

064/OFF/11/2004

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012
(the Act)

AND

IN THE MATTER

of an application by General Distributors Limited pursuant to section 100 and 127 of the Act for the renewal/variation of OFF Licence 064/OFF/11/2004, in respect of the premises situated at 9 Browne Street, Timaru, and known as "Countdown Timaru"

BEFORE THE TIMARU DISTRICT LICENCING COMMITTEE

Commissioner Sharyn Cain
Member Cr Peter Burt
Member Cr Dave Jack

BY WAY OF PUBLIC HEARING

Timaru District Licensing Committee Hearing was held in the Council Chambers, Timaru District Council, 2 King George Place, Timaru on Thursday 6 April at 10.00am

APPEARANCES

Ms Joanne McNaught – Applicant
Mr Duncan McGill – Representative for the Applicant
Mr Shayne Broughton, Liquor Licensing Health Promotor, Canterbury District Health Board – Reporting Agency in Opposition
Dr Daniel Williams, South Canterbury Medical Officer of Health, Canterbury District Health Board – Reporting Agency in Opposition
Mr Peter Shaw, Community and Public Health, Canterbury District Health Board – Representative for the Reporting Agency in Opposition, delegated under section 151
Sharon Hoogenraad, Chief Licensing Inspector, Timaru District Council – Reporting Agency
Sergeant Mylen Hamilton, Alcohol Harm Reduction Officer, New Zealand Police – Reporting Agency

RESERVED DECISION OF THE TIMARU DISTRICT LICENCING COMMITTEE

INFORMATION

1. This application is for a renewal/variation Supermarket Style OFF Licence. The criterion found at section 105 and 106 of the Sale and Supply of Alcohol Act 2012 (the Act) applies to this application

2. The application is in respect of the premises situated at 9 Browne Street, which trades as Countdown Timaru
3. The application for a Supermarket Style OFF Licence was received by the Timaru District Licencing Committee on 26 January 2017
4. The applicant is a Body Corporate: General Distributors Limited, which was incorporated under the Companies Act 1993, via name change on 1 August 1997. The Directors of the company are: Gideon Nigel Robert THOMAS, and David John CHAMBERS
5. The application was publicly notified in the Timaru Herald on 12 October 2016 and 19 October 2016, and resulted in a report in opposition being received from the Medical Officer of Health within the statutory reporting time. No public objections were received. It is to be noted that the advertisements stated hours that did not meet the Local Alcohol Policy, but as the hours advertised were greater than those that could be sought a waiver was granted pursuant to Section 208 of the Sale and Supply of Alcohol Act 2012.
6. The application was presented to the Timaru District Licencing Commissioner on 26 January 2017, and on perusal some potential concerns regarding the proposed single alcohol area were noted. A minute was sent out offering the applicant the opportunity to consider changes to the proposed plan.
7. At a meeting of the Timaru District Licencing Committee held on 3 February 2017, the Committee considered the Licensing Inspector's Report dated 25 January 2017 and further on 2 February 2017, which did not oppose the application. The Committee noted that the New Zealand Police reported on 11 October 2016, and did not oppose the application. The Medical Officer of Health opposed this application, as per the letter received 17 October 2016. The Committee reviewed the objection received. An opportunity was given to the applicant to readdress the plan submitted with the renewal application. Their legal representative advised that they wish to continue with the original plan provided.
8. After due consideration, the Committee agreed that the application would require a public hearing to determine the outcome of the application.

THE HEARING EVIDENCE AND SUBMISSIONS – IN SUMMARY

COUNSEL FOR THE APPLICANT – MR MCGILL

9. Mr McGill submitted that he thought the “crux of the matter” was the end of the aisle issues, which is at the end of the proposed single alcohol area, in the first aisle of the premises once you have come through the entrance and moved towards the main body of the store.
10. Mr McGill further noted that he didn't understand there to be any opposition or objection to the other matters in section 105 of the Act, being the suitability of the applicant and matters of those nature.

