

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

And

IN THE MATTER of an application by Fresh One Limited for the renewal of an off-license pursuant to section 17 of the Act in Respect to premises at 30 McMillan Street Methven.

Licence No. 062/OFF/02/14

BEFORE THE DISTRICT LICENSING COMMITTEE AT ASHBURTON

Chairperson: I.J. Burgess
Members: A. Lawn
R. Kilworth

HEARING at Ashburton District Council on 13 March 2015

APPEARANCES

Mr. A.W. Braggins	For the Applicant
Mr. S.I. Ling	Applicant
Mrs. H. Faass	District Licensing Inspector – in opposition
Sergeant M.G. Lord	For the New Zealand Police – in opposition
Mrs. S. Newton	For the Medical Officer of Health – in opposition

RESERVED DECISION OF THE DISTRICT LICENSING COMMITTEE

Introduction

1. The application is for a renewal of an existing off-licence under Section 17 of the Sale and Supply of Alcohol Act 2012. The application relates to the premises at 30 McMillan Street, Methven, and is known as Methven Supervalu. The site is located in a mall off McMillan Street, and are the premises the applicant has traded from, including the sale of alcohol, for seven years without coming to the notice of any authorities.
2. Other matters relevant to this application.
3. Fresh One Limited is a Private Company, the two Directors of which are Mr. S.I. Ling and Mrs. C.T.A Ling, and trades as 'Methven Supervalu'.
4. Under the Act Methven Supervalu would be a grocery store. In answer to the question from Mr. Lawn, what is to be the principal purpose of the business, the application reveals that a full range of foodstuffs and general merchandise is sold, and Mr. Ling testified that alcohol is a minor percentage of the total sales. Methven Supervalu is also a Lotto and related lotto products agency.

5. The application seeks hours as per those currently licensed for the sale of alcohol; Monday to Sunday 7 am – 10 pm.
6. There is one church within 500 metres, and one residential property within 50 metres. There were no objections from the public, but the reporting agencies are united in their opposition, which focused solely on an appropriate single area for the sale of alcohol in these premises. The present premises are the same as those operated from prior to the Sale and Supply of Alcohol Act 2012, and specifically sections 112, 113, and 114 of the Act.

Evidence of the Parties

7. Mr. Andrew Braggins, counsel for the applicant, commenced the proceedings with an opening submission which covered the following matters;
 - The ARLA Bishopdale Decision,
 - The Effect of section 113 (1),
 - The meaning of section 113 (5),
 - The store's layout.
8. Mr. Braggins described in detail the four sections above and drew heavily on the Bishopdale decision which he submitted was similar in most respects to the Fresh One application currently being heard.
9. Mr. Ling then gave his evidence (attached) which included photos and evidence of the store's layout and traffic flows, Progressive Enterprises Limited (PEL's), Responsible Service of Alcohol Policy to which the store strictly adheres, and copies of the New World Supermarkets at Bishopdale and South City which recently won appeals to ARLA based again on the Single Area for Alcohol. Mr. Ling had previously removed a prominent display of cartons of beer from the end of the aisle which would have been very visible from the checkouts. During his evidence Mr. Ling revealed there exists a Sale and Purchase agreement for Methven Supervalu, with the sale expected to be completed in August of this year.
10. Mr. Ling's evidence reinforced the fact that the single area is the only factor producing opposition from the reporting agencies, as the store has an enviable record including a 100% success rate in CPO's and a monthly mystery shopper. Strict training for his staff along the lines of PEL's policy is the norm. In his application Mr. Ling lists six certificated staff including Mrs. Ling and a seventh person who is in the system but has yet to receive their certificate. Mr. Ling then answered questions from the panel and representatives of the agencies.
11. The Licensing Inspector for the Ashburton District Council, Mrs. H. Faass, an Inspector with twelve years' experience, then presented her report which focused on the single alcohol area. Mrs. Faass spoke of a visit she made to the premises on June 10th 2014, during which she spoke with Mr. Ling and expressed concern that the single alcohol area may not comply with sections 113 – 115 of the Sale and Supply of Alcohol Act, and as described in section 112, limit the exposure of shoppers to displays of alcohol. Mrs. Faass also believed that the area was located next to the point of sale and as such is in a prohibited area. At that point it should be noted that the prominent display of some four different brands of beer at the end of the aisle in close proximity to the checkouts had not been removed.

maximum exposure of product'. 'Research has shown that end of aisle displays appear to have a large impact on sales of alcohol and non-alcoholic beverages'.

