

**IN THE ALCOHOL REGULATORY AND LICENSING AUTHORITY
TE MANA WAETURE TAKE WAIPIRO**

[2023] NZARLA 145

UNDER	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 Waikato District Licensing Committee's refusal to grant renewal of an on-licence for premises situated at 9 Bow Street, Raglan known as 'The Yot Club'
BETWEEN	ROCKAWAY BEACH LIMITED Appellant
AND	WAIKATO DISTRICT LICENSING COMMITTEE Respondent

Hearing:	11 April 2023 at Hamilton
Authority:	Judge P R Connell Ms J D Moorhead Mr R S Miller
Appearances:	Mr S Middlemiss for Appellant Mr R Ashton for Respondent Mrs N Zeier for Medical Officer of Health – to assist Senior Sergeant D Hall – to assist
Judgment:	17 August 2023

DECISION OF THE AUTHORITY

Introduction

[1] The Appellant, Rockaway Beach Limited ('Rockaway Beach'), owns and operates an on-licence premises in Raglan, trading as 'The Yot Club'.

[2] Rockaway Beach sought to have its on-licence renewed. This was opposed by the New Zealand Police ('Police') and the delegated Medical Officer of Health and the Licensing Inspector ('Inspector'). There was no public objection to the renewal.

[3] Following a four-day hearing conducted virtually on 10-12 and 15 November 2021, the Waikato District Licensing Committee ('the DLC') in a reserved decision refused the application for the renewal of the on-licence. The licence expired three months from the date of the refusal.

[4] The current application is an appeal against the decision of the DLC brought by Rockaway Beach pursuant to s 154 of the Sale and Supply of Alcohol Act ('the Act').¹

[5] The following sets out information about the premises and its surroundings, the relevant law, the grounds for the opposition by the reporting agencies, the reasons for the DLC's decision, the grounds of appeal, the applicable legal principles to an appeal, assessment of the grounds of appeal, followed by a re-evaluation of the application under the relevant provisions of the Act and the conclusions reached by this Authority.

The premises

[6] The premises of The Yot Club is situated at 9 Bow Street, Raglan and is operated and managed by the sole Director of Rockaway Beach Limited, Andrew Meek ('Mr Meek') for eight years.

[7] There is an indoor and an outdoor space and the courtyard area boundary with its neighbour and competitor, The Yard, is delineated with a 2.1 metre steel mesh fence.

[8] Mr Meek has more than 20 years of experience in the hospitality industry, initially through premises in Auckland and more recently in Raglan.

[9] There have been no prosecutions or negative holdings against Rockaway Beach.

¹ Sale and Supply of Alcohol Act 2012.

The relevant law

[10] The overarching object of the Act is that the sale and supply of alcohol should be undertaken safely and responsibly, and any alcohol related harm should be minimised.²

[11] The criteria for the renewal of the licences is set out under s 131 of the Act which states that:

(1) In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:

- (a) the matters set out in paragraphs (a)-(g), (j) and (k) of section 105(a):
 - (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:
 - (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:
...
 - (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."
- (b) whether (in its opinion) 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:
- (c) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made by virtue of section 129:
- (d) the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.

[12] The Act further provides that:³

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):

² Sale and Supply of Alcohol Act 2012, s 4(1)(a) and (b), respectively.

³ Sale and Supply of Alcohol Act 2012, s 106(2).

- (a) current, and possible future, noise levels;
- (b) current, and possible future, levels of nuisance and vandalism.

Opposition by the Reporting Agencies

[13] The Police opposed the renewal of the On-licence on several grounds including:

- (a) failure to meet the object of the Act by allowing intoxicated persons to remain on the premises;
- (b) suitability;
- (c) insufficient systems, staff and training to comply with the law;
- (d) design and layout of the premises; and
- (e) lack of disclosure around what training has taken place in the past three years.

[14] The delegated Medical Officer of Health, Ashleigh Mail ('Ms Mail') had not submitted a brief of evidence but read her initial report at closing. Her opposition was largely in support of the evidence produced by the Police and on the grounds of:

- (a) lack of suitable staff, systems and training;
- (b) risk of alcohol related harm linked to the renewal of the licence;
- (c) noise issues; and
- (d) lack of capability of meeting the object of the Act.

[15] The Licencing Inspector, Bianca Staines ('Ms Staines') opposed the renewal of the On-licence on the grounds of:

- (a) noise;
- (b) concerns around object of the Act;

- (c) suitability;
- (d) Local Alcohol Policy ('LAP');
- (e) hours and days of operation;
- (f) design and layout of the premises;
- (g) insufficient systems, staff and training;
- (h) report from the other two agencies;
- (i) amenity and good order and the manner in which the applicant has sold alcohol.

[16] Ms Staines confirmed under cross-examination that she had been influenced by some aspects of the initial police report in opposition and agreed that she had repeated some of what the police mentioned in their report. Most of her evidence was centred around the issue of noise.

[17] Ms Staines gave evidence that there were 35 noise complaints between 18 December 2015 and 25 June 2021, which was consistent with the three year period before that. She had created a map and logged where each of the 35 complainants resided but was reluctant to share the map. Of the 35 complainants, Ms Staines did not call any of the complainants to give evidence and none of those complainants opposed the application.

[18] Ms Staines gave evidence regarding the 'Letter of Direction' that had been issued by the previous Licensing Inspector, Mr Kumar, on 9 May 2019. This was issued when Mr Kumar had taken noise readings outside the premises and found that the noise emitted from the premises was above the permitted district plan limits. The noise was 20 db above permitted levels and even with the bass lowered, the noise dropped to about 8 db. The letter directed Mr Meek to reduce and/or mitigate the noise to permitted limits.

