



Decision No. N/53/888/2021

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER

of an application by **BRIAN ROY GILES**, for an On-Licence pursuant to s.99 of the Act in respect of premises situated at **Fyffe Quay, Kaikōura** and known as '**Charli's**'.

DECISION OF THE KAIKOURA DISTRICT LICENSING COMMITTEE

Chairperson: Vicki Gulleford

Members: Derrick Millton, Robert Roche

FULL COMMITTEE 'ON THE PAPERS' DECISION

Introduction:

This is an application by **Brian Roy Giles** for a new On-Licence in respect of premises situated at **Fyffe Quay, Kaikoura**, known as '**Charli's**'. The Kaikōura District Licensing Committee met on 20 July 2021 to consider the application 'on the papers'.

The general nature of the premise is that of a movable converted vehicle, containing a bar, operating as a tavern from a roadside reserve with a Licence to Occupy.

This application is for a new business venture, a converted Renault transport van containing a bar, based at 'Jimmy Armers Beach' on Fyffe Quay, next to the Kaikōura Seafood BBQ. The purpose of this van is to sell alcohol (beer, wine and cider in plastic cups) to support and accompany the Seafood BBQs food sales. The Seafood BBQ holds a licence to occupy a site for mobile shops, approved by Kaikōura District Council and the applicant has been approved in principle a licence to occupy a site for mobile shops at this location.

The applicant seeks an On-licence for the hours of 11.00am to 7.00pm, Monday to Sunday, only when the Kaikōura Seafood BBQ is operating and within daylight hours/before sunset.

Key to the application, is the provision of food by Kaikōura Seafood BBQ and a memorandum of understanding between the two businesses has been provided with the application. The Inspector reports that it has been repeatedly discussed that if the Kaikōura Seafood BBQ is not selling food, then Charli's will not be able to operate.

s.103 Reports

Reports from the Inspector and NZ Police have not raised any matters in opposition. The Medical Officer of Health (MOH) has reported in opposition. The application was duly advertised and no public objection or notice of desire to be heard has been received; accordingly we deal with the matter on the papers. Per s.191(2), a full quorum of three members was present on 20th July 2021 to make this decision.

MOH originally reported in opposition on 9 April 2021 citing:

- The original application for an on licence stated the premise was a conveyance. The Act interprets Conveyance as ‘...an aircraft, coach, ferry hovercraft, ship, train or other vehicle, used to transport people...’ MOH submitted that the caravan from which the applicant intends to sell alcohol is not a conveyance within the meaning of the Act as it is not used to transport patrons and consumption of alcohol will not take place on board.
- Section 53 – food to be available – the holder of an on-licence or club licence must ensure that, at all times when the premises are open for the sale and supply of alcohol, a reasonable range of food is available for sale and consumption on the premises, in portions suitable for a single customer. MOH cited Sharma and Sons (2009) Limited decision [2018] NZARLA 137
 - *[50] ...It is not sufficient for the purposes of s.53 that a reasonable range of food is made available from other premises when there is no, or minimal, food available for sale and consumption on the premises.*

The applicant resubmitted the application on 9/5/21 stating the licence applied for is not a conveyance and is a tavern.

The Committee initially considered holding a hearing for this application and the agencies were advised on 24th June 2021 of this, and offered prospective dates. On 2nd July 2021, after clarifying s.202(1) Procedure, the Committee advised that as there was no public objection to the application, a full Committee meeting would be held on 12th July 2021 to consider the application on the papers. The Committee then met to consider the application.

MOH supplied a supplementary report on 15 July 2021 following further discussions with the Applicant. This new report raised the following points:

- The application has been amended so that it is no longer an application for a conveyance but is instead for a tavern.
- MOH submits this premise and application is the first of its kind in the Canterbury area. It appears to be a van in a layby on the edge of reserve land applying to be a tavern.
- The applicant relies on a third party to supply substantial food options, the food caravan will be located inside the footprint of the proposed licenced area but is not controlled by the applicant. It is accepted that the proposed hours of the licence are intended to coincide within the hours of the food caravan's operation and a written

contract is supplied with the application however MOH submits that this is not sufficient.

