

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER

of an application by GENERAL DISTRIBUTORS LIMITED pursuant to s. 122 of the Act for renewal of an Insert: ON, OFF or CLUB licence in respect of the premises situated at 123-127 MAIN ROAD,, KATIKATI known as "COUNTDOWN KATIKATI".

Hearing Date: 28 August 2015

Committee: Mr Michael Jones (Commissioner/Chair)
Ms Maria Horne (Member)
Mr Don Thwaites (Member/Councillor)

Appearances: Mr Philip Guilford (Applicant)
Mr Duncan McGill (representing the Applicant)
Mr Ron Burgess (Licensing inspector – in opposition)
Sgt Nigel McGlone (NZ Police – in opposition)
Ms Dawn Meertens (representing Medical Officer of Health)

Before the Western Bay of Plenty District Licensing Committee

1. The application for renewal of the existing off-licence is granted, subject to the conditions set out below. The Applicant may continue to sell and deliver alcohol for consumption off the premises, or to provide samples of alcohol to persons on the premises.
2. The licence will expire three years from the date of issue, being the maximum period allowable under the Act.
3. The renewed licence may be issued immediately.

CONDITIONS

The licence is subject to the following conditions:

1. Alcohol may be sold on or delivered from the premises for consumption off the premises, or supplied free as a sample for consumption on the premises, only on the following days and hours: Monday to Sunday 7:00am to 10:00pm.
2. No alcohol is to be sold on or delivered from the premises on Good Friday, Easter Sunday or Christmas Day or before 1.00 pm on Anzac Day.

3. While alcohol is being supplied free as a sample, water is to be provided to patrons free of charge at the place where the samples are being supplied.
4. No alcohol may be sold other than:
 - a. beer that complies with the applicable New Zealand food standard for beer; or
 - b. mead that complies with the applicable New Zealand food standard for mead; or
 - c. fruit or vegetable wine that complies with the applicable New Zealand food standard for fruit or vegetable wine; or
 - d. grape wine that complies with the applicable New Zealand food standard for grape wine; or
 - e. a food flavouring, prepared for culinary purposes, that is unsuitable for drinking undiluted.
5. A properly appointed certificated or acting or Temporary Manager must be on duty, at or nearby the point of sale, at all times when the premises are open for the sale and supply of alcohol.
6. The Licensee must display signage as follows:
 - a. At every point of sale detailing restrictions on the sale and supply of alcohol to minors and intoxicated persons;
 - b. A copy of the licence attached to the inside of the premises so as to be easily read by people entering each principle entrance to the premises; and
 - c. A sign prominently displayed at the premises, which identifies by name the manager for the time being on duty.
7. The "single alcohol area" for the premises is as shown in hatched red described on the plan found at appendix 1, dated 05-05-15. In terms of that single alcohol area:
 - a. All alcohol must be displayed and promoted only within the single alcohol area;
 - b. No advertising or promotion of alcohol within the single alcohol area may be visible from outside the premises;
 - c. No products other than alcohol may be displayed or promoted within the single alcohol area.
 - d. Screening of the single alcohol area from the body of the supermarket shall be a minimum length of five (5) metres from the end of the sharktooth entrance to the premises. Note: existing screening is three metres and thirty five centimetres (3.35 m).
 - e. No end of aisle displays are permitted in the single alcohol area within a distance of eight (8) metres from the end of the sharktooth entrance to the supermarket.
 - f. That all alcohol advertising facing into the body of the store including suspended signage, shall be restricted in terms of the total size and amount of text and graphics to no larger than A4 in size (29.5 cms in length and 21 cms in width).
 - g. That the total number of promotional suspended signs advertising alcohol shall not exceed three (3) signs.
 - h. That the existing frosted glazing on external windows of the store, currently at seventeen hundred millimetres (1700 mm) high is to be retained (as a minimum) to reduce the view of alcohol promotion signage within the store.
8. The requirement for a single alcohol area for these premises, as required in condition 7, will take effect on date 3 months from the date of this decision.

BACKGROUND TO DECISION

The Committee must consider an application by General Distributors Limited (the Applicant) for renewal of an off-licence to sell and supply alcohol for premises which trade as a supermarket, under the trading name of (Katikati) Countdown.

All reporting agencies received copies of the application and duly provided opposition to the renewal of the licence; as such the matter came before the Licensing Committee to consider by way of public hearing.

POSITION OF THE REPORTING AGENCIES

Inspectors Position

The Committee has received a detailed report on the application from Licensing Inspector Mr Burgess, which opposes the application on the basis of the single alcohol area.

