

IN THE MATTER

of the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER

of an application by **General
Distributors Limited** for a renewal
of Off- Licence pursuant to section
127 of the Sale and Supply of
Alcohol Act 2012, in respect of the
premises situated at 433 Victoria
Avenue, Whanganui and known as
"Countdown Victoria Avenue
Supermarket".

BEFORE THE WHANGANUI DISTRICT LICENSING COMMITTEE

The application for renewal of Off-Licence was advertised in the Whanganui Chronicle on the 25th November and 2nd December 2015 with no objections received. No matters of opposition were raised under section 128 and 129 reports; therefore the matter was considered by the Whanganui District Licensing Commissioner on the papers contained in the full file provided by the secretary in accordance with the provisions of s.202 (1) and 191(2) of the Sale and Supply of Alcohol Act 2012.

Commissioner: **Stuart Hylton**

RESERVED DECISION OF THE WHANGANUI DISTRICT LICENSING COMMITTEE

Application

(1) The premises at 433 Victoria Avenue, Whanganui is currently operating as an off licence 'Supermarket' (036/OFF/3/2009) and this application is to renew the licence.

(2) The application to renew was made on 16th November 2015 on the prescribed form. The application seeks to renew with similar existing conditions apart from the trading hours that have been decreased from the current 6.00am to 12.00 midnight each day (Monday to Sunday) to 7.00am to 11.00pm each day. The changes have been made to conform to the new National Default Hours for off-licence premises.

The applicant requested the District Licensing Committee grant a three month (delay?) period under s 115(2) of the Act during which the single-area condition will not apply. Reports from both the inspector and MOH comment that the proposed changes to the single alcohol area have already been made which negates the need for the deferral request.

The general nature of the business will continue to be that of a 'Supermarket'.

(3) The Victoria Avenue Countdown Supermarket is a long established Wanganui supermarket that has been run by the company for a number of years as part of a significant chain of supermarkets both within New Zealand and Australia. The premise is 'undesignated' and has not come to the notice of enforcement agencies in an adverse manner during the renewal period.

(4) The complete file that I received included –

- The application
- Supplementary Information in support of the application by the company. Most helpful and appreciated.
- Copy of Certificate of Incorporation
- Copy of current licence
- Floor plan received 16 November 2015 that included a demarcated single alcohol area
- Copy of draft renewal advertisement
- Copy of fire evacuation scheme statement
- Reports from Police, Medical Officer of Health and Inspector

Decision Making

(5) In considering this application for renewal of Off-Licence the District Licensing Committee (here in after referred to as "the Committee") had regard to the criteria specified under s. 131 of the Act.

Single Alcohol Area

(6) The Committee must also have regard to the stores display and promotion of alcohol and set a condition in relation to 'single alcohol area/s' in accordance with s. 112 of the Act. That section is copied for clarity:

s. 112 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 for alcohol.*
- (2) The licensing authority or licensing committee concerned must ensure that, when it issues or renews an off-licence for premises that are a supermarket or grocery store, it imposes on the licence a condition describing one area within the premises as a permitted area for the display and promotion of alcohol.*
- (3) On the renewal of an off-licence for premises that are a supermarket or grocery store, any single-area condition imposed when the licence was issued (or was last renewed) expires.*
- (4) Subsection (3) is subject to [section 115\(4\)](#).*

(7) Sections 113 to 115 go on to further describe the requirements when determining 'single alcohol area/s'.

(8) Justice Gendall in his High Court Judgement, CIV-2015-409-000098 (2015) NZHC 2749 dated 6 November 2015, reviewed the requirements of the Act in relation to the renewal process around single alcohol area's for supermarkets or grocery stores in accordance with sections 112-114 of the Act.

He said at para. (61)(a) -

"In the case of an off-licence which is also a supermarket or grocery store, the relevant body must impose a single alcohol area condition if it grants a licence. This entails an evaluative exercise requiring the relevant body to:

- (i) be satisfied that the proposed area is a single area;*
- (ii) be satisfied that the proposed area complies with s 113(5)(b);*

(iii) consider whether the proposed area plan limits, so far as reasonably practicable, the exposure of shoppers to displays, promotions and advertisements of alcohol;”

(9) The purpose of a single alcohol area under the Act is to limit, so far as is reasonably practicable, the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol. (our emphasis)

(10) The application contained the following information to assist the Committee to make its decision on the s.112 - 114 matters:

- A copy of a premise floor plan indicating the area where alcohol is to be displayed, and
- Inspectors report that discusses the proposed 'single alcohol area', and
- Medical Officer of Health's report that offers conditions for the licence pertaining to the 'single alcohol area'.

