

[2018] NZARLA 198-199

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER

of two appeals pursuant to s 154 of the Act against a decision of the Lower Hutt District Licensing Committee granting an off-licence for premises situated at 1 Rutherford Street, Lower Hutt, known as “Blackbull Liquor”

BETWEEN

SHADY LADY LIGHTING LIMITED

First Appellant

AND

RAKESH PATEL

Second Appellant

AND

LOWER HUTT LIQUORMART LIMITED

Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly
Member: Mr D E Major

HEARING at WELLINGTON on 29 May 2018

APPEARANCES

Mr A G Sherriff and Ms L E S Grey – for the appellants
Mr J H Wiles – for respondent
Mr D K Bentley – Hutt City District Licensing Inspector – to assist

DECISION OF THE AUTHORITY

Introduction

[1] Following a hearing at Lower Hutt on 20 October 2017, and by way of a decision dated 9 November 2017, the Lower Hutt District Licensing Committee (DLC) granted an application for an off-licence to Lower Hutt Liquormart Limited for premises trading as ‘Blackbull Liquor’.

[2] On 20 November 2017, Shady Lady Lighting Limited and Mr Rakesh Patel filed separate appeals with the Authority against this decision to grant the licence.

Grounds of Appeals

[3] The notices of appeal from each appellant are the same. They set out six grounds of appeal, namely that:

- (1) the decision is contrary to ss 3 & 4 of the Act;
- (2) the DLC failed to take into account:
 - a) the Proposed Amendment to the Local Alcohol Policy (PALAP), the Council's decisions leading to this amendment, and the fact that there are no appeals of the PALAP in relation to a cap on new bottle stores in the locality;
 - b) the unchallenged evidence of Ms G Emms, an objector;
 - c) the evidence of disorder and nuisance from inappropriate alcohol consumption in the locality in the past;
 - d) the evidence of the Medical Officer of Health (MOH);
 - e) a joint briefing paper by the Police and MOH dated November 2016;
 - f) a Council subcommittee report dated 23 June 2017;
- (3) the DLC did not stand back and evaluate the evidence and provide reasons as to why granting the application will promote the object of the Act;
- (4) the DLC failed to evaluate the number of premises for which licences are already held, the purposes for which nearby land is used and the purposes for which the premises will be used (per s 106(1)), and its decision was contrary to the evidence;
- (5) the DLC was plainly wrong, and its decision that the objectors' evidence was speculative is contrary to the before and after evidence of two objectors, namely Mr Smith and Ms McKone; and
- (6) the DLC was wrong to grant a new licence in reliance upon ambiguous, meaningless or unenforceable undertakings and conditions.

[4] By way of relief, the appellants submit that the decision of the DLC should be reversed and the application for a licence refused.

Law

[5] Section 105 sets out the criteria to which a DLC must have regard when deciding whether to issue a licence:

- (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:

(b) the suitability of the applicant:

(c) any relevant local alcohol policy:

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

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

(f) whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:

(g) whether the applicant is engaged in, or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:

(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:

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

(k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.

(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.

[6] In respect of s 105(1)(h), s 106(1) provides:

(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.

[7] Section 3 of the Act sets out the Act's purpose:

- (1) The purpose of Parts 1 to 3 and the schedules of this Act is, for the benefit of the community as a whole,—
 - (a) to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2); and
 - (b) to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act.
- (2) The characteristics of the new system are that—
 - (a) it is reasonable; and
 - (b) its administration helps to achieve the object of this Act.

[8] Relevant to s 3 and 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).

[9] Finally, s 211(1) and (2) of the Act provides:

- (1) The licensing authority and every licensing committee must give its decision on an application in writing, and must state in it—
 - (a) the reasons for the decision; and
 - (b) what reports on the application were received; and
 - (c) the attitude towards the application of every report.
- (2) The statement of the attitude towards an application of any report may be in general terms only.

...

Appellants' submissions

[10] In general terms, Mr Sherriff for the appellants asks the Authority to redress what he says was a lack of evaluation of the evidence by the DLC. In evaluating the evidence, however, Mr Sherriff asks the Authority not only to cross-check the application against the object of the Act, but also to cross-check the application against the purpose of the Act. That is, Mr Sherriff invites the Authority to ask "*will the grant of the licence benefit the community as a whole?*"

[11] The requirement to stand back and evaluate whether the issue of the licence will benefit the community as a whole is a matter of law, it is submitted, and goes to the first and third grounds of appeal. The remaining grounds of appeal relate to the requirement for the DLC to evaluate the application against the evidence which, it is submitted, the DLC did not do.

Grounds 1 and 3: the decision is contrary to ss 3 & 4 of the Act, and the DLC failed to evaluate the evidence

[12] Mr Sherriff submits that, not only did the DLC not consider or express any reasons or any finding about how the issue of the licence would benefit the community as a whole, but the DLC failed to provide any reasons for its conclusory assertion that "*The applicant has established that the granting this application is compatible with the Act's objective*" (sic)¹. That is, the DLC did not stand back and evaluate the evidence in relation to how it met both the purpose and the object of the Act.

[13] It is submitted that the Act is to be interpreted and applied in a way that is for the benefit of the community². This gives voice to the community including the appellants and the objectors. Moreover, an applicant must also demonstrate that the grant of the licence also meets both limbs of s 4(1) of the Act.

[14] Issuing a seventh off-licence for an additional bottle store (on top of three existing bottle stores and three supermarkets), it is submitted, will not minimise alcohol-related harm (ARH) from the excessive or inappropriate consumption of alcohol. Mr Sherriff submits that the appellants are supported in this regard by the evidence of the MOH, and by the Hutt City Council's position in relation to its PALAP.

[15] Mr Sherriff submits that the correct approach for a DLC to take before deciding to grant an application for a licence is to ask:

- (a) first, will the issue of the licence benefit the community³ as a whole (s 3(1));
- (b) secondly, will the issue of the licence help achieve the safe and responsible sale, supply and consumption of alcohol (s 3(1)(b), s 3(2)(b) and s 4(1)(a));
- (c) thirdly, will the issue of the licence help achieve the minimisation of the harm caused by the excessive or inappropriate consumption of alcohol (s 3(1)(b), s 3(2)(b) and s 4(1)(b); and
- (d) fourthly, is issue of the licence reasonable (s 3(2)(a))?

¹ per [64] of the DLC decision

² s 3

³ Specifically, the community which will be affected by the application

[16] It is also submitted that the DLC did not make a merits-based determination of the application as it was required to do, and failed to properly consider the objections made in respect of the application, particularly the unchallenged evidence of Ms G Emms. As the DLC did not refer to Ms Emm's objection, it is submitted that there is no basis to infer or conclude that the DLC had any regard to it let alone that the DLC evaluated her evidence.

[17] In respect of the evidence from the applicant Mr Sharma, while the DLC listed a series of undertakings given by Mr Sharma, it is submitted that the DLC did not undertake a merits-based evaluation of conflicting evidence, concluding that objectors' evidence was "*speculative*"⁴. The conclusory assertion reached by the DLC referred to in paragraph [12], Mr Sherriff says, flies in the face of the 'before and after' evidence of Ms McKone, Mr Smith and Dr Palmer, in relation to impact that the closing of The Mill bottle store in Hutt Central had on the locality.

