



DOC16/038148

FILE NO: A15/0005564

COMPLAINANT:



LICENSED PREMISES: Bauhaus West, Enmore – LIQO660010325

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, Sean Goodchild, Director Compliance Operations, Liquor and Gaming NSW, a delegate of the Secretary, Department of Justice, in relation to the complaint made in respect to Bauhaus West, 163 Enmore Road, Enmore, have decided to impose the following two conditions on the liquor licence:

1. A requirement to comply with the LA10 noise criteria.
2. A requirement for the rear exit door to be kept closed on any trading night other than to provide access for patrons to the toilet facilities located at the rear of the premises.

The details of the proposed conditions, including the dates in which they become effective, are outlined in Annexure 1.

REASONS FOR DECISION

Legislation

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,
 - 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 5 June 2015 [REDACTED] Enmore (the complainant) lodged a disturbance complaint under section 79 of the Act concerning the restaurant. The complainant alleged undue disturbance predominately on Friday and Saturday nights between 9.30 pm and 1.30 am from excessive music and patron noise, and a further allegation that the restaurant trades past the nominated trading hours. The complainant lodged the complaint as a person residing in the neighbourhood who is authorised by three other residents who are affected by the disturbance detailed in the complaint.

6. The complainant stated he had engaged with Mr Christopher Thomas the licensee on a number of occasions about disturbance from the operation of the restaurant and that the issues of noise intrusion became more frequent. The complainant alleged that he had lodged the complaint on the basis of on-going undue disturbance from amplified entertainment and patron noise. The complainant provided a 'Noise Log' compiled between the dates of 28 February 2015 and 29 May 2015 and details of text messages sent to the licensee requesting music volume levels be reduced.
7. Between 7 July 2015 and 9 March 2016 various submissions were lodged by all affected parties. A list of the material that is before the delegate of the Secretary is set out in Annexure 2.

Considerations and findings

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

8. The Act requires that in certain cases the Secretary have regard to three statutory considerations being the order of occupancy between the licensed premises and the complainant; any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises; and, any changes in the activities conducted on the licensed premises over a period of time.
9. *The order of occupancy between the licensed premises and the complainant –*
The restaurant has operated at its present site since 19 May 2009. The complainant has resided at his current address since 30 June 2014. This fact is not in dispute and I consider that the order of occupancy consideration is in favour of the restaurant.
10. *Any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises –*
The complainant advised that the restaurant has installed outdoor decking, lighting and a sound system with external speakers. There have been no changes to the complainant's premises.
11. *Any changes in the activities conducted on the licensed premises over a period of time –* The complainant alleged that at the time of moving to his current residence the licensed premises was operating as a Spanish tapas bar and the complainant enjoyed co-existing with that business as there were no noise disturbance issues. When the business changed under the current proprietor, noise emissions became excessive and disruptive to nearby residents, particularly from amplified music and noisy patrons.

Summary and conclusion

12. I have considered the submissions of the complainant, licensee, NSW Police and the local council. I have also had regard to the particular context in which the restaurant operates (including the statutory considerations mentioned above).
13. I am satisfied the material before me is sufficient to support a finding that the restaurant has on occasions caused undue disturbance to the neighbourhood. I have balanced the submissions on behalf of the restaurant, the complainant, NSW Police and the council.
14. On 7 July 2015 a submission was received from Ms Jennifer Robinson, Governance Officer, Marrickville Council advised of no prior disturbance complaints in respect to the restaurant. The submission also provided a copy of Determination 200300776 dated 28 May 2004 in respect of the Development Application for the restaurant. Paragraph 2 of the document states, *'The area to be used for the café being restricted to the ground floor shop and no public access being available to the outdoor area except to use the sanitary facility. All seating and tables are to be removed from the outdoor area.'*
15. On 20 July 2015 the licensee submitted an acoustic report prepared by Environmental Monitoring Services in respect to monitoring that was undertaken at the restaurant on 3 and 4 July 2015 between the hours 9.00 pm 1.00 am. The report also advised that the following patron numbers were noted over the monitoring period being approximately 15 persons in the restaurant and at 11.00 pm three persons were inside and six persons were located in the outdoor area.
16. The report recommends that to comply with the LA10 noise criteria the restaurant's amplifier level should be set at the medium level at all times. Should higher levels be desired then a frequency based noise limiter should be installed, and a new window fitted with 6.38mm glass and a solid core timber back door fitted with appropriate seals to contain noise emissions. The report also advised that a number of additional noise management strategies should also be implemented to avoid disruption to neighbours that includes the closure of the restaurant's back door at all times and carpet or rubber matting to cover the wooden patio to prevent intermittent impact noise.
17. In response to the acoustic report recommendations, the licensee in an email submission advised that a 'self-closing door' will be installed at the back of the restaurant and rubber matting applied to the decking in the outdoor area as soon as possible. The licensee also advised that the restaurant's sound system will remain on the lower setting. In respect to the complainant's comments about the use of timber decking in the outdoor courtyard the licensee

advised that such decking was in existence for at least 2-3 years before the restaurant commenced operating on 19 December 2014.

