

IN THE MATTER

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

AND**IN THE MATTER**

of an application by **A & A
PHIMESTER LIMITED** for the
grant of an off-licence pursuant to
s.100 of the Act in respect of
premises situated at 33-37 Main
Road, Katikati trading as "**Four
Square Katikati.**"

BEFORE THE WESTERN BAY OF PLENTY DISTRICT LICENSING COMMITTEE

Chairman: Murray Clearwater
Member: Arthur Wilkinson
Member: Bev Edlin

HEARING at Tauranga on 22 March 2024

APPEARANCES

Mr. Adam Phimester for the applicant –A & A Phimester Limited ("the applicant")

Ms. Micaela Turner – Western Bay of Plenty Alcohol Licensing Inspector ("the
Inspector") – to assist.

Ms. Dawn Meertens- delegated officer for the Medical Officer of Health ("MOoH") –
in opposition. (Did not appear due to confusion over whether her attendance had
been confirmed or not)

RESERVED DECISION OF THE COMMITTEE**Introduction**

1. By an application dated the 4th of October 2023, **A & A Phimester Limited** has applied for the grant of a grocery style OFF licence for **Four Square Katikati**. They have been operating the store without incident for several months under Temporary Authorities.
2. It was duly advertised and reported on by the agencies. No public objections were received but an adverse report was lodged by the delegated officer for the Medical Officer of Health.
3. The store has been in existence for many years and has held an off licence for about 10 years. The applicant seek the same days and hours as the previous



operator, of **Monday to Sunday 7.00am to 9.00pm.**

4. The MOoH, first opposed the application believing the Single Alcohol Area (SAA) did not minimise the exposure of alcohol as far as reasonably practicable and that the sale of single serve products did not contribute to the Object of the Act i.e. to minimise alcohol related harm.
5. The MOoH subsequently withdrew their opposition to the SAA but maintained their opposition to single sales.
6. Effectively the hearing was to determine whether it was necessary, or not, to impose a condition around single sales of alcohol.
7. Due to the non-appearance of the MOoH at the hearing it was agreed that the analyst's data would be received and the MOoH would be permitted to provide written closing submissions as soon as practicably possible.
8. The applicant would be given a right of reply.

Applicant's Evidence

9. We heard from Adam Phimester who told us about his work history and experience in grocery stores in Te Aroha and here in Katikati.
10. He said the Katikati clientele were generally older and friendly, and that there was a lot of growth in the area. They operate the "If you look under 30 we will insist on ID" policy. That results in 20-30 'young persons' a week being denied service because they were underage or did not have ID. He estimated that they turn away 2-3 persons a week who they believe are intoxicated and cannot be served.
11. He said there are a few vulnerable people in the Katikati township, but they do not have any major problems or conflicts with them.
12. In regard to single sales, they have the 650-750ml bottles that are designed by the manufacturers to be sold as singles and a number of the 500ml cans of Tui, Hagen and the like. He said the main clientele for these products are tradies and people driving by who just want one or two drinks.
13. He submitted a three page document that he had prepared in consultation with Foodstuffs. In it, he argued that single sales are not a focus for the store, they do not have a vulnerable or street dwelling clientele who seek out cheap high strength products.
14. He pointed to their excellent compliance record and that if there was to be minimum pricing on alcoholic products that is a matter for central government not DLCs. We will discuss this point later in the decision.



15. During the questioning he said they had sufficient certificated managers to ensure the grocery shop was properly managed at all times. Regarding 'broken boxes' it was his policy to repair the box as best he could and sell the box at a slightly discounted price. **They do not sell mainstream beers or ciders as singles or even clipped up into 4's or 6's.**
16. He had approached people drinking in the car park, but they were drinking spirits that had been purchased from the nearby bottle store and not products obtained from the Four Square store.

Alcohol Inspector Evidence

17. The Inspector's Report was presented by Micaela Turner.
18. She stood by the contents and findings in her report, and she confirmed that there was no evidence to support a discretionary condition around single sales from this store.

Medical Officer of Health Evidence

19. The delegated Officer for the Medical Officer of Health, in this area is Dawn Meertens. Due to the non-confirmation that she was attending the hearing she did not appear in person.
20. In order to expedite the determination of this application we agreed to receive the analyst's data by way of hand up and the MOoH would provide written closing submissions.
21. In closing she referred us to helpful case law around the Purpose and the Object of the Act. She encouraged us to adopt the precautionary approach and impose a condition restricting high strength single sales from this store.
22. In support of that stance the MOoH pointed us to the higher rates of hazardous drinking in the BOP area, though not specifically in Katikati and its surrounds.
23. Ms. Meertens said there are pockets of vulnerable people in the community and two emergency housing establishments nearby.