[18] In short, it is submitted that the DLC failed to evaluate the evidence in support of the application against the preponderance of evidence from the objectors and the MOH, and failed to evaluate the application against s 3 (purpose) and s 4 (object) of the Act. In particular, Mr Sherriff submits:

- (a) there is no evidence that a further bottle store will benefit the community as a whole;
- (b) to grant a new off-licence would be unreasonable;
- (c) it is impossible to conclude that granting a new off-licence where there are already six off-licences will minimise the harm caused by excessive or inappropriate consumption of alcohol; and
- (d) in all circumstances, it will not help to achieve the object of the new reformative system of control over the sale and supply of alcohol for this application to be granted and the licence issued.

Grounds 2 and 5: The DLC failed to take into account relevant matters, and the decision was contrary to the evidence

[19] Mr Sherriff further submits that the decision of the DLC is unreasonable in so far as the DLC failed to take into account the "consensus community viewpoint" which resulted in the PALAP.

[20] A Local Alcohol Policy (LAP) is in force in the Hutt City Council and the Council has proposed an amendment which will cap the number of new off-licence premises that can be established in six community areas, including Hutt Central. That is, it is submitted that the community, supported by the Police and the MOH, has decided against new bottle stores in the area where Blackbull Liquor is proposed to be located. Although the PALAP is currently the subject of appeals⁵, the PALAP is not the subject of an appeal by *bottle stores* in relation to the proposed cap.

[21] While it is acknowledged by counsel for the appellants that the DLC is not bound by the PALAP, it is submitted that the DLC was wrong in dismissing the PALAP as carrying no weight for the reason that it is not yet in force pursuant to s 90 of the Act.

⁴ DLC decision at [59]

⁵ filed with the Authority pursuant to s 81 of the Act

Rather, because ss 105 and 106 are not exhaustive lists of the material and evidence that a DLC can consider, when considered against the backdrop of ss 3 and 4 of the Act, the DLC was wrong in both fact and law in being “peremptorily dismissive” of the evidence which comprised Council resolutions, reports and the community support for the PALAP. Mr Sherriff submits that a DLC must have sound justification for departing from such community consensus.

[22] In any event, as the health data which sits behind the PALAP was referred to in the MOH’s s 103 report⁶, the DLC should have had regard to that evidence pursuant to s105(1)(k) of the Act. Pursuant to s 211(1)(a) of the Act, Mr Sherriff submits that a DLC must evaluate and provide findings or reasons in respect of the mandatory criteria in s 105 of the Act. Granting the licence for Blackbull Liquor, it is submitted, is contrary to the PALAP and all that preceded it.

[23] Mr Sherriff also submits that the DLC failed to take into account the unchallenged evidence of Ms Emms (an objector), and the evidence of Ms McKone and Mr Smith about disorder and nuisance in the locality before and after the closure of The Mill bottle store just prior to Christmas 2015. The DLC dismissed this evidence as being ‘speculative’ when it was not.

[24] It is also submitted that the DLC dismissed detailed localised evidence presented by Dr Palmer because the DLC found the applicant to be a suitable person to hold a licence, and because of undertakings offered by the applicant. Faced with an application for a new licence, it is submitted that the DLC was required to have regard to the MOH report and the expert evidence of Dr Palmer and to evaluate the application against that evidence. No reason was given by the DLC for reaching a conclusion contrary to that evidence.

Ground 4: The DLC failed to evaluate ss 106(1)(a)(iii) and 106(1)(b)(i) against the evidence

[25] Mr Sherriff submits that s 105(1) requires a DLC or the Authority to undertake a merits-based evaluation of the application against the evidence. There is no reasoned basis, he says, for the DLC’s conclusory assertion that there would be no reduction in the amenity and good order of the locality if regard is had to the number of premises for which licences of the kind are already held, and the purposes for which land near the premises concerned is used (per s 106(1)(a)(iii) and (1)(b)(i) of the Act).

[26] It is submitted that there is nothing to indicate that the DLC considered any of the evidence of the objectors or of Dr Palmer in relation to these matters, and there is no evidential basis for the grant of the application in light of these matters.

Ground 6: The DLC was wrong to rely on ambiguous, meaningless or unenforceable undertakings and conditions

[27] It is further submitted that the applicant offered eight undertakings to the DLC which were translated into conditions on the licence that was issued.

[28] Two of these conditions, it is submitted, are unnecessary as they repeat the law set out in ss 122(1)(b) and 237 of the Act.

⁶ report of Dr Jill McKenzie, Medical Officer of Health, Hutt Valley District Health Board dated 30 June 2017

[29] In respect of the condition (c) which simply says “*no external advertisements will occur on the premises*”, it is unclear what is meant by this condition as there is no discussion in the decision about it.

[30] Further, in respect of condition (f) that “*no slushy RTD drinks are to be sold from the premises*”, it is submitted that there is no discussion as to what the term ‘slushy RTD’ means in relation to any bottle store product. In the absence of clarity as to what this term means and about what harm the condition is seeking to address, it is not possible to determine if the condition is inconsistent with the Act (per s 117).

[31] Finally, in terms of condition (i) “*that a well run off-licence such as Lower Hutt Liquormart Limited should not see any increase in breaches of the Alcohol Free Zones or disorder*”, it is submitted that the condition unreasonably conflates the desired outcome (that there are no breaches or disorder), with the statutory obligation to comply with the Act. The condition itself does not limit liquor ban breaches or disorder in the area. There is also no definition of what “well run” means and it is questionable whether such a condition could ever be enforceable.

[32] It is submitted that rather than evaluating the application against the evidence, the DLC based its decision on undertakings offered by the applicant which were transcribed word for word, and on a finding as to Mr Sharma’s suitability. As the conditions imposed are ambiguous, meaningless, or unenforceable, they are unreasonable and are indicative of the uncritical and inadequate approach taken by the DLC to its evaluative function under s 105 of the Act.

Respondent’s submissions

[33] Mr Wiles for the respondent submits that onus is on the appellants to satisfy the Authority that the DLC’s decision is wrong and that the DLC erred in some respect. Further, the Authority should be slow to draw different factual conclusions from those reached by the DLC. Mr Wiles submits that the DLC’s decision was properly made and that there has been no miscarriage of justice.

[34] While the DLC must ‘have regard to’ the matters in ss 105 and 106 of the Act and give them ‘genuine attention and thought’, the weight attached to each criterion is a matter for the decision-maker. In this regard, Mr Wiles submits that the DLC found that issues of amenity and good order, and proliferation, were not reasons to decline the licence and that the DLC was entitled to reach that view on the evidence before it.

[35] Mr Wiles submits that the area in which the premises is located is commercially zoned. One of the appellants itself is a commercial business. Inferences as to proliferation are misleading as only two premises⁷ are within 300 metres of the proposed premises for Blackbull Liquor. Two other premises⁸ are 568 metres and 699 metres away respectively. Mr Wiles submits that the DLC had no reason or evidence to contradict the evidence of Mr Sharma that the proposed site merely bordered on the suburb of Boulcott. Further, the proposed development containing a birthing centre, early childhood centre and medical centre is not visible from the proposed site due to there being a large *Beaurepaires* business between the proposed site and the

⁷ namely *Pak ‘n Save* and *Big Barrel*

⁸ *Countdown Lower Hutt* and *Countdown Queensgate*

development, and the proposed premises is also separated from the development by a busy main road intersection.

[36] Mr Wiles submits that there was no objection from the nearby rest home or any other sensitive site. Further, Mr Wiles submits that there is no evidence to contradict the position that residents did not ‘loom large’ in the immediate locality and that the site was not exposed to foot traffic or that the appellant’s target market is those people travelling by car rather than on foot.

