



SPECIAL COMMUNITY STANDARDS & LICENCE APPEAL COMMITTEE

AGENDA

February 19, 2019 – River Valley Room

9:30 a.m. Call to Order 4:30 pm Adjournment
 12 noon to 1:30 pm Lunch

MEMBERS

M. Banga, J. Dziadyk, C. Caterina

ITEM		ACTION
1.	CALL TO ORDER AND RELATED BUSINESS	
1.1	Call to Order	
1.2	Adoption of Agenda	
2.	EXPLANATION OF APPEAL HEARING PROCESS	
3.	COMMUNITY STANDARDS AND LICENCE APPEAL COMMITTEE MATTERS	
3.1	Appeal of decision to cancel Business Licence 107425872-001 issued to 1370498 Alberta Ltd. o/a Nyala Lounge at 10875 - 98 Street NW	
4.	ADJOURNMENT	

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SPECIAL COMMUNITY STANDARDS & LICENCE APPEAL COMMITTEE

MINUTES

February 19, 2019 – River Valley Room

PRESENT

T. Caterina, J. Dziadyk, M. Banga

ALSO IN ATTENDANCE

S. Sarich, Office of the City Clerk
C. Ashmore, Law Branch
I. Russell, Office of the City Clerk

PRESENT

M. Banga, J. Dziadyk, T. Caterina

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DECISION SUMMARY

ITEM	DECISION
1. CALL TO ORDER AND RELATED BUSINESS	
1.1 Call to Order	

M. Banga called the meeting to order at 9:35 a.m.

1.2 Adoption of Agenda

Moved T. Caterina:

That the February 19, 2019, Community Standards and Licence Appeal Committee meeting agenda be adopted.

In Favour:

Carried

T. Caterina, J. Dziadyk, M. Banga

2. EXPLANATION OF APPEAL HEARING PROCESS

M. Banga explained the appeal hearing process and asked if anyone objected to any member of the Community Standards and Licence Appeal Committee hearing the appeals. No one objected.

3. COMMUNITY STANDARDS AND LICENCE APPEAL COMMITTEE MATTERS

3.1 Appeal of decision to cancel Business Licence 107425872-001 issued to 1370498 Alberta Ltd. o/a Nyala Lounge at 10875 - 98 Street NW

T. Engel, Solicitor for the Appellant, made a presentation and responded to the Committee's questions.

Copies of Exhibit 3.1A, submitted by T. Engel, were distributed to the Members of the Committee and the Office of the City Clerk.

Moved T. Caterina

That five additional minutes be granted to T. Engel to complete his presentation.

In Favour: J. Dziadyk, M. Banga **Carried**

Mr. M. Tesfay, Appellant, made a presentation and responded to the Committee's questions.

Moved T. Caterina

That the following individuals be granted permission to speak in support of the Appellant:

R. Hersi
M. Alfadli
H. Badi
R. Rozaneosh

L. Landers
S. Johnson
T. Asefaw
S. Desta

In Favour: J. Dziadyk, M. Banga **Carried**

R. Renouf, Solicitor for the Respondent, made a presentation and answered the Committee's questions.

Moved T. Caterina

That five additional minutes be granted to S. Renouf to complete his presentation.

In Favour: J. Dziadyk, M. Banga **Carried**

J. Lallemand, Citizen Services Department and Sgt. C. Simpson, Edmonton Police Service (members of the Public Safety Compliance Team – the Respondent), accompanied S. Renouf and responded to questions from the Committee.

Motion: T. Caterina

To extend orders to allow J. Dziadyk to complete his questioning of the Respondent prior to the lunch break.

In Favour: J. Dziadyk, M. Banga **Carried**

The Committee re-convened at 1:32 p.m. and continued questioning the Respondent.

C. Ashmore, Law Branch, brought it to the Committee's attention that every second page of SDAB decision SDAB-D-17-149 in the Appellant's written submission was missing.

C. Ashmore, Law Branch, provided information to the Committee and answered the Committee's questions.

The Committee heard from P. Adams, a Development Officer with the City of Edmonton, who provided clarification regarding the sections of the Edmonton Zoning Bylaw relevant to the subject site.

The Committee met in private at 3:00 p.m., pursuant to Section 20 (Disclosure harmful to law enforcement) of the Freedom of Information and Protection of Privacy Act.

The Committee met in public at 4:35 p.m.

Motion: T. Caterina

To extend orders to complete the appeal hearing.

In Favour: J. Dziadyk, M. Banga

Carried

Moved : J. Dziadyk:

The Decision of the Program Manager is overturned.

The Conditions shall remain in place.

The Committee would have found that there were condition breaches but that a short suspension would have been warranted. Since the business has effectively been shut down since the hearing was postponed on February 8, 2019, that suspension was sufficient.

Written reasons to follow.

In Favour:

Carried

T. Caterina, J. Dziadyk, M. Banga

4. ADJOURNMENT

The meeting adjourned at 4:37 p.m.

Chair

City Clerk



**EDMONTON
TRIBUNALS**

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Decision of the Committee

Appeal of Decision to Cancel Business Licence 107425872-001 1370498 Alberta Ltd. o/a Nyala Lounge

Hearing Date: February 19, 2019

**Appellant: 1370498 Alberta Ltd. o/a
Nyala Lounge**

I. ISSUES

Should the business licence for 1370498 Alberta Ltd. o/a Nyala Lounge (Nyala¹) be reinstated?

