

[2013] NZARLA PH 920

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application by **R S DHILLON LIMITED** for an off-licence pursuant to s.31 of the Act in respect of premises situated at 62-66 Michaels Avenue, Ellerslie, Auckland, known as "Liquor 2 Go"

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole

Member: Mr D E Major

HEARING at AUCKLAND on 6 September 2013

APPEARANCES

Mr P D Swain – agent for applicant

Miss M J McLeod – Auckland District Licensing Agency Inspector – in opposition

Mr G S Whittle - NZ Police – in opposition

Objectors

B Johnson (on behalf of Ellerslie Residents' Association)

J Baker (on behalf of Ellerslie Play Centre)

D McIver

D Sang

J Cameron

G Wilkie

C Summers

A Hall

C Moginie

D McAulay

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] Michaels Avenue is in the middle of the suburb of Ellerslie, Auckland. It runs between the Ellerslie-Panmure Highway and Marua Road. The area consists of gentle hills and the road has a number of bends in it.

[2] Opposite Lawry Street is a block of five shops which serve the residential locality. Included in them is a Thai takeaway, a hairdresser, a homeopathic dispensary and a dairy. The shop at the far left of the building is presently empty and the applicant proposes to establish a bottle store there.

[3] By application dated 7 February, 2013, the applicant has applied for an off-licence in respect of premises at 62-66 Michaels Avenue, Ellerslie. It is to be known as "Liquor 2 Go".

[4] At the commencement of the hearing the applicant confirmed that it wished the application to be considered by the Authority under the criteria set out in s.105 of the Sale and Supply of Alcohol Act 2012 (“the Act”). This can be done pursuant to s.406(4) of the Act.

[5] As a result of that application, this application becomes the first to be considered by the Authority under s.105 of the Act. The benefit to the applicant by adopting this procedure is that if it is granted a licence, the licence will last for one year and can then be renewed for up to three years. If the applicant had requested that the application be dealt with under the Sale of Liquor Act 1989, and if the licence were granted, it would be an interim licence that expired after 12 months. The applicant would then have been obliged to obtain a new licence, and that application would be dealt with under the Sale and Supply of Alcohol Act 2012.

[6] The application was duly publicly notified. As a result over 130 objections were received as well as a petition containing 246 signatures.

Applicant's Evidence

[7] The sole shareholder and director of the applicant is Ranjit Singh. He stated that he is the current holder of a General Manager's Certificate which he has held since 2006. He operated a licensed restaurant in Tuakau for six years and experienced no difficulties with the enforcement agencies. For the past six months he has worked for his brother-in-law in a bottle store in Otara.

[8] It is intended that Mr Singh's wife will assist him in the bottle store. She holds a General Manager's Certificate. She has had experience in the restaurant trade. All staff to be employed in the store will hold General Managers' Certificates. At all times there will be at least two staff in the store.

[9] Mr Singh stated that it is intended that the shop will have closed circuit security cameras inside and that there will be one outside the premises. The premises will be well lit. Signage will be on the veranda but there will not be signage over the windows.

[10] Mr Singh gave evidence concerning no sales to intoxicated persons or persons under the age of 18 and how his staff will be required to obtain identification from anyone who appears to be under the age of 25.

[11] The applicant proposed to sell a full range of liquor products, non alcoholic drinks, tobacco products and snack type foods such as nuts, potato chips and the like.

[12] He stated that liquor would not be sold below cost. However, promotions would be run in respect of product specials promoted by the brand supplier.

[13] Being aware, from having read the objections, that there was concern about alcohol being drunk in the Michaels Avenue Reserve, he stated that he would not sell single bottles or cans of beer or RTDs. He said there would be regular checks made of the area outside the premises to ensure that no one drinks alcohol there. Whenever possible a circuit of the Reserve will be made and if someone is seen drinking in the Reserve the Police will be called.

