

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application by **TONY'S LIQUOR UPPER HUTT LIMITED** for an off-licence pursuant to s.31 of the Act in respect of premises situated at 168-172 Main Street, Upper Hutt known as "Tony's Liquor"

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole
Member: Ms J D Moorhead

HEARING at WELLINGTON on 4 March 2014

APPEARANCES

Mr N S P Laing – for the applicant
Mr K Foley – for the Medical Officer of Health – in opposition
Sergeant S Bengé – NZ Police – in opposition
Mr J Peat – Upper Hutt District Licensing Inspector – to assist

Objectors

Mr P A Thompson – on own behalf and for Upper Hutt Baptist Church
Ms N G Hutchison

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] The applicant seeks an off-licence in respect of premises situated at 168-172 Main Street, Upper Hutt to be known as "Tony's Liquor".

[2] The application is dated 29 October 2013. In accordance with s.407 of the Sale and Supply of Alcohol Act 2012 the application must be considered under the Sale of Liquor Act 1989. However, the criteria set forth in ss.105 and 106 of the Sale and Supply of Alcohol Act 2012 apply. Any discretionary conditions that might be imposed must be imposed pursuant to s.37(4) of the Sale of Liquor Act 1989.

[3] The Police opposition to the application was incorporated in the opposition by the Medical Officer of Health. The Inspector did not oppose the application.

[4] The proposed days and hours of opening were Monday to Sunday 8.00 am to 11.00 pm. However, in evidence Mr Loveday, a director of the applicant, indicated that the following hours were acceptable:

Monday, Tuesday, Wednesday:	9.00 am to 8.00 pm
Thursday:	9.00 am to 9.00 pm
Friday and Saturday:	9.00 am to 11.00 pm
Sunday:	10.00 am to 7.00 pm

Location of Premises

[5] This was well described by Mr Foley representing the Medical Officer of Health.

[6] Upper Hutt, according to the Medical Officer of Health, has a population of 40,179 (according to the last census). Mr Loveday thought that the population of Upper Hutt was about 65,000. Little turns on this discrepancy as there seemed to be some differences as to the geographical area that constitutes Upper Hutt.

[7] The proposed premises are currently occupied by a convenience store known as "City Stop Grocery Store" at 168-172 Main Street. This is at the very northern end of the city business district of Upper Hutt and is in a Liquor Ban area. The entrance to the proposed premises is from Wakefield Street between "Domino's Pizza" to the east and the "Red Cross Opportunity Shop" to the west. Immediately across the road, 20 metres away and facing the proposed premises, is the main entrance to a large "McDonald's" family restaurant which is open 24 hours a day, seven days a week. There is a drive-through and car park at the rear of "McDonald's". Another pedestrian entrance to the "McDonald's" restaurant is from Main Street which is directly opposite the entrance to a shopping mall and which is 12 metres away from the main entrance to "McDonald's". Outside the proposed premises are two benched seats and a busy bus stop. At the intersection of Main Street and Wakefield Street there are planter boxes where seats have been placed for pedestrians. The Work and Income New Zealand office is at 162 Main Street which is approximately 62 metres (or 40 seconds walk) from the proposed store. The Upper Hutt railway station is 550 metres from the proposed premises (about a five minute walk). At the railway station there is an underpass. This leads to a road which takes one to the Maidstone Skate Park.

[8] The area containing the proposed premises is well known to be a "*hangout*" area where many of the young people of Upper Hutt congregate. The main attraction is the "McDonald's" family restaurant and the bus stops. The most popular time when there are secondary students in the area is between 3.30 pm and 8.00 pm Mondays to Fridays.

[9] The Medical Officer of Health's evidence in this regard was confirmed by the objector Mr Thompson who lives and works in Upper Hutt and knows the area well. Both of them indicated that there seems to be a walking circuit that the young people follow. They start at "McDonald's" at about 3.30 pm. They then walk along Main Street and go to the shopping mall. They then move on to the Maidstone Skate Park via the train station underpass. Some of them consume alcohol at Maidstone Park. They then return to "McDonald's" and then go back to the park. This activity continues until about 6.00 pm or 6.30 pm.

[10] In evidence photographs of young persons loitering or sitting outside the proposed premises were produced. Mr Thompson looked at the photographs and commented that he knew some of the young persons. He commented that accessibility to alcohol was the last thing that the young persons whom he identified needed.

Criteria

[11] Sections 105 and 106 of the Sale and Supply of Alcohol Act 2012 apply. In this case the most significant criteria are the object of the Act, the applicant's suitability, and whether the amenity and good order of the locality would be likely to be reduced

by more than a minor extent. In this latter regard s.106(1)(a)(iii) and s.106(1)(b) are of concern. Thus the Authority must consider whether a new entrant into the market place will create an unacceptable proliferation of off-licences in the area. In addition, the extent to which the proposed premises would be compatible with nearby land use requires consideration. In this regard, the “McDonald’s” and the general locality of the proposed premises (which Mr Thompson referred to as a “hub for young people”) are relevant.

