



OTOROHANGA DISTRICT LICENSING COMMITTEE

<b>Application</b>	018-0013
<b><u>IN THE MATTER</u></b>	of the Sale and Supply of Alcohol Act 2012
<b><u>AND</u></b>	
<b><u>IN THE MATTER</u></b>	of an application by J & J Clark Limited trading as Kawhia General Store for the renewal of an off-licence pursuant to section 127 of the Act

OTOROHANGA DISTRICT LICENSING COMMITTEE

Chairperson: Mrs S Grayson  
Members: Cr R Johnson, Mr R Murphy

HEARING at the Te Awamutu Fire Station Hall on 7 July 2017

APPEARANCES

Mrs J Clark, director of J & J Clark Limited - Applicant  
Mr R Davies, counsel for J & J Clark Limited  
Miss N Petersen, Medical Officer of Health  
Mr K Tutty, Licensing Inspector  
Sergeant J Kernohan, Police

HEARING at the Waipa District Council Chambers on 6 April 2018

APPEARANCES

Mrs J Clark, director of J & J Clark Limited – Applicant  
Mr J Clark, director of J & J Clark Limited - Applicant  
Mr R Davies, counsel for J & J Clark Limited  
Mrs N Zeier, Medical Officer of Health  
Mrs M Fernandez, Licensing Inspector

**DECISION OF THE OTOROHANGA DISTRICT LICENSING COMMITTEE**

1. The off-licence 018/OFF/006/15 in respect of the premises situated at 29 Jervis Street, Kawhia and known as Kawhia General Store is renewed for a further period of 3 years. The licence may issue upon payment of the annual fee.

2. The present conditions of the licence are replaced as follows
  - (a) Alcohol may be sold or delivered on Monday to Sunday, from 8.00am to 8.00pm.
  - (b) No alcohol may be sold on the premises on Good Friday, Easter Sunday, Christmas Day, or before 1.00pm on Anzac Day.
  - (c) The area where alcohol is to be sold is described in the plan date stamped as received by the Otorohanga District Licensing Committee on 6 April 2018. The only area permitted within that plan, as an area for the display and promotion of alcohol is the area delineated with a green line.
  - (d) The entire premises is undesignated.
  - (e) A holder of a manager's certificate must be on duty and on the premises at all times alcohol are sold.
  - (f) A manager's register (as required by s.232 of the Act) is to be maintained and available on site.
  - (g) A Host Responsibility Policy must be maintained and displayed at all points of sale and the licensee must ensure all staff receive training in their responsibilities and obligations under the Sale and Supply of Alcohol Act 2012.
  - (h) There must be no sale or supply of alcohol to minors or intoxicated persons and there must be displayed at every point of sale appropriate signs detailing these restrictions.
  - (i) Drinking water must be freely available and displayed whenever alcohol is being supplied by way of complimentary tastings.
  - (j) The Licensee must ensure the following are displayed;
    - i) A sign to be seen from outside the principal entrance stating the ordinary hours of business during which the premises will be open for the sale of alcohol.
    - ii) A copy of the original licence with all the conditions, just inside the principal entrance so persons entering can read it.
    - iii) A sign in a prominent place identifying the duty manager.

## **Reasons**

### **Introduction**

1. This is an application by J & J Clark Limited for the renewal of an off-licence in respect of the premises situated at 29 Jervois Street, Kawhia, known as Kawhia General Store. J & J Clark Limited purchased the store from Judith Geraldine Collins and William John Collins in partnership in 2015. This is the first renewal of the off-licence. The 2015 off-licence application stated that the type of premises was a grocery store, however the principal

business was described as a general store. The decision of the licensing committee dated 8 January 2016 does not state what kind of premises the licence is issued for however reference is made to the fact that the shop is a “typical open plan grocery store”. However, the current licence is not an off-licence for a grocery store because it does not restrict the alcohol that can be sold and does not identify an alcohol area. The licence issued is effectively a full off-licence. This has created some confusion and the licensing committee acknowledges that it is important to clarify these matters.

