

Northern Territory Licensing Commission

Decision on whether Objections will proceed to Hearing

Premises:	Nirvana Restaurant
Applicant:	Mr Jason Hanna
Licensee:	TJ Investments (NT) Pty Ltd
Nominee:	Tho Thanh Thai
License Number:	80503480
Objector:	Mr Alan Thomas
Legislation:	Sections 4F to 47I of the <i>Liquor Act</i> and Section 28 of the <i>Interpretation Act</i>
Decision of:	Philip Timney (Legal Member)
Date of decision:	16 August 2012

Background

- 1) By letter dated 14 May 2012 Mr Jason Hanna, on behalf of TJ Investments (NT) Pty Ltd, applied to the Licensing Commission in accordance with Sections 32A and 119 of the *Liquor Act* ("the Act") for approval for variations to licence conditions and for a material alteration to the Nirvana Restaurant premises. The application sought approval for the construction of an al fresco deck and a variation of licence conditions to allow the sale of alcohol without the requirement for such sales to be ancillary to the consumption of a meal.
- 2) Application was advertised in the NT News on Wednesday 23 May 2012 and Friday 25 May 2012 pursuant to Sections 119(3) and 32A(3)(a) of the Act.
- 3) The advertisement was as follows:

I, Jason Hanna, hereby give notice that I have applied to the Northern Territory Licensing Commission for a Material Alteration and variation to the existing Liquor Licence 80503480 known as Nirvana Restaurant, located at 6 Dashwood Crescent, Darwin City.

Proposed Material Alteration is as follows:

- *Inclusion of a new alfresco deck situated on the Dashwood Crescent side of the premises.*

Proposed Variation to Liquor Licence is as follows:

- *Removal of Condition 10 – Liquor to be sold with a meal.*
- *Patrons must be seated in the alfresco deck area.*
- *Liquor hours of premises will remain unchanged as:*

*Sunday 11:30 and Monday 02:00
Monday 11:30 and Tuesday 02:00
Tuesday 11:30 and Wednesday 02:00
Wednesday 11:30 and Thursday 02:00
Thursday 11:30 and Friday 02:00*

*Friday 11:30 and Saturday 02:00
Saturday 11:30 and Sunday 02:00*

This is the first notice of application. The notice will be published again on Friday, 25 May 2012.

The objection period is deemed to commence from Friday, 25 May 2012 (date of publication of second notice).

Pursuant to Section 47F(2) of the Liquor Act an objection may only be made on the ground that the grant of the licence may or will adversely affect:

- (a) the amenity of the neighbourhood where the premises the subject of the application are or will be located; or*
- (b) health, education, public safety or social conditions in the community.*

Only those persons, organisations or groups described in Section 47F(3) of the Liquor Act may make an objection. Section 47G of the Liquor Act requires the Director of Licensing to inform the applicant of the substance of any objection. This will include the identity and where relevant the address of the objector.

For further information regarding this application contact the Director of Licensing on telephone 8999 1800. Objections to this application should be lodged in writing with the Director of Licensing, Licensing, Regulation and Alcohol Strategy, GPO Box 1154, Darwin, within thirty (30) days of the commencement date of the objection period.

Dated this 18 Day of May 2012

- 4) The second notice was published on 25 May 2012. Pursuant to Section 47F(4)(d) an objection must be lodged within thirty days after the publication of the last notice, namely on or before 25 June 2012.
- 5) Section 47F of the Act prescribes the circumstances in which an objection may be made, specifies the grounds for objection and identifies the persons entitled to object to a particular application. Relevant to this application Section 47F provides:

47F Person may object to certain applications

(1) Subject to this Section, a person, organisation or group may make an objection to the following applications:

- (b) an application for a variation of the conditions of a licence, as notified under Section 32A;*
- (d) an application for approval to make a material alteration to licensed premises, as notified under Section 119.*

(2) The objection may only be made on the ground that the grant of the licence, variation of conditions, substitution of other premises or material alteration may or will adversely affect –

- (a) the amenity of the neighbourhood where the premises the subject of the application are or will be located; or*
- (b) health, education, public safety or social conditions in the community.*

(3) Only the following persons, organisations or groups may make an objection under sub-Section (1):

- (a) a person residing or working in the neighbourhood where the premises the subject of the application are or will be located;*

(b) *a person holding an estate in fee simple in land, or a lease over land, in the neighbourhood where the premises the subject of the application are or will be located;*

- 6) One objection has been lodged in response to the application and the applicant has provided a response to that objection pursuant to Section 47G of the Act. Under Section 47I of the Act the Commission must determine whether objection received are to proceed to Hearing.

Objection from Mr Alan Thomas:

- 7) Section 47F(1)(b) provides that a person may lodge an objection to an application for variation of licence conditions and Section 47F(1)(c) provides for an objection to an application for material alterations.
- 8) By letter dated 21 June 2012, Mr Alan Thomas expressed his concerns regarding the application for material alterations and the variation of licence conditions. Mr Thomas is a resident and owner of premises situated at 5 Harriett Place, Darwin which is located within close proximity to the Nirvana Restaurant. As such, Mr Thomas is entitled to lodge an objection pursuant to sub-sections 47F(3)(a) and (b) of the Act. The objection was lodged within the prescribed time limit.
- 9) Mr Thomas objects on the grounds the removal of the requirement for alcohol to be served in conjunction with a meal posed the potential for the proposed deck area to become an al fresco bar. He submitted that, if approved, the al fresco area should be subject to a curfew, independent of the closing time of the kitchen. Mr Thomas suggested that 10.00 pm closing for the deck area would be a fair compromise to ensure that neighbouring residents were not disturbed by activity in that area. Mr Thomas noted that he was in favour of the al fresco area but was concerned at the possibility of neighbours being disturbed late into the evening.