18. On 21 July 2015 NSW Police in a submission (received by OLGR on 21 August 2015) advised that the restaurant is located within a large commercial strip on Enmore Road with residential premises located both above and behind the venue. During the tenure of the current licensee there have been no recorded complaints received or inspections conducted concerning the restaurant. In response to the disturbance complaint licensing police conducted a business inspection at the restaurant on 18 July 2015. During the inspection officers noted an external courtyard area adjacent to the restaurant was set up with four tables and enough seating for 25 persons. The submission noted that at the time there were no patrons occupying this area possibly due to inclement weather. The officers also noted that sound speakers were affixed to the courtyard walls to provide amplified music, however the wiring attaching the speakers to the in-house sound system had been disconnected.
19. In response to questions by the officers concerning use of the courtyard area, the licensee responded that when it is used by patrons, complaints are invariably made by residents. Police consider that the licensee's use of the outdoor area conflicts with Development Consent DA200300776 dated 28 May 2004 issued by Marrickville Council.
20. On 2 August 2015 the complainant in an email response to the licensee's submission advised that he and the other residents appreciate the improvements that the licensee continues to make to ensure that sound is kept at a reasonable level. The complainant requested that the volume levels be kept at the lower setting at all times. In respect to the noise assessment the complainant submitted that such testing was carried out on a night that was not a true representation of an ordinary trading night due to the lack of patrons and cold weather. The complainant is supportive of the majority of the suggested solutions and believes when implemented they will provide an effective outcome for all parties. In respect to the outdoor speakers, the complainant advised they should be turned off and patrons moved indoors from 10.00 pm. The complainant also acknowledged some noticeable improvement recently but believes this may be attributed to the colder weather.
21. On 15 October 2015 in an email to an OLGR case officer the complainant advised that the outdoor area of the restaurant was being advertised for use and this was reported to both NSW Police and the council on 29 September 2015. To support this allegation the complainant provided social media material from the venues Facebook page promoting use of the restaurant's outdoor area. In response to a complaint made to the council, the complainant advised that he received an email from Mr Jeff Norman, Town Planner, Marrickville Council which advised, *'the public use of the outdoor area is confined to the use of the toilets and at present the operator of the venue is not using the outdoor area for entertainment or for*

food/drink consumption purposes. He has been informed that should he wish to use it for these purposes an application is required to be submitted to Council. The venue operator alleged he does not operate beyond 12 midnight however does have patrons who use the toilet facilities after this time. Council allows for some tolerance beyond 12 midnight for patrons to finish consuming their drinks and to use the toilet facilities'.

22. On 19 October 2015 in an email to an OLGR case officer, Mr Norman confirmed that the council had received complaints predominately in relation to alleged breaches of consent conditions. Mr Norman also confirmed that during his attendance at the restaurant he had noted outdoor furniture including tables and chairs in the courtyard area. In response to his questions about the use of the outdoor area, the licensee had advised that the area was no longer used. Mr Norman had warned the licensee that council consent was required should he wish to use the outdoor area for dining/drinking purposes. The email also advised that the council had advised the complainant of the investigation outcome.
23. On 27 November 2015 at 11.35 pm OLGR inspectors attended the restaurant and conducted an assessment of noise emissions noting that although music noise was audible from the footpath at the front of the restaurant, such noise emissions were not above the ambient levels of traffic traversing Enmore Road. The inspectors entered the restaurant and noted approximately eleven patrons in various areas within the venue. The volume levels of the amplified music that was playing at the time was high and was being projected from an area located near the kitchen. The inspectors then noted that the rear door permitting entry to the courtyard was closed. An inspector entered the courtyard area via this doorway, and confirmed this area was clear of patrons and was not being used. Two tables and multiple chairs had been stacked to one side of the area leaving a vacant space on the timber deck. The eastern wall of the courtyard forms part of the neighbouring residential building and is in line of sight to the resident's apartments.
24. The inspectors noted that although the sale and service of liquor had ceased at midnight patrons were permitted to remain in restaurant. At 12.20 am three patrons still remained giving an impression that the venue was open and trading.
25. On 11 December 2015 OLGR inspectors convened a meeting with the licensee at the restaurant in respect to allegations of trading contrary to permitted trading hours, and the issues set out in the disturbance complaint. During an inspection it was noted that tables and chairs stacked against the wall in the outdoor courtyard area were covered in dust and did not appear to have been used for some period of time. The inspectors also noted that the toilet facilities and upstairs apartments can be accessed via a gate at the end of the courtyard. In response to questions by the inspectors concerning use of the courtyard area the licensee

advised that the courtyard is now not used for seating however is considering lodging a development application with the council to use the area.