- The applicant will rely on the nearby public toilets for its patrons. It is not common practice for an on licence to 'borrow' the amenities in the locality which it cannot provide itself.
- The van will depart the licenced area each evening and be parked overnight elsewhere. With the licenced area being vacated each day, it becomes available to be occupied by anyone else for an unknown length of time (potentially into the licenced hours), not a problem commonly associated with managing a licenced premises.
- MOH is concerned if the licence is granted it sets a precedent for other similar scenarios in rural and urban settings.
- MOH provided caselaw for the benefit of the Committee when assessing the application or if indeed the premises is a tavern.
 - **[2019] NZARLA 175 Rosco's Café and Bar**
 - **[2019] NZARLA 214 Nexus Wine and Café**
 - **[2021] NZARLA 27-28 The Landing**
- MOH remains opposed to the issues of an on licence. This opposition is made in the knowledge that the Committee need not convene a hearing, s.202 of the Act providing that only public objections require this. The Committee may choose to decide the matter on the papers although s.191(2) requires a full quorum of three members sitting.
- Email correspondence between the Applicant and MOH was included in the supplementary report.

Based on this additional report, the Committee met again on 20th July 2021 to consider the application again.

MOH Opposition:

Type of licence applied for:

The application has been amended to tavern.

s.5(1) Interpretation states:

tavern—

(a)

means premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public; but

(b)

does not include an airport bar

The Committee consider that Mr Giles intends to only sell alcoholic (beer, wine, cider in plastic cups), low alcoholic and non alcoholic beverages. Based on this interpretation, the premises can be considered a tavern.

S.53 Provision of Food

Substantial food is available from the Kaikōura Seafood BBQ at all times that Charli's is operating. The Seafood BBQ menu supplied with the application shows a good selection of meals available in single portions. The Seafood BBQ is located within the defined perimeter of the proposed licenced area. The Committee is satisfied that this meets the criteria of s.53 - *the holder of an on-licence or club licence must ensure that, at all times when the premises*

are open for the sale and supply of alcohol, a reasonable range of food is available for sale and consumption on the premises, in portions suitable for a single customer.

Agreement with Kaikōura Seafood BBQ

A signed agreement between Mr Brian Giles and Ms Kate Claridge was provided with the application. This states that both parties have agreed to work together at the site with the Seafood BBQ being the required food source as required by the Act. The agreement would require Charli's to open and close at the same time as the Seafood BBQ opens and closes for the day and would be unable to operate if the Seafood BBQ was not operating on the site.

The Inspector recommends adding conditions to the On-licence (if granted) that:

- The premises known as Charli's shall only sell and serve alcohol if the Kaikōura Seafood BBQ caravan is situated within the licenced area and selling food.
- There shall be no sale of alcohol after the defined sunset hours (if earlier than 7pm). For the purposes of this condition, the times for sunset are those stated by the Meteorological Service of New Zealand Limited (Metservice – Te Ratonga Tiorangi) each day.

The Committee is satisfied that the agreement with Kaikōura Seafood BBQ, and the conditions recommended by the Inspector are sufficient.

Use of Public Toilets:

The Committee recognises that the use of the public amenities for an on-licenced premise is unusual. However, the Committee also recognises that the proposed premise is located within an area that has 3 sites for Public Place Traders. It is common practice within the Kaikōura District to have sites designated for Public Place Trader Licence's to be granted – and these are mainly located in sites with public toilets nearby. The Committee is aware that patrons consuming alcohol at Charli's may require the use of public toilets. The Committee noted that patrons eating at the Seafood BBQ in the past were able to purchase refreshments (non-alcoholic drinks) and would also have need of the public toilets.

Licenced area vacated overnight:

The Committee all have local knowledge of Fyffe Quay, Jimmy Armer's Beach and the proposed licenced area. The area is adjacent to a designated Responsible Freedom Camping parking area where up to 6 vehicles may park overnight. During the summer months, Freedom Camping Ambassadors monitor and educate campers. Campers are required to vacate the area at 8am. The proposed licenced area is not part of the Responsible Freedom Camping area and vehicles are not allowed to park there overnight. The Kaikōura Seafood BBQ vacates their area each evening and leaves sandwich type boards indicating that this area is for their food caravan. They manage access to their site well and the Committee is confident that Mr Giles will benefit from their knowledge of ensuring access to the site daily. The proposed licenced area is the only area that Mr Giles will be able to set up and sell alcohol from, along with the Kaikōura Seafood BBQ.

