IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-3632

BETWEEN	PP AND G BASRA LIMITED First Appellant
AND	HOSPITALITY ASSOCIATION OF NEW ZEALAND Second Appellant
AND	RANGITOTO COLLEGE BOARD OF TRUSTEES & ORS Respondents

Hearing: 30 October 2009

Appearances: J H Wiles for first appellant
A J Higgins for second appellant
A Dormer and A Zhou for respondents
J A L Oliver for Liquor Licensing Authority

Judgment: 21 December 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4 pm on Monday 21 December 2009

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[1] This is an appeal against a decision of the Liquor Licensing Authority (the Authority) given at Auckland on 27 May 2009. The Authority granted the appellant an off-licence to open a stand alone retail liquor store at 544 East Coast Road, Mairangi Bay, Auckland upon certain conditions. These conditions included a significant limitation upon trading hours, which were to be restricted to 10 am to 2 pm, and from 4 pm to 6 pm, Monday to Friday inclusive and 10 am to 8 pm on Saturday. There was to be no Sunday trading.

[2] Trading hours sought by the appellant had been 7 am to 12 midnight Monday to Saturday, and from 7 am to 11 pm on Sunday.

[3] The appellant appeals against the trading hour conditions, pursuant to s 139 of the Sale of Liquor Act 1989 (the Act).

Factual background

[4] The property with which this appeal is concerned was purchased by a family trust associated with the appellant in 1998. The trust had since developed the land by building a retail complex of eight shops, six of which were already leased by the time of the hearing before the Authority. The proposal before the Authority was that the appellant be permitted to establish a bottle store in one of the remaining shops.

[5] The requirements of the Resource Management Act 1991 were met with respect to the proposed bottle shop, and the appellant had planning approval from the North Shore City Council. Neither the police, nor the District Licensing Agency Inspector opposed the application. There were no concerns as to the appellant's suitability as an applicant.

[6] However, the application was the subject of considerable opposition from members of the community. No fewer than 184 notices of objection were received. For the most part the objections centred on the proximity of the proposed bottle shop to two schools and two churches. Objectors raised various concerns, but there was a

general focus upon the risk of vandalism, loitering and other undesirable behaviour likely to result from the sale of liquor by the appellant.

Grounds of appeal

[7] The appellant submits that the Authority's decision is vitiated by four separate errors of law:

a) The Authority took into account impermissible considerations and was improperly influenced by the wider purpose of the Act when exercising its discretion under s 37(4)(a) to impose conditions;

b) By limiting trading hours so significantly, the Authority engaged in "heavy handed" administration of the Act in a manner inconsistent with the objectives of the statute, thus derogating from the appellant's right to a licence;

c) The conditions imposed were inconsistent with those granted in previous comparable cases;

d) Contrary to the procedural regime established by the Act and to s 27(1) of the New Zealand Bill of Rights Act 1990, the appellant was denied natural justice in that the Authority had regard to aspects of the objections which should not have been considered, and to which the appellant did not, and could not have been expected to, prepare a response.

The approach on appeal

[8] The appeal is brought in reliance on s 139 of the Act which provides that:

> **139 Appeal against decision of Licensing Authority on question of law**
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> (1) Where any party to any proceedings before the Licensing Authority under this Act is dissatisfied with any determination of the Licensing

> Authority in the proceedings as being erroneous in point of law, that party may appeal to the High Court on that question of law.
>
> (2) Subject to sections 140 to 146 of this Act, every appeal under this section shall be dealt with in accordance with rules of Court.

[9] Section 139(2) incorporates r 718A of the High Court Rules, which confers a wide jurisdiction on this Court. The Court may make virtually any order which is appropriate in the circumstances, including an order remitting the case to the Authority for rehearing or for further consideration.

Impermissible considerations

[10] Section 32 of the Act provides for a right of objection to the grant of an off-licence. Section 32(1) provides:

> (1) Any person … who has a greater interest in the application than the public generally may object to the grant of an off-licence.

[11] But the permissible grounds for objection are significantly constrained. Section 32(3) provides:

> (3) No objection may be made in relation to any matter other than one specified in section 35(1) of this Act.