[14] Although the application sought trading hours for the sale of liquor from 8.00 am to 10.00 pm, he indicated that the applicant was prepared to reduce the opening hours to 10.00 am to 10.00 pm daily. It was not prepared to reduce the trading hours so that they would coincide in any way with the liquor ban affecting the Michaels Avenue Reserve. Under cross-examination he indicated that he had visited the Michael Avenue Reserve which he said had two entrances from Michaels Avenue. Upon reflection, he stated that the CCTV camera outside the premises would only operate in the area immediately outside the premises. He stated that there would not be staff members patrolling the reserve but that could be done by the camera. He was unaware of the existence of the Michael Park School (the Rudolf Steiner School across the reserve from the proposed premises). This was because they do not wear uniforms.

[15] He was unaware that school buses stop outside the premises and disgorge students. He was also unaware that school buses stop across the road when taking students to school. He stated that there was no school bus sign across the road.

[16] He knew that there was a playcentre not far from the premises. He was unaware of where the other schools in the area were.

The Inspector

[17] The Inspector reported that the block of shops is located in a highly populated residential area. There are two Council reserves in close proximity – viz Michaels Avenue Reserve situated at 46 Michaels Avenue, Ellerslie which is approximately 77 metres from the premises and the Liston Park Reserve at 101 Michaels Avenue, which is approximately 536 metres north of the premises.

[18] The Michaels Avenue Reserve is the home for the Ellerslie YMCA, a recreation centre and the “Ellerslie Sports Club”. The main entrance to the Reserve is from Michaels Avenue. There are three entrances to the reserve from Michaels Avenue. The Reserve contains a playground area and a large car parking area. There is one training field and three playing fields. In addition there is a cricket pitch and an area for cricket nets. The Reserve contains its own wetland area.

[19] The Auckland Council has recently upgraded the top sports field at the Michaels Avenue Reserve with artificial turf at a cost \$2 million. Further upgrading is planned. Council proposes to install gates at the Michaels Avenue car park entrance and the Ellwood Road car park entrance during the forthcoming summer. At present there are no gates at any of the car park entrances.

[20] The “Ellerslie Sports Club”, which has a building in the Reserve, holds a club licence.

[21] Liston Park Reserve was previously the home to the “Marist Brothers Old Boys Football Club”. In 2010 the land and building were sold to the Auckland Council and the site is presently vacant.

[22] There is a liquor ban in force for the Liston Park and Michaels Avenue Reserve. The ban operates seven days a week. Its hours of operation are from 10.00 pm to 8.00 am during daylight saving time; outside daylight saving time its hours of operation are 8.00 pm to 8.00 am.

[23] There are nine off-licensed premises reasonably close to the proposed premises. The closest is "Cobra Liquor" at 71A Marua Road, Ellerslie which is 400 metres from the premises. The most distant off-licensed premises (included in the nine) is "Highway Liquor" at 1 Harris Road, Mount Wellington which is 10.7 kilometres from the premises. In addition there are four on-licensed premises which are between 1.6 and 2.8 kilometres from the premises.

[24] The Inspector said that she was not challenging the suitability of the applicant.

[25] The Inspector stated that the hours that she would like to have imposed were 10.00 am to 9.30 pm during daylight saving and at all other times 10.00 am to 7.30 pm. This was because of the residential nature of the neighbourhood and the existence of the parks.

The Police

[26] The Police opposed the application. Sergeant J Edwards, who is the assistant intelligence manager for Auckland, indicated that there had been two serious incidents in the Michaels Avenue Reserve during the last year. He considered that alcohol induced offences constituted low to medium in the scale of Auckland suburbia. In short, this is not an area which features prominently in the Police statistics as having many alcohol induced crimes or other incidents in it.

The Objections

[27] Evidence and submissions made by the objectors concentrated on the following matters:

- [a] The proliferation of off-licences in the area. It was noted that "Cobra Liquor" at 71 Marua Road is the closest off-licence to the premises;
- [b] The proposed location of the bottle store. The Rudolf Steiner School and kindergarten are across the Michaels Avenue Reserve from the premises. There are other schools in the area. The dairy attracts children and students disgorge from the buses which stop outside the premises in the afternoons;
- [c] The sports fields at Michaels Avenue Reserve. Because of the upgrading that has occurred there they attract large numbers of young people. In addition, there was concern that the turf could be damaged by persons who might have obtained alcohol from the premises;
- [d] The quiet residential neighbourhood. It has a playcentre which uses the Lawry Street Reserve (a short distance from the premises). Concern was expressed that drinking of alcohol with product from the premises would occur in the Reserve and that glass would be left there. Possibly this could injure bare footed children. There are schools in the area and the area has the usual attributes that one might expect in an Auckland residential suburb;
- [e] Public disturbances in the Michaels Avenue Reserve. The gates are not locked at night. The Ellerslie Business Association patrols do not wish to

be out late at night because of the opening of a bottle store. There were three or four alcohol fuelled disturbances in the Reserve during the last year. This places children at risk;

