

Decision No: N/59/150/2020

IN THE MATTER of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER of application under s.99 and 100 of the
Sale and Supply of Alcohol Act 2012 by
OKTOBERFEST LTD in respect of
premises situated at **4 Eastfield Drive,
Lincoln**, to be known as **Oktoberfest
Restaurant and Bar**.

RESERVED DECISION OF THE SELWYN DISTRICT LICENSING COMMITTEE

Chairperson: Mr G J Clapp
Members: Mrs S Griffin
Mrs R Kilworth

HEARING: at the Habgood Lounge, Lincoln Events Centre, Lincoln
on the 3rd March 2020

PRESENT: **Jan Fryczewski** – Director of the applicant company
Craig White – To assist the applicant
Jason Parmenter – Building Owner representative
Malcolm Johnston – Alcohol Licensing Inspector – to assist
Peter Stills – Police Senior Sergeant – expert witness for the
Licensing Inspector
Paula Williams – Representing the Medical Officer of Health
Linda Hermiston – Objector

INTRODUCTION:

This is an application by Oktoberfest Ltd for an On-licence for premises to be known as Oktoberfest Restaurant and Bar, situated at 4 Eastfield Drive, Lincoln. Oktoberfest Limited is a private company with two directors, Mr Jan Fryczewski who has 25 shares (25%) and his mother Mrs Bettina Fryczewski who has 75 shares (75%).

The premises are situated on the corner of Eastfield Drive which runs north from Edward Street; Southfield Drive runs south from Edward Street. The Eastfield Drive/Edward Street corner has a block of shops that consists of a Laundromat,

Pantry Café and store, décor and gifts, a chiropractor, a 24 hour flexi fitness centre and a boutique. There are other shops that are yet to be leased to tenants. The area is mainly residential. Edward Street is the main street through Lincoln township.

There were no reports in opposition either from the Police or the Medical Officer of Health. However one objection was received from Mrs Linda Hermiston who resides at 289 Southfield Drive, diagonally across Edward Street from the proposed premise. She listed her main concerns as the hours of operation especially on a Friday and Saturday night and the potential effect on the amenity and good order of the locality from noise and behaviour issues that may arise from persons leaving at closing time.

At the instigation of the Licensing Inspector a meeting between the applicant and the objector took place at the proposed restaurant in February 2020 and a number of the issues were discussed. The objector wanted the restaurant to close at 10.00pm except for Friday and Saturday when she wanted 11.00pm closing. The applicant still sought the hours in his application. Mrs Hermiston advised the following day that she wished to proceed with a formal hearing.

Documentation submitted including the application form had an error. The applicant omitted to include the outdoor area in the licensed area and thus an earlier closing time for this area as required in the resource consent provided. The application form stated Sunday to Thursday from 9.00am until 11.00pm and Friday and Saturday from 9.00am until midnight. In the hearing the applicant and his representative spoke of the outdoor area closing at 9.00pm. Indeed, the resource consent requires an 8.00pm close time for this outside area. We are satisfied that the errors were not wilful. Accordingly we grant a waiver under s.208 of the Act.

Police did not make submissions for the hearing and did not appear.

The applicant Mr Fryczewski, of German descent, does not have a great grasp of the English language and has employed Mr White to speak for him.

EVIDENCE OF THE PROPERTY MANAGER:

Mr Parmenter, as the Property Manager for the development company gave evidence on their behalf.

He read from a prepared statement:

Mr Parmenter said that when the building was designed it was to have minimal impact on this new residential community. An example of this was that signage was not to be large or flashy.

The developers believed there was a social responsibility for the company to make sure that there was a good fit with the surrounding community. He stated that they did not want bars with TABs at the venue. He added that they had turned away several people looking to occupy the building and cited one example of an application made for an Off-Licence at the site which drew around 50 objections at the time. They noted the comments on Facebook and went no further.

The plans put forward by the applicant were in keeping with what the developer wanted to achieve for the site.

Cross examination:

Mr White, assisting the applicant Mr Fryczewski, asked Mr Parmenter what was different to Jan compared to other people who had shown interest?

Mr Parmenter replied that he had been dealing with the applicant for about a year and a half when the applicant was initially looking at setting up a Café in another part of the complex. They were keen when Mr Fryczewski spoke of wanting to put in a high-quality establishment. He considered the plans to date to be supporting the developer's requirements for the location.

The objector, Mrs Hermiston asked Mr Parmenter about the efforts made to engage with the residents over the past 2 years?

Mr Parmenter replied that he had not engaged with the residents at all, but said when they saw the comments on Facebook for a prior application they could tell people were unhappy, so they negotiated a way out of the lease. At that time the applicant was still keen to proceed in spite of the objections but the developer was not.

There were no questions in cross examination from the Licensing Inspector, Medical Office of Health or the committee.

EVIDENCE FROM SENIOR SEARGEANT STILLIS – expert witness for the Licensing Inspector:

Senior Sergeant Peter Stills gave evidence as an expert witness for the Licensing Inspector. He stated that he had been a Police Officer for 37 years and for the last 19 years held the rank of Senior Sergeant.

He read from a prepared statement:

From January 2013, until December 2019 he was the Officer in charge of the Selwyn Policing area which has the same geographical area as Selwyn District Council. He had been called by the Licensing Inspector to give expert evidence particularly in relation to sections 105 and 106 of the Act.

His role included the delivery of a wide range of frontline policing services, from the coordination of deployment of emergency response resources through to investigating offences and public safety.

In the seven years based in Selwyn he had developed a good understanding of the various policing issues and challenges around the district. He believed that he had also developed a good working knowledge of the licensed premises around the district. He regarded alcohol related harm as an issue and in this respect hotels and taverns were where police tended to find most issues. From time to time they did have some issues around some of the other premises. Where a premise becomes a persistent issue for Police or the community his practice has been to sit down with

the licensee and resolve the issues through effective dialogue. He also liked to stay 'across' new licensed premises that become established around the district.