## **Background**

2. At the first hearing, counsel for the applicant Mr Davies, explained that the premises has sold a full range of alcohol under three consecutive section 34-style (or section 36-style under the Sale of Liquor Act 1989) licences since July 1997. In 1995 the licensing authority, in the decision *Re Wilkins* LLA 2824/95, determined that the Kawhia General Store was situated in an area where the sale of liquor in a premises of a kind described in section 36(1)(c) [alcohol manufacturers] or (d) [supermarkets and grocery stores] *would not be economic and is not a shop of a kind commonly known as a dairy*”. Mr Davies submits that the Kawhia General Store qualifies for a full off-licence under the section 34 exception on the basis that Kawhia is a small, geographically discrete community where the sale of alcohol in a premises of a kind described in section 32(1)(b), (d), (e) or (f) would not be economic.
3. In the report dated 31 March 2017, the Licensing Inspector Mary Fernandez refers to the statement of annual sales as showing that the principal business carried on in the premises is the sale of food and concluded that the premises had the characteristics of a grocery store.
4. It is also the view of the Medical Officer of Health, Miss Petersen, that the premises possesses many of the characteristics normally associated with a grocery store. This is because “*the general range of goods stocked includes fresh fruit and vegetables, baking ingredients, toilet paper, household cleaning products, meat, milk, cheese, cream, butter, margarine, eggs, bread, frozen foods, canned foods, sauces, and beverages of more than 1 litre grocery*”. Miss Petersen also refers to the statement of Annual Sales Revenue submitted with the application, which shows that the sale of food products is the largest category (41% of sales) and is therefore the principal business.
5. However, it became evident at the first hearing that the statement of annual sales revenues for the period from 1 December 2015 to 1 December 2016 was false and no weight could be given to this evidence. This is because the information supplied to the accountant was based on product purchases made, not sales figures. Therefore, the licensing committee decided to adjourn the hearing to give J & J Clark Limited an opportunity to provide a statement of annual sales revenue prepared in accordance with regulation 12 of the Sale and Supply of Alcohol Regulations 2013 for the six-month period from 1 September 2017 to 1 March 2018.
6. The licensing committee conducted a site visit prior to the second hearing on Friday 6 April 2018 for the purpose of viewing the size, layout, and appearance of the premises, and the range and kinds of items on sale. At the site visit the licensing committee observed that the Kawhia General Store has a large area at the rear of the store that was not represented on the plan filed with the application. This items for sale in this area include; building materials, hire fishing rods, tools, bicycles and more frozen bait.

## **Public Objections**

7. The application was advertised, and one public objection was received from Sonja Barlow. The letter from Sonja Barlow did not contain an address. The Licensing Inspector made some investigations and identified a possible address for Sonja Barlow. Two letters were sent to Sonja Barlow, the first on 8 February 2017 and the second on 10 March 2017, asking if she wanted the opportunity to appear at a hearing. There was been no response to these letters. In the absence of any correspondence from Sonja Barlow providing an address, it is not possible to serve a notice of hearing. Therefore, in Direction (3) dated 7 April 2017, the licensing committee determined that the objection from Sonja Barlow would not be considered at the hearing.

## **Reports**

8. The Licensing Inspector and Police do not oppose the application. The Medical Officer of Health opposes the application on the grounds that a general store is not a premises that may have an off-licence. If the premises is deemed to be a grocery store then it cannot sell spirits and the single alcohol area has not been adequately configured on the floor plan.

## **The Act**

9. The purpose of the Act is to put in place a new system of control over the sale and supply of alcohol (s 3). The object of the Act is to ensure that the sale and supply of alcohol is undertaken safely and responsibly, and the harm caused by excessive or inappropriate consumption of alcohol is minimised (s 4).
10. In deciding whether to renew an off-licence the licensing committee must be satisfied that the premises is a kind of premises for which an off-licence may be issued and must have regard to sections 131 and 105 of the Act. Therefore this committee must consider the following questions within the framework of the purpose and object of the Act:
  - a) Is the applicant suitable?
  - b) Are the days and hours during which the applicant proposes to sell alcohol reasonable?
  - c) Is the design and layout of the premises suitable?
  - d) Does the applicant propose to engage in the sale of goods or provision of services other than those directly relating to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments and food?
  - e) Does the applicant have appropriate systems, staff and training to comply with the law?
  - f) Have the police, inspector and medical officer of health raised any relevant considerations?
  - g) Will the amenity and good order of the locality be increased by more than a minor extent by the effects of a refusal to renew the licence?
  - h) Has the applicant sold, displayed, advertised or promoted alcohol in a responsible manner?
11. There are no concerns about any of the criteria in section 105. The suitability of J & J Clark Limited to hold an off-licence is not in question. There are no changes proposed to the current hours of 8.00am to 8.00pm Monday to Sunday. There is no evidence to suggest that the company has breached the conditions of the licence in any way. At the first hearing Mr Davies explained that J & J Clark Limited employs five staff members, three of which are certificated duty managers. At the second hearing, Mr Davies advised that one duty

manager had left and that Mr and Mrs Clark had given an undertaking that they would employ a third duty manager within four weeks of the date of the hearing. Given this undertaking, the licensing committee accepts that s J & J Clark Limited has sufficient staff, systems and training to ensure compliance with the Act.