Additionally the Committee undertook its own inspection of the premise to view the proposed single alcohol area.

(11) The Inspector in his report is rather 'quiet' on whether the proposed single alcohol area is compliant or not however the Committee takes from the omission of any 'opposition' and his offer of recommendations to mean the proposed area is compliant in his view.

(12) The Medical Officer of Health "MOH" in his report also offers no 'opposition' to the renewal and states in relation to s. 112 -114 matters - *"Our assessment of the area indicates that there is no significant work required to achieve compliance under the Act...the position of the single area is not opposed; however we believe that exposure could be limited to an acceptable level by the edition of reasonable conditions"*. The MOH then goes on to recommend two conditions relating to advertising and display of alcohol within the single alcohol area.

(13) The MOH report is a little contradictory when it offers no opposition and states that the single alcohol area achieves compliance but then offers two recommended conditions stating "*exposure could be limited to an acceptable level by the edition of reasonable conditions*". (our emphasis) As there is no opposition raised by the MOH or the inspector within their reports I will deal with the MOH proposed conditions separately as potential conditions under section 117 of the Act. The Committee addresses the recommendation for the two conditions later in this decision as this matter is outside provisions of sections 112-115 being discussed here.

(14) The Committee in considering the aspect of single alcohol area made a site visit to the premises in question. The premise is a large sized supermarket store catering for all the needs of a person on a grocery-shopping trip. The store is spacious with a natural entrance through a fruit and vegetable/ delicatessen section prior to entering into long aisles of foodstuffs, cleaning products etc. The single alcohol area is on the immediate left hand side of the premises to the left of the fruit and vegetable stands. Although shoppers entering the store can see and would normally pass by the proposed single alcohol area, as a matter of normal shopping experience they do not enter into the single alcohol area from when they enter the store through to the check outs unless they consciously decide to. The single alcohol area is quite away from the main customer counters. Compared with the store as a whole, the display is not large or unnecessarily extravagant and little or no alcohol advertising was seen in this area during the site visit. The inspector in his report also comments that during his site visit "*there was no sign of excessive advertising, in fact alcohol related advertising within the store was almost nil*".

(15) This single alcohol area, in my view, is outside –

- the most direct pedestrian route between the entrance to the premises and the general point of sale.
- the most direct pedestrian route between the main body of the premises and the general point of sale.

This is a requirement of s.113 (5)(b). This being my finding and with all agency reports not offering any opposition the single alcohol area as proposed on the renewal application is deemed compliant.

MOH recommendation for two discretionary conditions

(16) In considering the MOH request for the following two discretionary conditions to the renewal application –

- All signage located within the single alcohol area shall be confined to posters that do not exceed A4 in size;
- There should be no "end of aisle" displays within the single alcohol area that face the outer edge of the area;

the Committee declines for the reasons stated below.

(17) The MOH refers to the high court's decision of *Christchurch MOH v J and G Vaudrey Limited* (2015) as giving the DLC the ability to set such discretionary conditions under s. 117 of the Act.

(18) Single alcohol areas are a new aspect of the 2012 Act which relevant decision making bodies are still coming to terms with. The *CHCH MOH v J and G Vaudrey Limited* (2015) is a landmark case that was appealed to the Alcohol Regulatory and Licensing Authority before being further appealed to the High Court. Although it appears there may be a further appeal the High Court judgment of *Gendall J* contains very useful analysis of decision-making required around single use areas and also s 117 discretionary conditions.

(19) *Gendall J* in his decision stated within para. (14)(g) -

"The relevant body has a discretion to impose any further conditions which are reasonable and that are "not inconsistent" with the Act."

(20) Further within the same decision the judge states that conditions under s. 117 must be both reasonable and not inconsistent with the Act. The decision goes on to state that the concept of reasonableness requires being able to justify the decision as being rational with the test being an objective one.

The decision further states within para. (104) -

"I consider the principles can be stated as follows:

(a) the relevant body must have identified a risk which it seeks to abate, or a benefit which it seeks to secure;

*(b) that risk or benefit must be consistent with the purpose and object of the Act, and not inconsistent with the Act in its entirety. In this respect the comments of the authors of *Sale of Alcohol* are usefully repeated: Any conditions considered under this provision must be reasonable, and, in the view of the authors, must relate to, and be consistent with, Parliament's intentions in the legislation as set out in ss 3 and 4 – the purpose and object of the Act;*

(c) the relevant body must direct itself as to all relevant circumstances;

(d) it must then weigh the risk to be abated, or benefit to be secured, against the relevant circumstances as identified;

(e) the condition must be a proportionate response. As was said in *Johnsonville Club Inc v Wellington District Licensing Agency*:122

... a condition which in its totality bears marginal relevance to that total risk, must be said to be illogical and therefore as a matter of law unreasonable.

