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**FILE NO:** A20/0016923

**COMPLAINANT:** [REDACTED]

**LICENSED PREMISES:** Toronto Hotel, Toronto - LIQH400118171

**ISSUES:** Whether the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed.

**LEGISLATION:** *Liquor Act 2007*

## SECTION 81 DECISION

Under Section 81 of the *Liquor Act 2007* (the Act) I, John Coady, Manager Regulatory Interventions, a delegate of the Secretary of the Department of Customer Service, in relation to the complaint made in respect to the Toronto Hotel, Toronto – LIQH400118171 (the hotel) have decided to **issue a warning** to the licensee in the following terms:

*Under section 81(d) of the Liquor Act 2007, I, John Coady, Manager Regulatory Interventions, a delegate of the Secretary of the Department of Customer Service, warn Mr Jonathan Bortoli, the licensee of Toronto Hotel, that he must ensure no future undue disturbance is caused by the operation of the hotel, including the provision of live entertainment and patron noise.*

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## REASONS FOR DECISION

### Legislative framework

1. Section 79 of the Act provides that a prescribed person may complain to the Secretary, that the quiet and good order of the neighbourhood of the licensed premises is being unduly disturbed because of the manner in which the business of the licensed premises is conducted, or the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).

2. For the purpose of section 79 of the Act, a person who has standing to make a complaint includes a person who is a resident in the neighbourhood of the licensed premises and is authorised in writing by two or more other residents.
3. Section 80 of the Act enables the Secretary to deal with a complaint by way of written submissions from the licensee and any other person the Secretary considers appropriate. After dealing with the complaint, section 81 of the Act provides that the Secretary may decide to impose, vary or revoke licence conditions, issue a warning, or take no action.
4. In exercising functions under the Act, the Secretary must have regard to the Objects set out in section 3 of the Act and must have regard to the matters set out in section 3(2) which are:
  - a) the need to minimise harm associated with the misuse and abuse of liquor;
  - b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, services and consumption of liquor; and,
  - c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

### **The Complaint**

5. On 26 March 2020, [REDACTED] (the complainant), of [REDACTED] lodged a section 79 noise disturbance complaint with Liquor & Gaming NSW (L&GNSW) alleging undue disturbance to the quiet and good order of the neighbourhood caused by the hotel. The complainant lodged the complaint as a resident authorised by two other residents.
6. The complainant alleges disturbance is caused by excessive noise from activities at the hotel. The complainant raised the complaint following an outdoor concert held at the hotel on Sunday 15 March 2020. The concert took place from 2pm until 8pm and the complainant submits the volume was extreme and caused his windows to rattle. The complainant states disturbance occurs once a week from amplified music played at concerts in the beer garden. Every second concert ends no earlier than 10:30pm, which is then followed by crew and staff dismantling and packing up equipment.
7. The complainant seeks a remedy whereby the amplification of bass and drums is turned down as he and his wife cannot fall asleep, watch television and or talk with one another.
8. On 23 June 2020, the complaint was served on the hotel, Lake Macquarie City Council (Council) and NSW Police. Between 24 June 2020 and 31 August 2020, various submissions were lodged by the parties involved.

9. On 4 July, 11 July and 18 July 2020, L&GNSW received separate noise complaints from [REDACTED] (the second complainant) of [REDACTED]. Following a discussion with the complainant, a decision was made to invite the second complainant to become an official party to the formal noise disturbance complaint. On 24 July 2020, [REDACTED] completed a Complainant Authorisation form and joined the proceedings.
10. On 27 July 2020, L&GNSW informed the licensee, Mr Jonathan Bortoli, that the second complainant had joined the proceedings as a supporting resident to the complaint. The licensee was also provided the completed Complainant Authorisation form and the complaints made by the second complainant. The second complainant was provided with the original complaint, submissions from Council, Police and the licensee, resulting in him providing a submission in this matter on 29 July 2020.

