

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

AND

IN THE MATTER of an application by **Victory Supermarkets Limited** pursuant to section 127 of the Act for the renewal of an Off-Licence in respect of the premises situated at Rimu Road, Paraparaumu known as “Kapiti Pak n’Save Supermarket”.

BEFORE THE KAPITI COAST DISTRICT LICENSING COMMITTEE

Chair: Ms Fiona Vining
Members: Mr Trevor Knowles
Mr Michael Dodson

HEARING at Council Chambers, 175 Rimu Road, Paraparaumu, on 17 October 2017

APPEARANCES

- Mr Glen Taylor - applicant
- Mr Iain Thain – Counsel for the applicant
- Ms Vanessa Young, Hutt Valley DHB on behalf of Medical Officer of Health
- Ms Katherine McLellan, Inspector

RESERVED DECISION OF THE COMMITTEE

Introduction

- [1] Victory Supermarkets Limited has applied for a renewal of its off licence in respect of its premises situated at Rimu Road, Paraparaumu, known as Kapiti Pak ‘n Save Supermarket.

The Application

- [2] The Applicant’s evidence was provided by Mr Glen Taylor, who is one of the two directors of the applicant company, Victory Supermarkets Limited. The Applicant was represented by Mr Iain Thain.
- [3] This Application was first lodged in February 2015. There are no objections to the application. The Medical Officer of Health filed a report on 14 April 2015 with no opposition to the Application.
- [4] The Police filed a report on 16 March 2015 opposing only the description of the Single Alcohol Area (“SAA”) that was proposed by the Applicant, but not opposing the Application on any other basis. A question was raised whether the Police report may have been out of time, as the Act allows 15 working days for a report to be filed by the Police from when the Application was received. However, in April of 2015 the Police withdrew their opposition, but at that stage asked for an extra condition to be imposed

in addition to the SAA condition, which was to limit the signage in the SAA to no larger than A4 size.

- [5] In December 2015, the Police subsequently referred to the fact that they had withdrawn their opposition earlier, and explained why they did so. They still however suggested the Committee consider an alternative plan for the SAA. The Inspector then filed a report with no opposition to the Application including no opposition to the SAA, but the Inspector suggested the Committee should consider an alternative plan for the SAA.
- [6] Prior to the hearing the Committee undertook a site visit. The Committee had been advised that the supermarket had been reconfigured to correspond with the proposed SAA. The Committee observed that the layout at that time did not match the proposed SAA filed with the application. The Committee issued a minute prior to the hearing noting that this matter would need to be clarified and stating that the Applicant needed to file a more accurate floor plan, preferably with measurements. This was done after the hearing by memorandum on 31 October 2017 and it is this SAA that has been considered by the Committee.

Submissions of Mr Thain

- [7] Mr Thain submitted that this is the first time that this store has been subject to an SAA condition, and until renewal of the licence has taken place, all efforts to ensure the display, advertising and promotions are restricted to the SAA area are voluntary. There is no legal requirement until renewal has taken place to ensure this is carried out.
- [8] Mr Thain submitted that the approach that the Committee to take is that set out by the Court of Appeal in *J & G Vaudrey Ltd v Christchurch Medical Officer of Health*¹. This is the approach the Committee has followed and it is set out later in this decision.
- [9] Mr Thain submitted that that the Committee can set the boundaries of the SAA but that it cannot specify the layout of stock, e.g. pallets, within this area. Mr Thain observed that the Authority has clarified that you cannot use a general condition under section 117 of the Act to specify the layout, without specifically considering the criteria in that section. Any condition under this section must be reasonable. It must be a proportionate response to minimising alcohol related harm.
- [10] In specific terms, he submitted that when considering the suggestion that the Committee impose a condition that alcohol signage be no larger than A4 that the Committee needed to focus on whether this would minimise alcohol related harm rather than minimise shoppers' exposure to alcohol. He submitted that in this case, there was no evidence before the Committee to this effect. He submitted that the signage in the alcohol area was consistent with signage in the rest of the store. On this basis, he submitted that there is not valid basis for a condition regarding signage in this store.
- [11] Mr Thain explained to the Committee how customers flow through the store based on a document provided to the inspector submitting that the natural flow of customers was more naturally around the outside of the SAA. As this was a matter of evidence rather than a submission this issue was further discussed with Mr Taylor.