Senior Sergeant Stills said that he was aware of the new retail development in Lincoln on Eastfield Drive. He was also aware of the proposed restaurant seeking to establish itself in that location and now seeking an On-Licence. He said that the development resembled the Farringdon (Rolleston) development to some extent. He believed from what he had seen of the plans, that this Restaurant will be similar to the Pedal Pusher in Farringdon, in terms of size, customers, hours of trading and proximity to residential housing.

From a Police point of view Lincoln restaurants do not cause Police issues with noise, drink driving, vandalism or disorder. Police would rather see locals consuming alcohol with food, rather than just drinking at a hotel. There may well be some isolated incidents, but by and large it is expected to be similar to the Pedal Pusher. Police have had no issues there and similarly they do not expect to get any issues around the proposed restaurant.

Cross examination:

Mr White asked Senior Sergeant Stills if in his experience, would the amenity and good order be reduced by more than a minor extent if the restaurant was granted a licence?

Senior Sergeant Stills answered; No.

Mr White asked if nuisance and vandalism issues would increase by more than a minor extent?

Senior Sergeant Stills answered; No.

Mrs Hermiston asked Senior Sergeant Stills if in his experience a licence is granted for longer hours would there be more alcohol related harm?

Senior Sergeant answered by saying if closing was between 11:00 p.m. and midnight then; No. However, if it was to close at 5:00 a.m. then; Yes.

Mrs Williams representing the Medical Officer of Health asked Senior Sergeant Stills if students in the Selwyn area, in Lincoln, were attracted to restaurants like in the same way as they are with bars?

Senior Sergeant Stills answered; No.

Mrs Williams also asked if in his experience did he think this premise will attract students?

Senior Sergeant Stills replied; I have a good knowledge of the students and their activities and I can't see this attracting them. They tend to go to taverns and hotels, particularly the ones that run specials or offer an incentive to go there. At the moment they show no interest in a restaurant.

The committee asked Senior Sergeant Stills:

Is alcohol a greater problem for smaller populated districts?

His response; I would say lesser for this district.

What did he put that down to?

He answered that most of the premises in Selwyn were well managed and have good cultures. Most premises have a courtesy coach for getting patrons home safely. The premises in this area that he has had trouble with are usually poorly managed or run.

What would you call a neighbourhood restaurant and in your view how are they managed?

He answered that he was in favour of a community restaurant provided there was food available. They are supported by the local community and are usually well managed. In his time in Selwyn restaurants have not caused any issues. He believed that this development was always going to have a restaurant there.

Would you regard the area around Rosemerryn as vulnerable?

He answered; No, not in relation to social harm.

How would you describe the demographics of the area, where you have upper middle class and generally both parents predominantly in work?

He considered that it was a functioning community with good infrastructure. Issues in Lincoln were predominantly around dishonesty, normally poor security.

You talk about The Black Door, Pedal Pusher and Two Fat Possum, have you had any issues with noise at these premises?

He answered; No.

Are the hours in the Local Alcohol Policy (LAP) suitable?

He answered; I believe so.

How would you describe the amenity and good order around the area?

He answered; it was difficult to comment but not a risk to us (Police).

Would you see the area as family friendly?

He replied; very family friendly, very safe.

EVIDENCE ON BEHALF OF THE APPLICANT MR FRYCZEWSKI:

Mr White, a consultant with 32 years in the Hospitality industry, represented Oktoberfest Limited for Mr Fryczewski at the hearing and read from a prepared statement.

He gave evidence that Mr Fryczewski was a chef by trade and had been involved in the hospitality industry as a chef all his working life. Jan has a passion for food and cooking, and his dream for many years has been to open a German style restaurant where he can showcase the dishes of his homeland. In terms of the word "*Oktoberfest*", he said this Oktoberfest will be a venue that the local community comes to for a relaxed lunch or dinner and to sample some great German cuisine as well as some Kiwi classics.

He further stated that the focus will be on food and he referred to the substantial menu submitted with the application. There was also a beverage menu with a range of beer, wines and spirits and an extensive range of non-alcoholic drinks.

The proposed hours applied for were Sunday through to Thursday from 9.00 a.m. until 11.00 p.m. On Friday and Saturday from 9.00 a.m. until midnight. The outside area would be from 9.00 a.m. until 9.00 p.m.

Reference was made to three other similar type premises in relation to trading hours, within the Selwyn District:

- **The Black Door Bar and Eatery**, Lincoln, Monday to Sunday 8:00 am until midnight.
- **The Pedal Pusher**, Rolleston, Monday to Sunday 8:00 am until midnight. The outside areas allow for public access until 10:00 pm.
- **Two Fat Possums**, West Melton, Sunday to Thursday 8:00 am until midnight and Friday and Saturday 8:00 am until 1:00 am (the following day).

The only objector, Mrs Linda Hermiston, lives diagonally across the road from Oktoberfest. Mrs Hermiston's grounds for objection are based on the following:

- The days on which and the hours during which the applicant proposes to sell alcohol.
- The provision of services other than those directly related to the sale of alcohol, low alcoholic refreshments, non-alcoholic refreshments and food.
- The effect of amenity and good order of the locality.

Mr White told the committee that this would be a family friendly restaurant focused on serving food to the local and wider community. Alcohol will be served at the venue to accompany the food on offer. He believed that noise and vandalism issues at licensed premises were generally caused by people consuming too much alcohol. Staff at Oktoberfest will be trained to identify any customer who is displaying signs of being influenced by alcohol and that any such customer would be dealt with accordingly as per their host responsibility policy. As most customers will be local and have a vested interest in the area, there should be little concern for noise or vandalism.

Food will be the number one focus for Oktoberfest with a substantial menu available and a range of alcoholic and non-alcoholic drinks. The only music available will be background music that will be in keeping with the majority of licensed restaurants.

Control over patron's noise levels when they leave the premise could lead to isolated incidents of noise but this should not reduce the amenity and good order of the locality by more than a minor amount. There was no direct evidence that Mrs Hermiston's main concern - patrons leaving the venue late and making a noise that will interrupt the sleeping patterns of neighbouring residents – would be an issue.

