

IN THE MATTER of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER of an application by **D & G Holdings Limited** pursuant to s99 of the Act for an Off Licence for premises situated at 7f Leicester Avenue, Tamatea, Napier, and known as PAK'nSAVE Tamatea.

BEFORE THE NAPIER DISTRICT LICENSING COMMITTEE

Chairman: Mr DE Fellows
Members: Cr F White
Mr R Pinkham QPM.

HEARING at Napier on Monday 14th November 2016

APPEARANCES

Mr A Graney	for the Applicant
Mr I Thain	Counsel for the Applicant
Ms M Scott	Consultant for the Medical Officer of Health- to assist
Mrs T Te Whaiti	for the Medical Officer of Health- to assist
Sgt R Wylie	Police- to assist
Mr D Waugh	District Licensing Inspector- to assist.

RESERVED DECISION OF THE DISTRICT LICENSING COMMITTEE

INTRODUCTION

1. This is an application by D & G Trading Limited for an Off Licence in respect of a supermarket premises situated at 7f Leicester Avenue, Tamatea, Napier and known as PAK'nSAVE, Tamatea. The building comprising of some 5000 square metres is immediately adjacent to the present PAK'nSAVE supermarket, which will cease to operate upon the opening of the new store, scheduled for 29th November 2016.
2. The application drew no public objections and neither the Police nor the Licensing Inspector raised any objections, however, the Medical Officer of Health (MOH) in an undated report raised concerns in relation to the single alcohol area (SAA).
3. A further report dated 2nd November from Dr Caroline McElroy, the Medical Officer of Health, commenced by stating that she was unable to attend the hearing due to priority being given of work involving a contaminated drinking water inquiry, however, she

stated that –

“I would like it noted that I am not opposing pursuant to section 103 of the SaSAA2012, however, I am contesting the content of the conditions of the Single Alcohol Area (SAA)”.

4. The report also mentioned 2 meetings with Mr Graney specifically relating to the SAA; in particular, the end of aisle displays, the dog leg display and the exposure of the SAA from the checkouts, which she stated had been partly addressed by the 1.2m extension of a 3m high wall between the checkouts and the SAA.
5. The Medical Officer of Health was represented at the hearing by Ms Marie Scott, and whilst no letter of delegation pursuant to s.151 was received from Dr McElroy, no objections were raised by Mr. Ian Thain, Counsel for the applicant, to Ms Scott appearing and assisting.

THE HEARING

6. Mr Ian Thain presented his opening submissions on behalf of the applicant, and whilst addressing the matters to which the committee must have regard pursuant to s.105, all of which received a positive response from the reporting agencies, confirmed that the sole issue for the committee related to the design and layout of the premises in respect of the SAA.
7. Mr Thain guided us through the discussion and outcomes of the Medical Officer of Health’s consultants meeting with Mr Graney. He stated that the suggested extension of a wall to obscure the dog leg display unit had been undertaken, and produced an amended plan of the SAA.
8. Upon suggestions from the Medical Officer of Health in respect of end of aisle displays of non-alcoholic products which would lessen the display of alcohol, he contended that this would merely have the adverse effect of drawing customers up to the SAA. He further stated that the nature of the PAK’nSAVE business model requires wide aisles and flexibility of placement of products on pallets.
9. Mr. Thain concentrated his submissions on the matter of limiting the exposure of shoppers in supermarkets to display and promotions of alcohol, and advertisements for alcohol, pursuant to s112(1) of the Act. He talked through the origins of the SAA history as explained in **Judgment of Gendall J. in the Vaudrey and Bond appeal**, in particular the Law Commission proposal at paragraph 37] 8.98 in relation to exposure.

“We propose a “single are restriction”, similar to the requirement of the Victorian legislation. This would seem to be a sufficient control of the placement of alcohol within a supermarket. To impose a greater degree of separation, similar to that in New South Wales would appear to impose a too great a cost on retailers’ at this stage. The law would restrict the displays of all alcohol products to one area. Conceivably this would be more than one aisle if the supermarket required this. However, there should be no displays of alcohol products at the supermarket’s entrance or

at checkouts, as those positions seem to be areas of particular vulnerability for supermarket patrons.”