[37] Mr Wiles submits that the first respondent’s main concern is that parking might be difficult, but the DLC was correct in its finding that “*There is no requirement for a store owner to provide car parking in the Central Business District*”⁹.

[38] Mr Wiles submits further that it is a matter of weight as to what regard, if any, the Authority might give to the objections by persons¹⁰ who appeared at the hearings but who are not parties to these appeals. Further, in respect of the second appellant, it is submitted that he only tendered a letter of objection and did not give evidence before the DLC. This letter, Mr Wiles says, was not supportive of a finding that the grant of the licence would be likely to reduce amenity and good order of the locality to more than a minor extent. Instead it is largely confined to there being childcare centres in the vicinity. Ms Emm’s evidence was similar, Mr Wiles says, and as a matter of common sense and reality it is not compelling.

[39] Mr Wiles submits that the nub of the problem for the appellants is that there is no evidence that might substantively support an argument that the issue of the licence will detract from good order and amenity of the locality.

[40] As regards the absence of reasoning, Mr Wiles submits that the absence or sufficiency of reasons given to justify a decision is not a question of law and a tribunal is not required to refer to every piece of evidence given or to every argument.

[41] Mr Wiles submits further that there is no substance to the ground that the DLC did not evaluate the evidence of Mr Smith. Mr Wiles submits that the DLC could not have set out more thoroughly than they did the entire tenor of Mr Smith’s evidence. As regards the objection of the second appellant and other objectors, Mr Wiles submits that this was unspecific, generalised and truly speculative. It is also submitted that the evidence of Ms McKone and Dr Palmer was summarised correctly and succinctly by the DLC. In any event, the Authority should only be concerned with the evidence of the appellants as part of its re-evaluation under s 157.

Ground 1: ss 3 & 4 of the Act

[42] In respect of the DLC having to consider whether the application is consistent with and both ss 3 and 4 of the Act, Mr Wiles submits that s 3 does not operate in such a way that each application must be scrutinised to see whether it benefits the community as a whole. As a matter of statutory interpretation, Mr Wiles submits, the omission of such a requirement is deliberate as it will always be possible for any objector to argue that an application will not necessarily be for the benefit of the community “as a whole”. Mr Wiles submits that the application cannot be determined by the purpose of the Act in isolation of the object or criteria.

⁹ DLC decision at [51]

¹⁰ namely Ms McKone and Ms Emms

Ground 3: Evaluation and provision of reasons

[43] Mr Wiles also submits that there is no substance in the submission that the DLC did not stand-back and evaluate the evidence but it did so as far as it was able. No applicant, he says, can be expected to respond to vague and general concerns which do not identify or evidence a causal nexus between the proposed premises and harm or reduction of amenity and good order.

[44] Similarly, as regards arguments of proliferation, Mr Wiles says there is no evidence that these premises by their mere existence would result in vandalism or litter. Mr Wiles submits that the DLC had regard to the applicant's good record and appropriate systems to ensure the sale, supply and consumption of alcohol is safe and that any harm caused is minimised. The existence and availability of alcohol alone cannot be equated with harm or offend against the Act's object without further evidence establishing the required causal nexus.

[45] Mr Wiles submits that it is evident that the DLC considered all matters it was required to have regard to in ss 105 and 106. There is no onus on an applicant to satisfy the Authority that the grant of the application would not result in reduction to amenity and good order by more than a minor extent. It is for the DLC as part of an inquisitorial function to evaluate all of the evidence and this is what Mr Wiles says the DLC did.

Grounds 4 & 5 - the number of premises for which licences are already held and the purposes for which nearby land is used, and the objectors' evidence being speculative

[46] Mr Wiles submits that the DLC was correct in finding that the evidence of most of the objectors was speculative and the DLC was entitled to come to the conclusion that there was no cogent evidence that amenity and good order would likely be reduced to more than a minor extent. Mr Wiles submits that on the basis of a decision of the Authority in *Crown Liquor Limited*¹¹ where it was stated that objectors must have detailed and specific evidence supporting their objection if they are to succeed¹², objectors must provide evidence to support grounds for their objections and where the consequence of a refusal is to deny an applicant its legal rights, then the standard of proof is high and close to the criminal standard.

[47] Mr Wiles submits that the DLC had regard to the fact that there was only one other stand-alone bottle store within the locality and it was entitled to have regard to the fact that The Mill had closed in December 2015. Mr Wiles also submits that the DLC carefully considered the evidence of Mr Smith, Ms McKone and Dr Palmer. The weight to be given to the evidence is a matter for the DLC and the DLC did not have to give exhaustive reasons justifying its decision. In standing back and evaluating the evidence, this does not mean the Authority should substitute its opinion for that of the DLC.

¹¹ *Crown Liquor Limited* [2015] NZARLA PH 128

¹² *Crown Liquor Limited*, above n 11 at [11]

Ground 2 – PALAP and related reports

[48] In terms of the PALAP and related reports, Mr Wiles submits that s 105(1)(c) only requires the DLC to have regard to a LAP in force in accordance with ss 87-90.

[49] The DLC referred to Ms Emms' evidence as unchallenged and it cannot be established therefore that the DLC did not take this into account. In the case of concerns raised by Dr Palmer, Mr Wiles says that the DLC concluded that his concerns could be met by imposing conditions on the issue of the licence.

Ground 6 – Conditions

[50] In respect of the conditions imposed, Mr Wiles submits that the appellants are being hyper-critical of the undertakings offered to the DLC. While condition (c) might be somewhat unclear, it is generally understood to mean that there will be no advertising of alcohol products visible externally.

[51] “*Slushy RTDs*”, Mr Wiles submits, is a well understood generic term for RTDs packaged with crushed ice such as frozen vodka sorbet packages.

[52] Mr Wiles concedes that condition (i) – “*that a well run off-licence such as Lower Hutt Liquormart Limited should not see any increase in breaches of the Alcohol Free Zones or disorder*” – cannot be readily interpreted as a condition, but may have been an acknowledgement by the DLC of the applicant's other well run operations and an attempt by the DLC to reinforce the respondent's resolve or undertaking to run these premises in a similar manner.

[53] Notwithstanding these criticisms, Mr Wiles submits that there can be no criticism that if all the stated conditions are adhered to they should contribute toward minimising alcohol-related harm, and that it was open to the DLC to determine the undertakings were useful and sufficient to respond to the issues raised particularly given the generalised and speculative nature of those issues.

Authority's Decision and Reasons

[54] An appeal brought pursuant to s 154 of the Act is by way of rehearing¹³. As the Authority said in *Mangere-Otahuhu Local Board v Level Eighteen Limited*¹⁴, at [15], the onus lies on the appellant before the Authority to satisfy the Authority that the decision in the original hearing before the DLC was wrong. The Authority will be slow to draw different factual conclusions from a DLC as the DLC will have had the advantage of hearing the evidence at first instance.¹⁵ *Mangere-Otahuhu Local Board v Level Eighteen Limited* reflects what the Supreme Court said in *Austin, Nichols & Co Inc v Sighting Lodestar*¹⁶, at [146]:

“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

¹³ s 157

¹⁴ *Mangere-Otahuhu Local Board v Level Eighteen Limited* [2014] NZARLA PH 627-228

¹⁵ *Mangere-Otahuhu Local Board v Level Eighteen Limited*, above n 12, at [17]

¹⁶ *Austin, Nichols & Co Inc v Sighting Lodestar* [2008] 2 NZLR 141

of the record of the court or tribunal appealed from unless, exceptionally, the terms in which the 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. (emphasis added)

[55] The Authority disagrees with Mr Wiles that this means that the Authority should only be concerned with the evidence of the appellants. In an appeal by way of rehearing, judgment is to be given as it ought to have been given if the case came at that time before the Court of first instance. This includes all of the evidence and not just that of the appellants.

