

NORTHERN TERRITORY LIQUOR COMMISSION

Decision Notice

MATTERS:	APPLICATION FOR MATERIAL ALTERATION AND APPLICATION FOR SUBSTITUTION OF PREMISES
REFERENCE:	LC2019/122 and LC2019/123
LICENCE NUMBERS:	80317565 & 80316631
LICENSEES:	AFS Realty & Business Brokers Pty Ltd AND Nundor Pty Ltd
PREMISES:	Wisdom Bar and Cafe 48 Mitchell Street DARWIN NT 0800 AND The Fox Ale House 48 Mitchell Street DARWIN NT 0800
NOMINEE:	Ms Carlee Maree Colville
APPLICANTS:	AFS Realty & Business Brokers Pty Ltd AND Nundor Pty Ltd
LEGISLATION:	Section 119 of the <i>Liquor Act 1978</i> and section 75 of the <i>Liquor Act 2019</i>
HEARD BEFORE:	Mr Richard Coates (Chairperson) Mr Robert Parker (Health Member) Ms Sandra Cannon (Community Member)
DATE OF HEARING:	22 September 2020
DATE OF DECISION:	20 October 2020

Decision

AFS Realty & Business Brokers Pty Ltd

1. Pursuant to section 119(8) of the *Liquor Act 1978* (the 1978 Act), the Commission has determined to approve the material alteration of the premises known as Wisdom at 48 Mitchell Street, Darwin in accordance with the plans, marked in red which relate to Wisdom and are Attachment "F" to the Director of Liquor Licensing (Director) referral which was Exhibit 1 in these proceedings.

2. The approval is subject to the following conditions:
- a) The works must be carried out and completed within 3 years of the date of this Decision Notice, or such later date as the Commission approves;
 - b) Prior to commencing work on the alterations the licensee will submit for the Commission's approval, a proposal outlining the arrangements that will be put in place for the continuation of any trade at the premises whilst the alteration work is being carried out;
 - c) At the conclusion of the alteration works, the following special condition will be inserted in the licence:

The Licensee undertakes to permit its lift to be used and provide a thoroughfare through its premises to facilitate disabled access for patrons of the adjoining Fox Ale House wishing to go to the upper level of these premises.

NUNDOR Pty Ltd

3. Pursuant to section 75 of the Liquor Act 2019 (the 2019 Act) the Commission has determined to approve the substitution of new premises for the Fox Ale House (previously located at 85 Mitchell Street, Darwin) in Licence Number 80316631. The new premises will be located at 48 Mitchell Street in a building currently known as Ashton Lodge.

4. This approval is subject to the following conditions:
- a) That within three years from the date of this Decision Notice, or such later date as the Commission may approve, the Licensee complete the proposed construction works on the Ashton Lodge building in accordance with the plans, marked in Green which relate to the Fox Ale House and are Attachment "K" to the Director's referral in respect of this matter;
 - b) That the Licensee not commence trade under this licence until it provides documentary proof to the satisfaction of the Director that it has obtained the necessary fire safety and building approvals including a certificate of occupancy in respect of the new premises;
 - c) That the following special conditions will be inserted in the licence:

The Licensee is required to provide prompt and courteous assistance to disabled patrons wishing to access the upper level of these premises and will put in place appropriate measures to facilitate their entry and egress from that part of the premise via the lift located on the adjoining Wisdom premises.

- d) The Licensee must display a sign, in a prominent place and in a form approved by the Director which states:

“DISABLED ACCESS TO THE UPPER LEVEL AND NON AMBULANT TOILETS

It is a condition of this licence that the Licensee provide disabled access to patrons wishing to use the upper level of these premises. Fox Ale House patrons are able to use the lift on the ground floor of the adjoining Wisdom

premises but will need to obtain a key pass to re-enter our premises on the upper level. Please contact any of our bar staff to obtain a key pass and to also receive information regarding the location of non-ambulant toilets.