II. APPEARANCES AND EVIDENCE

In dealing with this appeal, the Community Standards and Licence Appeal Committee (the Committee²) heard from:

Appellant: Mr. T. Engel legal counsel for the Appellant
Mr. M. Tesfay, Appellant

In Support of the Appellant:

R. Hersi
M. Alfadli
H. Badi
R. Rozaneosh
L. Landers
S. Johnson
T. Asefaw
S. Desta

¹ “Nyala” will refer collectively to 1370498 Alberta Ltd. operating as Nyala Lounge, and depending on the context will also refer to the owner Mulugeta Tesfay.

² The Committee is established under the *Community Standards and License Appeal Committee Bylaw 15166* and consists of three City of Edmonton Councillors.

Respondent: Mr. S. Renouf, legal counsel for the Public Safety Compliance Team
Justin Lallemand, Special Enforcement coordinator with the City's Citizen's Services Department
Sgt. C. Simpson, Edmonton Police Service

Written Submissions:

- Record from the Program Manager, Business Licensing and Vehicle For Hire (Program Manager)
- Written Submission from the Respondent
- Written Submission and Rebuttal from the Appellant
- Response to Appellant's Submission from the Respondent
- Additional Submissions from the Appellant
- Exhibit 3.1A (Appellant) - Pages 16 and 17 of the Respondent's Written Submission for the June 14, 2018, hearing (Appeal of Conditions)

III. SUMMARY OF APPELLANT'S POSITION

Mr. Engel

1. Nyala is very important to both the African community as well as non-African people who are patrons of the business. Mr Tesfay has turned a building which was in very poor repair into something to be proud of. The extra attention from the Edmonton Police Service (EPS) or the Public Safety Compliance Team (PSCT) is not fair or warranted and the licence cancellation has negatively impacted both clients and employees.
2. Mr. Tesfay fled a dictatorship in Ethiopia and arrived in Canada in 1993. He worked as an aircraft technician prior to joining the RCAF reserve in 1998 and the regular force in 2003. He moved to Edmonton in 2003 and served in Afghanistan in 2006 and 2011. He suffers from PTSD as a result of his military service which has been aggravated by recent police actions and has resulted in the break-up of two marriages. He also incurred serious lower back and neck injuries as a result of his military service.
3. Mr. Tesfay opened Nyala in 2012 and this was to be his retirement income. He has never made any money from operating Nyala; in fact, he has lost a lot of money. He invested \$110,000 for a new HVAC system in 2016.
4. He had good relations with the EPS until 2016; but everything changed in 2016 with the change of leadership in the PSCT.
5. All of the submissions for today's hearing have been made without the benefit of full disclosure regarding the January 21, 2018, gun incident which is being withheld from

this Committee by the PSCT. Mr. Engel has instructed Mr. Tesfay not to speak about the January 21, 2018, incident today as criminal charges are pending.

6. This is a hearing *de novo* and the Committee must make its own decision on the evidence before it without any regard to the decision being appealed. Significant weight should be placed on the failure on the part of the Respondent to provide complete disclosure. The PSCT has cherry picked the information they have provided as it knows that the production of full disclosure and presentation of witnesses would be harmful to their case.
7. Mr. Engel referred the Committee to a spreadsheet that shows the present status of all of the criminal prosecutions. The majority of these have been dismissed or withdrawn. The sheer number of withdrawals and dismissals constitutes strong evidence that there has been an abuse of process and harassment of the Appellant by the PSCT.
8. The process leading up to this appeal and the appeal itself are unfair. The Appellants still do not have the FOIP disclosure they requested from the EPS or the City of Edmonton. Also an implied undertaking prohibits Mr. Tesfay from using material regarding the gun incident. As a result an adverse inference ought to be drawn against the Respondent.
9. Submissions made by the Appellant's previous counsel (found in Tab 3 of the Record from the decision maker) show that the PSCT is biased against the Appellant. It is evident that the end goal of the PSCT was to close down Mr. Tesfay's business and everything they did furthered that goal. This should be taken into account when assessing their evidence and submissions.
10. The PSCT alleges that there is a significant history of violent incidents both inside and directly outside of Nyala and itemized all of these incidents. It is Mr. Tesfay's position that these are misrepresentations and these incidents do not have anything to do with Nyala. Mr. Tesfay is only aware of the August 22, 2015 and September 4, 2015, incidents because he was the one who called the police to report these disturbances.
11. On July 8, 2017, Mr. Tesfay was handcuffed, arrested and taken away for possession of tobacco for re-sale. No analysis was ever done to confirm it was tobacco. Mr. Tesfay has filed complaints against members of the EPS under the *Police Act*. 1 ½ years later, EPS has still not investigated or conducted interviews with Mr. Tesfay or witnesses.
12. Recent history is clearly relevant to the ultimate decision. The PSCT has not found the need for any recent inspections nor have there been any recent problems that have come to the attention of the PSCT.

