

[2019] NZARLA 270

UNDER

the Sale and Supply of Alcohol Act
2012

AND

IN THE MATTER

of an appeal pursuant to s 154 of
the Act against a decision of the
Thames Coromandel District
Licensing Committee granting an
off-licence for premises situated at
Unit A, 23 Albert Street,
Whitianga, known as 'Whitianga
Wines & Spirits'

BETWEEN

TIFFANY ANNE REED
First Appellant

MARIA TERESE OSBORN
Second Appellant

PARMINDER SINGH KAINTH
Third Appellant

RANJIT SINGH SAINI
Fourth Appellant

AND

KALOTI NZ LIMITED
Respondent

AND

MEDICAL OFFICER OF HEALTH
Section 204 Party

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly

Member: Ms S L G Mehrtens

HEARING at THAMES on 6 December 2019

APPEARANCES

Ms Pervinder Kaur – for appellants

Ms Deborah Riley – for respondent

Mrs Nicole Zeier – Medical Officer of Health delegate

Sgt James Kernohan – New Zealand Police – to assist

Mr Brian Taylor – Thames Coromandel District Council – to assist

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DECISION OF THE AUTHORITY

Introduction

[1] On 17 October 2019, following a public hearing on 16 September 2019, the Thames-Coromandel District Licensing Committee (DLC) granted an application for an off-licence to Kaloti NZ Limited for premises at Unit A, 23 Albert Street, Whitianga to be known as 'Whitianga Wines & Spirits'.

[2] Ms Tiffany Anne Reed, Ms Maria Therese Osborn, Mr Parminder Singh Kainth, and Mr Ranjit Singh Saini appeared as objectors before the DLC. They now appeal the decision of the DLC.

Summary of result

[3] The Authority is not satisfied that the grounds of appeal have been made out. Accordingly, the appeal is dismissed. Pursuant to s 158 of the Act, the decision of the DLC is confirmed.

The proposed premises and applicant

[4] The DLC has described the premises as follows:¹

The proposed premises is situated in the town's CBD and is flanked by an Antiques and Collectibles Shop on one side and a Tattoo Parlour on the other side. There is a Pizza Shop, Juice Up shop, Fish & Chips Takeaway and other retail activities in the same block of shops. The proposed premises is relatively small for a bottle store. The interior fit out has yet to be completed pending the result of this hearing.

[5] As the Licensing Inspector reported, the premises was previously a veterinary clinic. Its principal entrance is on Albert Street. The proposed layout is typical of a bottle store, with the service counter located at the entrance to the store, a walk-in alcohol chiller at the rear and display shelves lining the walls. The applicant has stated that the store windows will be clouded or frosted at least half-way up and there will be no external advertising.²

[6] The premises is located within a permanent liquor ban area and within a five-minute walk of the nearest beach reserve and park.³

[7] The sole director and shareholder of the applicant company, Kaloti NZ Limited, is Mr Gurinderpreet Singh.

[8] Before the DLC, Mr Singh said in evidence that he is committed to not selling cheap or risky products and that the premises will not to be a discount store that competes on price. Mr Singh said that he has many premium products available to him that are not stocked elsewhere.⁴ Attached to Mr Singh's evidence is a list of products

¹ DLC decision at [3]

² s 103 report from Chase Cook, Licensing Inspector dated 15 August 2019 at [6.2]

³ Above n 2 at [8.1]

⁴ Singh BoE dated 3 September 2019 at [15]

that he said that he will not sell, including ‘shots’, light spirits, RTDs, and ‘mainstream beers’.⁵ Conversely, also attached to Mr Singh’s evidence is a comprehensive list of products that are proposed to be sold, including a range of single malt and blended whisky, New Zealand and other spirits, liqueurs and wine. Mr Singh also proposes to sell a range of craft beer, low alcohol beer and cider.

[9] Mr Young, Mr Singh’s counsel before the DLC, said that:⁶

As will be apparent from the evidence of Mr Singh, this application is not conventional. Mr Singh does not wish to sell cheap RTDs and beer. He has demonstrated his belief and commitment to his premium business model, and he has learned more about alcohol-related harm through his declined Whangamata application. He clearly does not wish to replicate the orthodox business model of the existing bottle stores in the locality. He clearly does not want 18-25 year old customers queueing for pre-mixed “Bourbon and Cola” over the busy holiday period. In that context, the usual proliferation or harm arguments advanced by the reporting agents must fall away.

[10] Mr Young said further:⁷

While [Mr Singh] has always maintained that his business model promotes premium products, he has now taken the bold step of turning his back on high risk products such as RTDs, light spirits and cheap beer which demonstrates an unerring commitment to his business model.

The Law

[11] Section 105 of the Act sets out the criteria to which a DLC must have regard when deciding whether to issue a licence. Relevant to this appeal, s 105 says:

- (1) In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:**
- (a) the object of this Act:**
 - ...
 - (h) 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 issue of the licence:**
 - (i) whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that—**
 - (i) they would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but**
 - (ii) it is nevertheless desirable not to issue any further licences:**
 - ...
 - (k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.**

⁵ At appendix A

⁶ Opening submissions of counsel for Kaloti NZ Limited dated 16 September 2019 at [5]

⁷ Above n 6, at [16]

- (2) The authority or committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence.

[12] Relevant to s 105(1)(a), s 4 sets out the object of the Act as follows:

- (1) The object of this Act is that—
- (a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and
 - (b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.
- (2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes—
- (a) any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and
 - (b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

[13] In addition, s 106(1) provides a 'legislative aid, detailing the factors to which decision makers must have regard in forming an opinion as to the amenity and good order of the locality':⁸

- (1) In forming for the purposes of section 105(1)(h) an opinion on whether the amenity and good order of a locality would be likely to be reduced, by more than a minor extent, by the effects of the issue of a licence, the licensing authority or a licensing committee must have regard to—
- (a) the following matters (as they relate to the locality):
 - (i) current, and possible future, noise levels:
 - (ii) current, and possible future, levels of nuisance and vandalism:
 - (iii) the number of premises for which licences of the kind concerned are already held; and
 - (b) the extent to which the following purposes are compatible:
 - (i) the purposes for which land near the premises concerned is used:
 - (ii) the purposes for which those premises will be used if the licence is issued.

[14] Also relevant to this appeal, s 116(1) provides:

- (1) The licensing authority or licensing committee concerned may issue an off-licence subject to conditions of any or all of the following kinds:
- (a) conditions prescribing steps to be taken by the licensee to ensure that the provisions of this Act relating to the sale of alcohol to prohibited persons are observed:
 - (b) conditions prescribing the people or kinds of person to whom alcohol may be sold or supplied:

⁸ per *Lower Hutt Liquormart Ltd v Shady Lady Lighting* [2018] NZHC 3100 [28 November 2018] at [66]

- (c) in the case of premises where (in the opinion of the authority or committee) the principal business carried on is not the manufacture or sale of alcohol, conditions relating to the kind or kinds of alcohol that may be sold or delivered on or from the premises.

[15] Finally, s 117 reads:

- (1) The licensing authority or licensing committee concerned may issue any licence subject to any reasonable conditions not inconsistent with this Act.
- (2) The generality of subsection (1) is not limited or affected by any other provision of this Act.