Reasons For Decision

Background

5. On 8 March 2018, two applications were lodged by Todd McCourt on behalf of both AFS Realty and Business Partners Pty Ltd (the licensee of Wisdom) (AFS) and Nundor Pty Ltd (the licensee of The Fox Ale House) (Nundor) to redevelop and expand the existing Wisdom tavern premises and to relocate the Fox Ale House to a building known as Ashton Lodge which is on the same land as Wisdom at 48 Mitchell Street, Darwin.
6. The substitution application in respect of the Fox Ale House also involved significant building works to convert the Ashton Lodge into a tavern with a gaming machine lounge.
7. The original premises known as Fox Ale House ceased trading on 7 September 2012 and were subsequently demolished.
8. On 11 October 2016, a delegate of the then Director-General of Licensing (Director-General) cancelled the Fox Ale House licence number 80316631, pursuant to section 47(5) of the 1978 Act on the basis that the licensee was unable to conduct the business of the liquor licence.
9. The Licensee sought a review of that decision by the Director-General who held that the cancellation under section 47(5) (1978 Act) was invalid as it should have proceeded by way of a complaint for a breach of condition of the licence pursuant to section 67. On the basis of the Licensees advice that it was then intending to apply to substitute the licence for the Wisdom licence, the Director General took no further action in respect of the Fox Ale House licence.
10. Subsequent to the lodgement of these two applications in March 2018, there were delays, attributable both to the applicants and to Licensing Officers. However, for reasons that will be expanded upon later in this decision, the application for substitution of premises would have failed but for the March 2020 amendments to the 2019 Act, so those delays have in fact been to the benefit of the applicant.
11. In support of the application for a material alteration, AFS provided the following documents:
 - Affidavit in accordance with section 26A of the 1978 Act;
 - Community Impact Assessment in accordance with section 6 of the 1978 Act;
 - Public Interest Criteria in accordance with section 6.2 of the 1978 Act;
 - Proposed site plans.

12. In support of the application for the substitution of premises, Nundor provided the following documents:
- Affidavit in accordance with section 26A of the 1978 Act;
 - Community Impact Assessment in accordance with section 6 of the 1978 Act;
 - Public Interest Criteria in accordance with section 6.2 of the 1978 Act;
 - ASIC Certificate of Registration of Company and associated ASIC documents;
 - ASIC Business Name Registration for The Fox Ale House.

Publishing of Applications and Consultation

13. Both applications were advertised in the NT News on Saturday 17 November 2018 and Wednesday 21 November 2018. Two “Green signs” were also erected at a prominent area of the proposed premises for the requisite 30 day period.
14. As a result of the publication of the application, no objections were received from the public.
15. Notification of the applications and comments were also sought from:
- CEO Department of Health;
 - Commissioner of NT Police;
 - City of Darwin.

No adverse comments were received.

16. The applications were referred to the Commission on 7 October 2019 by the Director.
17. On 16 October 2019, the Commission wrote to Nundor and advised as follows;

“Prior to setting down a hearing date, I wish to draw your attention to paragraphs 131 - 134 of the Decision Notice of Woolworths Group Ltd (excerpt attached) which raise the issue of the Commission approving a substitution subject to conditions.

Generally when the Commission grants a licence in respect of premises which have not been completed or require renovation, it imposes a condition on the licence that the Licensee may not commence trade until a certificate of occupancy or the necessary fire safety approvals are obtained in respect of the premises. If the Commission’s recent observations in the Woolworths case are correct then it may not be possible to grant a substitution in circumstances such as exist here.

You may care to obtain legal advice on this issue prior to the hearing and if necessary seek an adjournment of the hearing to enable that to occur”.

18. Following receipt of advice that the applicants had obtained legal representation both matters were set down for public hearing on 26 November 2019.