Mr. Tesfay

13. Nyala is the safest bar in Edmonton. He is here to fight the racism he has been subjected to by the City of Edmonton and a few police officers who have been harassing his customers and employees over the last three years. He has a right to run his business as an African.
14. The police action is as a result of a letter of complaint Mr. Tesfay sent to the Chief of Police. Within a week of this letter Mr. Tesfay was arrested out of revenge.
15. Mr. Tesfay would not be here today if he did not believe Nyala was a safe place. He does not want to put his customers or the neighbourhood at risk and would close the business himself if he thought there was a safety issue. Many of his customers are here today to provide support.
16. The purpose of the PSCT is to shut down all of the African businesses in the City. They target the African bars and do not treat the white bars the same way. He knows of at least four other African bars in Edmonton that have been forced to shut down. Police visited these establishments three or four times a night which caused landlords to become suspicious and resulted in leases not being renewed. Sometimes 10 to 15 police would attend a premise at the same time.
17. Since Mr. Tesfay owns his building, police must lie about a lot of stuff to get his licence cancelled.

Speakers in Support of the Appellant:

Rashid Hersi

18. Mr. Hersi came to Edmonton in 2006 and has 17 years of experience as a social worker.
19. Those outside of the community are not aware of the racial profiling Africans are subjected to by Police. He has witnessed groups of up to sixteen police officers as well as the gang unit visiting Nyala and conducting searches three to four times a week. He has never seen another bar in Europe, Canada or the United States that is subject to this kind of scrutiny by police.
20. Nyala is frequented by 30 to 40 year olds who like to sit down and visit and listen to their own music. Other ethnic groups such as Chinese or Asians also have their own gathering places but are not being targeted the way that African businesses are. He is aware of another bar in Edmonton in which a murder occurred and it was allowed to re-open within 12 days.
21. He has never witnessed a single fight inside or outside of Nyala. Mr. Tesfay always makes sure everyone gets to their car safely when they leave his establishment.

Muhamed Alfadli

22. Mr. Alfadli works as a security guard for Nyala and has 5 years of experience in this industry. He has worked at other bars and shisha places and agrees that Nyala is the safest place in Edmonton. Many of the customers are regulars and there are never any fights or evidence of criminal activity here. Murders and many fights occur in other bars in the City.
23. He believes that this bar is the target of racism on the part of the police. Often more than 12 officers arrive and check around everywhere.
24. Mr. Alfadli is in charge of taking IDs and searching patrons when they arrive. He has worked here for 1 ½ years and has never found any drugs or weapons while conducting a search. He typically does not have to ask customers to leave; it is sufficient to give patrons a warning should an argument take place.

Ms. Hawa Badi

25. Nyala is like home to her. All the patrons and employees are like family and everyone knows the owner. The owner knows how to defend his customers because of his military background and personally knows almost all of his clients. Nyala is a place to get away from the stress of work and listen to good music. There are never any fights or problems at this place.
26. She has seen police come to Nyala, go to the kitchen and look at everything. She has been smoking shisha there and police have grabbed it and opened it up to see what was inside.
27. She doesn't know what the police are looking for. If you come several times without finding anything you should not keep coming back.

Roza Rozaneosh

28. She has been in Canada for almost 4 years and has been working at Nyala for about 2 years. Everyone at Nyala knows each other – they are like family. People come to smoke shisha, have some drinks and go home. Nyala employees make sure patrons get into their car and go home.
29. Nothing ever happens; however, every weekend from Thursday to Sunday the police show up, sometimes several times during the evening. Even though the police know her they ask for her ID every time they come in. On a day when there were only two customers one officer was very aggressive towards her, told her everyone hated her and told her to wait and see – they were going to shut this place down. The officer's partner told him to back off. She did not report this incident but has video evidence.

30. The officers then checked everything – the bar, opened the fridge and opened her shisha. She told them she does not smoke tobacco shisha.

Linda Landers

31. She has worked at Humpty’s Restaurant, adjacent to Nyala, for 12 years. The customers of Nyala have always been quiet and respectable and there were never any problems. Nyala staff would come and have breakfast.
32. All the trouble started when a hookah bar opened on the corner. There were constant fights, bottles thrown and a gun fight. Police were often in the Humpty’s parking lot because of an incident at the hookah club; this caused her to lose customers.
33. She knew the people creating the problems were from the hookah bar because Nyala’s clients are older Ethiopians. The people from the hookah bar were younger, drunk and causing fights. The trouble stopped after the hookah bar shut down.

Shelley Johnson

34. She moved here from Nova Scotia 12 years ago and two of her children are bi-racial. She has been going to Nyala for about a year now.
35. She has never seen so many police officers in such a small business and they show no respect to the customers. She almost never sees any police in other clubs even though there are always fights in these other clubs.
36. Nyala is not like that. She enjoys going there because there are never any fights. She feels that her daughters are safe there and she does not have to worry about them. She brings her white friends to Nyala and they are all made to feel like family. Everyone knows each other and it is like inviting your friends to your home.
37. It is sad that in this day and age there is still so much racism going on. She would think that Edmonton would be better than this.