[19] Ms Staines also gave evidence that there was only one other venue which presented noise issues, but it was nowhere near to the number of complaints received against the Applicant.

DLC's Decision on Renewal of the On-Licence

[20] The DLC based its decision on the assessment of:

- (a) suitability;
- (b) design and layout;
- (c) systems, staff and training;
- (d) amenity and good order;
- (e) reports of the reporting agencies; and
- (f) the object of the Act.

Suitability

[21] The DLC noted opposition by the Police and the MOH on the basis of suitability.

[22] The Police report outlined a number of incidents over the previous two years either occurring at The Yot Club or where it was implicated. In particular there were two incidents where large crowds had gathered outside The Yot Club on 15 January and 20 March 2021 and an incident where a young woman was found unresponsive on the premises on 20/21 February 2021.

[23] During the first incident on 15 January, Mr Meek assisted in dispersing the crowd and Senior Constable Stevenson acknowledged that she thanked Mr Meek for his assistance.

[24] As for the incident of 20/21 February 2021 there is no evidence to suggest that the applicant or Mr Meek contributed to the woman's unresponsive state. To the contrary, the response of Mr Meek in summoning Mr Thomas may have prevented an already life threatening situation from escalating. As Mr Thomas noted in his evidence, if Mr Meek had only called an ambulance, he did not believe the young woman 'would have made it'.

[25] Then the DLC noted that the applicant's compliance with the law was a significant cause for concern in the renewal hearing in 2017 in which the DLC refused the licence application, having considered that the applicant had failed to demonstrate that he had the ability to operate the premises at an appropriate level and in accordance with legislation. To the contrary, the DLC noted that consistent failure to adhere to administrative requirements such as maintaining a current Building Warrant of Fitness, maintaining a current food hygiene certificate, and complying with the conditions of the licence in respect of submitting a professionally produced Noise Management Plan, all during a period of time where the applicant could reasonably expect to be under scrutiny.

[26] The DLC then considered the reasons why the Authority had overturned the DLC's finding. The Authority, in light of the object of the Act, took into account the criteria in ss 131 and 105, the concerns with regards to the Applicant's lapses relating to the Food Act 2014, Building Act 2004, Fire Services Act 1975, and a noise management plan being implemented, against the experience of the licensee's sole director, and the fact that he had not breached the Act over the course of his career. The Authority did not consider that the evidence showed these lapses to have been deliberate or wilful. On balance, based on the evidence, the Authority was satisfied that the ground of the renewal was consistent with the Act's objects, noting that its decision was finely balanced.

[27] The DLC then expressed its disappointment that the Applicant continued not to comply with the law. It failed to notify Fire and Emergency New Zealand of trial evacuations though this was addressed by Mr Meek when it was brought to his attention. While the DLC accepted that this lapse was not deliberate or wilful, it stated that it expected experienced licensees to be more proactive in ensuring that they comply with relevant legislation at all times rather than waiting for prompts.

[28] The DLC considered Mr Meek's significant experience in the industry and was not aware of any negative holdings against the Applicant or Mr Meek. Despite the concerns of the Police about the operation of the premises, no enforcement actions had been taken against the Applicant.

[29] The DLC disregarded unsubstantiated allegations provided in the Police evidence, such as the incident of 'drink spiking'.

[30] Having regard to case law principles around suitability,⁴ and the relevant test which is "whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of the licence",⁵ the DLC concluded that Mr Meek strikes it as someone who has a general disregard for authority, which is "reflected in his continual failure to strictly adhere to all aspects of the law at all times".⁶

[31] The DLC commented that Mr Meek focused on noise but less on ensuring that administrative tasks are completed and recorded. It expressed concern about the low level failures that have been consistently raised since the initial application for this licence. It refused to turn a blind eye and questioned Mr Meek's commitment to carrying out his responsibilities as a licensee stating that someone of his experience would face the issues that confront him at each renewal.

[32] Having regard to the checklist for suitability provided for in *New Zealand Police v Casino Bar No 3 Ltd*,⁷ the DLC took into account that Mr Meek had no previous holdings or convictions, there was no evidence of previous unlawful operation of the premises, Mr Meek's character is also evidenced by his response to the incidents as outlined in the Police report and evidence. However, the DLC weighed in the significance of Mr Meek's considerable experience and the Applicant's, against their continuing failure to comply with the law at all times. Further, that a suitable licensee should not consistently have to be called on to explain oversights in their management and systems at each renewal.

[33] On the DLC's evaluation of the evidence as a whole, it held that the question of suitability is finely balanced. However, due to the ongoing non-compliance with the law, it found that the Applicant is unlikely to carry out its responsibilities under the law and is thus not suitable to continue to hold the licence for the premises.

Design and Layout

[34] With regards to the design and layout of the premises, the Police expressed concern at the use of the wire mesh fencing delineating the licensed area in Volcom Lane. However, the DLC

⁴ Citing *Nishchay Enterprises Ltd* [2013] NZARLA PH 837 at [53] and [54]; *New Zealand Police v Casino Bar No 3 Ltd* [2013] NZHC 44 at [34] and [35]; and *Two Brothers Wholesale Limited v Medical Officer of Health Waikato District Health Board* [2021] NZARLA 32 at [103].

⁵ *Re Sheard* [1996] BCL 86.

⁶ At [197].

⁷ *New Zealand Police v Casino Bar No 3 Ltd* [2013] NZAR 267.

accepted Mr Meek's evidence that it provides an appropriate barrier to prevent patrons from entering the premises without being checked by door staff. Of greater concern to the DLC was the issue of tenure over the licensed area. However, having regard to the plan submitted by the landlord, Mr Bruce on 28 January 2015 (which was considered by the DLC during the 2015 licence application) it clearly shows the full extent of the current licensed area, the DLC was satisfied that the design and layout of the premises was appropriate.