**Statutory considerations of section 81(3) of the Act:**

11. The Act requires that the Secretary have regard to the following statutory considerations.
12. *The order of occupancy between the licensed premises and the complainant* – the hotel has operated at its present site since 16 February 1960. At the time of lodging the complaint, the complainant had lived at his residence for approximately four years and four months. As the hotel predates the complainant's occupation of his residence by a great deal of time, I consider the order of occupancy to be in favour of the hotel.
13. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises* – Council provided a Development Application Notice of Determination approved on 24 December 2014. This document described the development as alterations and additions to the 'pub, motel accommodation, entertainment facility and bottle shop'. Council also provided an Application to Modify Development Consent Notice of Determination approved on 20 January 2016. The modification focused primarily on alterations to the bottle shop and minor internal layout alterations to the garbage room, store room and loading space. The complainant refers to a new bottle shop in his submission however there are no other significant structural changes of note. The complainant submits he has spent \$8,000 in soundproofing upgrades to his residence.
14. *Any changes in the activities conducted on the licensed premises over a period of time* – There is insufficient evidence provided by the parties to support whether there have been any changes in the activities conducted by the hotel over a period of time. The complainant contends outdoor concerts commenced approximately 18 months ago.

## Other Considerations

### *Undue disturbance*

15. I am satisfied there is sufficient material to support a finding that the hotel has caused undue disturbance to the neighbourhood. In making this finding, I have balanced the submissions made by the complainant, the second complainant, NSW Police, Council and the licensee.
16. The hotel is located at 74 Victory Parade, Toronto. It is a two-storey hotel that faces north east over Lake Macquarie and towards Bolton Point. The hotel is situated close to the Toronto main street, which includes a variety of residential, hospitality and commercial premises. The hotel has a large grassed outdoor area, which overlooks Lake Macquarie, and is used to host live entertainment and staged performances. The premises holds a hotel licence and Mr Bortoli has been the licensee of the hotel since 15 September 1993. The hotel is subject to eight licence conditions, with three of those relating to the management of noise and the provision of live entertainment, including a LA10 noise condition.
17. The complainant resides at the [REDACTED] located at [REDACTED]. The unit is located next door to the hotel's outdoor area. A stage is erected for concerts in the outdoor area, that faces towards Lake Macquarie, however it is set up parallel to the complainant's unit. The complainant submits the stage is set up less than 30 metres from his bedroom and further undue disturbance is alleged to be caused by vehicles leaving the hotel.
18. The second complainant resides at [REDACTED], which sits approximately two kilometres across the water from the hotel. The second complainant has provided a number of recommendations for the hotel, specifically relating to lowering the noise level to acceptable levels, installing noise barriers or by facing the amplified speakers in another direction other than directly at his residence. The second complainant submits he has trouble hearing phone conversations or listening to the television during the disturbances and despite lodging complaints with Police, there is yet to be any appropriate action taken.
19. On 24 June 2020, Council provided a response in the form of three complaints received, a Notice of Determination to Development Application 1780 (DA) and a Modified Consent to DA 1780. The Modified DA contains two conditions relating to noise. Condition 68 is near identical to the LA10 noise condition while condition 69 relates to compliance with the NSW Office of Environment and Heritage sleep arousal criteria.

20. The three complaints were received by Council between November 2019 to March 2020. All complaints shared similar concerns about unreasonable noise levels from loud music emanating from the hotel. Council advised the complainants they would take no formal action unless a Public Noise Nuisance is established, which requires the lodgement of three separate complaints from three separate premises. Council directed each complainant to make contact with L&GNSW.
21. On 9 July 2020, Police provided a submission. Police state that concerts held at the hotel usually occur on a Saturday or Sunday afternoon and finish at the latest by 10:00pm. Police submit that on 6 July 2020, they attended the hotel and spoke with the licensee regarding a meeting held between hotel management and nearby residents on 2 July 2020. The licensee advised Police that 10 residents attended the meeting whereby the issue was resolved and the following initiatives were implemented:
- a) The complainant and licensee have shared their contact phone numbers to address issues of disturbance as and when they occur;
  - b) The outdoor stage will be moved closer to the hotel away from the western boundaries of the car park which back on to the unit complex;
  - c) Packing of entertainment equipment after a concert will be completed the following day to reduce disturbance to neighbours; and
  - d) On 3 July 2020, the licensee organised for an acoustic engineer to assess noise levels omitted from the hotel at his cost.
22. Police submit that inquiries on the COPS system have revealed no adverse information relating to noise complaints connected to the hotel. Police refer to a historical complaint in August 2016 made by the complainant relating to anti-social behaviour coming from the hotel. On this occasion, the complainant refused to meet with the licensee to discuss the issue. Police also spoke with the body corporate of the unit complex, Strata Plus North, who advised that there have been no recent complaints from residents relating to the management of the hotel.
23. On 14 July 2020, the licensee provided a submission in response to the complaint. Upon receiving the complaint, the licensee invited all residents of the unit complex to attend a meeting to address any issues relating to the hotel. As supported by the Police submission, only 10 apartments were represented at the meeting, with a total of 13 residents in attendance. The licensee states that of the 10 resident apartments in attendance at the meeting, eight were satisfied with the operation and management of the hotel. The initiatives noted above are reflected in the licensee's submission.

