
DECISION – ON-LICENCE & OFF-LICENCE

ONGA ONGA GENERAL STORE 2019 LIMITED

CENTRAL HAWKE'S BAY DISTRICT LICENSING COMMITTEE

Meeting Date: **Wednesday 23 September 2020**

DECISION NO: CHBDC/001

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

AND

IN THE MATTER of an application by **ONGA ONGA
GENERAL STORE 2019 LIMITED**
pursuant to section 99 of the Act for an
on-licence and an off-licence in respect
of premises situated at **59 Bridge Street,
Ongaonga** known as "Onga Onga
General Store"

BEFORE THE CENTRAL HAWKE'S BAY DISTRICT LICENSING COMMITTEE

**AT A HEARING AT CENTRAL HAWKES DISTRICT COUNCIL HELD ON
23 SEPTEMBER 2020 AT 9.30 am**

LICENSING COMMITTEE: Chair: Tania Kerr
Members: Gerard Minehan
Exham Wichman

APPEARANCES:

Applicant	Onga Onga General Store 2019 Limited with Mr Adam Watts as Director
Licensing Inspector	Natasha Karaitiana
Police	Sergeant Raymond Keith Wylie
Medical Officer of Health	Glynn Paul O'Rourke authorised by Dr Rachel Eyre to present submission on behalf of the Medical Officer of Health

DECISION OF THE CHB DISTRICT LICENSING COMMITTEE

A. DECISION

- [1] For the reasons which follow, the Committee has unanimously determined to refuse to authorise the issue of both the on-licence and the off-licence as sought. Both applications are declined.

INTRODUCTION

- [2] Onga Onga General Store 2019 Limited is owner and operator of Onga Onga General Store located at 59 Bridge Street, Onga Onga. Based on a photograph produced to us by the applicant, which showed the exterior of the premises, they are described as "*Tearooms*" and "*Historic Village of Onga Onga General Store 1899*". In the application and the public/site notices the business is variously described as "*Rural General Store and Post Office*", "*Grocery store/coffee shop/Diner and Takeaway*"; and "*Café/Diner*".

- [3] Onga Onga General Store 2019 Limited has sought a new on-licence and a new off-licence.

On behalf of the applicant Mr Watts told us that the premises had previously held an on-licence which had expired on 22 December 2011 and an off-licence which had expired on 19 December 2010. We were told the previous owner allowed them to lapse "*due to personal reasons*". What is significant to us is that those licences were both issued under the previous legislation. It is our understanding that the premises have not been licensed under the current 2012 Act. As will become apparent, this, in our opinion, is significant.

- [4] The application is in accordance with the Central Hawke's Bay District Council Local Alcohol Policy.
- [5] The applicant is a private company and the director of the company is Mr Adam Watts.
- [6] Mr Watts does not have recent experience managing a licensed premise.
- [7] The Licensing Inspector is opposed to the issuing of either licence.
- [8] The Police, and the Medical Officer of Health, have both opposed the issue of either licences.
- [9] There were no public objections.
- [10] Both applications were referred to a hearing in front of Central Hawke's Bay District Licensing Committee (CHBDLC) because of the opposition of all the reporting agencies. The hearing occurred on 23 September 2020.

STATUTORY CRITERIA FOR EVALUATION

[11] In considering an application for an On-Licence or Off-Licence, the Committee is directed by section 105(1) of the Act to have regard to the following criteria:

a) *The object of the Act*

(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)*

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.*

[12] There were some definitions in s 5 of the Act which were significant for these applications:

- **"grocery store"** *has the meaning given by s 33(1).*
- **"manager"**
 - (a) *means a manager of licensed premises appointed under this Act; and*
 - (b) *in relation to any licensed premises, means a manager of those premises.*
- **"principal business"** *in relation to the business carried on or to be carried on in any premises, means principal business as ascertained, assessed, or calculated by a means for the time being prescribed by regulations made under this Act for the purposes of this definition.*

[13] The Committee also considered s 212 and s 214 regarding Managers were relevant to the matters raised at the hearing. They provide:

Sec 212 Appointment of managers: on-licences, off-licences, and club licences

Every holder of an on-licence (other than an on-licence endorsed under section 37), an off-licence, or a club licence must appoint a manager or managers in accordance with this Part.

and

Sec 214 Manager to be on duty at all times and responsible for compliance

- (1) *Except as provided in [section 215](#), a manager must be on duty at all times when alcohol is being sold or supplied to the public on any licensed premises.*
- (2) *A manager on duty on any licensed premises is responsible for—*
 - (a) *the compliance with and enforcement of—*
 - (i) *the provisions of this Act; and*
 - (ii) *the conditions of the licence in force for the premises; and*
 - (b) *the conduct of the premises with the aim of contributing to the reduction of alcohol-related harm.*
- (3) *At all times while a manager is on duty on any licensed premises, the full name of the manager must be prominently displayed inside the premises so as to be easily read by people using the premises;*

and the person named as manager at any time is to be treated for the purposes of this Act as the manager at that time.

- (4) *At all times when alcohol is being sold or supplied on licensed premises the licensee must take all reasonable steps to enable the manager to comply with this section.*

[14] In considering the kinds of premises that can hold an off-licence the Committee looked for guidance in s 32, s33, s34, s35 and s36. No one submitted to us that s 35 had any relevance to the off-licence application before us. However, because the applicant was not legally represented we discuss it later.

Sec 32 *Kinds of premises for which off-licences may be issued*

- (1) *An off-licence may be issued only—*

(a) to the holder of an on-licence issued for a hotel or tavern, for the premises (or part of the premises) for which the on-licence is held; or

(b) for retail premises where (in the opinion of the licensing authority or 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; or

(c) if—

(i) the premises for which it is to be issued are not retail premises; and

(ii) at least 85% of the annual income of the person to whom it is to be issued is (in the opinion of the licensing authority or licensing Committee concerned) expected to be earned from the remote sale of alcohol; or

(d) for premises where (in the opinion of the licensing authority or licensing Committee concerned) the principal business carried on is the manufacture of alcohol; or

(e) for premises that (in the opinion of the licensing authority or licensing Committee concerned) are a supermarket with a floor area of at least 1 000 m² (including any separate departments set aside for such foodstuffs as fresh meat, fresh fruit and vegetables, and delicatessen items); or

(f) for premises that (in the opinion of the licensing authority or licensing Committee concerned) are a grocery store.

- (2) *Premises for which (by virtue of [section 350\(b\)\(i\)](#)) an off-licence must not be issued except to a licensing trust can still be premises for which (by virtue of subsection (1)) an off-licence may be issued.*

- (3) [Section 36](#) overrides subsection (1).

[15] To determine whether premises are a grocery store the committee had regard to s 33.

Sec 33 *Determining whether premises are a grocery store*

(1) *In this section,—*

food product—

(a) *does not include—*

(i) *alcohol, confectionery, ready-to-eat prepared food, or snack food; or*

(ii) *a drink (other than milk) sold in a container with a capacity of 1 litre or less; but*

(b) *includes delicatessen items that are not ready-to-eat prepared food or snack food*

grocery store means a shop that—

(a) *has the characteristics normally associated with shops of the kind commonly thought of as grocery shops; and*

(b) *comprises premises where—*

(i) *a range of food products and other household items is sold; but*

(ii) *the principal business carried on is or will be the sale of food products*

ready-to-eat prepared food—

(a) *includes food for the time being declared by regulations under this Act to be ready-to-eat prepared food; and*

(b) *does not include food for the time being declared by regulations under this Act not to be ready-to-eat prepared food*

snack food—

(a) *includes food for the time being declared by regulations under this Act to be snack food; and*

(b) *does not include food for the time being declared by regulations under this Act not to be snack food.*

(2) *In forming for the purposes of this Act an opinion on whether any premises are a grocery store, the licensing authority or a licensing Committee—*

(a) *must have regard to—*

(i) *the size, layout, and appearance of the premises; and*

(ii) *a statement of the annual sales revenues (or projected annual sales revenues) of the premises, produced in accordance with any regulations in force under this Act prescribing what information such statements must contain and how it must be set out; and*

(iii) *the number, range, and kinds of items on sale (or expected to be on sale) on the premises; and*

(b) may have regard to any other matters it thinks relevant; and
 (c) may determine that the premises do not have the characteristics normally associated with a shop of the kind commonly thought of as a grocery shop by virtue of characteristics that the premises and the items on sale there lack or will lack, characteristics that the premises and the items on sale there have or will have, or a combination of both.