The Hearings

19. On 26 November 2019, Mr Crawley SC appeared on behalf of the applicants. Mr McCourt was also present and Mark Wood and Tania Chin appeared on behalf of the Director. During the course of the hearing, it became clear that although the applicants had obtained planning approval for the proposed building works, that the Development Consent Authority (DCA) approval was predicated on there being disabled lift access to the whole of the first floor. Whereas the effect of the proposal before the Commission is to create two separate licensed footprints and the only way disabled patrons could access the upper floor of the Fox Ale House is by using the Wisdom lift and traversing through part of the first floor of Wisdom to gain entrance via a locked door to the upper floor of the Fox Ale House.
20. Having regard to these access problems and the legal difficulties that the Commission had raised with the substitution of a licence to premises which had not yet been fully built, the Commission suggested that it could be simpler to proceed with a material alteration in respect of the whole of the land at 48 Mitchell Street rather than having two separate licences over the adjoining buildings.
21. Mr McCourt on behalf of both Applicants indicated that they wanted the flexibility of having two licences in case they decided to in future lease out the operation of one of the taverns to another entity. The other factor of overriding significance in our view, is that the Fox Ale House had an associated gaming machine licence which Nundor will be applying to substitute to these premises should the liquor licence substitution be approved. In light of the applicants indication that they intended to pursue both applications and on being advised that the Northern Territory Civil and Administrative Tribunal (NTCAT) was considering the limitation on the power to substitute premises, the Applicants sought an adjournment of the hearing to 11 February 2020.
22. The Commission subsequently adjourned the matter at the Applicants request until 1 April 2020. On 23 December 2019, NTCAT delivered its decision Woolworths Group Ltd V NT Liquor Commission, Foundation for Alcohol Research and Education Ltd and Ors (2019) NTCAT 37 (23/12/19) in which it confirmed that there was no power under the Liquor Act (1978) to grant a substitution application subject to conditions.
23. Following the NTCAT decision in the Woolworths substitution matter, Woolworths commenced proceedings in the Supreme Court to appeal that decision. The Northern Territory Government also announced it would be introducing urgent legislation to amend those provisions of the 2019 Act which governed substitution applications.
24. The Liquor Amendment Bill (2020) was introduced in the February sittings with a proposed commencement date of late March 2020.

25. The *Liquor Amendment Act 2020 (NT)* commenced on 27 March 2020 and now applies to the substitution application. The new section 326(2) now mandates that the application must proceed and be determined under section 75(2) and (2A) of the 2019 Act which provide:

Section 75 Substitution of premises

(2) *Despite subsection (1), instead of issuing a new licence the Commission may, on application by the licensee, amend a licence to substitute other premises for the licensed premises if satisfied that the substitution satisfies the public interest and community impact requirements.*

(2A) *To avoid doubt, the Commission may, under subsection (2):*

(a) *Impose conditions on the substitution; and*

(b) *Substitute premises that are not yet constructed or are still under construction.*

26. Accordingly while the Commission is required to determine the substitution application under the 2019 Act, the application for a material alteration still falls to be determined under the 1978 Act.
27. Although the legislative amendment removed a significant impediment to the substitution application by April, the nation was confronted with the COVID-19 pandemic, which resulted in the imposition of restrictions in relation to public gatherings. Most on licensed premises also ceased operations for a number of months. The Commission contacted the applicants' solicitors to ascertain whether they were intending to proceed with the hearing on 1 April 2020 but were advised that they no longer acted for the applicants. Following discussions with the applicants, the matter was adjourned to a date to be fixed.
28. Having not had any further communication or enquiry from the applicants, the Commission determined to relist the matter for hearing on 22 September 2020. On that date, Mr Todd McCourt appeared for the Applicants and Mr Jeff Verinder appeared to represent the Director.

Assessment of the Application

29. As has been indicated earlier in this decision the application for a material alteration to the Wisdom premises is to be determined under section 119 of the 1978 Act. In determining whether to approve the application the Commission is required to apply the public interest and community impact test as set out in section 6(2) of that Act and to also have regard to the Community Impact Assessment Guidelines issued by the Minister pursuant to section 6A.
30. In considering the application for substitution of premises the Commission is required by section 75(2) of the 2019 Act to be satisfied that it meets the public interest and community impact requirements as set out in section 49 of that Act. Although the 2019 Act requires an applicant to both prove that the application is in the public interest and that it will not have a significant adverse impact on the community, on the facts of this case the differences with the legislation are not materially relevant to our consideration of the merits of these applications.