Suitability

[12] Mr Loveday is the Managing Director of Tony’s Liquor Upper Hutt Limited. He has had significant experience in operating licensed premises, is of good character and reputation, and has no criminal convictions. He does not hold a General Manager’s Certificate but proposes to employ well qualified staff who do. He noted that staff members’ contracts provide that a failed controlled purchase operation constitutes serious misconduct which can lead to dismissal. He anticipates spending approximately 60% of his time at the “Taphaus” which is the other licensed premises he currently owns. About 40% of his time will be spent at the proposed business.

[13] The only issue that the Authority has with the suitability of Mr Loveday is his lack of candour. His evidence in chief was self serving and failed to inform the Authority of some of the relevant aspects of the application and his attitude to them. No details of his licensees’ having failed controlled purchase operations were given. In fact there were two failed controlled purchase operations at former premises in which he has been involved, namely at the “Bruhaus Bar” in Wellington and at a “Tony’s Liquor Store” in Manners Street, Wellington ([2011] NZLLA 648; and [2012] NZLLA 729).

[14] His evidence in chief failed to mention the “McDonald’s” family restaurant immediately opposite the proposed premises. Mr Loveday was unaware of the seating arrangements outside the proposed premises. He seemed to have no idea that the area outside the proposed premises constitutes a hub for the bored youth of Upper Hutt.

[15] Mr Loveday’s evidence emphasised that it is proposed to sell quality alcohol products at the premises. The Authority accepts this. However, it was only after being questioned by the Authority that Mr Loveday was prepared to concede that the proposed business, to be competitive, will sell all types of alcohol as well as the high quality craft beers, wines and spirits. It will sell RTDs.

[16] A lack of candour by an applicant is an indication that an applicant might not carry out properly the responsibilities that go with the holding of a licence: see *Re Sheard* [1996] 1 NZLR 751. If an applicant is not completely frank with the Authority then there is a possibility that an applicant will also treat reporting agencies in a similar fashion.

[17] Nevertheless, despite this criticism, this applicant has managed to satisfy the Authority as to his suitability.

Amenity and Good Order of Locality - Proliferation

[18] Section 105(1)(h) requires the Authority to have regard to “*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*”. In this regard s.106(1) requires the Authority to have regard (*inter alia*) to the number of premises for

which similar licences are held in the locality. Within 10 minutes of the proposed premises there are three supermarkets all of which have off-licences. A “Countdown” supermarket is 200 metres away from the proposed premises or a two minute walk from them and is on the trail used by the young people of Upper Hutt (see paragraph [9]). In addition, there are three bottle stores, namely “Capital Liquor” (400 metres or a five minute walk from the proposed premises); “Fergusson’s Liquor”, 1.4 kilometres to the north of the proposed premises (or a 19 minute walk or a four minute drive); and “The Mill” which is one kilometre to the south of the proposed premises (12 minutes’ walking time or three minutes’ drive).

[19] Until the enactment of the Sale and Supply of Alcohol Act 2012, the proliferation of off-licences and the effect of a new entrant into a confined market place was not an issue for the Authority unless the proposal offended against the object of the Act. However, this is now a significant issue when considering whether or not to grant an off-licence. The applicant argued, as did Mr Sheriff in *Utikere v I S Dhillon & Sons Limited*, CIV 2013-454-264; [2014] NZHC 270 that the diminution of sales at other outlets resulting from the same total volume sold was a likely outcome of a new entrant entering the marketplace. It followed that there was no evidence that more liquor in absolute terms would be consumed by the public, either generally or specifically as a result of the new entrant entering the marketplace. Kos J accepted this argument.

[20] When considering s.106(1)(a)(iii), it is not so much the number of licences that creates the concern but rather the harm that can be created by them. This is directly relevant to the object of the Act as set out in s.4 of the Sale and Supply of Alcohol Act 2012. Whilst in *Utikere* Kos J commented that there was no cogent evidence that a new licence would necessarily result in an increase in the supply of liquor to the public and therefore greater harm, that comment is not supported in some of the literature. For example, in the summary of the report by the Alcohol Advisory Council of New Zealand “*The Impacts of Liquor Outlets in Manukau City*” dated January 2012 can be found the following comment:

“In Manukau City off-licence liquor outlets tend to locate in areas of high social deprivation and high population density, while on-licence liquor outlets tend to locate in main centres and areas of high amenity value. Price and non-price competition leads to low alcohol prices and longer opening hours in areas where the density of off-licence liquor outlets is higher.”

[21] That conclusion was confirmed in *Sapphire Dreams Limited* [2012] NZLLA PH 1370. In that case Mr J P Tregidga, who was Mayor of the Hauraki District but also who had been in retailing all his life, said that in retailing any additional outlet creates additional demand and that usually results in price cutting. The price cutting was not necessarily by the new entrant but by competitors. The Authority concluded in that decision that price cutting would result in more liquor becoming available in an area where liquor abuse problems were rife.

[22] The evidence of the Medical Officer of Health, which was supported by Mr Thompson indicated that Upper Hutt is similar to Porirua where much of the population is in the lower socio-economic group. The youth of Upper Hutt have little to do and are frequently bored. They are prime candidates for alcohol abuse.

