

IN THE MATTER

of the Sale and Supply of Alcohol
Act 2012

AND

IN THE MATTER

of an application by **MISTY
MOUNTAIN LIMITED** pursuant to
s.99 of the Act for an off-licence in
respect of premises to be situated
in the Queenstown Central
development in the centre of the
Frankton retail precinct, to be
known as “Bottle–O Queenstown”

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

Chairman: Mr E W Unwin
Members: Mr J M Mann
Mr L A Cocks

HEARING at QUEENSTOWN on 31 October 2017

APPEARANCES

Mr N S P Laing – for Misty Mountain Limited - applicant
Ms T J McGivern – Queenstown Lakes Licensing Inspector – to assist
Sergeant T Haggart – N Z Police – to assist
Dr K Reid – Medical Officer of Health – in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction.

- [1] Before the Committee is an application for an off-licence for a stand-alone bottle store. The application was brought under the provisions of s.32 (1) (b) of the Act for retail premises where (in the opinion of the licensing committee concerned) at least 85% of the annual sales revenue is expected to be earned from the sale of alcohol for consumption somewhere else. In other words the business is a bottle store.
- [2] The building where the proposed business will be located is a new shopping centre to be built in the centre of the Frankton retail precinct. The new complex will have the “5 Mile” retail centre to the south. This large area includes The Warehouse, Countdown, Briscoes, Rebel Sport and the like. To the north is the Pak ‘n Save, Mitre 10 anchor development. The new Queenstown Central development will be anchored by Kmart, as well as a Town Square and a modern fresh food market. The proposed bottle store will

be 128 square metres including a cold room of around 35 square metres. If the licence is granted, the new business will be known as “Bottle–O–Queenstown”.

- [3] The applicant is Misty Mountain Limited (hereafter called the company). Mrs Gurbaksh Singh is the company’s sole director and shareholder. While Mrs Singh will be responsible for the overall management of the business, the daily operations will be managed and directed by Dr Harpreet Singh who is the holder of a Manager’s Certificate.
- [4] Mrs Singh has been operating grocery stores and off-licences for many years. She is the owner of LiqCo which operates remote sales delivering alcohol nationwide. The family has a number of off-licences including two “Bottle–O” stores in Wanaka and Waiuku and a Thirsty Liquor in Te Anau. The extended family operates supermarket and grocery off-licences. Since they started operating in 1999, no licence has ever been breached at any location. The “Bottle-O” franchise is not in the business of aggressively pricing its products. Indeed it is prevented from entering a price war under the terms of the franchise arrangement the store will operate under.
- [5] The company seeks trading hours from 8.00 am to 11.00 pm Monday to Sunday. The application was accompanied by confirmation that the proposed use of the premises meets the requirements of the Resource Management Act. Although an application has been made for a compliance certificate this cannot be granted until the premises has been built. The company requested that the entire store be designated as supervised.
- [6] Neither the Police nor the District Licensing Inspector opposed the application. There were no public objections. The Medical Officer of Health reported with matters in opposition. The concerns were based on the likely reduction of the amenity and good order of the locality based on the number of off-licences already held. The Medical Officer of Health also raised concerns about sensitive sites located within 500 metres of the proposed premises and the risk that continued issuing of licences in the area without consideration of the overall effect, will lead to adverse effects on the community

The Application.

- [7] Dr Harpreet Singh was an impressive witness. Not only does he hold three tertiary qualifications, he has managed licensed premises at various times over the past 17 years. He displayed a competent knowledge of the Act and its objectives and is the owner and operator of “The Bottle-O Waiuku, one of the largest liquor stores in Auckland. He adopts a hands-on management approach to his duties which means he is in charge of all staff management and recruitment, profit management, marketing strategies, and ensuring that the business is operated in line with the Act. He spoke on his mother’s behalf.
- [8] The family has longstanding connections with the online retail training programmes hosted by MetCash in Australia. Dr Singh advised that age verification is built into point of sale systems to ensure the ID is checked. His evidence was that members of staff are required to hold both a Licence Controller Qualification from NZQA and a Manager’s Certificate. Further,

there is policy whereby any customers consuming newly purchased liquor on the street or surrounding environs are automatically trespassed from the store.

