[2016] NZARLA PH 497

IN THE MATTER	of the Sale and Supply of Alcohol Act 2012
AND	
IN THE MATTER	of an appeal pursuant to s 154 of the Act against a decision of the Horowhenua District Licensing Committee granting an off-licence in respect of premises situated at 13 Ballance Street, Shannon, known as "Shannon Liquor Centre"
BETWEEN	**CORRINE SMITH**
	Appellant
AND	**KIWANO LIMITED**
	Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly
Member: Mr D E Major

HEARING at LEVIN on 10 November 2016

APPEARANCES

Miss C S Smith - appellant
Dr G Hewison ─ for appellant
Mr G B Bagga – respondent
Ms S A H Williams – objector – s 204 party

DECISION OF THE AUTHORITY

Introduction

[1] On 9 December 2015, Kiwano Limited applied for an off-licence in respect of premises situated at 13 Ballance Street, Shannon, known as "Shannon Liquor Centre".

[2] The application attracted 18 individual objections, including the appellant. There was one submission in support of the application and a late petition against the application signed by approximately 390 people. Neither the Medical Officer of Health nor the Police opposed the application. The Licensing Inspector reported that she saw no reason under the Act why the application should not be granted and recommended that it be granted.

[3] Following a hearing on 14 March 2016, the Horowhenua District Licensing Committee (DLC), by way of a decision dated 11 April 2016, granted the application.

[4] The appellant, an objector before the DLC, has appealed the decision of the DLC.

Grounds for Appeal

[5] The grounds of appeal are that the DLC erred:

(i) in relying on the 'non-opposition' by the Police when the Police limited their consideration to issues of applicant suitability, controlled purchase operations (CPOs), and the running of the applicant's other business in Foxton, but not s 4 issues;

(ii) in relying on the 'non-opposition' by the Inspector given that the Inspector relied on the fact that the Police had not objected, which led to the Inspector believing that the amenity and good order of the locality would not be changed when there was a third off-licence premises in the town;

(iii) in not questioning the Inspector as to the basis and reason for her 'non-opposition' in light of objections and the limitations of the Police report;

(iv) in putting 'significant weight' on the 'non-opposition' of the Medical Officer of Health given that report did not include information of social deprivation and alcohol harm in Shannon, did not express a view on whether the application met the criteria in ss 4, 105(h) and (i), and 106(1) of the Act, and the Medical Officer of Health was not called to, and did not attend the DLC hearing and was not questioned as to his 'non-opposition';

(v) in not asking the Police or Inspector to respond to the evidence of objectors that Shannon is a socially deprived area where alcohol harm prevails and that the amenity and good order of Shannon would likely be reduced, to more than a minor extent, by the effects of the issue of the licence;

(vi) by failing to acknowledge that the applicant gave no evidence and did not challenge the evidence of objectors as to whether the amenity and good order of Shannon would likely be reduced, to more than a minor extent, by the issue of the licence;

(vii) by failing to provide objectors an opportunity to ask questions of the Police and Inspector as to the reasons for their 'non- opposition';

(viii) by giving insufficient weight to unchallenged evidence of objectors, particularly the appellant's objection, and the objection of Ms Sharon Williams, that Shannon is a socially deprived area where alcohol harm prevails and that the amenity and good order of Shannon would likely be reduced, by more than a minor extent, by the effects of the issue of the licence, or that Shannon is already so badly affected that it is still undesirable to grant the licence;

(ix) by failing specifically to consider the criteria in s 106(1) of the Act; and

(ix) by misapplying the reasoning of the Authority in *Masterton Liquor Limited v Jacquiery*[1] when considering s 106(1), by not taking a cautious approach to the grant a further licence in a socially deprived area where alcohol harm exists that would result in the ratio of off-licences being below the national average of 1:1000 persons.

Law

[6] Subsections 103(1) to (3) of the Act provide:

> **(1) On receiving an application for a licence, the secretary of the licensing committee concerned must send a copy of it, and of each document filed with it, to—**
>
> **(a) the constable in charge of the police station nearest to—**
>
> **(i) the premises for which the licence is sought; or**
>
> **(ii) the secretary's office, where the licence is sought for a conveyance; and**
>
> **(b) an inspector; and**
>
> **(c) the Medical Officer of Health—**
>
> **(i) in whose district the premises are situated; or**
>
> **(ii) in whose district the applicant's principal place of business in New Zealand is situated, where the licence is sought for a conveyance.**
>
> **(2) The inspector must inquire into, and file with the licensing committee a report on, the application.**
>
> **(3) The Police and the Medical Officer of Health—**
>
> **(a) must each inquire into the application; and**
>
> **(b) if either has any matters in opposition to it, must file with the licensing committee a report on it within 15 working days after receiving the copy of it.**
>
> **…**

