

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	INDOOR SPORT WINNELLIE
APPLICANT:	Mrs Marie Smith-Taylor
APPLICATION:	New "On Licence" Liquor Licence
OBJECTOR:	Director of Licensing and Regulation
HEARD BEFORE:	Mr Richard O'Sullivan (Chairman) Mr John Brears Mr Paul Costigan
DATE OF HEARING:	22 August 2007
APPEARANCES:	Mr Bill Priestley for the Director of Licensing and Regulation Mrs Marie Smith-Taylor for the Applicant Mr John Taylor assisting the Applicant

- 1) In making their decision the Commission must be mindful of the relevant sections of the *Liquor Act* ("the Act") - specifically Section 6 - Public Interest Criteria, and Section 26 - that the application was correctly made.
- 2) The Director's objection was based on Section 28(e) of the Act - "Whether the Applicant is a fit and proper person to hold a licence" and Section 6 - whether the licence would be a community benefit.

BACKGROUND

- 3) In 1992 (or early 1993) the Casuarina Indoor Sports Association was incorporated. For thirteen (13) years Mrs Smith-Taylor operated the indoor sports centre, initially in Casuarina, and later moving the operation to its current location in Winnellie. A "Continuing Special Licence" was issued yearly under the auspice of the Casuarina Indoor Sports Association Incorporated. Mrs Smith-Taylor was the Nominee during this period and was also the Public Officer of the Association.
- 4) In October 2005, Mrs Smith-Taylor sold the business to Ms Jodie Markwell on condition that Ms Markwell still wished to buy it after a month's trial. Mrs Smith-Taylor arranged vendor finance for the sale. At the end of the trial

Ms Markwell agreed to proceed with the purchase but stated that she would apply for her own Liquor Licence, rather than continue with the Incorporated Association Special Licence. Evidence was given that Ms Markwell did begin to make an application for a liquor licence, but did not complete the required application process. At this time Mrs Smith-Taylor returned to Melbourne to nurse her dying mother and spent considerable time during 2006 in that city caretaking her mother.

- 5) Mrs Smith-Taylor began proceedings to wind up the association, but evidence, especially from Mr John McLaren, Director of Business Affairs indicates that proceedings were not completed correctly. In effect the Casuarina Sports Association Incorporated became defunct and was wound up compulsorily by Business Affairs.
- 6) Mrs Smith-Taylor, believing that the Special Licence was still valid until 16 May 2006, left two (2) signed Association cheques with Ms Markwell so that she could purchase liquor for sale at the centre. Mrs Smith-Taylor, in retrospect, admits that this was a bad error of judgement.
- 7) In May 2006, Ms Markwell reneged on her purchase agreement and the business reverted to Smith-Taylor. At this time Mrs Smith-Taylor made application for a liquor licence. Following the investigation of complaints Licensing Inspectors visited the premises and detected unlicensed sales of alcohol. The Director of Licensing subsequently in July 2006 laid a complaint before the Court over alleged contraventions of the *Liquor Act* occurring on 11 and 18 July 2006.

FIRST APPLICATION

- 8) On 21 May 2006, Mrs Smith-Taylor applied for an "On Licence" for the Indoor Sports Centre Winnellie.
- 9) On 11 July 2006, and again on 18 July 2006, as stated in Statutory Declarations by Licensing Inspectors Calleja, Berry and Tribe, Mrs Smith-Taylor sold alcohol to them. At that time her Special Licence had lapsed, and her "On Licence" had not been granted.
- 10) On 26 July 2006 the Director of Racing Gaming and Licensing put the complaint of Mrs Smith-Taylor selling alcohol illegally before the Magistrate's Court.
- 11) On 8 August 2006 the Director recommended to the Licensing Commission that a decision on the Liquor application be deferred because of the outstanding proceedings before Darwin Magistrates Court against Mrs Smith-Taylor. The Commission approved the recommendation. Mrs Smith-Taylor was notified of this decision on 10 August 2006.
- 12) In September 2006 Mrs Smith-Taylor withdrew her application for an "On Licence", and requested the return of the \$200 Application Fee. The request was granted by the Licensing Commission, and Mrs Smith-Taylor was notified by letter on 27 September 2006.

- 13) Mrs Smith-Taylor's circumstances at this time were that her mother was seriously ill, and she was spending most of her time in Melbourne, nursing her mother. She also thought she had a buyer for the sports centre.
- 14) Under these circumstances Mrs Smith-Taylor did not intend to return to live in Darwin for at least two (2) years. Through her lawyer, Mr Elliot, she agreed not to apply for a licence for two (2) years and the Director agreed to withdraw the charges against Ms Smith-Taylor. This deal was brokered between Mr Elliot and Mr Priestley (acting for the Director). Other than the email of 1 November 2006, there appears to be no signed agreement, or other written confirmation of the deal.
- 15) The sale of the business fell through. Sadly Mrs Smith-Taylor's mother died and she returned to Darwin to run the business.

