

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

AND

IN THE MATTER of an application by GENERAL DISTRIBUTORS LIMITED pursuant to Section 127 of the Act, for the renewal of An Off licence, for premises situated at 36, Carlyle Street, Napier, known as Countdown Carlyle.

BEFORE THE NAPIER DISTRICT LICENSING COMMITTEE

Chairman: Mr DE Fellows.
Members: Councillor K Price.
Mr RH Pinkham QPM.

HEARING at Napier Conference Centre on Monday 13th August 2018.

APPEARANCES

Mr D McGILL. for the Applicant.
Mr P A Radich. Applicant.
Mr D L Waugh. District Licensing Inspector.
Sergeant R Wylie. NZ Police – to assist.
Dr R M Eyre. Medical Officer of Health- to assist.

RESERVED DECISION OF THE DISTRICT LICENSING COMMITTEE

Introduction

1. This is an application by General Distributors Limited for the renewal of an off licence of its premises at 36, Carlyle Street, Napier and known as Countdown Carlyle. Of significance is that the licence renewal expires on 10th October 2018, the delay in determination due, in the main, to the extraordinary lengthy number of judicial appeals for matters surrounding the single alcohol area in supermarkets.
2. Initially, two objections to the application for renewal were received from the Medical Officer of Health (MOH) and the District Licensing Inspector, in relation to the single alcohol area, and with the added implication of failure to meet the object of the Act. Following site visits, discussions and correspondence prior to the hearing in respect of the configuration and screening of the single alcohol area, the MOH, withdrew her objection.
3. The District Licensing Inspector objects on the grounds that the applicant has not limited so far as reasonably practicable the exposure of alcohol to shoppers, that the single alcohol area is an area, through which the most direct pedestrian route between the entrance and main body of the premises passes and as a consequence breaches the object of the Act in that the sale of alcohol is not being undertaken safely.

The Hearing

4. Mr Duncan McGill of Duncan Cotterill introduced Mr P A Radich to the stand who stated he was the Alcohol Responsibility Manager for Woolworths New Zealand Limited, for which General Distributors Limited is a wholly owned subsidiary. He stated that he had sixteen years' experience in the alcohol regulatory field as an inspector, adviser to the Auckland licensing department, and for the past 18 months in his present position.
5. Mr Radich, through his brief of evidence, gave a comprehensive review of the policies and procedures of the Countdown store in relation to all requirements specified for the renewal of their licence.
6. Mr Radich confirmed the withdrawal of the MOH objection following notification that there would be no end of aisle displays and that a 5 metre by 1.8 metre high shelving unit would be placed inside the entrance further shielding the display of alcohol from shoppers outside and immediately entering the supermarket. In cross examination the Licensing Inspector submitted that the display of alcohol could still be easily viewed not only upon entering the supermarket, but outside the entrance, and presented photographic evidence to Mr Radich who confirmed that since the photos presented by the Inspector were taken, the shelving unit had been adjusted and was also 1.9 metres high and that this alteration had been made within the past 4 days.
7. He further stated that the end of aisle grocery displays were wrap-around limiting the display of alcohol at the edge of the area and therefore lessening the exposure to shoppers.
8. Mr Radich added that a clearly defined delineation of the alcohol area for both the public and supermarket staff was emphasized by the recent placement of a permanent black coloured flooring strip at the boundary of the area.
9. Questioned why these alterations had taken so long to initiate, when he had previously, at meetings with the MOH and Inspector, expressed that the area was non-compliant and needed addressing, he said that work had been started earlier but the Company were still awaiting the outcome of an appeal of another case, which could have effects on their proposals.
10. Further questions by the Inspector in relation to the positioning of the single alcohol area were answered by Mr Radich that the plans and layout of the supermarket were based on the National Guidelines for Prevention through Environmental Design in New Zealand (CPTED Guidelines) and he was adamant that the location of the area was fully compliant with the requirement that it was possible to access all areas of the store without passing through the single alcohol area.
11. Mr Radich was questioned as to whether the last minute alterations would be permanent, to which he confirmed that the layout would be maintained for the whole renewal and new licence period.
12. Mr Radich stated he had looked into relocation of the area, and provided details of the difficulties relocation would incur, including providing refrigeration, drainage, floor excavation, relocating roof top air conditioning services and plant and the difficulties in doing such work whilst still running an operational supermarket. He contended that these difficulties, together with the high costs of any alterations, rendered relocation not reasonably practicable.