Attitude of reporting agencies

Medical Officer of Health

[16] The Medical Officer of Health opposed the application on the basis that there are insufficient managers for the days and hours sought, and because of concerns relating to the amenity and good order of the locality due to the number of off-licences in Whitianga. Mrs Nicole Zeier, the delegate for the Medical Officer of Health said:⁹

...we are not satisfied that the applicant has established that the amenity and good order of the locality would not be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence having regard to the number of premises for which licences are already in existence.

Whitianga is already well served by off-licences. At the time of reviewing this application there are seven other premises that hold an off-licence in Whitianga. Should this application be granted, there would be eight off-licences within very close proximity to each other in Whitianga, and as such Section 106(1)(a)(iii) requires consideration.

The proximity of the proposed premises to existing off-licences represents increased availability, increased competition and competitive pricing and according to research, increased harm.

Police

[17] By way of an email dated 3 May 2019, Sergeant Andrew Morrison stated that the Police are not opposed to the application.

[18] Notwithstanding that, Sgt Morrison gave evidence before the DLC where he said:¹⁰

I believe that another off license store in town will just increase the supply and flow of alcohol over the Summer/New Years' times adding to alcohol harm. Including alcohol fuelled violence and property damage along with injury or death through medical emergencies.

⁹ s 103 report dated 17 May 2019

¹⁰ Morrison BoE at [17]

[19] Further, Sgt Morrison spoke to what he considered to be local youths and adults suffering from alcohol-related harm saying:¹¹

My concern is that with another off license in Whitianga these vulnerable local youths and adults will be who the off licenses rely on and target to keep earning a revenue over the majority of the year when the holiday makers have gone.

Licensing Inspector

[20] The Licensing Inspector, Mr Chase Cook, said in his s 103 report that he opposed the application on the grounds that the application does not meet the criteria in s 105 of the Act, for the following reasons:¹²

- That Whitianga has a small population of 4,368 people (2013 Census information) and an estimated population of 5,080 in 2018 (Stats NZ) and that within one-kilometre radius of the proposed site, there are currently eight off licensed premises. The addition of another will create an unreasonable proliferation of such businesses in the area.
- That such proliferation is likely to contribute to current and possible future alcohol related harm.
- That alcohol related harm already occurs both during the holiday season and throughout the year, it is a vulnerable community which has a higher than normal level of alcohol addiction and alcohol related problems.
- That the amenity and good order of the locality would likely be reduced by more than a minor extent should this application be granted.

Therefore, to grant the application would be contrary to s 4 of the Act.

There are currently eight off licensed premises within 1 km of the proposed site. The closest being a standalone bottle store approximately 45 m from the proposed site.

[21] The Inspector commented further:¹³

There is a high density of existing off licences for a small town which is a vulnerable community and another premises outlet would provide greater access and demand which would increase the likelihood of creating more alcohol related harm. Therefore, there is reason to believe that the amenity and good order of the locality would be likely to be reduced, by more than a minor extent, by the effects of the issue of the licence.

Objectors

[22] There were sixteen public objections to the application. The Inspector summarised these for the DLC as follows:¹⁴

The objections relate to the criteria in section 105 of the Act. A summary of the points raised by objectors includes:

¹¹ Morrison BoE at [24]

¹² above n 2, at [2.0]

¹³ above n 2 at [8.6]

¹⁴ above n 2, at [10.2.1]

- That there are enough off licensed premises to service the small permanent population of Whitianga.
- That there are already escalating problems with alcohol in Whitianga.
- That having the proposed shop next to a current off licence will create longer opening hours and the discounting of prices.
- That the proposed store is located where local school children congregate, near the pizza shop, ice cream parlour and fish and chip shops.
- That there are no parking spaces for the proposed shop.
- That the addition of another off licence would exacerbate the existing level of alcohol related harm in the community and thus contradicts the object of the Act.

Ms Tiffany Reed's objection

[23] Ms Reed is the owner of a tattoo studio located in the premises next door to the proposed location for Whitianga Wines & Spirits. Ms Reed objected to the grant of the application on the basis that it is inconsistent with the 'object of minimising the harmful effects and inappropriate consumption of alcohol.' Ms Reed said in her objection:

We are concerned that yet another liquor outlet in Whitianga will increase the exposure of alcohol to minors and also persons who are particularly susceptible to the harmful effects of alcohol. And that it will encourage higher levels of inappropriate alcohol consumption, which can undermine community well-being, and do direct and indirect harm to the community. We are concerned also that the potential for greater alcohol consumption across the community will lead to alcohol associated offences and crime, injury and illness.

We also object on the grounds of the effect on the locality.

We are concerned that there is another liquor outlet, Boulevard Liquor, just two shops away from the proposed location, and that the close proximity will lead to longer opening hours and the discounting prices of liquor, which will stimulate heavier consumption. In total there are 4 existing bottle stores and 3 supermarkets currently selling alcohol in Whitianga, we feel this is sufficient, if not already saturated.

We are concerned that a further liquor outlet in Whitianga will shed a disagreeable light on the surrounding businesses and lower the tone of the character of the Whitianga CBD, which has so recently been upgraded.

We strongly object on social and moral grounds ...

Ms Maria Osborn's objection

[24] Ms Osborn owns the antiques and floristry shop located on the other side of the proposed premises. Ms Osborn objected to the application on the basis that there are currently four bottle stores in Whitianga and this one would be a fifth, located just two doors down from an already existing bottle store. Ms Osborn said, amongst other things:¹⁵

¹⁵ objection dated 14 May 2019 sent to the Secretary of the DLC under cover of email dated 15 May 2019

Given the majority of permanent residents is under 5,000 and the likelihood that a third of these is under the legal age to purchase alcohol means that for the greater part of the year the audience for alcohol purchases stands around 3335 people thereabouts. Given the existing outlets are more than adequate to cater for the permanent residents and the holiday influx of visitors yet another takes the town to a point of saturation. It is to be noted that all of these stores are located within one square mile of each other, no doubt when the town pushes up to the other end of Joan Gaskell Drive there will be even more.

The location of the new outlet is concerning for several reasons, it is only a matter of feet and yards from a Pizza store and a Fish and Chip shop which is frequently a place where the local School Children congregate. I have taken an empty premises and spent five years and tens of thousands of dollars making it an asset to the town (see Epoch Antiques and Floristry), it will be sandwiched one shop bar one between two bottle stores and I expect it will not be beneficial to my business.

There is currently an ongoing upgrade and gentrification of town precincts at a significant cost to the Council and the ratepayers, while this work has been ongoing it has been at a significant impact to the locals and the local business owners of whom I am one. I am concerned that the proliferation of yet another bottle store will lower the tone of the revamp in this part of Albert Street and wipe away the gains the upgrade of the town precincts had made.

Mr Parminder Kainth's objection

[25] Mr Kainth is a trade objector, who holds an off-licence for Boulevard Liquor, which is located at 27 Albert Street Whitianga, two shops away from the proposed premises.¹⁶ Mr Kainth said in his objection:¹⁷

I do not have a problem if they apply at some other premises but this one is just next to my Retail Store.

My address is 27 Albert Street which has an off license issued for the last 8 Years.

We can't have two stores next to each other.