[12] Section 35(1) in turn, sets out a number of mandatory considerations to which the Authority must have regard in considering any application for an off-licence. That sub-section reads:

> **35 Criteria for off-licences**
>
> (1) In considering any application for an off-licence, the Licensing Authority or District Licensing Agency, as the case may be, must have regard to the following matters:
>
> (a) The suitability of the applicant:
>
> (b) The days on which and the hours during which the applicant proposes to sell liquor:
>
> (c) The areas of the premises, if any, that the applicant proposes should be designated as restricted areas or supervised areas:

(d) The steps proposed to be taken by the applicant to ensure that the requirements of this Act in relation to the sale of liquor to prohibited persons are observed:

(e) Whether the applicant is engaged, or proposes to engage, in—

(i) The sale or supply of any other goods besides liquor; or

(ii) The provision of any services other than those directly related to the sale or supply of liquor,—

and, if so, the nature of those goods or services:

(f) Any matters dealt with in any report made under section 33 of this Act.

[13] Section 37(4)(a) provides that on granting an application for an off-licence, the Authority may impose conditions relating to the days on which, and the hours during which, liquor may be sold. Section 37(5) provides that in determining the conditions to be imposed under subsection (4)(a), the Authority " … may have regard to the site of the premises in relation to neighbouring land use".

[14] There are two separate strands to the appellant's argument that the Authority fell into error by taking into account impermissible considerations. The first argument is that the Authority wrongly took into account the concerns of objectors about the impact of the appellants' proposals upon nearby schools and churches. The second argument is concerned with the extent to which the Authority appears to have taken into account the policy of the legislation as it appears in s 4 of the Act.

[15] As to the first of these points, the first appellant submits that the combined effect of s 32(3) and the mandatory and exclusive character of the list of criteria in s 35(1) is that in exercising its discretion under s 37(4)(a), the Authority may have regard to, first, "neighbouring land use" in the strict sense, and, second, those matters listed in s 35(1), but nothing else. In support of that argument Mr Wiles refers to the statement of the Authority in *Settlement Superette Limited* LLA PH40/2005 25 January 2005 at [30]:

> The impact of the proposed business on the neighbourhood is not a matter which is within our jurisdiction. Compatibility with other businesses and questions about traffic and parking are all issues which are covered by the

> certificate under the Resource Management Act. While the Council may be considering how to restrict future applications, the fact of the matter is that the applicant company has been given resource permission to establish an off-licence at this site.

[16] There, however, the Authority was speaking of the restrictions on its jurisdiction to refuse the grant of a licence altogether. I consider that the Authority's jurisdiction to grant an off-licence under s 35 (in the light of objections made under s 32) is to be differentiated from the Authority's jurisdiction to impose conditions under s 37. In other words, there is a distinction between a decision to grant a licence, which is mandatory if the s 35(1) criteria are met, and the jurisdiction to impose conditions, where the Authority has a discretion to consider:

> … the site of the premises in relation to neighbouring land use.

[17] Objectors have the right to make submissions in respect of the criteria appearing in s 35(1) which include:

> The days on which and the hours during which the applicant proposes to sell liquor.

[18] In considering such objections the Authority is entitled to have regard, not only to neighbouring land use in the strict sense, as is submitted for the first appellant, but may take into account the actuality of the use to which neighbouring land is put. In other words, the Authority may consider not only the fact that there are nearby schools and churches, but also evidence as to the needs and requirements of those utilising those facilities, and the impact of the applicant's proposals upon those persons and the use of land for those purposes.

[19] Mr Wiles submits that:

> … it would be unjust and contrary to the tenor of the statutory regime if such considerations were specifically excluded by s 32(3) as things to which objection could be made, but were able to get in by a side-wind and be considered by the Authority in relation to the setting of opening hours.

[20] The answer to that submission is that objectors are entitled under s 35(1)(b) to object to opening hours, and that in considering such objections, the Authority is entitled to have regard to the actual use to which neighbouring land is put.

[21] At [37] of its decision, the Authority said:

> However, we do have a discretion to fix the days and hours of trade by having regard to the site of the premises in relation to neighbouring land use. This is particularly important in this case given the nature and extent of the objections. We believe that we not only have a duty to ameliorate the likely impact of this new business on the neighbourhood, but we also have the responsibility of protecting as best we can the young people who are attending the nearby schools, as well as those that are worshipping in the nearby churches.