THE APPLICANT – MS J MCNAUGHT

11. Ms McNaught is the Operations Manager (South Island) for Progressive Enterprises Limited (Progressive). The applicant, General Distributors Limited (Countdown), is the operating arm of Progressive and the licence holder in respect of alcohol sales from all Countdown Supermarkets in New Zealand. Ms McNaught further noted that she has worked for Progressive for 35 years, that she is familiar with the matters in issue in this application, and is authorised by Progressive to give evidence on its behalf.
12. Ms McNaught noted that she is aware that the Medical Officer of Health is opposed to the application on the basis of the single alcohol area proposed by Countdown.
13. Ms McNaught gave evidence with regard to the applicant's suitability to meeting the object of the Act, and the relevant criteria for renewal of the OFF licence.
14. As no objection has been raised by the reporting agencies, or the Timaru District Licensing Committee, to any criteria other than Section 105 (1) (e) the design and layout of any proposed premises, in particular the location of the single alcohol area, Ms McNaughts evidence with regard this criteria is summarised below.
15. Ms McNaught believes that the single alcohol area depicted in the proposed plan complies with the requirements of the Act, and therefore she does not consider any modification is required.
16. In Ms McNaughts view the single alcohol area is not located on the most direct pedestrian route between the entrance and main body, or between the main body and checkouts. It is possible to access all areas of the store without passing through the single alcohol area.
17. Ms McNaught submitted that supermarket design and layout is a very complicated matter, which has to take in to consideration factors such as the safety and security of their customers, and the National guidelines for Crime Prevention through Environmental Design.
18. The proposed location allows staff to monitor the area to some extent, and changes to the location or layout could make it more difficult to supervise, and may increase the risk of theft or customer safety.
19. Other practical considerations noted by Ms McNaught included the location of the main entrance and car park; the location of the various back of house servicing departments; the location of plumbed in refrigeration and freezers, air conditioning, rooftop cooling plant, and underground plumbing; the location of walk in beer chillers; the location of the truck dock; engineering considerations such as strengthening parts of the roof; associated energy efficiency considerations such as the loss of heat/cooling between the rooftop plant and their fridges; Resource Consent and Building Consent constraints such as how much noise the rooftop plant makes; and the efficient overall flow of customers through the supermarket in a safe and convenient manner.
20. Ms McNaught submitted that there would be significant cost implications to relocate the alcohol area, but that she understands that there is no opposition to the location of the single alcohol area.

21. Ms McNaught considers that the proposed plan limits, as far as is reasonably practicable, the exposure of shoppers to displays, promotions, and advertisements for alcohol.
22. The proposed plan has the alcohol area located in the first aisle, meaning that once customers move past, that area is largely out of sight.
23. The proposed single alcohol area is relatively small compared with the entire area of the supermarket.
24. The proposed end of aisle displays are at the rear of the store only.
25. The signage in the store has a consistent look and feel, and the signage in the proposed single alcohol area will be no different to any other part of the store.
26. Ms McNaught submitted that the practical consequences for Countdown of making any further changes to its proposed single alcohol area plan would be significant, and she is doubtful that there are any further changes possible that would in fact reduce exposure to any significant degree.
27. Ms McNaught understands that the Medical Officer of Health is opposing the application on the basis that the proposed single alcohol area contains outward facing end of aisle displays of alcohol; the display units of alcohol at the rear of the proposed single alcohol area are off set, increasing shoppers exposure to displays of alcohol; and the shelving units in the proposed single alcohol area are a different height from the shelving units in the other central aisles, increasing shoppers exposure to displays of alcohol.
28. Ms McNaught submitted that not having end of aisle displays draws as much attention, as blank end of aisles (if adopted) would be a stark contrast. She also notes that whilst end of aisles are used to expose shoppers to product, they are also simply available shelf space upon which product can be housed. Ms McNaught believes that stocking the end of aisles with grocery products would do little to limit exposure of shoppers.
29. Ms McNaught submitted that one of the end of aisle alcohol displays is a built in refrigeration unit of chilled beer, and that it is not feasible for Countdown to relocate this unit given the costs associated.
30. It is also not feasible to put an additional display unit of non-alcohol products in front of the fridge as it would block the thoroughfare.
31. Finding an alternative range of chilled grocery products to be stocked in the fridge would be problematic.
32. Ms McNaught submitted that it would be unreasonable to remove the end of aisle alcohol displays as it would be difficult, involve significant cost, and would achieve little in terms of reducing exposure to alcohol.
33. The offset of the ends of the alcohol aisles are due to the built in refrigeration units located in the proposed single alcohol area, and adjacent to it.

34. Ms McNaught confirmed that the shelving in the proposed single alcohol area would be 1.98m high, which would be the same height as the rest of the shelving in the store.