- [9] He stated that the company's intention was to establish a high-end store with a premium fit-out, combined with extensive training systems and highly experienced staff to ensure a socially responsible and safe operation. The store will be well lit and spacious. Dr Singh also confirmed that the store will place an emphasis on specialised service with local wines and craft beer. Security cameras will be fitted both in and outside the premises.
- [10] Dr Singh addressed the issues of amenity and good order. He argued that the area was one of new modern commercial developments as well as high end housing developments. He contended that the locality was pleasant and agreeable and would continue to be so if the store was established. In particular he stressed the lack of vulnerable people living in the area. Nor was he aware of any local issues such as vandalism, nuisance or unlawful activity.
- [11] On the issues of "proliferation" and "density" he noted that "Henry's Beer Wine and Spirits" had applied for an off-licence in a nearby development about one kilometre away. There was no evidence that the application had been granted. Dr Singh acknowledged that there were two licensed supermarkets within a 500 metres radius of the subject site. He considered that they are not the same kind of store as a bottle store in that they compete in different markets with a different product focus.
- [12] He also argued that in his experience a new entrant tends to "split" the total market rather than "grow" it. This issue was important given the increased population expected in the area, with the proposals to build literally thousands of new homes. He contended that the issue might well be different if the company was trying to open a business in an existing area where there was a "static" amount of local residents to serve.
- [13] In relation to the argument about "sensitive sites" Dr Singh accepted that there was a childcare and medical centre within a 500 metre radius of the proposed store and a Church and associated day care just outside the 500 metre radius. However, because of the nature and position of the bottle store within a commercial complex, he did not think the store's location was incompatible with these activities.

The Medical Officer of Health.

- [14] Dr Keith Reid is a Public Health Physician employed by the Southern District Health Board. He is designated as a Medical Officer of Health for the Otago and Southland Districts. In 2007 he was admitted to the UK Specialist Medical Register as a specialist in public health medicine after completing specialist training in public health medicine in the United Kingdom.
- [15] He confirmed that the principal ground of opposition was the issue of density of licensed premises in the area surrounding the proposed store. No other issues under s.105 of the Act were raised. In other words he sought to influence our opinion as to whether the amenity and good order of the locality would be likely reduced to more than a minor extent by the effects of the issue of the licence, given that in forming our opinion we are required to have regard

to the number of premises for which off-licences are already held. (See ss. 105(1) (h) and 106(1) (a) (iii) of the Act.

- [16] In support of his submissions he produced a map of the Frankton Census area with current off-licensed premises. This showed an area which he argued was highly developed with a mix of uses including residential and commercial services, although containing an area of rural land with a low population density. This map showed that there were already seven off-licensed premises with two bottle stores and the rest being supermarkets. The proposed new bottle store (see Para [11]) would add to the number.
- [17] Dr Reid also produced data from the Centre for Public Health Research from 2016 which showed that Frankton had a high concentration of off-licensed premises by land area when compared with the rest of the Queenstown Lakes District at that time. He acknowledged that the area of Frankton East was not included because (a) the data was not up to date and (b) the land area included undeveloped rural land.
- [18] Dr Reid acknowledged that it was almost impossible to link the indirect contribution of an individual bottle store or supermarket to alcohol related harm arising from inappropriate or excessive consumption. He argued that from a health paradigm any increase in the volume of alcohol sold in a community is associated with increased rates of observed harm in communities. It was from this public health rationale that he urged caution when considering whether to issue further licences.
- [19] Dr Reid contended that the area of Frankton East (where the proposed premises are situated) was an area with rapid mixed development including residential. He submitted that given the pace of ongoing development it is likely that there will be further applications for off-licensed stores. His view was there will be a need at some point to curb the numbers. He also argued that there was likely to be a competitive edge between bottle stores and supermarkets.
- [20] Dr Reid referred to the report of the Licensing Inspector who had quoted from the Alcohol Advisory Council of New Zealand's report on "The Impacts of Liquor Outlets in Manukau City January 2012." The quotation reads:
- "In Manuka City off-licence liquor outlets tend to locate in area of high social deprivation and high population density, while on-licence liquor outlets tend to locate in main centres and areas of high amenity value. Price and non-price competition leads to low alcohol prices and longer opening hours in areas where the density of off-licence outlets is higher."***
- [21] His submission was that this price and non-price competition was likely to be reproduced to some extent in Frankton and further that such competition raises risks to the health of the community. In summary he argued that there was a risk that the continuing issues of licences in the area without consideration of the overall effect will lead to an exacerbation of the adverse effects on the local community caused by alcohol consumption.