Systems, Staff and Training

[35] The police and the Inspector both raised concerns in relation to systems, staff and training.

[36] In relation to systems, this related to how the licensee deals with patrons at risk, noise management, systems for training, and in general record keeping, to ensure compliance with the law were all raised.

[37] Mr Meek and Mr Thomas both gave evidence about the incident of the unresponsive young woman on 20/21 February 2021. The DLC noted that the system in place for dealing with this incident was somewhat ad hoc and that the Alcohol Management Plan for the premises had since been updated during the hearing process. Similarly, the Noise Management Plan, the Fire Evacuation Plan and staff training manual had all been updated during the hearing process. The DLC was satisfied that the licensee has appropriate systems in place to comply with the Act.

[38] On record keeping, the DLC noted that the Inspector faced some difficulties during her inquiries into the applications. Mr Meek did not appear to keep all the relevant business records in a systematic manner. The DLC referred to *Young v Lyger Investments Ltd*,⁸ where the Authority expressed that an experienced operator would be expected to have all relevant business records in place on renewal and their absence and the need to impose those through undertakings or conditions only reinforces the lack of systems, staff and training to comply with the law.

[39] During the hearing Mr Meek committed to maintaining a folder for all documents and records relevant to the operation of the premises and keeping that folder on the premises at all

⁸ *Young v Lyger Investments Ltd* [2018] NZARLA 299 at [112].

times. Noting the Authority's comment in *Young v Lyger Investments Ltd*, the DLC stated that this is the minimum they would expect of an experienced licensee.

[40] As to training records, these were provided at the hearing and the DLC was satisfied on balance that the licensee had been undertaking staff training as is required under the Act.

[41] Overall, taking into account the changes that had been implemented during the hearing, the DLC was satisfied that the Applicant had appropriate systems, staff and training in place.

Amenity and Good Order

[42] Section 106(2) of the Act outlines the matters that must be taken into account in relation to amenity and good order. This includes consideration of noise, nuisance and vandalism.

[43] With regard to the issue of noise, the DLC considered evidence of noise by the Inspector, including 35 noise complaints received between 18 December 2018 and 25 June 2021. The noise complaints resulted in a number of verbal warnings to the Applicant as well as two Excessive Noise Direction Notices and a Letter of Direction.

[44] In evidence, Mr Meek contended that many of the incidents of noise did not originate from Thee Yot Club. The DLC accepted that not all of the noise complaints were correctly attributed to The Yot Club. However, excluding those clearly not attributable, there was still a large number of noise complaints, but the DLC also noted that there had been no public objections to the licence renewal. Moreover, none of the noise complainants were called as witnesses which made the DLC's assessment difficult.

[45] The DLC referred to *Paihia Saltwater (2001) Limited*,⁹ and concluded that the issue of noise extends beyond an assessment of the number of noise complaints and considered the negative impact of noise escape which is an example of bad management.

[46] The DLC referred to the Applicant's updated Noise Management Plan following recommended changes by it. As part of the Plan, noise checks are conducted every night and the results are recorded. When faced with a complaint, Mr Meek gave evidence that he reduces the music volume even if he disagrees that The Yot Club is the correct source of the noise. He

⁹ *Paihia Saltwater (2001) Limited* [2001] PH391/2001 at [27] to [29].

also gave evidence that he has installed sound proofing on the building which has reduced the noise level by approximately 10 db. The DLC considered these to be the actions expected of a licensee in managing noise.

[47] Counsel for the Applicant challenged the noise complaints and the Letter of Direction which constituted business record hearsay evidence and that the DLC should give little weight to. The DLC accepted that the complainants were not present to be cross-examined but the complaints constituted valid evidence which was admissible under s 207(1) of the Act.

[48] The DLC conceded that without witness evidence or public objections and the disputed nature of some of the complaints, it was difficult for it to determine whether the noise is consistently at a level where 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 grant the renewal of the licence. Having regard to its previous decision with regards to noise with The Yot Club, the DLC considered that without further primary evidence, it was not established that there was a problem with noise but then stated that it noted Mr Meek's own recording of noise emanating from the premises revealed that noise regularly exceeded the District Plan noise levels.

[49] On nuisance and vandalism, the DLC heard evidence from Senior Constable Stevenson of two incidents of large crowds of intoxicated people congregating on the street outside The Yot Club on 15 January and 20 March 2021. The crowds were unruly and Senior Constable Stevenson gave evidence that she felt unsafe during these incidents. The DLC expressed that the lack of safety was of significant concern.

[50] Counsel for the Applicant challenged the evidence around intoxication on the basis that specific indicators of intoxication were not included in the brief of evidence, and this was a failing of natural justice because they could not prepare for this evidence. However, the DLC rejected this challenge, calling it illogical given that intoxication was specifically mentioned in the brief of evidence. In relation to the incident on 15 January 2021, Senior Constable Stevenson indicated in her brief of evidence at para [12] that "The majority were heavily intoxicated, behaving in an intoxicated manner, being loud and disorderly". In relation to the incident of 19 March 2021, Senior Constable Stevenson indicated at para [30] that "... there was another large number of intoxicated young people spilling out of The Yot Club".

[51] Equally, Counsel's submission that Senior Constable Stevenson was only called as a witness to give evidence about one incident but from the brief of evidence it was clear that she was giving evidence of incidents of 15 January, 20/21 February and 19/20 March 2021 so her evidence could not be tested was also rejected by the DLC as Senior Constable Stevenson was available for cross-examination at the hearing.

