer expressed the belief that the site would continue to comply with up to 20 people in the courtyard.
- [14] Supporting evidence was received from Mr M A Battaglia as well as Mrs E A Chisholm

The Licensing Inspector.

- [15] The Inspector duly reported on the application but maintained a neutral stance noting that there have been no recorded noise complaints since the time when the business has been under the control of Ms Rodgers. She confirmed that the proposed outside trading hours were within the permitted hours of operation under the resource consent.

The Objectors.

- [16] The general tenor of the objections was that the locality was largely residential; that an 8.00pm closure for the outside area had become the accepted norm; that any attempt to increase the outside trading hours should be preceded by a resource management application, as well as a change to the Noise Management Plan; and that any increase to the trading hours would reduce the amenity and good order of the locality by more than a minor extent. Mr and Mrs Hazlett signed a brief of evidence confirming that they had lived in Yewlett Crescent for 16 years. They confirmed that when the courtyard was first built they experienced a number of noise issues, but had had no problems since the tavern's outside hours were reduced to 8.00pm.
- [17] Ms J N Waldron has lived in the same Crescent for 12 years. She confirmed that the tavern was well run, but in her view, this was also because the

outside area was closed at 8.00pm. Having had a previous involvement with the hospitality industry she was well aware of the difficulty in restraining noise from people who had been drinking. She believed that if the closing time was extended there would be a serious impact on the amenity and good order of the neighbourhood.

- [18] Ms Surrey argued that a proper interpretation of the noise management plan did not allow use of the outside area after 8.00pm. She noted that a condition of the consent was that a noise management plan was to be developed and implemented in consultation with Mr and Mrs White. Its aim was to deal with noise from the courtyard after 8.00pm. She confirmed that the plan was to be submitted to the Council for final approval. Ms Surrey argued that the parties to the plan had agreed not to use the area after 8.00pm, and to some extent this was re-enforced by the changed wording of the plan. Her interpretation of the consent and the plan was that the outdoor area could not be used after 8.00pm.
- [19] She relied to some extent on a report issued by Ms M R Fitzgerald a Licensing Inspector in April 2011. In that report Ms Fitzgerald advised that based on the current compliance certificate, the outdoor areas could only be licensed to 8.00pm. On that basis Ms Surrey contended that in order to trade after 8.00pm, there would have to be a variation of the Resource Consent, and until such time as this happened, the Committee had no jurisdiction to extend the trading hours.
- [20] Mr and Mrs White are the owners of number 13 Yewlett Crescent but reside in Dunedin. The property is tenanted through a property management company. In his evidence, Mr White noted that the noise management plan called for the fire to go out by refraining from stoking it after 8.00pm, and further that there was to be no additional heating allowed in the area after 8.00pm. He contended that the aim of the plan was to reduce the number of people using the outdoor area at night. Mr White submitted that if the company wanted a 10.00pm closure outside, then they should be required to apply for a new Resource Consent as well as create a new noise management plan.

New Evidence.

- [21] After hearing the evidence the committee adjourned the hearing on the basis that a reserved decision would be issued in due course. In the process of researching the history of the resource consent issues, the Committee became aware that concerns as to the validity of the resource consent certificate had been expressed among Council staff. Richard Kemp holds a Bachelor of Planning (Honours) from the University of Auckland. He has been a Planner within the Resource Consents Team of the Queenstown Lakes District Council for nearly three years. His role is to undertake District Plan compliance checks of licensing applications under s.100(f) of the Act.
- [22] It appears that Mr Kemp had independently come to the conclusion that the conditions of the July 2007 Resource Consent may not have been met. This

was new evidence which could have a major bearing on the application. Using Ms Surrey's argument, if the current proposal did not meet the requirements of the Resource Management Act 1991, then we would not have the jurisdiction to grant it.