The District Licensing Agency Inspector.

- [22] Ms T J McGivern is a Licensing Inspector with the Queenstown Lakes District Council. In her report she noted that vandalism and nuisance were not expected to be associated with the business and referred to the company's policy of issuing trespass notices. She stated that in her opinion the potential effects on the amenity and good order of the surrounding area were less than minor.
- [23] Given the opposition comments from the Medical Officer of Health, the Inspector sought information from the planning department of the Queenstown Lakes District Council in regards to growth in the immediate area. There are at least four subdivisions in the planning stage. There is a C2 area in the Frankton Flats where the Remarkable Residences are going. These are to be approximately 255 three, four and five bedroom terraced houses, some with studio units and office spaces. This was referred to by Dr Singh as a \$100 million housing complex.
- [24] In addition there is a development in Quail Rise East not far from the proposed new business. This is regarded as medium density residential and could enable up to 1000 residential units to be built. A further two developments in Ladies Mile and Remarkables Park (the other side of the airport) are proposed but both these are some distance away. The Inspector produced figures showing anticipated growth for visitor and residents in Frankton and its surrounds over the next 40 years. A steady growth in excess of 10% is expected.
- [25] Ms McGivern referred us to the decision of *Tony's Liquor Upper Hutt Limited* [2014] NZARLA PH 171 where the Authority discussed the new (and significant) provision in the Act concerning proliferation. The Authority referred to a recent appeal to the High Court (*Utikere v I S Dhillon & Sons Limited CIV 2013-454-264*) where the appellant's argument below had been accepted by the High Court.

"The diminution of sales at other outlets resulting from the same total volume sold was a likely outcome of a new entrant entering the marketplace. It follows that there was no evidence that more liquor in absolute terms would be consumed by the public, either generally or specifically as a result of the new entrant entering the marketplace."

- [26] In her closing submissions the Inspector also referred to the definition of locality which she noted had not been defined in the Act. She noted the decision of *Mangere-Otahuhu Local Board v Southern Cross Camous and Level Eighteen Limited* [2-14] NZARLA PH 627-628 in which the Authority had stated:

"Determining what is meant by „locality“ in any given case will vary depending on the evidence adduced. Generally however, locality will be that area of land that is likely to be affected by the operation of the licence."

The Applicant's Closing Submissions.

- [27] Mr N S P Laing referred to Section 106 (1)(a) of the Act which reads:

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;

[28] He submitted that the words would be likely had been considered by the Court of Appeal in *Port Nelson Limited v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562-563 and should be equated with a

“real and substantial risk that the stated consequences will happen”

[29] He argued that the “locality” should be within a 500 metre radius on the basis that this is a developing commercial area and the retail complex will be a destination in its own right. Given the large number of residences that are in the planning stages and accepting that this store will be the only one to sell spirits, he submitted that the two supermarkets within 500 metres could not be said to be too many. Indeed he contended that the proposal would provide more choice and may not increase the amount of alcohol available.

[30] In addressing the final issue of the cross-checking requirement whether the application is capable of meeting the object of the Act, Mr Laing suggested that in the light of the evidence about the company’s repute, the support available in terms of compliance and training, the systems that will be in place, and the exceptional track record of the family, the Committee can have faith that the company will meet the Act’s objectives.

The Committee’s Decision and Reasons.

[31] In considering an application for an off-licence for a stand-alone bottle store we are directed by s.105 of the Act, to have regard to a number of matters. The only issue in this case is whether (in our 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. Pursuant to s.106(1) of the Act, in forming our opinion we must have regard to the number of premises for which licences of the kind concerned are already held.

[32] The locality is the area that is likely to be affected by the operation of the licence. We are aware of the area. It is pleasant and agreeable. We do not think that the Church or the child care centres will be affected in any way. The locality comprises significant commercial developments and high end housing spaces. In many cases each commercial complex will be a destination in its own right. As Mr Laing pointed out such an up-market shopping complex is a far cry from a small quiet suburban shopping area.

[33] Within the locality there are no suggestions of vandalism, nuisance or unlawful activity. It is unlikely that area will attract vulnerable people to live. In our view social deprivation in the locality is unlikely. This is a bottle store inside a modern up market shopping complex. There will be no street visibility. We think the Inspector is right. A radius of 500 metres is appropriate.