[52] Counsel also challenged Senior Constable Stevenson's ability to make assessments of intoxication and submitted that if intoxication is alleged then evidence of intoxication should be disclosed well in advance of the hearing. The DLC was satisfied that Senior Constable Stevenson had significant relevant experience and her ability to effectively assess intoxication based on s 5 of the Act factors. It is the same process used by many licensees and their staff and counsel did not question the ability of the Applicant to assess intoxication. The DLC could not make out what additional evidence needed to be presented and accepted that there were intoxicated people in the crowds during 15 January and 20 March 2021.

[53] The DLC accepted that during those incidents, some of the crowd had come from The Yot Club. Senior Constable Stevenson believed that on 20 March 2021 some crowd members had left The Yot Club with alcohol. However, she noted the possibility that alcohol had been stowed nearby. Mr Meek gave evidence of having systems in place to prevent alcohol being taken out but conceded that the systems could be evaded. On balance, the DLC accepted that some people had left The Yot Club with open vessels on 20 March 2021. This allegation, which then contributed to an unsafe situation for the Police, was a serious one. The DLC expected that enforcement action had been taken against the licensee, but it was not.

[54] The DLC noted that the evidentiary standard for considering amenity and good order matters was one that required it to form an opinion, which was different to whether or not the applicant had established on a balance of probabilities that a relevant fact has been proved.¹⁰

[55] The DLC stated that it believed that counsel misunderstood the law and the manner in which it was required to undertake its evaluation. It cited passages from *Kaiti Club Hotel Limited (Kaiti Sports Bar) v Ka Pai Kaiti Trust*,¹¹ which stated that concepts such as onus of proof and standard of proof are inappropriate. The weight to be given to relevant matters is for

¹⁰ Citing *Shady Lady Lighting Limited* [2018] NZARLA 198 at [68] and [69].

¹¹ *Kaiti Club Hotel Limited (Kaiti Sports Bar) v Ka Pai Kaiti Trust* [2018] NZARLA 225.

the decision-maker and the degree to which they are persuaded is inherent in the concept of 'weight'. Without evidential foundation, there is no basis for a decision-maker to be persuaded of some matter which may go to prove alcohol-related harm. There must be an underlying basis for the decision maker to be reasonably satisfied in respect of any allegation.

[56] The DLC also cited *Medical Officer of Health (Wellington Region) v Lion Retail Limited*,¹² where the High Court stated that evidence implicating the premises was sufficient to engage the requirement to minimise alcohol-related harm. Evidence of demonstrable historical harm is not required. What is required is assessment of risk, which by definition is future risk.

[57] Here, the DLC was satisfied that the evidence produced by the Police met the appropriate evidentiary standard that The Yot Club premises was implicated in that at least some of the crowd originated from The Yot Club. The evidence demonstrated real future risk of alcohol-related harm.

[58] The DLC then considered whether refusing to renew the licence would minimize its impact, in terms of reductions in amenity and good order. It referred to *Medical Officer of Health (Wellington Region) v Lion Retail Limited*,¹³ where it held that "Where there is an evidential foundation enabling a link to be drawn between a real risk of alcohol-related harm and the grant or renewal of a licence, the harm must be minimized not ignored or condoned..."

[59] The DLC concluded that the decision was a finely balanced one. On the one hand, there was evidence of intoxicated crowds associated with the premises on at least two occasions and on the other, the Police had not taken any enforcement actions. To the contrary, the actions of the licensee helped to disperse the crowd on one of those occasions.

[60] The DLC, nevertheless, determined that large, unruly and intoxicated crowds generate a serious negative impact on the amenity and good order of the locality. On evaluating the evidence, it concluded that The Yot Club had contributed indirectly to at least one of those incidents. Overall, it was satisfied that the amenity and good order of the locality would be improved, to more than a minor extent, by not renewing the licence.

¹² *Medical Officer of Health (Wellington Region) v Lion Retail Limited* [2018] NZHC 1123 at [70].

¹³ *Medical Officer of Health (Wellington Region) v Lion Retail Limited* [2018] NZHC 1123 at [67].

Reports from the Reporting Agencies

[61] The DLC reiterated that all the reporting agencies opposed the application for the licence renewal. One issue not addressed earlier was that the Police had raised the fact that no business plan had been provided by the Applicant.

[62] The DLC stated that absence of a written plan does not mean that Mr Meek does not have a plan. Further, that provision of a business plan is not required under the Act as noted in *Bridle v J & I Imports Limited*.¹⁴

Object of the Act

[63] The DLC set out the evaluative exercise outlined in *Christchurch Medical Officer of Health v J & G Vaudrey Limited*,¹⁵ and stated that having inquired into the application, having received evidence and submissions from all parties and having evaluated the application against ss 131 and 105 of the Act, it determined that the application did not satisfy all the criteria. In particular, it considered that the Applicant was not suitable to hold the licence, and that the amenity and good order of the locality would be likely to be improved by more than a minor extent, by refusing the renewal of the licence.

[64] Then having regard to all of its reasons stated above, it was not satisfied that the application was capable of meeting the object of the Act. Hence, the application for renewal of the licence was refused.

The Grounds of Appeal

[65] The appeal by the Applicant's counsel is presented on the following nine grounds:

- (a) failure to apply the Evidence Act 2006;
- (b) admitting evidence that should have been excluded;
- (c) acting without jurisdiction;

¹⁴ *Bridle v J & I Imports Limited* [2019] NZARLA 215 at [87].

¹⁵ *Christchurch Medical Officer of Health v J & G Vaudrey Limited* [2015] NZHC 2749 at [56].