Mr Ranjit Saini's objection

[26] Mr Saini is also a trade objector. Mr Saini owns an off-licence in Lee Street trading as Liquorland Whitianga. Mr Saini says:¹⁸

We already have 3 off licence premises within [a] 250 metre (approximate) radius of each other. Having [a] 4th one almost within same sort of radius is not acceptable.

DLC decision

[27] After canvassing the evidence for the applicant, the Police, the Medical Officer of Health, the Inspector, and the objectors, the DLC set out the relevant criteria in the Act, discussing each seriatim.

¹⁶ Before the DLC Mr Kainth said he is attached to Super Liquor Mercury Bay, Super Liquor Whitianga and Boulevard Liquor – DLC transcript at page 3

¹⁷ Email objection dated 13 May 2019

¹⁸ Email objection dated 19 May 2019

[28] The views of the appellants, which we have already set out above, are referred by the DLC in its decision.¹⁹ We discuss these further below.

[29] In the case of Mr Ranjit Saini, the DLC specifically noted that he queried whether the niche market that the applicant says he will target actually exists. The DLC noted that Mr Saini said that he, and other stores, already offer fine wines and premium spirits and that 15-30% of his sales were craft beer, fine wine and premium spirits.²⁰

[30] In respect of s 105(1)(a) of the Act (object), the DLC noted that the application is distinguished from the normal type of application for a bottle store in that the applicant stated he will not sell shots, RTDs, light spirits and cheap mainstream beer. The DLC noted, however, that the agencies and objectors said the offer of such an undertaking still did not allay their concerns.²¹

[31] In terms of amenity and good order of the locality (s 105(1)(h)), the DLC had regard to s 106(1) of the Act and amongst other things, turned its mind to the issue of proliferation saying:²²

We are further obliged to consider the number of premises for which licences of the kind concerned are already held. We heard that there are already 4 off-licensed bottle stores within 1000 metres of the proposed store. There are also two supermarkets, a Club and a grocery store in the township holding off licences. The granting of this application would see a 9th outlet within this locality.

We are required to consider “the purposes for which land near the premises concerned is used”. The agencies have told us there is a Pizza shop, a Juice Up Shop, Fish & Chip Shop and an Antiques and Florist in the same block as the site. The area is apparently popular for children and busy especially during the summertime.

[32] The DLC concluded:²³

We find, on balance, that a speciality wine and spirits outlet that does not sell shots, RTDs and cheap beer & wine will not reduce the amenity and good order of the locality by more than a minor extent.

[33] The DLC went on in to consider s 105(1)(i) and said:²⁴

We heard from the Police that Whitianga does not experience the same issues as Whangamata and other seaside towns. We were told that reported crime was down on the previous year and that there was no significant issue with breaches of the town’s alcohol ban.

On that basis we have determined that the amenity and good order of the locality is not so already badly affected by the effects of the issue of existing licences that we should not issue any more.

¹⁹ DLC decision at [56] – [61]

²⁰ DLC decision at [60]

²¹ DLC decisions at [70]

²² DLC decision at [80] – [81]

²³ DLC decision at [82]

²⁴ DLC decision at [83] – [84]

[34] In making its decision on the application, the DLC said:²⁵

Section 3 of the Act requires us to act reasonably in the exercise of our duties and to regulate with the aim of helping achieve the object of the Act.

The Committee accepts this direction and agrees that outlet density is a matter that we must consider carefully when determining whether to grant additional licenses. Indeed section 106(1)(a)(iii) says we must have regard to “the number of premises for which licences of the kind concerned are already held” (as they relate to the locality). However, we do not consider this criteria in isolation as it must be linked back to current, and possible future, amenity and good order levels.

We put to one side the evidence of the trade objectors even those that have residence in the town because none of them were able to give us direct evidence of current or potential for future, noise, vandalism or disorder. They were sceptical of the applicant’s business model and believed that the existing stores already catered for the ‘premium and craft’ market.

The undertaking offered is considerable and, in our view, will draw a different clientele to the business. Whether there will be enough of them to make the business viable will, of course, be entirely up to the applicant to prove.

This undertaking is sufficient for the Committee to conclude that the application as proffered would assist in achieving the object of the Act. We now turn ourselves to the imposition of any conditions that will cement the undertaking offered and any other concerns that we may hold.

[35] In granting the licence, the DLC imposed the following condition 8:²⁶

8. No alcohol of the following types are to be sold under this licence:

- a) Spirit-based shots of any type;
- b) Ready to Drink (RTDs) of any type;
- c) Light spirits up to 13.9% abv of any type;
- d) Mainstream beers under \$25 per dozen;
- e) No single sales of beers or cider under 500mls excluding craft beers;
- f) Cask wine of any type.

Grounds of appeal

[36] The grounds of appeal set out in the notice of appeal²⁷ are that the DLC erred:

- (1) in its application of s 105(1)(a) of the Act by relying on the applicant’s undertakings and granting the licence based on these undertakings. The DLC failed to take into account relevant considerations such as there are already eight off-licence premises within 1 km of the premises and that the proposed operations would be likely to lead to alcohol-related harm (ARH) in the locality;
- (2) by relying on s 117 of the Act to impose discretionary conditions which were clearly inconsistent with s 116(1)(c) of the Act. Section 116(1)(c) does not permit a DLC to impose a condition on a bottle store off-

²⁵ DLC decision at [97] – [101]

²⁶ Condition 8 as amended by corrigendum issued on 18 October 2019

²⁷ dated 29 October 2019

licence restricting the types of alcohol that the licensee may sell. A condition purporting to restrict the kinds of alcohol that the applicant (bottle store) can sell would be ultra vires;

- (3) by relying on the applicant's consent in imposing conditions relating to the types of alcohol. Consent by a licensee/applicant cannot confer jurisdiction on a DLC where the statute does not; and
- (4) by forming a view that a speciality wine and spirits outlet will not reduce amenity and good order of the locality by more than a minor extent, in particular when there are already 8 off-licence premises within 1km of the proposed premises.

[37] Before the Authority, Ms Pervinder Kaur, counsel for the appellants, said that the first and fourth grounds are interrelated.

[38] Further, the respondent agrees in relation to the third ground of appeal that consent cannot confer jurisdiction.

[39] Taken together, there are essentially three issues for the Authority to determine, namely:

- (i) whether the DLC erred by imposing a condition pursuant to s 117 of the Act reflecting the applicant's undertakings;
- (ii) whether the DLC erred by relying on the applicant's undertakings not to sell high risk products such as RTDs, light spirits and cheap beer; and
- (iii) whether the DLC failed to take into account relevant considerations namely that there are already eight off-licence premises in proximity to the proposed premises and the effect of that on alcohol-related harm.

Relief sought

[40] Before the Authority, Ms Kaur said the appellants seek by way of relief under s 158 of the Act, that the decision of the DLC be reversed and the application declined.