21. A further concern is that the area is very visible when customers enter the premises and can in fact be seen from without the premises. In answer to a question from the chairman Mrs. Newton agreed that this was possibly exacerbated by the prominent display of beers at the end of an aisle facing toward the entrance. This display has subsequently been removed
22. Mrs. Newton gave evidence on the background of the single alcohol area provisions of the Sale and Supply of Alcohol Act, 2012 and quoted Section 112 to 114 of the Act.
23. Mrs. Newton answered cross examination from the panel, and counsel with Mr. Braggins, referring to the two New World decisions in Christchurch recently handed down by ARLA. In particular the Bishopdale New World Decision.

Administrative Matters

24. During the hearing it was pointed out to the applicant that he had applied for a 'supermarket style off licence but the store appeared to be too small for this categorization. In answer to a question of clarification from the chair, Mr. Braggins confirmed that Methven Supervalu is a Grocery Store and sought a waiver of to amend its application to state just that. The waiver was granted and as section 33(2)(a)(ii) of the Act states that the Committee "must have regard to a statement of annual sales revenue" a set of audited accounts was offered by the applicant, after discussions with the Alcohol Licensing Inspector. Five working days was set to allow the applicant to provide these to the committee and the Inspector.
25. As a site visit was believed to be very necessary, the committee took a view of applicant premises.
26. During the site visit the panel observed at length the single alcohol area and noted the traffic flows throughout the store, in particular through the alcohol area. Although this was on a busy Friday afternoon there was little or no traffic observed entering the alcohol area except for one customer who purchased a bottle of wine.
27. During the site visit and subsequent viewing of the applicant's SAC plan a concern was raised in relation to the non-alcoholic drinks refrigerator being a small part of the 'single area', (0.6m) is actually in the prohibited area. The chair issued a Minute to the applicant seeking their comment as the potential exists whereby unaccompanied minors might be standing in part of the single alcohol area in order to purchase non- alcoholic beverages. The minute was sent to all parties to the hearing.
28. A memorandum of Counsel dated 27th March 2015 was received which included a proposed plan suggesting that,

"the Single Alcohol Area be adjusted so that it borders the centerline of the aisle for that part of the aisle (0.6m), being that part of the non-alcoholic drinks refrigerator that intrudes into the single alcohol area. This will minimize the possibility that unaccompanied minors might be standing in the alcohol area in order to make purchases of non-alcoholic beverages".

12. During discussions at that time with Mr. Ling about alternative areas for the alcohol, no other area was identified as Mr. Ling did not wish to move the existing area because he felt staff are better able to limit shoplifting from the present location.
13. During the next six months more enquiries were made and two decisions from ARLA were received in respect of single alcohol areas. Mrs. Faass made contact with Mr. Ling and explained that while some of her concerns had been clarified by those decisions, she still believed the area was located in a prohibited area and does not comply with Section 113 (5) (b) (ii) to of the Act.
14. A copy of a report setting out these concerns accompanied by photographs taken in June 2014 was forwarded to Mr. Ling. A copy of this report was produced as an exhibit. (Exhibit).
15. On the 27th February 2015, Mrs. Faass received a 'phone call from the counsel for the applicant, Mr. A.W. Braggins. Mrs. Faass explained that subsequent to the latest ARLA decisions regarding the Christchurch New World decisions, she still believed the area was a prohibited area under the Act. At this point Mr. Braggins informed Mrs. Faass that the prominent display of beers at the end of the aisle had been removed. Mrs. Faass again visited the premises on March 3rd, spoke briefly to Mr. Ling, and took several more photos of the area. Mrs. Faass sought leave to produce these photos as an exhibit (EXHIBIT).
16. The representative of the New Zealand Police, Sergeant M.G, Lord elected not to present a report.
17. Next to present her Brief of Evidence was Mrs. S. A. Newton, the Public Health Alcohol Regulatory Officer with Ashburton Community Alcohol and Drug Services (ACADS), who holds a full delegation from the Canterbury Medical Officer of Health, pursuant to section 151, Sale and Supply of Alcohol Act 2012. Mrs. Newton has been employed in this role since 2007.
18. Mrs. Newton testified that on the 27th June 2014 she visited the applicant premises accompanied by Mrs. C. Clark, ACADS General Manager who has 22years experience in the field of public alcohol sales and consumption. Mrs. Clark also holds full delegation from the Canterbury Medical Officer of Health pursuant to Section 151, Sale and Supply of Alcohol Act, 2012. Mesdames Newton and Clark met with Mr. Steven Ling, a director of the applicant company.
19. During the visit concerns were raised with Mr. Ling with regard to the prominent end of aisle display of beers. At that time Mr. Ling stated he would remove the display of beers from the end of the aisle, however when the report was being compiled a new floor plan indicating that this had in fact happened, had not been received. A 'phone call was subsequently received on the 6th March 2015 from Mr. Braggins, counsel for Mr. Ling, which assured ACADS that the issue of the proposed plan would be rectified. Later that same day a new plan was received via e-mail confirming the removal of the end of aisle display.
20. Concerns were also raised with Mr. Ling regarding the outward facing aisle of the alcohol area which is in close proximity to the produce and ice cream freezers as shown on the plan (submitted). Mrs. Newton gave evidence that the Medical Officer is well aware that aisle and product placement in supermarkets is not haphazard, but a very particular science aimed at getting customers to take a particular route through the supermarket, and to get