- (d) breaches of natural justice;
- (e) suitability;
- (f) amenity and good order;
- (g) taking irrelevant considerations into account;
- (h) predetermination; and
- (i) finding that the application was not capable of meeting the object of the Act.

[66] The Authority has read the submissions made by counsel and considers that not all the matters raised are essential to consider for the purposes of dealing with this appeal, which is by way of a rehearing.¹⁶ Suffice to state that as per s 207(1) of the Act, the Authority can consider any evidence presented to the DLC and attach the weight it considers appropriate, having considered matters such as hearsay and lack of direct witness evidence.

[67] Hence, keeping in mind the procedure prescribed by the Act and the need for efficiency, the Authority considers that it is most appropriate to proceed with the appeal on the basis of its assessments, as outlined below.

Assessment of the Decision to Decline Renewal of the On-Licence

[68] As stated earlier, the DLC based its decision to decline the renewal of the licence on the assessment of the following grounds:

- (a) suitability;
- (b) design and layout;
- (c) systems, staff and training;
- (d) amenity and good order;

¹⁶ Sale and Supply of Alcohol Act 2012, s 157(1).

- (e) reports of the reporting agencies; and
- (f) the object of the Act.

Suitability

[69] The DLC noted opposition by the Police and the MOH on the basis of suitability.

[70] In particular, the Police referred to two incidents where large crowds had gathered outside The Yot Club on 15 January and 20 March 2021 and an incident where a young woman was found unresponsive on the premises on 20/21 February 2021.

[71] During the first incident on 15 January, Mr Meek assisted in dispersing the crowd.

[72] As for the incident of 20/21 February 2021, there was no evidence of the Applicant being at fault and the DLC seemed to have considered it favourably that Mr Meek made the right decision by calling Mr Thomas for assistance as Mr Thomas gave evidence that he did not believe the young woman 'would have made it' otherwise.

[73] Then the DLC noted that the applicant's compliance with the law was a significant cause for concern in the renewal hearing in 2017 and outlined what those concerns were. The DLC then considered the reasons why the Authority had overturned the DLC's finding.

[74] The DLC then expressed its disappointment that the Applicant continued not to comply with the law without specifying what those were, except for reference to the Applicant's failure to notify Fire and Emergency New Zealand of trial evacuations, although this was addressed by Mr Meek when it was brought to his attention. While the DLC accepted that this lapse was not deliberate or wilful, it stated that it expected experienced licensees to be more proactive in ensuring that they comply with relevant legislation at all times rather than waiting for prompts.

[75] The DLC considered Mr Meek's significant experience in the industry and lack of enforcement actions taken against the Applicant and himself by the Police. This was in contrast to the Police's myriad of alleged concerns. Despite those concerns, there was a lack of enforcement actions taken after the exiting of intoxicated patrons from the premises with

alcohol in hand. Having regard to case law principles around suitability,¹⁷ and the relevant test which is "whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of the licence",¹⁸ the DLC concluded that Mr Meek struck it as someone who has a general disregard for authority, which is "reflected in his continual failure to strictly adhere to all aspects of the law at all times".¹⁹

[76] The DLC commented that Mr Meek focused on noise and less on ensuring that administrative tasks are completed and recorded. It expressed concern about the low-level failures that have been consistently raised since the initial application for this licence, again, without detailing as to what these were.

[77] Having regard to the checklist for suitability provided for in *New Zealand Police v Casino Bar No 3 Ltd*,²⁰ the DLC took into account that Mr Meek has no previous convictions, there is no evidence of previous unlawful operation of the premises and Mr Meek's character is also evidenced by his response to the incidents as outlined in the Police report and evidence.

[78] However, the DLC weighed the significance of Mr Meek's considerable experience and the Applicant's, against their continuing failure to comply with the law at all times. Further, it said that a suitable licensee should not consistently have to be called on to explain oversights in their management and systems at each renewal.

[79] On the DLC's evaluation of the evidence as a whole, it held that the question of suitability was finely balanced. However, due to the ongoing non-compliance with the law, it found that the Applicant is unlikely to carry out its responsibilities under the law and was thus not suitable to continue to hold the licence for the premises.

[80] Without any specifics as to what those continuing non-compliance issues were and whether or not they were each substantiated with evidence, the Authority does not consider that a finding of lack of suitability was open to the DLC. By and large, the statements of the DLC are very generic and do not offer any particular insight to the specific matters of suitability which caused concern for the DLC.

¹⁷ Citing *Nishchay Enterprises Ltd* [2013] NZARLA PH 837 at [53] and [54]; *New Zealand Police v Casino Bar No 3 Ltd* [2013] NZHC 44 at [34] and [35]; and *Two Brothers Wholesale Limited v Medical Officer of Health Waikato District Health Board* [2021] NZARLA 32 at [103].

¹⁸ *Re Sheard* [1996] BCL 86.

¹⁹ At [197].

²⁰ *New Zealand Police v Casino Bar No 3 Ltd* [2013] NZAR 267.

Design and Layout

[81] With regards to the design and layout of the premises, the Police expressed concern at the use of the wire mesh fencing delineating the licensed area in Volcom Lane. However, the DLC accepted Mr Meek's evidence that it provides an appropriate barrier to prevent patrons from entering the premises without being checked by door staff. Of greater concern to the DLC was the issue of tenure over the licensed area. However, having regard to the plan submitted by the landlord, Mr Bruce, the DLC was satisfied that the design and layout of the premises was appropriate and the Authority is satisfied with that conclusion as well.

Systems, Staff and Training

[82] The police and the Inspector both raised concerns in relation to systems, staff and training.

[83] In relation to systems, this related to how the licensee deals with patrons at risk, noise management, systems for training, and in general, record keeping, to ensure compliance with the law were all raised.