Noise from customers leaving later in the evening would be no different to existing noises from the main street.

The premise is double glazed and a large glass screen will be erected to help reduce the noise from outside diners. On the application the applicant had asked for use of the outside area until 9:00 p.m. However, he now understands from information provided to the hearing, that the Resource Management requirement is that the outside area may only be used up until 8:00 p.m.

In conclusion Mr White summarised that his client would like a similar opportunity to that of other licensed restaurants within the Selwyn District and to demonstrate that he is a responsible licensee. He will be directly involved in the day to day running of the business and has offered to give residents his telephone number so they can contact him directly if they have any concerns. The granting of the licence would be for a year therefore there was an onus on the applicant during that time to prove to customers and the community that he is a good operator.

Cross examination:

Mrs Hermiston asked Mr White if his client was aware that a Special Licence was required if the premise needed to run later?

He replied that Mr Fryczewski was aware, but that there was a cost as well as a limited time frame for Special Licence applications. Jan did not plan to have any last-minute events or functions.

The Licensing Inspector, Mr Johnston put it to Mr White that he would be aware that a Special Licence cannot grant hours beyond the hours of the resource consent. He then asked Mr White to tabulate the steps taken by the applicant to reduce noise. Mr White replied that there is double glazing, insulation, a glass frontage to be put around the outside area to reduce noise, that doors from the restaurant to the outside area will be shut after 8:00 pm (not 9.00 pm as incorrectly stated) to keep patrons inside the premises.

Following a meeting between the applicant, objector and the Inspector, it had been agreed that Mr Fryczewski would supply a telephone number so that residents could ring him if there was any disturbance. A sign would also be placed on the windows for patrons exiting the premises with a request; "When leaving the premises please respect our neighbours".

Ministry of Health representative, Mrs Williams asked Mr White where exactly was the smoking area going to be?

He replied; on the corner of Eastfield Drive.

Mrs Williams advised that a lot of complaints around bars comes from smoking area and had the applicant considered going smoke free?

Mr White replied; no he hadn't.

Mrs Williams responded; well there is an opportunity.

The committee then cross-examined Mr White:

If the Restaurant was fully booked and other patrons arrived would there be enough parking in the shopping complex?

He replied that there were several car parks in the complex but that there was also some parking on the road. Any event organiser would be advised of available parking and of managing noise levels.

At this time the committee requested the applicant Mr Fryczewski be sworn in to answer questions.

Mr Johnston asked the applicant about the type of beer that would be for sale at the restaurant.

He replied that some will be both imported beer and local beer.

Mrs Williams asked if you are the chef, who will manage the bar when you are on days off?

He replied that he will have duty managers employed at the restaurant.

The committee asked the applicant to confirm that his application under the provisions of Section (10) (d), the hours requested and Section (10) (d) on which days and during which hours the applicant intend to sell alcohol under the licence - he has stated Sunday to Thursday from 9:00 am until 11:00 pm and Friday and Saturday from 9:00 am until mid-night. There is no mention of the outside area being used as a licensed area. Could the hours sought for the application be clarified?

Mr White assisted and told the committee he believed the hours were submitted with a floor plan.

When pointed out by the committee that the Resource Consent would only allow the outdoor area to operate until 8:00 pm, Mr White told the committee that this was his mistake. For clarity, the application should also read Outside Area Monday to Sunday from 9:00 am until 8:00 pm.

The applicant was asked if the outside area is the smoker's area, how will he ensure that no drinks will be outside after 8:00 pm?

The applicant explained that when the outside area is the smokers' area after 8.00 pm, there will be signs and that staff will monitor the area. The doors are also for egress.

The applicant agreed that he would have an incident book, manager's guide and a bar code. When asked if he had brought them to the hearing; he replied No.

Mr Fryczewski was asked how having these resources would allay the objector's concerns?

He replied that he wants to be the best licensee possible. An incident book means they can keep records. He wants to know what's going on at his restaurant especially when he is not there. When questioned further he said that he intends to record staff meetings and trainings. The applicant and his manager will run the training for staff. He will be having monthly staff meetings.

When asked his thoughts on the current amenity and good order in the area?
He replied that it is very nice area. He lives in Selwyn with his wife and son.

When asked what percentage of food he predicted would be served?
He replied 50 - 60%. He told the committee that the restaurant will be concentrating on food and that there was an expensive fit-out.

When asked to explain his management style?
He replied that he was tough and liked things to be done correctly. He would not tolerate any drunkenness. He would not tolerate staff giving away drinks to their friends. He has his life savings and house on this venture and he needs it to succeed. He is prepared to work 16 hours per day to make this work, if this is what it takes. He won't be losing it by stupid nonsense.

When asked who the responsibility lies with during licensing hours, he was quite clear it was with him.

Mr Fryczewski was asked what he expected to see recorded in an incident book?
He replied all incidents including people drunk and being refused service. The clientele will be middle to upper class. He did not want to attract students. He told the committee that he intended to put glass around the outside area to keep noise down for the residents and also act as shelter.

The applicant told the committee that there would be very little signage around the building and that it would be small in size. The tables outside for dining will not block the exit way highlighted in the Resource Consent.

Mr Fryczewski was asked what actions he would take if the noise levels outside became annoying to neighbours?
He replied he would out check the noise and if necessary close the outside area earlier. There will also be security cameras in and around the building.

EVIDENCE OF THE OBJECTOR MRS HERMISTON:

The objector, Mrs Hermiston, told the committee that she first knew of the application for an On-Licence via social media. She said that it would be disturbing that if the On-Licence went ahead, it would be one year before another objection could be lodged. She objected via the Council web site.
On social media people were discouraged from objecting and told to make suggestions only.

Mrs Hermiston then read her prepared statement.

Mrs Hermiston said that the area was a mixed-use zone where properties were valued higher than those in and around the other eateries that had been referred to. Because other people didn't lodge an objection they couldn't be heard today.