[7] Section 105 of the Act then provides:

> **(1) In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:**
>
> **(a) the object of this Act:**
>
> **(b) the suitability of the applicant:**
>
> **(c) any relevant local alcohol policy:**
>
> **(d) the days on which and the hours during which the applicant proposes to sell alcohol:**
>
> **(e) the design and layout of any proposed premises:**

[1] [2014] NZARLA PH 881

(f) whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:

(g) whether the applicant is engaged in, or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:

(h) whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence:

(i) whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that—

(i) they would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but

(ii) it is nevertheless desirable not to issue any further licences:

(j) whether the applicant has appropriate systems, staff, and training to comply with the law:

(k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.

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

[8] Section 106(1) then reads:

(1) In forming for the purposes of section 105(1)(h) an opinion on whether the amenity and good order of a locality would be likely to be reduced, by more than a minor extent, by the effects of the issue of a licence, the licensing authority or a licensing committee must have regard to—

(a) the following matters (as they relate to the locality):

(i) current, and possible future, noise levels:

(ii) current, and possible future, levels of nuisance and vandalism:

(iii) the number of premises for which licences of the kind concerned are already held; and

(b) the extent to which the following purposes are compatible:

(i) the purposes for which land near the premises concerned is used:

(ii) the purposes for which those premises will be used if the licence is issued.

…

[9] Section 204(3) also provides:

Any of the following persons may appear and be heard, whether personally or by counsel, and call, examine, or cross-examine witnesses, in any proceedings stated in subsection (1):

> **(a) the applicant:**
>
> **(b) an objector:**
>
> **(c) an inspector:**
>
> **(d) a constable:**
>
> **(e) a Medical Officer of Health.**

[10] Previously, s 35 of the Sale of Liquor Act 1989 provided:

> **(1) In considering any application for an off-licence, the Licensing Authority or District Licensing Agency, as the case may be, must have regard to the following matters:**
>
> > **(a) the suitability of the applicant:**
> >
> > **(b) the days on which and the hours during which the applicant proposes to sell liquor:**
> >
> > **(c) the areas of the premises, if any, that the applicant proposes should be designated as restricted areas or supervised areas:**
> >
> > **(d) the steps proposed to be taken by the applicant to ensure that the requirements of this Act in relation to the sale of liquor to prohibited persons are observed:**
> >
> > **(e) whether the applicant is engaged, or proposes to engage, in—**
> >
> > > **(i) the sale or supply of any other goods besides liquor; or**
> > >
> > > **(ii) the provision of any services other than those directly related to the sale or supply of liquor,—**
> >
> > **and, if so, the nature of those goods or services:**
> >
> > **(f) any matters dealt with in any report made under section 33.**
>
> **(2) The Licensing Authority or District Licensing Agency, as the case may be, must not take into account any prejudicial effect that the grant of the licence may have on the business conducted pursuant to any other licence.**

Submissions

Appellant's submissions

[11] The appellant submits that where objections have been made on an application, the Police must consider those objections and file a report to assist the DLC and the Inspector in their consideration of the issues, particularly in relation to the purpose and object of the Act. The appellant submits that as the Police only considered issues of applicant suitability, CPOs, and the running of the applicant's other business in Foxton, the DLC should not have relied on the lack of opposition by the Police in coming to its decision.

[12] The appellant further submits that notwithstanding that the Inspector appears to have considered the issues raised by objectors, because of the limited scope of the inquiry by Police, the Inspector did not have any information from the Police as to the number of incidences attributed to alcohol. As a consequence, it is alleged that she was wrong to draw any conclusions about the number of such incidences. As, it is

alleged, the Inspector's conclusions were wrong, the DLC erred in relying on the lack of opposition from the Inspector. Moreover, the DLC should have questioned the Inspector in light of the evidence put forward by objectors. In not doing so the appellant says that the DLC failed to exercise its inquisitorial function.

[13] Similarly, the appellant submits that the Medical Officer of Health must consider objections made and file a report, particularly in relation to the purpose and object of the Act, and also ss 105(1)(h) and (i) and s 106(1) of the Act. As it is not apparent that the Medical Officer of Health was aware of the objections made, the appellant submits that they have not fulfilled their reporting function and the DLC should not have put weight on the 'non-opposition' of the Medical Officer of Health. This was compounded by the fact that the DLC did not question, or provide the opportunity for objectors to question the Medical Officer of Health. By failing to question the Medical Officer of Health, it is alleged that the DLC again failed to exercise its inquisitorial function.