12. In broad terms, the most important issue to be decided is whether the Kawhia General Store is a kind of premises for which an off-licence may be issued. The Sale and Supply of Alcohol Act 2012, contains a very prescriptive definition of a grocery store, and as a result the process of determining whether a full off-licence can be granted under the section 34 exception, has changed.

#### **Issues to be decided**

13. The issues to be decided are:

- a) Is the Kawhia General Store a kind of premises for which an off-licence may be issued? Is the Kawhia General Store a grocery store (section 33 of the Act & Regulation 6 of the Sale and Supply of Alcohol Regulations 2013)?
- b) If the Kawhia General Store is a grocery store, does the single alcohol area comply with sections 112 and 113?
- c) If the Kawhia General Store is not a grocery store, does the premises qualify under the section 34 exception of the Act because it is in an area where some licensed premises may not be economic?
- d) If the Kawhia General Store is not a grocery store, is it a kind of premises that is prohibited from holding an off-licence by section 36 (convenience store, dairy, garage, service station etc)?

#### **Is the Kawhia General Store a kind of premises for which an off-licence may be issued? Is the Kawhia General Store a grocery store (section 33 of the Act & Regulation 6 of the Sale and Supply of Alcohol Regulations 2013)?**

14. In deciding whether to renew an off-licence the licensing committee must be satisfied that the shop is one of the categories that an off-licence can be granted for. An off-licence cannot be granted for a petrol station, garage, dairy, convenience store or a shop within a shop (section 36). However, an off-licence can be granted for a grocery store.
15. In deciding whether a shop is a grocery store, the licensing committee must decide whether the shop (section 33(1)):
- a) has the characteristics normally associated with shops commonly thought of as grocery stores?
  - b) sells a range of food products and other household items?
  - c) sells food products as its principal business?
16. In making this decision the licensing committee must have regard to (section 33(2)):
- a) the size and layout of the store.
  - b) a statement of annual sales revenues of the premises.
  - c) the number, range and kinds of items on sale.
  - d) any relevant matters.
17. A food product does not include alcohol, confectionary, ready-to-eat prepared food or snack food or a drink in a container of 1 litre or less (section 33). Regulation 6 of the Sale and

Supply of Alcohol Regulations 2013, provides that the principal business of a store can be calculated by deducting from the gross sales revenue of the business carried on the premises (for a period of 12 months ended no more than 90 days before the time at which the application is made);

- a) GST
- b) all revenue of lotto, keno, instant kiwi etc

and determining which group below has the largest proportion of the remainder of the revenue:

- a) the sale of foods products
- b) the sale of alcohol
- c) the sale of tobacco
- d) the sale of convenience foods
- e) other sources of revenue.

18. In other words, to be a grocery store, the sale of foods products must be the biggest category of revenue after GST and NZ lotteries revenue is deducted. If food products are not the biggest category, then the store is likely to be a dairy or convenience store that is not able to hold an off-licence.
19. Miss Petersen helpfully directs the licensing committee to the licensing authority decision of *The Medical Officer of Health v Uday Investments Limited* [2016] NZARLA PH 486. In this decision, the licensing authority considered an appeal by the Medical Officer of Health, of the Whangarei District Licencing Committee decision, to grant the renewal of an off-licence to a store with the largest category of sales being sales of tobacco and not food products. The licensing authority granted the appeal and reversed the decision of the DLC on the grounds that the 'principal business', as determined by the statement of annual sales revenue was not the sale of 'food products'.
20. The licensing authority found that:

*[23] The requirement "to have regard to" the matters in s 33(2) requires the DLC to undertake an evaluative assessment of the characteristics of the size, layout and appearance of the premises, annual sales revenue and the number, range and kinds of items being sold. And, s 33(2)(b) makes it explicit that the DLC is not precluded from having regard to other matters.*

*[24] Nevertheless, by circumscribing what constitutes the principal business of the premises by reference to the Regulations, along with the word "but" in s 33(1), the sales revenue of the premises becomes of critical importance.*

*[25] Notwithstanding that the premises may have the visual appearance or characteristics of a grocery store, if the 'main' product sold during the requisite period is not 'food products', then the premises are not a grocery store regardless of how much they may resemble one. This is not to say the characteristics of the premises, or the range of food products on offer, are not relevant to the determination of whether premises are a grocery store. In order for premises to be granted an off- licence as a grocery store, it is not sufficient for the main products being sold to be food products. The premises must also share the characteristics normally associated with shops commonly thought of a grocery shops. Conversely, it is not*

*sufficient that the premises only have the appearance of a grocery store or sell a range of products. If the main product being sold is not food products, then the premises cannot be a grocery store.*