Approach on appeal

[41] It is well settled that an appeal brought pursuant to s 154 of the Act is a rehearing.²⁸ As was said in *Mangere-Otahuhu Local Board v Level Eighteen Limited*,²⁹ the onus on the appellant before the Authority is to satisfy the Authority that the decision in the original hearing before the DLC was wrong. In this regard, *Mangere-Otahuhu Local Board v Level Eighteen Limited* reflects what the Supreme Court said in *Austin, Nichols & Co Inc v Stichting Lodestar*.³⁰

Perhaps the most familiar general appeals are those between courts. Similar rights of general appeal are provided by statute in respect of the decisions of a number of tribunals. The appeal is usually conducted on the basis of the record of the court or tribunal appealed from unless, exceptionally, the terms in which the

²⁸ s 157; see also *Capital Liquor Ltd v NZ Police and others* [2018] NZARLA 335 at [109] – [110]

²⁹ *Mangere-Otahuhu Local Board v Level Eighteen Limited* [2014] NZARLA PH 627-228 at [15]

³⁰ *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [146]

statute providing the right of appeal is expressed indicate that a de novo hearing of the evidence is envisaged. ... In either case, the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.

Preliminary issue

[42] The appellants have sought to adduce further evidence on appeal. Each of Ms Reed, Ms Osborn, and Mr Kainth have sought to adduce additional evidence in support of their appeals.

[43] Under s 157 of the Act the Authority has the power to receive further evidence. As the High Court has reiterated, however, that power ought not detract from the general nature of an appeal being by way of rehearing, namely that the Authority is to consider the matter on the evidence before the DLC whose judgment is subject to appeal.³¹ It is for this reason that this Authority said in *Mangere-Otahuhu Local Board v Level 18 Ltd* that:³²

Whilst s 157(4) of the Act gives the Authority a discretionary power to hear and receive further evidence on questions of fact, the Authority takes notice of the High Court's approach as stated in *Hayford v Christchurch District Licensing Authority*, Further evidence should only be adduced "in exceptional circumstances".

[44] In *Paper Reclaim Ltd v Aotearoa international Ltd (No 2)*,³³ the Supreme Court said that an appeal by way of a rehearing:

... does not contemplate a right to a new hearing of the evidence. The appellate Court is required to determine issues which had to be determined in the proceeding of the Court appealed from on the basis of the evidence appearing in the lower Court's record. This may be supplemented by adducing fresh evidence, but only within established guidelines. It would ordinarily be outside the scope of the statutory direction to proceed by way of rehearing for this Court to allow a new case to be put up by the party to the appeal on which fresh evidence has to be called.

[45] In *General Distributors Ltd and Anor v De'Ath and Anor* Duffy J said:³⁴

The test under the High Court Rules for the admission of fresh evidence on appeal is well established, the Court must be satisfied that:

- (a) The fresh evidence is cogent;
- (b) Likely to be material; and
- (c) Could not have reasonably been available at the time of the first hearing.

[46] While the ordinary principles applicable to a rehearing do not preclude the admission of updating evidence,³⁵ in such a case the Authority must be satisfied that the evidence is of circumstances that have occurred since the date of the original

³¹ *Hayford v Christchurch District Licensing Authority HC Christchurch AP 201/92*, 3 December 1991; affirmed in *Cats Niteclub (1991) Ltd v Police* [1997] NZAR 83 (HC) at 88.

³² *Mangere-Otahuhu Local Board v Level Eighteen Limited* [2014] NZARLA PH 627-228 at [12]

³³ *Paper Reclaim Ltd v Aotearoa international Ltd (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124 at [16], footnotes omitted

³⁴ *General Distributors Ltd and Anor v De'Ath and Anor* [2014] NZHC 1485 at [19]

³⁵ *Capital Liquor Limited v New Zealand Police and others* [2019] NZHC 1846 at [48] – [51]

hearing and which ex hypothesi could not have been known to the party seeking to adduce it.³⁶

[47] Before the Authority, Ms Kaur acknowledged that evidence sought to be adduced is not new or fresh. The Authority is satisfied it is not updating evidence of circumstances that have occurred since the date of the DLC hearing and which could not have been known to the appellants seeking to adduce it.

[48] Accordingly, the Authority refused to allow the new evidence to be heard.

Natural Justice

[49] In addition to the grounds of appeal, the Medical Officer of Health submits that natural justice was not afforded to all of the parties. The DLC sought submissions on the proposed conditions before making its decision but Mrs Zeier submits that because parties were not provided the opportunity to comment on the conditions orally at the DLC hearing, but only through written submissions, the DLC breached natural justice.

[50] This matter can be disposed of at the outset.

[51] First, the principle Mrs Zeier considers has not been met is that of *audi alteram partem*, or the right to be heard. That right manifests itself in a number of ways depending on context but in essence, and as we recently said in *Qing Qing Trading Company Limited v Wilson*,³⁷ it ensures that someone affected by a decision is given an opportunity to be heard. That is, to present his or her case, and to have reasonable notice of the case against him or her.³⁸

[52] The right to be heard is afforded to the party likely to be affected or prejudiced by a decision. In this case, that person is the respondent as it is the party that will be subject to the conditions imposed. Ms Deborah Riley for the respondent has submitted before the Authority that the respondent was heard before the conditions were imposed and they were based on undertakings proffered by the respondent in pre-circulated evidence.

[53] In any event, the Medical Officer of Health is not an appellant, and this is not one of the appellants' grounds of appeal.

First issue: whether the DLC erred by imposing a condition pursuant to s 117 of the Act reflecting the applicant's undertakings.

Submissions for appellants

[54] The essence of this issue is that the appellants submit that a condition may not be imposed under s 117 of the Act, which restricts the type of alcohol that may be sold in a bottle store off-licence, because such a condition is inconsistent with s 116(1)(c) of the Act.

³⁶ *New Zealand Co-Operative Dairy Co Ltd v Commerce Commission (1991) 3 PRNZ 262 (HC) at 266, cited in Capital Liquor Limited v New Zealand Police and others* [2019] NZHC 1846 at [49]

³⁷ *Qing Qing Trading Company Limited v Wilson* [2019] NZARLA 241 at [149]

³⁸ *Ali v Deportation Review Tribunal* [1997] NZAR 208 at [220]

[55] Ms Kaur submits that s 116 provides a number of discretionary conditions that a decision-maker may consider when granting an off-licence but s 116(1)(c) does not allow a condition to be imposed on a bottle store off-licence to restrict the types of alcohol that the licensee may sell. It is therefore submitted that condition 8 imposed by the DLC is ultra vires the Act.

[56] Ms Kaur submits that a general provision in a later statute does not derogate from an earlier specific statute. Ms Kaur submits that as s 116 derives from s 37 of the Sale of Liquor Act 1989 it is a specific discretion that was given to DLCs that cannot be derogated from by subsequent provisions. As s 117 is new in the sense that there was no equivalent in the 1989 Act, Ms Kaur submits that if Parliament had intended for the DLC or the Authority to have the power to restrict the kinds of alcohol a bottle store licensee could sell, it would not have included that wording in s 116(1)(c), which explicitly prohibits the application of that provision to bottle stores.

Submissions for respondent

[57] Ms Riley for the respondent submits that *Christchurch Medical Officer of Health v J & G Vaudrey*,³⁹ and *Medical Officer of Health (for the Manawatu District) v G & B Hasler Ltd*,⁴⁰ are authorities for the position that s 117 confers a broad discretion to impose conditions that are reasonable having regard to the particular circumstances of an application.

[58] It is submitted that there is nothing in the text of s 116(1) that purports to limit the discretion in s 117 and to do so would read words into s 116 that are not there. Further, s 117(2) provides that the generality of s 117(1) is not limited or affected by any other provision of the Act.