[56] The approach to be taken when determining whether to grant an application for a licence has been well traversed by the superior courts.

[57] As Heath J said in *Re Venus NZ Ltd*¹⁷, the Act does not articulate a specific test for the Authority to apply when determining whether to grant an off-licence application. Rather, a series of criteria are identified in s 105(1) that the Authority must take into account in determining whether to issue a licence. In any given application, one or more of these criteria may assume prominence.

[58] In the present application, questions are raised about the object of the Act (s 105(1)(a)), the suitability of the applicant (s 105(1)(b)), the proposed amendment to the LAP (s 105(1)(c)), the design and layout of the proposed premises (s 105(1)(e), and amenity and good order (s 105(1)(h) and (i)). The object of the Act and amenity and good order are prominent amongst these.

[59] As Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*¹⁸, the role of the DLC or the Authority in considering the relevant factors in s 105 of the Act is an evaluative one¹⁹. As Gendall J put it:²⁰

“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;*

¹⁷ *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315

¹⁸ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] 2 NZLR 382

¹⁹ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* above n 16 at [54]

²⁰ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 16, at [55] – [56]

(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) ...”

[60] Recently, Clark J summarised the applicable principles in respect of the renewal of a licence in *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*²¹. These principles²² include that:

- (a) there is no presumption that an application for a licence will be granted²³;
- (b) a DLC, and the Authority, after having regard to the criteria in the Act, is then to step back and consider whether there is any *evidence* indicating that granting the application will be contrary to statutory object in s 4. Or as Heath J articulated a “test”²⁴:

Although the “Object” of the 2012 Act is stated as one of 11 criteria to be considered on an application for an off-licence, it is difficult to see how the remaining factors can be weighed, other than against the “object” of the legislation. It seems to me that the test may be articulated as follows: is the Authority satisfied, having considered all relevant factors set out in s 105(1)(b)–(k) of the 2012 Act, that grant of an off-licence is consistent with the object of that Act?

- (c) the application of rules involving onus of proof may be inappropriate²⁵, and similarly, there is no onus on the reporting agencies to prove the application should not be granted;²⁶
- (d) the criteria for the issue of licences, and for renewal, are not to be interpreted in any narrow or exhaustive sense. The Authority may take into account anything which, from the terms of the statute as a whole, appears to be regarded by the legislature as relevant to licence conditions and the terms on which they should be granted. “That must include the statutory object referred to in s 4.”²⁷ The matters raised by s 4 are to be approached on a nationally consistent basis;²⁸ and

²¹ *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited* [2018] NZHC 1123

²² *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 20 at [46]

²³ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 16, at [55].

²⁴ *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315 at [20]

²⁵ *Re Venus NZ Ltd*, above n 21, at [60] and *Auckland Medical Officer of Health v Birthcare Auckland Ltd* [2015] NZHC 2689 at [52]

²⁶ *Auckland Medical Officer of Health v Birthcare Auckland Ltd*, above n 22 at [113]

²⁷ *Walker v Police*, HC Wellington AP 87/01, 31 May 2001 at [29] approved in *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 564, [2010] NZAR 152 at [67]

²⁸ *Walker v Police*, above n 11 at [29]

- (e) the Authority is not required to be sure that particular conditions will reduce alcohol abuse²⁹:

It is entitled to apply the equivalent of the precautionary principle in environmental law. If there is a possibility of meeting the statutory objective ... then it is entitled to test whether that possibility is a reality."

[61] This evaluative function is an assessment of risk³⁰. As Clark J put it at [43]:

"The factors to be considered in the course of assessing an application for a licence or for renewal, as the appellants submitted, stand to be assessed in terms of their potential impact upon the prospective risk of alcohol-related harm."

[62] A causal nexus is required between the evidence to suggest that the grant of the application, contrary to the object of the Act, will increase the risk of alcohol abuse and the relevant risk³¹. However, as the evaluative function is an assessment of risk and it is the risk profile which is relevant, there is no requirement to link specific ARH to specific off-licences, or as Clark J said in the *Lion Liquor* decision, "for the premises to be at the centre of the harm"³². While *Lion Liquor* involved a renewal of an off-licence, the same reasoning is applicable to the initial grant of an off-licence. Again, as Clark J put it³³:

"The Act looks to minimise alcohol-related harm. Where there is an evidential foundation enabling a link to be drawn between a real risk of alcohol-related harm and the grant or renewal of a licence, the harm must be minimised not ignored or condoned." (our emphasis)

[63] Further:

*"It is not necessary to establish, ..., that the proposed operation "would likely lead to" alcohol-related harm. To require demonstration of a link to this degree of specificity is not much different from requiring proof. Requiring proof of "a causative link is not only unrealistic but is contrary to the correct legal position"."*³⁴

[64] When undertaking the necessary evaluation:

*"The statutory provisions must be applied in a way that promotes the twin statutory objects which are that the sale, supply and consumption of alcohol should be undertaken safely and responsibly and that alcohol-related harm should be minimised."*³⁵

[65] That is, these limbs are not to be read in a way that implies that a balance is to be achieved between them.³⁶ Both limbs must be satisfied.

²⁹ *My Noodle Ltd v Queenstown Lakes District Council*, above n 11, at [74]

³⁰ *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 18 at [43] and [47],

³¹ *Otara-Papatoetoe Local Board v John Enterprises Ltd* [2012] NZHC 1406, [2012] NZAR 717 at [31], *Auckland Medical Officer of Health v Birthcare Auckland Ltd*, above n 22 at [50] and *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 18 at [60]

³² *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 18 at [64]

³³ *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 18 at [67]

³⁴ *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 18 at [68]

³⁵ *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 18 at [45]

³⁶ *The Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited*, above n 18 at [48] - [50]

[66] The weight to be applied to each of the criteria in s 105 is a matter for the DLC or the Authority. As Gendall J said in the High Court judgment *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*³⁷, the principles relating to the requirement to “have regard to” can be summarised as these:

“(a) the phrase “have regard to” bears its ordinary meaning;

(b) the decision maker must actively and thoughtfully consider the relevant matters;

(c) to do so requires the decision maker to correctly understand the matters to which he or she is having regard;

(d) the weight to be given to such matters is generally within the discretion of the decision maker;

(e) there will be cases where the matter(s) to which the decision maker is required to have regard are so fundamental or critical that they assume an elevated mantle.”

[67] Mr Sherriff, for the appellants, has submitted that in reaching its decision about whether 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, the DLC (and now the Authority) must form an opinion. The Authority agrees. As Heath J said in *Venus*³⁸ at [57]:

“... s 105(1)(h) and (i) of the 2012 Act, both of which deal with “amenity and good order” considerations, requires the Authority to form an “opinion”. The need for a judicial body to form an independent opinion is conceptually different from a decision that is based on whether or not an applicant has established on a balance of probabilities that a relevant fact has been proved.”

[68] Moreover, unlike the other criteria in s 105(1), paragraphs (h) and (i) expressly require a decision-maker to form an opinion. This is reinforced by the wording of s 106(1) and (2). Contrary to the submission by counsel for the respondent, however, as already stated by Heath J, in considering the evidence when forming this opinion, objectors do not need to provide evidence at close to the criminal standard or even on the balance of probabilities.