In my opinion the Authority was perfectly entitled to approach the application in that way.

[22] In a related argument, the first appellant takes issue also with the receipt by the Authority of a large number of objections that ranged beyond the s 35(1) criteria. In particular, the first appellant argued that certain "flow on" effects apprehended by many objectors ought to have been formally excluded from consideration. Those effects included the prospect of increased littering and vandalism; a further allegedly irrelevant issue concerned the contemporary approach to alcohol education.

[23] Mr Wiles is particularly concerned about [28] of the Authority's decision:

> [28] Furthermore, it will be seen that we have no power to refuse the grant of a licence in response to local opinion on issues which may not be specified in the above section. In summary there is no underlying discretion to grant or refuse an application for an off-licence under s 36(1) of the Act. If the applicant meets the criteria then the off-licence should be granted. On the other hand, the Act specifically provides for the exercise of a discretion for different types of applications made under s 36(2) to (5) of the Act.

[24] It is submitted by Mr Wiles that these comments suggest that the decision with respect to opening hours was reached, not only on the basis of permissible considerations, but also on account of impermissible associated social policy concerns.

[25] In my view there is nothing in this point. The Authority is a full time authority with much accumulated experience in this specialist area. It is plainly fully alive to the limited objection rights conferred by the Act. At [8] of its decision it explicitly notes that:

> … many of the objections did not address the criteria set out in s 35 of the Act …

[26] Moreover, as earlier discussed, the Authority in exercising its discretion under s 37(4)(a), was entitled to take into account properly based s 35 objections in its consideration of the actuality of neighbouring land use. That consideration could legitimately extend to such questions as the opening hours of the schools and churches, the number of students at the schools, the use of the church grounds as a thoroughfare, and experience of litter and vandalism in and about those facilities in connection with public loitering problems.

[27] I turn to the second aspect of Mr Wiles' argument; namely, the extent to which the Authority was entitled to have regard to statutory policy, and in particular to the objectives set out in s 4 of the Act.

[28] In his synopsis of submissions, Mr Wiles argued that the Authority was not permitted to have regard, in reaching its decision, to the general object of the Act, as expressed in s 4 which provides:

> **4 Object of Act**
>
> (1) The object of this Act is to establish a reasonable system of control over the sale and supply of liquor to the public with the aim of contributing to the reduction of liquor abuse, so far as that can be achieved by legislative means.
>
> (2) The Licensing Authority, every District Licensing Agency, and any Court hearing any appeal against any decision of the Licensing Authority, shall exercise its jurisdiction, powers, and discretions under this Act in the manner that is most likely to promote the object of this Act.

[29] The first appellant relies, in advancing that submission, on the judgment of Wild J in *re Gold Coast Supermarket Ltd* HC WN AP123/00 9 February 2001, where at [35] His Honour said:

> There is no requirement on the Authority in s 35(1) in granting an application to achieve a reduction in liquor abuse.

[30] Mr Wiles refers also to the Authority's decision in *Kims Trading Ltd* LLA PH244/06 6 April 2006 where the Authority held at [40] that:

> We cannot ignore the statutory criteria, and refuse an application on the grounds that to do so will contribute to the reduction of liquor abuse. We have no power to refuse the grant of a licence to further the aim of the Act, or in response to local opinion on issues which may not be a ground of objection – ie matters not specified in s 35(1) of the Act.

[31] However, not long after the *Goldcoast* decision, Fisher J took a different line in *Walker v Police* HC WN AP87/01 31 May 2001. At [29] of that decision, His Honour said:

> [29] For all of those reasons I am satisfied that s 22, and to the extent that it is relevant s 13, are not to be interpreted in any narrow or exhaustive sense in the way proposed by the appellants. The Authority was permitted to take into account anything which in terms of the statute as a whole appeared to be regarded by the legislation as relevant to licence conditions and the terms on which they should be granted. That must include the statutory object referred to in s 4. If *Goldcoast* was intended to indicate otherwise I regret that I am unable to follow it. Of course to say that a consideration is relevant is not to say that it takes priority over other considerations expressly listed where the statutory discretion is created. Nor is it to say that the matters raised in s 4 are to be approached on anything other than a nationally consistent basis.