[84] Mr Meek and Mr Thomas both gave evidence about the incident of the unresponsive young woman on 20/21 February 2021 and the DLC noted that the system in place for dealing with this incident was somewhat ad hoc and that the Alcohol Management Plan for the premises had since been updated during the hearing process. Similarly, the Noise Management Plan, the Fire Evacuation Plan and staff training manual had all been updated during the hearing process. The DLC was satisfied that the licensee has appropriate systems in place to comply with the Act.

[85] On record keeping, the DLC noted that the Inspector faced some difficulties during her inquiries into the applications. Mr Meek did not appear to keep all the relevant business records in a systematic manner and during the hearing Mr Meek committed to maintaining a folder for all documents and records and keeping that folder on the premises at all times. Noting the Authority's comment in *Young v Lyger Investments Ltd*, the DLC stated that this is the minimum they would expect of an experienced licensee.

[86] As to training records, these were provided at the hearing and the DLC was satisfied on balance that the licensee had been undertaking staff training as is required under the Act.

[87] Overall, taking into account the changes that had been implemented during the hearing, the DLC was satisfied that the Applicant had appropriate systems, staff and training in place. The Authority finds that this determination was open to the DLC.

Amenity and Good Order

[88] Section 106(2) of the Act outlines the matters that must be taken into account in relation to amenity and good order. This includes consideration of noise, nuisance and vandalism.

[89] With regard to the issue of noise, the DLC considered evidence of noise by the Inspector, including 35 noise complaints received between 18 December 2018 and 25 June 2021. The noise complaints resulted in a number of verbal warnings to the Applicant as well as two Excessive Noise Direction Notices and a Letter of Direction.

[90] In evidence, Mr Meek challenged the source of the noise and the DLC accepted that not all of the noise complaints were correctly attributed to The Yot Club. However, excluding those clearly not attributable, there was still a large number of noise complaints. The DLC also noted that there had been no public objections to the licence renewal. Moreover, none of the noise complainants were called as witnesses which made the DLC's assessment difficult.

[91] The DLC referred to the Applicant's updated Noise Management Plan following recommended changes by it. As part of the Plan, noise checks are conducted every night and the results are recorded. When faced with a complaint, Mr Meek gave evidence that he reduces the music volume even if he disagrees that The Yot Club is the correct source of the noise. He also gave evidence that he has installed sound proofing on the building which has reduced the noise level by approximately 10 db. The DLC considered these to be the actions expected of a licensee in managing noise.

[92] Counsel for the Applicant challenged the noise complaints and the Letter of Direction which constituted business record hearsay evidence and that the DLC should give little weight to. The DLC accepted that the complainants were not present to be cross-examined but the complaints constituted valid evidence which was admissible under s 207(1) of the Act.

[93] The DLC conceded that without evidence of witnesses or public objections and the disputed nature of some of the complaints, it was difficult for it to determine whether the noise is consistently at a level where 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 grant the renewal of the licence. Having regard to its previous decision with regards to noise with The Yot Club, the DLC considered that without further primary evidence, it was not established that there was problem with noise but then stated that it noted Mr Meek's own recording of noise emanating from the premises which revealed that noise regularly exceeded the District Plan noise levels. The Authority has reservations about finding noise to be an issue after the DLC stated that without further primary evidence, it was not established that there was a problem with noise - with regards to The Yot Club.

[94] On nuisance and vandalism, the DLC heard evidence from Senior Constable Stevenson of two incidents of large crowds of intoxicated people congregating on the street outside The Yot Club on 15 January and 20 March 2021. The crowds were unruly and Senior Constable Stevenson gave evidence that she felt unsafe during these incidents. The DLC expressed that the lack of safety was of significant concern.

[95] Counsel for the Applicant challenged the evidence around intoxication on the basis that specific indicators of intoxication were not included in the brief of evidence. However, the DLC rejected this challenge calling it illogical given that intoxication was specifically mentioned in the brief of evidence.

[96] Equally, Counsel's submission that Senior Constable Stevenson was only called as a witness to give evidence about one incident but from the brief of evidence it was clear that she was giving evidence of incidents of 15 January, 20/21 February and 19/20 March 2021 so her evidence could not be tested was also rejected as Senior Constable Stevenson was available for cross-examination at the hearing.

[97] Counsel also challenged Senior Constable Stevenson's ability to make assessments of intoxication and submitted that if intoxication is alleged then evidence of intoxication should be disclosed well in advance of the hearing. The DLC was satisfied that Senior Constable Stevenson had significant relevant experience and her ability to effectively assess intoxication based on the s 5 of the Act factors.

[98] The DLC accepted that during those incidents, some crowd had come from The Yot Club. Senior Constable Stevenson believed that on 20 March 2021 some crowd members had left The Yot Club with alcohol. However, she noted the possibility that alcohol had been stowed nearby.

Mr Meek gave evidence of having systems in place to prevent alcohol being taken out but conceded that the systems could be evaded. On balance, the DLC accepted that some people had left The Yot Club with open vessels on 20 March 2021. The Authority does not consider that this finding was open to the DLC on the evidence given.

[99] The DLC went on to state that this allegation, which then contributed to an unsafe situation for the Police, was a serious one. The DLC expected that enforcement action would have been taken against the licensee, but it was not. The Authority considers that the DLC should have simply accepted the fact that the Police chose not to take enforcement action.

[100] The DLC noted that the evidentiary standard for considering amenity and good order matters was one that required it to form an opinion.²¹ It considered that the weight to be given to relevant matters is for the decision-maker and the degree to which they are persuaded is inherent in the concept of 'weight'. Without evidential foundation, there is no basis for a decision-maker to be persuaded of some matter which may go to prove alcohol-related harm. What is required is assessment of risk, which by definition is future risk. The Authority is satisfied with this assessment.