Evidence of Mr Taylor

- [12] Mr Taylor has been in the supermarket business for about 41 years and has been an approved owner/operator for 20 years.

¹ [2016] NZCA 539; [2017] 2 NZLR 334

- [13] Mr Taylor outlined the processes and policies of the Applicant in terms of the sale of alcohol noting that the Applicant is also required to comply with Foodstuffs policy regarding the sale of alcohol. He noted that the requirement is that all staff must require ID from anyone who looks under the age of 30 and that any person who is intoxicated will be refused the sale of alcohol. He stated that only certain staff may approve the sale of alcohol. He also outlined training provided to staff.
- [14] Mr Taylor stated that in his twelve and a half years of operating the store that the Applicant had never failed a controlled purchase operation. He acknowledged that the store had failed one Foodstuffs mystery shopper audit and the steps undertaken as a result of this.
- [15] Mr Taylor stated that while the Applicant was not required to sell alcohol only from a SAA until its first renewal under the new legislation, the Applicant developed a SAA around November 2014 and reconfigured its store based on this SAA. Since this time, alcohol has only been sold from the voluntary SAA.
- [16] Mr Taylor commented on the SAA proposed by the police stating that the Applicant's proposed SAA can be avoided by shoppers if they wish and that it currently under-represents sales in proportion to its size.
- [17] Mr Taylor noted that shifting alcohol products into a different area has flow-on effects on non-alcohol product display space. He stated that a straight swap between alcohol and non-alcohol products is not possible as non-alcohol products like cards and magazines do not fit in pallet displays.
- [18] Mr Taylor's evidence was that Kapiti customers are very resistant to change and are never pleased when this takes place. He acknowledged that products are moved around within the store when there is a need for it. He stated that they are always looking for ways to improve the store.
- [19] In reference to the suggestion by the police that the Committee impose a condition restricting alcohol signage to a maximum A4 size, Mr Taylor noted that the Applicant's product ticketing is consistent with or smaller than other signage in the store. He acknowledged that it did have signage in the exterior windows advertising "wine and beer week" but stated that the Applicant had limited all alcohol signage which includes prices to the voluntary SAA for the past two years.
- [20] The primary concern by the reporting agencies in terms of the SAA is the area to the south of the SAA next to the freezers. In his evidence Mr Taylor stated that this pallet display makes up "almost 50% of its remaining promotional display space". He confirmed that this meant "not normal everyday pricing".
- [21] The Inspector raised the issue of limiting exposure of alcohol to shoppers. She suggested that having the cheapest alcohol on display on large pallets including signage saying "Extra Low" and "I can't believe my eyes" seems to be maximising alcohol to shoppers. In response, the Applicant advised that the Supermarket has an exposure agreement they have to follow around the signage they use. If there is a promotional product lower than the everyday price it is advertised.
- [22] The Inspector raised that the Applicant had bottles of wine on display selling for \$7.79. The Applicant outlined that every retailer in the country has customers looking for these prices. Mr Taylor's evidence was that the Applicant has reduced its \$10 bottle of wine volume and increased the more expensive bottles. He stated that this pallet is not only

used for cheap bottles of wine, it is also used for more expensive wines, e.g. Champagne around Christmas time etc.

- [23] There were a number of questions asked around the flow in the store with both the reporting parties present making statements based on their observations. Mr Taylor also made some statements based on his observations. The Committee has not given any weight to any of these statements as there was not enough clarity about them to treat them as reliable evidence. The Committee would have found clear evidence on this point helpful.

Reporting Agencies

Evidence of the Licensing Inspector

- [24] The Inspector did not oppose the objection but did share the concerns raised by the Police and Medical Officer of Health regarding the proposed SAA and the size of signage within the SAA.

Evidence of the Police

- [25] The police did not appear at the hearing nor give evidence. As noted above, in 2015 when the application was first filed the police did suggest that an alternative single alcohol area be considered. The police also requested that a condition be imposed limiting the size of alcohol signage to an A4 size.