[14] The Appellant also submits that the DLC failed to give sufficient weight to evidence of objectors that Shannon is a socially deprived area where alcohol harm prevails and that the amenity and good order of Shannon would likely be reduced, to more than a minor extent, by the issue of the licence. Further, by not requiring the Police and Inspector to respond to the evidence of objectors, the DLC failed in its inquisitorial role. And, in circumstances, where such evidence is not challenged by the applicant, the evidence of the objectors should be accorded more weight. In this case, it is submitted, the unchallenged evidence of the appellant and the evidence of another objector, Ms Sharon Williams, was not given sufficient weight. Moreover, it is submitted that the DLC did not exercise a cautious approach to the granting of a further licence where that would result in the ratio of off-licences being below the national average of 1:1000 persons.

[15] Finally, the appellant submits that by failing to specifically refer to s 106 in its decision, in contrast to specific mention being made to s 105(1)(h) and (i), it is not apparent that the DLC turned its mind to s 106. (At the hearing, however, the appellant conceded that the DLC did consider s 106 but that it would have been helpful for the DLC to state that fact, and its reasoning with respect to s 106 matters.)

Respondent's submissions

[16] The respondent made limited submissions in response to the submissions made by the appellant. The respondent submitted, however, that in his view the establishment of another off-licence is unlikely to increase any offences linked to alcohol abuse because there is no indication of increasing trends of alcohol harm in the community.

[17] The respondent further advised the Authority of the steps it will be taking to maintain the amenity and good order of the Shannon community including such things as encouraging patrons to leave the premises after purchasing alcohol, monitoring the car park and removing any litter or graffiti, imposing strict management disciplines and being open to neighbourhood feedback. The respondent also outlined that, in his view, the design and layout the premises will minimise potential harm through the installation of lighting and CCTV cameras, a TV display promoting responsible drinking, having two staff on site at all times, and keeping the windows clear of promotional material. The respondent has no intention of providing 'cheap' liquor or entering into price wars with competitors.

Authority's Decision and Reasons

[18] This appeal raises three broad questions. The first relates to the roles of the inspector and the DLC in respect of applications for licences under the Act. In particular:

(i) is an *Inspector* required to look behind any reports of the Police or Medical Officer of Health when those agencies report that they have no objection to an application; and

(ii) is a *DLC* required to look behind any reports of the Police, Medical Officer or an inspector when those agencies report that they have no objection to an application?

[19] The second question raised by this appeal relates to what weight the DLC is required to give to evidence of objectors relating to amenity and good order in light of there being no opposition from reporting agencies as to amenity and good order.

[20] Finally, what are the obligations of the DLC to direct that reporting agencies respond to the evidence of objectors, or provide objectors an opportunity to ask questions of the reporting agencies?

Roles of the inspector and the DLC

[21] Subsequent to the Police undertaking their inquiry pursuant to s 103 of the Act, they filed a report dated 14 January 2016, which read:

> *"Police have no objections to the issue of the licence sought by the applicant."*

[22] Later, at the hearing of the DLC, it became apparent that the Police in undertaking their inquiry only looked at some of the considerations set out in s 105 of the Act. The DLC decision reads [at 3.8]:

> *"Mr Comber asked Snr Constable Clarke to comment on the parameters for the Police to lodge an objection and the rationale for not submitting in this case. Snr Constable Clarke informed that in this case the Police looked at applicant suitability, CPOs and the running of the applicants business in Foxton. All of these areas were favourable; Police, therefore, did not find reason to submit an objection."*

[23] Similarly, the Medical Officer of Health said in its report dated 26 January 2016:

> *"The Medical Officer of Health has no matters of concern. There is no opposition to the issuing of this Licence. However, it is noted that the premises is not yet operational and therefore we have not been able to observe the premises in operation. Therefore, a full assessment of host responsibility could not be conducted at this time.*
>
> *We will undertake a compliance check should the licence be granted and request that we are notified of the opening date."*

[24] The Medical Officer of Health concluded:

"To reiterate, we do not oppose the issuing of the licence. We have not been advised of any concerns or objections from yourselves, NZ Fire Service or NZ Police."

[25] In his report made pursuant to s 103(2) of the Act, the inspector said:

"The fact that the Police have not objected under the amenity and good order of the locality brings me to believe that there is not much if any change to the number of incidences attributed to alcohol now from when there was a third off licence premises in town."

[26] And further:

"I recommend that as the applicant is a suitable person, the days and hours fall within the national maximum trading hours and the sale of liquor policy 2006 and that Police and Public Health have no issues with the application, that the application be granted."