[32] That was a case involving the grant of a licence rather than the imposition of conditions. However, Fisher J's comments must also be applicable to the setting of conditions, as Mr Wiles accepts. But he argues that the *Goldcoast* approach is preferable.

[33] Mr Wiles also complains (and here he is echoed by Mr Higgins for the second appellant), that the Authority ought not to have referred in its decision to a World Health Organisation study, which linked societal problems with average alcohol consumption.

[34] In oral argument Mr Wiles was inclined to express himself in rather less forthright terms on this point. He accepts that the Authority is not bound to ignore altogether the provisions of s 4. Rather, he maintains that if his earlier argument (as to the limited grounds upon which the Authority might restrict opening hours) is accepted, then s 4 considerations must necessarily be excluded as well.

[35] On 1 December 2009, some time after the hearing of the present appeal, the Court of Appeal released its judgment in *My Noodle Ltd v Queenstown Lakes*

District Council [2009] NZCA 564. The Court of Appeal dismissed an appeal from the decision of French J on four questions of law concerned with the Authority's refusal to permit 24 hour trading on renewal of the appellant's on-licences. Instead, licences were granted which would permit trading 21 hours a day, in the light of the liquor policy developed by the Queenstown Lakes District Council. That case was of course different from the present appeal, in that it related to the conditions to be imposed upon the renewal of an on-licence, rather than the conditions to be imposed in respect of a newly granted off-licence. Moreover, the primary issue in *My Noodle* was the extent to which the Authority ought to give effect to the Queenstown Lakes District Council liquor policy. To some degree, therefore, the decision of the Court of Appeal will be of limited application for present purposes.

[36] However, on the issue of relevance to this appeal, namely the significance of s 4, I am satisfied that the reasoning adopted by the Court of Appeal is of application here.

[37] At [72]-[74] Glazebrook J, delivering the judgment of the Court of Appeal said:

> [72] In our view, the Authority was entitled to give precedence to the overriding statutory object in s 4. The specific statutory criteria must be interpreted having regard to that purpose. The Authority was not restricted to consideration of individual licensees or individual premises: see above at [66].
>
> [73] If the Authority considered (as it did) that reduced trading hours would help reduce liquor abuse then, logically, any restriction on trading hours must be a blanket provision that applies to all liquor outlets (subject to the consideration of special individual circumstances).
>
> [74] In our view, the Authority is not required to be sure that particular conditions will reduce liquor abuse. It is entitled to apply the equivalent of the precautionary principle in environmental law. If there is a possibility of meeting the statutory objective (as the Authority found there was in this case), then it is entitled to test whether that possibility is a reality. In this case, it clearly intended to test its hypothesis and keep the matter under review: see above at [37].

[38] Of equal significance for present purposes, are the observations of the Court of Appeal at [79] of the judgment:

> [79] We accept the submission (as did French J) that there was evidence linking reduction in hours with a reduction in liquor abuse. We also accept the submission that, having regard to the evidence before it, along with inferences of fact it was entitled to make, the Authority was lawfully able to conclude, within its own knowledge and expertise, that with regard to the issue of trading hours, the policy and the desirability of a common closing time outweighed the other relevant considerations.

[39] In my opinion, the approach adopted in *My Noodle* reflects the range of considerations which the Authority was relevantly entitled to take into account in the present case. It was entitled to have regard in a general sense to the objects of the Act as set out in s 4 (indeed, it was obliged to do so in the light of s 4(2)), and it was entitled to bring to bear its own knowledge and expertise to the assessment of appropriate trading hours.

[40] I am satisfied that the Authority did not fall into error by taking into account impermissible considerations.

Heavy handed administration

[41] The three remaining alleged errors of law all raise what might loosely be regarded as natural justice issues. First Mr Wiles submits that the Authority has engaged in impermissible, heavy handed administration. In order to succeed on this point the appellants would need to establish that the Authority's decision lacked a proper evidential foundation, or was otherwise perverse.