[59] Ms Riley submits that the intention of s 116(1) is to permit decision-makers to manage risks associated with particular premises rather than to restrict the overall discretion of a decision-maker to impose other conditions under s 117 as may be appropriate for minimising alcohol-related harm.

Analysis

[60] Section 5 of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.

[61] The principle that general provisions in a statute cannot derogate from specific provisions, as a principle of statutory interpretation, applies where two provisions are in conflict. That is, where sections conflict, the specific section overrides the general section. On the other hand, where it is possible to read two provisions in an Act in a way that is not in conflict, provided that it does not offend against the overall legislative scheme or the purpose of the Act, that interpretation is to be preferred.

[62] Section 116(1) expressly provides that a DLC may issue an off-licence subject to conditions of the kinds stated in that subsection. Section 116(2) then prescribes the mandatory conditions that may be applied. There is nothing on a plain reading of the text of s 116 that is prohibitive in nature.

³⁹ *Christchurch Medical Officer of Health v J & G Vaudrey* [2016] 2 NZLAR 382

⁴⁰ *Medical Officer of Health (for the Manawatu District) v G & B Hasler Ltd* [2018] NZHC 1208

[63] In respect of s 116(1)(c), the overall scheme of the Act is that s 32 specifies the types of premises in respect of which off-licences may be granted. This includes manufacturers of alcohol (e.g. wineries), supermarkets and grocery stores (per s 32(1)(d), (e) and (f)).

[64] In the case of supermarkets and grocery stores, s 58(1) then restricts the types of alcohol that may be sold to beer, mead, and wine. Section 58 is expressed as a prohibition on the sale of alcohol other than these types.

[65] Section 116(1)(c) then provides that in the premises where the principal business is not the manufacture or sale of alcohol, further conditions may be imposed relating to the types of alcohol that may be sold. For example, in a supermarket or grocery store (where the principal business is the sale of food rather than alcohol), a DLC may restrict the types of alcohol that may be sold notwithstanding that s 58 provides an exception for the sale of beer, mead and wine.

[66] Section 58 is expressed in negative terms. Section 116(1)(c), however, is expressed in positive terms that allows something to be done. Section 116(1)(c) is permissive, allowing a DLC to impose further restrictions, further narrowing the types of alcohol that may be sold under s 58.

[67] Section 116(1)(c) says nothing about premises where at least 85% of the annual sales revenue is expected to be earned from the sale of alcohol for consumption elsewhere (per s 32(1)(a)). That is not surprising given it is a provision that allows for the narrowing of the types of alcohol that may be sold in supermarkets and grocery stores.

[68] As Ms Riley for the respondent has rightly pointed out, s 117 of the Act was intended to confer a broad discretionary power on a DLC to tailor conditions to the particular circumstances.⁴¹ Given this, were s 116(1)(c) read the way the appellants submit it ought to be read, the new power given to DLCs would be thwarted, at least in part. The DLC could not apply a restriction on the types of alcohol that can be sold by any business except manufacturers, supermarkets and grocery stores. That would be contrary to the express wording of s 117(2), which states “The generality of subsection (1) is not limited or affected by any other provision of this Act”.

[69] In addition, insofar as s 116(1)(c) only applies to manufacturers, supermarkets and grocery stores, there is nothing to indicate that conditions cannot be imposed under s 117 similarly restricting the types of alcohol that may be sold in other types of off-licences. While s 116(1)(c) could have been drafted to include all other types of off-licences, the Authority is satisfied that s 116(1)(c) has effectively been carried-over from the previous s 37(6) of the 1989 Act, and that the effect was equally achieved by s 117(2) (given that there was no equivalent of s 117 in the 1989 Act to carry over).

[70] Having regard to the purpose of the Act, the Authority heard no policy reason why the appellant’s interpretation of s 116(1)(c) ought to be preferred. To the contrary, the Authority considers it would be an odd result if when reforming the system of control over the sale and supply and consumption of alcohol for Parliament to have intended that off-licences (which are already limited as to what alcohol they can sell) could be further restricted, but those off-licences where no such restrictions apply cannot be, despite it being reasonable to do so.

⁴¹ Departmental Report for the Justice and Electoral Committee: Part One (Ministry of Justice, May 2011), at 519.

[71] The Authority agrees with the respondent that as is apparent from *Christchurch Medical Officer of Health v J & G Vaudrey*,⁴² and *Medical Officer of Health (for the Manawatu District) v G & B Hasler Ltd*,⁴³ s 117 confers a broad discretion to impose conditions that are reasonable having regard to the particular circumstances of an application. The Authority sees no conflict in allowing a condition like condition 8 to be imposed under s 117 where to do so would help advance the object of the Act as set out in s 4.

[72] The Authority is therefore not satisfied that s 116(1)(c) prohibits the imposition of a condition under s 117 of the kind imposed by the DLC as condition 8.

[73] Accordingly, the second ground of appeal must fail, as must the third ground, given its relationship to the second ground.

Second Issue: whether the DLC erred by relying on the applicant's undertakings not to sell high risk products such as RTDs, light spirits and cheap beer

Submissions for appellants

[74] Ms Kaur submits that, in essence, when the DLC imposed condition 8, it was of the view that the object of the Act could not be met by the application as submitted by the respondent, but that it could only be met by the application subject to reduced licence hours, and condition 8.

[75] It is submitted that in *Lyger Investments Ltd*⁴⁴ the Authority said the imposition of conditions on a licence is a subsequent consideration for the DLC after it has first determined the application is capable of meeting the object of the Act. In the present case, the DLC formed a preliminary view that the application could not meet the object of the Act and other relevant statutory criteria, and the conditions for which comment was sought from the parties was an attempt to lock in aspects of the business plan as described by the respondent. Further, it is submitted that the DLC after undertaking its evaluative risk assessment, would not have approved an application for a full bottle store style off-licence given there is an existing bottle store within 40 metres of the proposed premises except for the amendments and undertakings proffered by the respondent. Ms Kaur says, the amendments and undertakings proffered by the respondent were an attempt to get the application 'across the line'.

Submissions for Medical Officer of Health

[76] Mrs Zeier submits that the DLC issued the licence subject to conditions restricting the sale of certain types of alcohol on the basis that it would cure the deficiencies in the application such that it would then meet the object of the Act.

Submissions for the respondent

[77] Ms Riley submits that a decision-maker can rely on undertakings, and in the present case the applicant provided sound reasons for the undertakings, which were significant and compelling, as even the Licensing Inspector accepted.

⁴² *Christchurch Medical Officer of Health v J & G Vaudrey* [2016] 2 NZLAR 382 at [68]

⁴³ *Medical Officer of Health (for the Manawatu District) v G & B Hasler Ltd* [2018] NZHC 1208 at [69] and following

⁴⁴ *Re Lyger Investments Ltd* [2018] NZARLA 299-300 at [85]

[78] Unlike in *Lyger Investments Ltd*,⁴⁵ it is submitted that this is not a case where the DLC unilaterally sought to remedy defects in an application after a hearing, but the undertakings were proffered by the respondent in pre-circulated evidence and carefully and extensively evaluated by the DLC. It is submitted that in *Cowe v Yankee Bourbon Co Ltd*,⁴⁶ the Authority upheld the ability of a DLC to incorporate undertakings into conditions.

Analysis

[79] The Authority agrees with the respondent that the conditions in this case were not imposed after the DLC formed a view that the object of the Act could not be met.