CROSS EXAMINATION OF APPLICANT

35. Under cross examination Ms McNaught confirmed that it was not her understanding that the Medical Officer of Health was proposing that the shelf space would be available for products other than alcohol.
36. Ms McNaught confirmed that the store is in the process of refurbishment, and that the refrigeration unit is not currently in place but that it is going at the end of the aisle starting from the back. She reiterated that it would be hard to replace with non-alcoholic chilled product.
37. Ms McNaught confirmed that the Medical Officer of Health had not asked the applicant to remove the refrigerated units; and after some initial confusion, that the Medical Officer of Health was requesting a reduction in the proposed single alcohol area, not the length of the aisles.
38. Although questioning where does it stop, Ms McNaught confirmed that the more you take away, the more limited the exposure is, and that if the ends were removed there would be some limitation of exposure.

REPORTING AGENCY IN OPPOSITION – MR S BROUGHTON

39. Mr Broughton is employed by the Canterbury District Health Board as a Liquor Licencing Officer, with a delegation from the Medical Officer of Health, under Section 151 of the Sale and Supply of Alcohol Act 2012, and has held this position since 2012.
40. Mr Broughton submitted that the proposed layout of the single alcohol area shows two end caps on the south ends of the aisles, and that these end caps expose shoppers to displays of alcohol outside the single alcohol area.
41. Mr Broughton referred to a number of points from the Law Commission Report – ‘Alcohol in our Lives: Curbing the Harm’ which was received in evidence.
42. Mr Broughton submitted that evidence has shown that end cap displays are prominent areas in stores that provide greater exposure to shoppers, and they are used to highlight specials to customers, and increase sales of products displayed there.
43. Mr Broughton further submitted that end of aisles or end caps are a display of alcohol that can be easily limited, and it is reasonably practicable to move the alcohol from the ends of aisles for this applicant. Mr Broughton believes that removing the ends of aisle is a cost neutral process for the applicant.
44. Mr Broughton noted that they are satisfied that the proposed area complies with section 113(5)(b) and that it has no end of aisles next to the check outs, which is a requirement of that section.

CROSS EXAMINATION OF MR BROUGHTON

45. At the start of cross examination, Mr McGill noted that there had been some confusion in terms of the exact location of the refrigerated units. Ms McNaught has now advised that the two end caps referred to throughout proceedings are actually both just shelving units. Mr McGill apologised for the confusion.
46. Mr Broughton confirmed that there is no prohibition against end caps in the Act, but noted that there is a limitation. He further confirmed that there is no prohibition against shoppers seeing the alcohol whilst doing their shopping whilst outside the single alcohol area.
47. Mr Broughton accepted that in the normal course of events someone doing their shopping will be exposed at some point during that time to alcohol products.
48. Upon questioning from a panel member Mr Broughton agreed that end cap marketing is a good form of marketing for the marketer because it increases sales.

REPORTING AGENCY IN OPPOSITION – DR D WILLIAMS

49. Dr Williams is a Public Health Physician, employed by the Canterbury District Health Board. He is a registered Medical Practitioner, and a fellow of the New Zealand College of Public Health Medicine. Dr Williams is the Medical Officer of Health for South Canterbury designated by the Director General of Health, pursuant to Section 7 (a), Health Act 1956, and has held this position since 1999.
50. Dr Williams submitted that the South Canterbury Community experiences significant alcohol-related harm.
51. Dr Williams noted that the object of the Sale and Supply of Alcohol Act 2012 is aimed at reducing this harm, and the Act's specific conditions regarding supermarket displays of alcohol are intended to contribute to harm reduction by limiting the exposure of shoppers to alcohol displays in supermarkets.
52. Dr Williams submitted that displaying alcohol on the two aisle ends will not limit exposure to alcohol as far as reasonably practical, and that it is reasonably practicable for the applicant to remove these end caps. By doing this they will be limiting the exposure of shoppers to the display and promotion of alcohol and contributing to the reduction of alcohol-related harm in the community.
53. Dr Williams believes there would be limited cost in time and money.
54. Dr Williams noted concerns around standard conditions to limit visibility of the single area from other aisles and he mentioned full height surrounding shelves and equal length aisle ends.
55. Dr Williams submitted that end of aisle displays are very special places in supermarkets, and while end of aisles are not specifically mentioned in the legislation, the requirement of the legislation is for this Committee to consider whether the single area that it specifies limits the exposure of shoppers to alcohol as far as is reasonably practicable.

