

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

AND

IN THE MATTER of an application by **NIKHIL HIMALAYA LIQUOR OTAKI LIMITED** pursuant to section 100 of the Act for a new Off Licence in respect of premises situated at Unit 4, 4 Arthur Street, Otaki, to be known as 'The Bottle O'.

BEFORE THE KAPITI COAST DISTRICT LICENSING COMMITTEE

Chair: Ms F M Vining
Members: Mr P Parkinson
Mrs H Wooding

HEARING at ŌTAKI on 17 November 2017

APPEARANCES

Mr John Young (Counsel for the applicant)
Mr Ravinder Kumar Arora
Mr Trevor Hosking

Objectors

Mr Hamish Wood (Otaki College and Te Kura-ā-Iwi o Whakatupuranga Ru Mano)
Mr Donovan Joyce (Ngati Mairotaki hapu)
Ms Denise Hapeta (Otaki and Porirua Trusts Board and Te Wananga o Raukawa)

Reporting agencies

Mr Slade Sturmeay (Police)
Ms Vanessa Young (Regional Public Health representing Medical Officer of Health)
Ms Jane Parish (in support of Medical Officer of Health)
Ms Katherine McLellan (Inspector)

RESERVED DECISION OF THE COMMITTEE

Introduction

- [1] Nikhil Himalaya Liquor Otaki Limited has applied for a new off licence in respect of premises situated at Unit 4, 4 Arthur Street, Otaki, to be known as 'The Bottle O'.
- [2] There were ten objections filed in respect of the Application. The Committee considered that based on the information provided that two of those objections were filed by people who do not meet the criteria in section 102(1) of the Sale and Supply of Alcohol Act 2012 ("the Act") in that they did not have a "greater interest in the application for the licence than the public generally". The Committee did not take

these objections into account. Of the remaining objectors, five were represented at the hearing by three individuals.

- [3] The Committee noted that due to an administrative error, the objection for Otaki and Porirua Trusts Board was not received until after the date for objections had closed. That was because a staff member misunderstood instructions and posted the objection rather than sending it by email. The objection was received on 4 September 2017, 4 days after objections closed. As it was one of a number of objections which resulted in the matter having to be considered at a public hearing, there was not a significant disadvantage, if any, to the Applicant in accepting this objection. Therefore, the Committee determined under section 208 to waive the requirement to file the objection by 31 August 2017.

Preliminary procedural matter

- [4] Prior to the hearing the chair advised the Applicant and his counsel that she had previously been involved as counsel in an unrelated matter where she had cross-examined Mr Hosking as manager of the current Otaki Bottle-O. She noted that Mr Hosking's evidence had been to provide till receipts and confirm identity and as such had been procedural, however, for transparency she wished to raise the matter and allow the Applicant to comment.
- [5] The Applicant confirmed through counsel that he did not have any comments or concerns.

The Application

- [6] The Applicant's evidence was provided by Mr Ravinder Kumar Arora, who is the director of the applicant company, Nikhil Himalaya Liquor Otaki Limited and Mr Trevor Hosking, who is the manager of the Bottle-O situated at 42B Main Street, Otaki, the licence for which is held by another company controlled by Mr Arora. The proposed licence would also be operated as a Bottle-O franchise store.

Submissions of Mr Young

- [7] Mr Young submitted that the Authority has commented on the object of the Act and submitted that for the law to remain a good law system it must be reasonable, not suppressive or excessive.
- [8] Mr Young further submitted that the concerns raised by the objectors in relation to the Act could be levelled at any application for a license in Otaki. He suggested that if this Committee found the applicant to be suitable but did not grant the licence then it would not be possible to ever grant a licence in Otaki for any style of licenced premises.
- [9] Mr Young noted that neither Police nor the Inspector had raised any issues in relation to amenity and good order. He submitted that the most valuable information in terms of that criteria generally comes from Police as they have the relevant information.
- [10] Mr Young submitted that it would be beneficial for Otaki to have any additional store run by the licensee of the existing store. This would be because there would not be

pressure to reduce prices that might occur if a low priced competitor entered the market. He submitted that it would also be good for Otaki to have any new licenced premises run by an existing operator with local knowledge and experience.