24. The licensee states he contacted the complainant on Sunday 5 July 2020 and Tuesday 14 July 2020 to discuss his concerns and the noise levels from the previous weekend's events. The complainant was satisfied with the noise levels on both occasions. The licensee also proposed installing shipping containers on the hotel boundary near the complainant's unit to create a temporary sound barrier until further investigation into an acoustic wall can be taken.
25. The licensee submits he takes his position and the reputation of the hotel very seriously after 27 years in the role. The licensee has provided 10 management plans to residents and Police about upcoming events to be held at the hotel. At no time has any resident contacted the licensee to make a complaint. The licensee also provides an acoustic assessment report from Amenity Acoustics Pty Limited and three letters from patrons who support the hotel and their live entertainment offering. All three of these patrons also reside within the [REDACTED] complex.
26. In response to the licensee's submission, the complainant submits the meeting on 2 July 2020 did not resolve the issues and ended abruptly. The complainant submits the licensee offered to attend his unit to listen to the alleged disturbance himself, however this did not occur. Further, the complainant submits the licensee was adamant that concerts would continue and that he could not control the volume as it may deter other artists from performing at the hotel due to this level of oversight.
27. The complainant contends that since the meeting there have been three consecutive concerts held on Saturdays from around 3pm to 8pm and moving the stage 10 metres further away from his residence has made little difference with no significant result in mitigating disturbance. The complainant also submits the licensee's proposal for two shipping containers to be stacked as noise barrier would not be effective as they would not be high enough to reach his windows.
28. The complainant contends any noise testing should be done during an outdoor concert and without the licensee's knowledge. Lastly the complainant acknowledges that the licensee has made some effort to rectify the situation, for which he is grateful.
29. On 29 July 2020, the second complainant provided a response to the submissions from Police, Council and the licensee. The second complainant expresses disappointment with the submissions of Police and Council and concerns over the acoustic report provided by the licensee as it appears to have been conducted after hours and without a band playing.
30. The licensee provided his final submission on 31 August 2020. The licensee states he travelled to the property of the second complainant at [REDACTED] on 29 August 2020,

during which a concert was held in the beer garden of the hotel. The licensee also engaged Amenity Acoustic Pty Limited to undertake a second sound testing from this location at the same time. The licensee spoke with the second complainant, and resolved to inform him in the future about events taking place in the beer garden and provided his personal mobile number to contact if any issues relating to noise occurred in the future so immediate action could be taken. A letter conveying same was sent to the second complainant on 31 August 2020.

31. The licensee submits he spoke to the complainant on 27 August 2020, prior to the concert on 29 August 2020, who informed him he was satisfied with the noise levels emanating from the hotel since the commencement of the formal noise complaint with L&GNSW. The licensee similarly informed the complainant to immediately contact him if there were any issues with noise at the concert. The licensee submits that the hotel will adopt the recommendations in both acoustic assessments and that he will closely monitor noise from the hotel. The licensee further submitted that he will continue to communicate with both complainants in relation to noise from the hotel.
32. The licensee also submitted the two acoustic assessments relating to the hotel. The first acoustic assessment by Amenity Acoustic Pty Limited relates to testing conducted on 3 July and 4 July 2020 from the boundary of the unit complex the complainant resides in. The report found non-compliance in the two testing periods between 10:50pm and 11:05pm and 11:34pm and 11:49pm on 3 July 2020. The non-compliant noise sources came from the following activities:
  - a) First floor live entertainment noise emission via open doorways on the eastern verandah;
  - b) Loud patron noise on the eastern side of the first-floor verandah;
  - c) Furniture movement/site preparation on the eastern side of the first-floor verandah;
  - d) Car park activity in the car park near the eastern site boundary; and
  - e) Loud patron noise in the ground floor beer garden.
33. The acoustic reports states that if these activities are managed accordingly, then this could potentially result in compliance with the LA10 noise criteria. The following noise attenuation and mitigation measures proposed in the acoustic report are as follows:
  - a) Limiting patron access to the eastern verandah after 10pm;
  - b) Self-closing doorways along the verandah;
  - c) No staff furniture movements on the eastern verandah after 10pm;