Applicant's Response to Objections:

- 10) Mr Hanna responded to the objection by undated letter delivered to Inspector Shane McCorkell. He stated that the proposed deck area will always be a dining area and there is no real option of it becoming a bar area. He noted that there will be no bar tables and the area will predominantly trade as a restaurant at all times.
- 11) Mr Hanna submitted that a closing time for the deck area of 10.00 pm was not acceptable or reasonable as the kitchen closes at 10.00 pm most nights and 10.30 pm on weekends. A 10.00 pm closure of the deck bar would mean patrons could not be seated in the al fresco area for a meal after 8.00 pm. He added that he anticipated the deck area would "naturally be cleared by midnight" due to staff costs in keeping the area open later than midnight and it was in management's interest to move patrons inside the premises after that time.
- 12) Mr Hanna stated that the area to be renovated had previously been an area where itinerant activity has been of concern. He submitted that a restriction on the time the deck area could remain open was not in the interests of the venue or its patrons. He accepted that residential premises were close by to Nirvana and agreed that the potential for noise disturbances was an issue that management would need to deal with and control. He concluded by stating that Nirvana has enjoyed eighteen successful years as a Darwin restaurant and the proposed alterations, which have been under consideration for more than six years, were a result of listening to and responding to client needs and wants.

Further submission from Mr Thomas:

- 13) The Act does not provide for an objector making further submissions in respect of the response from the applicant. However, it is apparent that Mr Thomas was provided with

the response from Mr Hanna at some stage. Mr Thomas made further submissions in relation to Mr Hanna's response in an email to Inspector McCorkell dated 22 July 2012.

- 14) In that email Mr Thomas noted that after reading the response from Nirvana he did not feel that his concerns had been addressed. He stated that it was still important to impose trading conditions and cited the Waterfront Precinct al fresco areas, which close at 11.00 pm. He submitted that if the Nirvana deck area was permitted to trade beyond 11.00 pm neighbours would be disturbed by noise from normal activity at the venue.
- 15) Mr Thomas stated if the closure time was set and enforced and patrons were required to be seated on the deck area his objection to the variation to allow the sale of alcohol without a meal would be reduced. He also submitted that the current noise condition attached to the liquor licence should be extended to the al fresco area and should include restrictions on the volume of spoken noise from that area.
- 16) In a further email to Inspector McCorkell dated 14 August 2012 Mr Thomas requested that his email sent on 22 July 2012 be treated as a formal objection. The email from Mr Thomas of 22 July 2012 was received well outside the specified objection period with the result it cannot be treated as a formal objection unless an extension of time within which to object has been approved. However, the 22 July 2012 further submission does not raise any new grounds of objection and could reasonably be treated as an expansion of the grounds of Mr Thomas' original objection.
- 17) In his email of 14 August 2012 Mr Thomas also advised that he was happy to rely on his email submission and initial letter of objection. However he would be available to meet in person with the Commissioners if they wish to discuss his objection.

Consideration of the Issues

- 18) Mr Thomas' objection relates to the amenity of the neighbourhood in which the Nirvana Restaurant is located and raises concerns in respect of the potential for the proposed al fresco area and the authorisation to sell alcohol without a meal to result in disturbances to nearby residents. His submission is therefore a valid ground of objection pursuant to Section 47F(2)(a) of the Act.
- 19) It should be noted that Mr Thomas does not object to the material alterations or the licence condition variations per se, he in fact supports the development of the al fresco area. His objection requests, should the application be approved, that the Commission impose appropriate licence conditions and a fixed closing time for the al fresco area so as to limit the risk of disturbance to neighbouring residents late in the evening.
- 20) It may reasonably be assumed that the Commission will apply appropriate licence conditions, including a noise attenuation condition, were the application to be granted. Mr Hanna appears to acknowledge that possibility and has in fact sought the inclusion of additional licence conditions to those that currently exist for the premises. For example, conditions that patrons be seated at a table in the al fresco area, no advertisement of the availability of alcohol without a meal etc. However, the issue of the imposition of a closing time for the al fresco area has not been resolved between the parties and remains for determination by the Commission.
- 21) In his email of 14 August 2012 Mr Thomas indicated that he was happy to rely on his written objections however he would be available to meet with the Commissioners to discuss his concerns. The only avenue for Mr Thomas to discuss his concerns directly with the Commission is through a Hearing process, with Mr Hanna in attendance to make submissions on behalf of the Licensee.
- 22) In all the circumstances the appropriate course is for the Commission to conduct a Hearing to consider the objection lodged by Mr Thomas and, particularly, whether the trading hours for the al fresco area should be limited by a fixed closing time.

Decision

23) The Commission has determined that the objection lodged by Mr Alan Thomas is valid and requires a Hearing pursuant to Section 471(7) of the Act.

Philip Timney
Legal Member

16 August 2012