Evidence of Mr Hosking

- [11] Mr Hosking is the current manager of the Bottle-O store located at 42B Main Street, Otaki. The licensee for this store is another company controlled by Mr Arora. Mr Hosking has eight years' experience in the alcohol industry and has lived in Otaki for 38 years.
- [12] Mr Hosking gave evidence as to how he manages the current store. In response to questions, Mr Hosking stated that he consulted with Police, local Iwi, college and the churches after Ms Young prepared her report on behalf of the Medical Officer of Health. Mr Hosking acknowledged that a number of those parties stated that they would oppose the application.
- [13] Mr Hosking explained that there is a plan to put in CCTV and additional lighting to cover outside areas near the store as there was a concern that some of the area between the train station and the store was not well lit.
- [14] His written evidence stated that he had discussed that car park area with the owners of the Railway Hotel, which is another licensee near the proposed store. He stated that he was advised that there are no current issues in the area.
- [15] Mr Hosking explained their process for "trouble makers" which includes banning them from the shop for 24 months. He also explained that there is a system in place between local licensees to advise each other of issues and to jointly ban individuals if necessary.
- [16] Mr Hosking's written evidence provided information about staff training and supervision as well as processes that apply in the current store which would also apply to the new store.

Evidence of Mr Arora

- [17] Mr Arora is the sole director of the Applicant Nikhil Himalaya Otaki Limited. This is one of a number of companies operated by Mr Arora which hold licenses to sell alcohol.
- [18] Mr Arora's written evidence stated that he was concerned about when a previous application for a bottle store in a similar location was declined. He stated that he understood that it would be a store with pricing that are generally cheaper than Bottle-O and that it would lead to downwards pricing pressure. Mr Arora and Mr Hosking decided to seek another off-licence in that area as that would be likely to prevent another operator seeking to establish a bottle store in Otaki.
- [19] He also stated that pricing at the new store would be the same as at the existing store. He acknowledged that he would probably lose some customers at the existing store but thought that he would pick up some customers that currently use New World.

- [20] His written evidence stated at paragraph 2.5(d):
I consider that we have a good understanding of the community due to Mr Hoskings close connections with the community. I consider that we can operate a second store safely and responsibly. Mr Hosking is very important in this regard as he is a local.
- [21] And at paragraph 2.5(e):
I will visit the store every 3 to 6 months. I will be in regular contact with Mr Hosking.
- [22] Three other companies controlled by Mr Arora have failed four controlled purchase operations between them. Another store has failed to properly notify the appointment of a duty manager leading to its licence being suspended. Mr Arora outlined how these breaches occurred and what steps had been taken to ensure that they would not happen again.
- [23] It was clear from Mr Arora's evidence that he has delegated management of the current Otaki store entirely to Mr Hosking and that Mr Hosking would also have full responsibility for the new store. Mr Arora said that he trusts Mr Hosking completely in terms of how he runs the stores. Mr Arora stated that he cannot run the store, so he appoints a manager to manage the store. He acknowledged that he is reliant on Mr Hosking.
- [24] In response to a question Mr Arora acknowledged that he did not know how far away the local schools were and that he had not been involved in consultation. He agreed that the main driver for opening the new store is to keep out competition and stated that this is to avoid a price war.
- [25] Mr Arora agreed that he would not have any signage or advertising on the main road of Otaki directing people to the location of the store.

Objectors

Mr Donovan Joyce

- [26] Mr Joyce appeared on behalf of Ngati Mairotaku hapu. The hapu officially represents 700 people of whom 400 live in Otaki. Unofficially it would represent around 1000 to 1500 people.
- [27] Mr Joyce said that he did not oppose the sale of liquor but that he did oppose the issuing of a new off-licence. He stated that there would be no benefit to a further liquor store being opened up.
- [28] He referred to a newspaper clipping dated 1872 which referred to problems with alcohol and stated that the opinion of the problems of alcohol remains the same.
- [29] In response to a question from Mr Young, Mr Joyce stated that he would not have the same opposition to a pub as it is a place of "meeting and greeting" as opposed to "pay and grab".
- [30] Mr Joyce had concerns about alcohol being treated as a "restricted" item and said that made it more enticing to younger people. He preferred it to be in view and treated the same as other products, for example, in a supermarket. While

acknowledging that this would create more exposure, his view was that it meant that alcohol wasn't seen as such a "big deal".

- [31] Mr Young asked whether it would be better for a new bottle store to be opened by someone you know or someone from out of town. Mr Joyce said that it wouldn't make any difference.
- [32] Mr Joyce acknowledged that Mr Hosking has an "outstanding reputation" and is very well respected.