- [34] Within that radius there are two supermarkets neither of which is sited in this shopping complex. In terms of the Act, supermarkets hold the same “kind” of licences as bottle stores. Nevertheless we agree with the argument that people may well visit one for different reasons than the other. There is a different product focus between the two. There is no other licence held within the radius. The proposed bottle store was not licensed at the date of the hearing and at any event it is to be sited more than 500 metres away. The other off-licence referred to by the Medical Officer of Health is located one kilometre away. The other three off-licences to the West are located less than three kilometres away.
- [35] We have had regard to the presence of two licensed supermarkets in other commercial areas in the locality. Will the issue of a third off-licence in the locality reduce in any way the current amenity and good order of this locality? In our opinion the answer is no. We accept that there are some decisions of both other Committees and the Authority which have been decided on the basis that the amenity and good order of a particular locality will be significantly affected by the issue of a licence. In the great majority of those cases there was evidence of alcohol related harm as well as disorder and nuisance and social deprivation. It could be argued that the amenity and good order of such communities was already tarnished.
- [36] In this case there was no evidence of alcohol related harm, or noise or vandalism. The only evidence of concern came from the Medical Officer of Health and he was more focused on the risk inherent in granting too many licences in the locality. Not unnaturally he was unable to provide evidence of alcohol related harm attributable to the proliferation of licences since the current proposal has not yet been established. His submissions would have carried much more weight if made to the Queenstown Lakes District Council when it decides to adopt its local alcohol policy. We are required under the Act to determine a specific application for specific premises
- [37] We think the decision in *Lion Liquor Retail Limited (Liquor Kent Terrace) v Palmer* [2017 NZARLA PH 170 at [61] has relevance. It was referred to us by Mr Laing in his closing submissions. The Authority made these comments:
- “The data before the DLC is undoubtedly evidence of excessive or inappropriate consumption of alcohol in the locality of the premises or in the Courtney Place entertainment precinct more generally. The data does not, however, constitute evidence that excessive or inappropriate consumption of alcohol and increased ARH will result from the renewal of this particular licence. Or, put in another way, there is no „causal“ nexus between the grant of this renewal licence and general incidence of ARH in the locality established by the respondents and objector.**
- In a licensing application such as this, it is not sufficient that there simply be a positive correlation between alcohol consumption and ARH, or that there is a positive correlation between the sale of alcohol from off-licence and ARH. Rather, in a licensing application like this, what is required is consideration of whether the proposed operation of the premises which is the subject of the application is likely to lead to harm caused by the excessive or inappropriate consumption of alcohol.”**
- [38] Its relevance relates to the final issue we are required to determine as enunciated by Moore J in *Auckland Medical Officer of Health v Birthcare*

Auckland Limited [2015 NZHC 2689. We refer in particular to the comments at paragraph [50] as follows:

“There is no reason in principle why the “causal nexus” approach adopted under the 1989 Act and approved in decisions of this Court, should not continue to be relevant and applicable under the new Act. Indeed, it was not suggested in argument that a different legal test should be adopted. Under both Acts the relevant enquiry is the same; the Authority is required to have regard to the s.105 criteria (or in the case of a renewal the s.105 criteria as modified by s.131) and then step back and consider whether there is any evidence to suggest that granting the application will be contrary to the object of the Act contained in s.4(1). Namely that the sale supply and consumption of alcohol should be undertaken safely and responsibly and the harm caused by excessive or inappropriate consumption of alcohol should be minimised.”

- [39] In our view the developers have selected a “safe pair of hands” when they resolved to request the company to be responsible for the operation of a quality wine/liquor option. We are satisfied that the company will carry out properly the responsibilities that go with the holding of a licence including the responsibilities of complying with the object of the Act.
- [40] Any new licence is issued for a period of one year. This gives the reporting agencies as well as members of the public the opportunity to monitor the business to see exactly what sort of business is developed. If the company shows a lack of commitment to host responsibility or to the conditions of the licence, then the Authority has the power to refuse to renew the licence, or alter the trading hours, or add conditions. In this way the company has a clear incentive to ensure that the concerns expressed by the Medical Officer of Health are unrealised.
- [41] For the reasons given the application for an off-licence is granted on the terms and conditions requested. The licence cannot issue until a certificate of compliance has been received.

DATED at QUEENSTOWN this 23rd day of November 2017



Mr E W Unwin
Chairman