[42] In *Meads Bros Ltd v Rotorua District Licensing Agency* [2002] NZAR 308, at [53], McGrath J, delivering the judgment of the Court of Appeal in the context of a liquor licensing appeal, said:

> …The proposition that the economic impact of particular restrictions on a liquor outlet will never be relevant to the terms of renewal of its licence is too great a generalisation. It is to be remembered that the statutory object is to establish a reasonable system of control. This envisages that at a certain point, at the extreme end of the scale, the administration of the licensing system may become unreasonable in its pursuit of the aim of reducing liquor abuse. Evidence that there would be such an extreme situation if particular additional restrictions were imposed may be relevant, not as a general rule, but to demonstrate that a particular case is exceptional in this way.

[43] But while allowing for the possibility of an exceptional case, McGrath J nevertheless observed that the licensing system must not be permitted to create an expectation of financial viability. At [56] he said:

> Most restrictive licensing controls will have an economic impact on licensees which sometimes will be substantial. That is a normal incident of a system of reasonable control of liquor abuse. The general provisions for grant and renewal of licences allow no basis for the expectation that a licensee will be able to run a particular type of business successfully.

[44] A little later, in *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd* [2003] NZAR 752 at [26] the Court of Appeal observed that if the administration of the Act's licensing system became too heavy handed, so that it unreasonably inconvenienced those wishing to purchase and consume liquor in a manner not giving rise to abuse, then that result would be inconsistent with the statutory object set out in s 4.

[45] Mr Wiles points out that the appellant sought a licence which would permit it to sell liquor for 118 hours a week. The permitted hours restricted trading to 40 hours each week. Moreover, it is not entitled to open during peak evening hours on weekdays. He advises the Court that the proposed business is not financially viable if it is to be restricted to the currently limited opening hours. The decision of the Authority is thus equivalent in practical terms, Mr Wiles argues, to a refusal to grant a licence at all. This must therefore be regarded as one of those extreme situations contemplated in *Meads Bros.*

[46] I am unable to accept that submission. As is plain from *Meads Bros* there can be no guarantee of financial success, or even viability, under the licensing system. *Karara* Holdings demonstrates, moreover, that the focus is upon the convenience of those wishing to purchase and consume liquor, not upon those who wish to obtain licences to sell it. The evidence is there are a great many liquor outlets in the immediately surrounding area, and so this is not a case in which the purchasing public will be greatly inconvenienced by restricted opening hours.

[47] There was evidence before the Authority to the effect that Rangitoto College in particular, was used to a significant degree each weekday evening. And of course,

the nearby churches were active on Sundays. The close proximity of schools and churches, and evidence before the Authority of alcohol related vandalism, littering, and trespassing justified the Authority's conclusion that this was an especially sensitive neighbourhood that required a conservative approach to the setting of opening hours.

[48] Under s 4 of the Act the Authority was charged with playing a role in the establishment and maintenance of a reasonable system of control. In pursuit of that objective, the Authority was entitled to call upon its own experience and expertise. Only in the clearest case would this Court be entitled to strike down a decision of the Authority on appeal by a disappointed applicant upon the ground that the decision was unduly heavy handed. In my opinion this is not such a case.

Inconsistency with comparable cases

[49] The next point taken by Mr Wiles concerns the appellants' complaint that this decision was out of line with other recent decisions. In other words it was unreasonably inconsistent. On this point, Mr Oliver's submissions have been of assistance to the Court. The starting point is the consideration that this Authority is a specialist Tribunal, having national jurisdiction and possessing expertise beyond that of this Court. It is entitled to proceed on a case by case basis. No two cases are ever quite the same. Inconsistency only becomes an issue when truly like cases are not treated alike.

[50] Mr Oliver for the Authority, concedes that this decision departed to some degree from other similar decisions, and indeed, characterised the outcome as "radical", but nevertheless submits that this was an unusual case involving an especially sensitive neighbourhood, and so calling for close individual attention.