Setting precedent:

The Committee were guided by information in the Inspector's report, supplementary document 2 and Appendix 3 – Waimakariri DLC decision for the Rangiora Craft Beer Company. This decision is for the company, trading as the Good Drop, to operate as an On-licence, with food supplied from a food truck located within the licenced area. The food is sold from a mobile kitchen called the Alt Kitchen. This application was not opposed by MOH and the Inspector states is successfully meeting the requirements of section 53 of the Act.

Whilst Mr Giles' application is very similar, a key difference is the mobile nature of the van which moves on and off site each evening. The other difference the Committee notes is the proposed licenced premises are part of a road reserve that is designated for use by Public Place Traders. The Committee has addressed these points elsewhere in this report.

Case Law provided:

The Committee thanks the MOH for the provision of case law to assist us to assess the application. MOH also states 'or if indeed the premises is a tavern'.

- **[2019] NZARLA 175 Rossco's Café and Bar**

This case is based on the renewal of a premise and whether it met the definition of a tavern, primarily if the premise was used principally for providing alcohol and other liquid refreshments¹. This premise also operated gaming machines which brought in other revenue to the business.

The Committee consider the application by Mr Giles is for a tavern licence as he only intends to sell alcohol and other refreshments.

- **[2019] NZARLA 214 Nexus Wine and Café**

This case is based on the grant of a On-licence for a venue trading as a tavern. The premise also operated gaming machines. The decision cites **L & H Graces Place Limited v Abbott**²

[143] In L & H Graces Place Ltd v Abbott we said:

[74] The nature of the premises and how it intends to operate is a relevant consideration when considering the criteria in s 105 of the Act. In Kaiti Club Hotel Ltd, we said that where an applicant seeks a licence for a tavern, as the appellant has done in this case, it is necessary to consider whether the premises is a tavern. If the premises do not have as their principal purpose the sale of alcohol and other refreshments, then a tavern licence may not be issued. Having said that, it is not sufficient that the premises have as their principal purpose the sale of alcohol and other refreshments. The DLC is still required to have regard to the other relevant matters in s 105(1).

[75] The term 'tavern' is defined in s 5 of the Act as premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public. This is a question of fact and degree. As we noted in Kaiti Club Hotel Ltd the authorities to date establish that this involves consideration of a number of factors including:

- a) the nature and configuration for the premises;*
- b) the public perception provided it is referable to the legal definition;*
- c) the reasons why patrons attend the premises;*
- d) the revenue from various sectors of the business;*
- e) the imposition of a cover charge;*
- f) the current nights of the week when the premises are open;*
- g) the trading hours and days requested; the nature of the entertainment; and*
- h) the nature of food and beverages offered.*

[76] As we said in the appellant's previous appeal [34], consideration of these factors remains the correct approach to take when determining whether premises are a tavern.

The Committee were guided by and considered the factors above –

¹ [2019] NZARLA 175 [15] citing Inspector's report

² [2018] NZARLA 273

- a) The nature and configuration of the premises is suitable for the applicant's purpose of selling alcohol alongside the Kaikōura Seafood BBQ
- b) Public perception is unable to be gained at this stage as the premise is not yet established
- c) The reasons patrons attend the premises are intended to be the consumption of alcohol while eating a meal purchased from the Kaikōura Seafood BBQ.
- d) The business's revenue will come from the sale of alcohol and other liquid refreshments as the applicant is only selling these
- e) There is no cover charge
- f) The premises are not currently open
- g) The premise intends to open Monday to Sunday from 11am to 7pm or sunset if earlier
- h) The food available from Kaikōura Seafood BBQ includes whole crayfish with sides, fish meals, platters, chowder, and other types of seafood meals. The beverages the applicant will sell are beer, wine and maybe cider, in plastic cups.

The decision also states at [146]

If an applicant states that they intend to conduct the premises in the nature of a tavern, it is for the decision-maker to assess whether the premises are to be used principally for providing alcohol and other refreshments based on the evidence before it. This allows a decision maker to then impose controls, through conditions, depending on the nature of the premises and how they are managed and the nature of risk which will vary according to the nature of the premises being established. In doing so, a decision-maker is able to ensure, where an application is capable of meeting the object of the Act, that the provisions of the Act will be observed.

- **[2021] NZARLA 27-28 The Landing**

This decision relates to a hotel On-licence and designation of areas.

In Mr Gile's application he applies for the licenced premises to be designated as supervised and the van to be designated as restricted. The Inspector summarises the designation as Supervised – dining area surrounding the van and Kaikōura Seafood BBQ.