- (3) Paragraph (a) of the definition in subsection (1) of **food product** is for the avoidance of doubt only, and does not extend the generality of the term.

[16] The Committee noted some premises may be exempt from s 32(1), which we set out above, if we are satisfied of certain things set out in s 34, which provides:

Sec 34 Exception for certain areas where some licensed premises not economic

- (1) The licensing authority or licensing committee concerned may direct that an off-licence should be issued for premises not of a kind described in section 32(1) if satisfied—

(a) that, in the area where they are situated, the sale of alcohol in premises of a kind described in section 32(1)(b), (d), (e), or (f) would not be economic; and

(b) that the granting of the licence would not cause any significant increase in alcohol-related harm.

- (2) Subsection (1) overrides section 32(1) but is overridden by section 36.

[17] Exception for certain complimentary sales.

Sec 35 Exception for certain complementary sales

- (1) The licensing authority or licensing committee concerned may direct that an off-licence should be issued for premises not of a kind described in section 32(1) if it is satisfied that-

(a) the premises are a shop, but not a shop where the principal business carried on is the sale of food (whether food of a particular kind or kinds, or a range of food); and

(b) alcohol would be an appropriate complement to goods of that kind sold (or to be sold) in the shop.

- (2) Subsection (1) overrides section 31(1) but is overridden by section 36.

[18] While Parliament has said that some premises must not have a licence.

Sec 36 No off-licences for petrol stations, certain garages, dairies, convenience stores, conveyances, or shops within shops

The licensing authority or licensing Committee concerned must not direct that an off-licence should be issued for any premises if (in its opinion)—

(a) the principal business carried on there is—

(i) the sale of automotive fuels; or

(ii) the repair and servicing of motor vehicles and the sale of automotive fuels; or

(b) they are a shop of the kind commonly thought of as a dairy; or

(c) they are a shop of the kind commonly thought of as a convenience store; or

(d) they are a conveyance; or

(e) they are situated (wholly or partially) within a shop; or

(f) the public can reach them directly from a shop, or directly from premises where the principal business carried on is a business of a kind described in paragraph (a).

[19] **The Committee was aware that if Section 36 applies, it overrides Sections 32, 34, 35.**

[20] In the Sale and Supply of Alcohol Regulations 2013, clarity is given with interpretation of food types to assist when ascertaining the *principal business* conducted at the premises.

Reg 3 Interpretation

(1) *In these regulations, unless the context otherwise requires, -*

Convenience food means anything that is—

(a) confectionery; or

(b) ready-to-eat prepared food; or

(c) snack food; or

(d) a beverage (other than alcohol or milk) sold in a container with a capacity of 1 litre or less

food product has the meaning given by section 33(1) of the Act

[21] Clarity was needed around types of food sold so the Committee made reference to Regulations 8, 9, 10 and 11.

Reg 8 Certain food declared to be ready-to-eat prepared food

(1) *Food is **ready-to-eat prepared food** if it has been so cooked or prepared that it can be eaten immediately as a meal, part of a meal, or a substitute for a meal—*

- (a) *in the form in which it is sold; and*
- (b) *without further preparation (for example, assembly, heating, or thawing).*
- (2) *Food of the following descriptions is ready-to-eat prepared food:*
 - (a) *a sandwich (whether hot or cold, and whether open or closed):*
 - (b) *food (whether hot or cold) that,—*
 - (i) *instead of a slice or slices of bread, uses some other container, covering, or base (such as a pancake, pocket, roll, taco shell, tortilla, or wrap) for its contents or topping; but*
 - (ii) *is otherwise analogous to a sandwich or open sandwich:*
 - (c) *a pizza, pizza slice, pizza sub, or pizza pocket:*
 - (d) *food analogous to a pizza, pizza slice, pizza sub, or pizza pocket:*
 - (e) *fish and chips or similar food:*
 - (f) *a hamburger, hot dog, or similar food:*
 - (g) *food of the kind commonly referred to as a pie (whether meat, vegetable, or fruit):*
 - (h) *a pastie, samosa, or similar food (whether meat, vegetable, or fruit):*
 - (i) *a sausage roll or similar food.*
- (3) *Subclause (2) does not limit the generality of subclause (1).*
- (4) *Regulation 9 overrides subclauses (1) and (2).*

Reg 9 Certain food declared not to be ready-to-eat prepared food

- (1) *Food of the following descriptions is not ready-to-eat prepared food:*
 - (a) *unprocessed raw fruit or vegetables:*
 - (b) *food intended to be used as a component of a home-prepared meal (for example, cooked chicken, fresh pasta, or pasta or simmer sauce):*
 - (c) *a mixture (whatever its ingredients) of the kind commonly referred to as a salad:*
 - (d) *a beverage (other than alcohol or plain milk) sold in a multi-pack of single-serve containers with an aggregate volume of 1 litre or more:*
 - (e) *packaged biscuits (or similar items):*
 - (f) *a full-sized cake:*
 - (g) *delicatessen items such as antipasti, cold sliced meat, smoked chicken, or smoked fish:*
 - (h) *multi-packs of items of food or drink of a kind often included in school lunches:*
 - (i) *dried fruit:*

- (j) *unfilled bread, bread rolls, or buns:*
- (k) *spreads:*
- (l) *condiments, pickles, relishes, and similar food.*
- (2) *For the purposes of subclause (1)(a), fruit or vegetables are not processed by reason only of being peeled, sliced, or both.*

Reg 10 Certain food declared to be snack food

- (1) *Food is **snack food** if—*
 - (a) *it is so cooked or prepared that it can be eaten immediately; and*
 - (b) *(whether or not it can form, or sometimes forms, part of a meal) it is food of a kind usually consumed between meals; and*
 - (c) *it is usually sold—*
 - (i) *in small quantities (in the case of food sold by volume or weight); or*
 - (ii) *as small items (in the case of food sold as individual items).*
- (2) *Food of the following descriptions is snack food:*
 - (a) *potato chips, crisps, sticks or straws, and similar food made of ingredients other than potatoes (for example, corn):*
 - (b) *pretzels and similar food:*
 - (c) *bacon crackling, pork crackling, and similar food:*
 - (d) *prawn chips and similar food:*
 - (e) *if sold as individual items with a volume of less than 1 litre, blocks, cakes, or similar items, made of ice-cream or ice-cream substitute:*
 - (f) *ice-creams, and similar items made of ice-cream substitute:*
 - (g) *ice-blocks and similar items:*
 - (h) *food that is, or consists mostly of, bars, biscuits, cones, cookies, crackers, wafers, or similar items that—*
 - (i) *weigh less than 60g; and*
 - (ii) *are sold as individual items:*
 - (i) *processed or treated seeds or nuts (or mixtures of seeds and nuts) presented in quantities of less than 60g:*
 - (j) *popcorn.*
- (3) *Subclause (2) does not limit the generality of subclause (1).*
- (4) *Food declared by regulation 9(1)(f) not to be ready-to-eat prepared food can still be snack food by virtue of subclause (1).*
- (5) *Regulation 11 overrides subclauses (1) and (2).*

[22] **Reg 11 Certain Food declared not to be snack food**

- (1) *Food of the following descriptions is not snack food:*

(a) unprocessed raw fruit or vegetables:

(b) multi-packs of items of food or drink of a kind often included in school lunches.

(2) For the purposes of subclause (1)(a), fruit or vegetables are not processed by reason only of being peeled, sliced, or both.

[23] The Committee also had to decide the *principal business* carried on on premises and had regard to Regulation 6.