[27] The appellant relies on the previous decision of this Authority in *Foodcorp Distribution Ltd* [2013] NZARLA PH 511 as authority for the position that in undertaking its inquiry, the Police should have considered s 4 issues as well as the criteria in s 105(h) and s 106 of the Act relating to amenity and good order in light of objections about amenity and good order. As the Police filed a report stating that they had no objections to the issue of the licence, the appellant says the DLC, to the extent that it relied on the Police report, drew invalid and unreliable conclusions about the application. By electing to report, albeit to say they had no objections, then the Police should have clarified which s 105 criteria they had regard to and which they did not.

[28] The same argument is made in respect of the Medical Officer of Health.

[29] A similar argument is made in respect of the Inspector save that it is alleged that the Inspector drew invalid and unreliable conclusions in reliance on the report of the Police because of its narrow inquiry.

[30] *Foodcorp* concerned an application under the 1989 Act for an off-licence in relation to premises in Dunedin. As the application was opposed, it was forwarded to the Authority for determination as was then required by s 34 of the 1989 Act. In its report, Police raised concerns that the application did not accord with the object of the 1989 Act. In particular, the Police were concerned about the location of the proposed premises, given the density of liquor outlets in what was a high risk area for alcohol related offending.

[31] The 1989 Act differs from the 2012 Act in that under s 35 of the 1989 Act, the Authority was not expressly required to consider the object of the Act. As a consequence, the Authority turned its mind to whether it was obliged to form a view on whether granting of the application would be contrary to s 4 of the Act. This question, of course, is no longer in doubt. Section 105 now expressly requires the decision maker to consider the object of the Act.

[32] In *Foodcorp*, this Authority said at [25]:

"From the foregoing, the Authority considers:

[a] That upon receiving an application the reporting agencies must make their inquiries quickly;

[b] They must report quickly;

[c] After learning if objections have been filed to the application, they must consider the objections and file a report to assist the District Licensing Agency and the Inspector in considering the objections – in particular in relation to s. 4 of the Act issue; …"

[33] The 'foregoing' to which the Authority referred were the decisions of the Court of Appeal in *My Noodle* [2009] NZCA 564, and of the High Court in *Otara-Papatoetoe Local Board* v *Joban Enterprises Limited* CIV-2011-404-007930 [2011] NZHC 1406.

[34] It is clear from *My Noodle* that an agency report was not limited to matters relating to the criteria set out in s 35 of the 1989 Act. The Court of Appeal said [at 55] that s 20 of the 1989 must be interpreted broadly to allow considerations of general policy to be addressed so that the requirements of s 4(2) of that Act could be met. In other words, *My Noodle* was authority for the position that where policy considerations were raised in a report, the decision maker was bound to consider those by virtue of s 22(d) of the 1989 Act. As already stated, this is now no longer open to question given the express nature of s 105 of the Act.

[35] By virtue of s 105(1)(a) and (k), in turn, a DLC is not constrained to consideration of the criteria in s 105. Given these provisions and applying the rationale from *My Noodle*, the position remains that s 105 is not an exhaustive list of matters on which an agency may report, or to which a DLC may have regard.

[36] In *Otara-Papatoetoe Local Board,* Heath J reiterated that a decision maker is required to undertake an evaluative exercise which brings to bear both the factors set out in what was then s 35 of the 1989 Act (now s 105), *as well as other relevant considerations relating to the a statutory object.* In setting out a framework for this evaluative analysis, Heath J said that the reports presented by the Police and the inspector should be directed to both the s 35(1) criteria and the extent to which the grant of the application might offend the object of the Act [at 31]. Once again, this is now express in s 105 of the Act.

[37] The short point is that in *Foodcorp*, the Authority confirmed that the DLC must undertake its evaluative exercise including considerations relevant to the object of the Act. In this regard reporting agencies had a broader remit under the 1989 than objectors who were limited to the matters set out in s 35 of that Act (by virtue of s 32(3)). Once again, this distinction no longer applies by virtue of s 105(1)(a).

[38] As Heath J put it in *Re Venus NZ Ltd* [2015] NZHC 1377 at [20]:

> *"Although the "object" of the 2012 Act is stated as one of 11 criteria to be considered on an application for an off-licence, it is difficult to see how the remaining factors can be weighed, other than against the "object" of the legislation. It seems to me that the test may be articulated as follows: is the Authority satisfied, having considered all relevant factors set out in s 105(1)(b)–(k) of the 2012 Act, that grant of an off-licence is consistent with the object of that Act?"*

[39] *Foodcorp* answered the question of whether a decision maker had to have regard to the object of the Act, when reported on by the Police in light of what appeared to be exhaustive s 35 criteria. *Foodcorp*, however, is not authority for the proposition that it is mandatory for the Police and Medical Officer of Health to report

under the Act. In fact, in that decision, this Authority said that the Police only have to file a report if they have matters in opposition to the application. This remains the position of the Authority. And, consistent with *Otara-Papatoetoe Local Board,* and now s 105, should a reporting agency decide to file a report, it can consider the object of the Act.

