

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Diggers Den Restaurant
Licensee:	Mr Arminio Niceforo
Nominee:	(Not applicable)
Proceeding:	Application to vary licence conditions; Application for approval of material alterations
Heard Before:	Mr Peter Allen (Chairman) Mr John Withnall Mr Paul Costigan
Dates of Hearing:	17-18 June 2003
Date of Decision:	29 July 2003
Appearances:	Ms D Elliott, for the Licensee Mr Mark Gage, objector in person

1. The liquor licence for the Diggers Den Restaurant, previously the Olympia Cafe, prescribes trading conditions in accordance with its description as a restaurant licence with "liquor without a meal".
2. The "liquor without a meal" conditions require the premises at all times to maintain the appearance of, and to trade predominantly as, a restaurant. Patrons are to be seated at a table.
3. Problems of adherence to these conditions arose several years ago for licensee Mr Arminio Niceforo in the then perceptions of licensing inspectors and the Director of Licensing, and in early 2001 Mr Niceforo sought to vary the conditions of the licence by the removal of the requirements to have patrons seated at table and to look like a restaurant, although he undertook to continue to trade predominantly as a restaurant.
4. That application to the Commission failed for reasons that are set out in the relevant Reasons for Decision (*Olympia Cafe, 28.02.2001*), which also sets out Mr Niceforo's history with the premises in some detail.
5. That decision of the Commission concluded with guidelines for the proper operation of the "liquor without a meal" system.
6. In August 2002 the Commission heard a complaint by two liquor inspectors that their observations on the night of 2nd June 2002 had revealed the premises to be in breach of the requirement that prevented patrons from being permitted to stand around while drinking.
7. As an outcome of that hearing (see the Commission's Reasons for Decision, *Diggers Den Restaurant, 29.11.2002*) the Commission determined to issue Mr Niceforo with a notice under s.33 of the *Liquor Act* removing the "liquor without a meal" concession from the licence. The Commission opted to implement the s.33 process rather than to effect the change immediately by the use of s.49(4)(a) because the Commission's major disaffection with the appearance of the premises as a restaurant - the pool table - had not been a ground of the inspectors' complaints.

8. Before such s.33 notice had been issued to Mr Niceforo, he again applied for a variation of licence conditions. As was advertised, he applied to be able to trade as an on-licence without the requirement to trade as a restaurant provided that seating was available for at least 50% of the maximum patron capacity recommended by the NT Fire and Rescue Service and that table service would be made available to any seated persons.
9. Mr Niceforo also volunteered to comply with noise limits as prescribed under the Environmental Protection Act of South Australia (NT regulations being still on what is turning out to be a rather ageing drawing board), and in negotiations with the police Mr Niceforo had agreed to a raft of detailed conditions in circumvention of police opposition to the application.
10. The Commission cannot help but to observe that if the police were a trading organisation its developing practice of pressuring applicants to accept limitations to liquor applications as the price of police non-objection would undoubtedly attract the attention of the ACCC to the same degree as is currently public knowledge in relation to Woolworths and Coles Myer for alleged similar practices. In the case of the police, the inequality of bargaining power, or more accurately the applicant's likely perception of such an inequality, is a matter of growing concern for the Commission. However, in Mr Niceforo's case he was represented from the outset by capable legal Counsel, and appeared well satisfied with the tenor and outcome of his negotiations with the police, a process which he himself had initiated. We were satisfied that he was well aware that the police demands may not necessarily have coincided with those of the Commission or been in full accord with the Commission's eventual determination of the application had the police fully contested the matter.
11. Mr Niceforo conducted a very extensive campaign of publicising the present application, testifying as to a combined letter-drop and mail-out of some four thousand letters, unarguably almost "every household in Katherine" as he maintained. As well as approaching the police he personally addressed and enlisted the support of the Katherine Town Council and the Council of the Kalano Community Association.
12. The licensee's considerable efforts in that regard produced objections from six residents, five of the objections surviving the new Part IV pre-filtering process, albeit not in respect of every claimed ground of objection (see Reasons for Decision, *Diggers Den Restaurant*, 15 May 2003). Four of those residents (Mr and Mrs Gage, Mr and Mrs Burns) signed a single letter of joint objection, and all were represented at the hearing by Mr Mark Gage, one of the signatories to that letter.
13. Mr Gage's wife is the owner of a unit the rear bedroom of which abuts and overlooks the Diggers Den carpark. The unit is currently tenanted. The Gages are naturally apprehensive of additional noise and traffic, grounds echoed by all objectors.
14. During the course of his evidence Mr Gage readily complimented the current licensed premises as being "a great facility", and told the Commission that "people say good things about it all the time". He conceded that there had never been any trouble with the facility up until now, but the concern was that as a tavern there would be a different type of clientele.
15. For his part Mr Niceforo pointed to a history of Special Licence and temporary variation applications which he says has seen him operating very much in the manner he now applies for on a permanent basis, except for the extension of the outside area which he had agreed with the police he would continue to operate on a seated-only basis and maintain its appearance as a dining area. Mr Niceforo does not anticipate any appreciable changes in the nature or demographics of his clientele.
16. The proposed extension of the outside area caused the Commission some concern during the hearing, as the full extent of the over-all proposal had not been made obvious at the time the application was advertised. As presented at the hearing, the application was inclusive of an application for approval of material alterations pursuant to s.119 of the *Liquor Act*, such alterations involving the extension of the inside licensed area into Mr