This is appropriate for a tavern on-licence as stated in s.119(1)

The licensing authority or licensing committee concerned must do one of the things described in subsection (3) when issuing an on-licence for a hotel or a tavern.

s.119(3) *The things referred to in subsections (1) and (2) are—*

(a) designate all of the premises—

(i) an area to which minors must not be admitted; or

(ii) an area to which minors must not be admitted unless accompanied by a parent or guardian:

(b) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted:

(c) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted unless accompanied by a parent or guardian:

(d) both—

(i) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted; and

(ii) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted unless accompanied by a parent or guardian.

Location of proposed premises:

The proposed licenced area is 6m x 45m of roadside reserve, bounded by trees and shrubs between the licenced area and the beach. Mr Giles has provided detail of moveable bollards and tape that will be used to demarcate the rest of the area and has enlisted the support of an Engineer from Kaikōura District Council to help demarcate the area further. The licenced area will be designated supervised and the inside of the van will be designated restricted. The Seafood BBQ is also located within the licenced premise area. Signage will clearly state that alcohol must be consumed on the premises and cannot be taken out of the licenced area. Examples of signage have been provided with the application.

The site is located around 70m south of the Council provided toilets. The nearest licenced premises is The Pier Hotel. There is one residential dwelling within 300m of the site.

The object of the Act:

The applicant has provided a satisfactory host responsibility policy stating suitable measures that will be undertaken with regard to responsible sale and supply of alcohol and that harm will be minimised.

Suitability of the applicant:

Mr Giles has a history of working in the compliance field and the Inspector states Mr Giles has a firm stance on responsible drinking and adhering to legislative requirements. He has not managed a licenced premises previously or been directly involved in the hospitality industry however has operated a food truck in the Kaikōura area for a number of years, adhering to the Food Act 2014 and supporting regulations. The Inspector reports that this shows willingness and the ability to comply with legislation. He has applied for his manager's certificate and the Inspector reports he interviewed well for this.

The applicant's manager Charlene De Zen has a wealth of experience within the alcohol industry and has been a manager in Australia for over 10 years. She has completed her LCQ and applied for her manager's certificate. The Inspector is satisfied with the number of certified duty managers for this premises.

Local Alcohol Policy:

Nothing in the application breaches the Kaikōura District Council Local Alcohol Policy.

Days and hours during which the applicant proposes to sell alcohol:

Monday – Sunday from 11.00am to 7.00pm (only when the Kaikōura Seafood BBQ is operating and within daylight hours / before sunset).

Design and Layout of the proposed premises:

A CPTED assessment was undertaken by the applicant and is deemed to be accurate. There are no identifiable issues or concerns regarding the design of the premises.

There is no lighting provided by either van within the licenced area. For this reason, in the winter months, Charli's and Kaikōura Seafood BBQ are proposing to only be open within daylight hours. For safety reasons, and to clearly define the sale of alcohol during the winter hours, the Inspector proposes a condition on the licence that states there shall be no sale of alcohol after the defined sunset hours. For the purposes of this condition, the times for sunset are those stated by Meteorological Service of NZ Ltd (Metservice – Te Ratonga Tiorangi) each day.

The serving window of Charli's van will be facing the dining tables, ensuring that the manager on duty is able to monitor the entire licenced area. The dining area is situated between Charli's and Kaikōura Seafood BBQ van.

The sale of goods and provision of goods other than those directly relating to the sale of alcohol, low and non-alcoholic refreshments and food:

Not applicable

The amenity and good order of the locality would be likely to be reduced, by more than a minor extent, by the effects of the issue of the licence:

The Inspector reports there have been no noise complaints, evidence of graffiti or vandalism in the area. The Police have not reported any problems such as calls for service. The Kaikōura Seafood BBQ has been situated here for a number of years and has raised no complaints. There is no evidence that 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.

Number of premises for which the same kind of licence are already held:

There are many other premises that hold similar licences in Kaikōura. The Pier Hotel is located approximately 1km away from the proposed premises. Other licences premises are within the main township of Kaikōura which is 4km away.

Purposes for which land near the premises is used:

This is a low density mixed residential area. There is one residential dwelling located within 300m of the food truck and Charli's proposed van. A licence to occupy has been applied for at the Kaikōura District Council and has been approved subject to the On-licence being granted and taken effect by 31 July 2021.

