

WHANGAREI DISTRICT LICENSING COMMITTEE

Applicant

HELENA BAY CAFÉ LIMITED

Decision Number: NZDLCWD/02/092 [2017]

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

AND

IN THE MATTER of an application by Helena Bay Café Limited pursuant to Section 100 of the Sale and Supply of Alcohol Act 2012 for an On-Licence in respect of premises situated at 1392 Old Russell Road, Helena Bay, Whangarei District known as Helena Bay Cafe

BEFORE:

Chairperson: A Court

Members: P Dimery and L Andrewes

HEARING:

At Whangarei Chambers 10:00am 4 December 2017

APPEARANCES

Janet Pope - Helena Bay Café Limited (Applicant)

Mike Henehan – Licensing Inspector

Tamsin Sutherland – Licensing Inspector

Sergeant Howard Clement – Alcohol harm Prevention Officer Whangarei/Kaipara



Introduction

- (1) We have before us an application by Helena Bay Café Limited for an On-Licence in respect of premises situated at 1392 Old Russell Road, Helena Bay, Whangarei District known as Helena Bay Cafe.
- (2) Concurrently the applicant has filed application for the issue of a Managers Certificate pursuant to Section 222 of the Act. This matter is the subject of a separate decision (NZDLCWD/093/MC 2017) refers.
- (3) The application was filed with the Whangarei District Licensing Agency on the 9th day of August 2017. Accordingly the Sale and Supply of Alcohol Act 2012 (the Act) applies.
- (4) The inspector has filed a report in support of the application.
- (5) The application has been opposed by the New Zealand Police on the grounds that the applicant cannot satisfy Sections 105(j) and 222(c) of the Act in regard to the applicant's experience. The premise of Police opposition is that the test of whether the applicant has the appropriate experience to comply with the law cannot be satisfied.
- (6) The Medical Officer of Health did not oppose the application noting: *'There are concerns regarding the applicant's lack of industry experience and no certificated manager(s) on staff to assist in the safe and responsible management of the sale and supply of alcohol. While the risk profile of the premises is deemed to be low risk, the appropriate levels of management for the premises will need to be considered by the District Licensing Committee prior to granting the licence'*.

Applicant

- (7) The applicant Helena Bay Café Limited was incorporated under the Companies Act 1993 on the 12th day of April 2017. The Companies Office records Janet Dawn Pope and Gregory Brian Pope as the directors of the company.

- Entity Type: NZ Limited Company.
- NZBN: 9429046075871
- Company Number: 6267428
- Business Classification: H451110 – Cafe Operation

Accordingly Section 28(1)(c) of the Act applies.

- (8) Neither director has held a licence issued pursuant to the Sale and Supply of Alcohol Act 2012.



Premises

- (9) The premises were previously owned and operated by the partnership of Julia Nuechter and Uwe Manfred Krohmann and known as 'Café Helena Bay Hill'. The premises operated as a class 3 café/restaurant under authority (02/ON/039/2016) which expired on the sale of the business in June 2017.
- (10) The café is part of a large building that includes an art gallery and the residential property of the gallery owner.

Location

- (11) The premises are located in the Countryside environment of the Whangarei District Plan some 36.5km north east of Whangarei CBD. The environment is a remote scenic location which is only accessible by vehicle

Evidence and Submissions

Licensing Inspector

- (12) Licensing Inspector Mike Henehan presented a verbal submission in support of his written report. Mr Henehan referred to Clause 20 of the Whangarei District Licensing Policy, acknowledging that whilst the policy could no longer be legally relied upon as a statutory document, it nevertheless had wide public support and provided a good policy on which historically applications of this nature had been assessed. In the seven years this policy had been in force no incidents had occurred in any of the small businesses granted licenses under Clause 20.
- (13) In summary of Clause 20: This section provides discretion where applicants on taking over or opening new licensed premises can be granted licences in certain circumstances. Specifically where:
- The applicant has made application for an On-Licence in relation to a café/restaurant operation which is low risk
 - The businesses are a small family operation (sole operator or 2 partners)
 - The applicant has experience in managing successful businesses or other ventures either in New Zealand or overseas
 - The applicant is in all other aspects suitable to hold a licence having gained the LCQ etc.
- (14) Mr Henehan stated that the premises were low risk servicing predominantly tourists and locals. The applicant had excellent business skills which were easily transferrable to the suitability test of the Act and in his view having interviewed Mrs Pope and



assessing many applicants over the years Mrs Pope was 'at the top of the list' in his opinion in regard to ability and skill.