Evidence of the Medical Officer of Health

- [26] The evidence for the Medical Officer of Health was provided by Vanessa Young of Hutt Valley DHB.
- [27] Ms Young noted that the original lack of opposition by the Medical Officer of Health was based on case law at the time of the application. She noted that if the application was being considered now, based on current case law, the Medical Officer of Health would oppose the application.
- [28] The Medical Officer of Health's evidence was that the primary concern with the proposed SAA is in relation to the area described by Mr Taylor as the "promotional area".
- [29] Ms Young observed that if there is an actual flow to walk through the SAA that this doesn't limit exposure, that exposure is limited by not having to walk through the area. She submitted that there is a higher exposure if you walk through the area as opposed to around it. She was of the view that while the Applicant had stated that people could avoid the area if they wished this did not reflect the actual reality of the natural flow of shoppers.
- [30] She stated that the Medical Officer of Health agreed with the plan that was proposed by the Police, and viewed that as a reasonable practicable option.
- [31] Ms Young noted that the Medical Officer of Health is of the view that the Applicant is in similar circumstances to "Bond Markets" as there is a very limited amount of time before its licence must be renewed. On that basis, the Medical Officer of Health would not have an issue if the licence were renewed at this time but noted that if the area was

to stay the same the Medical Officer of Health would look at putting in an opposition in March or April next year when it comes up for renewal.

Site visit

- [32] As noted above, prior to the hearing the Committee made a site visit to the Applicant's store. To ensure that the Applicant had a proper chance to comment on observations by the Committee and answer any points raised, the Committee conducted another site visit during the hearing with all parties who wished to attend present.
- [33] During the site visit the Committee observed the current signage in place and discussed that with Mr Taylor and counsel. The Committee noted that the signage at the time was approximately A2 size, being 600mm by 430mm. The Committee contrasted this with the much larger signage shown in the photos attached to the Inspector's report. The Committee asked whether the Applicant would agree that signage not be larger than this size and this was agreed by Mr Taylor and his counsel. The Applicant has provided an undertaking to the Committee that "price signage in the single alcohol area will be no be larger than 600mm by 430mm".
- [34] During the site visit there was also discussion between the Committee and the Applicant regarding some minor modifications to the proposed boundaries of the SAA. These changes were agreed and are reflected in the plan filed by memorandum on 31 October 2017.

The Law

- [35] Section 131 of the Act sets out the criteria that the committee must consider when deciding whether to renew a licence. This section states:
- (1) In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:
 - (a) the matters set out in paragraphs (a) to (g), (j), and (k) of section 105(1);
 - (b) whether (in its opinion) the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence;
 - (c) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made by virtue of section 129;
 - (d) the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.
 - (2) The authority or committee must not take into account any prejudicial effect that the renewal of the licence may have on the business conducted pursuant to any other licence.
- [36] The relevant subsections of section 105 state:
- (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) ...
- (i) ...
- (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.

Discussion

- [37] The object of the Act is the overarching principle, or touchstone for determining off-licence applications. As Heath J put it in *Re Venus* [2015] NZHC 1377:

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 s105(1)(b)–(k) of the 2012 Act, that grant of an off-licence is consistent with the object of that Act?

- [38] On this basis, the Committee considered the various criteria set out in section 105, with the final consideration being the object of the Act.

Suitability of the Applicant

- [39] The Committee was satisfied as to the suitability of the Applicant.

Any relevant local alcohol policy

- [40] There is no local alcohol policy in place.

The days and hours on which alcohol would be sold

- [41] The application is for alcohol to be sold on Monday to Sunday from 7am to 11pm. These are the default maximum trading hours for off-licences and are consistent with other supermarkets in the area.

The design and layout of the premises

- [42] Subject to the discussion below the Committee found the design and layout of the supermarket to be satisfactory.

Whether the applicant proposes to engage in the sale of goods other than beverages

- [43] The applicant proposes to trade as a supermarket. The legislation specifically allows for a supermarket to hold a type of off-licence which allows for the sale of beer and wine only.

Whether the applicant proposes to engage in the provision of services other than the sale of beverages

- [44] The applicant does not propose to engage in the provision of services other than those linked to operation as a supermarket.

Whether the amenity and good order of the locality would be likely be increased, by more than a minor extent, by the effects of a refusal to renew the licence

- [45] There was no evidence that refusing to renew the licence would result in any increase in the amenity and good order of the locality.

Whether the applicant's appropriate systems, staff and training comply with the law

- [46] The Committee is satisfied that the applicant has appropriate systems, staff and training to comply with the law.

Any matters dealt with in the report provided by the Police, Inspector, or Medical Officer of Health

- [47] In addition to comments on the SAA, the Police, Medical Officer of Health and Inspector also raised concerns about the size of signage within the SAA. Each of these parties recommended imposing conditions in relation to this issue. The various statutory bodies raised this issue in respect of various criteria relevant to the granting of a license. The Committee has considered these concerns when considering the object of the Act below.