Mr Burgess submits that *"I have no alternative but to oppose this application for renewal because of non compliance with section 112 of the Act"*

Medical Officer of Health Position

The Alcohol Regulatory Officer, Ms Meertens, attended the hearing and provided evidence and submissions, both orally and by way of a written brief in opposition to the application on the basis of the single alcohol area.

Her opposition was in relation to the following:

"the plan allows for alcohol products to be visible and fully exposes shoppers to alcohol as they enter the store".

And further

"The Medical Officer of Health would withdraw opposition if the entire alcohol area was to be screened off from shoppers as they enter the store thus limiting exposure of alcohol, including promotional material to shoppers."

NZ Police Position

Sergeant McGlone of the NZ Police attended the hearing and provided evidence by way of a written brief in opposition to the application being granted, on the basis of the single alcohol area.

Specifically:

"the Police view that the current layout of the "alcohol area" at Countdown Katikati does not comply with the Act and that this renewal must be opposed"

"Police would have no opposition should the layout be changed so that shoppers were not exposed to such an alcohol area and its promotions as they enter the premises"

APPLICANTS CASE

General Distributors evidence

Mr Philip Guilford, Bay of Plenty Group Manager for Progressive Enterprises Limited (the Applicant) gave oral evidence and a written brief at the hearing.

Mr Guilford proposed that the single alcohol area would only contain alcohol, it would be simple for shoppers to completely bypass that aisle altogether should they not wish to purchase alcohol.

Applicant's submissions

The Applicant was represented by Mr Duncan McGill as legal counsel. Mr McGill provided a helpful bundle of documents and oral submissions.

In relation to the application for renewal, Mr McGill's submission was that the Applicant met the criteria to have the renewal granted.

In relation to the single alcohol area proposed, Mr McGill submitted that the Applicant's proposed location would comply with the requirements of the Act. At the hearing, Mr McGill provided references to a number of other applications considered by the Alcohol Regulatory Licensing Authority (ARLA) as well as other Licensing Committees, from which licences had been granted, with similar single area layouts.

Counsel made reference to the ARLA J & C Vaudrey decision (2015) NZARLA PH 64-65 with regard to Committees setting decisions and requirements in respect to single alcohol areas. In his concluding statement Mr McGill made the following submissions:

It was submitted that the Application met the criteria for the issue of an off-license. General Distributors Limited was widely acknowledged and recognised as a responsible and suitable license holder. Mr Guilford, on behalf of General Distributors Limited, had given evidence of the criteria for renewal.

It was submitted that the reporting agencies had not raised valid grounds of objection. For reasons articulated in his written evidence, it was submitted that the single alcohol area complied with the requirements of the Act. It was submitted that it was not located in a restricted area and its composition, including the shelving installed, limited exposure of shoppers to alcohol so far as it was reasonably practicable.

Accordingly, it was submitted that the Application should be granted on the terms sought.

DISCUSSION

As indicated at the hearing, there are a number of matters which the Committee must determine. The primary issue to determine is whether the licence should be renewed. If the licence is to be renewed, then the Committee must determine the conditions which are to attach to the renewed licence. Because this is a supermarket, the Committee must also designate a single alcohol area which complies with the relevant provisions of the Act.

The purpose of the Sale and Supply of Alcohol Act 2012 (the Act) is to put in place a system of control over the sale and supply of alcohol (s3). The object of the Act is to ensure that the sale

and supply of alcohol is undertaken safely and responsibly and the harm caused by excessive or inappropriate consumption of alcohol is minimised (s4).

Renewal of the Licence

In deciding whether to renew the licence, the District Licensing Committee must have regard to the criteria in section 131, and various criteria found in section 105. This includes the following questions:

- a) Does the grant of the licence ensure the safe and responsible supply of alcohol and the minimisation of harm caused by excessive or inappropriate use of alcohol?
- b) Is the applicant suitable?
- c) Are the days and hours during which the applicant proposes to sell alcohol suitable?
- d) Is the design and layout of the premises suitable?
- e) Does the applicant propose to sell goods other than alcohol such as low-alcohol refreshments, non-alcoholic refreshments and food?
- f) Does the applicant propose to provide services other than those related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments and food?
- g) Will the amenity and good order of the locality be increased by more than a minor extent by declining to renew the licence?
- h) Does the applicant have appropriate systems, staff and training to comply with the law?
- i) Have the police or medical officer of health raised any concerns?
- j) The manner in which the applicant has sold or supplied alcohol under the previous licence.

