

Northern Territory Licensing Commission

Decision on whether Objections will proceed to Hearing

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| Premises: | Wisdom Bar & Cafe |
| Applicant: | Mr Todd McCourt |
| Licensee: | AFS Realty & Business Brokers Pty Ltd |
| Nominee: | Mr Kevin Stephens |
| License Number: | 80317565 |
| Objector: | Ms Sheena Matthews |
| Legislation: | Sections 32A, 119 and 47F 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: | 17 October 2012 |

Background

- 1) By letter dated 1 June 2012, Mr Todd McCourt applied, pursuant to Sections 32A and 119 of the *Liquor Act* ("the Act"), for variations to the conditions attached to the liquor licence for the Wisdom Bar & Cafe ("Wisdom") and for the approval of material alterations to the premises. Mr McCourt is the Managing Director of the Licensee Company, ASF Realty and Business Brokers Pty Ltd.
- 2) The proposed material alterations include:
 - Construction of two shade sails within the perimeter of the beer garden;
 - Decking within the restaurant eating area which will be raised 300mm with surrounding fencing to act as a visual barrier between the current non-smoking and smoking areas provided;
 - Relocation of the existing reception area of Ashton Lodge to the front area of the building;
 - Construction of a new building along the western side boundary to accommodate the new reception area which will also include a stairwell and a lift for disabled access to the 1st floor cocktail bar;
 - Construction of a cocktail bar above the existing café area fronting Mitchell Street, with male and female toilet amenities, which will increase the licensed area;
 - The proposed licensed hours for the cocktail bar are 12.00 pm until 02:00 am (the following day);
 - An upgrade of the current camera surveillance equipment to accommodate the extra cameras necessary to cover the extension of liquor licensed areas; and
 - Minor cosmetic refurbishments of the current bar area inclusive of tiling behind the bar.

- 3) The proposed variations of licence conditions include the replacement of the existing conditions with the following conditions:

Noise Control

The Licensee shall take all measures necessary to ensure that the noise from the premises does not cause undue disturbance or discomfort to residents of the neighbourhood.

Entertainment

- (a) Pre-recorded and live music may be played although live musicians must be situated within the internal spaces. There shall be no designated dance floor.
- (b) Notwithstanding compliance by the Licensee with this requirement, the Licensee shall effect such further or other sound attenuation as the Commission in its discretion may notify the Licensee in writing at any time as having become a reasonable requirement in the considered view of the Commission in circumstances then prevailing provided always that the Licensee shall be entitled to request a hearing in relation to any such requirement of the Commission.

Premises Concept

The concept for the premise shall be a relaxed, tropical garden atmosphere providing quality food, beverages and service in the non-smoking area of the Beer Garden, the Footpath Alfresco Dining Area and within the air-conditioned internal spaces.

The venue, in music choice and focus, will predominantly cater for people in the 30 to 50 year old age group and will ensure at all times that some areas within the licensed area are available to patrons where comfortable conversation is possible. The Commission must first approve any material change in this concept.

- 4) The application was advertised in the NT News on Friday, 22 June 2012 and Wednesday, 27 June 2012.
- 5) The advertisement was as follows:

I, Todd McCourt on behalf of AFS Realty & Business Brokers Pty Ltd, HEREBY GIVE NOTICE that I have applied to the Northern Territory Licensing Commission to conduct Material Alterations and Variation of Licence Conditions to the premises known as Wisdom Bar & Cafe (Liquor Licence number 80317565) located at 48 Mitchell Street, Darwin.

The alterations to the premises will consist of:

- *Construction of two shade sails within the perimeter of the beer garden.*
- *Decking within the restaurant eating area which will be raised 300mm with surrounding fencing to act as a visual barrier between the current non-smoking and smoking areas provided.*
- *Relocation of the existing reception area of Ashton Lodge to the front area of the building.*
- *Construction of a new building along the western side boundary to accommodate the new reception area which will also include a stairwell and a lift for disabled access to the 1st floor cocktail bar.*
- *Construction of a cocktail bar above the existing café area fronting Mitchell Street, with male and female toilet amenities, which will increase the licensed area.*
- *The proposed licensed hours for the cocktail bar are 12.00 pm until 02:00 am (the follow day).*

- Minor cosmetic refurbishments of the current bar area inclusive of tiling behind the bar.