She was very pleased to be having a new Restaurant in the area but concerned about the impact it may have on the area. She believed the hours applied for were

too long. A petition was produced from residents. None of these people was speaking in support of her objection.

Mrs Hermiston believed that the licence should be from 9:00 a.m. until 10:00 p.m. Sunday to Thursday and from 9:00 a.m. until 11:00 p.m. on Friday and Saturday and that if the applicant wanted to go longer then a Special Licence could be sought.

Cross examination:

By the Applicant:

You talk about discouraging objections, who was this?

Mrs Hermiston replied that she didn't know but it was on social media.

You have concerns around the hours, what are your main concerns?

I have 2 children and a husband that is a fireman so if on a Friday and Saturday if the licence is to mid-night and patrons leave between 12:30 am and 1:00 am it can be disturbing.

So, it's noise essentially?

Yes, noise and disturbance. Hopefully you are booked out, we would love that but it's the noise.

When asked if its car noise or what?

She replied; anything that disturbs us.

The Objector said that over time patterns have changed, people do not always dine at 6:00 pm - 7:00 pm these days. Who knows how many times Jan would be open until mid-night? He doesn't want to be turning people away. That's why she wants to have that security.

Mr White said he didn't want to sound disrespectful but did neighbours ever have people over late with BBQ's. She replied; I think once in three years.

By the Inspector:

The Inspector asked Mrs Hermiston if she could describe the amenity and good order around the area at the moment?

She replied; it's very good.

Did Senior Sergeant Stills have any concerns around the area?

She replied; no, I respect him around the district, but he hasn't given me any assurances around the amenity and good order if the licence goes ahead.

By the Committee:

Mrs Hermiston was asked if her home had double glazing?

She replied that it did. She also added that the property had fencing and plants around it. She also agreed that this would go some way to reducing levels of noise. She does have issues with noise at 11:00 pm at night.

When asked if there were noisy vehicles at all along Edward Street?

She replied; yes on occasions. She added that two points of the objection had been covered with the applicant at a meeting on the 10th February 2020. She took them at their word example there would be no Karaoke nights and quiz nights which would attract the wrong element.

Mrs Hermiston said she believed that everyone should be gone from the premises by 10:00 pm during the week.

She was asked if she had visited the premises mentioned earlier, The Blackdoor Bar and Eatery, The Pedal Pusher and Two Fat Possum?

She replied that she had visited all the named venues. When visiting the Pedal Pusher, she spoke to a neighbour who said that they had had no trouble with noise issues.

It was put to Mrs Hermiston that if a licence was granted for a high-end restaurant would that be a benefit to the community?

She agreed it would.

EVIDENCE OF THE INSPECTOR:

Licensing Inspector, Mr Johnston read his prepared statement.

He told the committee about the other businesses in the shopping complex and provided a map of the area.

The applicant was seeking conditions consistent with an On-Licence for a Class One Restaurant. He considered the sale and supply of alcohol under these conditions is consistent with the purpose of the Act and meets the criteria of Sections 105 and 106 of the Act.

He had interviewed the applicant Mr Fryczewski on 21 November 2019. The applicant is one of two company directors for Oktoberfest Limited and has a 25% shareholding. The company was incorporated on 21 August 2019. The other director is Mr Fryczewski's mother Mrs Bettina Fryczewski, who has a 75% shareholding in the business.

The applicant will be actively involved in the day to day running of the Restaurant. He is new to the hospitality industry and has started the process of obtaining a Manager's Certificate. He intends to employ experienced managers to assist him.

He understood the applicant was selected by the developers because the proposed restaurant is a more 'high-end' restaurant, which the developers felt was in keeping with the high standard of residences in this suburb. Certified managers would be employed and there would be a duty manager working at all times the restaurant is

open. At this stage the applicant has not employed staff as he is waiting until he has a clear indication of when the restaurant will open.

The application complies with the Local Alcohol Policy. The Council has confirmed that the use of the premises as a licensed restaurant is consistent with the resource consent that has been issued.

The applicant has completed a statement stating that the owner of the building provides and maintains an evacuation scheme as required by Section 76 of the Fire and Emergency Act 2017. A copy is attached to the application.

A GIS map showing sensitive sites indicated only one sensitive site within 500 metres, namely *Whippersnappers Early Learning Centre*, situated at 53 Edwards Street. The Centre is some 100 metres from the restaurant. The restaurant was not expected to pose any issues for, or impact upon the Early Learning Centre.

The committee was told that the required public notices with regard to the application were placed appropriately. As a result, there was one public objector who lives across the road from the premises some 40-50 metres away.

The Inspector said that the public may object to new licences dependent on whether they come within the class of persons described in Section 102 of the Act, which he explained.

The Licensing Inspector stated that geographical proximity is accepted as one of the key considerations to determine whether the proposed objector has a greater interest in the application than a member of the public generally. The Inspector believed Mrs Hermiston has the standing to object and her objection relates to s.105(1) of the Act. The objection is based around the days/hours of trading (Section 105(1)(d)) and amenity in good order (Section 105(1)(h)).

Mrs Hermiston, in her objection, raised concerns in relation to the hours of trading and the potential impact that persons leaving later in the evening would have on the amenity and good order of the area. The objector believes an earlier closing time would reduce the risk of any potential noise or nuisance from these patrons.

The Inspector arranged a meeting between the applicant and the objector in an attempt to discuss the issues between the two parties. The meeting was held at the proposed restaurant on Monday 10 February 2020. The Inspector stated that the applicant summarised what he was hoping to achieve, his vision for the restaurant, and how the restaurant will operate. The objector articulated her concerns about the hours of operation and the potential noise and behaviour issues that may arise. Mrs Hermiston confirmed the following day that she wished to proceed with a formal hearing. She confirmed she preferred the restaurant to trade up until 10:00 pm from Sunday until Thursday and to 11:00 pm Friday and Saturday evenings. The applicant still sought the hours in his application.