SECOND APPLICATION

- 16) In March 2007 Mrs Smith-Taylor re-applied for an "On Licence" for the Indoor Centre Winnellie. At the April 2007 Licensing Commission meeting it was determined that owing to the amount of time that had elapsed between applications, the application would need to be re-advertised. The Chairman notified Mrs Smith-Taylor of this decision by letter on 19 April 2007.
- 17) At the July 2007 Licensing Commission meeting it was determined to hold a hearing into this application. The hearing was conducted on 22 August 2007. The Director of Licensing and Regulation was the only objector.

ISSUES

- 18) The Commission was advised that initially the sale of the business was based on Ms Markwell becoming Public Officer of the Association. Either because of the ineffectual or slipshod operation of the association, or a desire to operate the licence under her own recognisance, Ms Markwell did not take on the Public Officer role and commenced licence application procedures in her own name. At this time it is evident that the operation and governance of the Association were not being maintained to the required standard.
- 19) While Ms Taylor-Smith maintains she commenced wind up procedures in late 2005, she does acknowledge that her move to Melbourne did complicate matters. The reliability of her explanation of events and her recall were challenged by the evidence provided by Mr McLaren. In any event it is a matter for public record that Notice of Intention to Dissolve the Casuarina Indoor Sports Centre was gazetted on 4 October 2006, with formal Notice of Dissolution gazetted on 10 January 2007.
- 20) It appears that the Association over time ceased to meet its objects and purposes of incorporation and ceased to meet its general governance requirements. Mrs Taylor-Smith was apparently the driving force of the

Association and this was self serving to a degree, particularly following her purchase of Indoor Sports Winnellie. The Ongoing Special Licence issued to Casuarina Indoor Sports Association transferred to the Winnellie location at this time.

- 21) In a Statutory Declaration of 15 March 2006 Mrs Smith-Taylor stated that an Annual General Meeting of "approximately" 10 January 2005 determined to commence wind up procedures. There is no strong evidence before the Commission to conclude that this intention was systematically pursued or that an orderly wind up was proceeding. Evidence tendered by Mr McLaren cites lack of presentation of audited Financial Statements from 2001 to 2005.
- 22) Failure to meet governance requirements and failure to lodge necessary documentation is not uncommon amongst Associations. In this instance the Association had gross liquor sales in its latter years of approximately \$15,000. Evidence was presented that liquor for sale was contained on two (2) shelves of a drinks fridge. In these circumstances the Commission is inclined to discount the issue of poor governance and accountability of the Association and the role played by the Public Officer as there was no evidence of significant detriment, ie no misuse of funds and the Public Officer is only one of a number of committee members.
- 23) The Commission has given careful consideration in relation to the Director of Licensing withdrawing his complaint over alleged breaches of the *Liquor Act* following an undertaking by Mrs Smith-Taylor not to reapply for a liquor licence for two (2) years. From late 2005 and through 2006 a number of issues were confronting Mrs Smith-Taylor, namely:
 - In late 2005 the Association Committee was breaking up;
 - The negotiations with Ms Markwell over the purchase of the Indoor Sports Winnellie business;
 - Mrs Smith-Taylor's departure to Melbourne to nurse her ailing mother.
- 24) It is contended that these circumstances were contributors to the aberrant behaviour of the applicant which included leaving two (2) Association blank cheques for Ms Markwell to purchase alcohol, the selling arrangements to enable sports team members to purchase alcohol (alleged offences of 11 and 18 July 2006) and the agreement not to apply for a liquor licence for two (2) years, following the dropping of the complaint before the Court by the Director.
- 25) It is evident to the Commission that the agreement proposed between Solicitors Mr Peter Elliott and Mr Bill Priestley on behalf of the Director was not formally documented or agreed to. That it was based solely on phone exchanges between Mr Elliott and Mrs Smith-Taylor gives further diminution to its validity or enforceability.
- 26) In her defence the applicant informed the hearing that a two (2) year moratorium on any liquor licence application was only one of several forms of agreement discussed with Mr Elliott over the telephone. The gravitas of the agreement was also likely to be diminished in the mind of the applicant under

the stressful circumstance of nursing a dying mother. It appears that the applicant was somewhat unwise and hasty in advising of agreement without some formalisation of its content. The same comment on lack of formalisation of the agreement can be applied to the Director.

27) In the circumstances of an agreement the applicant claims she was advised by Mr Elliott "has no effect at law and is not legally binding", she did not consider it binding when the sale of the sports centre fell through. With the sale collapsed and the death of her mother, the applicant returned to Darwin to restore viability to the business.

28) Taking into consideration all of this background, the Commission does not consider this invalidates the application.

SUMMARY OF OBJECTION

29) Mr Priestley, in his summary, based the Director's objection on two points:-

- (a) That Mrs Smith-Taylor is not a fit and proper person to hold a Liquor Licence; and
- (b) That there is no benefit to the community in the Indoor Sports Centre having a licence.