31. There were no objections or adverse comment from stakeholders in relation to either application. Furthermore no concerns have been raised as to the fitness of either Licensee to operate licensed premises so that is not an issue.
32. In support of the application for a material alteration, the licensee AFS submitted a community impact statement which had been prepared by Sapphire Business Solutions. The thrust of the business case for the alterations is the current lack of all-weather space at Wisdom which is largely an outdoor venue. The increase in the amount of enclosed space will be used for a gaming machine lounge on the ground floor and an indoor restaurant, bar and function area on Level 1. On Level 2 there will be function rooms together with offices and store rooms. The plans include a lift from the ground floor of Wisdom to Level 2 which is available for disabled use.
33. The increase in the licensed area on the ground floor is 25m², on Level 1 is 195m² and Level 2 is 131m².
34. The venue is within an existing tourism and entertainment precinct and the Applicant relied on the growing needs of the then robust cruise ship market for greater on shore hospitality options. That market is of course now significantly dampened however the Applicant is optimistic that it and general tourism will bounce back. It estimated a further 4 to 6 staff could be employed.
35. In support of the substitution application, Nundor submitted a Community Impact Assessment dated August 2018 which had been prepared by DWS Consultants, once again that applicant relied on the cruise ship market and the venues proximity to the Waterfront precinct as justification for the business case. It stressed that this was not an application for a new licence but rather a relocation of an existing licence from one part of the Mitchell Street entertainment precinct to another.
36. The Applicant has estimated that re-opening the Fox Ale House at this location will generate in the range of 23 jobs (including part-time and casual workers). Mr McCourt estimated that a total of approximately \$3.5 would be spent on construction costs across both sites. That is not an insignificant sum given the current financial challenges facing the Northern Territory.
37. The Commission believes it is relevant that neither the NT Police nor City of Darwin have suggested that there are already more than enough licensed venues in Mitchell Street. Having regard to the relatively small amount of the licensed footprint at Wisdom that is suitable for all weather use, we consider it not unreasonable that the Licensee wishes to carry out the proposed alterations to the premises.
38. The Commission is also satisfied that the public interest criteria requirements of the 2019 Act are largely met with the proposed relocation of the Fox Ale House to the old Ashton Lodge next to Wisdom. There will be no increase in density of outlets occasioned by the substitution and the Licensee has a proven record in relation to the operation of licensed premises in this precinct.
39. The issue that has caused the Commission most concern in these proceedings is the proposed use of the Wisdom lift as the only option for disabled access to the upper floor of the Fox Ale House premises. When questioned about this issue, Mr McCourt made the common mistake of saying that he does not expect to receive many mobility impaired patrons. Unfortunately the lack of adequate wheelchair access to the older

entertainment venues in Darwin is a reason why some disabled persons are uncomfortable about visiting licensed premises. Whilst it might be said that these patrons are able to choose an alternate venue which better caters for their particular needs, that overlooks the fact that everyone should feel free to accept an invitation to a social event or function in the knowledge that in 2020 they can be confident that there will be disabled access to the licensed premises.

40. In his evidence before the Commission, Mr McCourt said that the estimated cost of putting another lift into the Fox Ale House premises was at least \$150,000 however, there were also logistical problems in finding an appropriate place to position a lift which would not adversely impact on the structural integrity of the building or render unusable an unduly large amount of floor space. Mr McCourt assured the Commission that both licensees were prepared to abide by licence conditions which obliged them to provide “user-friendly” disabled access through the Wisdom premises for Fox Ale House patrons. Mr McCourt also stressed that planning approval had been granted for the proposed works on the basis of only one lift. However, it is the view of the Commission that as it is being asked to divide the “approved building” into separate licensed premises it is responsible for ensuring that both licensees comply with the obligation to provide disabled access to the Fox Ale House.