[51] Having said that, there are several recent cases in which the Authority has pared back the hours that might otherwise have been available to an applicant, on grounds associated with liquor abuse issues. For example, in *Emkay Trading Company Ltd* LLA PH837/2009 6 August 2009, the applicant applied for an off-

licence in respect of a proposed stand alone retail liquor store in Karangahape Road, Newton, Auckland. The Authority said at [40]:

> We used to take the view that the establishment of a new bottle store was unlikely to have any impact on the neighbouring community. Experience has shown that this is not necessarily the case. The impact of a store will often depend on the neighbourhood where the new business is to be established. We now believe that a bottle store could well impact adversely on the neighbouring amenities and compromise public safety. The closing hours reflect our attempt to ameliorate the impact of this new business on the neighbourhood. We believe that the restricted hours set out below are likely to encourage a reduction in liquor abuse issues.

[52] The approach taken in that case was effectively the same as taken in the present instance, although the precise hours differed. There, there were problems with street drunkenness, liquor abuse, alcohol related crime, social disorganisation, high density residential instability and a somewhat rundown locale. There were also two nearby parks where alcohol was often consumed. Nevertheless, the area was understood to be colourful and vibrant, features that the Authority was concerned to preserve. The reduced hours of operation were from 10 am to 6 am on Sundays to Wednesdays and from 10 am to 9 am on Thursdays to Saturdays.

[53] In *Mason* LLA PH616/2003 4 September 2003, there was an application for a licence between the hours of 11 am and 11 pm from Monday to Saturday. The Authority noted that the proposed outlet was located near a primary school, a kindergarten and a Council park. In the particular circumstances the permitted opening hours were restricted so that the outlet was required to remain closed between 2 pm and 5 pm.

[54] In *Bear & Associates Ltd* LLA PH251/2001 5 July 2001, the applicant wished to establish a tavern at Ruakaka in Bream Bay Northland. It sought to open between 10 am and 2 am from Monday to Friday, and from 10 am to midnight on Saturday and Sunday. The proposed tavern was next door to a medical centre and a kindergarten. By reason of these neighbouring land uses the Authority declined to permit the tavern to open before 6 pm on weekdays.

[55] Accordingly, as Mr Oliver submits, the Authority's practice of approaching its work on a case to case basis and of limiting opening hours as appropriate, is well

established. Mr Wiles accepts that the Authority has a discretionary jurisdiction and that this Court is unable to interfere with it unless an error of law has been established, or where the ultimate decision has been shown to be irrational or unreasonable.

[56] Here, Mr Wiles submits, the decision is irrational and unreasonable, in that it is so far out of line with those to which I have referred, and one or two others to which he referred in passing. Among them was *Boyes Food Centre Ltd* LLA PH440/2009 24 April 2009. That was an application for an off-licence in respect of a new stand alone retail liquor store in Greymouth. There were a number of objections. Notably for present purposes there was an objection from the owner and operator of an establishment which engaged in out of school tutoring for some 50 students aged between five and 17 years. Classes took place between 3.30 and 6.30 pm. That establishment was diagonally opposite the proposed premises. Nevertheless, the Authority approved hours of trading of 11 am to 9 pm seven days a week.

[57] Mr Wiles refers also to premises at 6 Rosedale Road, Auckland, which are likewise in close proximity to educational establishments. There, the current hours are 9 am to 11 pm seven days a week.

[58] Irrationality is an extremely difficult argument for the appellant to run in circumstances such as these. The mere fact that there appear to have been one or two cases that are broadly similar but where a different outcome resulted, is quite insufficient to give rise to a finding of unreasonableness or irrationality. In order for the argument to succeed, it would need to be shown that this case produced an utterly abnormal result compared with a broad selection of truly comparable cases. There is simply insufficient material before the Court to support Mr Wiles' argument. To suggest that the Authority might well have fixed rather more liberal hours and still given full effect to the thrust of the objections, is simply to criticise the manner in which the Authority has exercised its discretion. This Court has, of course, no jurisdiction to interfere with a decision that is simply discretionary. The Authority is greatly experienced. It exercises a national jurisdiction, and deals with hundreds of cases each year. It is uniquely placed to judge the requirements of this application in

comparison with other like cases. While the permitted hours here do seem rather limited, I am not satisfied that the outcome can be considered irrational.