- [f] Cars are inclined to speed along Michaels Avenue and this will be aggravated if this application is granted;
- [g] The demographics of the area. Ellerslie's population is approximately 12,000. There are approximately 3,750 residences in the suburb. There has been a significant movement of elderly people into retirement homes and their places have been taken by families. Ellerslie is a densely populated residential suburb.

Authority's Decision and Reasons

Legislation

[28] Section 105(1) of the Act sets out the criteria to be considered in applications of this sort. In deciding whether to issue a licence, the Licensing Authority 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 proposing 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 affects of the issue of existent 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 affects 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.**

[29] Section 3 of the Act sets out its purpose. It is to put in place a new system of control over the sale and supply of alcohol; and to reform the law generally relating to the sale and supply and consumption of alcohol. The characteristics of this new system are that:

- (a) **It is reasonable; and**
- (b) **Its administration helps to achieve the object of this Act.**

[30] Section 4 sets out the Act's object. Section 4(1) reads:

- (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 and indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

[31] Section 5 defines the expression “*amenity and good order of the locality*” as meaning:

... the extent to which, and ways in which, the locality in which the premises concerned are situated is ... pleasant and agreeable.

Onus and standard of Proof

[32] Section 105(1) of the Act commences with the mandatory admonition that the Authority is required to have regard to the matters set out in that subsection. This means that each of those criteria must be considered. If the applicant fails to give evidence as to some of those matters which are only within its knowledge, then the Authority cannot have regard to those matters. An applicant for an off-licence must prove its case. If it fails to do so, then the Authority is unable to grant the application. The standard of proof is the civil standard, namely *on the balance of probabilities*.

Criteria

[33] As with any application, some of the criteria are of more relevance than others. It is appropriate that each the various criteria be considered; but not in the order they are set out in s.105(1) of the Act.

Local Alcohol Policy

[34] In respect of s.105(1)(c) of the Act: there is no relevant local alcohol policy in existence. There is nothing to consider.

Merchandise

[35] The applicant gave evidence as to the goods referred to in s.105(1)(f) of the Act which it proposes to sell. These are unexceptional; except that to a minor extent the premises would compete with the dairy in respect of the foodstuffs component. Possibly under aged persons could be interested in these products: but as they are available in the dairy this is unlikely.

Services

[36] No evidence was given as to whether the applicant intends to engage in any of the services referred to in s.105(1)(g) of the Act. The Authority infers that the

applicant does not intend to engage in such services. Evidence should have been specifically adduced to cover this matter.

Systems and Training

[37] The applicant did give evidence about the matters contained in s.105(1)(j) of the Act and it seems that the proposed procedures will be adequate if properly adhered to. The nature of till prompts was not explained.

Design and Layout

[38] The applicant gave no evidence about the design and layout of the proposed premises. This matter is referred to in s.105(1)(e) of the Act. In order that the Authority could consider this criterion, evidence should have been adduced. The Authority accepts that this matter usually will be of greater moment in respect of on-licence applications than applications for off-licences. In this case it is inferred that the premises will have a fairly usual shop style design and layout. The whereabouts of the till and the chillers (with their RTDs) can be relevant. Indeed the location of such product as RTDs can be relevant to a determination of an applicant's suitability as ready access to them by young people can involve a breach of the object of the Act in some instances. For example, barrels of RTDs at a store's entrance will normally be abhorred.

Suitability

[39] The Inspector accepted that the applicant is suitable.