Ted Asefaw

38. He has lived in Canada more than 30 years and Nyala is peaceful and welcoming and feels like home. He knows the owner and staff very well.
39. He has never seen any fights or anything illegal occurring there. He brings important guests to Nyala because it is nice and clean and he feels safe there.
40. He questions why places on Whyte Avenue or West Edmonton Mall do not have to close their doors even though many fights occur there.

41. It makes him sad to see the harassment of African Canadians by some police officers. He described a personal experience of his where he was wrongfully arrested while walking to school.

Semere Desta

42. Mr. Desta addressed the Committee through a translator.
43. He has been working at Nyala for over 1 ½ years as a manager, server and cashier. Prior to this he worked at different bars. He finds that Nyala is a very comfortable and nice place to work.
44. After he had worked at Nyala for six months he was suddenly arrested by police. He was held for 24 hours and then released because they could not find anything. The owner was also arrested at that time.
45. The recent closure of Nyala has created financial stress for his family. Mr. Tesfay has been helping him pay his bills.

IV. SUMMARY OF RESPONDENT'S POSITION

46. It is important to consider that the inspections and charges started in the summer of 2018. The Program Manager imposed a series of conditions on Nyala in early 2018 which Nyala appealed. At the June 14, 2018, appeal hearing, Nyala requested a postponement and advised the Committee it could not comply with all of the conditions immediately. The Committee agreed to grant a postponement but the business was to remain closed until all of the conditions could be complied with. On June 15, 2018, Nyala advised the Committee they would be re-opening on June 16, 2018, and all conditions would be complied with.
47. The PSCT had to investigate because of Nyala's flip-flop. First Nyala said it would take some time to comply with all of the conditions and then all of a sudden they advised that they were re-opening two days after the hearing.
48. There was a history of inspections starting on June 22, 2018, all of which were documented. Nyala was never in full compliance during any of the inspections. The PSCT had to enforce the situation by the laying of tickets, some of which resulted in convictions. It is unfortunate that there is a perception of ethnic or racial targeting and that the proprietor of Nyala has not explained to his customers why the scrutiny was being imposed.
49. On December 4, 2018, the Program Manager issued a decision to cancel the business licence in accordance with section 7 of the *Business Licence Bylaw* (Bylaw 13138) and outlined the following nine bylaw breaches, contraventions or safety concerns:

- Failure to meet security staff requirements
 - Failure to keep the HVAC system on and maintained
 - Failure to keep accurate patron counts
 - Failure to maintain incident log
 - Failure to properly document patrons using patron scanning system
 - Failure to use metal detector
 - Failure to maintain video surveillance footage
 - Failure to ensure all staff have SMART training
 - January 21, 2018, incident
50. The Appellant has not adequately addressed these concerns nor has he explained why the Program Manager's decision was incorrect or unreasonable.
51. One of the ongoing unresolved violations is the totally inadequate photos being taken by the scanning system as per Tab 6 of the Record. Photos show that lighting was inadequate or patrons were allowed to turn their head away to avoid being photographed.
52. 12 tickets have been issued since June 22, 2018. This is after Nyala agreed to comply with the conditions. Of these there were:
- 3 not-guilty findings
 - 4 guilty findings
 - 2 not adjudicated yet
 - 3 withdrawn
53. The *Tobacco Act* charges referred to by Mr. Engel were as a result of another EPS operation and did not involve the PSCT. The information Mr. Renouf has regarding that incident is that the Crown Prosecutor was satisfied that the quantity was consistent with personal use rather than being sold and the charge was stayed on that basis.
54. Mr. Renouf rejects that there is racial targeting of African Canadians. As of October, 2018, there are more than 30 hookah or shisha bars in the City of Edmonton. The PSCT has engaged with 4 or 5 of them by making recommendations to improve and has received cooperation from all but Nyala. The only other business licence cancelation of a bar serving the African Canadian community he is aware of is Papyrus Lounge where a serious shooting incident occurred.
55. There are two principal factors this Committee must take into account:
- a) First and foremost is public safety. While Mr. Tesfay has the right not to comment on the January 21, 2018, incident, it is still a very real issue. It is a disturbing suggestion that Mr. Tesfay has no recollection of seeing the gun being handled and wiped down because of his state of mind resulting from PTSD medication.