[40] At the hearing the appellant acknowledged that there is no requirement for the Police or Medical Officer of Health to file a report. In this case they chose not to do so. However, the appellant submits that as one of the purposes of obtaining a report from the Police or the Inspector is to provide some basis on which a decision maker could determine whether the grant of a licence would meet the statutory criteria, it would be useful to signal to the DLC the basis for not opposing an application, making explicit the scope of its inquiry. While the Authority agrees that this might in some cases be useful to a DLC, there is no requirement on them to do so. Nor is there a requirement on the Police or the Medical Officer of Health to provide a seriatim evaluation of each of the s 105 criteria. As stated by Heath J at [33] in *Otara-Papatoetoe Local Board:*

> *"I consider it is important for those responsible for reporting to the Authority to collect and collate information of that type and to have regard, in doing so, to any local authority guidelines which represent a community's stance, after a consultation process has been completed. That does not necessarily require a lengthy report of detailed research. For example, police officers will know, from daily and nightly observations, of concerns of the type raised by the Board."*

[41] And, at [35]:

> *"As indicated, it is self-evident that police officers at the nearest station to the proposed premises will have a good understanding of the extent of liquor abuse problems in the area and will be able to raise them with the Authority."*

[42] Given that it is expected that the Police, and for that matter the Medical Officer of Health, will know from their observations whether there are any concerns with an application, it is for the DLC to undertake this s 105 evaluation based on the evidence before them, including information provided to them by these agencies, if any. Similarly, there is no requirement for the Police and Medical Officer of Health to report on objections by other parties, those being matters for the DLC to consider as part of its evaluative exercise. In fact, the only party entitled to the objections under s 105(2) is the applicant. There is nothing in s 103 of the Act expressly requiring the reporting agencies to consider the objections.

[43] Applying the framework of Heath J, the DLC is to consider the reports it receives from the Police and the Medical Officer of Health (if any), the report from the Inspector, and any objections. The DLC is then required to undertake an evaluative exercise considering these reports, and any public objections, and "*having considered all that information, … to stand back and determine whether the application should be granted (whether on conditions or not) or refused.*" (per Heath J in *Otara-Papatoetoe Local Board* at [31]).

[44] The obligations of the inspector, of course, differ from those of the Police and Medical Officer of Health. The inspector is obliged to report on the application. Unlike the Police and Medical Officer of Health who only need report if they wish to put any matters in opposition to the application before the DLC, the role of the inspector's

report is wider and is not intended to be confined to matters in opposition to the application. Consistent with what Heath J said in *Otara-Papatoetoe Local Board,* one of the purposes of the inspector's report is to provide some basis on which the decision maker – here the DLC – can act in determining whether the grant of a licence will meet the statutory criteria. In this regard, it is expected that the inspector will comment on each of the criteria in s 105, to the extent it can. Where information is limited, their ability to do so may be correspondingly limited. Again, where such limitations exist it might in some cases be useful for a DLC to be advised of this, but there is no express requirement for the inspector to do so. That it would be useful is consistent with s 197(2) of the Act which sets out an inspector's ongoing obligation to monitor a licensee's compliance with the Act. It is in this context that an inspector may express opposition to, or support for, an application. In a new application, the Inspector can be expected to express a view on how the applicant meets the s 105 criteria at the time of the application and once a licence is granted.

[45] The Act also states that should a Police or Medical Officer of Health report not be filed within the statutory time period, the DLC is entitled to assume that there is no opposition. This reinforces the fact that the primary obligation is not on the Police or Medical Officer of Health to satisfy the DLC that the applicant meets the criteria in the Act. Again that is for the DLC regardless of whether it has a report of the Police or Medical Officer of Health, or such report is out of time.

[46] Having regard to this schema, the Authority considers that there is no requirement on an inspector to look behind any reports of the Police or Medical Officer of Health when those agencies report no objections to an application. Nor is a DLC required to look behind any reports of the Police, Medical Officer or an inspector when those agencies report no objections to an application. The DLC is entitled to make a decision on the information before it, including the views of reporting agencies that they do not object to the grant of the licence. The views of those agencies, both opposing an application, and not opposing an application, are entitled to be given weight.

[47] If objections are raised about some aspect of an application, the DLC in undertaking its evaluative function must weigh those against any reports it has received from reporting agencies. This evaluative exercise does not mean that the absence of a report from a reporting agency negates any objections the DLC has received. The DLC is still obliged to consider any objections in the absence of any contrary report. The issue then becomes one of weight to be given to each.