30) FIT AND PROPER:

- (a) **Lack of Honesty:** - Mrs Smith-Taylor broke her agreement not to apply for a Licence for two (2) years. She sold liquor without a licence and did so in a duplicitous manner - with each sale selling a bottle of water for the price of the alcohol, and claiming to give the alcohol away. The evidence for this comes from the Statutory Declarations of the three (3) Licensing Inspectors and from the verbal evidence of Inspectors Berry, Tribe, and Lye. While there is evidence that this occurred on two (2) occasions, there is no evidence of systemic occurrence. Sworn evidence was given that patrons generally brought their own eskies. Inspector Kirstenfeld gave evidence on another incident, but was unable to verify, under oath, that she saw Smith-Taylor sell alcohol. The Commission accepts that the applicant acted unlawfully but given her previous record as a Nominee considers this behaviour aberrant and out of character with her past record.
- (b) **Lack of Knowledge:** - Although being the Public Officer of the Casuarina Sports Association for thirteen (13) years, Mrs Smith-Taylor showed a distinct lack of knowledge of procedures required to fulfil this role properly. Evidence from Mr John McLaren supported this.
- (c) **Ability:** - Mr Priestley claimed that Mrs Smith-Taylor does not have the ability to perform the function of a Nominee responsibly. This is challenged by her thirteen (13) year record as a Nominee and the maintenance of a viable business.

31)COMMUNITY BENEFIT:

- (a) Mr Priestly stated that it was not in the public interest for the sports club to hold a Liquor Licence, and that it would provide no community benefit.
- (b) Mrs Smith-Taylor, in reply, argued that the circumstances under which she agreed to the two (2) year application moratorium had changed dramatically. She had been forced to return to run the business when the sale fell through. Her commitments in Melbourne had lessened considerably with the death of her mother. She did not appreciate the severity of the agreement and had neither received nor signed an agreement, and that her only knowledge of it came from a phone call from Mr Elliot, received when she was under extreme duress while nursing her dying mother. She further stated that had the charges been brought to Court she would have defended them vigorously and believed she would have won.
- (c) Mrs Smith-Taylor presented a number of character references attesting to her honesty and reliability. She stated that she had performed the duties of a Nominee for thirteen (13) years without once having a complaint against her. She pleaded that a licence was necessary to maintain, and hopefully improve her business. The other indoor sports clubs are licensed, and she is already losing business because players cannot have a drink after their matches.

DECISION

- 32)The Application was correctly made and advertised.
- 33)The evidence of Inspectors Calleja, Berry and Tribe is accepted.
- 34)Inspector Kirstenfeld, in sworn evidence, stated that she could not swear to having seen Mrs Smith-Taylor sell alcohol. Her evidence against Mrs Smith-Taylor is discounted as not conclusive.
- 35)Mrs Smith-Taylor has a proven record of being a responsible Nominee. In a similar case currently before the Commission, the defendant was warned a number of times not to sell alcohol. In this case the undercover operation was undertaken without prior warnings.
- 36)The question of Mrs Smith-Taylor's agreement not to apply for a licence for two (2) years is a vexed one. On the one hand the application falls within the time frame, however on the other hand Mrs Smith-Taylor's circumstances changed after the agreement was made. An expected sale of the business failed forcing her to re-assume responsibility for the business. Her family obligations in Melbourne ceased with the death of her mother. There is also some question as to whether the agreement would have any standing in law.

- 37) Further, Mrs Smith-Taylor stated clearly that had she foreseen her changed circumstances she would have defended the charges vigorously in Court and believes that she would have been successful. The only evidence presented of the agreement was the email sent by Mr Elliot to Mr Priestley - Exhibit 5. Mrs Smith- Taylor stated under oath that she received nothing in writing, and only had a phone call from Mr Elliot at a time when she was under severe emotional stress.
- 38) The Commission accepts the Application as being reasonable in the circumstances.
- 39) Is Mrs Smith-Taylor a fit and proper person to hold a liquor licence for Indoor Sport Winnellie?
- i. She has a proven record of responsible service of alcohol.
 - ii. She presented highly supportive written references in the brief.
 - iii. The highly emotional and stressful period of her life, leading certainly to some very erratic behaviour appears to be over.
 - iv. However, she did, at the very least act injudiciously and dishonestly in attempting to cover up the sale of alcohol under the guise of selling expensive water. Effectively, to reject the application would be equivalent to cancelling a licence. Cancellation, or long term suspension is considered by the Commission for offences such as serving minors or intoxicated persons or the habitual serving of alcohol outside trading hours. The Commission does not consider Mrs Smith-Taylor's actions, however serious and wrong, to be in that category. A lighter penalty is considered more appropriate but none is available under the *Liquor Act*.
- 40) The Commission, therefore, has decided to grant an "On" licence to Mrs Smith-Taylor for Indoor Sport Winnellie, but under the following conditions:-
- a) The licence will be reviewed by the Commission after six (6) months. Should any offence be committed during that period, and proven, it is recommended that a hearing panel of the Commission should seriously consider cancellation.
 - b) All other conditions such as availability of bar snacks, noise conditions, security of alcohol after hours and those operating at other similar premises be applied.

Richard O'Sullivan
CHAIRMAN

9 November 2007