26. On 11 February 2016 the complainant in an email to an OLGR case officer advised of further issues of disturbance from amplified music and that the door to the outdoor courtyard remains open. On 15 February 2016 an OLGR case officer forwarded the email to the licensee and requested a response to the issues raised.
27. On 22 February 2016 the licensee responded to this query by email, and denied that the rear door of the restaurant remains open, on the basis that the venue is now air-conditioned and an automatic open/closing door has been installed. In respect to allegations of noise the licensee advised that there are four rooms located above the restaurant of which three are currently leased and the occupants of these rooms conducted a party on 11 February 2016 and also previously on 18 December 2015. On 20 December 2015 the courtyard was used to provide a farewell gathering for the sous chef. The only access to the upstairs flats is via a gate leading into rear courtyard and suggests the noise at 2.00 am may have been from residents returning home.
28. On 15 March 2016 the licensee was advised by an OLGR case officer that inspectors conducted an assessment of noise levels from the operation of the restaurant between 9.30 pm and 10.15 pm on 12 March 2016. At the time the inspectors noted that a door separating the internal area from the outside area was fixed in the open position.
29. The inspectors later attended the complainant's residence which is adjacent to the restaurant. Observations were undertaken from the living room of the residence where inspectors were of the opinion that noise from the restaurant although audible was not considered undue. Observations from within the complainant's bedroom noted noise intrusion from the restaurant was at a higher level. From the bedroom's balcony the predominant noise was from the movement of plates, cutlery and persons talking. With the glass sliding doors which divide the bedroom from the balcony in an open position noise intrusion levels within the bedroom were significantly higher and considered intrusive. The complainant advised that on most nights they are unable to sleep if the glass sliding doors are in the open position especially if restaurant patrons use the rear courtyard with amplified music and socialising by patrons.
30. The submissions from the Council confirm that the restaurant does not have consent to use the rear courtyard for purposes other than as a walkway for restaurant patrons to use the toilet facilities. I am of the view that the use of the rear outdoor courtyard area as described in the complaint (and in a manner emphasised by the content of the restaurant's Facebook page) was a significant factor of disturbance to the residents.

31. I consider that the initial actions of the licensee to engage and carry out the recommendations of an acoustic consultant (who recommended closure of the restaurant's back door at all times to avoid noise spillage from music and patrons, the requirement for noise absorbing material to be installed on the wooden patio to avoid intermittent impact noise) to be positive measures to prevent undue disturbance from the restaurant. However, as noted by the OLGR inspectors on 12 March 2016, the door separating the restaurant's internal area from the outside was fixed in an open position and confirms the complainant's opinion that this door is not kept closed.
32. Positive actions to rectify identified noise concerns, such as those taken by the licensee in this instance, are often sufficient to reduce the need for regulatory intervention. However, in this instance, I note the report of OLGR Inspectors, following an inspection on 12 March 2016, which indicates that the door separating the restaurant's internal and external areas was fixed in an open position. Accordingly, I have formed the view that voluntary measures and undertakings are not sufficient in this instance, as I cannot have confidence that they will continue to be adhered to.
33. As such, to provide regulatory certainty and in order to ensure appropriate safeguards are in place to prevent disturbance arising from the future operation of the restaurant, I consider it appropriate to impose the LA10 noise condition, and a further condition requiring that the rear exit door to be kept closed on any trading night other than to provide access for restaurant patrons to use the toilet facilities. I am also of the view that the imposition of these conditions does not place an undue burden on the restaurant's operation.

Date of decision: 23 June 2016



Sean Goodchild
Director Compliance Operations
Delegate of the Secretary, Department of Justice

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 21 days of the date of this decision, that is, by no later than **13/07/2016**. A \$500 application fee applies. Further information can be obtained from Authority Guideline 2 published at www.liquorandgaming.justice.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.liquorandgaming.justice.nsw.gov.au

Under section 81 of the *Liquor Act 2007* a delegate of the Secretary of the Department of Justice has imposed the following conditions on the liquor licence of:

Bauhaus West – Enmore (LIQHO660010325)

LA10 Noise Condition

The LA10* noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz – 8kHz inclusive) by more than 5dB between 07:00am and 12:00 midnight at the boundary of any affected residence.

The LA10* noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz – 8kHz inclusive) between 12:00 midnight and 07:00am at the boundary of any affected residence.

Notwithstanding compliance with the above, the noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12:00 midnight and 07:00am.

*For the purposes of this condition, the *LA10 can be taken as the average maximum deflection of the noise emission from the licensed premises.*

Date condition effective: 7 July 2016

Closure of rear exit door

From 7:00pm on any trading night the licensee must ensure that the rear door of the restaurant leading to the rear courtyard is kept closed except to allow patrons to enter and egress the rear door for the purpose of using the toilet facilities.

Date condition effective: 7 July 2016

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

1. Section 79 Noise Disturbance Complaint lodged by [REDACTED] on 11 June 2015 and associated emails dated 26 August 2015, 14 July 2015, 12 September 2015, 15 October 2015, 30 October 2015 and 11 February 2016.
2. Submissions by Marrickville Council dated 6 July 2015 and 19 October 2015.
3. Submission by Newtown Local Area Command dated 21 July 2015.
4. Email submissions from Mr Christopher Thomas licensee dated 15 July 2015 attaching an acoustic report prepared by Environmental Monitoring Services, 18 September 2015.
5. File notes of OLGR inspector observations and inspections at the restaurant on 27 November 2015, 12 March 2016 and 7 April 2016.