[80] The DLC was at pains to ensure it was not imposing the conditions to cure any defect in the application. Following it seeking feedback on the proposed conditions, the DLC expressly said:⁴⁷

We received submissions from Pervinder Kaur purporting to represent the interests of 4 of the objectors who appeared at the hearing namely, Parminder Kainth, Tiffany Reed, Ranjit Saini and Maria Osborn.

It was the view of counsel that the Committee was not entitled to 'cure' an application that would not help in achieving the object of the Act. We are very familiar with the Lyger decision and record that it is very different from this case. The Committee had first decided that the application and the undertaking proffered by the applicant during the hearing was sufficient to meet the object of the Act, i.e. that the sale and supply of alcohol would be undertaken safely and responsibly.

[81] Further, as already noted, the DLC expressly said when making its decision on the application that it wished to give effect to the undertakings made proffered:⁴⁸

This undertaking is sufficient for the Committee to conclude that the application as proffered would assist in achieving the object of the Act. We now turn ourselves to the imposition of any conditions that will cement the undertaking offered and any other concerns that we may hold.

[82] In this respect, the Authority agrees with Ms Riley for the respondent that the circumstances are similar to those in *Yankee Bourbon Co Ltd* where we said:

[101] ... the first respondent gave undertakings not to sell singles (including RTDs) and to cease the fill-your-own service (both of which it has done), despite the DLC not being convinced that Yankee Bourbon was necessarily cheaper in respect of spirits (other than its own brand), beers or its own RTDs.

[102] The undertakings given by the applicant are steps voluntarily taken by Yankee Bourbon to minimise ARH rather than being an indication of the applicant acting in a way which ignores or condones ARH.⁴⁹ Notwithstanding that Yankee Bourbon's suitability was not the subject of challenge, to the extent that Yankee Bourbon's single sales and fill-you-own products lead to harmful consumption after sale, the applicant has changed its business to no longer sell these products.

⁴⁵ *Re Lyger Investments Ltd* [2018] NZARLA 299-300 at [85]

⁴⁶ *Cowe v Yankee Bourbon Co Ltd* [2019] NZARLA 150

⁴⁷ DLC decision at [109] - [110]

⁴⁸ DLC decision at [101]

⁴⁹ *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 33 at [67]

[103] For these reasons, the Authority finds no error on the part of the DLC in respect of it failing to take into account relevant matters when having regard to the suitability of the applicant.

[83] We went on to say:

[138] ... In *Lyger Investments Ltd* the DLC granted a renewal application saying⁵⁰:

Are we satisfied that the sale, supply and consumption of alcohol is being undertaken safely and responsibly, and is the harm caused by the excessive or inappropriate consumption of alcohol being minimised?

The short answer is no. Is the overall gravity of the situation, given that some changes have occurred, as we have discussed above, and is the strength of the evidence, that has been put before us, sufficient for us to refuse the renewal?

On balance the answer is no, but it was very close indeed.

[139] That is, in *Lyger Investments*, despite the DLC finding that object of the Act was not met, it then went on to renew the licence saying: “We will approve a renewal but will impose several conditions that we think are necessary to ensure compliance with this Act.”

[140] In contrast, in the present case the question about whether the application was capable of meeting the object of the Act was answered by the DLC in the affirmative.

[141] When discussing Yankee Bourbon’s undertakings around single sales, it was the Chair of the DLC who noted that it could reflect the undertakings in conditions to ‘make it simpler for everyone’. In this way, the undertakings were offered by Yankee Bourbon and ‘imposed’ by the DLC for convenience which was not the situation in *Lyger Investments*. Yankee Bourbon responded to the DLC’s suggestion by saying that it would prefer that its undertakings be included as conditions to make them clear but in saying “either way, whatever is easiest for the committee”, it is apparent that Yankee Bourbon intended to honour its undertakings even if they were not conditions of the licence.

[142] In light of this, the Authority is not satisfied that the conditions were imposed to ensure compliance with the Act as was the case in *Lyger Investments*.

[143] ...

[144] What is required is that where an application is capable of meeting the object of the Act, any conditions imposed must then be valid, and supported by reasons proportionate and relevant to the restriction sought to be imposed. There is nothing before the Authority to suggest that the undertakings have been invalidly reflected as conditions, and as the conditions reflect the undertakings given by Yankee Bourbon, no question of proportionality arises.

[84] In a similar way, unlike in *Lyger Investments*, here the conditions were proffered by the respondent in evidence circulated prior to the hearing.⁵¹

⁵⁰ DLC decision dated 19 July 2018 at [213] – [217]

⁵¹ Refer Singh BoE at [11] and [15] and appendix A

[85] Accordingly, the Authority is not satisfied that the DLC erred by relying on the applicant's undertakings not to sell high risk products such as RTDs, light spirits and cheap beer. The first part of the first ground of appeal is not made out.

Issue three: whether the DLC failed to take into account relevant considerations namely that there are already eight off-licence premises in proximity to the proposed premises and the effect of that on alcohol-related harm.

Submissions for appellants

[86] In terms of the amenity and good order of the locality, Ms Kaur submits that:

- the proposed premises is situated on the edge of Whitianga's commercial area, which is zoned as Pedestrian Core. The Inspector's report also notes there are 14 potentially sensitive sites within 1km of the premises;
- a quantum leap is not required to conclude that with so many off-licences in the town and with another proposed, that alcohol-related harm might occur or increase;
- as was stated in *Tony's Liquor*, it is not so much the number of licences that creates the concern but rather the harm that can be created by them;⁵²
- the DLC's view that a specialty wine and spirit outlet would not reduce the amenity and good order of the locality is based on the respondent's business model, which was not supported by any evidence such as market research, population projections or other substantive evidence. The effects of a bottle store are the same regardless of whether they are a 'standard' or 'specialty' store. Both types, will affect people with alcohol addictions and the inappropriate or excessive consumption is the same regardless of the nature of the store;
- the premises are undesirable in a locality because of their negative and widespread effects on people's lives;
- a study by *Peter Day et al*⁵³ shows that close proximity to alcohol outlets is associated with increased serious violent crime in New Zealand and that the areas associated with the greatest locational access to alcohol outlets is associated with the highest incidents of serious violent crime; and
- the amenity and good order of the locality will reduce if the application is granted, given the easy access to alcohol and the higher potential of violent crime incidence and in concluding that "a speciality wine and spirit shop will not reduce amenity and good order..." and separating the effects of a bottle store in the way the DLC did, the DLC erred in assessing the amenity and good order of the locality.