10. He further stated that in endeavouring to limit the exposure, such as end of aisle displays, the committee should weigh up the benefits of hiding exposed alcohol to the risks of supermarket operations where the exposed alcohol is visually a minor display in the overall presentation of the SAA.
11. Mr Graney gave evidence that he was the sole director of D & G Trading Ltd and operated under a franchise agreement with Foodstuffs North Island Ltd. He has been in the supermarket business for about 12 years as store manager, assistant manager and owner.
12. He stated that he treats Foodstuffs policy on the sale of alcohol very seriously, and policies were implemented in regard to:
 - Staff training; new members complete induction training in the sale of alcohol requirements
 - Under age purchases; under 25 ID required by operators.
 - Sales authorisation; automatic computer prompt at point of sale requires authorisation by Duty Manager.
 - Intoxication; Staff trained to recognize the signs.
 - Declined sales; logged, repeat offenders trespassed.He further stated that the store had never failed a CPO and had passed all Foodstuffs mystery shopper tests.
13. He expressed the view that the SAA was compliant as it was designed by Foodstuffs design team, and met the requirements regarding the positioning away from the direct routes between the entrance and checkouts. He stated he was surprised at the Medical Officer of Health's opposition as he had extended a wall of the SAA 1.2m and felt he had satisfied the Medical Officer of Health by reducing the visibility of the dog leg display when looking from the checkouts.
14. Questioned as to the design and positioning of the SAA, he stated that the design of the store and its layout was not available to the applicant and was undertaken by Foodstuff designers.
15. Sgt Wylie, in cross examination, suggested that the dog leg extended display had been included in the SAA to attract customers that may not be aware of the Beer and Wine area. Mr Graney refuted this claim and stated the extension was needed to make available more space for his products which was very limited.
16. Ms Marie Scott representing the Medical Officer of Health questioned the reluctance of the applicant to seek the views of the Medical Officer of Health and upon the timing of the application, Mr. Graney confirmed that the design was finalised in late 2015 and that building work was well advanced when the application was made on 17th August 2016. However, he emphasized that control of the design was with the Foodstuffs team and he had no input.

17. Ms Scott questioned why the Company had not contacted the Medical Officer of Health, when they knew she wanted to open discussions well before the application was made, to which Mr. Graney responded that he was unaware of such a liaison was required.
18. Ms Scott suggested that the extension of the wall, which only partially masked the view of the dog leg display, was erected to extend the SAA. Mr. Graney stated that it was built to satisfy the Medical Officer of Health, was not difficult to install and was of little extra cost. That it obscured the dog leg display quite considerably and its length was governed by the need for suitable passage width.
19. Ms Scott vigorously questioned Mr Graney in relation to the end of aisle displays. She produced layouts and photographic evidence of other major Foodstuffs establishments indicating the ability to limit the exposure of alcohol by end of aisle displays outside the SAA. Mr. Graney responded that there was at least a 3-4 metre space between the grocery shelves and the end of aisle display, and to display other items at the end of aisle could have the undesirable effect of bringing customers up to the alcohol area. Furthermore when he asked what products could be displayed there the Medical Officer of Health was silent on the issue. He also stated that the layouts presented by Ms Scott of other stores were not to scale, many were configured differently from his store, and the photos did not give a clear picture of the store layouts.
20. Ms Scott concluded by intimating that the short notice of the hearing, albeit within the statutory time, in order to meet a planned opening of the store on 29th November was irrelevant to the case to be heard. The design and layout to provide the best SAA should be the major concern.

At this point the hearing had been in session for 2 ¾ hours. A short adjournment was called at 12.15 pm and the meeting re-convened at 12.30 pm at which time the committee confirmed that a site visit was to take place and the hearing was further adjourned until 2.15 pm.

