
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : SISTARO PTY LTD & ANOR and CITY OF
JOONDALUP [2003] WATPAT 43

CORAM : MS W F BUCKLEY
MS B MOHARICH
MR E A MCKINNON

HEARD : 9 APRIL 2003

DELIVERED : 28 JULY 2003

FILE NO/S : APP 126 of 2002

BETWEEN : SISTARO PTY LTD
WILSON HUNT DESIGN CONSULTANTS
Appellants

AND

CITY OF JOONDALUP
Respondent

Catchwords:

Appeal against conditions - Tavern refurbishment - Amenity - Noise - Resident's concerns

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellants	:	Mr R Sandover
Respondent	:	Mr J Skinner

Solicitors:

Appellants	:	Jackson MacDonald
Respondent	:	McLeods

Case(s) referred to in decision(s):

Tempora Pty Ltd v Shire of Kalamunda (1994) 10 SR(WA) 296

MS W F BUCKLEY, MS B MOHARICH, MR E A MCKINNON:

- 1 This is an appeal against certain conditions imposed by the City of Joondalup on the grant of development approval for refurbishment and extension of the Carine Glades Tavern ("**Tavern**"). Approval was granted on 23 July 2002.
- 2 The appeal was initially against conditions 5, 6, 7 and 8 which are as follows:
 - “• Condition 5: the Family Courtyard shall not be used in any capacity after 7pm. No background music, live amplified band or similar amplified entertainment shall occur in this area at any time;
 - Condition 6: the Function Room Courtyard may be included in the licensed area provided it is roofed and adequately restricted for noise emission to the satisfaction of Council’s Environmental Health Officers and shall not be used in any capacity after 7pm. No background music, live amplified band or similar amplified entertainment shall occur in this area at any time;
 - Condition 7: the external Entertainment Courtyard shall have a maximum occupancy of 100 patrons. No live amplified band or similar amplified entertainment shall occur in this area at any time;
 - Condition 8: the provision of not less than 162 car bays on site, ie a 1:4 ratio.”
- 3 The parties were able to reach agreement on the bulk of the grounds of appeal prior to the hearing and the only matter that came on for substantive determination was the issue of whether the Appellants could use a new courtyard being built outside the area nominated as the function room ("**function room courtyard**") as an entrance and exit to the Tavern after 7.00 pm.
- 4 By the time of the hearing it was common ground between the parties that the function room courtyard would not be a suitable environment for the playing of background music, live amplified music or amplified entertainment of any type.

- 5 The provisions of the *Environmental Protection (Noise) Regulations 1997* (“**Noise Regulations**”) set standards for noise emissions and those standards were likely to be breached by the noise of any background music or amplified entertainment in addition to the noise made by patrons in the function room courtyard. Accordingly, the Appellants did not continue the appeal against condition 7.
- 6 The noise regulations set different standards for acceptable noise emission during the day and after 7pm. The parties agree that the function room courtyard cannot be used by the hotel patrons after 7pm as that use is likely to exceed those more restrictive standards.
- 7 The issue whether the noise made by those ordinary patrons will exceed the noise regulations before 7pm is still the subject of dispute between the parties. The parties’ experts could not say with any certainty whether the noise of ordinary patrons in the courtyard would exceed the acceptable noise levels.
- 8 The parties have, however, sensibly entered into a deed agreeing that they would conduct noise testing after the function room courtyard is built at agreed locations and in an agreed fashion. The purpose of the testing is to determine whether noise emissions could be managed in such a way as to comply with the noise regulations.
- 9 If the noise emissions do meet the standards set out in the noise regulations the City of Joondalup will then acknowledge that the function room courtyard was “adequately restricted for noise emissions” and the function room courtyard will then form part of the licensed area of the Tavern.
- 10 In addition, condition 8 has been agreed between the parties to be amended to read, “the provision of not less than 158 car bays on site”.
- 11 Those matters having been agreed the issue for determination by the Tribunal is whether the courtyard can be used as an entrance or exit from the Tavern after 7.00 pm.

The Tavern Premises

- 12 The Tavern was built in the early 1970s and has been operated as a tavern ever since.
- 13 The Tavern is built in the Carine Glades commercial area. The Tavern has car parking almost entirely surrounding it.