- b) There is also a problem of governability when a bar is not prepared to keep up its end of the bargain. In June, 2018, Mr. Tesfay said he was going to comply with the conditions. Either he did not know what was involved or he had no intention of living up to the conditions.
56. The Respondents (S. Renouf, J. Lallemand and Sgt. C. Simpson) provided responses to questions from the Committee:
- a) Mr. Lallemand confirmed that there have been zero incidents outside of Nyala since June 16, 2018 and no citizen complaints during the last 6 months. The PSCT conducted four inspections after June 16, 2018 and found approximately 80 condition violations. 12 of these violations resulted in penalty tickets.
- b) Regarding the Appellants comments about the *Police Act* not being followed, Mr. Renouf believes this deals with Mr. Tesfay having made one or more complaints which are now in the hands of the Chief of Police. Mr. Renouf is unable to comment on this.
- c) The PSCT is made up of members from the following organizations: City of Edmonton Bylaw, Edmonton Fire Rescue Services, Edmonton Police Service, Alberta Gaming, Liquor and Cannabis Commission. A sanctioned PSCT inspection would consist of 2 EPS members, 1 or 2 AGLC inspectors, 1 or 2 bylaw officers and 1 fire prevention officer. More EPS officers are called in if there are safety concerns. Visits are usually done between 9:00 p.m. to 4:00 a.m. as this is when the majority of the incidents occurred.
- d) The patron scanning system is supposed to take a photo of a patron's face at the same time as their ID is scanned in. That way it can be confirmed either at the time or at a later time if the two match. This is to prevent patrons who have been banned either by EPS or the establishment itself from using a false ID to enter. The use of this scanning system was a condition imposed on Nyala as of June, 2018. Every inspection since June, 2018, has found that it did not always function correctly.
- e) The fact that a number of pictures did validly show patrons scanned in demonstrates that the system is able to do that. Where pictures are not clear someone has made a conscious decision to have the lighting turned down or security allowed people to turn away.
- f) If there has been a safer vibe at Nyala during the last six months it is because of the continuous inspections. There seems to be a reluctance or unwillingness on Mr. Tesfay's part to involve police as evidenced by the January 21, 2018, gun incident. On another occasion Mr. Tesfay was inciting customers to hassle police. The PSCT is not feeling cooperation with regard to safety.
- g) Nyala's existing business license is for: General Business; Restaurant or Food Service; Alcohol Sales (Consumption on Premises/Minors Allowed). However, it

is operating as an adult only establishment without having to comply with the higher standards that night clubs must adhere to.

- h) The different types of uses would be required to have different types of menus but the Respondents were not aware of the exact AGLC requirements. The kitchen at the venue seems to be a standard commercial kitchen although inspections found a lack of food ingredients to make the items found on the menu. During the PSCT inspections they never saw any food being served at all.
- i) In August, 2017, Mr. Tesfay applied to the SDAB to change the Use from a Restaurant to a Bar and Neighbourhood Pub. This appeal was successful.

V. REBUTTAL OF APPELLANT

Mr. Tesfay

57. Mr. Tesfay confirmed that the SDAB approved the change of use from a Restaurant to a Bar and Neighbourhood Pub in August, 2017. He subsequently applied for a business licence for the new Use and paid the required fees; however, he has not yet been granted this new licence as it was not approved by the PSCT.

Mr. Engel

- 58. The *Police Act* complaint made to the Chief of Police on January 18, 2018, included Ms. Rozaneosh's concerns about her treatment by an EPS officer.
- 59. The comments made by Ms. Landers, an employee at Humpty's, confirm that the incidents that the PSCT refer to are connected to the hookah bar, not Nyala.
- 60. Semere Desta was arrested on July 8, 2017, in the same incident where Mr. Tesfay was arrested and taken away in handcuffs. This is the subject of a July 20, 2017, *Police Act* complaint.
- 61. Mr. Engel reminded the committee that this is a hearing de novo in response to Mr. Renouf's statement that no evidence has been provided to show that the decision of the Program Manager was unreasonable. However, the nine reasons for the cancellation were addressed in Mr. Alvis's letter of October, 2018.
- 62. Mr. Tesfay did not know that the scanning system was not working properly until he got ticketed. He was using the equipment recommended to him by the PSCT and remedied the problem as soon as he found out by buying an extra light. The PSCT has checked the system on a number of occasions since it has been fixed – there is video confirming this.

63. It was stated that Nyala was the only shisha / hookah bar refusing to cooperate with the PSCT. Mr. Tesfay was willing to go to Alternate Dispute Resolution (ADR) facilitated by the EPS; however the police were not willing to engage in ADR as this would be contrary to their goal of having this business shut down. The EPS likes to trumpet they are in community based policing. What better way than to show this than to engage in ADR. All the videos show that Mr. Tesfay has always been very cooperative with the police.
64. Videos submitted to this Committee confirm that many EPS officers attend Nyala on a regular basis, not just the 7 member PSCT team referred to by the Respondent. This can also be confirmed by obtaining an event chronology from EPS; this would provide the badge number of every officer who attended on any particular day at Nyala.
65. While Mr. Lallemand stated there have been no complaints by neighbours during the last 6 months, the truth is there have never been any that he is aware of.
66. Mr. Renouf referred to the “Dangerous Cats” video to show that police are attempting to portray that Nyala has dangerous people in it which is not true.
67. Mr. Tesfay refused to turn over the security video regarding the January 21, 2018, gun incident as he simply wanted to speak to his lawyer first. The police could have obtained an emergency warrant to obtain this video if it was urgent that it be viewed immediately.
68. Mr. Engel disputes that Mr. Tesfay attempted to incite customers causing the police to leave because of officer safety concerns. This is simply not true and a video can be made available confirming this.
69. Recent inspections have been clean despite the Respondent’s suggestion that there has never been a clean inspection.

VI. REBUTTAL OF RESPONDENT

70. The record does not support that the issue with the scanning system was resolved as soon as the matter was brought to Mr. Tesfay’s attention. The problem was brought to the attention of management on numerous occasions and it is concerning that it was not corrected.
71. The *Police Act* complaints involve individual police officers and have nothing to do with the PSCT.