Weight to be given to the evidence of objectors

[48] Natural justice requires that a finding is based on evidence that has some probative value. In *Re Erebus Royal Commission*; *Air New Zealand Limited & Mahon* [1983] NZLR 662 at 671 the Privy Council articulated the rules of natural justice:

> *"The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests … may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.*

> *The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required … is that the decision to make the finding must be based upon some material that tends to logically show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory."*

[49] It is axiomatic that the purpose of these rules is to afford fairness to the party that may be adversely affected by a decision. That party is the applicant for the licence.

[50] A s 154 appeal is not a judicial review. An appeal brought pursuant to s 154 of the Act is by way of rehearing (s 157). The applicable principles are set out in *Mangere-Otahuhu Local Board* v *Level Eighteen Limited* [2014] NZARLA PH 627-228. As noted in that decision [at 15], the onus on the appellant is to satisfy the Authority that the decision in the original hearing was wrong. And, the Authority will be slow to draw different factual conclusions from a DLC as the DLC will have had the advantage of hearing the evidence at first instance [at 17].

[51] That is not to say that a DLC can ignore objections. The decision of the DLC must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning is supportive of the finding. The reasoning of the DLC and the inferences drawn from the facts, need to be logically available to the DLC.

[52] Where there are no objections from reporting agencies the DLC is entitled to use that in its evaluative function, to draw support for any inferences it makes from the facts. In *British Isles Inn Limited* NZLLA PH 406/2006, this Authority stated [at 39]:

> *"Although the onus is on the company to establish its suitability, there is a reasonably high threshold to be met by the objectors in order to displace the absence of concerns by the reporting agencies. We are on record as stating that in the absence of unfavourable comments from the reporting agencies, we are unlikely to be persuaded that an applicant is unsuitable."*

[53] More recently, in *Ponda Holdings Limited* [2014] NZARLA PH 558 we said [at 12-13]:

> *"The same principle applies to the new criteria contained in ss 131 and 105 of the Act. Thus, when considering s 131(1)(b) of the Sale and Supply of Alcohol Act 2012, where there are no adverse comments by the reporting agencies it is unlikely that an objector will satisfy the Authority that "the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence".*
>
> *Decisions such as The Narrows Landing Limited NZLLA PH 479/2003 recognise that it can be hard for objectors to mount a sustainable objection in respect of matters such as noise and nuisance. However, it is equally difficult for an applicant to respond effectively if the criticisms are too generalised. The Authority stated:*
>
> > 'Nevertheless, unless neighbours are prepared to provide details of when the breaches of the Act or the Resource Management Act occur and what action was taken, it would be difficult for them to overcome the threshold of factual information required to put the applicants to proof.'"

[54] The Authority will not interfere where there is an evidential basis for the DLC's finding. Provided that there is no factual error, issue of weight to be given to the evidence is for the DLC.

[55] This appeal is expressed in terms of the DLC giving insufficient weight to the unchallenged evidence of objectors. The appellant's essential complaint is that in the absence of evidence to the contrary from reporting agencies, the DLC failed to give sufficient weight to the evidence of objectors that Shannon is a socially deprived area where alcohol harm prevails and that the amenity and good order of Shannon would likely be reduced, to more than a minor extent, by the issue of the licence.

[56] Of specific concern to the appellant was the issue of proliferation of premises in the area. As the appellant put it:

> *"The ratio for Shannon is currently 1 off-licence for every 619 people. That means Shannon already has nearly twice the number of off-licences than the national average. The third off-licence proposed by the applicant would bring the ration down to 1 off-licence for every 413 people."*

[57] In coming to its decision, the DLC had regard to the previous decision of this Authority in *Masterton Liquor* v *Jaquiery* [2014] NZARLA PH 881 which stated at [10]:

> *"… the DLC accepted Dr Palmer's conclusion to the effect that Masterton is saturated with off-licences. The very significant difference between the number of off-licences in the district (presently one for every 806 persons) compared with the national average (one for every 1,000 persons) is telling. An additional off-licence (resulting in one for every 780 persons) would accentuate the difference. It is not a quantum leap to conclude that with so many off-licences in the district and with another proposed to be located in a socially deprived area where alcohol-related harm exists, that increased alcohol-related harm might occur. This is the antithesis of what the object of the Act is intended to achieve."*

[58] Having regard to this decision (as well as a Kapiti Coast DLC decision), the DLC said [at 6.3]:

> *"Although there was some evidence before the committee, in particular that of Ms Corrine Smith and Ms Sharon Williams, that Shannon was such a socially deprived area, and that there was no cause to doubt the sincerity of their evidence, all though (sic) some of the evidence was conflicting, the view was formed that in the absence of objections by the Police …, Public Health (who did not appear) and the Licensing Inspector…, the evidence did not satisfy the Committee that the position in Shannon was directly comparable to that of Masterton, or that Shannon was saturated with off-licences."*

[59] It is clear from this that the DLC, having had the question of proliferation put squarely before it by objectors, gave consideration to this issue.