[69] The requirement for a decision-maker to form an opinion about the effect of the issue of the licence (or renewal as the case may be) on the amenity and good order of the locality requires a decision maker to reach a conclusion on that matter when it is fundamental or critical to the application, before or when undertaking its overall evaluation of the matters in s 105(1) against the risk of alcohol-related harm arising from the issue of renewal of the licence. In doing so, the decision maker is able also to ensure that he or she has correctly understood the matter. In the present applications, the DLC does not draw any such conclusion but merely states³⁹:

³⁷ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] 2 NZLR 382 at [78] – while four questions of law were decided for appeal in the subsequent decision *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2016] NZHC 73, this did not relate to the meaning of the words “must have regard”

³⁸ *Re Venus NZ Ltd*, above n 21, at [57]

³⁹ DLC decision at [59]

“Whilst we understand the speculative concerns of the objectors, in order to meet the object of the Act, we are granting the licence for one year only in order for the Appellant to prove that he manages the premises to a high standard, in line with the requirements of the Act.”

[70] By not forming an opinion in this way, the DLC has erred.

[71] In standing back to weigh the factors in s 105(1)(b)–(k) of the Act against the object of the Act, Mr Sherriff for the appellants has invited the Authority to also evaluate those factors against the purpose of the Act and ask if the Authority is satisfied, having considered all relevant factors set out in s 105(1)(b)–(k) of the 2012 Act, that the grant of an off-licence will benefit the community as a whole? The Authority does not consider this additional step is required.

[72] While the criteria for the issue of licences are not to be interpreted in any narrow or exhaustive sense, it would not be correct to take this to mean that the words *‘for the benefit of the community as a whole’* are to be imported from s 3 into the list of matters in s 105 of the Act to which a DLC or the Authority must have regard.

[73] As Tipping J said in *Waitakere City Council v Khourī*⁴⁰, it is elementary that statutes are to be given their literal meaning unless there is no such meaning, or the Court is satisfied that there is another meaning properly available on the words used which would better fulfil the policy and purpose of the legislation. Section 105(1) specifically makes the object of the Act a mandatory consideration but does not do the same in respect of the purpose of the Act.

[74] There are likely two reasons for this. First, the approach to s 105 is clear and can sensibly be applied without reading the statutory purpose into s 105 as if it were an additional mandatory consideration in all cases.

[75] Secondly, the object of the Act is the end Parliament seeks to attain. The purpose of the Act reflects Parliament’s rationale for the Act. While it is a tenet of the purposive approach to statutory interpretation that where possible the Act should be interpreted to give effect to its purpose, both as regards the individual section which is the subject of evaluation, there is no ambiguity as to the meaning of the criteria in s 105 or of the object to which those criteria are oriented. The new system of control over the sale and supply of alcohol that Parliament put in place to achieve the object set out in s 4 is made manifest through the evaluative function in relation to the s 105 criteria, which Parliament has expanded from the previous s 35 (of the 1989 Act). The purpose of the Act makes explicit the rationale for this evaluation. As Gendall J put it, the characteristics of the new system are that it is reasonable and its administration helps to achieve the object of the Act⁴¹. This administration includes the evaluation of s 105 criteria.

[76] In any event, prospective sellers or suppliers of alcohol form part of the community in question. The Act enables prospective sellers or suppliers to be issued licences if the criteria in s 105 are satisfied, such that this extra consideration appears to add little to what is already in s 105.

⁴⁰ *Waitakere City Council v Khourī* [1999] 1 NZLR 415, (CA) at 421 citing *Commissioner of Inland Revenue v Alcan New Zealand Ltd* [1994] 3 NZLR 439 (CA)

⁴¹ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 16, at [23]

[77] While not a mandatory consideration for the purposes of s 105, the evaluation of the criteria in s 105 must necessarily reflect the purpose in s 3, and relevantly for this application, that the system of control over the sale and supply of alcohol is new. In other words, s 3 heralds a change in the way in which the sale, supply and consumption of alcohol is regulated. Licences can be expected to be harder to get relative to the 1989 Act by virtue of the additional mandatory considerations in s 105. An additional gloss on the test articulated by Heath J in *Venus* is not required to give proper effect to s 105.

Reports and information before the DLC

Medical Officer of Health – s 103 report

[78] In her report to the DLC the MOH, Dr Jill McKenzie, opposed the grant of the off-licence on the basis that;

- (a) the application is unlikely to be in harmony with the object of the Act as there are existing high levels of harm caused by excessive or inappropriate consumption of alcohol in the area and an additional premises will not minimise the harm;
- (b) the application represents an additional off-licence which would not be in keeping with the proposed amendments to the local alcohol policy;
- (c) the hours proposed are not in line with recently issued off-licences in the area and later hours are more likely to be associated with excessive and inappropriate consumption of alcohol;
- (d) the proposed design and layout of the premises raises parking and safety issues; and
- (e) the amenity and good order of locality would be likely to be reduced to more than a minor extent by the effects of the issue of the licence, given the proximity of the premises to areas associated with breach of the liquor bans.

[79] The MOH noted that the area where the premises is situated (Hutt Central) has high levels of alcohol-related harm. The health data from hospital discharges in the greater Wellington Region from the Capital and Coast District Health Board, the Hutt Valley District Health Board, and the Wairarapa District Health Board areas (which the MOH says corresponds with residents living in the area surrounding the proposed premises), has been collated over seven financial years from 1 July 2009 to 30 June 2016. This data, the MOH reported, shows that admissions wholly attributable to alcohol⁴² for residents aged 15 years and over, are in the top 10% both in terms of numbers and rates for the whole of the Wellington region, and the second-highest in terms of numbers for the Hutt City area units.

[80] The MOH referred to a briefing paper that was provided to the Hutt City Council by Regional Public Health and the Police to inform the PALAP. The MOH said this briefing paper developed a risk matrix using police and health data to identify

⁴² such as alcohol intoxication, alcohol dependency and alcoholic liver disease

communities at higher risk of alcohol-related harm, and that Hutt Central was identified as one of the suburbs at greatest risk of alcohol-related harm.

[81] While the MOH noted the applicant has identified systems and processes to reduce the likelihood of harm, the MOH is concerned that the applicant is requesting a licence for an area with existing high levels of health harms and that the measures identified by the applicant are unlikely to minimise this harm. The Authority agrees. As Dr McKenzie says, levels of harm remain disproportionately high before the selection of available alcohol products is increased. The MOH reported that off-licence premises are the more significant contributor to alcohol-related harm and that pricing and later trading hours are associated with increased levels of harm. While the proposed closing time of 10.00 p.m. is similar to existing licences in Hutt Central, the closing time represents a later closing time compared with recently issued off-licences in Lower Hutt.

Police – s 103 report

[82] The Police initially submitted a report dated 13 June 2017 in opposition to the grant of the licence. Upon further enquiry into the application, however, the Police advised the DLC on 30 August 2017 that they had re-evaluated their initial concerns, and withdrew their opposition. As a consequence, there is no Police opposition to the application.

Licensing Inspector – s 103 report

[83] The Licensing Inspector, Mr Rick Mead, in his report dated 30 August 2017 noted that the proposed premises will be located within the Lower Hutt Central Business District in premises that are currently vacant and were previously occupied by DULUX (paint) trade. On an inspection to the area on 29 August 2017 Mr Mead noted that the surrounding businesses are predominantly commercial in nature. The inspector spoke with the owner of the first appellant who indicated that they had issues with car parking and in particular with customers reversing out of parks having accidents. The Inspector also spoke to the retirement village located 52 metres away which stated that it had canvassed its residents and the resident's concerns related to youth drinking around the river which is located across Rutherford Street.