56. Dr Williams believes that the evidence he presented shows that end of aisle displays are one of supermarkets most effective tools at increasing exposure of any product to shoppers, and that is why they are concerned about end of aisle displays.
57. Dr Williams further submitted that as he sees it on the proposed plan, shoppers in this supermarket will mostly enter the supermarket through the produce area, they will mostly pass around the far end of the first aisle, and they will mostly do that between the end of the first aisle and the chest freezer which is marked on the plan. As it is currently drawn what will be right in their faces is the end of the second aisle, which as it is drawn on the application, will be displaying alcohol. Dr Williams believes that the applicant will then be free to display their current specials, or whatever alcohol advertising they wish to, on the inside end of that second aisle, and it will be highly visible to almost every shopper that walks through the store. So effectively that inside end of the second aisle is an end of aisle display. It is an area which will have high visibility which is likely to affect shoppers' exposure to alcohol and shoppers purchasing decisions.
58. Dr Williams concludes that, from his own position as a public health physician, whilst many of us enjoy a drink and alcohol is part of our culture, there are some people in our community that run into significant problems with alcohol addiction and with problem drinking, and that for those people visual triggers do make a difference to their choices around purchasing of alcohol.

CROSS EXAMINATION OF DR WILLIAMS

59. Under cross examination Dr Williams confirmed that it is his position that some people would be triggered to buy alcohol simply by seeing it at the end of the aisle. Dr Williams referred to the two studies that he presented. The first one, the Sorensen Study talks about the importance of visual cues in influencing purchasers decisions, and the second study makes it quite clear that end of aisle displays are actually a key trigger for increasing sales of both alcohol and non-alcohol products. Dr Williams did concede that shoppers would still be able to see alcohol in the store even if the applicant didn't have the end of aisle displays, but believed it was a balancing act.
60. Mr McGill questioned the lack of relevant studies from New Zealand, and argued that the overseas studies were not comparable evidence. Dr Williams explained that these two studies were part of his evidence as they are studies which have been tabled in previous hearings before ARLA, the High Court, and the Court of Appeal; and they have been accepted and referred to in the High Court Decision.

CHIEF LICENCING INSPECTOR – SHARON HOOGENRAAD

61. The Inspector noted no objection to the application.

NEW ZEALAND POLICE – SERGEANT MYLEN HAMILTON

62. Sergeant Hamilton noted no objection to the application.

SITE VISIT – COMMISSIONER CAIN, CR DAVE JACK, AND CR PETER BURT

63. Immediately following the hearing a site visit was undertaken to 9 Browne Street, Timaru to familiarise the committee members with the premises location, surrounding area, and location of the proposed single alcohol area.

SECTION 105 and 106 (1) [a] [b]

Criteria for Issue of Licences

- (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) *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 effects of the issue of existing 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 effects 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.*
- (2) *The authority or committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence.*

Considering Effects of Issue or Renewal of Licence on Amenity and Good Order of Locality

- (1) *In forming for the purposes of section 105(1)(h) an opinion on whether the amenity and good order of a locality would be likely to be reduced, by more than a minor extent, by the effects of the issue of a licence, the licensing authority or a licensing committee must have regard to—*
- a) *the following matters (as they relate to the locality):*
 - i. *current, and possible future, noise levels:*
 - ii. *current, and possible future, levels of nuisance and vandalism:*

- iii. *the number of premises for which licences of the kind concerned are already held; and*
- b) *the extent to which the following purposes are compatible:*
 - i. *the purposes for which land near the premises concerned is used;*
 - ii. *the purposes for which those premises will be used if the licence is issued.*

RELEVANT SECTIONS 105 AND 106 ADDRESSED

64. **Suitability of applicant** – None of the reporting agencies raised any issues as to the suitability of the applicant. The Timaru District Licensing Committee notes no concern with regard to this item.
65. **Any relevant Local Alcohol Policy** – The Timaru District Licensing Committee has regard to the joint Local Alcohol Policy of the Timaru, Waimate, and Mackenzie District Councils. In summary, having amended the trading hours sought in the application to 7.00am-9.00pm, the application now complies with the Local Alcohol Policy.
66. **Days and hours** – The applicant had originally requested hours of Monday-Sunday 7.00am-11.00pm, and was advertised as such. Following identification of this error by the Licensing Inspector, a waiver was granted pursuant to Section 208, and the applicant amended the hours in the application to Monday-Sunday 7.00am-9.00pm. The times now requested are within the applicants Resource Consent, and the Local Alcohol Policy requirements.
67. **The design and layout of the premises** - The Inspector raised no issues as to the design and layout of the premises, however the Medical Officer of Health had objected to the proposed single area, as shown on the proposed plan of the premises in the application. This matter is dealt with throughout the document.
68. **Other goods or services** – The reporting agencies raised no issues under this provision. The Timaru District Licensing Committee notes no concern with regard to this item.
69. **Any matters dealt with in any report from the Police, an Inspector, or a Medical Officer of Health made under section 103** – Neither the Police, or the Licensing Inspector raised any matters under section 103. The Medical Officer of Health is in opposition to the application, with specific regard to the single area defined on the applicants plan, and those matters are addressed throughout this document.
70. **Amenity and Good Order – 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** - No matters of objection were raised by the reporting agencies, under this section of the Act. The Timaru District Licensing Committee notes no concern with regard to this item.
71. **Systems, staff, and training to comply with the law** - The Timaru District Licensing Committee is satisfied that the Applicant has sufficient systems, staff, and training to comply with the law.
72. **Reporting agencies** - The reporting agencies' positions have been discussed above.

