HENSON PARK HOTEL

The proposed development will result in an unacceptable social impact on the population

SYNOPSIS

Known colloquially as the Henson Park Hotel this paper covers the attempts, and eventual success, by an applicant to establish a new hotel with gaming machines in a two storey commercial building in the centre of Marrickville Town Centre. The applicant lodged three applications between 2006 and 2010 and Marrickville Council refused all three for a number of reasons that included potential negative social impact. The first two applications were for the same proposal and the third was amended slightly to include a café/bistro on the ground floor, move a bar to the first floor and install a mechanical lift with access to both floors and rooftop car park.

The applicant appealed all three Council refusals in the NSW Land and Environment Court. The first two appeals were dismissed on the basis of inadequate car parking, amenity impacts and unacceptable social impact. In these two appeals the Court accepted the advice of Council’s expert, Dr Judith Stubbs, on potential social impact.

The applicant appealed the first dismissal to the NSW Court of Appeal in relation to Justice Jago’s decision. Justice’s Hodgeson, Campbell and Taylor dismissed that appeal but confirmed that a consent authority could not refuse a development application or request amendments in relation to the proposed gaming machines.

The applicant appealed the second dismissal under s 56A of the Land and Environment Court Act 1979. Justice Pain of the Land and Environment Court dismissed this 56A appeal in deciding that Commissioner Murrell had not erred in law and that social impacts were a relevant consideration under 79C(1) of the EP&A Act.

Commissioner Tuor upheld the third appeal to the Land and Environment Court, on Council’s refusal of the third application, and granted consent to the proposal. Social impact was the only issue in the third Class 1 appeal. Commissioner Tuor accepted the applicant’s social impact advice (from Mr J Lette) over Council’s social impact advice (from Dr Judith Stubbs).

Throughout this process the applicant progressively whittled away the matters that had been raised as reasons for refusal (primarily lack of parking and potential anti-social behaviour and noise in the lane to the rear of the premises). The applicant then addressed the issue of social impact through amendments that included a bistro/café on the ground floor, and by convincing Commissioner Tuor that the character of Marrickville had changed from a social perspective and that the application should not be refused on the basis of social impact.

The paper focuses on the third appeal and the opinions of Commissioner Tuor in relation to the social impact evidence presented to her.

PROPOSAL AND CONTEXT

The proposal was to demolish part of the premises carry out alterations and to use the premises as a hotel (with gaming machines) with hours of operation of 8.00am to 2.00am the following day Mondays to Saturdays and 8.00am to 12.00 midnight Sundays, and to erect associated signage. The premises are at 252-254 Illawarra Road, Marrickville, near the intersection of Illawarra Road and Marrickville Road.

The premises are in a business zone – surrounding is the retail and commercial shopping strips of Illawarra and Marrickville Roads that make up the Marrickville Town Centre. There is residential to the rear of the premises, fronting Touhy Lane that runs along the rear of the premises.

The Marrickville Royal Exchange Hotel is about 250m walking distance to the north east of the premises, the Marrickville Tavern Hotel is about 125m walking distance to the north west, and the original Henson Park Hotel is about 900m to the north.

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The proposal involved moving the liquor and gaming machine licences from the Henson Park Hotel to the premises. A gaming room is proposed on the ground floor opening to a terrace, through bi-fold doors. The gaming room would be visible from the footpath. One bar and the café/bistro were also proposed on the ground floor, with another bar on the first floor. The proposed lift would give access to both floors of the hotel, and to the roof top parking where 25 parking spaces would be allocated to staff and patrons.