- [23] Mr Kemp was asked to provide an affidavit and did so. In his affidavit Mr Kemp traced the history of the resource consent application leading to the decision by the two commissioners to consent to the application subject to a number of conditions. He then explained the process undertaken by the consent holder as described in paragraph [7] above. The 'game changing' factor was the final acoustic report which advised that noise levels were not compliant with the Resource Consent. Mr Kemp concluded that the company was unable to use the outdoor area after 8.00pm as to do would breach the District Plan's 40 dbA night-time noise limit. In summary he advised that the application to extend the closing hour outside did not meet the requirements of the Resource Management Act.
- [24] Copies of the affidavit were duly circulated to the parties. In particular the company was advised that it had three options. (a) It could request that the application be continued at a public hearing so that Mr Kemp's conclusions could be challenged or contested; (b) it could withdraw the application to extend the outside closing time; or (c) it could ask the committee to issue its decision in the knowledge that it had no jurisdiction.
- [25] In the event the company advised that it was reviewing the Noise Management Plan and consulting with Mr and Mrs White as it was required to do. What happened then is the subject of a comprehensive report dated 30 September from Mr Kemp. It can usefully be summarised as follows. The company employed a firm called Town Planning Group. They considered the noise assessment from Marshall Day Acoustics dated 3 March 2014. This document confirmed that the premises would be compliant with the consented 45dBA after 8.00pm provided the number of people in the courtyard did not exceed 20 at any one time. The Resource Consent (Condition 7) provides for any noise assessment to be peer reviewed. The reviewer was Malcolm Hunt Associates. The review accepted the original report and recommended a limit of 20 people in the courtyard at any one time after 8.00pm.
- [26] Upon receiving the reports, the company and its consultant proceeded to review and amend the noise management plan. The basis for doing so was Point 8 of the first Noise Management Plan which provides for an annual review by the management of the tavern. It seems to us that the first Noise Management Plan had been amended quite dramatically from the recommendations of the Commissioners contained in Condition 6(f) of the Consent. The second document appears to be much clearer, easier to follow and logical when viewed against the terms of the Resource Consent. Furthermore it has annotations in relation to each point, particularly where the Whites had previously been consulted.

- [27] The amended plan was reviewed by a Senior Environmental Health Officer with the Queenstown Lakes District Council and she advised acceptance. She accepted that the objectives of the Noise Management Plan as required by condition 6(f) of the Resource Consent had been met. Consultation with Mr and Mrs White did take place. The Whites stated that in their opinion the plan could not be amended without a variation to the Resource Consent, and that the proposed amended plan fundamentally changed the objectives in a way not provided for by condition 6(f) of the Consent. Effectively they declined to provide comment
- [28] Mr Kemp was in no doubt that the amended plan is compliant with condition 6 (f) of the Resource Consent. He is satisfied that consultation has taken place and pointed out that consultation does not necessarily mean agreement. Furthermore he has approved and stamped the new agreement. It is not for us of course to make a judgement on the process. But as a result of the fresh evidence we now have before us a new Noise Management Plan that the Council's planner advises will be reviewed in 12 months. Provided this plan is adhered to, Mr Kemp considers that the use of the courtyard to 10.00pm on Monday to Saturday and to 9.00pm on Sunday will be compliant with the Resource Consent.

Responses to the new Noise Management Plan.

- [29] As will be seen, the status of the company from a Resource Management aspect has changed two times during the course of the hearing. The company started by being considered (by the Inspector) to be compliant. After the hearing, evidence was received (from a Planner) that it was not compliant. More recently the Planner had advised us that we have jurisdiction. Accordingly all the new material was sent to the parties for response in the way of comment or submission.
- [30] Neither the Inspector nor Sergeant Stevens wished to be heard in respect of this new evidence. Mr and Mrs White repeated their objection to the amended noise management plan, and also expressed concerns about the noise assessment. They argued that condition 6(f) was being amended. Furthermore they suggested that allowing 20 people outdoors until 10.00pm was the antithesis to the objective of the plan. The Whites were critical of the noise assessment process, and argued that there were only 12 people present when it was taken. In their conclusion they expressed concern that the courtyard was being turned into a restaurant. There was no request for any further hearing.
- [31] Ms Surrey provided very helpful submissions. She continued to argue that the company did not have Resource Consent to trade after 8.00pm. She also referred to the five objectives of the noise management plan with the aim of reducing the number of people using the outdoor area at night, and the length of time people stay outside. She also took the view that many of the people would be diners who therefore might stay outside for longer. She argued that the amended noise management plan could well encourage more patrons to stay for longer. If this were to happen she contended that a variation to the Resource Consent would be required. It seems that Ms Surrey was challenging the amended or new Noise Management Plan, and relying on the old Plan to support her argument.