In light of those criteria, The Committee are mindful that the following factors particularly support renewal of the application:

- The applicant has held an off-licence for a number of years, and therefore it can be accepted they are experienced licensees.
- Comprehensive policy documents, reflecting careful attention to the licensee's obligations under the Act.

The Committee are satisfied that the considerations fall in favour of the application being granted. There is no evidence on the application file, which would suggest the applicant would sell or supply alcohol in any way contrary to the Act.

Single Alcohol area

Having determined that the application for renewal can be granted, the Committee must now consider the imposition of a single alcohol area.

The Act requires that supermarkets and grocery stores sell alcohol in a single area. The specific provisions of the Act which relate to single alcohol areas are found in sections 112 and 115. The provisions are relatively complex but, in short, they require that all alcohol be located in a single area (s113 (5) (a)), depicted on a plan (s113 (2)) and the Act precludes the Committee imposing a single area which contains any part or all of:

- "(i) Any area of the premises through which the most direct pedestrian route between any entrance to the premises and the main body of the premises passes; or*
(ii) Any area of the premises through which the most direct pedestrian route between the main body of the premises and any general point of sales passes."

The applicant has supplied a plan with the application, which identifies a single area, that plan is found at appendix 1 to this decision (dated 05-05-15). The location of the single alcohol area

is at the entrance to the supermarket, however the area is considered to generally comply with the single alcohol area location requirements under the Act with regard to location.

The extent to which shoppers will be exposed to the display of alcohol from the setup within this location has been raised by all reporting agencies.

The applicant proposes minor adjustments only to the existing alcohol display area, increasing the length of the "infill unit" that faces into the aisle at the entrance – to reduce the current level of exposure at that point.

A site visit undertaken by the Committee to view the location of the single alcohol area and the display of alcohol within this area identified the following areas of concern:

- Advertising, within the single alcohol area that faced out into the body of the store
- End of aisle displays of alcohol
- Screening of the alcohol area – did not limit exposure to alcohol

The Committee noted that all of these points were of particular concern due to the location of the single alcohol area in a sensitive area, being the entrance to the premises. This alcohol area was also clearly visible at the exit aisle. The Committee considerations were that the requirements of section 112 (1) should apply, specifically "*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.*"

These concerns were also raised by all reporting agencies. Ms Meertens and Mr Burgess had suggested some solutions regarding screening and end of aisle displays during the course of the hearing.

Whilst the Committee has considered those conditions put forward by the Agency representatives, the Committee considered the level of screening recommended would result in too greater level of isolation of the single alcohol area and the level suggested would exclude exposure, rather than limiting exposure of shoppers to alcohol.

End of aisle displays have been limited to provide a reduction in the level of exposure

Advertising of the alcohol in the area was considered too prominent in relation to other advertising within the store, especially considering the nature of the product, accordingly the size and nature of the advertising has been limited through conditions.

The applicants proposed additional infill unit to the single alcohol area, does little to limit exposure of shoppers to alcohol at the entrance to the premises.

The next question becomes when the single area conditions shall apply.

Section 115 of the Act holds that the introduction of a single alcohol area can be delayed for some renewals. That provision holds:

"(2) When imposing a new single area condition, the licensing authority or licensing Committee concerned may state a period (not exceeding 18 months) from the day on which the renewal concerned takes effect during which the condition will not apply.

(3) The period stated must be no longer than (in the opinion of the licensing authority or licensing Committee concerned) as reasonably necessary to enable the licensee to configure the premises concerned so that the new single-area condition can be complied with.

(4) When stating a period under subsection (2), the licensing authority or licensing Committee concerned may state any other conditions (being conditions the authority or Committee thinks reasonable) to apply while the new single-area condition does not apply."

The undertakings required to the single alcohol area and displays are considered minor and can be reasonably undertaken by the applicant within a short period of time.

The Applicant is required to have all conditions of the single alcohol area met 3 months from the date of this decision.

HEARING ADJOURNMENT

It is noted that this decision has been pending by the Committee for an extended period of time. The following is an outline of the reasons for the delay by the Committee in releasing this decision.

At the conclusion of the hearing date 28 August 2015, the Committee determined that the pending appeal in the High Court in relation to the ARLA Vaudrey decision would have an impact on the outcome of the Committee decision. Accordingly the Committee decision has been delayed awaiting the outcome of the High Court appeal.

The High Court appeal decision was released in November 2015: (2015) NZHC 2749 (6 November 2015). The Committee has reconvened following review of this decision, to make a final decision in relation to the application.