21. In undertaking the evaluative exercise recommended by the licensing authority, we turn first to the statement of annual sales revenues for the period from 1 September 2017 to 1 March 2018. The statement has been signed by a chartered accountant Paula Woods as having been prepared in accordance with the requirements of regulation 12 of the Sale and Supply of Alcohol Regulations 2013. Mrs Clark has confirmed that the data supplied to the accountant for this six-month period was based on an accurate point of sale system established by Activata.
22. Given that at the time of the first hearing, J & J Clark Limited did not have point of sale information available, regulation 12 could not be strictly complied with because it was not possible to provide a statement of gross sales revenue *for the 12 months ending no more than 90 days before the time at which the application for the ... renewal of an off-licence for the premises is made.*
23. Therefore, the licensing committee granted a waiver from this requirement and agreed that the statement of annual sales revenue could cover the six-month period from 1 September 2017 to 1 March 2018, instead of a twelve-month period. This decision was made bearing in mind the need to conclude this matter promptly. The licensing committee is satisfied that this period covers both holiday and non-holiday periods and will therefore give reasonable information about the average sales at the store.
24. The licensing committee and the reporting agencies accept that the verified sales revenue for the period 1 September 2017 to 1 March 2018, shows that the sale of food products accounted for only 16% of the total revenue. The biggest category of revenue after GST is deducted is the sale of convenience products.
25. Given the key findings of the *Uday Investments* decision outlined above, this means that the premises is disqualified from being a grocery store, and it is not necessary to consider the size and layout of the store, the number, range and kinds of items on sale and any other any relevant matters. It is also not necessary to consider whether the store has an appropriate single alcohol area.

**If the Kawhia General Store is not a grocery store, does the premises qualify under the section 34 exception of the Act because it is in an area where some licensed premises may not be economic?**

26. Section 34 provides an exception for certain areas where some licensed premises are not economic stating that:
  - (1) The licensing authority or licensing committee concerned may direct that an off-licence should be issued for premises not of a kind described in section 32(1) if satisfied—
    - (a) that, in the area where they are situated, the sale of alcohol in premises of a kind described in section 32(1)(b), (d), (e), or (f) would not be economic; and
    - (b) that the granting of the licence would not cause any significant increase in alcohol-related harm.
  - (2) Subsection (1) overrides section 32(1) but is overridden by section 36.

27. It has already been established that the Kawhia General Store is not of a kind described in section 32(1) because it is not a grocery store. None of the other categories are relevant to this premises.
28. Mr Davies has drawn the licensing committee's attention to a recent licensing authority decision *Pauatahanui G S Limited v Sutton* [2017] NZARLA 256, involving an appeal from a decision of the Porirua District Licensing Authority refusing to renew an off-licence because a premises did not qualify as a grocery store and did not qualify for the section 34 exception that a grocery store would be uneconomic in the area.
29. In the *Pauatahanui* decision the licensing authority explained that by virtue of section 34, a DLC has discretion to grant a licence for a premises that would otherwise be ineligible, if the premises are in an area where it would not be economically feasible to operate a permitted type of premises (ie. a shop of a kind described in se 34(1) of the Act), and the grant of the licence would not cause any significant increase in alcohol-related harm. At paragraph [47] the licensing authority observed:
- [47] Where a community in an area does not have access to a dedicated bottle store, manufacturer, supermarket or grocery store, because such a shop would not be economically viable in the area, the Act allows an exception to section 32 so the community can have reasonable access to an off-licence retailer. As Ministry of Justice Officials put it in their Departmental Report to the Justice and Electoral Committee on the Alcohol Reform Bill, dated May 2011:*
- "A typical example would be a general store in a remote rural or coastal community, where the population could not sustain a dedicated bottle store or grocery store".*
30. The licensing authority went on to point out that a DLC must exercise an inquisitorial function in determining the appropriateness of the grant of a particular licence having regard to all of the relevant factor.
31. Mr Davies draws the licensing committee's attention to the fact that the nature of the Kawhia General Store was examined by the licensing authority in *Re Wilkins LLA 2824/95 (19 September 1995)*. In *Re Wilkins* the licensing authority held that the premises were "*situated in an area where the sale of liquor in a premises of a kind described in section 36(1)(c) (alcohol manufacturers) or (d) (supermarkets and grocery stores) would not be economic and is not a shop of a kind commonly known as a dairy*". At the time this application was heard in 1995, Kawhia was described in evidence as an "*isolated beach resort*", with a residential population "*of approximately 400*", that "*increases to between 2,500 and 3,000 people over the summer months between December and February*". The premises was described as selling "*a wide variety of goods and services including agricultural and gardening items and is also the District Postal Agency*".
32. Mr Davies submits that nothing material has changed in the Kawhia area since that decision was issued. Kawhia is still an isolated beach resort with a small population that swells in summer months. The 2013 census gave Kawhia a population of 339 and Mrs Clark estimates the population to be around this figure currently. Mrs Clark gave evidence that the nearest city is Hamilton which is around 80km away and the nearest town is Otorohanga, which is around 55km away. Mrs Clark says that the population of Kawhia still grows in the summer months when the town becomes popular with bach owners, day-trippers and tourists.