[60] The DLC, faced with the issue of proliferation raised by objectors, went on to say:

> *"Although there was some statistical material put forward in the submission on behalf of Mr Bishop suggesting that there was some sort of test as to the*

> *number of licences appropriate to the population of an area, the Committee had considerable reservations about the methodology of such a submission. It does not appear to take into account the population of surrounding areas and how closely settled they are. While such statistics may be useful, they cannot, in the Committee's view, be determinative. To do so would be too simplistic a view. These matters cannot be determined on basis (sic) of a formula."*

[61] The DLC concluded, in respect of amenity and good order, that:

> *"The Act is concerned with effects of alcohol but also extends to people's enjoyment of their environment. The question the Committee must answer is whether the amenity and good order of the area would be likely to be reduced to more than a minor extent by the effects of the issue of the licence. The Committee does not believe there will be any effect. The location is within the business area; it is a small operation; there is no evidence of any effect on the amenity and good order."*

[62] Where Masterton differs is that Masterton, at the time of that decision, had 29 off-licences in the district with 12 of those being within 1.2 kilometres of the proposed bottle store. There was also evidence from the Police that the proposed store was in an area referred to as a 'second-level hotspot' which indicated that alcohol-related violent offending occurs at times in the area. There the DLC found that the evidence of alcohol related harm, was '*just enough'* to conclude '*the Masterton East community is an area where alcohol related harm prevails'*, in part because of the support by the Medical Officer of Health, the Inspector and the Police to that proposition. There it was '*not a quantum leap'* to find that increased alcohol-related harm might occur from an additional premises given '*so many off-licences in the district'*.

[63] That, of course, is not the factual matrix that was before the DLC in this application. Notwithstanding the evidence before the DLC from objectors (and, in particular, that of Ms Corrine Smith and Ms Sharon Williams), the Authority does not agree that the decision of the DLC that it did not consider Shannon to be directly comparable to Masterton, or that Shannon was not saturated with off-licences, was unreasonable.

[64] At the hearing of the DLC, the appellant spoke to *"the results of alcohol in our community, picking up cans, bottles behind the library, family deprivation, graffiti, littering and unengaged youth."* The appellant also spoke to what she saw as the current levels of alcohol misuse in the community and how another licence would aggravate this misuse. The appellant further advised the Authority that:

> *"…when I later read the Decision, it seemed to me that my evidence as well as that of all of the other objectors was given very little weight and instead the Committee relied on the 'non-opposition' of the Police, Inspector and Medical Officer of Health, even when that officer did not attend the hearing.*
>
> *I don't think that was the correct decision to make.*
>
> *… I think the Committee made a mistake by giving a lot of weight to the non-opposition of the three officers about the possible effects of the new licence on amenity and good order of Shannon when clearly those officers had no information to base their non-opposition on."*

[65] It is clear that the DLC considered the evidence of the objectors. In its decision the DLC said [at 3.4]:

> *"The next objector to give evidence was Ms Corrine Smith who had been a Shannon resident since 1990. Ms Smith's evidence covered issues with the sale of alcohol in Shannon which is a low social demographic area and impact on the already high family violence within the Horowhenua District. Ms Smith spoke about her observations of issues with alcohol in Shannon and reducing harm to the community".*

[66] And then [at 3.5]:

> *"Ms Sharon Williams spoke about the 2013 census information quoting the population of Shannon being 1,239; to her this was not a developing community. Ms Williams talked about her involvement in the Shannon community as a social worker who worked predominately with children and youth. She informed that she had not noted much litter in the CBD over the last five to seven years and she was concerned that this would increase if there was another Off-licence granted. Ms Williams also had concerns that people would start consuming alcohol in the local Skate Park. In conclusion, Ms Williams talked about the Off-licence premises ratio per person in Shannon and the National average and what it would be if there was to be an additional Off-licence granted."*

[67] In making its decision the DLC said [at 7.1-7.2]:

> *"The Committee is satisfied as to the matters to which it must have regard in section 105 of the Act and the Committee is satisfied that this new Off-licence application meets the purpose and object of the Act.*
>
> *Accordingly, despite the objections that were received, the Committee considers that the licence be granted."*

[68] The Authority considers that the DLC heard and considered the objections raised. The DLC also considered the lack of objections from reporting agencies. The DLC was entitled to do so, factoring into its evaluation, the absence of any adverse reports from the reporting agencies.