Reg 6 *Ascertaining principal business carried on on premises (existing business)*

(1) For the purposes of the definition of principal business in section 5(1) of the Act, the principal business carried on on any premises to which subclause (2) applies must be ascertained by—

(a) deducting from the gross sales revenue of the business being carried on on the premises for a period of 12 months ending no more than 90 days before the time at which the application for the issue or renewal of an off-licence for the premises is made—

(i) GST; and

(ia) excise duty and excise-equivalent duty on tobacco products; and

(ii) all revenue from sales of lotto, Keno, Instant Kiwi, or any other New Zealand lottery promoted by the New Zealand Lotteries Commission; and

(b) then assigning the remainder of that revenue to the following categories (with as much precision as is reasonably practicable in the circumstances):

(i) the sale of food products:

(ii) the sale of alcohol:

(iii) the sale of tobacco:

(iv) the sale of convenience foods:

(v) other sources of revenue; and

(c) then,—

(i) if more of that remainder has been assigned to one category than any other, treating as the principal business carried on on the premises the sale of goods of the kind concerned (or, in the case of other sources of revenue, the activities generating the revenue):

(ii) if equal amounts of that remainder (being higher than those assigned to other categories) have been assigned to 2 or more categories, treating as the principal business carried on on the premises the sale of goods other than food products.

- (2) *This subclause applies to premises where, as at the time at which the application for the issue or renewal of an off-licence for the premises is made,—*
- (a) business has been carried on for 12 months or more; and*
 - (b) the business being carried on has been substantially unchanged for at least 12 months before that time.*

[24] In order to ascertain the *principal business*, the Committee must have regard to Regulation 12 which defines what an Annual Statement of Revenue must contain.

**Reg 12 Requirements for statements of annual sales revenue
(existing businesses)**

- (1) *In the case of premises to which subclause (2) applies, the statement of annual sales revenue to which, by virtue of section 33(2)(a)(ii) of the Act, the licensing authority or a licensing Committee must have regard in determining for the purposes of the Act whether any premises are a grocery store must contain—*
- (a) a statement of the gross sales revenue of the business being carried on on the premises for the period of 12 months ending no more than 90 days before the time at which the application for the issue or renewal of an off-licence for the premises is made,—*
 - (i) excluding GST; and*
 - (ii) excluding excise duty and excise-equivalent duty on tobacco products; and*
 - (iii) after deduction of all revenue from sales of lotto, Keno, Instant Kiwi, or any other New Zealand lottery promoted by the New Zealand Lotteries Commission; and*
 - (b) a statement assigning the remainder of that revenue to the following categories:*
 - (i) the sale of food products:*
 - (ii) the sale of alcohol:*
 - (iii) the sale of tobacco:*
 - (iv) the sale of convenience foods:*
 - (v) other revenue; and*
 - (c) a statement from a chartered accountant verifying the figures given as correct according to prepared accounts.*
- (2) *This subclause applies to premises where, as at the time at which an application for the issue or renewal of an off-licence for the premises is made,—*
- (a) business has been carried on for 12 months or more; and*

(b) the business being carried on has not changed materially for at least 12 months before that time.

GUIDING PRINCIPLES

- [25] We understand these are the guiding principles for us which we have taken from the submissions and the case law:
- (i) Our role is an evaluative one, in an inquisitorial sense. That is to say, we are required to evaluate all the evidence before us, both in support of the applications and in opposition to the applications.
 - (ii) After evaluating the evidence, we must make a merits based determination as to whether or not the applications should be granted.
 - (iii) We must have regard to the matters in the Act and the Regulations.
 - (iv) To "*have regard to*" as a requirement means what it says. We do not have to give effect to anything and if, after having regard to a criteria, we conclude nevertheless to grant or refuse the applications that is permissible.
 - (v) The weight we give to evidence is a matter for us realising that no party has any onus of proving anything.
 - (vi) Whilst we must have regard to all criteria there will be some cases where some matters are so fundamental they assume an elevated importance – here we think the following matters have assumed a fundamental significance:
 - a. the object of the Act;
 - b. suitability;
 - c. what the agency reports contained;
 - d. the systems and training of the applicant; and
 - e. what the "*principal business*" of the premises is.
 - (vii) Whilst we do not have to consider section 3 separately, so long as we are reasonable in our evaluations we likely will achieve the two aspects of the section 4 object. We approach section 4 on the basis that our decision must be consistent with both aspects in subsection (1)(a) and (1)(b).
 - (viii) We must stand back at the end and reassess our earlier conclusions against attainment of the section 4 object. These two elements – the safe and responsible sale and supply and consumption of alcohol, and the minimisation of alcohol related harm – are equally important, are not to be balanced, and have precedence over the economic/commercial interests of a licensee.
 - (ix) There is no presumption of any licences being granted under this 2012 legislation which, in that sense, is different from the old 1989 Act.

- (x) The concept of suitability is wide and flexible and includes how a proposed licensee understands the law, and our risk assessment of the applicant and how alcohol might be sold and supplied if we granted the applications.
- (xi) The role of the reporting agencies is important to the licensing process and their evidence cannot and should not be ignored. A Committee is entitled to accord weight to a united opposition by all agencies.
- (xii) We may be required to form opinions on whether or not we consider the amenity and good order of the Onga Onga locality would be likely to be reduced to more than a minor extent if we granted the applications – in doing so we are guided by having regard to the matters in s 106(1) of the Act.
- (xiii) For a private company licensee, as here, we are entitled to look behind the corporate business and consider how its director behaves in relation to the agencies and the business and the legislation.
- (xiv) In relation to conditions, we have a wide discretion (s117) which is constrained by the need for any conditions we consider to be reasonable, proportionate, and likely to reduce a risk we might identify and achieve an identifiable benefit.
- (xv) There is an element of trustworthiness in assessing suitability in licensing situations. This is in addition to our evaluation of the evidence of an applicant's conduct, processes, understanding of risk, particularly future risk.
- (xvi) If we conclude that granting the applications would not be consistent with section 4 – the object of the Act – we cannot attempt to remediate that by the imposition of conditions. We may impose conditions if we consider granting the applications is consistent with the object of the Act and imposition of conditions will enhance that consistency.

[26] In this case (as we have indicated) there were additional determinations we had to make:

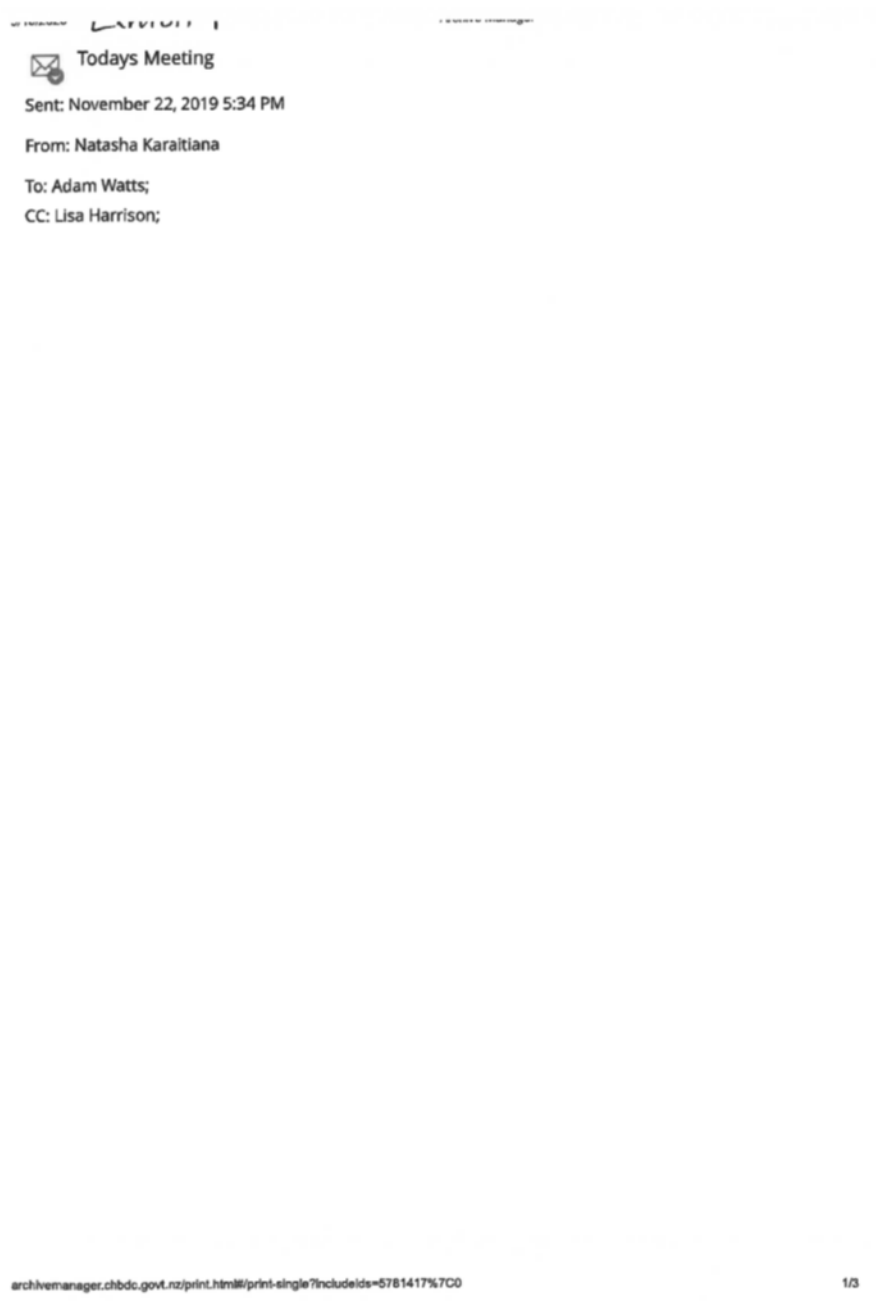
- What was the *principal business* of the proposed off-licensed premises? In short, was it that of *grocery store* or that of a petrol station?
- What was the *principal business* of the on-licence proposed to be?