- (15) Under examination it established that the Whangarei Liquor Licensing Policy had been substantially informed by submissions from the Police and Clause 20 was well known and understood. It had been used on many occasions and had to the best of the inspector's knowledge never been an issue on any application. He could not explain why this particular application had drawn an adverse report from the Police. He reiterated that he considered Mrs Pope to be of the highest integrity and he held no concerns regarding the administration of the licence if issued.
- (16) Under questioning from the Police the inspector was challenged on whether the application qualified as a 'small family operation' given that there were four staff on the team including (Mrs Pope and her son) and at what point does it stop being a 'small family operation'. The Inspector was of the view that the applicant was a small family operation regardless of the two extra staff and reiterated that in his view the applicant qualified under Clause 20.
- (17) The Police questioned the Inspector as to where in the Policy the matters regarding business success and promotion of economic growth were mentioned? The Inspector concurred that the Act did not specifically mention the matters raised in the Policy but affirmed that the Policy had been in operation for 7 years, it had not previously been challenged by the Police, it was working well and it gave effect to the Object of the Act.
- (18) The Police raised the point that the applicant should have been aware or been advised that she was required to have a minimum of three months experience and that this should have been conveyed to her by the inspector. The Inspector's response was that he had covered this with the applicant during the application process, however there are multiple ways to achieve compliance and this is only one of them. Clause 20 also applied to this scenario and this was the avenue chosen by the applicant and this was a perfectly acceptable solution.
- (19) The Police also raised the matter of the hours as applied for (93) questioning how the applicant if granted a licence could provide adequate cover and still achieve the Object of the Act. The Inspector responded that the applicant is only planning to work up to 60 hours until she had sufficient staff that were qualified to act as Duty Managers. In his view the extended hours gave her flexibility to operate the licence for special events and that it was unrealistic to expect the applicant to apply for the current hours of operation in anticipation of expecting the applicant to apply for a variation to the licence in three months' time.
- (20) Under examination by the committee it was established that:



- The Act does not specify how many Duty Managers are required. There was an industry expected standard of up to 60 hours (1 manager) and between 60-90 hours (2 managers) however the Act also requires at S.214 that a manager must be on duty at all times and responsible for compliance. Some flexibility is required to enable licensees to give effect to this concurrently the licensed hours as applied for are often not the actual licensed hours of operation.
- The Act does not specify three or six months experience is required. This has been reflected in various decisions of the Authority and best practice but Section 222 specifically gives the Licensing Committee or the Authority leave to consider experience as one of many determinant factors and that it should not be considered in isolation to the other assessment criteria.
- The first standard for consideration of a Managers Certificate is prescribed by the Sale and Supply of Alcohol Regulations 2013: A licensing committee must not issue a Managers Certificate on or after the commencement of this section unless the Manager holds the prescribed qualification being a qualification prescribed by regulation under this Act or the successful completion of a course of training.
- The prescribed qualification pursuant to Part 4 is Unit Standards 4646 and 16705 issued by an industry training organisation recognized under the Industry Training and Apprenticeships Act 1992

Police

- (21) Sergeant Clement spoke in support of his submission stating Mrs Pope would have or should have known when purchasing the business with due diligence that she would require a certified manager to operate the business she was taking over to continue selling alcohol.
- (22) The view of the Police is that she should hire a certified manager for at least three months and get the required experience in her own right.
- (23) Whether the Whangarei Liquor Policy complies with the Act is moot, the criteria for a managers certificate is prescribed by Section 222. Mrs Pope does not have any experience therefore she does not comply with the criteria.
- (24) Under cross examination Sergeant Clement was asked by the Licensing Inspector why he never opposed the application for the Burger Bank or other applications of a similar nature. Sergeant Clement could not recall the applications.
- (25) Under examination by the committee Sergeant Clement was asked about any matters arising in the Helena Bay area from alcohol related harm. He responded that he never went there so he didn't know.



Mrs Pope

- (26) Mrs Pope explained how she intended to operate the business this is captured in the following bullet points:
- The business is new and not making any money yet. I considered hiring a qualified manager but it would a short term contract for three months only and as I have 4 staff already there would be nothing for the manager to do and I would have to fund this out of my own pocket.
 - Sarah King who works in the gallery used to work in the café and has an expired certificate. If required she would be happy to reapply and act in a supervisory capacity if that was what was required.
 - My interest is not in running a pub or tavern. My interest is solely in the sale of food with a wine or beer as a complement to that.
 - I will only sell alcohol with food.
 - All sales to be by the glass only.
 - I am only working 9-5 but wish to apply for the extended hours so I can offer the premises for hire for special events such as weddings or birthdays.
 - There are a total of 40 seats in the café with 5 full time staff so we can actively manage and provide a quality service.
- (27) Under examination Mrs Pope discussed her previous job which was for an actuary in Auckland. It was a high stress environment with a significant staff and employment related matters. She has had vast experience in managing staff and people and could easily answer the test scenario put to her by the committee.
- (28) Mrs Pope said she did not intend to open after 5pm at this time. This may be revisited after Easter but it was too soon to tell.