⁵² *Tony's Liquor Upper Hutt* [2014] NZARLA 171 at [20]

⁵³ Peter Day et al 2012, Australia and New Zealand Journal of Public Health: <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1753-6405.2010.00827.x>

Submissions for Medical Officer of Health

[87] Mrs Zeier submits that:

- the DLC failed to take into account the number of premises for which licences of the kind concerned are already held, and the nature of the premises and proposed activity would be likely to lead to alcohol related harm in the locality;
- the evidence provided at the DLC hearing by the agencies and the community showed that the amenity and good order of the locality would be likely to be reduced, by more than a minor extent, by the effects of the issue of the licence. Further Mrs Zeier says the DLC itself, having undertaken its evaluation did not believe the application could be granted on the terms sought in its original application, prior to the receipt of objections and opposition from reporting agencies;
- the evidence the Medical Officer of Health produced includes the demographics of Whitianga, Whitianga's level of deprivation, and that all other off-licences are within 1km of the proposed premises;
- the evidence of Sgt Morrison was about a harmful drinking culture in the area, of the enforcement of the alcohol ban area, and his experience in dealing with youth related alcohol harm and of family harm incidents involving alcohol. Sgt Morrison was also concerned that with another off-licence in Whitianga, vulnerable youth and adults will be targeted to make money when summer holiday makers have left Whitianga; and
- the Licensing Inspectors gave evidence of these matters as well as evidence there was a risk of price cutting, a link between proximity to alcohol outlets and serious violent crime, and of calls for service to the Police for alcohol related matters.

Submissions for respondent

[88] Ms Riley submits that the appellants appear to be asserting that the DLC was wrong on the evidence and that the weight given to the various evidence by the DLC was incorrect.

[89] It is submitted that the DLC considered the evidence and that amenity and good order is addressed multiple times in the decision, including by the Police, about levels of harm and improvements in the reported crime in the town. The DLC acknowledged the number of other off-licences in Whitianga and it reduced the proposed trading hours specifically in response to the evidence about other premises in the locality. Therefore, it is submitted, there was no failure on the part of the DLC to consider these premises. In any event, proliferation of itself is not a ground for objections and that the Medical Officer of Health adduced no evidence of any actual impacts on amenity and good order. Ms Riley says that the submission that the premises' locality and its immediacy and convenience is such that the premises will increase the risk of alcohol related harm, was simply not accepted by the DLC.

[90] It is submitted by the respondent that no error is present in the DLC's approach to considering the evidence and there was scant evidence of any current impacts on amenity and good order.

Analysis

[91] The approach to be taken by a decision-maker when determining whether to grant an application for a licence has been well articulated by the higher courts.⁵⁴ As Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, the role of the decision-maker is an evaluative one:⁵⁵

Thus, when the relevant body receives an application, they must consider it against s 105 in deciding “whether to issue a licence”. There is no presumptive position, and certainly no foregone conclusion. I think the reality of the position is that if the object of the Act cannot be achieved by the application, then it cannot succeed.

So, in my view, the position can be summarised as follows:

- (a) The role of the relevant body upon receipt of an application for licensing or re-licensing is an evaluative one, requiring the decision maker to make a merits-based determination on the application.
- (b) In considering an application, the relevant body is fundamentally required to assess whether a licence ought to issue. In so doing, it must:
 - (i) consider any objections made by persons who have a greater interest in the application than the public generally;
 - (ii) consider any opposition filed by the constable in charge of the Police station nearest to where the application is filed, a Licensing Inspector, and the Medical Officer of Health;
 - (iii) have regard to the criteria stipulated in s 105 of the Act ...; and
- (c) The relevant body must finally cross-check whether the application is capable of meeting the object of the Act.
- (d) ...
- (e) It may impose further conditions in accordance with ss 116(1) and 117...

[92] As Gendall J said further, the weight to be applied to each of the criteria in s 105 is a matter for the decision-maker. The phrase “have regard to” bears its ordinary meaning and the decision-maker must actively and thoughtfully consider the relevant matters. This requires the decision-maker to correctly understand the matters to which the decision-maker is having regard, but the weight to be given to such matters is generally within the discretion of the decision-maker.

[93] The evidence of Mr Chase Cook, the Licensing Inspector for the Thames-Coromandel District Council, is that:

- there are eight off-licensed premises within 1km of the proposed site, which is one for every 546 people;
- an additional off-licence would result in one off-licence for every 485 people; and

⁵⁴ *Shady Lady Lighting Limited v Lower Hutt Liquormart Limited* [2018] NZARLA 198-199 at [55] – [65]

⁵⁵ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 72, at [55] – [56]

- this is twice the national average of 1 premises per 1000 people.⁵⁶

[94] Mr Cook's evidence is that Whitianga experiences high levels of deprivation, and given the population of Whitianga, there is the potential for other premises to reduce their prices in order to protect their market share. Under cross-examination, however, Mr Cook accepted that Mr Singh would not be competing on price in terms of cheap products, such as cheap beers, RTDs, shots and the like. Mr Cook remained of the view, however, that while Mr Singh would not be competing in this way, his competitors might.⁵⁷

[95] Mr Cook also referred to the *Day et al.* study,⁵⁸ which findings suggest there is a negative relationship between distance (access) to alcohol outlets and levels of serious violent offences. Mr Cook says that the study concluded that greater geographic access to alcohol outlets (i.e. being in closer proximity to those outlets) was associated with increased levels of serious offending across study areas.

[96] Mr Cook then referred in his evidence to Police statistics for 2017/18 and 2018/19. These statistics show are that notwithstanding an increase in the number of hotel checks undertaken by the Police (303: 410), there was a decrease in the number of drink driving offences (59:41), alcohol-related calls for service (189:160), and instances of public place/ licensed premises violence or disorder (35:30).

[97] Mr Cook said that given the ease by which people in Whitianga can access sales of alcohol (i.e. one can walk or drive to purchase alcohol in as little as 10 minutes), there is a greater potential for violent crime.

[98] In light of this, Mr Cook considered the amenity and good order of the locality would likely to be reduced by more than a minor extent by the granting of the application.

[99] Sergeant Morrison gave evidence, in turn, that binge drinking of alcohol increases the likelihood of criminal and traffic related harm.

- over the New Year period, off-licence premises in Whitianga have queues of cars and pedestrians with youth wanting to purchase alcohol; and
- the Police pick up people, mostly aged 13-25 years old, who cannot stand, are vomiting and do not know where they are or how to look after themselves.

[100] As already noted, Sgt Morrison is of the view that another off-licence store in Whitianga will increase the supply and flow of alcohol over the Summer/New Year's period leading to increased alcohol-related harm, and that it will target vulnerable local youths and adults at other times of the year.

[101] That said, in response to a question from Mr Young about whether Sgt Morrison is seeing disorder, and fighting in the town centre most weekends, Sgt Morrison said "thankfully, not most weekends, but again, if we keep an eye on it in terms of pubs and clubs to a degree, we can keep a cap on that, if you like. If we are dealing with

⁵⁶ DLC transcript at page 128: this figure refers to evidence of the Medical Officer of Health for Masterton in respect of *Masterton Liquor Limited v K N Jaquiere Limited* [2014] NZARLA PH 181

⁵⁷ DLC transcript at page 127

⁵⁸ Day P, et al, *Close proximity to alcohol outlets is associated with increased serious violent crime in New Zealand*, Australian and New Zealand Journal of Public Health (2012) Vol 36 No 1 at page 48

something else it can increase, I suppose what I would say is, there is in terms of disorder. I did hear in terms of a window that was broken, it's a drunk returning home that smashed the window. We have that on occasions but not all the time thankfully."⁵⁹

[102] Further, in response to a question from the DLC about whether the alcohol culture in Whitianga is improving, Sgt Morrison said statistically crime is down but he would prefer to say it is not increasing given the increasing population.⁶⁰ Sergeant Morrison repeated the same in response to a question from Ms Joe for the Inspector.⁶¹

[103] Mrs Zeier gave evidence that there is a large number of alcohol outlets in Whitianga and questioned whether there is a need for a ninth off-licence. Mrs Zeier also gave population statistics for Whitianga and noted the deprivation index for Whitianga is 8 (where 10 is the most deprived and 1 is the least deprived). Annexed to Mrs Zeier's evidence were multiple photos of alcohol displays to show the availability of alcohol in Whitianga.