Whether the applicant has appropriate systems, staff and training:

The applicant and manager hold LCQ and both have applied for their manager's certificates. Charlenne is the proposed day to day manager, with the support of Mr Giles as the licensee. They are dedicated to adhering to their host responsibility policy and have relevant Health Promotion Agency resources on hand to support safe sale and supply of alcohol. At this time, they do not intend to have any other staff to assist them.

Discussion:

The Committee discussed that the only area Mr Giles can sell alcohol is the proposed licenced area on Fyffe Quay. Mr Giles is entitled to apply for a Special Licence if he intends to sell alcohol at other areas.

The Committee were pleased to note that Mr Giles intends to sell only beer, wine and maybe cider, in plastic cups. This allays our concerns that broken glass could become an issue in this area.

The Committee discussed the potential for boisterous crowds on the proposed premises and management of these. We were pleased to read that Mr Giles has a history of working in the compliance field (Ministry of Fisheries) and believe that this experience would be helpful in managing the sale and supply of alcohol appropriately. We were also reassured by the extent of Ms De Zen's experience in the alcohol industry in Australia. We were satisfied with the limited dining spaces and the clear intention for the sale and supply of alcohol to be complementary to the food sales from Kaikōura Seafood BBQ.

Decision:

The Committee has considered the full application, including the supplementary report provided by MOH. The Committee believe that the applicant meets the requirements for the issue of an On-licence albeit with some differences to many other licenced premises. The Committee expects that the Inspector will monitor the premises regularly due to the unique nature of the business venture.

The applicant is reminded that the requirements regarding minors and intoxicated persons must be adhered to at all times.

We are satisfied as to the matters to which we must have regard as set out in s.105 and 106 of the Act and grant the licence for a period of one year pursuant to s.104.

The applicant's attention is drawn to s.56, 57 and 214(3) of the Act obliging the holder of an **ON LICENCE** to:

- 1) Ensure that for each principal entrance to the premises there is displayed at all times a sign attached to the inside or outside of the premises, so as to be easily read by people immediately outside the entrance, stating the ordinary hours of business during which the premises are open for the sale of alcohol.
- 2) Ensure that at all times a copy of the licence, together with a statement of all conditions subject to which it is issued, is displayed—
 - a) attached to the inside of the premises concerned; and
 - b) so as to be easily read by people entering each principal entrance.
- 3) At all times while a manager is on duty on any licenced premises, the full name of the manager must be prominently displayed inside the premises so as to be easily read by people using the premises; and the person named as manager at any time is to be treated for the purposes of this Act as the manager at that time.

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

CONDITIONS – SECTION 110 (2)

- a) No Alcohol is to be sold on the premises on Good Friday, Easter Sunday, Christmas Day, or before 1pm on ANZAC Day to any person who is not present on the premises to dine.
- b) Alcohol may only be sold and consumed the following days and during the following hours when the premises are operating as a Tavern

Monday to Sunday from 11.00am to 7.00pm

- **The premises known as Charli's shall only sell and serve alcohol if the Kaikōura Seafood BBQ caravan is situated within the licenced area and selling food.**
- **There shall be no sale of alcohol after the defined sunset hours (if earlier than 7pm). For the purposes of this condition, the times for sunset are those stated by the Meteorological Service of New Zealand Limited (Metservice – Te Ratonga Tiorangi) each day.**

- c) The following parts of the premises are designated as:
 - i) Dining area surrounding the van and the Kaikōura Seafood BBQ – Supervised
 - ii) Inside the van - Restricted
- d) Water will be freely available to customers on the premises while the premises are open for business
- e) 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:
 - i) Display of appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition on sales to intoxicated persons.
- f) The following steps must be taken to ensure that the provisions of the Act relating to the management of the premises concerned are observed:
 - i) Alcohol must only be sold, supplied and consumed within the area marked on the plan submitted with the application.
- g) The following steps must be taken to promote the responsible consumption of alcohol:
 - i) The licensee must implement and maintain the steps proposed in their host responsibility policy aimed at promoting the reasonable consumption of alcohol

OTHER RESTRICTIONS AND REQUIREMENTS

Section 51 – Non-alcoholic drinks to be available

Section 52 – Low alcoholic drinks to be available

Section 53 – Food to be available

Section 54 – Help with information about transport to be available

Section 56 – Display of signs

Section 57 – Display of licences

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

THE LICENCED PREMISES

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

DATED at KAIKŌURA this 21st day of July 2021



Vicki Gulleford
Chairperson
Kaikōura District Licensing Committee