- [32] On the other hand, Ms Surrey accepted the reality that it is not for the Committee to look beyond or behind any Resource Management Certificate. Ms Surrey pointed to the criteria in ss.105 and 106 of the Act and particularly whether in our opinion the amenity and good order of the locality would be likely to be reduced to more than a minor extent by the effects of the issue of the licence (with extended outside closing hours). She argued that in coming to our opinion we should have regard to current and future noise levels as well as current and possible future levels of nuisance and vandalism. She argued that amenity and good order were new provisions in the Act and should be approached conservatively. She seemed to take the view that the proposed increased trading hours could only be enjoyed by diners. We were unable to detect such a condition in the new plan. Finally, she suggested that a change of licensee cannot solve noise problems.
- [33] Ms Surrey was good enough to provide the case of *Amber Indian Restaurant Limited* [2013] NZARLA PH887 dealing with noise issues although we note that it was decided under the former Sale of Liquor Act and therefore has no great precedent value. We accept that the locality of the tavern is an important factor although there are a similar number of neighbouring supporters as objectors (although they did not appear). We accept that noise and the management of premises can reflect on the suitability of an applicant (see *Pahia Saltwater (2110) Limited* NZLLA PH 974/2003) but this is a case where not only is suitability not an issue, but it's a case where suitability may well add weight to an applicant's arguments.
- [34] As a matter of natural justice as well as courtesy the submissions from the objectors were referred on to the company. We received a response from the company's consultant. This response included one or two new factual allegations which we are bound to ignore as they were not raised at the original hearing.

The Committee's Decision and Reasons.

- [35] The company's licence is renewed for three years. There were no objections from members of the public or from the reporting agencies. This is the first renewal following what is known as the 'probationary' year, and all the boxes have been ticked. The objectors were clear in their acceptance of the applicant's suitability to have its licence renewed. The company has clearly established an entitlement to a renewal upon consideration of the criteria set out in s.105 of the Act.
- [36] We agree with Ms Surrey that although s.120 (Variation of Conditions) does not require a certificate from the territorial authority that the application to vary the trading hours meets the requirements of the Resource Management Act 1991, it is an essential aspect to any application to vary the conditions of a licence in this way. We have before us such certification from the territorial authority. It may be that this could be challenged under the Resource Management Act, but as long as it exists we are entitled and expected to rely on it. If it is in some way overturned, then a rehearing would clearly be appropriate. It is not our province to question the new Noise Management Plan. In summary we believe that we have the jurisdiction to hear and grant or refuse the application.