Mr Hamish Wood

- [33] Mr Hamish Wood is the Deputy Principal of Otaki College. Otaki College is approximately 300m away from the proposed premises by foot.
- [34] Mr Wood also appeared on behalf of Hami Doyle of Te Kura-ā-lwi o Whakatupuranga Rua Mano
- [35] Mr Wood advised that the college had concerns about the influence of an off-licence near the college. He confirmed that the college would oppose any application for an off-licence stating that there is enough accessibility to alcohol already, adding more licences potentially adds another way for people to abuse it.
- [36] Mr Wood noted that Mr Hosking had opposed the issue of a further off-licence when another party applied for an off-licence back in 2015.
- [37] Mr Young asked whether Mr Wood would prefer an existing well known person with a good performance record or an outsider to open an off licence. Mr Wood stated that the college would prefer no more outlets to open and that it would make no difference.
- [38] Mr Young asked if there is a store to be located in the railway area, would it be better on or off the main road area. Mr Wood stated that a preference that things are open and in full view, and that if hidden people can go through back doors. He said that being open about things is important. Mr Wood was of the view that the proposed location was not a good one as it was hidden out of view and could create a "hot-spot" for issues. His preference would be a location in public view as this would allow community oversight.
- [39] Mr Wood stated that things have improved at Otaki College since the previous application in 2015 but that his view is that there are a lot of issues around alcohol in the community and that those issues are possibly increasing. His view was that alcohol was "one of the big drugs" in the Otaki area.

Ms Denise Hapeta

- [40] Ms Hapeta appeared on behalf of Otaki and Porirua Trusts Board. She also appeared on behalf of her employer Te Wananga o Raukawa as Mereana Selby of Te Wananga-o-Raukawa was unable to attend the hearing.

- [41] The Otaki and Porirua Trusts Board owns substantial land in the Otaki area. Income from that land is primarily put towards education and education scholarships.
- [42] Ms Hapeta raised concerns about the possibility of another liquor outlet in the area. She was of the view that allowing another outlet would not be valuing the health and wellbeing of the community. She noted that the Wananga has a complete drug and alcohol ban on its grounds.
- [43] Ms Hapeta would prefer not to see any alcohol in the community. Ms Hapeta stated that they are not trying to remove the current licences which are in place, but that they are opposed to any new ones.

Reporting Agencies

Evidence of the Medical Officer of Health

- [44] The evidence for the Medical Officer of Health was provided by Vanessa Young. The Medical Officer of Health opposed the application.
- [45] Ms Young referred the Committee to a number of national and international studies stating that they showed that an increase in alcohol availability would result in an increase in harm. Those studies appear to have some contradictory results. Due to this, and the inability to ask questions of the authors of the studies, these studies provide limited value to this Committee.
- [46] Ms Young submitted that, as Otaki is an area with high levels of deprivation, that there are already sufficient alcohol licenses in Otaki.
- [47] Ms Young also stated the view that the consultation undertaken was insufficient. She stated that consultation involves engaging with people and taking things onboard.

Evidence of the Police

- [48] The evidence of the police was provided by Sgt Slade Sturmey. He noted that police did not object to the licence as there was a view that they did not have sufficient evidence to allow them to do so. However, he was clear in his evidence that he did not support the license.
- [49] In response to a question, Sgt Sturmey agreed that based on the relationship between police and Mr Hosking, he would expect that Mr Hosking would contact police if he witnessed alcohol related problems.

Evidence of the Licensing Inspector

- [50] The Inspector brought an article to the attention of the Committee that stated that Mr Arora or one of his companies was currently being investigated by the Department of Labour following allegations made by a former employee.
- [51] The Committee gave Mr Arora an opportunity to respond and he stated that he was not under investigation.

[52] The Committee noted that that the article was hearsay and has not relied on it.

Further evidence

[53] Following the hearing the Committee met for initial deliberations. At this stage, the Committee identified two matters which it wished to have clarified.

[54] The first matter concerned proposed staffing levels for the new store. The license application had stated that there would be two employees with manager's certificates to manage the store. On initial review this seemed sufficient for the hours proposed. However, the Committee noted that in the evidence provided during the hearing it was stated that Mr Hosking would in fact manage both the new store and existing Bottle-O store, splitting his time between the two stores.

[55] The Committee sought clarification of this issue through a minute issued to the Applicant. The Applicant responded providing details of a third employee with a manager's certificate who would be employed.

[56] The second issue was in relation to the allegations of an investigation of Mr Arora's companies for breaching labour laws. The Committee formed the view that this would be a relevant consideration but that it could not rely on hearsay evidence. The Committee determined that it would be appropriate to seek information from the Ministry of Business, Innovation and Employment.