[84] Having regard to the statutory criteria in ss 105 and 106 of the Act, Mr Mead reported, amongst other things, that as far as he was aware the applicant is suitable to hold an off-licence, and the proposed hours comply with the requirements of the Lower Hutt Alcohol Policy. The inspector noted that the business appeared to have appropriate systems, staff and training to comply with the law and the Hutt City Council policy. The inspector did not foresee any noise issues given the commercial zone where the premises are proposed to be located. He also noted that from a visual observation there was no visible evidence of vandalism on or near the premises, saying there is "*no reason to believe that vandalism or level of nuisances have been increased by the issue of a license to this business*". It is assumed that this was intended to be a prospective statement.

[85] The Inspector noted that the applicant provided details on how the business will mitigate any risk which could negatively impact the local community including, not selling single RTDs, not reducing or discounting alcohol products by more than 25%, and not advertising externally alcohol products and prices. Mr Mead concluded that there is no reason to believe that the amenity and good order of locality would be likely

to be reduced, to more than a minor extent, by the effects of the issue of the licence. Nevertheless, having regard to the objections received by the general public and the opposition from the MOH, Mr Mead recommended that the application undergo detailed consideration by the DLC.

Evidence of Mr Sahil Sharma

[86] Mr Sahil Sharma is one of two directors and shareholders of the respondent company. At the hearing before the DLC, Mr Sharma gave evidence in support of the grant of the application and outlined that the applicant company has off-licences for nineteen stores in the North Island. Mr Sharma said the directors have a good relationship with reporting agencies and that he has a good record as a bottle store operator having never failed any controlled purchase operations.

[87] Mr Sharma touched on the criteria in section 105(1) of the Act. Of particular note, Mr Sharma said he saw no reason why the amenity and good order of the locality would likely to be reduced to more than a minor extent if the licence is issued. He said that a heavier police presence will not be required as a result of the grant of the licence and that he is aware of the liquor ban operating along the riverbank walk area. Mr Sharma did not think that a well-run operation such as the one proposed would see any increase in breaches of liquor bans or disorder.

[88] Mr Sharma said that as with the company's other premises, robust till systems with regard to age verification are installed and he will ensure that persons employed are properly trained particularly with regard to proper identification to prevent the sale of liquor to underage persons and, not to sell to intoxicated persons.

[89] Mr Sharma undertook not to sell single units of RTD products or slushy RTD drinks, and not to advertise alcohol prices externally or on the roadside.

[90] Mr Sharma outlined that the Inspector's report confirmed that the surrounding businesses and premises are predominantly commercial. Mr Sharma set out in a letter dated 6 June 2017 addressed to the DLC (attached to his application), details of discussions that he had with neighbouring businesses. Mr Sharma outlined that the first appellant raised concerns related to parking but did not raise concerns regarding vandalism and nuisance, although he was yet to meet with Mr Smith to discuss the proposal. Mr Sharma's evidence was that in his view the bottle store is less likely to present parking problems than did the previous paint shop business, because that business attracted contractors and tradespeople, and the busiest time of activity for the bottle store will be between 4.00 p.m. and 6.00 p.m.

[91] Mr Sharma said that the manager of the Riverleigh Residential Care Home manager, Ms Thomson (which home is across the road), did not raise any concerns or have any objection to the bottle store opening directly diagonally opposite. Mr Sharma's evidence was that the nearest school (being St Oran's college on High Street) is approximately 450 metres away from the shop and that the nearest church is closer to another bottle store, Big Barrel, than it is to the proposed shop. Mr Sharma confirmed what the Inspector sets out in his report regarding the location of other off-licences but noted that the only other standalone bottle store is Big Barrel which is 289 metres away. Before the DLC Mr Sharma also pointed out that there is another bottle store 'Bottle-O' at the far end of High Street over a kilometre away⁴³.

⁴³ Transcript of DLC hearing at page 11

[92] Under cross-examination before the DLC, however, Mr Sharma agreed that he had not consulted with the community residents⁴⁴.

[93] In terms of proliferation Mr Sharma did not believe that an objector would be able to make a case for proliferation pointing out that a grant of a licence to the company will only see the situation revert to what it was just over a year prior when The Mill bottle store in Rutherford Street closed. Notwithstanding this, under cross examination by Dr Palmer about whether there had been any reduction in harm since The Mill closed, Mr Sharma acknowledged that when The Mill closed, there had been a reduction in off-licences, but "*it hasn't done any good*"⁴⁵. He went on to say however, in response to whether closing of the Mill was in synch with the object of the Act, that "*In that situation there would be no more bottle stores throughout the country then*"⁴⁶.

[94] Mr Sharma also noted that some of the objectors raised concerns about the riverbank area. He pointed out that there is a liquor ban operating along the riverbank which is capable of being policed. He considered that given his reputation in being careful not to serve minors and intoxicated persons, there is no reason why a bottle shop in the location will impact adversely on children or their parents accessing childcare centres. In his words, it "will not jeopardise a 'family-friendly' area".

[95] Before the DLC, in response to a question by Councilor Edwards, following a discussion about the opening hours of the applicant's premises in Palmerston North, Mr Sharma also said that he would be happy for a closing time of 9.00pm⁴⁷.

Evidence of Dr Stephen Palmer

[96] Dr Stephen Geoffrey Palmer, is one of two medical officers of health for the Wellington region working within the alcohol portfolio with responsibilities under the Act. Dr Palmer gave evidence primarily relating to section 105(1)(a) (the object) of the Act. Dr Palmer considered that only a small set of health harm can be linked to problems associated with amenity and good order, and this is mostly exclusively confined to injury from assaults.

[97] Dr Palmer said for the Hutt Valley, information and data is only collected in a systematic way for hospital admissions. His evidence related to disease, illness and injury which is confined to the direct effect on the individual and to risk factors relating to health harm such as demographic features and measures of deprivation.

[98] Dr Palmer's evidence is that while the proposed premises is in the commercial area of Hutt Central, it is located across the street from the medium density residential area of the Boulcott 'area unit' as defined by Statistics New Zealand. Across the corner of Melling Road and Connolly Street a new development which was, he understood, to encompass an early childhood centre and a medical centre, both of which will serve clients that are vulnerable in terms of the sale and supply of alcohol, being young people and those with alcohol dependency problems. At the hearing of the DLC, in response to a question from Councilor Edwards, Dr Palmer confirmed that the significance of the early childcare centre is that as children pass a liquor store there is a normalisation effect on them⁴⁸.

⁴⁴ Transcript of DLC hearing at page 27

⁴⁵ Transcript of DLC hearing at page 45

⁴⁶ Transcript of DLC hearing at page 46

⁴⁷ Transcript of DLC hearing at page 17

⁴⁸ Transcript of DLC hearing at page 161

[99] Dr Palmer said that while Mr Sharma stated that the premises will revert the situation back to where it was when The Mill was operating, that ignores the reality that the closure of The Mill was a positive step contributing to the object of the Act. Dr Palmer's evidence did not elaborate on this further but suggested that with the closure of the Mill and the earlier closure of a liquor store in Brunswick Street, with the saturation of supermarkets, the off-licence market is already satisfied.