- [37] In deciding this application, we are required to have regard to the relevant criteria that are set out in s.105 of the Act and which are normally considered in any application for a licence. In this case we have had regard to
- (a) *The object of the Act.*
 - (b) *The suitability of the applicant.*
 - (c) *The days on which and the hours during which the applicant proposes to sell alcohol.*
 - (d) *The design and layout of any proposed premises.*
 - (e) *Whether (in the committee's opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence.*
 - (f) *Any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under s.103.*
- [38] The company carries the onus of establishing an entitlement to trade for longer hours in the light of these provisions. Pursuant to s.106 of the Act in forming an opinion on whether the amenity and good order of a locality would be likely to be reduced, by more than a minor extent, by the effects of the grant of increased trading hours, we must have regard to current and possible future noise levels, current and future levels of nuisance and vandalism, and the purposes for which land near the premises concerned is used.
- [39] This application is not really about the object of the Act. There are no concerns about the safe and responsible sale and supply and consumption of alcohol. There are no obvious requirements to minimise the harm caused by excessive or inappropriate consumption of alcohol. We are inclined to the view that this is a case where the suitability of an applicant adds weight to the company's case. The licence is personal to Mrs Rodgers and her company. If she sells then a new owner may not retain the same level of confidence that we have for the company's ability not only to manage and control the sale of alcohol on these premises, but also monitor the escape of noise.
- [40] We visited the site. We agree that the area is largely residential, but the tavern does not dominate the surroundings. Furthermore there is a shopping centre as well as a motor camp and the main Frankton Road nearby. It is of more than passing interest that a small early learning centre which is sited on the company's site, supports the application. The bar is located in the middle of the premises and the outdoor area is enclosed on all sides although there is a narrow access way on the south-western side.
- [41] There are no current concerns about present noise levels, or present levels of nuisance or vandalism. The Resource Consent decided by two Commissioners which allowed an increase in noise levels to enable the outdoor area to function, stated at Para 9.1 *"Having regard to the matters set out in s.104 and our analysis above, we consider that the effects on the owners of 13 Yewlett Crescent and the Queenstown Lakes District Council will be less than minor."* And later *"The adverse effects of the proposal on the environment will be minor."* The application which resulted in the decision of the Commissioners was effectively to enable the tavern to extend its outside trading hours past 8.00pm. This decision has never had an opportunity to be tested in seven years.

[42] Ms Surrey submitted that we should be 'conservative' but it seems to us that given that the use of the courtyard is weather dependant, the proposed extra hours may well not be utilised regularly. Given that the tavern itself can trade to midnight, (and 11.00pm on Sundays) is it a fair question to ask whether closure of the outside area at 10.00pm (or 9.00pm on a Sunday) is that late? The company submitted that one of the reasons that it wanted the extra hours was to enable families to dine outside. However, we wonder whether people will be still eating at 10.00pm. We suspect that some of the patrons who get to enjoy the evening sunshine hours might be smokers.

[43] In the final analysis the issue comes down to our opinion as to whether the grant of the application is likely to reduce to more than a minor extent the amenity and good order of the locality. Although the definition of amenity and good order relates to a renewal of a licence we rephrase the question to this: "Is the grant of this application likely to make the locality less pleasant and agreeable to more than a minor extent?" We are unanimously of the view that the answer to both questions is no.

[44] We simply point to three elements of the case that were very persuasive in helping us come to our decision. (a) The change in atmosphere and behaviour of patrons that Mrs Rodgers has achieved in the past 18 months, (b) the reasons why a previous owner received Resource Consent to enable the noise level to be increased after 8.00pm by 5 dbA, and (c) the opinion of two experts that the noise level from 20 patrons in the courtyard to 10.00pm will not breach the consented night-time limit of 45dbA.

[45] Ms Surrey is right when she submits that we are dealing with new legislation, but the licensing Authorities have previously considered the question of noise on a number of occasions as the case references in this decision will show. While it is relatively easy to dispute the opinions and wisdom of experts in the field of noise emission, it is difficult to persuade us to disregard such opinions without calling evidence from a similarly qualified acoustic expert.

[46] We note that the current Noise Management Plan will be reviewed after 12 months and we would like to give the parties the opportunity to do the same. If any party requires a further public hearing (by way of a rehearing under s.201(4) of the Act), they will need to notify the District Council prior to the expiration of 12 months from the date of this decision. A further hearing will then take place for new evidence to be given, which may lead to a review of this decision. This opportunity should not be interpreted as an invitation to revisit any of the Resource Management issues, or the reasons for this decision, but rather to discuss whether there have been intrusions into the locality's amenity and good order, and if so, the effect of such intrusions. In this regard we refer to the decision of *Saltwater Corporation Limited* NZLLA PH 722/2005 where the Authority spoke of the need to provide "*specific probative evidence of noise emission*".

[47] For the reasons we have attempted to articulate we grant the application.

DATED at QUEENSTOWN this 26th day of November 2014

A handwritten signature in blue ink, appearing to be 'E W Unwin', with a stylized flourish at the end.

E W Unwin
Chairman