PRIOR TO THE HEARING

- [27] Original application for both on and off-licences was received on 11 September 2019.
- [28] The Police opposed application (on basis of a certified Duty Manager not being employed).
- [29] Medical Officer of Health opposed application (based on lack of certified Duty Manager, no payment had been received and that the premises may not qualify for an off-licence).
- [30] Licensing Inspector called a meeting with Applicant, the Police and Medical Officer of Health on 22 November 2019.
- [31] The minute's record that Applicant was advised of issues, in particular:
- Need for Duty Manager for both licences
 - Definition of grocery store
 - Requirement for evidence of principal business
- [32] All agencies agreed Mr Watts would only need 3 months' experience to obtain his Manager's Certificate.

[33] Minutes of this meeting were recorded in an email and sent to all parties, including the Applicant on 22 November 2019. They were produced to us and we now reproduce them:

[34]



Hi Adam

Thank you for meeting with us today to discuss your On and Off applications. Following on from our meeting can you please confirm that you are happy with following notes that were taken today?
If you believe anything has been missed please let me know.
I hope you gained some useful information from our meeting today.

I will send through all I can find on the revenue statement next week along with the template I spoke about.

Meeting with Adam Watts from OngaOnga Store regarding his ON and OFF Licence Applications

Friday 22 November 2019 from 10am – 11am

In Attendance:

Natasha Karaitiana	Central Hawke's Bay District Council
Mala Bishop	Central Hawke's Bay District Council
Lisa Harrison	Central Hawke's Bay District Council
Ray Wylie	Police
David Power	Police
Glynn O'Rourke	DHB
Adam Watts	OngaOnga Store Owner

Action Points

The purpose of the meeting was to discuss the agencies opposing the On and Off Licence applications received for OngaOnga Store, due to the following points:

1. **The requirement to have a Manager noted on the application.**
 - There was discussion around the table which was led by Ray around the requirements of having a manager noted on file as part of application process.
 - The agencies agreed that if Adam was to employ a manager and he and/or his wife were able to gain experience for minimum of 3 months that he and/or his wife would be able to gain their managers certificate.
 - Adam advised that he would look into finding someone that currently holds a managers certificate and employ them to enable him and/or his wife to gain the minimum 3 months experience required which was agreed to by the agencies.
 - Adam advised that he would not continue with his Off Licence application at this stage, not until he has been granted his On Licence and has gained the relevant experience required to gain his Managers Certificate. Once he has done this he will look to apply again for his Off Licence. We advised that it would be likely that this would mean there would be a District Licensing Committee Hearing required due to section 36 of the Sale and Supply of Alcohol Act and the interpretation of what is deemed to be a grocery store.
2. **The definition of a 'Grocery Store' under section 36 of the Sale and Supply of Alcohol Act 2012.**
 - There was discussion regarding the definition of a grocery store and what supporting documentation was required as part of the application form as Adam advised he had given the relevant revenue statement which was a requirement but that this was not a true reflection of his principal business.
 - Adam advised that the Community have asked for a social space to come and have a couple of drinks and catch up with his friends. This is the environment he is looking to provide out at OngaOnga. He is not wanting to be a 'pub' and as he noted on his application.

Guidance from the different agencies:

- Support from Community – need to provide evidence that there is strong community support e.g. petition
- Argument around not being a petrol station – seek legal advice
- Ability to prove to the agencies what the OngaOnga Stores principal business is

Natasha to send through to Adam a copy of the Sale and Supply of Alcohol Regulations - Section 7 Ascertaining principal business carried on on-premises (new business) Sale and Supply of Alcohol Regulations 2013 and any other relevant material to assist Adam.

Thank you
Natasha Karaitiana

archivemans

- [35] It is noted (in the 4th bullet point under item 1 of the minutes of the meeting on 22 November 2019) that Mr Watts advised he would not continue with off-licence.
- [36] In February 2020 Mr Watts advised his intention to continue with both applications.
- [37] Due to overseas travel by Mr Watts, and Covid, the Application and Licensing Inspector's Report were delayed being sent to DLC.
- [38] Sadly Cr Chote, the DLC Chair, passed away in June 2020.
- [39] A new Chair was appointed, and a Hearing date of 23 September 2020 agreed.

THE HEARING

- [40] The Chair introduced the Hearing Committee and ran through the proposed process for the day.
- [41] Upon asking about conflicts of interest Cr Minehan spoke of knowing many people who have signed the petition. He explained this is simply a result of living in a rural community for many years. He confirmed he had not spoken to anyone listed on the petition about the application, the store or the petition itself. No one suggested he should be disqualified on that basis.
- [42] The Chair checked with the parties and all agreed to hear both applications jointly.
- [43] Chair of the DLC noted the petition (included in the Applicant's evidence), and advised Mr Watts that most likely little weight would be given to that document as there is no ability of the Committee or other parties to hear directly from the petitioners or to cross-examine the signatories.
- [44] **The Applicant presented his evidence.**
- [45] Mr Watts, as director of the applicant company, presented the applicant's evidence in support of both applications. He was unrepresented. Given the complexity of the legislation relevant to these two applications that was unfortunate. The Committee has, itself, therefore necessarily evaluated the evidence against all of the possibly applicable provisions in the legislation to see whether or not the applications, or either of them, could succeed. Mr Watts told us he believes his store is a General Store and is not correctly "captured" by the legislation and therefore "the law is not applicable".
- [46] Mr Watts disputed the need for a Duty Manager: there is "no purpose in my mind to have a duty manager". "I can put any name down and not use them".
- [47] Mr Watts continued, "business owners should not be subject to this".
- [48] Mr Watts disagrees with the revenue test (set out in the regulations). He states fuel is not his main business in his opinion.
- [49] As a General Store, Mr Watts believes he should be able to sell alcohol as an extension of products and services currently available. Although Mr Watts did not refer us to section 35, or rely on that specifically, his evidence in this respect lead us to consider it.
- [50] Mr Watts disagreed that he lacked knowledge of the legislation and challenged the Licence Inspector's guidance. He approached his evidence on the basis that it was an appeal against the Agencies' opposition.

- [51] Under questioning from the Committee, Mr Watts claims he is "still not required to have knowledge" (of the applicable and relevant law), and when he disagrees with a rule, it is "my responsibility to challenge the law".
- [52] Mr Watts continued to then state that in his opinion he met all obligations and regulations with regard to fuel sales. As selling automotive fuels is beyond our remit, we cannot comment on that. However, it is not relevant to the questions we must answer - does the applicant meet all the obligations and regulations with regard to the future sale of alcohol?
- [53] Mr Watts did not have a strong understanding of the obligations of an off-licence holder.
- [54] Under cross-examination by the Police, Mr Watts confirmed his belief that he is not running a *grocery store*.
- [55] He agreed that in his application (September 2019) he wrote *"Pending - a suitable manager is in the process of being hired at the time of application"*.
- [56] Mr Watts advised he had advertised for a manager but with no success.
- [57] Further examination of the written application noted the phrase, *"The owners do not have relevant experience or training, however training is intended and an experienced manager will be hired if the licence is granted"*.
- [58] The Police, with reference to s 105(j), noted that the Licensing Committee *"must have regard to... whether the Applicant has appropriate systems, staff and training to comply with the law"*.
- [59] Mr Watts confirmed he did not have staff, and that *"systems are a changeable item"*. He then accepted he did not have systems in place designed to deal with the responsibility to sell alcohol.
- [60] Mr Watts confirmed he had recently completed his LCQ training.
- [61] A copy of his LCQ certificate has been provided to the Licensing Inspector, and in evidence to us (Appendix 4).
- [62] Mr Watts challenged the need to have a Duty Manager, *"Why would I have (this) in place before I have a licence?"*
- [63] The Police asked if Revenue criteria was met as outlined in Regulations. Mr Watts responded with, *"(It is) my right to question process"*.
- [64] The Police submitted how the Licensing Inspector went beyond what was required to organise a meeting of all parties and asked why Mr Watts had not complied with the suggestions of the agencies.