Paul Adams

72. Mr. Adams, a Development Officer with the City of Edmonton, came forward to provide some clarification regarding the Use class in the Direct Control Zone 1 where the subject property is located.
73. Section 3.2 of the Edmonton Zoning Bylaw explains the differences between Major and Minor Eating and Drinking Establishments:
- (e) Major Eating and Drinking Establishments is deemed to be Specialty Food Services, Restaurants, Bars and Neighbourhood Pubs and Nightclubs;
 - (f) Minor Eating and Drinking Establishments is deemed to be:
 - i. Specialty Food Services;
 - ii. Restaurants; and
 - iii. Bars and Neighbourhood Pubs for less than 100 Occupants;
74. The subject property is in the Direct Control Zone 1, Area 5 within the Boyle Street Area Redevelopment Plan. A Minor Eating and Drinking Establishment is listed as a Use, but a Major Eating and Drinking Establishment is not.
75. The SDAB determined it was a Bar and Neighbourhood Pub and that it could continue to operate with a limited seating capacity of 44.

VII. DECISION

The Decision of the Program Manager is overturned.

The Conditions shall remain in place.

The Committee would have found that there were condition breaches but that a short suspension would have been warranted. Since the business has effectively been shut down since the hearing was postponed on February 8, 2019, that suspension was sufficient.

VIII. REASONS

Overview

76. The task of this Committee is to decide, based on the evidence relating to the operation of the business, whether Nyala deserves any form of sanction, including the revocation of its business license.
77. This appeal arises from the decision of the Program Manager to cancel the business license of Nyala. However, according to Section 14(2) of the *Community Standards and License Appeal Committee Bylaw 15166*, this is a hearing de novo. This means that this Committee may hear and consider evidence that the Program Manager did not take into consideration.
78. Many of the issues that were raised have both a quasi criminal regulatory element, as well as a civil licensing requirement. This Committee is well aware that there is a different standard of proof in a criminal court. In this context, there were a number of bylaw tickets that are in various stages of prosecution. This Committee understands that a withdrawal of a ticket or an acquittal does not necessarily mean that an incident cannot be taken into consideration.
79. The relevant statutory provision that the Committee is acting under is found in *Business License Bylaw 13138*.

7. The City Manager may refuse to issue or renew a Licence, may suspend or cancel a Licence and may impose any conditions on a Licence for the following reasons:

(a.1) the Licensee has breached a condition of the Licence.

(b) the applicant or Licensee or any of it's officers or employees:

(i) furnishes false information or misrepresents any fact or circumstance to a Bylaw Enforcement Officer or the City Manager;

(ii) has, in the opinion of the City Manager based on reasonable grounds, contravened this bylaw whether or not the contravention has been prosecuted;

(iii) fails to pay a fine imposed by a court for a contravention of this bylaw;

(iv) fails to pay any fee required by this or any applicable bylaw; or

(c) in the opinion of the City Manager based on reasonable grounds it is in the public interest to do so.

The Condition Breaches

80. The evidence placed before this Committee related to a number of breaches of conditions found on the license of Nyala. For the most part, these condition breaches were reported by the Public Safety Compliance Team (PSCT) and came to the attention of the PSCT as a result of inspections that were conducted to check on the state of the business. During each inspection, the PSCT noted any condition breaches that they saw, but bylaw tickets were not always issued. The specific individuals from the PSCT that were involved in the inspections and made the observations was not always clear from the material that was presented to this Committee.

81. The Committee examined each of the various types of breaches to try and determine whether there was sufficient evidence to prove the breach, but also to attempt to determine the relative severity of the breach based on the overall evidence. The following are the findings of the Committee in relation to each of the condition breaches:

Condition #1: From 9:00 pm until the venue closed, a minimum of two Pro-Tect certified security staff must be on duty to supervise the premises and patrons, and at least one security staff must be stationed at each of the patron entrances and exits.³; and

Condition #2: All staff members must be easily identified by bright coloured clothing with the word STAFF or SECURITY written across the front and back of the garment in clearly visible letters.

82. There are a number of occasions where the PSCT did inspections and did not see security staff, or see evidence that the staff were wearing the appropriate shirts. On at least one occasion, on June 22, 2018, there is a dispute about whether the business was actually open at the time. Some specific details about the inspections, such as who was present at the inspection and the amount of time spent observing the alleged breaches, was not provided.

83. There was also testimony from the security guard, other members of staff and patrons suggesting that there were no specific issues with security. No specific times or details were provided so this evidence was more general in nature. The Committee was therefore faced with weighing the general evidence from the customers and employees against PSCT evidence that, while not having a witness present to give testimony, gave dates and times of the breaches.

³ While this decision outlines the nature of the conditions, the full extent of the condition has not been reproduced in all cases.

84. The Committee finds that there is no reason to believe that the reporting of the PSCT team about the breaches would be inaccurate. As such, the Committee accepts that it is more likely than not that there were some breaches of these conditions.⁴ However, without more details it is not clear how serious those breaches were. The Committee also finds, at least at this time, that the breaches of these conditions that took place do not appear to have significantly compromised public safety.

Condition #3: The Heating, Ventilation, and Air Conditioning (HVAC) system must be maintained and turned on during business hours.