[40] At the end of the hearing, however, the Police did not. In his final submissions, Mr Whittle, acting for the Police, noted how Mr Singh had had difficulty in answering questions put to him by the objectors. In particular, he was concerned about the evasive answers given by Mr Singh about the way in which the external CCTV camera would be used. He noted that it would be impossible for the camera to photograph nocturnal happenings in the Michaels Avenue Reserve as it is impossible to see the Reserve from the block of shops. He also noted how the evidence of Mr Singh changed in this regard whilst under cross-examination.

[41] Two phenomena dominate the location of the proposed premises. The first is the Michaels Avenue Reserve and its attendant activities. The second is the residential nature of the locality. Mr Singh, in his evidence, did not seem to appreciate how the opening of a bottle store in this locality could affect the locality. Indeed, his knowledge of the locality was abysmal. He did not know where the local schools were. He was unaware of whether or not school children at those schools wore uniforms. He was unaware that school buses stop outside the premises disgorging a number of students in the afternoon. He was unaware that students gather on the other side of the road to catch school buses in the morning. He seemed oblivious of the fact that people treat the shopping centre as a community hub and are inclined to congregate there. He was not aware of the hours of the liquor ban affecting the reserve. He was unaware that sometimes the car park of the Michaels Avenue Reserve is used by persons consuming alcohol.

[42] An applicant's suitability was discussed by the Authority recently in *Nishchay's Enterprises Limited* [2013] NZARLA PH 837.

[43] At paragraph [53] of that decision the Authority stated:

“[New Zealand Police v Casino Bar No 3 Ltd (CIV 2012-485-1491; [2013] NZHC 44) a recent High Court judgement which discussed “suitability” in some detail] did not specifically refer to the test for suitability contained in Sheard [1996] 1NZLR 751 where Holland J said at 758:

“The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of a licence”.

However the judgment inferred that the test applied when the learned Judge referred with approval to Holland J’s statement in Re Sheard:

“Suitability is a relatively broad concept and, in the context of an assessment of an application under section 13 of the Act, it relates to the suitability of the applicant to be granted the privilege of an on-licence to dispense liquor”.

Traditionally that test 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 section 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 paragraph. It includes how a licensee will deal with liquor abuse issues that may arise from the establishment of the business. The usefulness of the Sheard test is that it gives a focus to the wider exercise contemplated in the Casino Bar No. 3 Limited decision by reminding one of the reason for the exercise.”

[44] Paragraph [54]:

“In this case, the applicant did not deal with potential liquor abuse issues at all. Indeed it was obvious the applicant was unaware of many of the liquor abuse issues that occurred when the premises traded as a bottle store.”

[45] Of course, *Nishchay’s* decision was given in terms of the Sale of Liquor Act 1989. In this case, it is the Sale and Supply of Alcohol Act 2012 that applies. Thus when considering the suitability of the applicant, the issue is whether the character of the applicant has been shown to be such that it is likely to carry out properly the responsibilities that go with the holding of the licence. This includes the responsibilities of complying with the object of the Act.

[46] In this case the objectors have argued that to grant the application would be the antithesis of minimising the harm caused by the excessive or inappropriate consumption of alcohol. The harm alleged is that likely to be caused to society generally but more particularly to the community and this would be contributed to by damage and disorderly behaviour arising from persons purchasing liquor at the proposed premises.

[47] There is evidence that persons purchasing alcohol from other bottle stores in the area are inclined to converge upon the Michaels Avenue Reserve at night. This is particularly the case in respect of the car park. The objectors argue that this is likely to be aggravated if this application is granted. Noise and nuisance will result. Possibly more importantly, the sporting facilities (including the recently laid turf) are put at risk. If they are damaged, not only is there the financial cost that must be met; but also a very large number of sports men, women and children will have their leisure activities severely curtailed.

[48] It was suggested that persons purchasing alcohol at the "Cobra Liquor Store" would take it home in their cars. In those circumstances the alcohol would not be brought into the Michaels Avenue Reserve. The fact of the matter is that alcohol already is being consumed in the Reserve at night and it matters little as to where it might have been purchased. Suffice to say, that although the "Cobra Liquor Store" is approximately 400 metres from the proposed premises, if one walks along Whites Way it probably takes only about two or three minutes to reach the "Cobra Liquor Store" from the proposed premises. (The Authority did not actually undertake this walk when it visited the area: however, that was its observation. Distances given by the Inspector were taken from Google maps and may not be very accurate.)