[100] Dr Palmer considered that given the location of the premises motor vehicle access will be the preferred method of travel to it such that target markets will be residents from a wider geographic area. Under cross examination by Dr Palmer, Mr Sharma agreed the preferred method of travel will be by car⁴⁹. This wider area, Dr Palmer said, is already well endowed with off-licences, with at least six further liquor stores and two further supermarkets and a number of grocery stores. Under cross examination by Mr Wiles, Dr Palmer confirmed that his main concern about people driving to the premises is that they would be able to come from higher risk areas⁵⁰.

[101] Dr Palmer referred in his evidence to a briefing paper titled *Alcohol in Health and Crime: A Briefing Paper to Hutt City Council* prepared by Regional Public Health and the Police to inform the PALAP. This paper included development of a comprehensive health risk matrix of Lower Hutt by area unit. This report identifies that a large part of the broad area that is served by current central city off-licences is classified as very high risk or high risk in respect of the burden of health harm caused by inappropriate consumption of alcohol. The report states⁵¹:

"Hutt Valley District Health Board hazardous drinking levels are just below the national average in the most recent regional assessment in 2011/14. There is considerable variance throughout DHB areas in the country from 11.6% to 27.7%.

Of concern is the rising prevalence of hazardous drinking in the Hutt Valley DHB area. The level of hazardous consumption in Hutt DHB between regional surveys rose from 12.5% in 2006/07 to 14.9% in 2011/14, where as the national figure fell from 18.0% to 15.5%. In the six year period from 1 July 2009 to 30 June 2015 there has been a corresponding rise in the number of admissions for intoxication in the Wellington region (Murray 2016)."

[102] The report states⁵² that those area units at greatest risk of alcohol-related harm in the very high or high risk categories include Hutt Central.

[103] Dr Palmer also presented the New Zealand Deprivation Index 2013 at mesh block level for the broad area that is served by current central city off-licences. Age distribution pyramids show that the more deprived area units in the Hutt Valley District Health Board region tend to have the higher proportion of younger people. The New Zealand Health Survey in turn shows that the 15 to 25 year age group consistently has the greatest proportion of the hazardous drinkers. Although in the Hutt Valley District Health Board region the level of hazardous drinking has been decreasing for this age group, they still have a high proportion of hazardous drinking of all age groups.

[104] Dr Palmer also gave evidence on the link between hazardous drinking and health harms saying that hazardous drinking is a causal factor in more than 200 disease and

⁴⁹ Transcript of DLC hearing at page 49

⁵⁰ Transcript of DLC hearing at page 163

⁵¹ *Alcohol in Health and Crime: A Briefing Paper to Hutt City Council*, November 2016, at page 7

⁵² *Alcohol in Health and Crime: A Briefing Paper to Hutt City Council*, above n 32, at page 8

injury conditions and is associated with a risk of developing health problems such as mental and behavioral disorders, including alcohol dependence; major non-communicable diseases such as a liver cirrhosis, some cancers and cardiovascular diseases; as well as injuries from violence, accidents and road traffic crashes.

[105] While the data collected by the emergency department at Hutt Hospital on alcohol-related attendances is not yet available, hospital admission data has been analysed to inform health risk matrices. Dr Palmer said that the evidence about risk and vulnerability, the high levels of alcohol-related harm, and the object of the Act brings into question the merit of considering an additional liquor store in the central city. While a new licence would bring the number of stores back to the number that existed when the Mill liquor store operated, this misses the point in terms of reducing existing levels of alcohol-related harm in any significant way. Dr Palmer said:

“It is my considered opinion that this additional liquor store will lead to increases in excessive and inappropriate consumption of alcohol. I predict that these increases will not minimise alcohol-related harm either in the Hutt Central or Boulcott, nor in the broader community that will be served by the liquor store. It is more likely that alcohol-related harm will increase specifically in the immediate locality and in the wider areas.”⁵³

[106] While Dr Palmer acknowledged that the Police are the lead agency with respect to amenity and good order, he noted that the location of the premises is adjacent to the riverbank area, an area associated with previous incidences of breaches of liquor bans and other incidents. Dr Palmer noted that the Licensing Inspector’s report stated this to be a concern of residents of the neighbouring retirement home.

[107] Dr Palmer also referred to a background paper supplied by the Hutt City Council officers for the *Control of Liquor in Public Places Bylaw Review* dated 15 June 2016 which stated that in the six months prior there had been a significant rise in the incidence of public place drinking and this rise has been more noticeable in Central Lower Hutt.

[108] Dr Palmer also referred to the Safe City Ambassador incident notifications for the area surrounding the premises for the periods July 2015 to June 2016, and July 2016 to June 2017 which he said shows an increasing trend in the number of incidences of property damage and disorderly behavior reported between 2.00 p.m. and 1.00 a.m. on Thursdays to Saturdays and an additional premises adjacent to the affected area could further exacerbate the number of incidents even with a bylaw in effect to manage alcohol in public places.

[109] In terms of trading hours Dr Palmer noted that the Hutt City Local Alcohol Policy provides for a maximum trading hours of 10.00 p.m. This he says, is a maximum trading hour, and it is not mandatory that premises have their hours approved to 10.00 p.m. Each application needs to be assessed as to whether the location is suitable for later opening hours. Dr Palmer noted that recently issued closing hours of 9.00 p.m. have been imposed in areas associated with high levels of alcohol-related health harms.

⁵³ BoE at [69]

Evidence of Ms Georgia Emms

[110] Ms Georgia Emms is a resident who, with her husband and two preschool children, lives on Connolly Street, Lower Hutt. Ms Emms gave evidence of three childcare facilities on Connolly Street. *Millies House childcare* was being renovated at the time and was expected to open in early 2018. *Early Years Childcare Centre* and *KinderCare Learning Centre* cater to children ages 0-2, and 0-5, respectively. In addition, Ms Emms gave evidence that on the corner of Connolly Street and Melling Road a new Birthing Healthcare Centre was being finished and was expected to open before Christmas 2017. Ms Emms said that this centre will have a pre-school care facility as well. Also on the corner of Connolly Street and Melling Road is an aged person's residential care home.

[111] Ms Emms gave evidence of a fixed speed detector flashing signal on Connolly Street which alerts drivers to the speed and to slow down because of the sensitivities in the street/community.

[112] Ms Emms also gave evidence of three supermarkets and a bottle store selling alcohol within 550 metres of her home and to further bottle stores being located 1.5km and 2 kilometres away, respectively. Ms Emms said a further bottle store will not benefit the community and will not minimise alcohol-related harm, nor she says is it in harmony with the existing uses of the land and buildings in the locality, notably the greenbelt riverside park area which can be accessed diagonally across the road from the premises via the Melling Road entrance.

[113] Ms Emms also gave evidence of the Boulcott Primary School less than a kilometre from her home and of St Oran's College for girls on High St.

[114] Ms Emms's statement was tendered by Mr Sherriff at the DLC hearing, on the basis that Ms Emms was out of town at the time of the hearing. After checking with the parties and the DLC, it was understood that she would not be cross-examined or questioned on her statement. As a result, Ms Emms' statement went unchallenged.

Evidence of Mr Allen Smith

[115] Mr Allen Smith and his wife are the owners of the first appellant company which is located next door to the proposed bottle store. Above the lighting store, Mr and Mrs Smith lease a first-floor apartment to an existing tenant. Mr Smith objects to the issue of their licence on the basis that the residential flat and tenants will be affected by customers of the liquor store and their cars, arriving up to 10.00 p.m. seven days a week. This relates to both noise as well as concerns about the health, safety and security of tenants who risk being hassled and subject to an increased risk of vandalism etc. Mr Smith also objects on the basis that the bottle store will limit the type of tenants they can attract when the current tenants move on.