Relevant legislation

24. Section 3 of the Sale and Supply of Alcohol Act 2012 ("the Act") states the purpose of the Act as follows:

(1) *The purpose of Parts 1 and 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.**

25. Section 4 states the object of the Act as follows:

(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 and indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).**

Other criteria to be considered.

26. The Act provides that in deciding whether to grant a licence, the licensing committee must have regard to the matters contained in section 105 to 106 of the Act. In light of the recent Supreme Court ruling, we are also required to read the Purpose of Act together with the Object of the Act.

27. The Purpose of the Act tells us that the characteristics of the new system are that it is to be reasonable, and its administration helps to achieve the object of the Act and benefits the community as a whole.

Section 105(1)(a) The Object of the Act

28. Section 105(1)(a) of the Act requires the licensing committee to have regard to the Object of the Act. The licensing committee is satisfied that a grant of the licence would not offend against the Object of the Act. The Act prescribes that genuine grocery stores can be granted a licence to sell beer, wine and mead for consumption off the premises.



Section 105(1)(b) Suitability of the Applicant

29. Section 105(1)(b) provides that the applicant must be a suitable entity to hold an off-licence. In this regard, the suitability of the applicant is not challenged by any party. We are satisfied that **A & A Phimester Limited**, and its officers, are suitable entities to hold an OFF Licence.
30. Indeed, the applicants are experienced operators of licensed premises and they have not come to notice for selling alcohol to minors or intoxicated persons.

Section 105(1)(c) Relevant Local Alcohol Policy

31. The application fits within the parameters of the Western Bay of Plenty Local Alcohol Policy.

Section 105(1)(d) The days and hours of operation of the licence

32. The days and hours sought are **Monday to Sunday 7.00am to 9.00pm**. They are unremarkable and within the default national maximum trading hours for off licences.

Section 105(1)(e) The design and layout of any proposed premises

33. The design and layout of the premises is not contested, and the SAA is appropriately established at the back of the store.

Section 105(1)(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.

34. The applicant also sells a large range of other products including magazines, fishing gear & bait, phone cards, cleaning products and hardware.

Section 105(1)(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 and non-alcoholic refreshments, and food, and if so, which services.

35. The store holds a Lotto franchise and also provides an LPG bottle swap service and flowers.

Section 105(1)(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.



36. We are directed to the parameters of s.106(1) and to have regard to a series of matters (as they relate to the locality). Firstly, we consider current and possible future noise levels. The issue of noise was not raised by any of the parties, and we do not see this as a determining factor.
37. We are further obliged to consider the number of premises for which licences of the kind concerned are already held. We have no concerns relating to the proliferation of off licences in this area. This is the new owner of existing premises, not new premises.
38. We are required to consider "the purposes for which land near the premises concerned is used." The store has been there for many years and its location is not a determinative factor.

Section 105(1)(i) whether (in its (the Committee's) 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 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.

39. This criterion has not been raised for our consideration and we are satisfied the area currently has high levels of amenity and good order that are not adversely affected by the operation of this store.
40. However, the data produced by the MOoH indicates that the Katikati area has a high level of presentations at hospital for conditions wholly related to alcohol.

Section 105(1)(j) Whether the applicant has appropriate systems, staff, and training to comply with the law.

41. We are satisfied that this franchised store has appropriate systems, staff and training to comply with the law. We add weight to their decision to query all persons appearing to be under the age of 30 for age verification. This shows an additional commitment to not sell to under-agers.
42. Equally they must ensure that adequate numbers of well-trained certificated managers are employed at the store to ensure compliance. We were presented with no evidence to the contrary.



Section 105(1)(k) Any matters dealt with in any report of the Police, an Inspector and the Medical Officer of Health under Section 129

43. There are matters raised in opposition by the MOoH in which they believe the higher levels of alcohol related harm experienced in the district requires that single sales be controlled so as to not add to these problems.
44. In our view they have not adduced any evidence to show that there is currently a risk to be abated, or a future benefit to be secured.
45. The Police and the Inspector have not opposed this application.