21. At the recommencement of the hearing Mr Thain made his final submissions. He made great emphasis on the committee responsibility in interpreting secs 112-114. He referred to Judgment of Gendall J at paragraph 14 that the role of the committee was an evaluating one requiring the decision maker to make a merits-based determination.
22. Mr Thain drew attention to the requirement that in this case the committee must impose a single area condition and again referred to the same paragraph 14 that this entails an evaluative exercise requiring the committee to be satisfied the proposed area is a single area, that it complies with s.113(5)(b) and that so far as it reasonably practicable the plans limit the exposure of alcohol to shoppers.
23. He highlighted the concerns of the applicant that end of aisle displays would draw shoppers to the alcohol area and that this could be seen as being part of the single area, and would only lessen the exposure by an insignificant amount.
24. Mr. Thain again drew attention to the Judgment of Gendall J. in respect of limiting the exposure, referring to his conclusion at paragraph 81;

"In short, the requirement to limit in my judgment does not mandate prohibition".

25. He expressed the view that the dog leg display provided no extra magnetism for shoppers, as people at the checkouts were unlikely to be persuaded to leave the queue. Removal of the dog leg display would lead to serious display problems for the company.
26. Mr Thain drew attention to the Highland Park Countdown and the Albany Food Warehouse decisions where end of aisle displays and exposure consideration could provide a useful thought process for reaching a decision.
27. He closed his final submission by turning the committee's consideration of procedural issues that the timing of the hearing was not the applicants choice but lay with the opposition from the Medical Officer of Health, causing the delay. He confirmed the applicant would not want to open the supermarket without an OFF Licence, and indicated concern in respect of the appeal provisions irrespective of the decision.

DECISION AND REASONS

28. This is an application for the issue of an OFF Licence for a new PAK'nSAVE supermarket. The matters to which we must have regard are clearly identified in s.105 of the Act. However, it was clear from all parties that the matter in contention is that of s104 I(e) the design and layout of the proposed premises specifically the describing of the single area in relation to the exposure of shoppers to displays promotion and advertisements of alcohol.
29. Nevertheless, we are satisfied that the other matters to which we must have regard have been met as follows:
 - **s105 1(a) Object of the Act.**

The lack of any adverse reports from the Agencies and the positive response to all matters to which we must have regard assures us of the object being met.
 - **s105 1(b) Suitability of the Applicant.**

The Company through its sole director of 12 years experience has never had adverse reports from the Police, Inspector or from franchise audits
 - **s105 1(c) Relevant Alcohol Policy**

There is none.
 - **s105 1(d) Days and Hours.**

They are within the default national trading hours pursuant to s.43 of the Act.
 - **s105 1(f) The applicant's engagement in sale of goods other than alcohol.**

The applicant is a supermarket.

- **s105 1(g) The applicants engagement in services other than the sale of alcohol.**

The services are those in line with the operation of a supermarket.

- **s.105 1(h) and (i) Amenity a good order of locality likely to be reduced.**

The premises are on the same site as the existing supermarket and will have no adverse effect on the local environment.

- **s.105 1(j) Systems staff and training.**

The applicant has given details of all systems relating to lawful sale of alcohol and has numerous managers to cover all hours of operation.

- **s.105 1(k) Reports for reporting agencies.**

Presented as hearing exhibits. The Medical Officer of Health limited opposition stands.