- [65] Mr Watts advised he *"disagreed"* with the rules and how they were being applied: *"I was asked to do things that in my mind do not make sense, i.e. duty manager, revenue statement"*.
- [66] *"I was given advice and it did not make sense, so I disagreed."*
- [67] *"This is an application only, it's not important"*.
- [68] Mr Watts reiterated he complies with all fuel obligations.
- [69] *"I will challenge law... If I what I see is wrong, my process is to challenge it."* The difficulty Mr Watts faces is that we must follow what the Act and the Regulations say.
- [70] The Medical Officer of Health focussed cross examination on the Revenue Statement and whether the store was a premises that can sell alcohol.
- [71] When asked if his Revenue Statement complied with Regulation 6, Mr Watts replied, *"I believe so, or I would default back to fuel"*.
- [72] Clarity was sought on excise tax on tobacco, with Mr Watts noting that his tobacco income does not include excise tax as it is paid by his supplier.
- [73] The revenue statement on its face indicated tobacco sales provides the greatest income.
- [74] Once again Mr Watts challenged the description of his store, noting a "General Store" is not in the Sale and Supply of Alcohol Act.
- [75] The Medical Officer of Health questioned if Mr Watts had obtained legal advice (as recommended at the joint meeting of all parties).
- [76] Mr Watts responded, *"No"*.
- [77] Mr Watts once again confirmed he was not a *grocery store*, even though in the application he had written, under *"What is the nature of business? Grocery Store/Coffee Shop/Diner and Takeaway"*.
- [78] Questions were asked about differences in figures. Mr Watts confirmed the total revenue figure had not changed, just the breakdown between different categories.
- [79] Mr Watts confirmed tobacco excise tax is \$133k.
- [80] Cross examination from the Licensing Inspector clarified if Mr Watts believed he was a premises that could hold a licence: *"I fit, as I am not a prohibited premises"*.
- [81] But once challenged, he agreed *"No, I don't fit"*.
- [82] The Committee asked questions around minimising harm for children, especially those at school who catch the bus outside these premises.

- [83] The Committee was disappointed in the responses. They did not indicate Mr Watts appreciated the issue or had any answer or strategy to deal with it.
- [84] Questioning Mr Watts on a possible Single Alcohol Area, he identified there was no clearly defined Single Alcohol Area. Rather, the proposed off-licence would sell chilled wine and beer from a glass fronted fridge behind the counter and visible to those waiting at the counter to purchase other goods or takeaways.
- [85] Under the Off-licence application, Mr Watts agreed (in answer to cross examination) to sell Beer and Wine only, with Beer sold in a 4 or 6 pack or larger.
- [86] The premises has two public entrances with cameras throughout. The bulk storage of alcohol would be *"out the back"* and fully locked at all times.
- [87] Mr Watts again stated *"I am not a Grocery Store, not a convenience store"* but we are here for the locals *"to get what they forgot, beans, biscuits, bread"*.
- [88] Mr Watts was not interested in getting a Duty Manager to work for him, to train him and therefore allow Mr Watts to obtain experience.
- [89] Mr Watts responded, (It is) *"Unrealistic to expect me to work for a Duty Manager, when I am their employer"*.
- [90] Mr Watts was also not interested in working at the closest On/Off-licence in order to gain experience.
- [91] Mr Watts also blamed the employment law as a roadblock to being able to employ a suitable Duty Manager.

[92] **The Licensing Inspector presented her evidence.**

- [93] In summary, her objection to both applications is based on:
- Lack of Duty Manager
 - Applicant does not have relevant and recent alcohol experience
 - Original Revenue Statement showed automotive fuel sales are the largest income source.

We note, as it was somewhat unusual, that because of the uncertainty about the premises, the Council/Inspector had obtained a legal opinion, which the Inspector produced in evidence. We had regard to that.

- [94] The Inspector recommended the café be supervised and the store undesignated.

- [95] Confirmation of history of application was disclosed. At the first meeting with Mr Watts, the Inspector went over the incomplete application and through question by question.
- [96] The Licensing Inspector at that time highlighted the need for a Duty Manager.
- [97] A joint meeting of other parties was then arranged to let Mr Watts know what he needed.
- [98] In the beginning, Mr Watts showed "not a lot of cooperation", but in "recent months, has cooperated more".
- [99] Upon cross-examination the Licensing Inspector advised the requirement to allow 3 months (rather than 5-6 months) experience prior to granting a Manager's Certificate, was the Reporting Agencies and Inspector's attempt to assist Mr Watts. The Committee notes that that discussion occurred 12 months ago.
- [100] Mr Watts agreed (last year) to this 3-month period but did not go on to gain any experience.
- [101] The Sale of Alcohol Licences previously held by this premises was under the previous Sale of Liquor Act.
- [102] **The Police evidence was presented.**
- [103] Sgt Wylie told us that the Police are in opposition to issue of both licences, due to lack of detail regarding Duty Manager and lack of appropriate systems, staff and training to comply with s 105(j).
- [104] In cross-examination the Police acknowledged the café would be a low risk site for an on-licence.
- [105] The Police raised concerns around the attitude of Applicant.
- [106] They would reconsider opposition if a suitably qualified Duty Manager was employed.
- [107] The Police highlighted that "in deciding whether to issue a licence... the Committee must have regard to ... whether the Applicant has appropriate systems, staff and training to comply with the law".
- [108] Thus in the opinion of the Police, "*systems, staff and training*" need to be in place prior to the issue of the licence.
- [109] The Police argue that granting a licence "*subject to employing a manager*" is not appropriate.

- [110] Sgt Wylie reminded the Applicant and the Committee of s 247 (1):
- [111] **Sec 247 *Unauthorised sale or supply***
(1) *A person who is the licensee or manager of any licensed premises must take all reasonably practicable steps to ensure that the licensee does not do any of the following things without the authority of this Act:*
- (a) sell or supply alcohol on the premises for consumption there; or*
(b) let people consume alcohol on the premises; or
(c) sell or supply alcohol on the premises for consumption somewhere else.
- [112] If notice of appointment of Duty Manager is not given and no manager is actually on duty, then arguably any sale of alcohol amounts to an unlawful sale.
- [113] Under questioning from the Committee, the Police acknowledge a change (increase) in their opposition.
- [114] The Police now do not believe either Mr Watts or the applicant company is a suitable person (at this time) to hold an on or off-licence.
- [115] This is based on the director Mr Watts' comments interpreting the law and rules his way.
- [116] In the opinion of the Police, holding a licence demands a high level of cooperation with all agencies.
- [117] The Police then made reference to case law "*DJ Enterprises*" which highlights the importance of the "guiding hand of Duty Manager".
- [118] The Police raised concerns that Mr Watts has shown a tendency to interpret rules his own way and will "test or challenge" rather than resolving the issue or achieving what is required by law.
- [119] The Police do not visit Onga Onga often, therefore see the Duty Manager's role as very important to uphold the law for any licence.
- [120] Mr Watts has acknowledged he has no Duty Manager and has no alcohol experience.
- [121] Mr Watts, when cross-examining the Police, asked "*Is it fair to me, that I know all parts of the law?*"
- [122] The Police responded that Mr Watts as Applicant has not met the requirements of the Act.
- [123] **The Police summarised their opposition.**
- [124] Onus is on Applicant to prove suitability.