In the course of making enquiries into the application, Senior Sergeant Stills told him that he had no concerns around the likelihood of noise, nuisance or vandalism increasing in the area around the proposed restaurant – certainly not more than a minor extent.

Three existing restaurants had a similar setup to the proposed restaurant, and like Oktoberfest, were directly adjacent to residential housing. They were (a) the Blackdoor Bar and Eatery, Lincoln, Monday to Sunday 8:00 a.m. until midnight, (b) the Pedal Pusher, Rolleston, Monday to Sunday 8:00 a.m. until midnight. The outside areas allow for public access until 10:00 p.m and (c) Two Fat Possums, West Melton, Sunday to Thursday 8:00 a.m. until midnight and Friday and Saturday 8:00 a.m. until 1:00 a.m. (the following day).

Cross examination:

By the Committee:

The Inspector was asked, with the objector believing that an earlier closing time would reduce the risk, do you believe the risk would be low or minimal?
He replied; Yes.

Would he agree that the reduction of minimal risk would be no risk at all, again he agreed.

When asked if he had sighted the proposed Incident book?
He replied; No.

He told the committee that he expected to see two – three duty managers on duty at any time.

In his opinion there was probably only one high end restaurant in Lincoln, that being The Blackdoor Restaurant.

Mr Johnston commented on the area being a mixed-use zone and was asked by the committee to explain what that was.
He advised it was a combination of a residential area and retail development area.

The gym situated within the retail area operates for 24 hours. When asked if there could be car doors banging and chatter all night, he agreed that there could be.

CLOSING SUBMISSION FROM THE APPLICANT:

Mr White, on behalf of the applicant reiterated that the licence had not been opposed by any of the three reporting agencies but rather, Senior Sergeant Stills as an expert witness had commented that Restaurants in Lincoln did not cause issues for the Police in relation to noise, drink driving, vandalism, or disorder. Nor did he believe that the current and possible future levels of nuisance and vandalism would be increased by more than a minor extent should the licence be granted.

Mr Fryczewski had been proactive and had put measures in place to safeguard against noise and vandalism. He had installed double glazing, noise insulation and stated that the only entertainment would be soft background music. There will be signage on the doors reminding customers to respect neighbours and leave in a quiet manner.

He is part of the Selwyn Community and is committed to providing a venue for the local community to come for a relaxed lunch or dinner and sample great German Cuisine as well as some kiwi classics.

Mr Fryczewski wanted to be able to trade with similar hours as other restaurants in similar neighbourhoods and to demonstrate that he is a responsible licensee.

CLOSING SUBMISSION FROM THE INSPECTOR:

The Licensing Inspectors submits that the key issues at the heart of this hearing revolve around two criteria in Section 105(1) of the Act and s.106(1). Simply put the key issues relate to potential noise, nuisance and vandalism in this locality if the licence is granted.

Other restaurants in the Selwyn District comparable to the proposed Oktoberfest Restaurant were also similar in terms of their proximity to residential housing and three examples had been provided. There is a clear precedent in the Selwyn District that restaurants close to residential housing have been allowed to trade until midnight on Friday and Saturday evenings. Senior Sergeant Stills in his evidence confirmed the lack complaints or issues at any of these three restaurants.

The legislation is clear in respect to the central issue of this case. Section 105(1)(h) asks the decision maker to consider “whether the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of this Licence”. The unchallenged evidence of Senior Sergeant Stills is telling. He is a subject matter expert who is qualified to comment about the likelihood of noise, nuisance and vandalism in this area.

The Licensing Inspector is of the opinion that any reduction in the amenity and good order to more than a minor extent is not likely, and any reduction would not amount to more than a minor extent.

CLOSING SUBMISSION FROM THE MEDICAL OFFICER OF HEALTH:

The Medical Officer of Health is not opposed to this application.

The Medical Officer of Health cannot oppose an application once no opposition has been lodged, and the reporting timeframe has expired.

2015 ARLA PH 84 - Mavra Limited v Parampreet Singh Parihar and Jasjeet Singh Parihar refers.

In this instance following the hearing, the Medical Officer of Health remains satisfied with the no opposition report, however closing submissions on behalf of the Medical Officer of Health were provided to assist the committee.

Evidence was heard regarding the assessment criteria which the Committee must have regard to when considering this application. The Committee heard evidence from the agent for the applicant, the applicant, the objector, and the Licensing Inspector.

The Committee heard valid concerns from the objector - that the noise will reduce the amenity and good order to an extent that her sleep may be disturbed.

The applicant in cross examination outlined a variety of ways to ensure compliance with his application commitments and resource consent conditions relating to noise levels, and that he was agreeable to maintain open conversation with neighbours.

It is her recommendation to the Committee that the applicant formalise the strategies he outlined at the hearing in respect of s.106(1) into a noise management plan, and that this plan forms part of staff training to ensure compliance.

It will be for the Committee to determine whether that noise management plan is required and whether the plan becomes a condition of the licence should the Committee be of a mind to grant the licence

CLOSING SUBMISSION FROM THE OBJECTOR:

There were no closing submissions received from the objector.

DECISION AND REASONS:

- [1] The legislative framework for the issue of licences is set out in sections 105(1) of the Act and some of these are the matters that the Committee must take into account in determining whether to renew a licence.