**TIMELINE**

**2006**

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<th>Date</th>
<th>Event</th>
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<tr>
<td>JULY 2007</td>
<td>Council refused DA2006/00639</td>
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<tr>
<td>NOVEMBER 2007</td>
<td>Appeal to Land and Environment Court 10263 of 2007 dismissed</td>
</tr>
<tr>
<td></td>
<td>(Jago J)</td>
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<tr>
<td>DECEMBER 2009</td>
<td>Appeal to Court of Appeal 40865 of 2007 dismissed</td>
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<td>(Hodgeson J, Campbell J and Taylor J)</td>
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**2008**

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<tr>
<td>AUGUST 2008</td>
<td>Council refused DA2008/00111</td>
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<tr>
<td>JULY 2009</td>
<td>Appeal 10459 of 2008 to Land and Environment Court dismissed</td>
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<td></td>
<td>(Murrell C)</td>
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<td>SEPTEMBER 2009</td>
<td>s56A Appeal to Land and Environment Court dismissed</td>
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<td>(Pain J)</td>
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The 2006 and 2008 proposals were the same and proposed only six car spaces, all of which would be allocated to staff.

Main reasons for refusal of the first application were inadequate parking, increased activity in Touhy Lane at the rear of the premises and social impact.

Main reasons for refusal of the second application were inadequate parking and social impact – being proximity to a crime hot spot for non-domestic violence and within a socially disadvantaged area.

**2010**

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<td>OCTOBER 2010</td>
<td>DA 2010000472 lodged</td>
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<tr>
<td>NOVEMBER 2010</td>
<td>2010 deemed refusal appeal lodged</td>
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<tr>
<td>DECEMBER 2010</td>
<td>Council refused DA201000472</td>
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<tr>
<td>JUNE 2011</td>
<td>Appeal to Land and Environment Court upheld, application approved</td>
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<td>(Tuor C)</td>
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Minor changes from the previous two proposals include:

- Whole of the premises to be used for the hotel (previous ground floor only)
- Bistro/café introduced to the lower level
- Parking provision increased from 6 spaces to 25 spaces
- Social impact assessment lodged with the application

A significant number of submissions raised concerns that approval of the subject application would result in the closure of the existing Henson Park Hotel. However, Council and the courts did not consider this a relevant matter for consideration under Section 79C of the *Environmental Planning and Assessment Act 1979*.

The main reasons for Council refusal were social impact and insufficient information to determine adequacy of proposed parking and service vehicle access. The reasons Commissioner Tuor gave, for approval, are discussed below.

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GAMING ROOM

A significant aspect of the proposal is the proposed gaming room on the ground floor of the hotel, in an area fronting the footpath terrace, and enclosed with bi-fold doors.

Through the Court of Appeal it was confirmed that the social impact of any gambling related harm could not be considered in the assessment of the development application. Assessment of the social impacts of proposed gaming machines is excluded through the operation of s209 of the Gaming Machines Act 2001.

The appeal determined by Commissioner Tuor, therefore, was focussed on the social impact related to alcohol related harms as follows.

SOCIAL IMPACT ASSESSMENT

Although one of the reasons given for Council’s refusal was insufficient information to assess the adequacy of parking and service vehicle access, the applicant provided additional information and Council did not press this issue with the Court. This could be a contributing factor to why the final appeal was upheld, as there were no compliance or amenity issues remaining. Council opposed the appeal solely on social impact with the following contentions:

- The development would result in another alcohol facility in the Marrickville Town Centre (MTC)
- The MTC and its surrounds are subject to a high level of disadvantage associated with vulnerability to alcohol related harm which is likely to be exacerbated by the development
- The applicant’s SIA provided fails to justify the alcohol related social impacts.

Theses contentions are discussed through the arguments put by the social impact experts and the Commissioner’s response. At the beginning of proceedings it was agreed:

- The social impacts in the locality likely to result from the proposed hotel are a relevant matter for consideration under section 79C(1)(b)
- This does not include assessment of the social impacts of gambling which are excluded from consideration through the operation of s209 of the Gaming Machines Act 2001
- Assessment of social impacts of the proposal, therefore, focus on alcohol related harm.