85. The sole episode where this breach took place was on June 22, 2018. There is a dispute about whether the premises were actually open that day. If Nyala was not actually open to the public, this would not have been a breach. However, even if closed to the public the Committee agrees that Nyala should probably have been more careful by keeping the doors locked. Further, even if closed, if shisha/hookah was being smoked on site, the HVAC probably should have been on. If anything, this is a controversial technical breach, and as such the Committee will not take it into account at this time.

Condition #4: Accurate patron counts must be conducted hourly and documented in a log to ensure that no more than 44 patrons are allowed on site at any time, including the main floor and basement, in compliance with the September 7, 2017 decision of the Subdivision and Development Appeal Board.

86. The evidence suggests that there were times when accurate patron counts were only being logged. Counts seem to occur on a random basis. Nyala does not really dispute this characterization.
87. It is, however, important to note that there does not appear to be clear evidence that the number of patrons ever actually exceeded the 44 that are allowed. If this had taken place, this would be a more serious type of breach. There is also no convincing evidence that suggests that any of the patron count logs that existed were inaccurate or somehow fraudulent. If the evidence had supported this, that would have been a serious breach.
88. The Committee accepts that the record keeping of Nyala as it relates to patron counts is somewhat random and therefore this condition has been breached. Nyala needs to understand the importance of keeping accurate patron counts, and also needs to realize that this is not a difficult condition to comply with. However, given that the breaches related to keeping the log books or producing the log books, this is not a breach that would normally lead to a revocation of the license. However, Nyala still needs to keep better logs or may face additional sanctions.

⁴ See the commentary in Condition #3 relating to breaches that allegedly took place on June 22, 2018.

Condition #5: A daily Incident Log must be developed and maintained at the business premises.

89. Similar to the patron counts, the evidence suggests that such a daily log may not have been kept at all times. It does appear that there has been a breach of this condition similar to that outlined above.

Condition #6: From 9:00 pm until the venue closes, an approved patron Scan System must be used and ALL patrons must be scanned upon entry AND re-entry to the business premises.

90. There are clearly times when the patron scanning system was not taking accurate photos as a result of the lighting. This is obvious simply from viewing the photos that form part of the evidence. However, it also became clear during the hearing that not all photos were unclear. The PSCT team wanted this Committee to find that Nyala was deliberately causing the equipment to take a bad photo when someone was entering the business that should not have been allowed entry. To find that this was a deliberate act on behalf of Nyala is a stretch, and the Committee does not accept that argument. Instead the Committee accepted the evidence that better lighting has been added to the patron scan system and the problem is now resolved. The Committee heard no evidence to suggest that the issue is still outstanding. The Committee therefore finds that while this condition has been breached, the underlying cause of the breach has since been remedied.

Condition #7: From 9:00 pm until the venue closes, at the point of entry and re-entry to the business premises, the licensee must scan all patrons and bags using a metal detector; and prevent the entry of weapons.

91. There is no question that there is a desire to keep weapons out of this business, partly stemming from the January 21, 2018 incident. This makes compliance with this condition important.
92. The PCST mentions that breaches of this condition were noticed on several occasions. Again, one of those occasions is the date where there is a dispute about whether the business was open. The patrons and staff of Nyala provided evidence that the systems were always in use and that they were always scanned.
93. The problem that this Committee has is that it appears that the members of the PCST that witnessed the lack of scanning did not provide oral testimony about this issue and therefore could not be questioned about their specific observations such as the number of people that were not scanned and over what time period. The Committee was therefore faced with weighing the evidence from the customers and employees against the details from the PSCT that were provided.

94. Similar to the above issues, the Committee has no reason to disbelieve the observations of the PSCT and therefore finds that there were likely some breaches of this condition. However, in a similar fashion, without additional detail, and especially when weighed against the other evidence about security, it is not clear how serious those breaches were. At this time there is no evidence that these breaches *actually* compromised public safety, although they clearly created a risk to the public.

Condition #8 The business premises must have video surveillance.

95. It is apparent that on one occasion, being June 22, 2018, there appeared to be a breach of this condition. As far as the Committee can tell, there have been no additional breaches of this condition since that time.

Condition #9 All staff must complete Smart Training Programs including Proserve and ProTect.

96. On the June 22, 2018 inspection it appears this documentation was not available so there was a breach of this condition. However, this was also the date where there was a dispute about whether the facility was actually open. As far as the Committee can tell, failure to produce documentation has not been an issue since that time. Based on the evidence, even if there was a breach on June 22, 2018, this was a technical breach which now appears to be remedied.

Episode on January 21, 2018

97. The episode on January 21, 2018 also bears mentioning since this was a serious incident. The videos clearly show a gun being hidden and fingerprints being wiped off the gun. It appears that there is potential criminal activity taking place, and that Nyala's owner may be, at least partially, implicated. The Committee did not get a full explanation as to what took place from either party so it was left with viewing the video.
98. Keeping guns out of Nyala was part of the reason to put conditions on the business in the first place. This episode, however, took place prior to the conditions being placed on the business. This Committee is not here to decide on the criminal conviction. From a view of the videos, there are clearly questionable business practices taking place on the part of the owner, but without additional context, it is difficult to determine whether the bad business practices have already been resolved by the implementation of the conditions. In any event, this episode has, at least to some extent contributed to creating a risk to the public. This episode has been taken into consideration in the remedy as outlined below.