Section 105(1) provides as follows:

“105 Criteria for issue of licences (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.”*

- [2] Section 106(1) provides:

"106 *Considering effects of issue or renewal of licence on amenity and good order of locality:*

- (1) *In forming for the purposes of section 105(1)(h) an opinion on whether the amenity and good order of a locality would be likely to be reduced, by more than a minor extent, by the effects of a the issue of a licence, the licensing authority or a licensing committee must have regard to –*
- (a) *the following matters (as they relate to the locality):*
 - (i) *current, and possible future, noise levels:*
 - (ii) *current, and possible future, levels of nuisance and vandalism:*
 - (iii) *the number of premises for which licences of the kind concerned are already held; and*
 - (b) *the extent to which the following purposes are compatible:*
 - (i) *the purposes for which land near the premises concerned is used:*
 - (ii) *the purpose for which those premises will be used if the licence is issued."*

[3] Section 3 of the Act describes its purpose:

"3 Purpose

- (1) *The purpose of Parts 1 to 3 and the schedules of this Act is, for the benefit of the community as a whole,—*
- (a) *to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2); and*
 - (b) *to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act.*
- (2) *The characteristics of the new system are that—*
- (a) *it is reasonable; and*
 - (b) *its administration helps to achieve the object of this Act."*

[4] The object of the Act is set out in s.4 as follows:

"4 Object

- (1) *The object of this Act is that—*
- (a) *the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and*
 - (b) *the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.*
- (2) *For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes—*

- (a) *any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and*
- (b) *any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a)."*

[5] There are several important definitions relevant to us:

- (i) The term "*alcohol-related harm*" is defined by s.5(1) of the Act.

"alcohol-related harm—

- (a) *means the harm caused by the excessive or inappropriate consumption of alcohol; and*
- (b) *includes—*
 - (i) *any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and*
 - (ii) *any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in subparagraph (i)."*

- (ii) The term "*amenity and good order of the locality*" is defined by s.5(1) of the Act.

"amenity and good order of the locality, in relation to an application for or for the renewal of a licence, means the extent to which, and ways in which, the locality in which the premises concerned are situated is (or, in the case of a conveyance, the localities where the conveyance is likely to travel are) pleasant and agreeable."

[6] ***How we see our task in the light of the law:***

- (i) Our role is an evaluative one, in an inquisitorial sense. That is to say we are required to evaluate all the evidence before us, both in support of the applications and in opposition to the applications.
- (ii) After evaluating the evidence, we must make a merits-based determination as to whether or not the applications should be granted.

- (iii) We must have regard to the matters in section 105(1). This in turn requires us to have regard to the matters in section 106(1).
- (iv) To "*have regard to*" as a requirement means what it says. We do not have to give effect to anything and if, after having regard to a criterion, we conclude nevertheless to grant or refuse the applications that is permissible.
- (v) The weight we give to evidence is a matter for us realising that no party has any onus of proving anything.
- (vi) Whilst we must have regard to all criteria there will be some cases where some matters are so fundamental, they assume an elevated mantle – here we think the following matters have assumed a fundamental significance:
 - a. the object of the Act;
 - b. the amenity and good order of the locality
- (vii) While we do not have to consider section 3 separately, so long as we are reasonable in our evaluations, we likely will achieve the two aspects of the section 4 object. We approach section 4 on the basis that our decision must be consistent with both aspects in subsections (1)(a) and (1)(b).
- (viii) We must stand back at the end and reassess our earlier conclusions against attainment of the section 4 object. These two elements – the safe and responsible sale and supply and consumption of alcohol, and the minimisation of alcohol related harm – are equally important, are not to be balanced, and have precedence over the economic/commercial interests of a licensee.
- (ix) There is no presumption of an applicant having the right to a licence. The grant of a licence is a privilege.
- (x) The role of the reporting agencies is important to the licensing process and their evidence cannot and should not be ignored. A Committee is entitled to accord weight to an absence of concerns and a united lack of opposition from all agencies.
- (xi) We are required to form opinions on whether or not we consider the amenity and good order of the Lincoln locality would be likely to be reduced by more than a minor extent by the effects of the issue of the licence – in doing so we are guided by s.105, the extent to which and the ways in which the locality is pleasant and agreeable and having regard to the matters in s.106(1)(i) of current and possible future nuisance and vandalism and s.106(1)(ii) of the number of premises for which licences of the kind concerned are already held.
- (xii) In relation to conditions, we have a wide discretion (s.110) which is constrained by the need for any conditions we consider to be

reasonable, proportionate, and likely to ameliorate a risk we might identify and achieve an identifiable benefit.

- (xiii) If we conclude that granting the application would be consistent with section 4 – the object of the Act – we may impose any or some of the agreed suite of undertakings and/or any conditions if we consider granting the application is consistent with the object of the Act and the imposition of undertakings or conditions will enhance that consistency. What we think that means in this case is that before we consider the undertakings accepted by the applicant, and reiterated by the applicant we must first have come to a conclusion that the Applicant is eligible to have its On-licence granted consistent with section 4 (and the other criteria). If we do not reach that positive position, we need not consider the proposed undertakings or any conditions at all. If we reach positive conclusions on the criteria and section 4 then we need to turn to the agreed undertakings and to any conditions.

DISCUSSION:

In terms of relevant case law two decisions stand out:

Hayford v Christchurch District Licensing Agency (HC AP201/92 3 December 1993) where Holland J said “*A holder of a liquor licence under the Sale of Liquor Act is granted a privilege. It permits him to sell liquor when others are not permitted to do so*”.

And

A 2018 Wellington case provides guidance around objector’s evidence relating to potential amenity and good order issues and how the decision maker deals with that evidence.

Shady Lady Lighting Ltd & Rakesh Patel –v- Lower Hutt Liquormart 2018 NZARLA 198-199 at paragraphs 67 – 70

Mr Sherriff, for the appellants, has submitted that in reaching its decision about whether the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence, the DLC (and now the Authority) must form an opinion. The Authority agrees. As Heath J said in *Venus38* at [57]:

“... s 105(1)(h) and (i) of the 2012 Act, both of which deal with “amenity and good order” considerations, requires the Authority to form an “opinion”. The need for a judicial body to form an independent opinion is conceptually different from a decision that is based on whether or not an applicant has established on a balance of probabilities that a relevant fact has been proved.”

Moreover, unlike the other criteria in s105(1), paragraphs (h) and (i) expressly require a decision-maker to form an opinion. This is reinforced by the wording of s 106(1) and (2). Contrary to the submission by counsel for the respondent, however,

as already stated by Heath J, in considering the evidence when forming this opinion, objectors do not need to provide evidence at close to the criminal standard or even on the balance of probabilities.