(f) an absolute prohibition would not ordinarily be reasonable, nor a condition which secured a benefit or abated a disbenefit only marginally; equally, a condition may not be absurd, ridiculous, patently unjustifiable, extreme or excessive; and

(g) ultimately whether a condition is reasonable will depend on an objective assessment of whether there is a rational and proportionate connection, between the identified risk or benefit, when weighed against all relevant considerations. "

(21) The MOH recommended conditions would in effect further limit exposure and advertising of alcohol within the single alcohol area. The report provides very little justification, reasoning or objective analysis for the extra conditions apart from the very brief "*during our visit, we found that the single alcohol area is in a prominent location, with the potential for large exposure. The position of the single area is not opposed; however we believe that exposure cold be limited to an acceptable level by the addition of reasonable conditions*".

(22) The Committee is uncertain whether the MOH is implying the single alcohol area, in his view, is only compliant with the addition of the two conditions or rather that the object of the Act will be better able to be achieved with the addition of the conditions? We are also concerned that there is no evidence to suggest the applicant has had the opportunity to hear of the recommended conditions and make their representation on the matter in accordance with natural justice provisions. The lack of evidential basis and justification of the proposed conditions prohibits the Committee in making a full evaluative decision. In hindsight it may have been advisable for the MOH to have opposed the application in order for all parties to have been afforded the luxury, in one instance, and the right, in the other, to be heard and give fuller evidence. That is not the case and the Committee deals with the matters on the evidence before it.

(23) Section 114 (1)(a) of the Act states that every single-area condition takes effect as a condition that the licensee of a premises concerned must ensure that no display or promotion of, or advertisement for, alcohol occurs on the premises at any place outside the alcohol area. Therefore clearly within the single alcohol area there is an expectation of display, promotion and advertisement of alcohol. Section 117 allows for conditions generally but they must be reasonable and have a need for an evidential basis for the proposed condition.

(24) The Act envisages some exposure to shoppers of alcohol displays, promotions and advertisements, provided they are within a single alcohol area compliant with ss. 112 – 116. The purpose of a single alcohol area under the Act is to limit, so far as is reasonably practicable, the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol.

(25) The MOH suggested conditions presupposes that the single alcohol area by its prominent location in the supermarket affords shoppers large exposure to alcohol which is not envisaged under the Act or within the object of the Act. Again there is little comment or evaluation from the MOH to argue the merits of this stance. Therefore the Committee will have to rely on evidence from the inspector and what we observed during the site inspection.

(26) The inspector in his report commented that during his site visit "*there was no sign of excessive advertising, in fact alcohol related advertising within the store was almost nill*". This was also the case when the Committee visited the store with only a few small (slightly bigger than A4) advertising signs discretely placed within the single alcohol area.

(27) Further our inspection noted that although the single alcohol area was close to the entrance of the store, it was compliant with s. 113(5)(b) matters, was reasonably innocuous in that it wasn't overly overt in nature and shoppers would have to consciously walk into the single alcohol area away from the normal shopping areas. It would also be hard to suggest any other areas of the store where the single alcohol area could be sighted without having shoppers walk through it – unless it was gated off.

(28) The question also needs to be asked whether the conditions suggested are likely to have any positive effect in relation to any section 131 matters, especially in relation to the object of the Act. Again no evidence is provided by the MOH to assist with this determination. There is no evidence before the Committee to determine that the size of advertising or end of aisle displays, within a permitted single alcohol area, are likely to minimize the harm caused by the excessive or inappropriate consumption of alcohol.

(29) In summary the Committee finds there is insufficient evidential basis for the recommended additional conditions and if imposed would be a disproportionate response to any issue raised or otherwise, does not in itself necessarily assist compliance with the object of the Act and is therefore in this case found to be unreasonable.

Sections 105/131 Analyses:

(30) the object of the Act:

Both the Inspector and Medical Officer of Health inquired into the application seeking evidence that the object of the Act will be complied with under this licence. It is noted that the premise has not come to the notice of the authorities in an adverse way during the renewal period. The inspector within his report notes –

"The applicant has set the bar very high and maintains excellent levels of staff training and performance. The business runs a mystery shopper programme to test staff ID etc and to my knowledge they have never failed a Controlled Purchase Operation." and

"The manner in which the applicant has managed the licence in accordance with the Act is a credit to the applicant and their staff".

Provided the supplied Responsible Service Policy provided by the applicant is followed, the object of the Act should be complied with.