[49] The fact that the applicant seemed to have no knowledge of the locality or the potential problems associated with it goes to its lack of suitability. If the applicant had indicated some knowledge of the environment in which it proposes to set up a bottle store, then it follows that it would have discussed the measures necessary to assist in the minimisation of harm caused by excessive or inappropriate consumption of alcohol purchased at its premises. Those measures it did discuss were the ineffectual external camera and the discarded suggestion that a staff member would patrol the Reserve at night from time to time: a totally impractical suggestion for a business employing only two staff. More sensibly, it would have given greater thought to the hours it wishes to be open for the sale of alcohol in this area.

[50] The evidence before the Authority establishes a sufficient link between the proposed off-licence and alcohol induced activities that could occur particularly in the car park of the Michaels Avenue Reserve. The applicant has failed to satisfy the Authority as to the suitability criterion in respect of this application.

Object of the Act

[51] The preceding paragraphs [40] to [50] relate to the applicant's lack of suitability. However, s.105(1)(a) of the Act requires consideration to be given to the Act's object. Many of the comments in those paragraphs are pertinent to this issue as well. There is a causal nexus established by the evidence that if this application were granted breaches of the object of the Act are likely: in particular those aspects of the Act's object as are set out in paragraph [46]. This evidence is not merely speculative as alcohol fuelled incidents already occur in the Michaels Avenue Reserve to some extent. A bottle store in close proximity must aggravate the present situation. To grant this application would not accord with the Act's object.

Amenity and good order of locality

[52] In respect of s.105(1)(h) of the Act there is no doubt that the establishment of a bottle store in this locality would affect the amenity and good order of the locality. Whether this would be "*to more than a minor extent*" involves an objective assessment based on the evidence. Some assistance to the interpretation of s.

105(1)(a) of the Act can be gleaned from s.106 of the Act which requires an assessment of the compatibility of future noise, nuisance and vandalism in respect of the land near the premises (in this case Michaels Avenue Reserve) and the premises. In this case, the applicant gave no helpful evidence in respect of this criterion. It needed to; if it were to counter the evidence given by the objectors.

Proliferation

[53] In respect of s.105(1)(i) and s.106(1)(a)(iii) of the Act, whilst the applicant did not discuss this issue, there is insufficient evidence relating to the proliferation of off-licences in the immediate area to cause the Authority concern. Certainly other off-licences exist in the locality; but the evidence is that they are relatively wide spread.

Conclusion

[54] In any application for a licence, the applicant is obliged to make out its case. Here, the applicant has failed to satisfy the Authority that its application should be granted in accordance with the terms sought. The evidence indicates that if the application were to succeed, the condition relating to trading hours should be governed by the precautionary principle as expressed by the Court of Appeal in *My Noodle Limited v Queenstown-Lakes District Council* [2009] NZCA 564, [2010] NZAR 152 at paragraph [74]. Glazebrooke J, delivering the judgment of the Court of Appeal said:

“[74] In our view, the Authority is not required to make sure that particular conditions will reduce liquor abuse. It is entitled to apply the equivalent of the precautionary principle in environmental law. If there is a possibility of meeting the statutory objective (as the Authority found there was in this case), then it is entitled to test whether that possibility is a reality.

[55] The facts of this case are similar to those of *AKL Liquor Trading Limited* [2012] NZ LLA PH 448 where the Authority took into account the liquor ban prevailing in respect of parks in the area and imposed trading hours with closing times 30 minutes before the liquor ban commenced: namely during daylight saving 10.00 am to 9.30 pm and for the rest of the year 10.00 am to 7.30 pm daily. These are the hours advocated by the Inspector. In this case there is also some evidence supporting a closure of the business when the school bus arrives in the afternoon. In that regard the exact time of arrival of the school bus was not given in evidence: nor the number of children disgorged. There is no need to pursue either of these matters further as Mr Singh was emphatic at the hearing that the Inspector’s proposed hours were unacceptable.

[56] In those circumstances the Authority refuses the application.

DATED at WELLINGTON this 24th day of September 2013