The requirement for a decision-maker to form an opinion about the effect of the issue of the licence (or renewal as the case may be) on the amenity and good order of the locality requires a decision maker to reach a conclusion on that matter when it is fundamental or critical to the application, before or when undertaking its overall evaluation of the matters in s 105(1) against the risk of alcohol-related harm arising from the issue of renewal of the licence. In doing so, the decision maker is able also to ensure that he or she has correctly understood the matter. In the present applications, the DLC does not draw any such conclusion but merely states:

Whilst we understand the speculative concerns of the objectors, in order to meet the object of the Act, we are granting the licence for one year only in order for the Appellant to prove that he manages the premises to a high standard, in line with the requirements of the Act.”

By not forming an opinion in this way, the DLC has erred.

All that the objector needs to do is raise their concerns. In regard to the Oktoberfest application, the objector has raised her concerns. She does not have to prove the noise, nuisance or vandalism will occur, not even on the balance of probabilities. She just needs to raise the concerns and the Committee must evaluate those concerns based on the evidence they have heard during the course of the hearing. Not only does the Committee need to evaluate the objector’s evidence but they also need to assess all the evidence and weigh that against all the criteria of 105(1) and 106(1) of the Act. They must satisfy themselves that all the criteria are met.

One of these decisions was made under the previous legislation but is relevant to this hearing where the new legislation has corresponding provisions.

- [1] Having set those statutory provisions and the guidelines from case law as to the correct approach we will now proceed to discuss the application and the evidence in the light of those considerations.
- [2] We can immediately dispose of some of the non-controversial criteria and considerations. We are satisfied, from our consideration and evaluation of the evidence, that this application raises no concerns in relation to the considerations set out for us in section 105(1) –
 - s.105(1)(b) – suitability of the applicant
 - s.105(1)(c) - any local alcohol policy
 - s.105(j) - appropriate systems, staff, and training to comply with the law.
- [3] We are minded that the agencies did not report in opposition in respect of the Applicant and his company. They are satisfied that Mr Fryczewski will be a competent hands-on licensee.

- [4] The opposition that has been conveyed either verbally or in writing to the Committee by the Objector, Ms Hermiston focuses on;
- (i) The hours of operation. Mrs Hermiston in her objection raised concerns on the hours of trading and the potential impact that persons leaving later in the evening would have on the amenity and good order of the area.
 - (ii) The amenity and good order of the area should the On-Licence be granted, in regard to nuisance and vandalism factors and the number of premises for which licences of the kind concerned are already held; and
 - (iii) s.105(1)(a) and s.4 – the object of the Act.
- [5] We propose to discuss the application under those topics in that order.
- [6] Commitments made covered matters raised during the hearing, including from Mr Fryczewski's and the Licensing Inspector's evidence at the hearing, matters raised by Mr White and from the meeting 10 February 2020, attended by the applicant, objector and the Licensing Inspector. This meeting did not cause the objector to withdraw her objection.
- (i) Design and layout of premise interior was discussed by Mr Fryczewski as well as his vision for the Restaurant.
 - (ii) There would be soft background music only
 - (iii) Exterior signage would be minimal.
 - (iv) Mrs Hermiston articulated her concern around the proposed hours of operation and the potential noise and behaviour issues that may arise.
- [7] The Committee found the position taken by Mr Fryczewski to be realistic and in our opinion, he has displayed an ongoing spirit of co-operation and commitment to involve the community.

Whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence.

- [8] In *Progressive Enterprises Ltd v North Shore City Council* (2005) 11ELRNZ 421, [2006] NZRMA 72 (HC), the Court considered the meaning of "minor" in the context of the Resource Management Act 1991 and concluded that it must bear a meaning consistent with the general policy of participation which lies at the heart of the Resource Management Act. The Court considered that the dictionary senses of "petty", "comparatively unimportant", "relatively small or unimportant.... of little significance or consequence" captured the legislative purpose.

- [9] The applicant and indeed, those we heard from within the community acknowledge that the locality around the proposed premises is agreeable and pleasant. Lincoln is enjoyed by long term residents and families, tourists and visitors to the area.
- [10] We have been guided by having regard to the matters in s.106(1)(ii) of current and possible future nuisance and vandalism. Mr Fryczewski is not aware of complaints of nuisance and vandalism in the immediate vicinity. The expert witness from the Police supported this stance.
- [11] We noted Mr Fryczewski's initiatives and willingness in offering to look after the area. He has said that there will be only background music. The building is to be double glazed to reduce noise levels. Patrons can not use the outside area after 8:00pm when the door to this area will be closed and that there will be signage asking patrons to respect neighbours when leaving the premises. He has made a further commitment that he will give neighbours his telephone number so they can contact him if there were to be any issues. The MOH representative suggested that Mr Fryczewski formalise the strategies he outlined at the hearing into a noise management plan which could form part of staff training. We are of the opinion that this could be produced during any initial licence period as learnings are made by the licensee and his managers.
- [12] Currently there is not an issue with noise levels and it is not inferred that the proposed business is likely to affect noise levels adversely going forward.
- [13] The MOH representative, Police and the Licensing Inspector did not report in opposition. The Licensing Inspector views the premises as a high-end restaurant looking to service the wider area of Lincoln. The applicant also wishes to cater for family groups with children. The Inspector reported that an Early Learning Centre named, '**Whippersnappers**', is about 100 metres away but the proposed restaurant is not expected to pose and issues for, or impact upon, this Early Learning Centre.
- [14] It is our opinion for the reasons discussed after evaluating the evidence and the matters in s.106(1)(a) in particular, that there will be an increase in amenity and good order through this applicant company operating a Licensed Restaurant at the proposed location.