CONCLUSION

Having regard to the relevant provisions of the Sale and Supply of Alcohol Act 2012, the Committee is satisfied that the existing off-licence should be renewed, pursuant to the conditions set out above.

Dated at Tauranga on the 21st day of December 2015

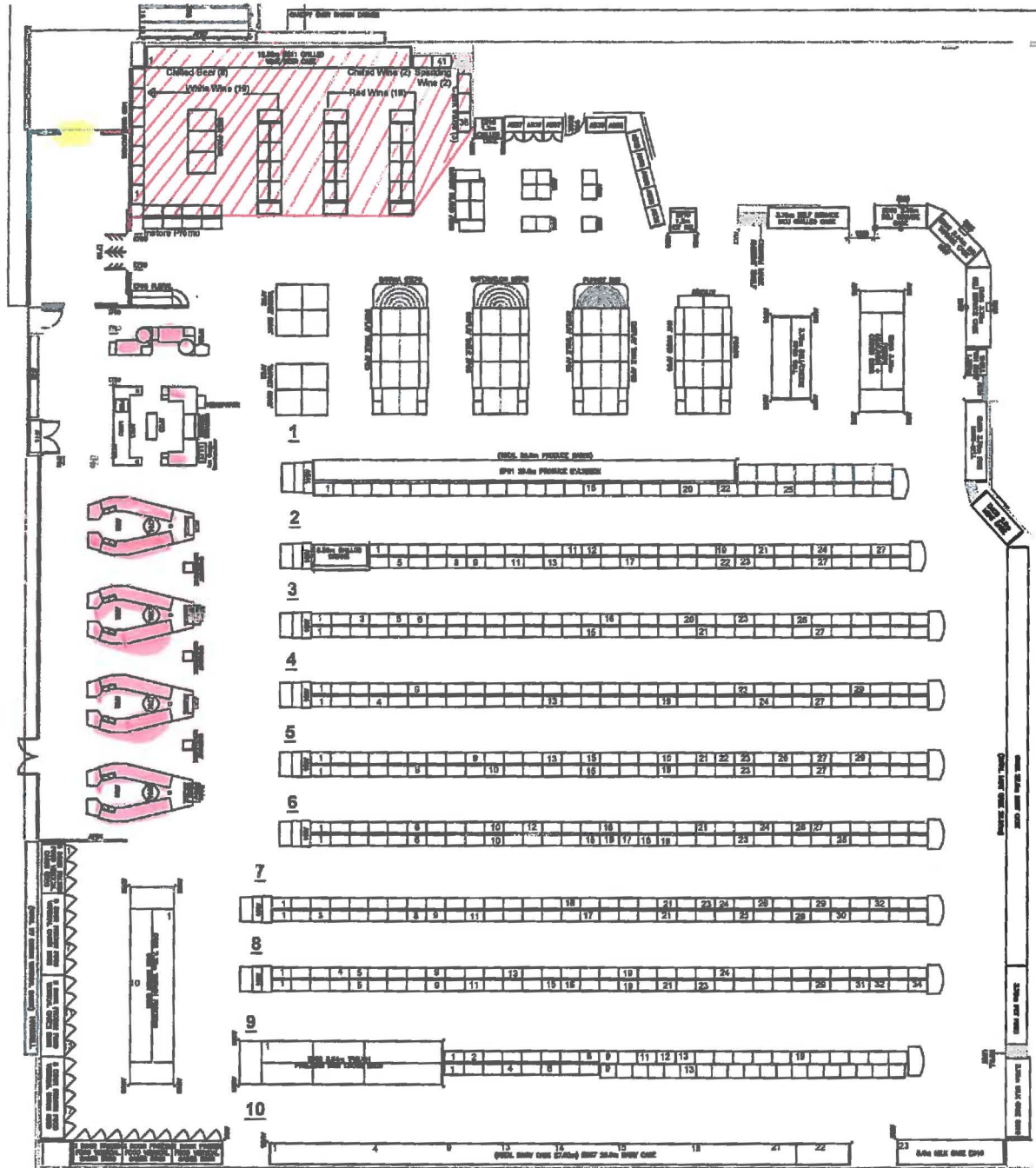


Michael Jones
Commissioner

Western Bay of Plenty District Licensing Committee

Application: 5763

Appendix 1 – Single Alcohol Area Plan



CD KATIKATI 9453 05-05-15

 = SINGLE ALCOHOL AREA

 = POINTS OF SALE

 = ENTRY