

**IN THE MATTER** of the Sale of Liquor Act 1989

**IN THE MATTER** of an application by **SAURIN KALYANBHAI GANDHI** for an off-licence pursuant to s.31 of the Act in respect of premises situated at 101D Maunganui Road, Mt Maunganui, known as "101 Foodmarket"

**BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY**

Deputy Chairman: District Court Judge J J Weir  
Member: Ms J D Moorhead

**HEARING** at TAURANGA on 4 June 2014

**APPEARANCES**

Mr K Kommu – counsel for applicant  
Miss D M Jurgeleit – Tauranga District Licensing Inspector – in opposition  
Sergeant N P McGlone – NZ Police – to assist

**RESERVED DECISION OF THE AUTHORITY**

***Introduction***

[1] This is an application by Saurin Kalyanbhai Gandhi for an off-licence in respect of premises situated at 101D Maunganui Road, Mt Maunganui, known as "101 Foodmarket". The applicant seeks a grocery style off-licence with hours authorised to sell liquor between 7.30 am and 10.00 pm daily.

[2] The application is made pursuant to s.36(1)(d)(ii) of the Sale of Liquor Act 1989. The parties agreed that the Sale and Supply of Alcohol Act 2012 does not apply as the application was filed with the District Licensing Agency on 5 March 2013, prior to the relevant provisions of that Act coming into force.

[3] An off-licence can be granted under s.36(1)(d)(ii) to any grocery store, where the Authority is satisfied that the principal business of the store is the sale of main order household foodstuff requirements. Section 36(3)(b) also provides that an off-licence cannot be granted in respect of any shop commonly known as a dairy.

[4] The application is opposed by the District Licensing Inspector, Miss Jurgeleit, who does not believe that it meets the relevant criteria. In her view the premises are a dairy. There is no opposition from the Police, nor are there any public objections.

### ***The Application***

[5] Mr Saurin Kalyanbhai Gandhi is the applicant for the off licence. He holds a current General Manager's Certificate issued on 5 May 2011.

[6] The premises have not been licensed previously. The premises were converted from a clothing retail store to the current use in October 2012. The building consent application at the time described the work as "fitout existing shop to Dairy –shop was retail". Mr Gandhi says however that he always intended to operate a grocery store and did not appreciate the difference between a "dairy" and a "grocery store" for liquor licensing purposes at that stage. He also said that the building application was not prepared by him. He pointed to other documentation which refers to the premises as a "grocery".

[7] Mr Gandhi disputed the Inspector's assessment of the off-licence application. He said that she called the premises a "dairy" while he called it a "grocery".

[8] There was also a dispute over the original turnover figures that were shown by Mr Gandhi to the Inspector, approximately three weeks prior to the application being filed. Those figures showed that tobacco sales were the predominant percentage of sales figures. When Mr Gandhi returned three weeks later the Inspector was surprised to see that a new set of certified figures showed a decrease in tobacco sales and an increase in grocery items. While she thought they were for the same time period Mr Gandhi said the first set of figures covered 8 October 2012 to 13 January 2013 and the second set 8 October 2012 to 3 March 2013. He also said that tobacco sales were high at the end of December due to the tourist season and a price rise on 1 January 2013. Mr Gandhi said he no longer had a copy of the original figures.

[9] Certified accounts were provided by the applicant. They are required pursuant to Regulation 8(2)(j) which provides that every application for an off-licence where the application relates to a grocery store shall be accompanied by

"particulars of the principal business of the store, including evidence and certified accounts showing the percentage of turnover that is derived from the sale of main order household foodstuffs."

[10] The certified accounts for the period 8 October 2012 to 3 March 2013 are dated 5 March 2013 and stated to be a "breakdown of percentage turnover to assist with an application for renewal of a convenience store off-licence". The largest single figure is for cigarettes and tobacco (30%) with a grocery category next (24%). The next largest category is drinks and beverages, with 1.5 + litre bottles, 1-3 litre juices, coffee, tea, milo etc (8%), and cans and small bottles (3%). All of the other categories are 0 -5% with ice blocks and ice cream cones being 5% and 2 litre tubs/blocks 4%. Fruit and vegetables are shown as 3%. Mr Gandhi calculated that 52% of sales were main order household foodstuffs.

[11] Further certified figures were also provided for the period 3 March 2013 to 2 March 2014 which show cigarettes/tobacco at 23% and grocery at 27%. On these figures Mr Gandhi said that 62.5% of sales were main order household foodstuffs.

[12] We were advised at the hearing that the store does not sell bakery or delicatessen items and accordingly these items are shown as nil on the accounts. There is no fresh meat or fish sold.

[13] Non food items should be excluded from what would be considered main order household foodstuffs. In response to questions from the Authority, Mr Gandhi confirmed that non food items had been included in the grocery category, such as toilet rolls (which are apparently a big seller) and fly spray.

[14] Taking into account the exclusions referred to above our calculation of the percentage of main order household food stuffs would be much less than that argued for by the applicant.

### ***The Opposition***

[15] Miss Jurgeleit is a Tauranga District Licensing Inspector. She opposes the issue of an off-licence on the grounds that the application does not meet the criteria in s.36 of the Act.

[16] The Inspector reviewed the initial turnover percentages provided by the applicant and formed the conclusion that the principal purpose of the business was not the sale of main order household foodstuff requirements. Her recollection of the first figures she was shown was that cigarettes and tobacco were around 45% of the turnover. She questioned the accuracy of the later figures provided. In particular the amount of fruit and vegetables, bread and 2 litre ice cream tubs stated to have been sold did not equate with the small amounts available that she had seen on her visits. She also commented on the very limited amount of ready meal options.