The object of the Act

- [48] The object of the Act is set out in section 4 of the Act, which states:

- (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).

[49] The High Court in *Re Venus NZ Ltd* in considering the purpose of the Act stated:

... both the Authority, and this Court, must have regard to reducing alcohol related harm to the smallest amount, extent or degree, when making decisions on the grant or renewal of a licence.

[50] Under section 117(1) of the Act, the Committee may impose conditions on the issue of any licence. Such conditions must be reasonable. The statutory agencies have recommended the imposing of conditions in relation to and the size of advertising and signage of alcohol. The reasons that have been given for the proposed conditions are essentially the minimising of alcohol related harm, giving effect to the object of the Act.

[51] The Committee cannot restrict the layout of the SAA under the SAA provisions, but retains the discretion to impose conditions which meet the purpose of the Act for minimising alcohol related harm.

[52] The recent decision of *Christchurch Medical Officer of Health v J & G Vaudrey Limited* [2015] NZHC 2749/2015 discusses section 117 of the Act. In this decision, His Honour, Judge Gendall stated:

I consider the principles can be stated as follows:

- (a) the relevant body must have identified a risk which it seeks to abate, or a benefit which it seeks to secure;
- (b) that risk or benefit must be consistent with the purpose and object of the Act, and not inconsistent with the Act in its entirety. In this respect the comments of the authors of *Sale of Alcohol* are usefully repeated.¹²¹

Any conditions considered under this provision must be reasonable, and, in the view of the authors, must relate to, and be consistent with, Parliament's intentions in the legislation as set out in ss 3 and 4 – the purpose and object of the Act;

- (c) the relevant body must direct itself as to all relevant circumstances;
- (d) it must then weigh the risk to be abated, or benefit to be secured, against the relevant circumstances as identified;
- (e) the condition must be a proportionate response.

[53] A concern was raised regarding large signage, particularly signage that refers to "super low" prices or similar in that it would encourage impulse purchases or the purchase of greater quantities of alcohol than originally intended. The Committee had reservations about the signage in the photographs attached to the Inspector's report, but as the Applicant has provided an undertaking that "price signage in the single alcohol area will be no greater than 600mm by 430mm", it is not necessary to determine whether this was too large.

[54] The issue is rather whether a condition requiring signage to be no greater than A4 should be applied. In the context of the display area, the Committee is satisfied that the restriction agreed to by the Applicant is a proportionate response, as required by the High Court decision in *Vaudrey* and that further restriction is not necessary to minimise alcohol related harm.

Single Alcohol Area

[55] Under section 112 of the Act, when issuing or renewing an off-licence for a supermarket or grocery store the Committee must impose "on the licence a condition describing one area within the premises as a permitted area for the display

and promotion of alcohol". This is commonly referred to the single alcohol area or SAA.

- [56] The purpose of the SAA is set out in section 112(1) as being to "limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol, and advertisements for alcohol".
- [57] Section 113 of the Act sets out certain criteria for the Committee when determining the SAA. This can be separated into matters which are compulsory and some for which the Committee has a discretion.
- [58] The approach that the Committee is required to take in applying the SAA provisions has been considered by the Court of Appeal in *J & G Vaudrey Ltd v Canterbury Medical Officer of Health*.
- [59] The first question on appeal in that case was stated as:

Question 1: Does the direction in s 113(1) merely give guidance (echoing s 112(1)) on the implementation of the s 113(5) requirements or does it impose a discrete obligation?

- [60] The Court concluded:

Section 113(1) directs the decision-maker to give genuine attention and thought to the purpose stated in s 112(1) in describing the perimeter of the single area. The decision-maker must take into account the purpose of limiting so far as reasonably practicable the extent of shoppers' exposure to alcohol displays, promotions and advertisements in describing the alcohol area.

- [61] The Court elaborated stating:

It is common ground that s 112(1) is not in itself an operative provision but sets out the specific purpose of the three single-area provisions, namely ss 112–114. By contrast, the dual requirements in s 113(5) are prerequisites to the function of describing an alcohol area. The point of contention arises from the direction in s 113(1) that the decision-maker "must have regard to section 112(1)" when describing an alcohol area. Does that impose a discrete obligation on the decision-maker?