30. Our attention is therefore concentrated on the requirement of s.112-15 and in particular to the Medical Officer of Health's opposition to the configuration and exposure of alcohol of the SAA. It was to this end we made a site visit to the new store, and with the opening due in a few weeks were able to view the premises as they will appear upon opening save for the display of stock.
31. We firstly consider the Medical Officer of Health's concern with regard to the dog leg extension along the eastern wall of the supermarket from the main body of the single area.
32. The single area of approximately 128 sq m. is situated in the south eastern corner of the supermarket, is rectangular in shape measuring 9m deep and 14m long with a display rack extension on the eastern wall extending approximately 4m. This was the focus of our site visit.
33. The Medical Officer of Health argued the point that this dog leg display was still visible from the checkouts although limited, following the wall extension to the SAA. We however, took the view that this dog leg was clearly visible and positioned to expose the display to almost all shoppers once entering into the store. It would be clearly visible to shopper using the cut through access to the main body and to all shoppers approaching the checkouts who may not have ventured as far as the SAA.
34. We are of the opinion that to have an alcohol display that could attract every shoppers attention, is clearly outside the intention of s.112(1) in respect of limiting the exposure to shoppers.
35. Furthermore, we are of the opinion that the removal of this dog leg display cabinet from the SAA would give greater effect to the requirements of s.112(1) and therefore be far more advantageous when weighed against the sacrifices made.
36. In securing its removal, therefore reconfiguring the SAA, we are guided by the decision of ARLA in **Lockyer Holdings Limited [2015] NZRLA 191** at paragraph 26

".....Thus a DLC can make alterations to the configuration, arrangement and

perimeter of a proposed single area in its discretions having regard to the s.112(1) purpose”

Furthermore, the **Judgment of Gendall J CIV-2015-409-00098 [2015] NZHC2749** when considering a SAA conditions at paragraph 14 (d) (iii)

“In undertaking this evaluative exercise, it is the role of the District Licensing Committee or the Authority concerned (not of the applicant) to describe the single alcohol area. Thus, the relevant body is not limited to simply accepting or rejecting the plan put forward by the applicant. Rather, the relevant body must describe an area which it considers complies with the above criteria after hearing evidence and submissions from all relevant parties”.

37. In cross examination the applicant stated that the dog leg display was needed to make available more space for his products, which was very limited. Mr Thain in final submissions also referred to the dog leg display and stated that;

“taking away the dog leg would lead to serious display problems with the Company”.

With respect, we consider the problem of lack of display space is of the Company's own making. This is a new building of some 5000 sq metres affording adequate space for displays at the design stage.

38. We shall therefore delete the dog leg display area from inclusion as part of the single alcohol area.
39. Turning to the end of aisle displays increasing the exposure of alcohol to shoppers as expressed by the Medical Officer of Health we do concur (although only marginally) with the applicants submission that to provide end of aisle displays, at the boundary of the SAA, of normal food or grocery products would have the undesired effect of shoppers being closely exposed to alcohol products and seemingly making the area a thoroughfare.
40. The whole of the 9 metre frontage of the SAA is open to the roof and affords a large area of alcohol exposure, we therefore consider the coverage of the end of aisle displays, as Mr Thain suggested, being de minimis, and leaving this option up to the applicant.
41. In considering our decision we must express our disappointment of the lack of insight or responsibility, towards the design of the SAA, where the designers appear to have ignored or paid little heed to the provisions of s112(1) with regard to exposure to shoppers.

s112(1) Compulsory conditions relating to display and promotion of alcohol in single area in supermarkets and grocery stores.

- (1) The purpose of this section and sections 113 and 114 is to limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of**

alcohol, and advertisements of alcohol. (our emphasis)

However, we are reluctant to make further requirements in relation to the exposure of the alcohol at the SAA in light of the present appeal before the Court of Appeal of New Zealand regarding matters surrounding this issue. Nonetheless the applicant needs to be aware that a new licence is issued for 12 months, prior to which application for a renewal must be sought. Should the Court of Appeal issue be finalized, and depending on the outcome and other decisions following that outcome, serious thought by the applicant may need to be given to perhaps further limit exposure at the SAA.

42. Otherwise we are satisfied as to the matters we must have regard to, and grant the applicant an OFF Licence subject to the condition of the OFF Licence 30/OFF/1245/2016 attached to and forming part of this decision.

43 The Licence may issue immediately.

DATED at NAPIER this 21st day of November, 2016.

A handwritten signature in blue ink, appearing to read 'D Fellows', with a horizontal line underneath the name.

DE Fellows
Chairman
Napier District Licensing Committee