- d) Utilising hotel carparking spaces situated in the western half of the site as the primary parking location, and only opening access to the car parking spaces near the eastern site boundary when capacity has been reached in western car park spaces;
- e) Management of patron noise levels on balconies and in the ground floor beer garden; and
- f) Installing signage within the hotel, visible upon departure, reminding patrons and staff to be considerate of the surrounding community and keep noise to a minimum. Patrons are to be reminded to be considerate of the surrounding community and minimise any loud activities while within the beer garden or on balconies.

34. The second acoustic assessment by Amenity Acoustic Pty Limited relates to testing conducted on 29 August 2020 at the open park grounds along [REDACTED]. This location was selected as it has a direct line of sight to the hotel and the boundary of the second complainant's residence is at a lower height with intervening ground topography. The report found non-compliance in the two testing periods between 7:28pm and 7:43pm and 7:45pm and 8:00pm. The report attributed this noise source to external live entertainment noise within the beer garden. The report recommends that the specific frequency noise emissions can be directly controlled by a parametric equaliser at the sound mixing desk and doing so may result in compliance with the noise criteria.

35. A level of disturbance from the normal operation of a licensed premises is to be expected, including noise from amplified entertainment, patrons, and pedestrian traffic caused by the hotel. Taken as a whole, the material indicates the hotel has, at times, caused undue disturbance with respect to amplified entertainment and patron noise. I note the findings of the acoustic assessments persuasive in this regard. The recommendations made by the acoustic engineer demonstrate that breaches of the LA10 noise criteria have occurred, but also provides practical solutions, while predictive in nature, that the licensee can implement to mitigate future noise emissions and ensure compliance with the LA10 noise criteria. However, aside from these findings, the submissions from Police and Council all indicate a relatively low level of disturbance created by the hotel.

#### *Action taken to mitigate disturbance*

36. In considering whether to impose conditions on the liquor licence, I have balanced the submissions of all parties, having specific regard to any action taken by the licensee in response to the complaint and the effectiveness of any measures that have been implemented to address disturbance.



37. Since the complaint was lodged, the licensee has implemented the following measures to mitigate disturbances, including:

- a) Holding a meeting for residents of the unit complex to discuss disturbance from the hotel;
- b) Moving the outdoor stage closer to the hotel and away from the unit complex;
- c) Packing of entertainment equipment after a concert will be completed the following day to reduce disturbance;
- d) Commissioned two acoustic assessments, with one focusing on acoustic impacts on the complainant's unit and the other in the vicinity of the second complainant's residence in [REDACTED];
- e) Meeting with both the complainant and second complainant, providing them with his personal mobile phone number and addressing their concerns; and
- f) Submitted that he will implement the recommendations of both acoustic assessments, closely monitor the noise levels of the hotel and continue to communicate with both complainants by providing his direct contact line with an intention to take immediate action on any future noise issues raised.

38. The licensee has taken measures to mitigate disturbance. This has come primarily in the form of commissioning acoustic assessments, proposing strategies to minimise noise and proactively engaging with the complainants and nearby residents. I note the licensee has been willing to engage with the complainants to appease their concerns and the complainant has expressed gratitude for the actions taken.

39. It remains to be seen whether the implementation of the recommendations outlined in the acoustic assessments will improve disturbance caused by the hotel. Ultimately, there needs to be further evidence as to whether these mitigating measures make an impact regarding noise, but as for the licensee's intent, the material indicates that he is taking the allegations of disturbance seriously and making reasonable and proactive efforts to mitigate noise at the hotel.

### **Findings and conclusion**

40. In making my decision, I have considered the submissions of both complainants, the licensee, Police and Council. I have also had regard to the particular context in which the hotel operates.