13. Mr Radich completed his evidence by stating that there were 175 Countdown stores in New Zealand and 54 had similar layouts to Countdown Carlyle. He confirmed in three stores, Countdown Huntley, Countdown Bridge Street and Countdown Katikati all with an identical layout to Countdown Carlyle, ARLA, upon appeal, had approved single alcohol areas as compliant

The Objector

14. Mr D L Waugh the Licensing Inspector called the MOH. Dr Eyre, to the stand, who gave evidence in respect of Hawkes Bays record, through surveys and statistics, of above average alcohol harm and abuse. She confirmed that figures indicate that the high levels of alcohol related harm appear to be on the rise. She further stated that 72% of alcohol was purchased from Supermarkets. She concluded that Supermarkets in Hawkes Bay do have the opportunity to help reduce alcohol related harm.
15. Dr Eyre confirmed she had withdrawn her objection as she was satisfied with the amended alterations to be made to limit the exposure of alcohol to shoppers, and when asked about the final outcome she stated she was pleasantly surprised with the end of aisle wrap around displays of groceries.
16. Mr Waugh presented his evidence, some of which had been superseded by alterations to the single alcohol area in the past few days. He was strongly opposed to alcohol areas adjacent to supermarket entrances, and accused the applicant of making no effort to limit the display of alcohol to shoppers. He stated that apart from some end of aisle displays of non-alcoholic products, nothing else had changed since the implementation of the 2012 Act.
17. He stated that shoppers had to negotiate the alcohol area when entering the supermarket and that the displays were also visible from some checkouts. He quoted information from the law firm Harness Henry –
“The Sale and Supply of Alcohol Act requires all alcohol off licences for supermarkets and grocery stores to have a condition that confines the display of alcohol to a defined area or areas within the premises. This is designed to avoid display of alcohol products at the supermarket entrance and checkout where there is particular visibility and vulnerability”
18. He further submitted that the alcohol area was positioned to achieve the best results from sales. He touched on the method used by supermarkets to obtain the best sales results by the use of a planogram. He suggested the alcohol area had been given no consideration to the requirements of the Act as it was placed exactly where the management wanted it to be for the best sales results.
19. He finally linked the incorrect location of the alcohol area and the failure to limit the display as far as reasonably practicable to the breach of Section 4, in that these failures do not lead to responsible sales of alcohol, and therefore encourage inappropriate consumption giving rise to the harm caused by such consumption.
20. Mr McGill questioned Mr Waugh at length in respect of the positioning of the alcohol area, and that customers do not go through the area either to the checkouts or to the main body of the supermarket, but Mr Waugh was adamant that this was not the case, as shoppers accessing the bakery or produce area had to pass the alcohol area, and it was in clear view of some of the checkouts.

Closing Submissions

21. Mr McGill presented a comprehensive submission in support of the application. In particular, he referred to the Court of Appeal decision in *J & C Vaudrey Limited and Ors v Canterbury MOH [2016] NZCA 539*, where it held that the District Licensing Committee does not have the power to impose a single-area condition specifying a single alcohol area different to that proposed by the applicant, when that course is opposed by the applicant.
22. He submitted that sec 113(5)(b) does not restrict the alcohol area to be close to the restricted areas, or in view of the main body or entrance of the premises. He stated that the plan of the premises shows quite clearly that to enter the alcohol area a shopper must deviate from a path to any other area of the supermarket, and that the Inspector is incorrect that shoppers pass through it.
23. He further submitted that the applicant had done all that was required to shield the area as much as possible from view, by strategically placed grocery display shelving, wrap around end of aisle displays, and clearly delineating the area by flooring strips.
24. Mr McGill further submitted.
“that the Committee is not minded to grant the application on the terms sought by the applicant, it should decline the application rather than grant it with conditions that have the effect of changing the plan proposed by the applicant”.
He advised that as the renewal period expired on 10th October 2018 a conditional approval could not be appealed and heard before the licence expired, whereas declining the application could be appealed, with a stay until determination of the appeal.