- [125] Premises do not meet definition of premises acceptable for an off-licence. S 34 exemption does not apply.
- [126] There are no "staff, systems or training", no qualified manager, and the Applicant is not suitable to hold a licence.
- [127] **The Medical Officer of Health presented evidence.**
- [128] The Medical Officer is opposed to both applications based on the lack of any suitably qualified manager.
- [129] They also note the premises is precluded from holding an off-licence as its *principal business* appears to be the sale of automotive fuels.
- [130] Section 36 prohibits some types of premises from holding an off-licence.
- [131] The Applicant has provided several Revenue Statements, both actual and proposed.
- [132] The most recent Revenue Statement provided by Mr Watts, dated 21 September 2020, (2 days before the hearing) is based on actual sales for the 12-month period from 1 September 2019 to 31 August 2020. This Revenue Statement became part of the evidence to clarify the revenue breakdown to identify the principal business.
- [133] Product breakdown provided by Mr Watts:
- | | |
|-------------------|--------------|
| Fuel Sales | \$158,254 |
| Tobacco Sales | \$186,391 |
| Food Products | \$86,517 |
| Convenience Foods | \$29,000 |
| Other | \$26,733 |
| | \$486,895.00 |
- [134] The Medical Officer of Health therefore concluded that the principal business is not that of a grocery store.
- [135] Under cross-examination, the Medical Officer of Health questioned the suitability of the Applicant, and the type of business applying for the licences.
- [136] Asked by the Committee, if a stand-down period should be recommended if the application was declined, the Medical Officer of Health commented that the Applicant has had 12 months to provide Duty Manager and address issues, and a stand-down period would have no real effect "as nothing will have changed".

- [137] This "business model does not fit" with selling alcohol.
- [138] The Medical Officer of Health indicated Reporting Agencies had met Mr Watts "half-way" and reduced the required 5-6 months' experience to only 3 months.
- [139] In their opinion, Mr Watts had not done his part.
- [140] In summary, the Medical Officer of Health advised that s 36 overrides s 32, and if *fuel sales* is principal business, an off-licence cannot be issued.
- [141] If the business is not a *grocery store*, then by definition it cannot hold an off-licence.
- [142] The Medical Officer of Health reiterated that the Applicant is not suitable to hold on or off-licence, as previously covered in hearing.
- [143] **Mr Watts' right of reply.**
- [144] Mr Watts believes his "*self-experience in many other aspects*" is sufficient, and "*questioned the value of learning from others*".
- [145] Mr Watts then continued to disagree with the law as it does not recognise his business model.
- [146] In reference to his character, Mr Watts believe it is his "*obligation to fight the law*" if it is "*not reasonable to meet the law*".
- [147] Mr Watts agreed he does not have alcohol related experience nor a Duty Manager.
- [148] He did not take any action between the joint meeting of all parties (which made recommendations) because "*it was obvious I would need to appeal; the revenue statement, no duty manager and no ability to meet the requirements*".

SITE VISIT

- [149] A site visit was undertaken by 2 of the Committee immediately after the hearing. (Due to a family medical event, the third Committee member visited the following week.)
- [150] The store appeared to us, individually, as similar in nature to a dairy, with a Post Shop in one corner and takeaways with the *convenience food* categories, not the *food products* categories being prominent. There was not the range of grocery items on display that we would associate with a grocery store. The range of household items (not being consumable) was very meagre. The premises layout and design was different from a typical grocery store.

- [151] The tea rooms/coffee shop on-site eating area were to one side.
- [152] There was no sense (to the Committee) that this was a grocery store. The signage promoting meals, toasted sandwiches, many varieties of burgers, and hot fish and chip style food was not consistent with a grocery store.
- [153] Photos provided by the Inspector in her report accurately reflected the "convenience" nature of the store, noting there was an additional set of shelves with a few tins of food on display.
- [154] The petrol and diesel bowzers are on the footpath immediately outside the premises.
- [155] The Committee did not accept this store is isolated.
- [156] The store is 15 minutes from the town of Waipawa and a similar distance to Waipukurau.
- [157] Waipukurau is a rural service town with all relevant retail services available including 2 supermarkets.

PRINCIPAL BUSINESS

- [158] Before we turn to our evaluation of the evidence and apply the law to it, we think it would help to summarise the evidence as to revenue/trading which was before us as that will assist us determine what the principal business is/is proposed to be.
- [159] We received three separate sets of revenue figures. We summarise these as follows:

Goods	Projected Gross Revenue 1/6/19 – 31/5/20¹	Actual Gross Revenue 1/9/19 – 31/8/20²
Groceries	146,849.59	169,917.16
Cigarettes	158,616.36	186,391.57
Food	36,672.17	29,573.61
Chocolate	650.04	459.13
Coffee	11,970.76	10,006.87
Tea	1,792.41	1,085.22
Diesel	103,773.83	69,970.37
Petrol – 91	117,692.50	88,283.43
Post Office	4,257.81	3,159.32

¹ Based on actual trading 1/6/19 – 15/9/19 and projected trading 16/9/19 – 31/5/19 (Chartered Accountant)

² Chartered Accountant

Phone Cards	4,836.14	3,873.92
TOTAL	\$587,111.61	\$562,720.60

These two statements were described as GST exclusive.

- [160] Mr Watts provided us with a handwritten statement of accounts, based on the regulations form, dated and signed 10 September 2020, for the period 1 September 2019 – 31 August 2020. We understand this was based on actual trading. It too was described as GST exclusive.

Description	\$\$	%
Food products	44,026.00	11
Meats	5,475.00	1
Breads Buns Rolls	9,500.00	2
Biscuits	5,900.00	1
Ice cream	520.00	0.1
TOTAL	\$65,421.00	16%

Description	\$\$	%
Confectionary	4,100.0	1
RTE at prepared foods	49,300.00	12
Snack Food	6,300.00	2
Beverages (not milk or alcohol)	29,000.00	7
TOTAL	\$88,700.00	21%

Description	\$\$	%
Tobacco	153,864.00	37%

Description	\$\$	%
Other:		
Sundry	17,000.00	4
Magazines / papers	2,700.00	1
Postage	2,764.00	1
Phone Cards	3,655.00	1
Commissions	24,289.00	6
Fuel	148,913.00	36
TOTAL	\$199,321.00	49%

We do not think this information complies with the regulations either. Neither this information nor the previous two revenue statements from the chartered accountant indicate that excise duty was deducted from the

tobacco figures [Reg 6(1)(a)(ia)], although Mr Watts stated excise tax was. This last list supplied by Mr Watts omits line items where he had indicated no revenue stream. For example, no revenue from:

- Hardware items.
- Toiletries, personal hygiene items.
- Stationery.
- Lotteries Commission revenue.
- Delicatessen items.
- Multipacks of chips.

Also we have replicated the \$\$ amounts and the percentages as produced to us by Mr Watts. Mr Watts said the revenue exclusive of GST was \$418,676.00.³

[161] The fuel totals for each of the three revenue statements are:

\$221,466.33; \$158,253.80 and \$148,913.00.

Gross revenue from fuel as a percentage of those totals would seem to us to be, from the above:

38%; 28% and 29%.

[162] In order to ascertain what the revenue/percentage of *food products* was (having regard to s 33(1) and the regulations [8, 9, 10, 11] we included the following from Mr Watt's statement reproduced earlier:

Food products
Meats
Breads buns rolls
Biscuits (assuming they are packaged)

We excluded ice cream and beverages (other than milk or alcohol) because we cannot be sure what the container capacity was.⁴

As the two statements from the chartered accountant did not follow the breakdowns set out in the regulations we found them of little assistance. Based on the information from Mr Watts we concluded that food products comprised approximately 12% of gross revenue. They were less than the total of confectionary, ready to eat prepared foods, snack food, and non-food-product beverages (20%).⁵

[163] In our overall evaluation of the gross sales revenue (which is what we are directed to focus upon in the regulations) we have concluded the best evidence was that of Mr Watts, as that was nearest to the requirements of s 33(1) and regulations available. In the result, as best we can determine,

³ The sum of the \$\$\$ and of the percentages are not reconcilable with this gross revenue figure – 100%. By our calculations the sum of the four subtotals exceeds \$500,000.