[23] The Medical Officer of Health referred to a study completed in 2013 by M P Cameron et al which looked at the specific relationships between alcohol density (by type of outlet) and social harms between 2006 and 2011. In the cases of Porirua and

Upper Hutt it observed that an additional off-licence outlet can result in 10.5 additional violent offences a year. Whilst the Authority is cautious about placing too much weight on the research literature, nevertheless the modelling exercise undertaken by the authors of the study tends to support the Manukau study and the *Sapphire Dreams* decision. The most recent Authority decision on this matter is the *Liquor Stop* decision dated 20 March 2014: [2014] NZARLA PH 000309.

[24] The Authority accepts that it is not the intention of Mr Loveday that the applicant will compete against its competition on price. That does not mean, however, that the competitors will not compete on price when a new bottle shop enters the market.

[25] Nevertheless, the Authority accepts Mr Loveday's contention that the concentration of alcohol retailers in the area is relatively low. It does not accept, however, that the applicant will not be targeting the same clientele as the existing off-licensed premises.

[26] As Mr Loveday conceded under questioning, some of the trade will come from customers of "McDonald's". They are unlikely to target the high end product sold by the applicant. It is difficult to believe that the location of the proposed premises opposite "McDonald's" was coincidental and without commercial advantages to the applicant.

[27] In the circumstances of this case it was necessary for the applicant to establish that its entry into the market place of Upper Hutt would not result in unacceptable proliferation of off-licences. It failed to address this issue satisfactorily. Nevertheless, the Authority would not refuse this application simply on that ground. This is because it recognises that the concentration of off-licences is nothing like as great as is found in other areas with similar low-socio economic features.

Neighbouring land use

[28] Section 106(1)(b) of the Sale and Supply of Alcohol Act 2012 is relevant. It requires the Authority to have regard to the purposes for which the proposed premises will be used and whether those purposes are compatible with the purposes for which land near the premises is used. In this regard, the issue is whether the proposed bottle store is a use that is compatible with the "McDonald's" family restaurant across the road and with the area between the two businesses including the bus stops. As Mr Thompson explained, this area constitutes a hub where young people congregate often to commence their *passegiata*. Mr Loveday countered this proposition by stating that his staff would be so well trained that it is unlikely that they would be prepared to sell to young persons. The Authority accepts this. However it also accepts Mr Thompson's proposition to the effect that young people will obtain alcohol from bottle stores despite the best trained staff. They may not personally obtain it from the store; but the alcohol comes from the store. It is the presence of the bottle store that creates the magnet.

[29] Ms Hutchison described the locality as "*a dark area of Upper Hutt*". In this regard, her evidence was supported by that of Mr Thompson and Mr Foley for the Medical Officer of Health.

[30] Mr Thompson was an impressive witness. He is the Youth Pastor for the Upper Hutt Baptist Church. He and his wife run two youth programmes in the low socio-economic areas of Upper Hutt. They also run a home for teenage girls. Eight girls live with them. For many of the girls alcohol has caused major issues. In his view,

“having alcohol available opposite one of the biggest youth hangouts (McDonald’s) is a recipe for disaster”. He pointed out that in Upper Hutt the young people have little to do. They are bored. In his view, having a bottle store at the proposed premises would diminish the amenity and good order of the locality by more than a minor extent.

[31] Whilst much of the evidence offered on behalf of the Medical Officer of Health was hearsay, the relevant points were confirmed by Mr Thompson’s first hand experiences. He knew the area. He knew the people. He was aware of the problems. He was well qualified to give an adverse opinion on the proposal.

Object of Act

[32] When considering the foregoing matters, it is appropriate to stand back and consider whether the object of the Sale and Supply of Alcohol Act 2012 will be achieved if this application were granted. The object of the Act is found in s.4. Section 4(1) seeks to have the sale, supply and consumption of alcohol undertaken safely and responsibly. In this regard, if the granting of this application results in the consumption of alcohol being undertaken unsafely and irresponsibly, then it contravenes the object of the Act. That is exactly the concern of Mr Thompson and the Medical Officer of Health.

[33] An applicant for a liquor licence must prove its case. The onus is upon it. Whilst commercial considerations would indicate that the proposed location of the premises is a good one, when one considers the criteria set out in s.105(1)(h) the Authority concludes that the location is inappropriate. If the proposal was simply to sell a very high quality product without attempting to cater for the rest of the market, then it is possible that the amenity and good order of the locality would be reduced by only a minor extent. However, as the proposed business is intended to cater for the total market, the Authority considers that the applicant has failed to establish that the amenity and good order of the locality would be likely to be reduced by more than a minor extent. The evidence establishes that the effects of the issue of the licence will reduce the amenity and good order of the locality by more than a minor extent.

Conclusion

[34] Whilst the applicant just managed to satisfy the Authority as to its suitability, it has failed to satisfy the Authority that its proposal will only reduce the amenity and good order of the locality by a minor extent. In addition it has failed to establish that the granting of this application is compatible with the Act’s object.

[35] Accordingly, the application is refused.

DATED at WELLINGTON this 28th day of March 2014

A E Cannell
Deputy Secretary