Decision and Reasons

25. We are required in respect of an application for the renewal of a licence to consider criteria set out in s131 of the Act.

s131 Criteria for renewal

- (1) *In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:*
 - (a) *the matters set out in paragraphs (a) to (g), (j), and (k) of section 105 (1)*
 - (b) *whether (in its opinion) the amenity and good order of the locality would be likely to be increased to more than a minor extent, by the effects of a refusal to renew licence:*
 - (c) *any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 129.*
 - (d) *the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised or promoted alcohol*

The matters referred to in section 1 (a) are;

- (a) *the object of this act:*
- (b) *the suitability of the applicant:*
- (c) *any relevant local alcohol policy:*
- (d) *the days on which and the hours during which the applicant proposes to sell alcohol:*
- (e) *the design and layout of any proposed premises:*
- (f) *whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:*
- (g) *whether the applicant is engaged in, or proposes on the premises to engage in, the*

provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:

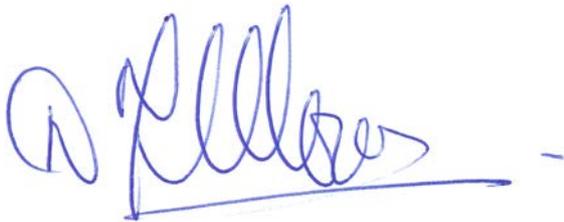
- (j) whether the applicant has appropriate systems, staff, and training to comply with the law:*
- (k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.*

We made it clear from the outset that our deliberations would be centered on the objection by the Licensing Inspector in relation to the design and layout of the premises, specifically the single alcohol area, and its influence on the object of the Act. However, we must address those other matters to which we are required to have regard.

- 26. s105 (1)(b) suitability was not in question.
- 27. s105 (1)(c) local alcohol policy, there is none.
- 28. s105 (1)(d) days and hours, 7.00am to 11.00pm meet the default maximum hours of the Act
- 29. s105 (1)(f & g) supermarket products.
- 30. s105 (1)(j) systems, staff and training is adequate, from the reports.
- 31. s131 (b) no evidence was forthcoming in respect of any disorder in or around the premises and the issues in respect of this hearing would not influence this consideration
- 32. We respect the Licensing Inspectors tenacity in pursuing his objections to the exposure and positioning of the single alcohol area. Many of his points raised in respect of profit over compliance could, at other times, have challenged the positioning of the single alcohol area, however, precedence has been set, and we would fail in our reasoning if we ignored legal interpretations.
- 33. We are satisfied that the position of the single alcohol area is fully compliant with s113(5) of the Act. It does not lie in an area of the premises through which the most direct pedestrian route between the entrance of the premises and the main body of the premises passes, nor between the main body of the premises and any general point of sale, passes. The Inspectors view, that shoppers should not pass by the area immediately once through the entrance, is incorrect.
- 34. Mr Radichs' evidence made it quite clear that any relocation of the single alcohol area would not be reasonably practicable either from a practical constructional viewpoint or one of cost verses effect.
- 35. However, the most significant point brought to our attention was the reference to the three other stores, Countdown Huntly, Countdown Bridge Street and Countdown Katikati, whose applications were subject to successful appeals to ARLA, and that these stores had identical layouts to Countdown Carlyle.
- 36. Whilst the plans did not show end of aisle displays, the applicant produced photographic evidence of the recently installed end of aisle wrap around grocery displays and confirmed that they would be permanent. We are satisfied that they provide a distraction and limitation of exposure to alcohol products.

37. Our acceptance that the premises meet the requirements of the Act in regard to limiting the exposure of alcohol as far as is reasonably practicable and our confirmation that the positioning of the single alcohol area is compliant with s.113(5), renders the objection that the applicant failed to meet the requirements of the object of the Act, null and void.
38. The application for renewal of the Off Licence to General Distributors Limited is approved and the single alcohol area is that area marked red as shown on a plan of the premises submitted in evidence as exhibit 4. The Off Licence 30/OFF/0042/2018 and notice of renewal attached to and forming part of this decision may issue immediately.

Dated at Napier this 21st day of August, 2018.

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

David Fellows
Chairman
Napier District Licensing Committee.