[57] The information received was forwarded to the Applicant for comment.

[58] The Ministry confirmed that Mr Arora was under investigation and that he was aware of the investigation by 23 January 2018 at the latest.

The Law

[59] Section 105 of the Act sets out the criteria that the committee must consider when deciding whether to issue a licence.

[60] 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:

[20] 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?

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

[62] The Committee acknowledges the concerns raised by the objectors and their strenuous objection to the opening of a new off-license in Otaki, however, none provided any evidence of how the application did not satisfy the requirements of the Act. The Committee is bound by the Act and must assess all applications against it.

While it has sympathy for the positions of the objectors it cannot simply decline all new applications for alcohol licenses.

Suitability of the Applicant

- [63] The Applicant is a limited liability company. It can only act through its agents. Therefore, the Committee is required to consider the suitability of that agent or agents.
- [64] The Committee is satisfied that if this application had been made by Mr Hosking or a company controlled by him then the criteria in the Act regarding suitability would be satisfied. Mr Hosking is an experienced manager who knows the local community well and is respected in that community. He was able to clearly articulate the checks and balances that would be put in place for the opening of the new store and the reasons for these. There have been no issues as to how he has run the current store.
- [65] If this application had been made without the involvement of Mr Hosking, then the Committee would not be satisfied as to the suitability of the Applicant. Mr Arora has no knowledge of the local area and has completely delegated all management responsibility to Mr Hosking. He acknowledged in his evidence that he is "reliant" on Mr Hosking. He controls a number of companies that have off-licenses and acknowledged that he could not manage all of them, which is why he appointed a manager. Despite this, he is seeking a further licence.
- [66] Three companies controlled by Mr Arora have failed Controlled Purchase Operations and one licensee has had its license suspended for failure to notify the appointment of a duty manager. This does not give the Committee faith in Mr Arora's companies and his management of them. Mr Arora is not fully aware of the systems and processes in place in his current Otaki store and has relied on Mr Hosking to ensure compliance with legislation.
- [67] During the hearing the question was raised as to whether the Applicant could offer an undertaking as to the continued employment of Mr Hosking. In closing submissions the Applicant offered the following undertaking:
Nikhil Himalaya Liquor Otaki Limited undertakes to take all reasonable steps to retain Mr Hosking as an employee for the first 1 year period of the off-licence. This undertaking is given on the basis that there may be unforeseen circumstances that arise which mean Mr Hosking's employment is terminated (such as illness or a job offer elsewhere that is preferred by Mr Hosking)
- [68] While the Committee acknowledges the reason that the Applicant could not give an unqualified undertaking, the Committee is of the view that the undertaking provided is insufficient. Without Mr Hosking acting as an agent of the Applicant, the Committee could not be satisfied that the Applicant meets the suitability criteria.
- [69] It is unclear whether the legislation allows the Committee to attribute the knowledge and actions of Mr Hosking to the Applicant. The Committee is of the view that in order to make this link, there must be a requirement under the licence that makes a clear link between Mr Hosking and the Applicant in order to satisfy suitability. On that basis, the Committee has determined that it is appropriate to impose a condition that the licence is only valid as long as Mr Hosking continues to be

employed as the manager with oversight of the store. This condition is necessary because without Mr Hosking's involvement in this application, the Committee would have declined the application.

- [70] Under section 117(1) of the Act, the Committee may impose conditions on the issue of any licence. Such conditions must be reasonable. The Committee is of the view that while this condition imposes a significant requirement on the Applicant that it is reasonable because without this condition, the Applicant would not have satisfied the criteria as to suitability and the application would not have been granted.
- [71] In the event that Mr Hosking is no longer employed by the Applicant then a new application will need to be made. It will then be possible to re-assess the suitability of the Applicant without Mr Hosking's involvement.
- [72] It is acknowledged that unforeseen circumstances may result in Mr Hosking's employment ending. The condition will allow for this providing that the licence will continue as long as an application for a new licence is made within four weeks of the Applicant becoming aware that Mr Hosking's employment will be ending.

Days and hours of trading

- [73] The Applicant has applied for opening hours of 9am to 9:30pm. During the hearing it was brought to the Applicant's attention that within the district that the majority of off-licence bottle stores have agreed to a 9pm closing time. There is also one licence where this closing time was imposed without agreement. That condition has been appealed. The Applicant has indicated that it is willing to also agree to close at 9pm as long as the other bottle stores continue to comply with that agreement. In the event that any bottle store in the area decides not to comply with the agreement it reserves the right to trade at the hours stated in its off-licence. It has given an undertaking in this respect.
- [74] The Committee regards that applicant's approach in this regard as reasonable and given the undertaking is prepared to grant the licence for the hours applied for.