Gendall J considered that it does. He said:²

I would therefore summarise the role of the relevant body in relation to the single area condition in these terms:

- (a) In the case of an application for an off-licence which is also a supermarket or grocery store, the relevant body must impose a single area condition if it grants a licence. This entails an evaluative exercise requiring the relevant body to:
 - (i) be satisfied that the proposed area is a single area;
 - (ii) be satisfied that the proposed area complies with s 113(5)(b);
 - (iii) consider whether the proposed area plan limits, so far as is reasonably practicable, the exposure of shoppers to displays, promotions and advertisements of alcohol.

² *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] 2 NZLR 382 [High Court judgment] as cited in *J & G Vaudrey Ltd and Canterbury Medical Officer of Health* [2016] NZCA 539; [2017] & NZLR 334

- [62] The Court of Appeal confirmed the approach set out by Gendall J stating that it accurately captured the nature of the obligations imposed on the Committee or ARLA. The Court noted, however, that:

The obligation imposed by s 113(1), while mandatory, is not as absolute in nature as the s 113(5) prerequisites. The requirement to "have regard to" a matter imports only an obligation to give genuine attention and thought to the stipulated matter.

- [63] In considering the application, the Committee followed the steps set confirmed by the Court of Appeal.

- [64] There was no dispute that the application set out a single area, however, the Inspector submitted that the proposed area did not meet the criteria set out in section 113(5)(b)(ii) and section 114(1)(b)(ii).

- [65] Section 114 is concerned with the effects of a SAA. Section 114(1)(b) applies after the decision of the Committee to ensure that a licensee cannot reconfigure the premises after the granting of a licence in a way that section 113(5)(b) is effectively frustrated. It is not relevant to determining the SAA.

- [66] The Committee is satisfied that the proposed SAA does meet the requirements of section 113(5)(b). This section refers to "the main body" of the premises and is expressed in the singular, therefore, the main body of the premises must be taken as a whole. The proposed SAA, while close to the checkouts, is not between the checkouts and the main body of the store.

- [67] Having confirmed that the proposed SAA complies with the mandatory requirements in section 113, the Committee turned to the next step of the analysis as set out by Gendall J. That is, that section 113(1) requires that the Committee must have regard to the purpose of the SAA as set out in section 112(1). Section 112(1) states:

The purpose of this section and sections 113 and 114 is to limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol, and advertisements for alcohol.

- [68] In considering this issue, the Committee has reservations about the SAA proposed by the Applicant and is not necessarily satisfied that it limits the exposure of shoppers on the Applicant's premises as much as is reasonably practicable.

- [69] Following the Court of Appeal decision, the matter was referred back to the Alcohol Regulatory Licensing Authority³. In reconsidering the matters, the Authority also had reservations about the proposed SAA, however, it stated:

Nevertheless, in the particular circumstances of this appeal, given the passage of time since the application for an off-licence was made by Bond, the Authority does not consider that it is reasonable, or in the interest of justice to reverse the decision of the DLC or to remit the matter back to the DLC for reconsideration.

³ *J & G Vaudrey Limited v Christchurch District Licensing Inspector* [2017] NZARLA 294 (24 August 2017)

[70] The Authority noted that the Christchurch DLC also needed to determine the renewal application for the period from 2015 to 2018. It stated:

... the Authority considers it would not be unreasonable in the circumstances, for a DLC when considering the renewal application for what is left of the period 2015 to 2018, to grant the same area pending consideration of any renewal application for the period from June 2018 onwards.

[71] The renewal of the Applicant's licence in this matter will be required by 4 April 2018. This is sooner than the time of renewal referred to by the Authority. Due to those time constraints, the Committee is satisfied that it should allow the issue of the licence with the SAA set out by the Applicant. This SAA will automatically lapse at the renewal of the licence. This will allow all parties and the regulatory agencies to approach this matter in a manner consistent with the approach set down by the Court of Appeal.

Decision

[72] The District Licensing Committee hereby grants the Application on the following conditions:

- a The area to be permitted for the display and promotion of alcohol (as required by section 112 of the Act) will be the area set out on the plan filed by the Applicant on 31 October 2017.
- b The licence will be from 7.00am to 11.00pm seven days a week.

DATED at Paraparaumu on 22 February 2018





Cr Fiona Vining
Chair