Proposed variations of Licence conditions will be as follows:

Noise Control

The Licensee shall take all measures necessary to ensure that the noise from the premises does not cause undue disturbance or discomfort to residents of the neighbourhood.

Entertainment

- (a) *Pre-recorded and live music may be played although live musicians must be situated within the internal spaces. There shall be no designated dance floor*
- (b) *Notwithstanding compliance by the Licensee with this requirement, the Licensee shall effect such further or other sound attenuation as the Commission in its discretion may notify the Licensee in writing at any time as having become a reasonable requirement in the considered view of the Commission in circumstances then prevailing provided always that the Licensee shall be entitled to request a hearing in relation to any such requirement of the Commission.*

Premises Concept

The concept for the premise shall be a relaxed, tropical garden atmosphere providing quality food, beverages and service in the non-smoking area of the Beer Garden, the Footpath Alfresco Dining Area and within the air-conditioned internal spaces.

The venue, in music choice and focus, will predominantly cater for people in the 30 to 50 year old age group and will ensure at all times that some areas within the licensed area are available to patrons where comfortable conversation is possible. The Commission must first approve any material change in this concept.

Current Licence conditions:

Noise Control

The Licensee shall not permit or suffer the emanation of noise from the licensed premises of such nature or at such levels as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any premises.

Entertainment

Pre-recorded and live music generally identified as "easy listening" may be played although live musicians must be situated within the internal spaces. There shall be no karaoke, drum kits or drum machines and no designated dance floor.

Notwithstanding compliance by the Licensee with this requirement, the Licensee shall effect such further or other sound attenuation as the Commission in its discretion may notify the Licensee in writing at any time as having become a reasonable requirement in the considered view of the Commission in circumstances then prevailing provided always that the Licensee shall be entitled to request a hearing in relation to any such requirement of the Commission.

This is the first notification of application. The notice will be published again on Wednesday, 27 June 2012.

The objection period is deemed to commence from Wednesday, 27 June 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 material alterations of licensed premises 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 22nd Day of June 2012.

- 6) 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 Friday 27 July 2012.
- 7) 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 –

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:
 - (a) an application for the grant of a licence, as notified under Section 27;
 - (b) an application for a variation of the conditions of a licence, as notified under Section 32A;
 - (c) an application for the substitution of other premises for the premises specified in a licence, as notified under Section 46A;
 - (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;
 - (c) a member or employee of the Police Force acting in that capacity;

- (d) a member or employee of the Fire and Rescue Service within the meaning of the *Fire and Emergency Act* acting in that capacity;
 - (e) an Agency or public authority that performs functions relating to public amenities, including health, education and public safety;
 - (f) a community-based organisation or group (for example, a local action group or a charity)
- 8) The application was referred to the Development Consent Authority (“DCA”), Northern Territory Police, Darwin City Council and the Department of Health for comment.
 - 9) Mr Michael O’Neill advised, on behalf of the Chairman of the DCA, that the proposed alterations are the subject of a current development application, for which the DCA has requested that the applicant provide further information to enable the proper consideration of the application.
 - 10) Superintendent Kristopher Evans advised on behalf of Northern Territory Police that the application is supported by Northern Territory Police. Mr Luccio Cercarelli advised on behalf of Darwin City Council that Council raises no objection to and has no comments to make in respect of the proposal.
 - 11) Mr Neil Wright, Senior Policy Advisor with the Department of Health made the following comments in respect of the application:
 - Whilst the construction of the first floor cocktail bar does not necessarily increase the availability of alcohol the re-opening of Discovery in August and the proposed re-opening of the Victoria Hotel will provide three additional bars in the CBD. Mr Wright queries the impact on policing responses to harms arising from alcohol use and instances of anti-social behaviour in and around the CBD.
 - The alterations must be carried out in a manner that does not restrict or decrease the ability to monitor patrons;
 - Mr Wright queries whether the applicant has undertaken any formal market surveys to determine whether there is demand or need for the additional bar;
 - Mr Wright queries what are to be the operating hours of the proposed cocktail bar; and
 - He notes that the change to the condition relating to live music is likely to impact on other businesses and queries the effect of the existing noise condition attached to the licence.
 - 12) For the purpose of this decision, Mr Wright’s submission is accepted as commentary on the application and not as a formal objection that requires referral to a Hearing.