- 14 Immediately adjacent to the Tavern car parking to the west is a shopping centre and other commercial development.
- 15 Beach Road is to the south of the Tavern and its car parking and beyond Beach Road there is a large area of public open space.
- 16 To the north of the Tavern, beyond the car park, is some residential development. The nearest houses in that direction are approximately 100 metres from the Tavern on the northwest side of Juniper Way.
- 17 To the east of the Tavern are some residential premises known as Plumosa Mews. Those houses were built some three or so years ago.
- 18 Some of the houses on Plumosa Mews are built as close as 33 metres to the eastern side of the Tavern. Between the eastern side of the Tavern building and the houses are an area of car parking, an access road and a high brick wall which runs along the rear of the houses.
- 19 Prior to refurbishment and extension of the Tavern the Tavern was licensed to cater for 530 patrons. Those patrons entered and exited the Tavern through doors in the old lounge/restaurant area into the north car parking area without restriction.
- 20 Those doors were in the approximate location of the doors between the function room and the function room courtyard now under consideration.

The Refurbishment and Extension

- 21 The refurbishment and extension has been considerable although to some extent it utilises the existing tavern building. In the northeast corner of the Tavern is the function room and the function room courtyard. The courtyard is a new addition. The function room courtyard is surrounded by a high wall which has been designed to lessen noise emissions and is described by the parties as an acoustic wall. Most of the wall is 2.7 metres high but it reduces to 2.4 metres high where the function room courtyard exits to northern entrance/exit area.
- 22 In the north western corner another new courtyard has been added to the existing building. That courtyard is immediately adjacent to the internal area of the Tavern restaurant, the al fresco area of the restaurant and a children's playground. Between the function room courtyard and the internal area of the restaurant a new toilet area has been added. All areas have been substantially refurbished and updated. In addition there has been significant internal reconfiguration by the addition of function room bars and kitchen support to the restaurant, internal air lock doors to keep

noise emissions from live entertainment within the building and moveable partitioning to enable the function room to be used in different configurations.

- 23 To the south there has been the addition of a new lounge bar and sportsmen's bar and associated changes to existing kitchen, bar and toilet areas associated with the addition of lounge area and the sportsmen's bar.

Entrances/Exits to the Tavern

- 24 There is an exit from the Tavern from the south wall of the Tavern directly into the car park area, and from the lounge bar to west into a courtyard and then out into the southern car park. Patrons using the lounge bar and sportsmen's bar will primarily use those entrances and exits.
- 25 On the west side there is also an entry directly into the car park through air lock doors which entrance is anticipated will be used by bands or entertainers who will be appearing in the lounge bar and their support staff.
- 26 There are no exits directly from the Tavern to the car park at the eastern side of the building. There are air lock doors leading from the function room out of the eastern side of the Tavern but those doors exit to an external unroofed passageway that runs along the eastern side of the function room and into the function room courtyard.
- 27 From the function room there are doors which open north into the function room courtyard. Patrons exiting the function room through the courtyard would travel to the eastern side of the toilet block that has been built between the function room and the restaurant, and then into the northern entrance/exit area which consists of a paved area from which stairs or a ramp lead up to the northern car park. There is distance of approximately 10 metres from the functions room doors across the function room courtyard to the northern entrance/exit area.
- 28 The restaurant entrance and exit doors open from the north of the Tavern into the restaurant al fresco area and the courtyard area immediately adjacent to the restaurant and the children's playground.
- 29 Neither the al fresco area, the children's playground, nor that courtyard are roofed.
- 30 Patrons leaving the Tavern through the restaurant entrance/exit, walk out from the restaurant into the unroofed space of the al fresco area and along

the western side of the new toilet block before moving into the northern entrance/exit area and up the stairs or ramp to the northerly car park.

- 31 When leaving through either of the potential northern exits, (ie. through the restaurant area or through the function yard courtyard) patrons will merge at the northern entrance/exit and move up the stairs or ramp to the northerly car park.
- 32 The Appellants intend to offer amplified music or other entertainment in the function room. It is conceded by the Appellants that if amplified music or entertainment is being played in the function room that it will be necessary to keep the external function room doors leading to the function room courtyard closed in order to keep noise emissions within acceptable limits. Within the Tavern air lock doors will keep the music noise within the function room.
- 33 It is not, however, lawful to lock the external function room doors. Those doors must be available for use as a fire exit.
- 34 Entry and exit from the function room while amplified music is under way would be internally through air lock doors between the function room and the restaurant. By those doors patrons pass the entrance to the toilets into the restaurant reception before passing out through the restaurant al fresco area to the northerly entrance/exit and to the northern car park.
- 35 Patrons in the function area could also exit through the air lock doors along the unroofed eastern external passageway between the function room and the side wall of the Tavern through the function room courtyard to the northern entrance/exit and out to the northern car park.
- 36 The Appellants have undertaken to manage potential noise emission from the function room and the Respondent has accepted their undertakings in that regard and imposed appropriate conditions. Escaping music is known as breakout noise and the conditions 2, 3 and 4 of the development approval deal with it. Those conditions are as follows:

- “• Condition 2: Development to be signed, constructed and operated in accordance with acoustic consultants report dated April 2002;
- Condition 3: the applicant is to provide recommendations and details of the control of noise breakout through doors and openings from the entertainment and function room areas to the satisfaction of the City; and

- Condition 4: the management of the Tavern shall at all times be conducted in the manner outlined in the management policy statement dated 10 May 2002.”

- 37 Effectively, it is proposed that under no circumstances would the external function room doors be used as an entrance or exit when amplified music or entertainment is being offered in the function room. The management policy statement provides for an employee to be stationed so as to prevent the use of those doors and to direct patrons to either the air lock doors between the function room and the restaurant or the air lock doors which open to the east of the function room.
- 38 The Appellants, however, wants to use the doors between the external function room and the function room courtyard as an entrance or an exit when amplified music or entertainment is not being undertaken, in particular, at the end of a function.
- 39 The Appellants contend that entrance and exit past the toilets and out through the restaurant is inconvenient and results in no significant improvement to the amenity of surrounding residents.
- 40 The City of Joondalup opposes the use of those doors and the courtyard as an entrance/exit on the basis that:
- (a) the original application did not propose the use of those doors as an entrance or exit;
 - (b) use of the function room doors will adversely affect the amenity of the residents to the east in Plumosa Mews;
 - (c) the reasons why the Appellants don't want to have all the patrons exiting through the restaurant are not compelling as it is a well-used area, being near the restaurant reception and utilising an existing walkway and by the end of most functions the restaurant will be almost clear of patrons in any event; and
 - (d) there is an adequate entrance/exit through the restaurant without using the function room doors.
- 41 On reading the original application, it is our view that it did not propose that the function room doors would not be used as an entrance/exit. Exhibit 5 is the final proposal put to Council for approval. At page 5 it says that the internal and external doors of the function room will close at

7.00 pm. A similar comment was made with respect to the restaurant doors and the Respondent does not suggest that those doors are not to be used as an entrance or exit.

- 42 In our view it is not a question of whether there are other appropriate entrance/exits to the building. The use of the function room courtyard as an entrance/exit is clearly easier for function room patrons and has the effect of a clean flow of patrons out of the Tavern. In our view unless the use of the function room courtyard as an entrance/exit impacted differently on the surrounding residents it was to be preferred.

Amenity

- 43 The essential question then is the effect on the amenity of the surrounding residents of the use of the function room courtyard as an entrance and exit after 7pm while there is no amplified music or other entertainment, as opposed to all patrons using the restaurant doors.
- 44 Although expert acoustic evidence was obtained by each side as to the amount of noise likely to issue from the function room courtyard when it is being used by patrons no evidence relating to the levels of noise arising from the use of either entrance/exit as it will impact on the surrounding residents was led.
- 45 It was said by Mr Higgins for the Appellants that the use of the restaurant entrance may impact more on the Juniper Way residents and those in the northeast part of Plumosa Mews and less on those residents living in the more eastern part of Plumosa Mews. This was because the outside wall of the toilet could act as a shield against some of the noise travelling to the east.
- 46 On the other hand, the function room courtyard was surrounded by an acoustic wall and its use would lessen the impact of any noise on those residents more affected by the use of the restaurant doors.
- 47 Mr Catchpole, the Coordinator of Planning Approvals, and an experienced town planner for the City said in his opinion the amenity of the closest residents, who live in Plumosa Mews, would be more greatly affected by the use of the function room courtyard as an entrance/exit.
- 48 When questioned about his views on the amenity, they were based on noise, general disturbance made at night and the impact on the well-being of the residents to the east. All of those matters of impact on amenity arise from the effect of any noise on those residents. Any amenity issues

arising because of cars leaving the car park do not depend on which exit from the Tavern was used.

49 Mr Catchpole said he believed the impact of the use of the function room courtyard would be greater on the residents in the eastern part of Plumosa Mews because they were closer, however, he was unable to say if the acoustic wall would lessen the noise emitted.