[17] The Inspector visited the premises on four occasions taking photographs on three of those occasions. The photographs are particularly telling as to the limited amounts of some items available, for example on one occasion showing five loaves of bread and five bananas placed on the counter. She noted in her report dated 20 August 2013 that the premises gave the appearance of being a dairy.

### ***The Authority's Decision and Reasons***

[18] The Authority is governed by the provisions of s.36(1) and (3) of the Act. Those provisions are set out in full below:

#### **36 Types of premises in respect of which off-licences may be granted**

**(1) Except as provided in subsections (2) to (5) of this section, an off-licence shall be granted only—**

- (a) To the holder of an on-licence in respect of a hotel or tavern, in respect of the premises conducted pursuant to that licence; or**
- (b) To the holder of a club licence, being a club that is entitled under paragraph (i) or paragraph (j) of section 30(1) of this Act to hold an off-licence, in respect of the premises conducted pursuant to that licence; or**
- (c) In respect of premises in which the principal business is the manufacture or sale of liquor; or**
- (d) In respect of—**
  - (i) Any supermarket having a floor area of at least 1000 square metres (including any separate departments set aside for such foodstuffs as fresh meat, fresh fruit and vegetables, and delicatessen items); or**
  - (ii) Any grocery store, where the Licensing Authority is satisfied that the principal business of the store is the sale of main order household foodstuff requirements.**

...

**(3) Nothing in subsection (1) or subsection (2) of this section shall authorise the grant of an off-licence in respect of—**

- (a) Any service station or other premises in which the principal business is the sale of petrol or other automotive fuels; or**
- (b) Any shop of a kind commonly known as a dairy.**

[19] This means that the applicant has to satisfy two tests. It must satisfy the Authority that the shop is a grocery store, having as its principal business *“the sale of main order household foodstuff requirements.”* “Principal” in this sense means mainly, first in rank or importance, and does not require that it be more than 50%.

[20] The applicant must also satisfy the Authority that the premises cannot be described as a shop of the kind commonly known as a “dairy”.

[21] In addition, there are certain criteria to which we must have regard when considering an application for an off-licence. These criteria are contained in s.35(1) of the Act.

[22] As to what would be considered main order household foodstuffs, some items that are traditionally sold by dairies such as milk, eggs, and bread, are also sold by grocery stores, and are, in our view, also part of a household’s main order foodstuffs. In *MK Devereau Limited* [2008] NZLLA PH 1532 the Authority defined main order household foodstuffs as *“...those food items that the majority of New Zealand families purchase to take home for preparation and consumption. They would generally not include impulse purchase of food items such as confectionery.”*

[23] In the guideline decision *Jay & H Company Limited* NZLLA PH 155/2001 (“Patumahoe Superette”) the Authority set out several tests in order to determine the principal business of a store.

The Authority stated:

*“In determining the ‘principal business’ of any store we endeavour to apply a broad common sense approach. Consideration includes-*

*(1) The turnover percentages produced in accordance with Regulation 8(2)(j).*

*(2) The number and range of the items available. The greater the number and depth of foodstuff items available, the more likely the premise is to be a grocery store in terms of s.36(1)(d)(ii).*

*(3) The size of the premises. Larger premises are less likely to be categorised as a dairy.*

*(4) The layout of the premises. The presence of trolleys in multiple rows of goods assist categorisation as a grocery store.*

*(5) A view of the premises. The evidential weight given by the Authority to a view is usually considerable.”*

[24] We apply the *Jay & H Company Limited* criteria to the present case.

### ***The Turnover Percentages***

[25] While on their face the figures provided would indicate that the principal business is the sale of main order household foodstuffs, and even though they are certified, we are not satisfied that they are accurate.

[26] On both sets of figures provided by the applicant, cigarettes and tobacco were major sellers. Other items that would be expected in a grocery store (such as bakery and delicatessen items) did not feature in the turnover figures.

### ***Number and Range of Items***

[27] There was a range of household foodstuffs which one might expect to find in a grocery store, although some choices were very limited. There was a very minimal range and number of frozen foods, fresh fruit and vegetables. If the premises were a grocery store we would expect a greater range and number of these items. There were no bakery or delicatessen items, both of which we would expect to find in a grocery store.

### ***The Size of the Premises***

[28] In this case the size of the premises at 119 square metres is small but is not a determinative factor either way.

### ***The Layout of the Premises***

[29] The layout is only partly a result of the available space. There are no real aisles with shelving and fridges along the walls and some displays and chest freezers in the middle. Pallets of drinks are stacked on the floor. There are no trolleys although we were advised that two baskets were available.

### ***The View of the Premises***

[30] The Authority took a view of these premises. The advertising on the outside of the shop was reminiscent of a dairy. The focus of the advertising was on ice creams, milkshakes, soft drinks and magazines. The displays inside that were the most prominent were also those that related to ice creams and soft drinks. At the entrance of the shop the first display is in fact a rolled ice cream counter. We were not persuaded from our view that the premises were a grocery store rather than a dairy.

[31] We believe on all the evidence that the business is in all likelihood a dairy. However, even if that is not the case, we only have the power to grant an off-licence to grocery stores where we are satisfied that the principal business is the sale of main order household foodstuff requirements. We are not satisfied that the applicant's premises meet that test. The application is therefore refused.

**DATED** at WELLINGTON this 30<sup>th</sup> day of June 2014

A E Cannell  
Deputy Secretary