[59] A second aspect of the decision which Mr Wiles characterises as inconsistent concerns the renewal process. This issue is of particular concern to the second appellant. Any new licences are issued for a period of one year; thereafter the grantee must apply for a renewal. That enables the Authority to monitor the operation of the licence and in particular, to consider the impact of the business upon the neighbourhood. The Authority has the power at the expiration of the year to refuse to renew the licence, or alter the trading hours by either increasing or further reducing them. Where there is no evidence of any adverse impact from the operation of the business, the appellant may well be entitled to seek and obtain more liberal trading hours.

[60] In that way, the Authority said at [40] of its decision: the appellant:

> … has a clear incentive to ensure that the concerns expressed by the objectors are kept in mind.

[61] The appellant's concern is that this approach departs from the Authority's earlier practice of taking a more liberal line initially, but then truncating hours if problems emerge in respect of the conduct of the premises during the first 12 month period. So, again, the appellant's complaint is that the Authority's approach to this case is unfairly inconsistent with what has gone before.

[62] In my opinion this point cannot succeed. Over time the approach of the Authority has tended to become somewhat more conservative in comparison with the early days of the current licensing regime. And it is well established that the Authority is entitled to develop a fresh approach over time to aspects of the liquor licensing process: *The Ole Forge Ltd v Papakura District Licensing Agency* [1996] NZAR 305 at [34], *Buzz & Bear Ltd v Woodroffe* [1996] NZAR 404 at 409-10, and *Johnsonville Club v Wellington District Licensing Agency* [1999] NZAR 360 at 364.

[63] As Gendall J said in the last of these cases, policy development is a constantly evolving process. Mr Dormer submits it is open to the Authority to vary

its traditional approach to the probationary period, and not for this Court to second-guess the Authority on matters of fact and opinion. There is force in that argument. The Authority must be entitled to fine tune its approach in the light of its experience and the emergence of fresh perspectives.

[64] Given the degree of concern which the Authority now entertains about the link between liquor abuse on the one hand and liberal trading hours on the other, it cannot be said that it is not within the Authority's jurisdiction to adopt a conservative approach in the first instance to the fixing of appropriate opening hours, particularly in a case where it has labelled the immediate neighbourhood as "sensitive". Provided that the Authority's approach was reasonably open to it (and I find that it was) then it is not for this Court to substitute its own view.

Natural justice

[65] The final point taken on appeal is a true natural justice point. Mr Wiles says that many of the objections lodged with the Authority and served on the appellant contained material that lay outside the grounds of objection permitted by s 35(1). Accordingly, he says, those objections were inadmissible insofar as they contain irrelevant material. He argues that the appellant had no reason to suspect prior to the hearing of the Authority that " … such objections straying outside the permitted subjects would be received by the Authority, or allowed to be aired at the hearing".

[66] Mr Wiles argues that the appellant was taken by surprise when the Authority permitted certain objectors to raise matters that were arguably outside s 35, and that the appellant was unable to provide any effective response to the substance of those objections.

[67] Much of this argument is subsumed in my finding that the Authority was entitled to receive and consider objections that were directed at appropriate opening hours, and that objectors were entitled to give evidence of the detail of neighbouring land use. But to the extent that the Authority may have heard objector evidence that strayed beyond s 35, it must be remembered that this is a jurisdiction in which it is accustomed to hearing evidence from lay people about matters of everyday concern.

The Authority is well aware of the limits of its jurisdiction. The fact it may have permitted one or two self-represented objectors to stray beyond the permitted limits of s 35(1) does not lead to the conclusion that the Authority must therefore have taken into account irrelevant material.

[68] In its decision the Authority outlined the broad scope of the objections received by it, as is its practice. There can be no objection to that. It went on to point out at [28] that it had no power to refuse the grant of a licence in response to local opinion on issues which did not fall within s 35(1). There is nothing to suggest that the Authority has improperly taken into account objector evidence that falls outside that subsection; nor anything to suggest that the appellant was disadvantaged because it was deprived of the opportunity of calling evidence to address irrelevant objector material. This ground of appeal must also fail.

Result

[69] The appeal is dismissed. The respondents are entitled to costs on a schedule 2B basis. Counsel may file memoranda if they are unable to agree.

C J Allan J