41. It will therefore be a condition of the Nundor licence that:

“The Licensee is required to provide prompt and courteous assistance to disabled patrons wishing to access the upper level of these premises and will put in place appropriate measures to facilitate their entry and egress from that part of the premise via the lift located on the adjoining Wisdom premises”.

42. It will also be a condition of the Nundor licence that it display a sign, in a prominent place and in a form approved by the Director which states:

“DISABLED ACCESS TO THE UPPER LEVEL AND NON AMBULANT TOILETS

It is a condition of this licence that the Licensee provide disabled access to patrons wishing to use the upper level of these premises. Fox Ale House patrons are able to use the lift on the ground floor of the adjoining Wisdom premises but will need to obtain a key pass to re-enter our premises on the upper level. Please contact any of our bar staff to obtain a key pass and to also receive information regarding the location of non-ambulant toilets.

43. It will be a condition of the AFS licence that:

“The Licensee undertakes to permit its lift to be used and provide a thoroughfare through its premises to facilitate disabled access for patrons of the adjoining Fox Ale House patrons wishing to go to the upper level of these premises”.

44. The Commission acknowledges that the proposed disabled access arrangements for the Nundor premises do not accord with best practice and represent a compromise between good planning principles and the economic interests of the Licensee. A significant factor in the Commission’s consideration of the merits of these applications is that the Northern Territory economy is currently in urgent need of private sector investment in the construction industry and job creation opportunities within the hospitality industry.

45. The Commission is mindful of the fact that the Fox Ale House ceased trading eight years ago and that these proposals have only emerged subsequent to the Licensee being put on notice that it was at risk of being prosecuted for failing to operate the licence. These applications were lodged two years ago and while some of the delay was occasioned through no fault of the Applicants they have not pursued it with the alacrity that we would have expected. The Commission therefore holds concerns that following our approval of these applications the project may then go into hibernation until the local business environment improves. That would render nugatory the economic stimulus benefits we have ascribed to these applications. Accordingly the Commission intends to make it a condition of both approvals that:

“The Licensee complete the approved building works within three year of the date of this Decision Notice or such further time as the Commission might allow”.

46. The Applicants should be under no illusion that the Commission will readily agree to a further extension of time if the works have not then commenced and been significantly advanced. The Commission may well take the view that the future economic benefits of the proposals are no longer sufficient to satisfy the public interest.

47. For the reasons outlined above, the Commission has determined to approve the material alteration to Licence 80317565 and the substitution of premises in relation to licence 80316631 on the terms and conditions outlined at the commencement of this decision notice.

Notice of Rights:

48. In relation to the decision concerning Licence number 80317565, section 120ZA of the 1978 Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. A decision to approve a material alteration pursuant to section 119 of the 1978 Act is specified in the schedule and is a reviewable decision.

49. Section 120ZC of the 1978 Act provides that a person affected by this decision may seek a review before NTCAT. Any application for review of this decision must be lodged within 28 days of the date of this decision.

50. For the purpose of this decision, and in accordance with section 120ZB(1)(b) and (c) of the 1978 Act, the affected person is the applicant.

51. In relation to Licence number 80316631, section 31 of the 2019 Act provides that any decision of the Commission for which a decision notice is required is reviewable by NTCAT and the following persons (*relevantly*) may apply to NTCAT for a review:

- In all cases – the Director;
- In the case of a decision regarding an application – the applicants; and
- In the case of a submission, complaint or objection that was the subject of a decision – the person who made the submission, complaint or objection.

52. In accordance with the substance of section 31 of the 2019 Act any application for review of this decision must be lodged within 28 days of the date of this decision.

53. Section 112(3) of the 2019 Act requires the Commission to give a decision notice, after making a decision under subsection (2), to the applicant.

A handwritten signature in black ink, appearing to read 'Richard Coates', with a large, stylized initial 'R'.

RICHARD COATES

Presiding Member

Chairperson

20 October 2020

On behalf of Commissioners Coates, Parker and Cannon