Remedy

99. As outlined above, the Committee is convinced that Nyala has breached a number of conditions that are currently on the license. However, that is not the end of the analysis. The Committee is also tasked with determining whether, in the context of all of the evidence, that the condition breaches are of such a nature that revocation of the license is the appropriate remedy.
100. It is both important and necessary to remember that shutting down a business is a harsh remedy. The Committee would be putting the employees out of work, and would also be removing a source of income from the owner. In some situations, where evidence shows significant public safety concerns, shutting down a business is the only alternative. In the past, this Committee has ruled in that fashion where businesses are causing a large number of calls for service, or where there is significant criminal activity taking place that is associated with the business. In other situations, a lesser remedy to start may be more appropriate. Balancing the rights of business versus the safety of the public is key.
101. Here, the testimony from staff and patrons of the facility indicate that they feel safe there. There are apparently no fights, and there is no evidence suggesting dangerous individuals have been entering Nyala since the conditions were put into place. This would suggest that overall there is no imminent danger to the public. It is possible that the conditions that were placed on the business in 2018 have alleviated some of the more serious concerns surrounding the business.
102. However, the failure to fully implement the conditions at all times does continue to create a risk to public safety. The conditions were applied to the license in order to assist with public safety and ensure that the patrons and staff of Nyala were not subjected to situations of danger such as where or gang members are allowed to enter into Nyala. Even a single failure to use a metal detector, or a single failure to scan a patron could end up having dire consequences in the wrong circumstances.
103. The PSCT wants this Committee to find that the various condition breaches prove that Nyala is ungovernable and that revocation is therefore warranted. If Nyala was truly ungovernable, then the Committee would agree that revocation would be the appropriate remedy. However, based on that evidence that we heard at this time, the Committee is not convinced this is the case. Instead the Committee believes that Nyala can and will improve, and that much of the problem stems from a breakdown of trust between Nyala and the authorities.
104. Having said that, there is no question that Nyala must face sanction for the condition breaches. To find otherwise would be to encourage further breaches. The opinion of this Committee is that given the breaches, and taking into consideration the breakdown of trust, a short suspension of the license would be warranted. Given that the Committee on February 8, 2019, prior to hearing all the evidence, lifted the stay on Nyala which required it to shut down for a period of time, the

business has already suffered a short suspension. The Committee finds that the period of time that the business was shut down is, at this point, a sufficient sanction for the various breaches that were identified.

The Breakdown of Trust

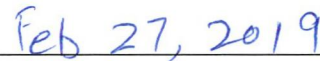
105. The one thing that is crystal clear is that there has been a breakdown of the relationship between Nyala and the PSCT, including the EPS, and that neither trusts the other. This Committee has no opinion on what first initiated this break down, and attempting to place blame would only make matters worse. What is clear is that the owner, staff, and some patrons of Nyala believe they are being targeted, while the PSCT feels that the attention is warranted.
106. It appears to be time to hit the reset button.
107. Nyala needs to understand that they must abide by the conditions that have been placed upon them and this also means that there will be times when the PSCT or the EPS need to conduct inspections. The conditions were placed on the business to try and improve things at Nyala, and the episodes of violence both inside and outside the business appear to have been reduced. During deliberations this Committee contemplated putting a condition on the license to *require* further inspections to ensure these conditions were being followed, but decided it was not necessary since inspections can already take place at anytime. Both the ownership, the staff, and the patrons of Nyala need to understand that inspections are not harassment. They are warranted when a business is not fully following the rules. Nyala also needs to understand that If the staff and patrons of Nyala take an aggressive stance towards the EPS or the PSCT during these inspections, things will continue to escalate, and the relationship will continue to deteriorate.
108. Likewise, the EPS and the PSCT need to understand that there has already been a breakdown of trust. They need to approach the inspections in a way that makes it obvious that they are concerned with the safety of the public. They are there to perform a vital monitoring function to ensure the safety of the public is coming first. They also need to make it clear that they are not there to interrupt the enjoyment of patrons that are not causing problems.
109. While it is not within the jurisdiction of this committee, and the Committee is concerned about its inability to cross examine certain witnesses to assess credibility allowing it to make a finding about whether harassment is actually taking place, the opinion of this committee is that while things could be handled in a different way or with a lighter touch, there is no evidence to support targeting of African businesses taking place. While Nyala to some extent is a target, this is as a result of ongoing breaches of conditions and is therefore warranted.
110. Stated simply, if the PSCT stops finding breaches of conditions when they are doing inspections, we would expect that over time the need for inspections would

lessen. However, if there are continuing breaches, we would also expect that the PSCT would have to attend more often to ensure that public safety is paramount. The best way to ensure minimal interruption of the business is therefore to fully comply with all conditions at all times.

111. Nyala must also understand that further breaches of conditions will likely lead to further sanctions. If the breaches are serious enough, that still may mean a revocation of the license. In other words, at least to some extent, Nyala is now on notice that they must do their best to abide by the conditions at all times. If condition breaches continue to take place after the reset that the Committee is recommending, this may be evidence that Nyala is truly ungovernable and is unwilling to follow the rules.



Councillor M. Banga



Date