Applicant’s response to the comments of Mr Wright:

- 13) Mr McCourt responded to Mr Wright’s comments by letter dated 7 September 2012. In respect of the potential for the opening of the cocktail bar to impact on Police resources and responses to manage harm, Mr McCourt notes that Wisdom has an unblemished compliance record over six years since opening. He states the cocktail bar will attract a different clientele to the Victoria Hotel and Discovery with the proposed use of the bar is for private functions and, potentially, a members only venue. Mr McCourt submits that the management of harm arising from alcohol use and anti-social behaviour will not be compromised by the increase in licensed area.
- 14) In respect of patron monitoring, Mr McCourt submits that the alterations will not affect the safety and security of patrons and that the cocktail area will be covered by the installation of additional CCTV cameras, as per existing licence requirements. He confirms that Wisdom

has not conducted any market research in respect of public demand for the cocktail bar and states that the proposal is actually driven by patron requirements. In respect of trading hours for the cocktail bar, Mr McCourt confirms that the trading hours will be the same as those currently in place for the remainder of the premises, that is, from 12 noon to 2.00 am daily.

- 15) In respect of the noise conditions attached to the Wisdom licence, Mr McCourt states that the Licensee is not applying for a condition to allow live music as that is already permitted under the existing licence conditions. He notes that regular sound monitoring is carried out at Wisdom, including sound checks and sound level monitoring as included in the premises' sound management plan. Mr McCourt submits that Wisdom intends to continue with its sound management system and implement any further changes required to ensure sound levels are maintained at an acceptable level.
- 16) One objection has been lodged in respect of 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 the objection received is to proceed to Hearing.

Objection from Ms Sheena Matthews, General Manager, Value Inn Pty Ltd:

- 17) Sub-sections 47F(1)(b) and (d) of the Act respectively provide that a person may lodge an objection to an application for variation of licence conditions and an application for material alterations. Ms Matthews is the General Manager of Value Inn Pty Ltd. Value Inn operates a budget accommodation motel business and is located at 50 Mitchell Street in the Darwin CBD, immediately adjacent to Ashton Lodge and Wisdom. As such Ms Matthews is entitled to lodge an objection pursuant to Section 47F(3)(a) of the Act on the basis she is a person working in the neighbourhood where the premises the subject of the application are located. The objection was lodged within the prescribed objection period.
- 18) Ms Matthews objects to the application for material alterations on the grounds they may or will adversely affect the business of Value Inn. She notes that Value Inn objected to the grant of a liquor licence to Wisdom in 2006 due to concerns regarding noise from the entertainment venue affecting guests of the motel. She states that Value Inn has suffered ongoing concerns regarding noise disturbances which have worsened over the past two years and which have been referred to the Licensee of Wisdom and to "Liquor Licensing". Ms Matthews submits that the noise disturbances have caused a loss of business through guests of the motel to checking out early and providing adverse reports on the motel. She states that the proprietor has been forced to double glaze the windows of fourteen rooms most affected by noise disturbances at a cost of \$8,000.
- 19) Ms Matthews submits that the opening of the Cocktail Bar during the hours of 12 pm to 2.00 am the following day with additional patrons and entertainment will further exacerbate the problems as more motel rooms will be exposed to noise from Wisdom. She seeks a new restriction on the licence limiting music to 12.00 midnight throughout the Wisdom premises, in accordance with the existing licence concept. She states that the concept of providing a "an atmosphere where comfortable conversation is possible at all times" is not currently being adhered to, especially later in the evening due to the volume and type of music being played. Ms Matthews specifically objects to the removal of the licence condition prohibiting drums, drum kits and karaoke as she states these practices have been occurring regardless of the licence conditions.
- 20) Included with the objection letter were records of noise complaints lodged with management by guests of Value Inn both in a complaints register and via internet comments on the venue by former guests.