⁴ From our site visit and the photos produced many fridges contained containers appearing to be less than 1 litre

⁵ Defined, collectively, as *convenience* food in Reg 3.

the gross sales revenue for 1 September 2019 – 31 August 2020 looks like this:

Fuel	= 29%
Food products	= 12%
Convenience food	= 20%
Everything else	= 9%
Tobacco	= 30%

- [164] We make two final observations about the analysis and significance of money to our task. Parliament saw fit to amend the regulations to exclude excise tax for tobacco products when assessing "*principal business*"⁶. It did not do so for fuels, so for fuel revenue for general stores the total actual gross sales revenue must be factored in. Secondly, the regulations direct our attention to gross sales revenue. For that reason, Mr Watt's evidence to us about profit figures and percentages is of no relevance or assistance to us in determining what the principal business is.

THE OFF-LICENCE

- [165] We propose to consider this first. Before we evaluate the evidence, we consider we should summarise what we understand the 2012 Act requires of us when considering whether or not a premises is eligible for an off-licence. We have come to the following conclusions about this 2012 Act and off-licences:

- The Act is new and is a reform.
- It tells us what we, as a DLC, can do, and what we cannot. In this it is very prescriptive.
- We must start with s 32 which follows a heading "*Restrictions on issue of off-licences*". Our first task is to decide whether or not the proposed premises comes within one of the six categories listed as (a)-(f). If the answer is "yes" then we must consider whether or not s 36 overrides that conclusion, pursuant to s 32(3). If the answer is "no" then we can turn to consider ss 34 or 35. If we consider that neither of those sections apply to the evidence, then we consider that is the end of the matter. The premises are not eligible.
- If the premises are not eligible then we do not need to consider s 105/106 at all.
- If we consider that either s34 or s35 is applicable, then we must consider whether or not s36 is relevant to override that – see ss 34(2) and 35(2).
- Section 36 is mandatory – we **must not** issue an off-licence for any premises described in (a)-(f) of that section. We need to form an opinion about that.

⁶ See Reg 6(1)(a)(ia).

- [166] It is our general understanding that ss 32-36 and the new regulations relating to determining "*principal business*" were all intended to clarify and reform the law. In this context we are not aware of any decision under this Act approving an off-licence to a general store which sells fuels (petrol and diesel) such as the Onga Onga General Store. None was cited to us by any of the parties. We also understand that the purpose of s36 is to separate alcohol and automotive fuels (diesel and petrol sales). We do not consider s36 allows a Committee such as we are to licence a one-stop-store where in a single transaction, in a single store or in a single premises a member of the public can purchase both alcohol to take away to consume and automotive fuel/petrol/diesel.
- [167] Despite what the applicant, and perhaps those members of the local community who signed the petition presented to us, think, and contrary to the opinion of the chartered accountant provided to us by the applicant, we are bound by the legislation. Sections 32, 33 and 36 of the Act and the definitions and regulations relating to "*principal business*" all contain mandatory instructions to us: "**must**".
- [168] So, turning to s32(1):
- No one suggested the premises were, or would become a tavern, as defined. Subclause (a) is not applicable.
 - No one suggested the premises were, or would become, a business where 85% of the sale revenue would arise from take away alcohol sales. Subclause (b) is not applicable.
 - The business is neither a remote seller or a manufacturer of alcohol so subclauses (c) and (d) are not applicable.
 - The premises are neither 1000m² nor otherwise a supermarket. Subclause (e) is not applicable.
 - We concluded this was not a *grocery store* in terms of subclause (f). We have referred to various evidence in our discussion of the site visit, and the revenue, and the witnesses' evidence. Having regard to the factors in s.33(1) and (2) and the evidence discussed we are quite satisfied this is not a *grocery store*.
- [169] Having concluded the premises do not fit any of the s 32 eligibility criteria, we turn to s 34. The case was not presented to us on the basis that none of the s 32 kinds of premises or businesses would be uneconomic in Onga Onga. There is no evidence upon which we could reasonably reach that conclusion. We do not consider s34 assists the applicant.
- [170] We turn to s 35. Can we describe the premises as a shop? If so, is it a shop where the principal business is the sale of food (not food product)? If not, would alcohol be an appropriate complement to those goods (not being food) sold in the premises? Is s 36 relevant?
- [171] "*Shop*", as used in s 35, is not defined in the Act or the Regulations. Nor is "*store*", or "*food*", or "*goods*". We are of the opinion that a shop and a store are synonymous in New Zealand in 2020 for our purposes (e.g.

general shop or general store) and describe *a place for the sale of goods*. We interpret "goods" as the opposite of "services" – *articles capable of being sold*. We consider petrol and diesel are both *goods*.

[172] We note that in s 35 Parliament has, for some reason unknown to us, used the word "food" three times, and has not used any of the other defined terms appearing in s 33 and the regulations. In *food* legislation *food* includes raw, prepared, and partly prepared things capable of being humanly consumed. We approach s 35 therefore on the basis that "food" there includes at least all of those things defined in the Act and Regulations as:

- *Food product*, and
- *Convenience food*

[173] Having regard to our evaluations and conclusions in the preceding two paragraphs we conclude the premises are a shop. Mr Watts' evidence focused on his understanding that this premises was a *general store*, a *rural general store* and not a *grocery store*. We agree with him; it is not a *grocery store*. On this basis, and aggregating all the line items in Mr Watts' revenue information it seems to us that as a category "food" [32%] exceeds tobacco [30%] and fuels (petrol and diesel) [29%]. On that basis by a very slim margin, we conclude it is likely that the principal business of the shop is the sale of food. If that is so then that conclusion engages s 35(1)(a) and means that s 35 cannot be used by us to grant an off-licence to these premises.

[174] Our evaluation of the evidence has not been easy by virtue of the fact that none of the three sets of gross sales revenue accounts comply with either regulation 6 or regulation 12. Furthermore, the agency reports were prepared on the basis of projected accounts which clearly indicated fuels would be the *principal business* based on projected gross revenues. At the hearing we were presented with two sets of figures both said to be based on actual trading for the 12 months 1 September 2019 – 31 August 2020. We have set those out earlier in our decision. It is impossible to reconcile those. As a result, we have based our evaluations on the figures presented to us by Mr Watts for two reasons – he is the applicant's director and prepared that statement, and it most closely follows the characterisations specified in the regulations. Given these circumstances, and the closeness of the percentages of sales revenue from food, tobacco, and fuels (all close to 30% each) it is not possible for us to be completely satisfied, on a balance of probabilities, what the actual *principal business* is.

[175] However, having regard to both s 35(1)(b) and (2), we are also satisfied that alcohol would not be an appropriate complement to the goods comprising a substantial proportion of the business of the premises – namely the sale of fuels. We therefore conclude s 35 does not assist the applicant and are not prepared to authorise the issue of an off-licence pursuant to that section.

[176] We now turn to s 36. As best we are able, based on the analysis of the gross sales revenue figures supplied to us, for the reasons we have endeavoured to explain previously, we do not consider we can safely form an opinion that the *principal business* of the Onga Onga General Store is the sale of automotive fuels. Our site visit left us each with the impression the premises were more akin to a dairy – inside. That said dairies do not typically sell petrol and diesel. The range of products on display appeared to us to be far fewer than would be expected in a *supermarket* or a *grocery store*. Because of its rural location, but not far from Waipawa and Waipukurau, and the limited range of household products we saw, in our opinion it is not a shop from which members of the public could or would purchase the majority of their food and household items. Mr Watts described it as providing "*essential*" goods. He also said to us, as we noted earlier, that his store is a place where the locals can "*get what they forgot, beans, biscuits, bread*". Looking at it, holistically we see it providing a post shop service, a takeaway food service, providing some dining with meals as a café rather than a restaurant, selling newspapers, tobacco, cigarettes, food products, *convenience food* and phone cards. In its rural setting in our opinion it is a *convenience store*. "*Convenience store*" is not defined. The dictionary says "*convenient*" means "*suitable or opportune, easy to use, nearby*". For residents in Onga Onga the store would be convenient in that sense. Mr Watts also told us that the store sells fuel "*since it is impractical for some farm equipment to refuel in the towns and not worth the time and cost to drive a private vehicle into town to refuel*". That, to us, reinforces the convenience nature of the store and the goods it sells. In our opinion rural areas can have *convenience stores* or *general stores* which differ in some respects from urban convenience stores. We see nothing inconsistent with that. That said, members of the Committee are familiar with urban convenience stores. In common with the Onga Onga store some of those have postal shop facilities; have takeaway hot and cold food; have essential food products; sell newspapers; have areas where patrons can sit and eat food purchased on the premises; sell phone cards; sell cigarettes and tobacco, in short, from which customers can purchase what they forgot at the supermarket or grocery store.