Reasons for the Decision

46. Section 3 of the Act requires us to act reasonably with the aim of contributing to the Object of the Act in the exercise of our duties. We are also bound to comply within the procedures and provisions of this Act. We also incorporate the purpose of the Act into our thinking.
47. Overall, we are satisfied that the premises has the characteristics normally associated with a grocery store.
48. The issue of single sales has been well debated at DLC level and higher authorities. It is our view that discretionary conditions around single sales are necessary and valuable in appropriate cases.
49. As the High Court clearly spelt out in *J & G Vaudrey Limited CIV-2015-409-000098 [2015] NZHC 2749 at [14](g)*¹

The relevant body has a discretion to impose any further conditions which are reasonable and that are "not inconsistent" with the Act. In deciding whether to impose such conditions, the relevant considerations are these:

- (i) *the relevant body **must have identified a risk which it seeks to abate, or a benefit which it seeks to secure;***
- (ii) *that **risk or benefit must be consistent with the purpose and object of the Act, and not inconsistent with the Act in its entirety;***
- (iii) *the relevant body **must direct itself as to all relevant circumstances;***
- (iv) *it must then **weigh the risk to be abated, or benefit to be secured, against the relevant circumstances as identified;***
- (v) *the **condition must be a proportionate response;***
- (vi) *an absolute prohibition would not ordinarily be reasonable, nor a condition which secured a benefit or abated a disbenefit only*

¹ J & G Vaudrey Limited CIV-2015-409-000098 [2015] NZHC 2749 at [14](g)



- marginally; equally, a condition may not be absurd, ridiculous, patently unjustifiable, extreme or excessive; and*
- (vii) ***ultimately whether a condition is reasonable will depend on an objective assessment of whether there is a rational and proportionate connection, between the identified risk or benefit, when weighed against all relevant considerations. (our emphasis)***

50. We are not satisfied that there has been a 'risk to be abated' elevated to the point that we should act considering the lack of evidence of current sales of single serves to customers that then go on to cause alcohol related harm.
51. After standing back and measuring the application against the Purpose and the Object of the Act we intend to grant the licence on standard conditions.

The Decision

The **Western Bay of Plenty District Licensing Committee**, acting pursuant to the Sale and Supply of Alcohol Act 2012 grant **A & A Phimester LIMITED** an off-licence pursuant to s.100 of the Act in respect of premises situated at 33-37 Main Road, Katikati trading as "**Four Square Katikati**."

The following conditions apply to the licence.

1. Alcohol may be sold on, or delivered from, the premises for consumption off the premises, and supplied free as a sample for consumption on the premises, only on the following days and hours: **Monday to Sunday 7.00am to 9.00pm;**
2. No alcohol is to be sold on, or delivered from, the premises on Good Friday, Easter Sunday, Christmas Day or before 1.00 pm on Anzac Day;
3. No alcohol may be sold other than –
 - a. beer that complies with the appropriate New Zealand food standard for beer; or
 - b. mead that complies with the appropriate New Zealand food standard for mead; or
 - c. fruit or vegetable wine that complies with the appropriate New Zealand food standard for fruit or vegetable wine; or
 - d. grape wine that complies with the appropriate New Zealand food standard for grape wine; or
 - e. a food flavouring, prepared for culinary purposes, that is unsuitable for drinking undiluted.



4. While alcohol is being supplied free as a sample, water is to be provided to patrons at no cost from a water supply prominently situated on the premises.
5. A properly appointed Certificated, or Acting or Temporary, Manager must be on duty, within the licensed area, at all times when the premises are open for the sale and supply of alcohol.
6. The Licensee must display signage as follows:
 - a. At every point-of-sale signage detailing the restrictions on the sale and supply of alcohol to minors and intoxicated persons;
 - b. A copy of the licence attached to the inside of the premises so as to be easily read by people entering each principal entrance to the premises; and
 - c. A sign prominently displayed at the premises, which identifies by name the manager for the time being on duty.
7. The "single alcohol area" for the premises is as described on the plan date stamped **15 October 2023**. The licensee must ensure that:
 - a. No alcohol is displayed, promoted or advertised outside the single alcohol area; and
 - b. No products other than alcohol, low-alcohol and non-alcoholic beer, wine or mead are displayed, promoted or advertised inside the single alcohol area.

NOTE

The new Single Alcohol Area as depicted on the plan dated 15 October 2023 is to be implemented by the 15th of June 2024

The licence is granted for 12 months from the date of issue.

DATED at Tauranga this 25th day of April 2024



Murray Clearwater
Commissioner
For the Western Bay of Plenty District Licensing Committee

NOTE

Sections 152, 154 and 155 relating to the right to appeal this decision are in effect. This decision has no effect during the period allowed for the filing of an appeal.

Any appellant has 10 working days after the date, on which notice of this decision is given to the parties, to lodge an appeal with the Alcohol Regulatory Licensing Authority.