THE OBJECT OF THE ACT

- [15] Our approach to section 4 has been on the basis that our decision must be consistent with both aspects in subsection (1)(a) and (1)(b).
- [16] We have made a merits-based determination as to whether or not the application should be granted. We have had regard to the matters identified in section 105(1) and in turn with matters in section 106(1)(a)(ii) and (iii). We have had regard to the matters which we considered held a fundamental

significance. We understand that our role is an evaluative one, in an inquisitorial sense.

- [17] The Applicant demonstrated positive experiences to this application. He has also displayed a corresponding acceptance of individual and company responsibility, demonstrating to the Committee that the holding of these licences is indeed viewed as an earned privilege and not a right.
- [18] The lack of matters of concern from the agencies coupled with an assessment of the past and potential issues raised give rise to an inevitable conclusion for us in terms of future risk. In our opinion the sale and supply of alcohol will be undertaken safely and responsibly at the proposed restaurant with the grant of this On-Licence.
- [19] The Licensing Inspector and the MOH representative have reported that they do not believe that there will be an increase in the level of alcohol related harm in the area through the establishment of this restaurant.
- [20] We have accorded weight to the united lack of opposition and lack of concern of the reporting agencies. We are persuaded by the report and evidence by the Licensing Inspector that is convincing and cogent - including licence conditions which were not challenged. It is our view that there is no doubt that there is an adequate understanding, of the safe and responsible sale and supply of alcohol for the proposed premises to operate within the Object of the Act.
- [21] In our opinion, the premises do not present an elevated risk picture – the sale and supply of alcohol should be undertaken safely and responsibly. We are satisfied that any alcohol related harm from the excessive and inappropriate consumption of alcohol that may be attributed to the introduction of this licensed premises will be minimised.

SUMMARY

- [22] For the reasons outlined and summarised we find this applicant is suitable to hold an On-Licence under the Act.
- [23] We stand back and we weigh everything before us. We conclude this Applicant is able to comply with the object of the Act. In particular – we are satisfied that:
 - (i) The sale and supply and consumption of alcohol would be undertaken safely or responsibly in the future at the Restaurant;

AND

- (ii) That harm caused by excessive or inappropriate consumption of alcohol would be minimised if we grant this On-Licence for this applicant.

- [24] As we have concluded that the Applicant is able to comply with the object of the Act, consideration of the licence conditions for an On-Licence is open to us.
- [25] We accept the commitments given and the licence conditions provided and have factored these into our evaluation.
- [26] The Committee unanimously determined to grant the application for the On-Licence to Oktoberfest Ltd for the premises to be known as Oktoberfest Restaurant and Bar and Restaurant, Lincoln, with the following agreed conditions and licence conditions, for a period of 12 months.
- [27] The Committee refers to the ARLA Lyger decision and its stance on the object of the Act. The Committee reiterates that there was no question of any pre-determination. We reinforced that the existence of this suite would in no way be an indication of granting the licence with these undertakings, rather we acknowledge that they allowed the Committee to be fully informed as to all options open to us when evaluating the evidence, forming opinions and making decisions and in our standing back.

CONDITIONS

- [28] There were commitments made during the hearing, including from Mr Fryczweski and Mr White on Mr Fryczweski's behalf and from the meeting that Mr Fryczweski and Mrs Hermiston had with the Licensing Inspector (Mr Johnston) at the proposed premises 10 February 2020 and reported in evidence, that we will formally note;
- (i) The premises will be double glazed.
 - (ii) A large glass screen will be installed outside to reduce noise from the dining area.
 - (iii) Background music only.
 - (iv) Signage will be minimal but will include a sign reminding patrons leaving to respect neighbours
 - (v) No karaoke or quiz nights as agreed with the objector.
 - (vi) The Licensee, Mr Fryczewski, is to obtain his LCQ certificate within six months of the granting of this licence.
 - (vii) Mr Fryczweski is then to follow the steps to acquire a Duty Manager's Certificate without undue delay, progress to be monitored by the Licensing Inspector.

The applicant must comply with all conditions on a licence.

The On-licence is subject to the following conditions:

Compulsory Conditions Section 110 (2)

- (a) No alcohol may be sold on the premises on Good Friday, Easter Sunday, Christmas Day or before 1.00 p.m. on ANZAC Day to any person who is not present on the premises for the purpose of dining.
- (b) Alcohol may only be sold on the following days and during the following hours when the premises are being operated as a Restaurant.

INSIDE:

Sunday to Thursday from 9:00 a.m. until 11:00 p.m.

Friday and Saturday from 9:00 a.m. until 12:00 a.m. (Midnight)

OUTSIDE:

Monday to Sunday from 9:00 a.m. until 8:00 p.m.

- (c) Water must be freely available to customers on the premise while the premises are open for business.

Discretionary Conditions Section 110 (1)

- (a) The following steps must be taken to ensure that the provisions of the Act relating to the sale of alcohol to prohibited persons are observed:
 - Display of appropriate signs adjacent to any point of sale, detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition on sales to intoxicated persons.
- (b) The following steps must be taken to ensure that the provisions of the Act relating to the management of the premises concerned are observed.
 - Alcohol must only be sold, supplied and consumed within the area marked on the plan submitted with this application.

Other discretionary conditions Section 117 (1):

- (a) The following steps must be taken to must be taken to promote the responsible consumption of alcohol:
 - The Licensee must implement and maintain the steps proposed in his host responsibility policy aimed at promoting the reasonable consumption of alcohol.

Restricted or supervised areas – Section 119:

The premises shall be **Undesignated**.

Other restrictions to be noted on the Licence:

Section 51 – Non-alcoholic drinks to be available

Section 52 – Low alcoholic drinks to be available

Section 53 – Food is to be available

Section 54 – Help with information about transport to be available

Section 56 – Display of signage

Section 57 – Display of Licences

Section 214 – Qualified Manager to be on duty at all times and responsible for compliance.

A copy of the licence setting out conditions to which it is subject is attached to this decision.

The Licensed Premises are identified on the plan provided with the application for a licence.

Dated at Christchurch this 12th day of May 2020.



G J Clapp

Chairperson

Selwyn District Licensing Committee

