[2014] NZARLA PH 847

IN THE MATTER	of 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 Auckland District Licensing Committee to renew the off-licence issued to **ALBANY FOOD WAREHOUSE LIMITED** in respect of premises situated at 139-163 Don McKinnon Drive Albany, Auckland known as "PAK'n SAVE Albany"
BETWEEN	**MEDICAL OFFICER OF HEALTH** (Auckland Regional Public Health Service) Appellant
AND	**ALBANY FOOD WAREHOUSE LIMITED** Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole
Member: Mr D E Major

HEARING at AUCKLAND on 8 October 2014

APPEARANCES

Mr B Northey − for appellant
Mr I J Thain and Ms C D Herbert – for respondent
Mr D L Elvin – Auckland District Licensing Inspector – to assist
Mr M B Couling – for Foodstuffs South Island Limited – interested party (s.204(2)(c))

RESERVED DECISION OF THE AUTHORITY

Facts

[1] By application dated 10 June 2014, the respondent applied for the renewal of the off-licence issued in respect of the premises situated at 139-163 Don McKinnon Drive, Albany, Auckland, known as "PAK'n SAVE Albany".

[2] Neither the Inspector nor the Police opposed the application.

[3] The appellant opposed the application because he considered that the premises did not meet the requirements of s.112(1) of the Act. His letter of opposition dated 9 July 2014 concluded:

> *"The Medical Officer of Health will consider withdrawing her opposition if the end-of-aisle alcohol displays are permanently removed to achieve compliance. Alternatively, she would like to maintain her opposition and wishes to advise that she does not require to present at hearing in this instance."*

[4] There were no public objections.

[5] The Auckland District Licensing Committee ("the DLC") issued a decision dated 2 September 2014. It states that the application was determined on the papers. In the written decision the DLC granted the application although it reduced the trading hours and imposed an additional condition reading:

> *"Only a single area as delineated on the attached plan is permitted area for the display and promotion of alcohol."*

[6] In the decision, the DLC stated that it had reviewed the information provided by the Inspector following a site visit. It considered that s.112 of the Act was not breached. It concluded that the application met the criteria under s.131 of the Act and it noted:

> *"The positive report from the Inspector, lack of any opposition from the Police and the Medical Officer of Health. No requirement for a hearing."*

[7] The Medical Officer of Health remained of the opinion that the single alcohol area within the premises did not comply with ss.113(5)(a) and 112(1) of the Act. Accordingly by notice of appeal dated 17 September 2014, she appealed the entire decision.

The Authority's Decision and Reasons

[8] At the hearing two preliminary points emerged. They required determination before the appeal could be considered on its merits.

Was there a valid decision?

[9] The DLC's decision was a "*papers*" decision. It must have been made in accordance with s.134 of the Act which reads:

"The licensing committee may decide an application for renewal of a licence on the papers if there are no reports opposing renewal, or objections."

Section 134 of the Act is in that part of the Act concerning "*matters that relate to decisions to renew licences"*.

[10] The letter dated 9 July 2014 from the appellant stated categorically that the appellant opposed the application. This was acknowledged in paragraph 3 in the DLC's decision. In these circumstances, in terms of s.134, there was no power to issue a decision on the papers.

[11] Section 202 (in that part of the Act concerning "*General provisions relating to licensing authority and licensing committees*") permits a DLC to grant an application on the papers if there are no objections. The opposition by the appellant does not constitute an objection: see *New Zealand Police v Casino Bar (No. 3) Limited & Ors*, CIV-2012-485-1491; [2013] NZ HC 44 at paragraph [48]. That decision was decided under the Sale of Liquor Act 1989 and paragraph [48] refers to the Police. However, in terms of s.202 of the Sale and Supply of Alcohol Act 2012 the Police and the appellant are treated equally. If s.202 applied, the DLC could have issued a papers decision as there was no objection.

[12] Section 202 does not apply. Section 5 of the Interpretation Act 1999, which requires an interpretation by reference not only to a statute's text but also in the light of its purpose, applies. The purpose of s.134 is that it should only apply to renewal applications. Section 202 applies only to those applications that are not otherwise provided for. There is no other way to reconcile the two sections.

[13] Section 203(1) requires a public hearing in all cases where s.202(1) (and by implication, s.134) does not apply. Section 27 of the New Zealand Bill of Rights Act 1990 imports the concept of natural justice into the proceedings of tribunals. One of the principles of natural justice is that a hearing be held in public. Unless otherwise permitted by s.134, the hearing had to be in public.

[14] The failure to hold a public hearing has the effect of invalidating the decision.

[15] The Authority has limited powers when determining an appeal. It does not have the power to remit a matter back to the DLC. In terms of s.158 of the Act, all it can do is to "*confirm, modify, or reverse the decision under appeal*". As there is no valid decision, there can be no appeal.

Status of Appellant

[16] If there was no valid decision, there is nothing to appeal. There can be no appellant.

[17] The appeal is struck out.

DATED at WELLINGTON this 10th day of November 2014

A E Cannell
Deputy Secretary