Niceforo's adjoining cafe area and an extension of the outside area to the western boundary of Mr Niceforo's property. The Commission therefore announced during the hearing that it needed to be satisfied that

- the owners of the premises immediately adjoining the proposed new western boundary of the licensed area
- the Police, and
- the Katherine Town Council

had been aware of the extensions having been part of Mr Niceforo's proposal.

17. Consequently we heard evidence from:

- Mr Allen Domaschenz, a proprietor of the adjoining property to the west, currently the site of a pawnbroking business with a caretaking residential unit. Mr Domaschenz testified that he was aware of the full extent of the Diggers Den proposal, inclusive of the extension of the western boundary of the licensed area, and that the proposal had his full support;
- Acting Superintendent David Pryce of the Central (Katherine) Division of the NT police. A/Supt Pryce confirmed that Mr Niceforo had shown him the full plans of the proposal, and that they had done a walkthrough together identifying the new extensions. A/Supt Pryce said that the police had no problems with Diggers Den, and that if the negotiated conditions were imposed nothing was expected to change in terms of police resources in relation to the facility;
- Mr Terry Buss, Chief Executive Officer of the Katherine Town Council. Mr Buss confirmed that in expressing itself "fully supportive" of Mr Niceforo's proposal (per letter Exhibit 3) Council had been aware that the proposal included extensions to the licensed area.

18. On the basis of the foregoing evidence the Commission was persuaded not to require the application to be re-advertised. The advertising and letterdrop are determined to have been sufficient notice to the public at large of the general nature of the proposal, and those who might be expected to have specific concerns with the detail of the extension westwards of the footprint of the licensed area were obviously fully aware of the over-all concept when expressing their full support.

19. Mr Niceforo called a further supportive witness in the person of Group Captain Metz, the Commanding Officer of the RAAF at Tindal, a base comprising well over 2000 people inclusive of families of serving personnel. Grp Capt Metz pointed out the hazards in having to travel to and from Darwin for entertainment, and that the proposal for Diggers Den would fill a much needed niche in Katherine. Grp Capt Metz was also aware of the full extent of the proposal. He testified that on a personal basis he totally supported what was proposed, and from the Tindal Base perspective "it can only be a good thing".

20. Mr Niceforo also had documentary evidence going to needs and wishes. As well as letters of positive support from several local residents and small business people, including the Kalano Community Association Inc. as mentioned, Exhibit 1 is a petition of support containing the signatures of over 400 identified Diggers Den patrons.

21. On all the foregoing evidence, the Commission is persuaded of such a degree of support for Mr Niceforo's proposal within the Katherine community as to have no hesitation in acceding to both elements of the application, despite the objections.