Applicant's Response to Objection:

- 21) Mr McCourt responded to Ms Matthews' objection by letter dated 27 August 2012. Mr McCourt submitted that many of the identified noise complaints referred to in the attachments to the letter of objection were made after Wisdom had ceased trading at 2.00 am and that the majority of complaints were logged in July and August, the busiest time of the year for Mitchell Street. Mr McCourt denies that Wisdom breaches the current prohibition on the use of drum kits and states that, apart from special times when a temporary variation is sought, drum kits are not permitted. He states that if guests of Value Inn are disturbed by noise from drums the noise must be emanating from some other premises on Mitchell Street.
- 22) Mr McCourt submits the construction of the new reception area and the cocktail bar will entail the erection of an additional wall which will exceed the height of the eaves of the Value Inn building and provide an additional noise buffer. He concludes by stating the objection by Value Inn is commercially motivated and a result of the direct relationship between the management of the Value Inn motel and that of the nearby Tap on Mitchell as Value Inn Pty Ltd holds the liquor licence for both those premises. Mr McCourt also states that Mr Doug Gamble, a Director of Value Inn Pty Ltd, also has business interests in other licensed premises in close proximity to Wisdom.

Consideration of the Issues

- 23) Ms Matthew's objection relates to the amenity of Value Inn Motel which is situated in the neighbourhood within which the Wisdom is located. Her objection concerns the potential for noise disturbance from the proposed cocktail bar to disturb the peaceful enjoyment of guests of the Value Inn due to the proximity of the rooms to the proposed site for the cocktail bar. Ms Matthews does not object to the application to amend the licence conditions apart from an objection to the removal of the condition prohibiting drum kits and karaoke.
- 24) In the opening paragraph of her letter of objection Ms Matthews states that she objects to the application for material alterations as these "may or will adversely affect the business (of) Value Inn Pty Ltd situated at 50 Mitchell Street". Section 47F(2)(a) of the Act limits the grounds for objection to matters affecting the amenity of the neighbourhood within which the licensed premises are located. On a strict reading of that sub-Section the impact of material alterations on a business activity in the neighbourhood is not specified as a ground for objection as distinct from the amenity of the neighbourhood itself.
- 25) Mr McCourt submits that Ms Matthews' objection is commercially motivated due to the fact that Value Inn Pty Ltd is also the Licensee for the Tap on Mitchell, a licensed venue that is in close proximity to Wisdom and a commercial competitor. The wording in the opening paragraph of Ms Matthews' letter of objection adds some weight to Mr McCourt's submission. It must be acknowledged however that whilst there is no liquor licence attached to the Value Inn Motel, Value Inn Pty Ltd does hold liquor licenses for the Melaleuca On Mitchell and the Tap on Mitchell, both of which are in very close proximity to Wisdom and presumably compete for liquor sales trade with Wisdom from guests of the Motel and the general public alike.
- 26) In support of the validity of the objection, it is noted that the majority of Ms Matthews' concerns relate to the potential for noise disturbances from the addition of the cocktail bar to impact on the comfort of guests staying at the Value Inn Motel. In that sense the objection does not relate to the amenity of the neighbourhood comprising the Mitchell Street precinct but rather to the amenity of Value Inn Motel premises which is within the neighbourhood.
- 27) The issue of commercial motivation for objections was considered by the Commission recently in a review conducted in respect of an objections decision which included consideration as to the commercial motivation of a number of objections. The Commission on Review pronounced:

“At Hearing the Commission can and will seek to determine to what extent these and other objections have a commercial interest basis. Weight accorded to objections will be assessed in conjunction with this determination.”