(31) the suitability of the applicant:

The applicant is a private company incorporated in 1987. The applicant is a wholly owned subsidiary of Progressive Enterprises Limited who also operate a significant number of other outlets in New Zealand. The applicant supplied eleven names of certified managers to be employed on the premises, which is seen as generous.

The reporting agencies do not challenge suitability of the applicant and neither does the Committee.

(32) any relevant local alcohol policy:

No local policy currently in place.

(33) the days on which and the hours during which the applicant proposes to sell alcohol:

The applicant has applied for truncated hours to conform with the National Maximum Trading Hours for this type of premise - Monday to Sunday 7.00am to 11.00 pm. These are considered reasonable.

(34) the design and layout of any proposed premises:

The application included a detailed CPTED assessment received with the application. No issues raised by reporting agencies and I see no issue with design and layout. Single Alcohol Area layout is discussed earlier in this report.

(35) whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the renewal of the licence:

I accept the inspectors assessment that there have been no complaints about nuisance type offences in the area in the past and that if managed well this should continue.

(36) whether the applicant has appropriate systems, staff, and training to comply with the law:

The applicant has nominated eleven managers of varied experience and skills. The inspectors report notes – *"the applicant has set the bar very high and maintains excellent levels of staff training and performance. The business runs a mystery shopper programme to test staff ID etc and to my knowledge they have never failed a Controlled Purchase Operation".*

Reporting Agencies

(37) The following reports were received under section 103/129 of the Act.

(38) **Police** – Report received on 20th November 2015, of no opposition.

(39) **Medical Officer of Health** - Report received on 8 December 2015, offering no opposition to the renewal but recommending two conditions be added to the off-licence renewal. This is discussed within sections (15) to (26) within this decision.

(40) Licensing Inspector

Full report dated 23rd December 2015. The inspector provided, amongst other things, his assessment of the application in relation to the Act. He also assessed the application against s105 criteria. This assessment has been referred to in this report.

The inspector concluded that the application is complete and will likely meet the criteria for renewal with offered conditions.

Committees Decision and Reasons

(41) Based on the evidence provided to the Committee within the complete file, lack of opposition from the relevant agencies, the Committee's site inspection and assessment above, the Committee concludes that the application meets the s. 105/131 criteria under the Act to be granted renewal of an off-licence for the premise situated at 433 Victoria Avenue, Whanganui, known as 'Countdown Victoria Avenue'.

(42) Accordingly the application is **approved for renewal for three years** subject to the following conditions and payment of any outstanding fees, if any.

The following conditions will apply to the licence:

- (a) No alcohol is to be sold or delivered from the premises on Good Friday, Easter Sunday or Christmas Day or before 1.00pm on Anzac Day
- (b) Alcohol may only be sold or delivered on the following days and during the following hours: Monday to Sunday 7.00am to 11.00pm.
- (c) The licensee must ensure that for each principal entrance to the premises there is displayed at all times a sign attached to the inside or outside of the premises, so as to be easily read by people immediately outside the entrance, stating the ordinary hours of business during which the premises are open for the sale of alcohol.

(d) The licensee and managers on duty must ensure that the provisions of the Act relating to the sale and supply of alcohol to prohibited persons are observed and must display appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of liquor to minors and the complete prohibition on sales to intoxicated persons.

(e) The licensee must ensure that at all times a copy of the licence, together with a statement of all conditions subject to which it is issued, is displayed—

- attached to the inside of the premises concerned; and
- so as to be easily read by people entering each principal entrance.

(f) Drinking water must be freely available to customers while alcohol is being supplied free as a sample on the premises and signage directing people to drinking water must be prominently displayed on the premises at that time.

(g) No alcohol is to be sold on the premises unless it contains no more than 15% ethanol by volume measured at 20°C and is—

- (a) beer that complies with the appropriate New Zealand food standard for beer; or
- (b) mead that complies with the appropriate New Zealand food standard for mead; or
- (c) fruit or vegetable wine that complies with the appropriate New Zealand food standard for fruit or vegetable wine (however that product may be described in the standard); or
- (d) grape wine that complies with the appropriate New Zealand food standard for grape wine (however that product may be described in the standard); or
- (e) a food flavouring, prepared for culinary purposes, that is unsuitable for drinking undiluted.

(h) In accordance with s. 113 of the Act the Single Alcohol Area as delineated on the application file plan date stamped 16 November 2015, is a permitted area for the display and promotion of alcohol.

(i) The whole of the premises is 'undesignated'.

Dated at Whanganui District this 8th day of January 2016.

Signed



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Stuart Hylton
Whanganui District Licensing Commissioner