41. I have taken the statutory considerations into account and acknowledge the order of occupancy is in favour of the hotel. I acknowledge that a certain level of disturbance is to

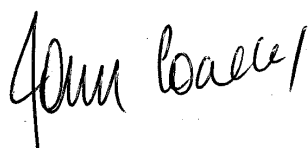
be expected from the operation of any licensed premises. Noting the position of the hotel within the Toronto community, I find it reasonable to expect some form of noise will be generated from the ongoing operation of the hotel.

42. Considering the material presented by the parties to the complaint, I conclude that the measures sought by the complainant to have been adequately addressed. These measures include that the amplification of bass and drums be turned down, the packing up of equipment after the concert has ceased until the next day, while also noting concerns with the placement of the stage.
43. I acknowledge the hotel has been responsive to both complainants in a proactive attempt to address and resolve their concerns and is willingly implementing mitigating measures. The licensee has commissioned two acoustic assessments, submitted his intention to adopt all recommendations outlined in the acoustic reports, proposed additional remedies to the complainant in the form of constructing sound barriers and has moved the stage further away from the complainant's unit. I have taken into account the overall efforts made by the licensee in addressing disturbance and accept the actions taken to be collectively positive efforts. I encourage the licensee to continue to approach voluntary alternative measures should any further issues arise.
44. The two acoustic assessments found that the hotel could comply with L&GNSW and Council noise criteria and made practical recommendations to assist the hotel in complying with these standards. This includes limiting noise levels by installing an equaliser at a sound mixing desk, managing patron noise levels both inside and outside the hotel and installing signage at the hotel to minimise community impact. I strongly urge the licensee to implement the measures recommended in the acoustic reports.
45. I have determined to issue a warning to the licensee in this matter. This decision reflects my conclusion that while there have been instances of undue disturbance emanating from the hotel, the licensee has taken a number mitigating measures to address and improve the management of disturbance. I am satisfied the licensee has been active in addressing the complaint, both by communicating effectively with all parties, and in commissioning an acoustic consultant, resulting in two acoustic assessments being completed from both complainants' respective residences.
46. In issuing a warning to the licensee, I provide the licensee an opportunity to implement the recommendations made by the acoustic consultant. The licensee should continue being vigilant in ensuring no undue disturbance is caused by the operation of the hotel or from

the behaviour of hotel patrons, as well as continuing a direct line of communication with both complainants.

47. Finally, I am satisfied that the above action is a proportionate, measured and appropriate regulatory response to the identified risks of undue disturbance in this case. With this in mind, I strongly encourage the hotel to continue to be proactive in the management of disturbance, in particular by implementing the recommendations contained within the acoustic reports. The hotel should be aware that if fresh and direct evidence is presented demonstrating further undue disturbance or disregarding his responsibility in relation to mitigating noise, it is open for the matter to be reconsidered and for further regulatory action to be taken.

**Decision Date:** 22 December 2020



**John Coady**

**Manager Regulatory Interventions**

Delegate of the Secretary of the Department of Customer Service

**Application for review:**

Should you be aggrieved by this decision, you may seek a review by the Independent Liquor & Gaming Authority by an application which must be lodged within 28 days of the date of this decision, that is, by no later than 19 January 2021. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at [www.liquorandgaming.nsw.gov.au](http://www.liquorandgaming.nsw.gov.au)

In accordance with section 36C of the Gaming and Liquor Administration Act 2007 this decision will be published on the Liquor & Gaming NSW website at [www.liquorandgamingnsw.nsw.gov.au](http://www.liquorandgamingnsw.nsw.gov.au)

**The material before the delegate of the Secretary in making this decision comprises:**

1. Copy of the liquor licence dated 21 December 2020.
2. Section 79 Noise Disturbance Complaint lodged by the complainant dated 16 March 2020.
3. Submission from Council dated 24 June 2020.
4. Complaints from second complainant dated 4 July, 11 July and 18 July 2020.
5. Submission from NSW Police dated 7 July 2020.
6. Submission from the licensee dated 14 July 2020, including an acoustic assessment from Amenity Acoustics Pty Limited issued on 14 July 2020.
7. Submission from complainant in response to Police submission dated 20 July 2020.
8. Submission from complainant in response to licensee and Council submissions dated 23 July 2020.
9. Submission from second complainant dated 29 July 2020.
10. Submission from licensee dated 31 August 2020.
11. Acoustic assessment from Amenity Acoustics Pty Limited issued on 2 September 2020