[104] There is nothing in Mrs Zeier's evidence that goes to the effects of the issue of this licence on the amenity and good order of the locality other than to say the locality suffers from high deprivation.

[105] The Authority is satisfied that the evidence of Mr Cook, Sgt Morrison and Mrs Zeier was properly considered by the DLC.⁶²

[106] The evidence of Mr Saini does not relate to the amenity and good order of the locality. Rather Mr Saini's evidence is that he keeps over a hundred craft beers and stocks premium beer and wine and in his view there should be more of a study undertaken to understand what sort of market there is for premium wines, beer and premium spirits in Whitianga.⁶³

[107] The evidence of Ms Reed is that another liquor outlet in Whitianga will increase the exposure of alcohol to minors and persons susceptible to the harmful effects of alcohol and will encourage higher levels of inappropriate alcohol consumption and will undermine community well-being. That is, Ms Reed is concerned with the object of the Act.

[108] Ms Reed is also concerned that the potential for greater alcohol consumption will lead to alcohol associated disorders such as crime, injury and illness. Further, Ms Reed expressed concern that the close proximity of Boulevard Liquor will lead to the discounting of prices, which will stimulate more consumption. A further outlet, Ms Reed says, will shed a disagreeable light on the surrounding businesses and lower the tone of the character of the Whitianga CBD.⁶⁴

[109] In response to a question from Mrs Zeier, however, Ms Reed said she had no evidence of alcohol-related harm in Whitianga but is aware of alcoholics in Whitianga.⁶⁵

[110] Ms Osborn's evidence is that she is concerned with the number of alcohol outlets in Whitianga and that with 4 outlets, plus 3 supermarkets, 6 clubs, 4 hotels and

⁵⁹ DLC transcript at page 104

⁶⁰ DLC transcript at page 106

⁶¹ DLC transcript at page 109

⁶² DLC decision at [28] - [49]

⁶³ DLC transcript at pages 71 and 72]

⁶⁴ DLC transcript at pages 83 and 84

⁶⁵ DLC decision at page 85

bars, and a licensed café, the number of outlets is reaching saturation.⁶⁶ Ms Osborn said that as the town has had a major upgrade and there is ongoing gentrification of the town's inner precinct with a view to making the inner precinct more family friendly, encouraging locals and visitors to use it with gardens, seating areas, cafes and shops as well as new art installations. Ms Osborn is of the view that another bottle store in the main street is not conducive to these aspirations.⁶⁷

[111] In response to a question from Ms Joe for the Licensing Inspector, Ms Osborn said that she had not personally seen any incidences of vandalism or antisocial behaviour around her premises, although she said she was aware of one premises having a window smashed but was not sure if it was alcohol related.⁶⁸

[112] The Authority is satisfied, in terms of the position summarised by Gendall J in *Vaudrey*, that the DLC had regard to these and the other objections before it. The DLC appropriately summarises this evidence in its decision.⁶⁹

[113] The DLC then found that on balance, a speciality wine and spirits outlet that does not sell shots, RTDS and cheap beer and wine will not reduce the amenity and good order of the locality by more than a minor extent.⁷⁰ The Authority is satisfied this was finding open to it on the evidence, which is generalised in nature and more focused on the fact of proliferation than the effects of proliferation on the amenity and good order of the locality. As this Authority said in *Gisborne Liquormart Limited v Ka Pai Kaiti Trust*,⁷¹

While the number of premises of the kind concerned in a locality is a matter which goes to the DLC's opinion on whether the amenity and good order of the locality, an objection must relate to a matter in s 105 of the Act.⁷² The Trust's objection relates to proliferation of alcohol outlets in Gisborne and the harm that alcohol creates in Gisborne as a result. The proliferation of outlets is a legislative aid for the DLC when forming an opinion on s 105(1)(h) and (i)⁷³. In itself, proliferation is not a ground of objection without some discussion of the effects of the issue of the licence on amenity and good order which is the s 105 criterion against which the application is being evaluated⁷⁴.

[114] The Authority is satisfied that the DLC approached its evaluative task as required, considered the evidence and formed a view on the evidence that was open to it. The Authority is not satisfied that the appellants have established an error on the part of the DLC. The first and fourth grounds of appeal, therefore, must fail.

[115] In reaching our conclusion on this matter, the Authority notes that Ms Kaur stated that a bottle store which offers to not sell shots, RTDs and cheap beer, and does not target youth, will have the same effects on the amenity and good order of a locality as one which does, given that 'alcohol is alcohol' and it is the availability of more alcohol from a further bottle store which is of concern. The Authority notes that Mrs Zeier took a similar stance before the DLC. In response to questions from Mr Young, Mrs Zeier expressed the view that another store, by mere virtue of its

⁶⁶ DLC transcript at page 90

⁶⁷ DLC transcript at page 92

⁶⁸ DLC transcript at pages 93 and 94

⁶⁹ DLC decision at [50] – [63]

⁷⁰ DLC decision at [82]

⁷¹ *Gisborne Liquormart Limited v Ka Pai Kaiti Trust* [2018] NZARLA 3176 at [89]

⁷² s 102(3)

⁷³ *Lower Hutt Liquormart Ltd v Shady Lady Lighting Ltd* [2018] NZHC 3100 at [66]

⁷⁴ See also *I S Dhillon and Sons Ltd (re Big Barrell Palmerston North)* [2013] NZARLA 256 at [35]

existence means that you cannot meet the object of the Act because there is more alcohol.⁷⁵

[116] The Authority disagrees. Undertakings given by the applicant to refrain from selling shots, RTDs and cheap beer, which may be attractive to youth, are in the Authority's view, an attempt to minimise alcohol-related harm relative to a store that chooses not to refrain from doing so. Efforts to minimise alcohol-related harm in this way should not be disregarded as the appellants would have us do. The DLC was right to have had regard to such efforts.

[117] The Authority also notes, that in respect of Mrs Zeier's submissions about the Police evidence and concerns, Sgt Kernohan made no submissions on these matters before the Authority. To the extent that the concerns of the Police were not addressed by the decision of the DLC, this was not something on which they chose to address before the Authority when the opportunity was made available to them.

Summary

[118] In response to the issues raised in this appeal, the Authority finds that the DLC:

- (a) *did not err* by imposing a condition pursuant to s 117 of the Act reflecting the applicant's undertakings;
- (b) *did not err* by relying on the applicant's undertakings not to sell high risk products such as RTDs, light spirits and cheap beer; and
- (c) *did not fail* to take into account relevant considerations namely that there are already eight off-licence premises in proximity to the proposed premises and the effect of that on alcohol-related harm.

Result

[119] For the reasons stated the appeal is dismissed.

[120] Pursuant to s 158 of the Act, the decision of the DLC is confirmed.

DATED at WELLINGTON this 13th day of December 2019

District Court Judge K D Kelly
Chairperson
Alcohol Regulatory and Licensing Authority

⁷⁵ DLC Transcript at page 115