50 Mr Catchpole admitted that he was not an expert on noise emissions.

51 Mr Catchpole is certainly qualified to give an opinion on matters of amenity but not as to whether there would be a quantifiable difference between any noise emitted through the use of the function room courtyard or any noise emitted through the use of the restaurant doors.

52 Mr Catchpole based his argument in relation to noise on the concerns expressed by residents of Plumosa Mews communicated during the public advertising process. The reasoning, he said, was because of the distance between the Tavern's main entrance and the residences to the north, compared with the close proximity of the houses to the east in Plumosa Mews. Put another way, the City's argument was that the issue of distance has a qualitative effect on noise in relation to amenity.

53 In the decision of *Tempora Pty Ltd v Shire of Kalamunda* (1994) 10 SR(WA) 296, the Tribunal made comment on the way in which amenity should be assessed:

“the determination of amenity must begin with evidence of the objective character of the neighbourhood and then only assess the views of the residents as factors that confirm or deny the objective assessment.”

54 The Tribunal went on to comment:

“The views of the residents that refine and explain the objective analysis of amenity or which raise new matters of amenity, not canvassed by experts, must be given great weight. Where all or a majority of residents come forward to express a concern that is grounded as a proper town planning consideration, this must be given the greatest weight and can, in appropriate circumstances, be persuasive. The combined effect of a shared view is to convert it into an objective reality that goes to the heart of the determination of the amenity of the area. Where the views are of a scattered group of residents, or only a few that

are affected, the Tribunal must determine what weight is to be given to the evidence by a consideration of the degree to which there is proof of the facts or opinions advanced.”

- 55 The City did not call any witnesses who were residents from the surrounding area to give evidence. Therefore the Tribunal is unable to assess the veracity of residents’ concerns nor the weight to be attributed to their perceived diminution of amenity caused by patrons of the Tavern exiting via the courtyard.
- 56 The relative closeness of the houses in Plumosa Mews is simply not conclusive of the matter. There are acoustic walls around the courtyard and there was evidence from Mr Higgins that the houses to the east in Plumosa Mews had been designed with only a few small windows addressing the Tavern and he queried whether any of those windows were opening windows at all.
- 57 It may well be true that the closest residents in Plumosa Mews may perceive the Tavern and any noise to impact more on their amenity than the other residents slightly further away. It is closer to them and their backyards are adjacent to the Tavern car park. But there is simply no way that the Tribunal could assess that any noise would be greater using the function room courtyard than if it was not.
- 58 Further it has always been the case that tavern patrons have entered and exited to the north of the Tavern.
- 59 The management have undertaken to manage the entry and exit of patrons at all times and in particular late in the evening.
- 60 They have undertaken to ensure that patrons move quickly through both exits out to the car park and away. The function room courtyard is only 10 metres across.
- 61 In our view, the different impact on amenity of using only the restaurant doors as opposed to both sets of doors cannot be assessed as being anything other than minimal.
- 62 The *Noise Regulations* set the limits of acceptable noise and disciplinary powers under the *Liquor Licensing Act 1988* are triggered if there are complaints that amenity, quiet or good order of the neighbourhood is unduly disturbed: see ss.95, 96 and 117 of the *Liquor Licensing Act*.

63 In all of those circumstances, we are of the view that we should exercise our discretion to allow the function room courtyard to be used as an entrance/exit after 7pm, unless amplified entertainment is being played in the function room. The appeal should be allowed and we propose the following orders:

(a) The appeal be upheld in respect of Conditions 5, 6 and 8 of the approval to commence development made by the City of Joondalup on 23 July 2002.

(b) Condition 5 of the approval to commence development be amended to read:

“the family courtyard shall not be used in any capacity after 7.00 pm other than as an entrance/exit to the Tavern. No background music, live amplified band or similar amplified entertainment shall occur in this area at any time.”

(c) Condition 6 of the approval to commence development be amended to read:

“the function room courtyard may be included in the licensed area provided it is adequately restricted for noise emission and in compliance with the deed of agreement between the City of Joondalup and Sistar Pty Ltd and shall not be used in any capacity after 7.00 pm other than as an entrance/exit to the function room. No background music, live amplified band or similar amplified entertainment shall appear in this area at any time.”

(d) Condition 8 of the approval to commence development be amended to read:

“the provision of not less than 158 car bays on site.”