In the words of Commissioner Tuor

The specific social impact in dispute is whether the town centre and its surrounds are subject to a high level of disadvantage associated with vulnerability to alcohol related harm which is likely to be exacerbated by the proposed development. (Commissioner Tuor)

Commissioner Tuor did not attach weight the two previous L&EC decisions (that included social impact as a reason for refusal. The Commissioner conceded these decisions outline the framework for considering social impacts relating to alcohol related harm, and there were similarities between the three applications. However, she decided the third application was different and must be considered on its merits, and cited the following reasons:

- Multiple reasons given for previous refusals (parking/amenity) overcome
- Dispute over the relevance of social impact as a consideration resolved
- Dispute over the ability to consider the social impact of gaming machines resolved
- Dispute over relevance of alcohol related harm resolved
- Supporting information had changed (BOCSAR, literature, expert evidence)
- Changed circumstances – the two clubs and their licences were no longer an issue
- Marrickville was gentrifying

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Probably most significantly to the outcome the applicant’s expert, Mr Lette, ‘undertook independent research and provided an effective contrador to Dr Stubbs evidence’ and the Commissioner reached different conclusions in relation to SEIFA data on the evidence of the experts before her.

Level of disadvantage

A key disagreement between the experts was the level of disadvantage within the primary and secondary localities and the appropriate SEIFA index to apply.

Dr Stubbs considered the locality should be defined in terms of the likely impacts, and described an area with radius of 300m for primary locality and an area of 1km radius for secondary locality. Mr Lette considered the Town Centre and surrounds to be the primary locality, a precinct predominantly commercial with no residential, but accepted that impacts related to amenity and other harms should be considered in the secondary locality.

Dr Stubbs relied on the index of disadvantage to support her claim that the community in the locality was substantially disadvantaged. Dr Stubbs considered the index of disadvantage the best and most widely accepted measure for area disadvantage. Mr Lette relied on the index of advantage and disadvantage, to demonstrate that the community in the locality was neither advantaged nor disadvantaged.

Through discussion with the experts the Commissioner resolved that:

> The agreed position of the experts is that the level of disadvantage in the locality is static or declining, however, pockets of significant disadvantage are likely to remain

Level of gentrification

The experts agreed that Marrickville is gentrifying. Dr Stubbs did not agree that the locality had gentrified but agreed that the level of disadvantaged persons in the locality was either static or decreasing. Mr Lette considered the gentrification evident in the 2006 Census would have continued and that less-advantaged people were being displaced in the locality through gentrification.

Level of alcohol related harm

Relevant aspects of alcohol related harm were agreed as:

- Assault (non-domestic violence) and assault (domestic violence)
- Anti-social behaviour such as offensive conduct/language, graffiti and malicious damage
- Amenity impacts that arise from anti-social behaviour

Dr Stubbs considered health impacts also relevant, however, these were not considered by the Commissioner. There was further disagreement on the relationship between disadvantage and alcohol related harm. Dr Stubbs considered that as the locality contains significant pockets of disadvantage based on SEIFA disadvantage and also displays vulnerability to alcohol related harm on relevant indicators, there was potentially significant risk of increased alcohol related harm from the proposal.

Mr Lette considered SEIFA a useful starting point but pointed out further research was needed to understand the nature of disadvantage and how it relates to the potential risk of alcohol related harm. He pointed out the level of people in the population with low incomes (that would contribute to the index of disadvantage) such as seniors, students and creative/cultural workers, that would not be considered vulnerable to alcohol related harm. Mr Lette questioned Dr Stubbs specific indicators of alcohol related harm on the basis that indicators such as unemployment, income and non-English speaking background could not automatically be linked to alcohol related harm, and her main indicator of a greater percentage of males was not prevalent in the locality.