22. The few objections are seen to be a minimal response to Mr Niceforo's extensive publicity campaign. In the Commission's previous decision on 28 February 2001 in relation to Diggers Den we remarked that the Commission has consistently held that the absence of formal objections is not necessarily to be equated with community support, and that to

“have regard to” community needs and wishes by way of inference from silence or minimal response must be approached with extreme caution. While that remains the Commission’s position as a general guideline, the qualifier is of course “not necessarily”, and each case must always be adjudged on its own merits. On this occasion Mr Niceforo’s initiatives in relation to ensuring public awareness of his proposal were both a quantum and qualitative leap from his comparatively perfunctory efforts in this regard on the previous occasion, and the scantness of the response in the context of the high level of community awareness can now be seen to be significant.

23. This is not to say of course that objections are to be treated in any way dismissively for being in an obvious minority. It is no more than reasonable of the Gages to seek to be protected from any increase in noise emanating from the operation of the licensed premises, and to this end we note that Mr Niceforo will accept conditions
- restricting music in the outside area to low volume background music only;
 - precluding nightclub style entertainment within the premises, limiting live music within the premises to small “ensembles” playing rhythm and blues, jazz or the like;
 - applying the quite conservative maximum sound levels for emanating noise as prescribed by the Environmental Protection Act of South Australia; and
 - preventing in any event the operation of the licensed premises from causing any unreasonable disturbance to the ordinary comfort of lawful occupiers of any residential premises.
24. Mr Gage conceded that his noise concerns had diminished following the Commission’s formal view of the premises, during the course of which Mr Niceforo demonstrated the sound system at various degrees of volume, and outlined the provision of an “airlock” to the toilets. The foregoing package of noise-prevention conditions should forestall Mr Gage’s remaining apprehensions as to increased noise disturbance. If such should prove not to be the case, Mr Gage is aware of his right to lodge a complaint with the Commission at any time as to any alleged breach of licence conditions on the part of Mr Niceforo. By statute, every complaint must be investigated, and every unwithdrawn complaint must come before the Commission for determination.
25. The only objector other than the Gage/Burns families was Ms Joanna Gleeson, who did not appear at the hearing to pursue her objection. Her concerns for residential housing and an aged care facility in “close proximity” (the latter arguably either 300 metres or over a kilometre away, depending on what she was actually referring to) were not echoed by any other resident. The availability of parking which she queries is not seen by the Commission as problematical, especially not in the light of the additional public parking facility to be established across the street from the Diggers Den entrance. The apprehended noise disturbance of live bands is to be addressed by restrictive licence conditions as already outlined.
26. All in all, as already indicated, the Commission is persuaded that Mr Niceforo’s concept for the future operation of Diggers Den should be approved, subject to the raft of conditions for which he has volunteered. The Commission’s approval comprises separate formal approvals of
- the variation of licence conditions as advertised
 - the proposed material alterations.
27. The former approval is independent of the latter, but is conditional on the licensee’s acceptance of the licence conditions negotiated with the police. In their transference to the new licence document such conditions may undergo re-wording in places as the Commission may see fit, either in the light of any specific evidence or in the interests of drafting consistency, but their thrust will remain unchanged.

28. It follows from the Commission's approval of the requested variations that the "authority" of the licence ceases to be that of "restaurant" and becomes that of an on-licence in the nature of a tavern.
29. Once the approved alterations are under way and reach the stage where any alteration to any existing wall is commenced, the licensee is directed pursuant to s.119(6) of the *Liquor Act* to cease to conduct business in and upon the licensed premises until such time as a new Permit To Occupy the premises as altered has been issued by a qualified building certifier. Such permit will need to accord with at least a Class 6 classification under Part A3.2 of the Building Code of Australia. Upon the issue of such new permit, the licensed area will be deemed to include the approved extensions.
30. Both the foregoing approvals are subject to the licensee's compliance with all other regulatory law as may be applicable, and such compliance shall be a specific condition of the new liquor licence.

Peter R Allen
Chairman

28 July 2003