[101] Here, the DLC was satisfied that the evidence produced by the Police met the appropriate evidentiary standard that The Yot Club premises was implicated, in that at least some of the crowd originated from The Yot Club and the evidence demonstrated real future risk of alcohol-related harm. The Authority notes that the DLC did not specify what aspects of the evidence satisfied it that some of the crowd originated from The Yot Club or how the evidence demonstrated real future risk of alcohol-related harm.

[102] The DLC then considered whether refusing to renew the licence would minimize its impact, in terms of reductions in amenity and good order. It referred to *Medical Officer of Health (Wellington Region) v Lion Retail Limited*,²² where it held that "Where there is an evidential foundation enabling a link to be drawn between a real risk of alcohol-related harm and the grant or renewal of a licence, the harm must be minimized not ignored or condoned..."

[103] The DLC concluded that the decision was finely balanced. On the one hand, there was evidence of intoxicated crowds associated with the premises on at least two occasions and on

²¹ Citing *Shady Lady Lighting Limited* [2018] NZARLA 198 at [68] and [69].

²² *Medical Officer of Health (Wellington Region) v Lion Retail Limited* [[2018] NZHC 1123 at [67].

the other, the Police had not taken any enforcement actions. To the contrary, the actions of the licensee helped to disperse the crowd on one of those occasions. These statements do not demonstrate how the decision is finely balanced. There were only two incidents referred to in the Police evidence, not at least two and the DLC did not specify how the intoxicated crowds were associated with the premises.

[104] The DLC, nevertheless, determined that large, unruly and intoxicated crowds generate a serious negative impact on the amenity and good order of the locality. On evaluating the evidence, it concluded that The Yot Club had contributed indirectly to at least one of those incidents. And overall, it was satisfied that the amenity and good order of the locality would be improved, to more than a minor extent, by not renewing the licence.

[105] The Authority notes that here the DLC referred to indirect contribution to at least one of those (two) incidents. Given that the DLC did not assess how the evidence established the Applicant's indirect contribution, the Authority considers that the congregation by the large, unruly and intoxicated crowds cannot be held against the premises alone and that there was a lack of evidential basis to conclude that the amenity and good order of the locality would be improved, to more than a minor extent, by not renewing the licence.

Reports from the Reporting Agencies

[106] The DLC reiterated that all the reporting agencies opposed the application for the licence renewal. One issue not addressed earlier was that the Police had raised the fact that no business plan had been provided by the Applicant.

[107] The DLC was correct to note that provision of a business plan is not required under the Act.²³

Object of the Act

[108] The DLC, having evaluated the application against ss 131 and 105 of the Act, determined that the application did not satisfy all the criteria. In particular, it considered that the Applicant was not suitable to hold the licence, and that the amenity and good order of the locality would be likely to be improved by more than a minor extent, by refusing the renewal of the licence.

²³ *Bridle v J & I Imports Limited* [2019] NZARLA 215 at [87].

[109] The DLC did not specify the Applicant's failure to comply with the laws by which they found him to be unsuitable. The Authority considers there was lack of an evidential basis to conclude that amenity and good order of the locality would be improved, to more than a minor extent, by not renewing the licence based only on "at least one incident". The Authority considers that the evaluative exercise undertaken by the DLC was not clear, precise and lacked clear analysis before drawing particular conclusions. Hence the Authority is not satisfied that the DLC's reasons for refusing the renewal of the licence are based on sound determinations.

Applicable Legal Principles to this Appeal

[110] Section 157 of the Act provides that an appeal is by way of a rehearing. As this Authority has held earlier:²⁴

On appeal the Authority is required to undertake its own assessment of the merits of the application. It is not sufficient for the Authority to simply decide that the DLC's decision was one which was open to it on the evidence. Instead, what the Authority is required to do is to independently assess the evidence and the merits of the application and to reach its own conclusion.

[111] The role of the Authority in considering the s 105 factors is an evaluative one, which requires the decision maker to make a merit-based assessment.²⁵

[112] While counsel for the Appellant has cited that "the case law clearly indicates that rules as to onus of proof will be of little relevance",²⁶ which was referred to in the context of an appeal regarding renewal in *McCutcheon v Level Eighteen Limited*,²⁷ the Respondent is correct to qualify that by stating "the onus is on the Appellant before the Authority to satisfy the Authority that the decision in the original hearing before the DLC was wrong."²⁸

Law as to the Renewal of the Licence

[113] Under s 131 of the Act,²⁹ the Authority must take into account:

- (a) the matters set out in paragraphs (a) to (g), (j), and (k) of section 105(1):
"105 Criteria for issue of licences

²⁴ *Otago University Students' Association - Starters Bar* [2021] NZARLA 3 citing the approach set out by Davison J in *Rainger v General Distributors Ltd* [2019] NZHC 3483 (20 December 2019).

²⁵ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2016] 2 NZLR 382, at [54]-[56].

²⁶ *Lower Hutt Liquor Mart Ltd v Shady Lady Lighting Ltd* [2018] NZHC 3100 as per Churchman J.

²⁷ *McCutcheon v Level Eighteen Limited* [2021] NZARLA 26 as per Kelly J.

²⁸ *Selby v KIW-E Otaki Limited* [2020] NZARLA 210 at [68].

²⁹ Sale and Supply of Alcohol Act 2012, s 131(1)(a)-(c), respectively.

- 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;
 - (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;
- ...
- (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."
- (b) whether (in its opinion) 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;
- (c) any matters dealt with in any report from the reporting agencies; and
- (d) the manner in which the applicant has sold, displayed, advertised, or promoted alcohol.