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

- [75] This criteria has the same issues as for the criteria regarding suitability. The Committee has concerns about the Applicant's processes given the number of failed CPOs that have occurred in premises licensed to companies controlled by Mr Arora. However, when the processes in place are combined with the oversight and knowledge of Mr Hosking then the Committee is satisfied.
- [76] We note that Mr Hosking was able to answer questions about the proposed processes, staffing and training far more fully than Mr Arora.

Whether the amenity and good order of the locality would be likely be reduced, to more than a minor extent, by the issue of the licence

- [77] The Medical Officer of Health objected on the basis that granting the license would reduce amenity and good order of the locality.

- [78] The proposed premises are in a retail area near the train station. There is the potential for issues to arise in the car park of the train station. Mr Hosking explained that this had already been considered. He had approached the council regarding the provision of additional lighting. As the council did not have the budget to fund this, the Applicant would be putting in further lighting in the direction of the car park.
- [79] Other matters raised under this heading were effectively in the form of speculation without any evidential foundation. We note that the evidence of the police is that their relationship with Mr Hosking is such that they would be confident that he would contact them as needed. In addition, there is an agreement between licensees in Otaki that provides for communication between licensees in respect of anyone who has been banned from licensed premises.

Whether the amenity and good order of the locality is already so badly affected by the issue of the licence, that the grant of a further licence would be unlikely to reduce the situation further, but nevertheless it would be desirable not to grant a further licence

- [80] There was no evidence that the amenity and good order of the locality is badly affected.

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

- [81] The Inspector raised the possibility that Mr Arora or a company controlled by Mr Arora was being investigated for breaches of labour legislation. Mr Arora denied this at the hearing. The Committee sought clarification of this from the Ministry of Business, Innovation and Employment as noted above.
- [82] The information provided by the Ministry does not show that Mr Arora was formally aware of the investigation at the time of the hearing which is consistent with his statements at the hearing.
- [83] While it was appropriate of the Inspector to bring this matter to the attention of the Committee, the Committee is of the view that it cannot put any weight on the investigation itself. It cannot pre-judge the matter until it has been formally investigated as that might result in a breach of natural justice. If the matter is concluded before this licence is renewed, then the results of the investigation may be considered then.

The object of the Act

- [84] The object of the Act is expressed 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).

- [85] The Act does not prohibit the sale of alcohol nor prohibit the opening of further licensed premises. Rather it is a new system that provides for taking into account the requirement to minimise alcohol related harm when considering a license application.
- [86] In terms of the evidence provided regarding the vulnerability of Otaki as an area, the Committee notes the requirement of a link between the proposed premises and the risk of excessive and inappropriate consumption. This was noted by the Authority in the context of a renewal in *Lion Liquor Retail Limited (Liquor King Kent Terrace) v Palmer*¹, which stated:
- [63] In the context of a licensing application, an approach that first identifies vulnerable communities and then seeks to reduce the availability of alcohol cannot substitute the requirement to identify whether a reduction in availability in respect of the particular premises is appropriate in light of the statutory object. This necessarily requires a link between the premises to the risk of excessive or inappropriate consumption at more than a generic level. If this were not the case, an evaluation of the matters set out in ss 105 and 131 would not provide the balance sought to be achieved in the Act between allowing the safe and responsible sale, supply and consumption of alcohol and the minimisation of harm caused by excessive and inappropriate consumption.
- [87] While this decision is under appeal, this Committee must decide this matter based on the law at present. As a result, the Committee cannot simply refuse the application based on the fact that Otaki is an area of relatively high deprivation without a link between the proposed premises and at a minimum the possibility of alcohol related harm resulting from those premises.
- [88] The objections that stated that no new licensed premises of this type should be allowed in Otaki is a matter which needs to be considered at a district level through a Local Alcohol Policy or at a national level through amendments to the legislation.

Decision

- [89] The District Licensing Committee hereby grants the Application on the following conditions:
- The license will be from 9.00am to 9:30pm seven days a week
 - Mr Hosking continues to be employed as the manager with oversight of the store or the Applicant has applied for a new licence within four weeks of the Applicant becoming aware that Mr Hosking's employment will be ending.

DATED at Paraparaumu on this 12th day of March 2018


Cr Fiona Vining
Chair
Kāpiti Coast District Licensing Committee



¹ [2017] NZARLA 170.