[177] For the purposes of s 36, for the above reasons, in our opinion, the Onga Onga general store is aptly described as a rural convenience store. For that reason, too we conclude it is ineligible to be granted an off-licence.

DELIBERATIONS – Off- Licence

[178] In case we are wrong in our analyses and evaluations and opinions based on ss32-36, previously, we turn to s 105 matters.

[179] In our opinion it would be contrary to and inconsistent with the object of the Act to grant an off-licence for premises where nearly one-third of the gross sales revenue comes from the sale of automotive fuels. It is clearly a purpose of the Act to disassociate sales of alcohol and automotive fuels. In this case there is no separation of premises from which alcohol is proposed to be sold and from which fuels are already sold.

- [180] In considering whether or not to grant a new off-licence, we must undertake a forward looking risk analysis based on our assessment of the evidence before us. Mr Watts' evidence left us in considerable doubt as to whether the sale and supply of alcohol would be undertaken safely and responsibly. He did not think the legislation was appropriate for his business. He maintained the revenue method of determining the financial business was "*flawed*". His evidence was that his *principal business* was the sale of tobacco (statement of evidence page 14). By a fine margin, on our analysis, that might be so. Whilst not prohibited by s 36, we do not see a premises where the *principal business* is the sale of tobacco (in a business which also sells fuels) is permitted by ss32, 34, or 35. We consider that such a business would be inconsistent with the object of the Act.
- [181] The Committee found the Applicant, and its director Mr Watts, were not suitable to hold an off-licence.
- [182] Although Mr Watts had completed his LCQ training, the Committee was not convinced he was sufficiently knowledgeable or experienced in the sale of alcohol. There is no qualified Duty Manager offered to us as part of the application. Mr Watts had not availed himself of that opportunity over the past 12 months to obtain a certificate himself, nor arrange for a qualified manager to work for the store if the licence was granted. As we noted earlier a company cannot sell alcohol without appointing a manager who must be on duty at all times. Mr Watts' failure in this respect calls into question the company's suitability.
- [183] The proposed layout of the premises did not include a Single Alcohol Area because Mr Watts did not consider it was a grocery store. However, given the general convenience nature of the store, the intention to have it all undesignated, and the likely patronage of children to the store, we were concerned about this.
- [184] The application was presented on the basis that the premises were proposed to be undesignated. We consider that to be problematic in a rural off-licence store which is neither a supermarket or a grocery store, sells convenience food and tobacco and fuels.
- [185] We were troubled by the evidence at the hearing that there was still no person with experience of alcohol sales under an off-licence, holding a manager's certificate, employed by the company. Nor was any evidence presented that any person with those qualifications and experience had been approached, and agreed to work for the company if it succeeded in obtaining an off-licence. In circumstances where agency opposition raised issues about staffing, systems, and training with specific respect to the need for a duty manager or duty managers this failure by the company alone could have been fatal to the application. It would be completely contrary to the object of the Act – which emphasises the safe and responsible sale of alcohol – for us to issue a licence where the applicant had no proposed duty manager and its Director has no experience of alcohol sales.

- [186] We have referred to the matters raised by the agencies. Because of the delay between the filing of the application and the meeting with the agencies, until the hearing, Mr Watts had more than reasonable time and opportunity to address those matters of concern. We do not consider he did so.
- [187] The application is consistent with the applicable Local Alcohol Policy.
- [188] The hours sought were not controversial.
- [189] As to s 105(1)(f) nearly 60% of the gross sales revenue comes from tobacco and automotive fuels and about 20% from convenience food. We are not satisfied that it is appropriate to issue an off-licence to such a business.
- [190] The business (from a single premises) currently offers postal services and dine-in eating services as well as selling various goods. We have significant doubt that an off-licence should properly be issued for premises offering such services.
- [191] In our opinion there would be no effect on the amenity and good order of the locality if we issued an off-licence. We heard no evidence to that effect.
- [192] Standing back, we have unanimously concluded that it would be contrary to s 4 of the Act to grant an off-licence for this premise. We do not consider the premises is eligible under any of ss32, 34 or 35, and we are of the opinion, too, that s 36(c) prevents us from granting an off-licence.
- [193] The off-licence application is declined.

DELIBERATIONS – On-Licence

- [194] The Committee must take into account the same criteria when considering whether to issue an on-licence.
- [195] If the application cannot meet the object of the Act, then the application should not proceed.
- [196] In the opinion of the Committee, the Applicant did not portray himself as a knowledgeable and experienced operator. Mr Watts did not present as suitable to hold an on-licence.
- [197] Mr Watts was argumentative, disagreed with the law, the licensing process and the regulations which are expressed in mandatory terms.
- [198] He challenged the Inspector and the Police and did not action recommendations made at a meeting of all parties (held for the purpose of assisting the Applicant).

- [199] The Police, Medical Officer of Health, and Licensing Inspector all referred to lack of any identifiable or likely Duty Manager as a reason to not grant a licence.
- [200] The café premises itself did not give rise to any concerns, and the Applicant advised details of security/CCTV.
- [201] Food, water and non-alcoholic beverages are already available.
- [202] No adequate staff, no adequate alcohol related training and no systems were in place to comply with the sale and supply of alcohol law.
- [203] From the foregoing nine paragraphs in this part of our decision it can be seen that we do not consider the company to be suitable to hold an on-licence. Mr Watts is the driving force of the company. He gave evidence for the company. He gave us no confidence that alcohol could or would be sold and supplied and consumed safely and responsibly on the premises. His training and experience were inadequate for him to manage an on-licence. He failed to obtain a manager's certificate himself, and failed to recruit, or arrange to employ a suitably qualified experienced manager who the company could appoint pursuant to s 212 which we set out earlier. Without a manager on duty no alcohol could be sold: s 214.
- [204] This evidence, and our evaluation of it, leads us to conclude that we are not satisfied that any of the criteria in s105(1):
- (a); and
 - (b); and
 - (j); and
 - (k),
- have been adequately addressed by the applicant. For those reasons alone we could not grant an on-licence.
- [205] However, the fundamental and fatal flaw in the application and the evidence, in our opinion, is the failure of the applicant to provide evidence which we could rely on, to establish how alcohol could and would be safely and responsibly sold and supplied and consumed on the same premises from which automotive fuels were also sold. The juxtaposition in a single-one-shop-store of on premises alcohol consumption and the sale of automotive fuels is completely contrary to s 4 in our view. As members of a DLC we are aware of community concerns about drinking and driving especially in rural communities. In our area we are not aware of any on-licensed premises where petrol and diesel are sold from the same premises.
- [206] The Act does not restrict the kinds of business or the kinds of premises eligible to hold an on-licence. However, as well as the object of the Act, in considering what other goods are sold already by the business from the proposed premises, we cannot ignore the high proportion of the gross sales revenue received from the sale of petrol and diesel [s 105(1)(f)].

Having regard to that criterion we would not have been prepared to grant an on-licence for this business or these premises.

[207] The Local Alcohol Policy and the hours do not raise issues of concern for this application.

[208] As to the design and layout of the premises, had we been minded to grant the on-licence we consider it would have covered only the café part, and not the whole of the premises.

CONCLUSION AND DECISION

[209] All reporting agencies submitted against both applications.

[210] The evidence we heard during the hearing process did not overcome their concerns.

[211] The Police opposition to the Application increased, between their report and the hearing.

[212] The Applicant company is not suitable to hold either an on-licence or off-licence.

[213] There are no adequate staff, training or systems in place, which satisfy us that we could grant either application.

[214] There is no experienced Duty Manager that either we, as a Committee, or any of the reporting agencies can assess.

[215] The premises are not a business that can hold a licence (being a convenience store) as best we can determine.

[216] The Committee, when cross-checking with the object of the Act, is not satisfied that either application meets the object of the Act.

[217] The Applications for an on-licence and for an off-licence are both declined.

DATED at Waipukurau this 13th Day of November 2020



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CHAIRPERSON

CENTRAL HAWKES' BAY DISTRICT LICENSING COMMITTEE