Re-Assessment of the Application for the Renewal of the Licence

Suitability

[114] The Authority notes from the two allegations of the two incidents of crowds gathering outside The Yot Club on 15 January and 20 March 2021, the actions of the Applicant to assist the Police during one of those incidents, which shows its willingness to deal with matters even though it was outside its premises. As for the patrons being intoxicated whilst exiting The Yot Club, this has not been proven to the extent necessary to conclude that was the case.

[115] Even though safety appears to have been a real concern during these two instances, the Authority is not willing to render the Applicant accountable. Rather, it appears more to be of a resourcing issue for the Police, having conceded they work alone in Raglan and are not adequately resourced to enforce the alcohol ban.

[116] What has been proven against the Applicant is the non-compliance with the Fire and Emergency New Zealand Act but this was rectified before the hearing.

[117] There is no other specific incident mentioned that has been proven to raise particular concerns as to the Applicant's suitability. To allege non-compliance with the law and not to have taken any enforcement action is also telling.

[118] To the contrary, the Applicant has significant years of experience and has had no prosecutions and no negative holdings against it. Thus, the Authority does not find that the Applicant is unsuitable to hold the licence.

Any relevant local alcohol policy

[119] Not relevant here.

Days and hours of operation

[120] This has not been challenged as an issue.

Design and layout of the premises

[121] The Police have raised concerns as to the use of temporary fencing and wire mesh to the height of 2.1 metres, with no security to watch over or with no clear sight to the fence.

[122] The Applicant has stated that the fence is to prevent people from entering the premises without security checks, and whilst the Police have submitted that the patrons might still be able to pass items through or over the fence, there is no evidence to suggest that this has happened.

[123] The Authority does not accept the Police submissions that the premises has for want of a better word, a porous layout.

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

[124] This is not an issue.

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

[125] This is also not an issue.

Appropriate systems, staff, and training to comply with the law

[126] The Police raised issues with regards to the Risk Mitigation Plan with regards to alcohol harm, vulnerability to security breaches, lack of an Alcohol Management Plan, lack of documentation and explanation for staff training and how the operation of the bar kept pace with new developments that could create unwanted risks for the patrons, the public and their staff.

[127] There is evidence of one incident of alcohol related harm and there was no suggestion that blame for it was attributable to the Applicant. To the contrary, the Applicant demonstrably made the right decision to deal with it and may have saved a life. There is no evidence to suggest that it is not capable of mitigating risks.

[128] The Applicant has provided an Alcohol Management Plan and a checklist for staff training. Although the Police raised issues with having one duty manager and two security staff, there is no evidence that these staff are not adequate. There has been no evidence of issues around intoxication on the premises either. Overall, there are no specific issues which arise from any of the evidence presented to suggest that there is non-compliance with the law.

[129] Furthermore, it is noted that during the hearing, Mr Meek committed to maintaining a folder for all documents and records relevant to the operation of the premises and keeping that folder on the premises at all times. This is not a legal requirement but it is helpful to assess compliance with the law.

Matters arising from the report from the Police, an inspector, or a Medical Officer of Health made under s 103

[130] This does not apply as the reports of the reporting agencies have been received under s 129 of the Act.

Whether (in its opinion) 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

[131] There has been evidence of 35 noise complaints as covered by the evidence of the Licensing Inspector. It is unclear as to how many of those 35 complaints are directly attributable to The Yot Club or how far the complainants reside from the Yot Club. The fact that none of those witnesses gave evidence also means that there is no clear evidential basis to hold the premises liable for all the noise issues.

[132] As to the level of noise, the Authority notes that the Waikato District Plan permits noise levels of up to 45 db. A Letter of Direction from the Council sent to Mr Meek with noise recordings on 7 April 2019 between 11.00 pm and 11.30 pm had readings of 70, 71 and 74 db. This is clearly above the permitted range.

[133] While the Authority notes that Mr Meek has undertaken sound proofing at The Yot Club, and in the absence of a clear evidential basis as to whether noise is a real issue of concern, the Authority rules that on balance and for now, noise as a nuisance has not been established.

[134] As for the two incidents of crowd gathering on 15 January and 20 March 2021, whilst some of the patrons are said to have exited from The Yot Club, there can be no justified conclusion drawn, based on these two incidents, that the amenity and good order of the locality will be improved, by more than a minor extent, by the effects of a refusal to renew the licence.

Matters arising from the report from the reporting agencies

[135] These have been dealt with under various heading separately.

Manner in which the applicant has sold, displayed, advertised, or promoted alcohol

[136] This was not an issue.

Object of this Act

[137] Standing back, apart from the issue of the noise raised by the Licensing Inspector, there were no other matters raised by the Licensing Inspector or the delegated Medical Officer of Health that was not already raised by the Police.

[138] The Authority has already found that there was not enough evidential foundation to come to the conclusion that noise was an issue of particular concern with The Yot Club, or that the crowd gatherings and the safety concerns for the Police was predominately attributable to The Yot Club.

[139] Overall, having regard to s 4, the object of the Act, the Authority did not find any proper evidential basis to conclude that the premises is contributing alcohol-related harm to the community in Raglan, either directly or indirectly.

Conclusions

[140] For the reasons provided, this Authority is satisfied that based on the evidence (or lack of it) before it, it was unduly harsh for the DLC to deny the renewal of the On-licence.

[141] Hence the appeal is allowed and the pursuant to s 158 of the Act, the decision of the DLC is reversed.

[142] The Authority orders that the Secretary of the DLC renew the On-licence, 14/ON/21/2018 for 3 years.

District Court Judge P R Connell
Chairperson

Alcohol Regulatory and Licensing Authority