The experts disagreed on the existing level of alcohol related harm. Dr Stubbs relied on BOCSAR hot spots. In 2009 the locality was in the:

- top 10% for assault (domestic)
- top 10% for assault (non-domestic)

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• top 30% alcohol related assault
• top 10% malicious damage
• top 10% for graffiti

Mr Lette argued the hot spots do not identify the suburb of Marrickville or the Town Centre as areas of high density alcohol related crime in comparison to the rest of the LGA or NSW, and further that dense inner city areas are more likely to be in the BOCSAR top deciles for incidents of crime but that the rate of crime per population residing or visiting the areas would be lower than other areas of the city.

Risk profile conclusions

Dr Stubbs considered that any increase in the number of licensed premises would likely increase alcohol related harm and concluded from her findings about the risk profile that there is likely to be an exacerbation of existing alcohol related harm through the introduction of another hotel in the social and physical context. Mr Lette concluded that the introduction of another hotel would not lead to an unreasonable increase in alcohol related harm and he considered the risk of alcohol related harm could be influenced in by the design and management of the hotel.

To counter this latter point Dr Stubbs accepted that individual hotels may reduce on site impacts through management and design but impacts off site area more difficult to mitigate - good management may transfer problems into the public domain.

Commissioner Tuors’ reasons for approval

The appeal, therefore, hung on the degree of association between disadvantage and alcohol related harm in the locality, and whether the proposed hotel would exacerbate such harm in the locality.

Commissioner Tuor accepted the applicant’s argument that the hotel was targeting a different market to the existing hotels in the locality (upmarket) and that, because of the development:

• There would likely be an increase in the number of people from within and without the community drinking in the locality
• Consumption of alcohol would be likely to increase in the locality, and that
• There was clear evidence that any increase in the number of licensed premises can increase alcohol related harm, however, the severity of the risk is linked to the risk profile and the attributes of the hotel

The Commissioner concluded that:

Individually the factors in the risk profile of proximity to residential uses, clustering, disadvantage and existing alcohol related harm do not support refusal of the application, however, they indicate a cautionary approach to any approval.

In the combined locality there are likely to be pockets of significant disadvantage and within these pockets there would be people with greater vulnerability to alcohol related harm. However, I don’t accept that this is likely to be exacerbated by the proposed development to the extent that it warrants refusal of the application.

It can not definitely be concluded that there would be an increase in the number of disadvantaged people who consume alcohol or that they would consume more alcohol.

However, it is indicative that careful consideration needs to be given to factors such as hours of operation, patron numbers and management to mitigate the potential impacts of an additional hotel in the locality.

Conditions, apparently to manage and mitigate the impacts, were agreed on – the primary one being hours of operation limited.

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CONCLUSIONS AND DISCUSSION

Council’s reasons for refusing the move of the Henson Park Hotel licences to Marrickville were based on the community profile and potential of alcohol related harm. Council was not able to boost this with the negative social impact of gambling related harm given he exception in the Gambling Act. However, statistically the community in Marrickville and Marrickville South is more disadvantaged, more vulnerable, more likely to gamble and more likely to suffer from gambling related harm, than the community around the Henson Park Hotel, to the north of Marrickville.

Unfortunately it is the characteristics of the Marrickville/Marrickville South’s communities, and the lack of those characteristics in the Henson Park communities, that provide the rationale for moving a hotel license 900m at such great expense.

This case exemplifies the determined persistence of the industry but shouldn’t be taken as indicative of the only possible outcome of a refusal.

Impediments to successful social impact argument:

- Lack of precedents and case law (only one alcohol related success in the L&EC (Campbelltown)
- Evidence based approach by the courts – social impact needs to be ‘proven’
- Alcohol-related harm occurs as a result of poor personal decisions not as a result of social policy decisions - overlooks the fact that liquor outlets of all sorts are concentrated in low income areas
- Myth of no social gradient to alcohol related harm

Improvements since 2011

- More research and data – needs consolidation into policy
- BOCSAR is more advanced and has more research
- Better health statistics produced by NSW Health – eg hospitalisation graphs
- Less community tolerance of misuse of alcohol
- One successful case in the L&EC – Campbelltown
- Campaign by the Foundation for Alcohol Research (FARE)