29. Mr. Braggins along with the information mentioned above included audited, comprehensive evidence of sales at Methven Supervalu which clearly demonstrates that this business meets the relevant tests in the Act and the Sale and Supply of Alcohol Regulations 2013 (“Regulations”), and clearly is a Grocery Store. Mr. Braggins sought an order under section 203(5) of the Act in relation to the audited accounts. An order is made prohibiting the publication of the accounts as submitted by the applicant and these accounts shall be treated as ‘private and confidential’.
30. A supplementary report was received from Mrs. S. Newton acting on behalf of the Medical Officer of Health which stated:

“We don’t believe the re-configuration of the plan addresses the concern that customers would be standing in the single alcohol area when selecting Non-alcohol beverages from the non-alcohol unit. Once again the plan is not to scale making it very difficult to access measurements of the aisle and configuration of the alcohol area”.

Decision

31. When seeking to renew an off licence of the kind applied for here, section 132(1)(b) applies. This states that ‘the licensing authority or the licensing committee concerned must impose any conditions subject to which it must issue a licence of that kind’; ...
32. This in effect brings the application under sections 112, 113 and 114 of the Act. These sections detail the compulsory conditions relating to display, promotion and advertising of alcohol in a single area in supermarkets and grocery stores.
33. Any area designated as a single area must promote both the object of the Act and the purpose, or intention, of the condition as set out at section 112(1).
34. The Alcohol Regulatory and Licensing Authority in its appeal decision of J & C VAUDREY LIMITED [2015] NZARLA PH 64-65 they outlined what section 112(1) describes at para [26];
- [26] Section 112(1) describes the purpose of ss.112 to 114 of the Act. It is “to limit (so far as is reasonably practical) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol and advertisements, for alcohol”. The subsection explains the rationale behind ss. 112 to 114. It recognizes that the exposure to displays and promotions of alcohol and advertisements for alcohol may ultimately result in alcohol-related harm. It seeks to limit such exposure but only so far as is reasonably practicable. Thus, the purpose of the sections is to achieve the limitation of one of the causes of alcohol-related harm which in terms of s.4 of the Act is to be minimized. It recognizes that in this instance minimization of alcohol-related harm will result from the reasonably practical limitation (but not the minimization) of exposure to displays, promotions and advertisements. In itself, the section does no more than explain the purpose of the following sections. It is not an operative provision”*
35. In effect the Authority is saying that the object of the sections is to place alcohol in one area within the supermarket or grocery store.

36. The main concern of the representatives of the Medical Officer of Health was the outward facing isles containing alcohol increasing the exposure of alcohol to shoppers. There is no limitation in the Act to outward facing isles. The fact that this store is small and limited for space means the outward facing isles are difficult to avoid practically. Having said that alcohol is in one single area on the plan provided by the applicant.
37. Another concern of the agencies was the positioning of the single area in a prohibited area, in the area between the main body of the grocery store and the point of sales.
38. The concern is genuine especially when the first plan as submitted by the applicant, is viewed. With the removal of the end of aisle display by the applicant, after discussions with the agencies, this concern is mitigated and the area, although close to the checkouts, is not in the area 'between' the main body of the store and the point of sale.
39. Again in the decision of J & C VAUDREY LIMITED (and others) [2015] NZARLA PH 64-65 the Authority outlined their interpretation of the section, 113(5). The section which concerns where a single area cannot be located. At paras [32] & [33] the Authority stated

32. *It is s.113(5) that has created most of the debate. It provides that the DLC can only describe an alcohol area if it is a single area. Further, that area may not contain all or part of the most direct pedestrian route between an entrance and the main body of the premises; nor may it be on the most direct pedestrian route between the main body of the premises and any general point of sale. The suggestion that the area may not be anywhere between an entrance (or general point of sale) and a part of the main body of the premises is incorrect; that definition imports words into the section that are not there ("a part"). The submission, if adopted, could have the effect of prohibiting a Single Alcohol Area completely which, clearly, is not the intent of the section.*