[69] Specifically, it is clear that the DLC considered the issue of proliferation. They also considered the fact that the proposed off-licence location is within the business area and is a small operation. There were no concerns raised by reporting agencies about any adverse effect on the amenity and good order of the locality. The DLC considered the issue of the ratio of off-licences per head of population. Those considerations, along with the fact that there are only two off-licensed premises in Shannon, one of which is not allowed to sell RTD's and spirits, leads the Authority to consider that the decision of the DLC was not an unreasonable conclusion to reach based on the evidence before it.

[70] Again, the Authority will not interfere where there is an available evidential basis for the DLC's finding. Nor does the Authority consider that any error of fact has been established by the appellant. While the appellant may consider that her objections, and those of others, were not given enough weight, the Authority will not interfere where it has not been established that the conclusion the DLC reached was not one which could have been drawn from the evidence before the DLC.

Obligations of the DLC to direct that reporting agencies respond to the evidence of objectors

[71] The final issue for consideration in this appeal is what obligation does a DLC have, in fulfilling its inquisitorial function, to question and seek an explanation from a reporting agency when they indicate that they have no-opposition to the issue of a licence, particularly in light of other objections made on s 105 matters? Related to this, do objectors have the right to question reporting agencies as to the reasons for not opposing an application? And, do DLCs have an obligation to require reporting agencies to respond to the evidence of objectors?

[72] The inquisitorial function of the DLC derives from s 201 of the Act which treats the DLC, within the scope of its jurisdiction, as a Commission of Inquiry under the Commissions of Inquiry Act 1908. Pursuant to the Commissions of Inquiry Act 1908, the DLC can inspect any papers, require the production of any documents and require persons to provide information (s 4C) and can summons witnesses (s 4D). In addition to those 'inquisitorial' powers, and subject to any material exceptions, it can regulate its procedure in such manner as it thinks fit (s 203(9) of the Sale and Supply of Alcohol Act 2013).

[73] There is nothing in this inquisitorial function that requires the DLC to seek an explanation from a reporting agency as to their non-opposition.

[74] As regards the question of whether objectors have the right to question reporting agencies as to the reasons for not opposing an application, the short answer is 'no'.

[75] An objector's right to cross-examine a witness derives from s 204(3) of the Act. The same applies to a reporting agency's right to cross examine witnesses. Unless summonsed by the DLC, a reporting agency providing a report under s 103, is not a witness.

[76] In the same vein, DLCs do not have an obligation to require reporting agencies to respond to the evidence of objectors. Similarly, unless summonsed, objectors are not witnesses (although they may call witnesses). If an objector chooses to call a witness, or directly give evidence, a reporting agency may choose to cross examine that witness. But the reporting agency cannot be compelled to do so.

[77] Rather, the function of the DLC is to undertake an evaluative exercise considering the reports (if any), public objections (if any), after making whatever queries it may wish (recognising it is not obliged or constrained in this regard), and having considered any information from those reports, objections and queries, to stand back and determine whether the application should be granted (whether on conditions or not) or refused. It has not been established to the Authority that the DLC has not done so.

Conclusion

[78] In light of the above, in response to each ground of appeal, the Authority concludes the DLC:

(i) did not err in relying on the 'non-opposition' by the Police as a consequence of the limited inquiry made by the Police; and

(ii) did not err in relying on the 'non-opposition' by the Inspector as a consequence of the Inspector's reliance on the Police's 'non-opposition'; and

(iii) did not err in not questioning the Inspector as to the basis and reason for her 'non-opposition'; and

(iv) did not err in putting 'significant weight' on the lack of opposition from the Medical Officer of Health and in not calling the Medical Officer of Health to attend the DLC hearing to be questioned on his 'non-opposition'; and

(v) did not err in not asking the Police or Inspector to respond to the evidence of objectors; and

(vi) did not err by failing to acknowledge that the applicant gave no evidence and did not challenge the evidence of objectors as to whether the amenity and good order of Shannon would likely be reduced, to more than a minor extent, by the issue of the licence; and

(vii) did not err by failing to provide objectors an opportunity to ask questions of the Police and the Inspector as to the reasons for their 'non- opposition'; and

(viii) did not err by giving insufficient weight to evidence of objectors; and

(ix) did not err by failing to specifically consider the criteria in s 106(1) of the Act (the appellant conceding before the Authority that the DLC did consider s 106 but that it would have been helpful for the DLC to state that that fact, and its reasoning); and

(x) the DLC did not err by misapplying the reasoning of the Authority in *Masterton Liquor Limited v Jacquiery*.

[79] Accordingly, the appeal is dismissed. Pursuant to s 158 of the Act, the decision of the DLC is confirmed.

DATED at WELLINGTON this 5th day of December 2016

J S Mitchell
Secretary