33. The evidence of Mrs Clark is that alcohol sales at the Kawhia General Store are in the order of 10% of the total sales revenue, after GST is deducted.
34. The licensing committee has formed the view that a stand-alone bottle store, alcohol manufacturer, supermarket or grocery store is not likely to be economic in Kawhia. This is because Kawhia has a small permanent population of less than 400 for the majority of the year and this population base would not support such a store. This conclusion is supported by the fact that alcohol only accounts for 10% of the sales at the Kawhia General Store and there are currently no dedicated bottle stores, alcohol manufacturers, or grocery stores in Kawhia.
35. The licensing committee notes that the nearby tavern holds an off-licence for across the bar sales, which occur in a part of its premises with a separate entrance. This is the type of off-licence identified in section 32(1) of the Act and is not one of the kinds of premises described in section 34(1)(a) of the Act. Therefore, its presence does not affect the ability of the Kawhia General Store to qualify under the reasonable access exemption.

**If the Kawhia General Store is not a grocery store, is it a kind of premises that is prohibited from holding an off-licence by section 36 (convenience store, dairy, garage, service station etc)?**

36. An off-licence cannot be granted for a petrol station, garage, dairy, convenience store or a shop within a shop (section 36). The exception in section 34 is overridden by this prohibition. This means that if the premises are a dairy or convenience store, no licence may be granted.
37. The evidence of Mrs Clark is that Kawhia General Store is the kind of one-stop shop you find in smaller communities. Locals depend on the store for many of their basic needs and therefore the store provides a wider range of goods than a grocery store might. In addition to food the store sells; hardware, giftware, fishing gear, general merchandise like toys and stationary, alcohol, tobacco, clothing range, soaps and moisturisers. The store sells takeaway food, is an agent for New Zealand Post and has an ATM machine.
38. The Act does not define a dairy or a convenience store. However, having regard to the wide range of products sold by the Kawhia General Store, the licensing committee accepts, on balance, that the store is more than a dairy and is more likely to be categorised as a typical general store in a remote rural community.
39. Similarly, the store sells a much wider range of products than would typically be found in a city-based convenience store. The Licensing Authority in the *Pauatahanui* decision (which involved a location similar to Kawhia) found that the concept of a 'convenience' store does not fit well with a premises in a remote location. We accept the submission of Mr Davies that the store cannot qualify as a convenience store because there are no other convenient alternatives for customers to use without travelling to Oparau (14km away) or Otorohanga (55km away).
40. Therefore, the Kawhia General Store is not a kind of premises that is prohibited from holding an off-licence by section 36.

## Conclusion

41. In conclusion, the premises qualifies for a full off-licence on the basis of the remote access exemption, and the renewal of the off-licence is granted. Therefore, the premises is not required by the Act to restrict the display and promotion of alcohol to a single alcohol area. However, as discussed at the hearing, the licensing committee considers that the current location of the alcohol is ideal because it is close to the counter where staff can see it at all times. In addition, it is a small discrete area, thereby reducing the exposure of shoppers to alcohol. This fits well with the object of the Act to ensure that the sale and supply of alcohol is undertaken safely and responsibly. Given that customers of this general store include children, the licensing committee has formed the view that it would be beneficial to include a condition on the licence that restricts the display of alcohol to the current location. Mrs Clarke has agreed to this condition and has highlighted the existing alcohol area on the site plan with a green pen. In addition, Mrs Clark has amended the plan to include the large area at the rear of the store that houses the building materials, hire fishing rods, tools, bicycles and extra frozen bait. The licensing committee accepts that the amended plan date stamped as received by the Otorohanga District Licensing Committee on 6 April 2018 is accurate.
42. The conditions for this licence have been replaced to ensure that they are consistent with licences issued in the Otorohanga District since the commencement of the Sale and Supply of Alcohol Act 2012. The new conditions include information about the statutory obligations to display signage and the maintenance of a manager's register.

Dated this 12th day of April 2018



Sara Grayson  
Commissioner  
Otorohanga District Licensing Committee