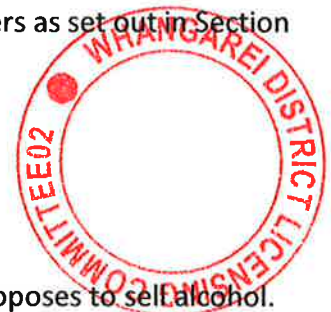
Concluding Statements

In concluding statements both the Licensing Inspector and the Police were asked if their views had changed during the course of the hearing. Both confirmed that they had not.

Deliberation

The committee in deliberation of the application considered the matters as set out in Section 105 of the Act

- a) The Object of the Act.
- b) The suitability of the applicant.
- c) Any relevant Local Alcohol Policy.
- d) The days on which and the hours during which the applicant proposes to sell alcohol.



- e) The design and layout of any proposed premises.
- f) Whether the applicant is engaged in or proposes on the premises to engage in the sale of goods other than alcohol, low alcohol refreshments, non-alcoholic refreshments and food and if so which goods
- g) Whether the applicant is engaged in or proposes on the premises to engage in the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments and food and if so which services.
- h) Whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent by the effects of the issue of the licence
- i) Whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that –
 - (i) They would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but
 - (ii) It is nevertheless desirable not to issue any further licences
- j) Whether the applicant has the 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.

Section 4: Object

Object

(1) The Object of the 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 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)

Section 105: Deliberation

- (a) The applicant has demonstrated that she has the appropriate systems in place to address the Object of the Act. Whilst we acknowledge that the applicant has no industry experience we are satisfied as to the applicants understanding of the Object of the Act and are satisfied that if the licence is granted the applicant will be able to give effect to the Object statements.



- (b) The licensing Inspector had provided a report confirming that he has investigated the application and that there are no matters which call into question the suitability of the applicant to hold an on-licence. Whilst it is acknowledged that the applicant lacks industry experience she more than makes up for this with business experience that is easily transferrable. Given this is a low risk premise the suitability of the applicant is not in question.
- (c) The Whangarei District has adopted a Provisional Local Alcohol Policy (LAP). In accordance with Section 87(6) a Local Alcohol Policy has no effect until it is brought into force. The committee is therefore unable to rely on the provisions of the Local Alcohol Policy until such time as the statutory process has completed.
- (d) The days and hours fall within those defined by the default legislation. The applicant will only operate between 9am and 5pm with the ability to cater for special events such as weddings and birthdays. The hours as applied for are appropriate for a class 3 licence operating as a café during the probationary 12 month period of the grant of the licence.
- (e) The Licensing Inspector has provided a comprehensive description of the premises. He is satisfied that based on the National Guidelines for Crime Prevention through Environmental Design (CPTED) developed by the Alcohol Advisory Council of New Zealand (ALAC) the premises meet the design criteria. We are therefore satisfied that the design and layout of the premises is satisfactory in accordance with the provisions of the Act.
- (f) The applicant does not propose to engage in the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments and food.
- (g) The applicant does not propose to provide services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments and food.
- (h) No adverse impacts on amenity and good order are apparent should the licence issue on the application as applied for.
- (i) No matters have been raised to suggest the amenity and good order of the locality will be reduced further (or would likely to be reduced further to only a minor extent) by the effects of the issue of this licence. (Refer: Assessment of Section 106 matters noted below)
- l) Whilst the applicant has openly acknowledged that she has no previous experience the committee had regard to the following:
- The applicant has previously worked in a high stress job that was highly accountable and involved tense employment related mediation. She has an excellent employment record which demonstrates her ability to easily transition her skills to the Sale and Supply of Alcohol Act 2012.
 - The only alcohol to be sold will be wine or beer. This will be as an accompaniment to food and will be not be sold as individual items.



- The premises are low risk.
- The licence will issue for a probationary period of one year which will give the applicant the opportunity to establish industry experience in a controlled and low risk environment.
- The licensing Inspector will undertake a site visit(s) during this time to ensure ongoing compliance with the conditions of the licence.
- The pricing of alcohol is at the high end, this helps to act as a deterrent to high volume consumption. Coupled with the requirement to purchase food the risk of alcohol related harm is low.
- The applicant has presented as an exemplary citizen and there are no issues with regard to her proposed management of the licence

m) The report from the Medical Officer raise no further matters required to be considered. The report from the Police was a puzzle to the committee. It is clear that historically applications of this nature have not triggered an opposed report requiring a hearing and that this applicant is an otherwise exemplary citizen.