33. *There was some divergence of opinion over the meaning of "the main body of the premises". Any attempt to describe it by alternative words is unhelpful. However, included in the phrase is "main". According to the New Shorter Oxford English Dictionary (Thumb Index Edition) "main" means inter alia:*

"The chief or principal path of; the most important part of some business, subject argument etc; designating a considerable uninterrupted stretch of land, water, space etc; chief in size or extent; constituting the bulk or principal part; designating the chief part of the thing specified."

What can be gleaned from this definition is that the main body of the premises does not necessarily mean the whole of the retail or shopping area where product is displayed. Often this will be the case (except for small displays adjacent points of sale). However, for example, if taking a direct pedestrian route from the entrance to the Single Alcohol Area involved passing a small retail area containing non-alcoholic product, the main body of the premises could mean the balance of the shopping or retail area excluding that small shopping or retail area situated between the Single Alcohol Area and the entrance. It is a matter of degree and involves the sort of judgement that a DLC must exercise when forming an opinion in terms of s.113(5) and having regard to the purpose as expressed in s.112(1). Regard to the purpose of the section will assist a DLC in forming an opinion not only as to whether it is a Single Alcohol Area that is being described but also whether that Single Alcohol Area is in one of the places prohibited by s.113(5)(b) of the Act. In these circumstances, this is not necessarily a "rubber stamping exercise" as

the reporting agencies claimed. Nevertheless, the effect of s.113(5) is that a Single Alcohol Area can be anywhere in the premises except in the prohibited areas.

40. The area as described by the applicant in their final plan fits all the criteria. It is not in the area between the entrance and the main body of the premise and it is not in the area between the main body of the premises and the general point of sale.
41. Methven Supervalu has operated under the management of Mr. Ling for seven years during which time the business has earned an enviable record for the responsible sale and supply of alcohol. Methven Supervalu has a 100% success rate with CPO's, and a monthly mystery shopper.
42. Staff training is high priority and a more than adequate number of duty managers is available. The business adheres to the principles of the Progressive Enterprises Responsible sale of alcohol policy.
43. Because of the exemplary record of this business in the area of the sale and supply of alcohol, the panel found that the applicant is suitable to hold a licence to sell alcohol.
44. We are satisfied as to the matters to which we must have regard as set out in sections 112, 113, 114, 116, 117, 105 and 106 of the Act and the licence renewal is granted for a period of 3 years pursuant to s.130, with the following conditions:
45. The applicant must comply with all conditions specified on the licence.

Compulsory Conditions – section 116 (2)

- (a) No liquor may be sold or delivered on Good Friday, Easter Sunday, Christmas Day or before 1pm on ANZAC Day.
- (b) Liquor may only be sold or delivered on the following days and during the following hours:

Monday to Sunday: 7.00 am to 10.00pm.

- (c) No alcohol may be sold other than—
 - (i) beer that complies with the appropriate New Zealand food standard for beer; or
 - (ii) mead that complies with the appropriate New Zealand food standard for mead; or
 - (iii) fruit or vegetable wine that complies with the appropriate New Zealand food standard for fruit or vegetable wine; or
 - (iv) grape wine that complies with the appropriate New Zealand food standard for grape wine; or
 - (v) a food flavouring, prepared for culinary purposes, that is unsuitable for drinking undiluted.
- (d) Only a single area as delineated on the attached plan is a permitted area for the display and promotion of alcohol.
- (e) Signage must be displayed stating (directly or by description) a place or places on the premises at which drinking water is freely available to customers, while alcohol is being supplied free as a sample on the premises.

Discretionary Conditions – Section 116 (1)

- The following steps must be taken to ensure that the provisions of the Act relating to the sale of alcohol to prohibited persons are observed.
- Display of appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition of sales to prohibited persons.
- The whole of the premises shall be undesignated.

Other restrictions and requirements

Section 56 - Display of Signs

Section 57 - Display of Licenses

Section 214 – Duty Manager to be available at all times and responsible for Compliance.

A copy of the licence setting out the conditions to which it is subject is attached to this decision.

THE LICENSED PREMISES.

The premises are identified on the plan provided with the application for a licence.

Dated at Ashburton this 9th Day of April 2015



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I J Burgess
Chairperson
Ashburton District Licensing Committee