FINDINGS OF COMMITTEE

73. The Committee have considered the matters provided for in s.105, including s.106 (1)[a] and [b], and we consider that most of those matters have been satisfied by the Applicant in this case.
74. As no objection has been raised by the reporting agencies, or the Timaru District Licensing Committee, to any criteria other than Section 105 (1) (e) - the design and layout of any proposed premises, in particular the location of the single alcohol area, this is the item with which this decision will rest.
75. Under Section 112 (2) the licensing authority or licensing committee concerned must ensure that, when it issues or renews an off-licence for premises that are a supermarket or grocery store, it imposes on the licence a condition describing one area within the premises as a permitted area for the display and promotion of alcohol.
76. The purpose of Section 112, 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.
77. The Committee has considered four main points as follows

The impact of end of aisle (end cap) displays within the single alcohol area, with regard to exposure to shoppers

78. The Committee accepts that end cap displays can be quite a prominent feature in a supermarket. As noted by Ms McNaught "...that whilst end of aisles are used to expose shoppers to product, they are also simply available shelf space upon which product can be housed", and that if the ends were removed there would be some limitation of exposure.
79. The Committee accepts that it is not necessary to remove the end caps, but that the exposure to shoppers would be limited if they were not part of the single alcohol area and were instead stocked with grocery items.

The impact of display units being offset within the proposed single alcohol area

80. The Committee, after reviewing the proposed plan and undertaking a site visit, accepts the evidence of the Medical Officer of Health, Dr Williams that as it is currently drawn when shoppers round the end of the first aisle, what will be right in their faces is the end of the second aisle, which as it is drawn on the application, will be displaying alcohol. It is an area which will have high visibility which is likely to affect shoppers' exposure to alcohol.

The height of shelving units

81. The Committee notes the Ms McNaughts submission that the shelving in the proposed single alcohol area would be 1.98m high, which would be the same height as the rest of the shelving in the store.

82. The Committee accepts that this is reasonable and in line with the purpose of Sections 112, 113, and 114 of the Act.

The practical and financial consequences for the applicant

83. The Committee notes the confusion with regard to the refrigerated unit (the unit) in the proposed single alcohol area. The original submission of Ms McNaught indicated that most of the practical consequences and financial implications would be incurred if the unit had to be shifted from the end of the aisle. As the hearing progressed it was identified that the unit was in fact further within the proposed single alcohol area, and that the two end caps were both shelving units.

84. The Committee further noted that the premises is currently undergoing a refurbishment and, as part of a site visit, ascertained that the work on the proposed single alcohol area had not yet commenced.

85. The Committee accepts that any changes to the proposed plan will have some consequences but, given the evidence and after Ms McNaughts submission, believes that these will be minimal for the applicant.

DECISION OF THE COMMITTEE

86. The Timaru District Licencing Committee is committed to making consistent decisions within its jurisdiction, wherever practicable, and has recently processed and approved two further OFF licence renewals requiring single alcohol areas to be identified, where the applicant has voluntarily made changes to the original plans provided, to meet with our expectation of limiting the exposure to shoppers.

87. Having reviewed all of the evidence before us, and after due consideration, the application by General Distributors Limited for an off licence at Countdown situated at 9 Browne Street, Timaru is on hold until the applicant either:

- Amends the plan to remove the single alcohol area from the end of aisle and replace the alcohol products on the end caps with grocery items; or
- Amends the plan to remove the end caps entirely, and ensure the single alcohol area extends the same length along both sides of the aisle.

88. Should an amendment be refused, the application will be declined.

89. Should the application later be approved it is noted that the applicant would be granted a negotiated period during which the condition will not apply, pursuant to Section 115 (2) of the Act.

90. A response to this request is required within 10 working days of the date of this reserved decision, and can be forwarded through the Secretary of the Timaru District Licencing Committee.

Dated at Timaru, on this 11th day of May 2017



Sharyn Cain
Commissioner
Timaru District Licensing Committee