- 28) That statement does not, on my reading, extend to directing a Commissioner tasked with considering the validity of objections to adopt a process whereby all objections that may have a commercial element are automatically referred to the Commission for Hearing. To attach that interpretation would restrict the functions and discretion of that Commissioner to an unreasonable extent and in a manner not contemplated by the Act. Such an interpretation would, in effect, remove the discretion provided by the Act to make an independent assessment of the validity of each objection on its individual merits, including whether the objection is commercially motivated to the extent it should be considered invalid as a consequence.
- 29) In my view consideration of whether an objection is commercially motivated must be determined by considering the substance of the objection as a whole and not by simply isolating selected words to justify a decision to allow or not determine whether the objection should be referred to a Hearing or not. By way of example, a commercially motivated objection cannot be validated by the simple insertion of some or all of the words contained in Sections 47F(2) of the Act (relating to amenity of the neighbourhood or the health, education, public safety or social conditions in the community) into an otherwise invalid objection. It is the consideration of the substance of the objection as a whole and not the isolation of specific words that determines the true nature of the objection, including whether or not it is commercially motivated.
- 30) On balance I do not regard the objection of Ms Matthews as being substantially motivated by commercial interest to the extent of being based on invalid grounds for objection on the basis of being outside the scope of Section 47F(2) of the Act. It is acknowledged that the Value Inn and associated Melaleuca on Mitchell are commercial enterprises and competitors in the hospitality and accommodation industry. However, the substance of Ms Matthews’ objection relates to the potential of the proposed addition of the cocktail bar to impinge on the amenity and enjoyment of the guests of Value Inn Motel. On that basis the objection is valid and must be referred to a Hearing pursuant to Section 47I(3)(c)(ii) of the Act.
- 31) Ms Matthews’ objection includes various materials relating to complaints by guests of the Value Inn Motel in respect of noise disturbances during their stays. As pointed out by Mr McCourt, both venues are located in the Darwin CBD in the heart of the Mitchell Street entertainment precinct. It is inevitable that guests staying in accommodation in that area will suffer from noise disturbances to some extent, not only from nearby licensed premises but also from the general congregation of people on Mitchell Street.
- 32) In her objection Ms Matthews states that the management of the Value Inn has found it necessary to double glaze fourteen rooms at Value Inn that have been the subject of noise complaints. She also states:
- We have on-going, worsening noise issues with Wisdom Bar & Café and we have constantly brought these issues to the attention of The Management at Wisdom Bar & Café and Liquor licensing more recently over the past two years.*
- 33) An objection Hearing is not the appropriate forum to deal with historical complaints alleging breaches of licence conditions. The complaints referred to by Ms Matthews relate to activities on the Wisdom premises conducted under its existing licence and conditions and should be dealt with under the complaint provisions of the Act and not via the objection process. It is noted that no complaints regarding noise disturbances emanating from Wisdom have been lodged with the Commission in the past two years and, as pointed out by Mr McCourt, Wisdom has a clear compliance record over the six years since opening. Mr McCourt’s submission includes a statement that many of the complaints referred to by Ms Matthews relate to times of the night when Wisdom has ceased trading with the result the noise disturbances complained of could not have come from the Wisdom premises.

34) Ms Matthews' objection in respect of alleged prior noise disturbances to the Value Inn Motel guests from activities conducted at Wisdom are not a valid ground for objection to the application currently before the Commission. For the purpose of the Hearing, Ms Matthews' objection should be limited to the issues surrounding the potential for the material alterations and the changes to licence conditions to impact on the amenity of guests of the Value Inn Motel premises.

Decision

35) The Commission has determined that the objection lodged by Ms Sheena Matthews is valid, to the limited extent referred to above, and requires a Hearing pursuant to Section 471(7) of the Act.

Philip Timney
Legal Member

14 September 2012