The Object of the Act is to address the responsible sale, supply and consumption of alcohol and that the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.

The Act prescribes the measures to be taken to give effect to the Object.

Section 205(j) and Section 222(c) cannot be taken in isolation to the overall assessment criteria and the requirement to address the Acts Object.

To do so would be to in effect minimize the Purpose of the Act as defined at [3] therefore the committee considered the opposition by the Police to this application to be at odds with their previously stated position.

Purpose

(1) the purpose of Parts 1 to 3 and the schedules of this Act is, for the benefit of the community as a whole-

- (a) To put in place a new system of control over the sale and supply of alcohol with the characteristics stated in subsection (2) and
- (b) To reform more generally the law relating to the sale, supply and consumption of alcohol so that its effect and administration help to achieve the object of this Act.

(2) The characteristics of the new system are that-

- (a) it is reasonable and
- (b) its administration helps to achieve the object of this Act

The Committee does not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence.



Section 106:

Considering effects of issue or renewal of licence on amenity and good order of locality

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

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

- i. current and possible future noise levels;
 - ii. current and possible future levels of nuisance and vandalism;
 - iii. the number of premises for which licences of the kind concerned are already held;
- and

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

- i. the purposes for which land near the premises concerned is used;
- ii. the purposes for which those premises will be used if the licence is issued.

(2) In forming for the purposes of section 131(1)(b) an opinion on whether the amenity and good order of a locality would be likely to be increased by more than a minor extent by the effects of a refusal to renew a licence the licensing authority or a licensing committee must have regard to the following matters (as they relate to the locality)

- a) Current and possible future noise levels
- b) Current and possible future levels of nuisance and vandalism.

No matters have been raised which would raise any matter of concern that the amenity and good order of the locality will be reduced by more than a minor extent by the effects of the issue of this licence.

Reasons for the decision

We are satisfied as to all of the matters to which I must have regard as set out in Section 105 and 106 of the Act.

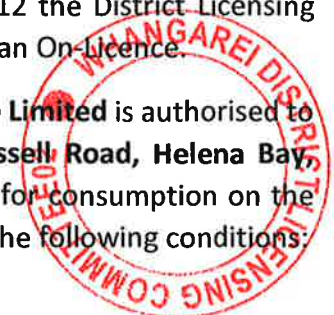
We are satisfied as to the applicant's ability to implement the licence, she is an exemplary citizen who will not put at risk her investment in her café.

We are further satisfied that the business will operate within its principal purpose and that the licence will be respected.

Decision:

Pursuant to Section 104 of the Sale and Supply of Alcohol Act 2012 the District Licensing Committee approves an application by **Helena Bay Cafe Limited** for an On-Licence.

Pursuant to the Sale and Supply of Alcohol Act 2012 **Helena Bay Cafe Limited** is authorised to sell and supply alcohol on the premises situated at **1392 Old Russell Road, Helena Bay, Whangarei District** and known as **Helena Bay Cafe**, to any person for consumption on the premises and to allow people to consume alcohol there. Subject to the following conditions:



Conditions:

- a) No alcohol is to be sold on the premises on Good Friday, Easter Sunday, Christmas Day or before 1:00pm on Anzac Day to any person who is not present on the premises to dine.
- b) Alcohol may be sold only on the following days and during the following hours:
On such days and during such hours as the premises are being operated as a Class 3 Restaurant but not other than on the following days and during the following hours:
 - **Sunday to Thursday 10:00am to 11:00pm**
 - **Friday and Saturday 10:00am to 12:00pm midnight**
- c) The licensee must have available for consumption on the premise at all times when the premises are open for the sale of alcohol a reasonable range of non-alcoholic refreshments and low-alcohol beverages. Drinking water must be available to customers free of charge upon request.
- d) Food must be available for consumption on the premises at all times when the premises are open for the sale of alcohol in accordance with the menu submitted with the application for the licence or variations of that menu of a similar range and standard.
- e) The licensee must ensure that signs are prominently displayed within the licensed premises detailing information regarding alternative forms of transport from the premises.
- f) The licensee must implement and maintain the steps proposed in the application for the licence aimed at promoting the responsible consumption of alcohol. Including implementation of the noise management plan.
- g) The licensee must ensure that the provisions of the Act relating to the sale and supply of alcohol to prohibited persons are observed and must display appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition on sales to intoxicated persons.

Advisory Notice

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

The licence may issue immediately and remain in force until its expiry 12 months after the date of issue

DATED at **KERIKERI** this 6th day of December 2017



Ann Court

Chairperson

Whangarei District Licensing Committee