[116] Like Ms Emms, Mr Smith also objects to the premises on the basis that alcohol can be purchased in supermarkets, bottle stores, pubs and restaurants, all within a kilometre or so of the area, with a large supermarket and large bottle store being within 500 metres. Mr Smith also gave evidence of that in the immediate area there are retail stores, "Baby Factory", betting showrooms, loading showrooms, and furniture showrooms for a high percentage of customers are female. Mr Smith also said that there is a motorbike shop, small car yard and tire shop in the vicinity as well as service industries comprising a retirement home, and the (then nearly completed) health

centre, which are not a good mix with a bottle store. Mr Smith also gave evidence of the kindergarten and childcare centre within 200-300 metres of the premises.

[117] Mr Smith also gave evidence that directly across the proposed shop and next to the retirement village there is a riverbank car park and picnic tables. Mr Smith said that having a place to purchase liquor in this area would, in his view, “be too much of a temptation”. Mr Smith is concerned that the premises would potentially lead to increased illegal public drinking in an area where people walk dogs and children play, and would likely result in increased clean-up costs for the Council. In response to a question from DLC member Baird, Mr Smith said that in one of seven visits to the river bank, he’ll find bottles there which he places in the bin⁵⁴. A liquor store, he said, will increase the risk of crime in the immediate area and Mr Smith produced a study by the University of Canterbury which concluded that having greater access to alcohol outlets was associated with increased levels of serious violent offending across the study areas implying that alcohol availability and access is an important determinate of alcohol-related harm. While security such as cameras may help catch a person committing offences, Mr Smith said it will not undo the harm, and any vandalism will still need to be paid to be cleaned or fixed.

[118] In response to a question from Ms Baird as to whether there had been a change in the frequency of how often he finds bottles on the river bank, Mr Smith said “*It’s probably helped, I can’t put my hand on my heart and say that. We don’t go to the park enough, we don’t live there ourselves personally. I think it’s definitely helped.*”⁵⁵ Mr Smith then spoke about the temptation to go to the river bank.

[119] Mr Smith also raised concerns about the manoeuvrability of vehicles parking on the proposed site and customers parking in carparks belonging to neighbours.

Evidence of Ms Alison McKone

[120] Ms Alison McKone is a resident of Mills Street in the suburb of Boulcott, Lower Hutt and lives close to the stop bank along the river. Before the DLC Ms McKone gave a power point presentation featuring her dog “Mollie the Collie” which she walks along the river bank.

[121] Ms McKone gave evidence⁵⁶ that when The Mill was open the picnic area near the Melling Bridge had drinkers there “all the time”, and the area was often littered with broken bottles, cans and beer box rubbish. Ms McKone said the rubbish bin was regularly overflowing and there used to be graffiti under the subway going under the bridge. Ms McKone said that when out walking her dog alone, the area was quite intimidating.

[122] Ms McKone spoke to how the area had improved when The Mill closed and it is now a pleasant place to walk. Ms McKone expressed concern that once alcohol leaves the premises, the operator doesn’t have to worry about what happens.

[123] Ms McKone said that elderly people often go to the river area where they walk to get their exercise or to sit. Having people drinking alcohol in the area, which she says

⁵⁴ Transcript of DLC hearing at page 89

⁵⁵ Transcript of DLC hearing at page 89

⁵⁶ Transcript of DLC hearing at page 118 et seq

they will do despite the alcohol ban, will "...completely ruin the amenity value of this particular area."⁵⁷

Section 105 Criteria

[124] As already noted, the s 105 criteria in question in relation to this application relate to the object of the Act, the suitability of the applicant, the proposed amendment to the LAP, the design and layout of the proposed premises, and effect of the issue of the licence on the amenity and good order of the locality, with the object of the Act and issues of amenity and good order taking prominence.

[125] While the Authority is satisfied that in considering the application the DLC has considered the objections of the objectors (which we have set out above), and the opposition from reporting agencies (again set out above), the Authority is not satisfied that the DLC had sufficient regard to the criteria stipulated in s 105 of the Act particularly whether the issue of the licence given the evidence of risk, is capable of meeting the object of the Act.

[126] The DLC has said that it is satisfied that the risk of harm to high decile and sensitive sites, would be minimised, given the undertakings made and the fact that Mr Sharma is a suitable applicant. Suitability is a broad concept. As the Authority said in *Nishcay's Enterprises Ltd*⁵⁸:

"Traditionally, [the test of suitability] has been interpreted as meaning whether or not an applicant will comply with the penal provisions of the Act. In fact, the test is much wider. To carry out the responsibilities that go with the holding of a licence includes whether or not liquor abuse issues are likely to arise. Thus it includes the object of the Act as set out in s 4. The Sheard test is not simply about how a business is likely to operate in the future. It is dependent on an assessment of the more generalised factors referred to in the previous paragraph⁵⁹. It includes how a licensee will deal with liquor abuse issues that may arise from the establishment of the business."

[127] The vulnerability of the area, in effect, raises the threshold of suitability in terms of whether the grant of the licence will result in a reduction or an increase in alcohol-related harm.

[128] That the issue of the licence is compatible with the object of the Act is contrary to the evidence before the DLC, particularly that of Dr Palmer who gave evidence that the area in which the premises are proposed to be located are in an area that is in the high risk category in respect of health harm from the inappropriate consumption of alcohol. His evidence goes to the vulnerability of the locality. The Authority accepts that a further bottle store will not help minimise the alcohol-related harm already existing in the immediate locality.

[129] The evidence also indicates that with the closure of The Mill, the amenity and good order of the riverbank area improved. While it is not possible to say whether this was down to the closure of The Mill or the liquor ban being extended, it is likely that both have contributed. The evidence of Ms Emms, Ms McKone and Mr Smith is not

⁵⁷ Transcript of DLC hearing at page 123

⁵⁸ *Nishcay's Enterprises Limited* [2013] NZARLA PH 837 at [54]

⁵⁹ i.e. the character and reputation of the applicant, its previous operation of premises, its proposals as to how the premises will operate, its honesty, its previous convictions, matters raised in reports from reporting agencies and whether the grant of the licence will result in the reduction or an increase in liquor abuse

speculative particularly as regards the impact on the riverside park area which can be accessed diagonally across the road from the premises via the Melling Road entrance. This evidence of what the area was like before and after The Mill was in operation is cogent and does not support the view that the conditions imposed will mitigate these concerns relating to amenity and good order.

[130] The Authority, however, does not accept that the DLC was wrong not to consider the proposed amendment to the LAP. As the DLC rightly identified, it is not yet in force and it is not a mandatory consideration until such time as it is in force. While the proposed amendment signifies a degree of community consensus about the number of off-licences that ought to exist in the district, the process in subpart 2 of the Act is yet to be completed to give effect to that community consensus. Whether it will ultimately be imposed is yet to be seen. To import that consensus into s 105, in effect imposes the proposed cap before it is brought into force pursuant to s 90.

[131] Standing back, the Authority does not consider that given the overall evidence of the vulnerability of the area, the issue of the licence even with the undertakings made and the conditions imposed, is capable of meeting the object of the Act.

Conclusion

[132] For the reasons stated, the appeal is allowed. Pursuant to s 158 of the Act, the decision of the DLC is reversed.

DATED at WELLINGTON this 2nd day of July 2018

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