

IN THE MATTER

of the Sale of Liquor Act 1989

AND

IN THE MATTER

of an application by OMAN HOLDINGS LIMITED for an on-licence pursuant to s.7 of the Act in respect of premises situated at 6 Omana Avenue, Epsom known as "Florence Court"

BEFORE THE LIQUOR LICENSING AUTHORITY

Chairman: District Court Judge J P Gatley

Members: Mr R J S Munro

Mr J W Thompson

HEARING at AUCKLAND on 8 and 9 July 1999

APPEARANCES

Mr A Dormer for applicant

In opposition

Mr R R Ladd for residents of Omana Avenue, Mountain Road and the Board of Pines Apartments Limited

Mrs V A Ross) In person

Mr D Williams)

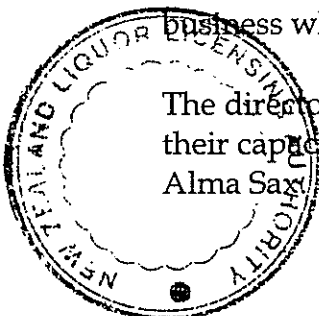
Mrs A M Carr - Auckland District Licensing Agency Inspector - to assist

DECISION

This is an application by Oman Holdings Limited for an on-licence in respect of premises situated at 6 Omana Avenue, Epsom, Auckland known as "Florence Court". Public notification of the application attracted objections resulting in the matter being set down for public hearing.

The application and public notice both described the general nature of the business to be conducted under the licence (if granted) as "a Lodge". The application also indicated that the sale of liquor was not intended to be the principal purpose of the business which was described as "home occupation/accommodation".

The directors of the applicant company are Messrs A J Wadhams and A W Young in their capacities as trustees of a Family Trust for the interests of David John Sax and Alma Sax. At the hearing evidence on behalf of the applicant was given by Mr Sax.



A "Lodge" does not feature in the Sale of Liquor legislation but Mr Sax outlined a small homestay business catering for lodgers in 3 bedrooms and guests of lodgers attending to dine, with the total number of lodgers and diners being sold or supplied liquor not exceeding 20 on any one occasion.

For the objectors Mr Ladd raised two concerns:-

1. Whether the application was accompanied by a valid Resource Management Certificate pursuant to s.9(1)(e) of the Act. Without such the Authority would not have jurisdiction to consider the application.
2. Whether past activities undertaken by Mr and Mrs Sax at Florence Court have inconvenienced neighbouring residents to such a degree that their suitability to hold an on-licence could be challenged. It was also suggested that a lack of action by Mr Sax in following up a stated intention to apply for a Resource Consent for activities other than homestay reflected on his credibility.

The Relevant Statutory Provisions

Section 7 of the Act provides:-

"7. On-licences-(1) An on-licence shall authorise the holder of the licence to sell and supply liquor, on the premises or conveyance described in the licence, for
consumption on the premises or conveyance, to-
(a) Any person who is for the time being living on the premises or
conveyance, whether as a lodger or an employee of the holder, or otherwise;
or
(b) Any person who is present on the premises or conveyance for the purpose of dining; or ... "

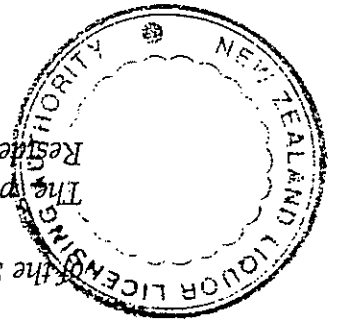
Section (9)(1)(e) Certificate

The original application was accompanied by a certificate issued pursuant to s.9(1)(e) of the Act dated 22 December 1998 signed by Richard Blakey, Team Planner, Hobson Ward certifying:-

"This is a certificate for the purposes of:

<input checked="" type="checkbox"/>	Section 7(1)(b) -	On Licence
<input type="checkbox"/>	Section 31(1)(3) -	Off Licence
<input type="checkbox"/>	Section 55(1)(3) -	On Licence

The premises at 6 Omana Avenue, Epsom, known as Florence Court, is zoned Residential 3a under the 1991 Operative Auckland City District Scheme and



Residential 2a under the 1993 Proposed Auckland City District Plan and the use of the premises for dining and consumption of liquor as part of a home occupation is:

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a permitted use;

☐

permitted as an existing use;

☐

permitted as a resource consent with conditions as per the attachments.

Accordingly, I hereby certify that the proposed use of the premises meets the requirements of the Resource Management Act 1991.

Signed for and on behalf of the Council".

Section 7(1)(b) of the Act describes an on-licence authorising the sale of liquor to persons present on the premises for the purpose of dining.

Following a query from the Authority, through an Agency Inspector, as to the adequacy of that certificate (on its face) in relation to the proposed use, a second s.9(1)(e) certificate was received by our Secretary on 24 June 1999, identical to the first except for the substitution of s.7(1)(a) in place of s.7(1)(b), with the result that the type of use cited as meeting the requirements of the Resource Management Act was the sale and supply of liquor to lodgers.

At the hearing a third certificate was produced, again dated 22 December 1998, with the only variation being that this time the certificate was worded as "*for the purposes of s.7(1)(a) and (b) - on-licence*" - i.e. covering the sale and supply of liquor to lodgers and diners.

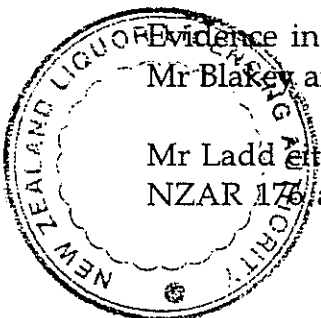
Although normally a s.9(1)(e) certificate would accompany the application, the Act does not preclude the Authority accepting an amended or subsequent certificate up to the time that an application is determined.

The hearing of this application took in excess of 1½ days with the majority of the time being taken up by Resource Management issues. Mr Ladd called Mr R J P Davies, a chartered planner and architect, to give his expert opinion concluding:-

" ... this application should not proceed to determination because the proposed activity is not in compliance with the Resource Management Certificate which I believe has been issued for activities of a different nature, definition and scale to those already existing on the site."

Evidence in relation to s.9(1)(e) certificates was also given by the above described Mr Blakey and by his Acting Team Leader Planning Consents, Mr H C Perkins.

Mr Ladd cited the judgment of Gallen J in Kyriak v Opuia General Store Ltd [1993] NZAR 176 at 186 as supporting a submission that an application which starts out



under s.7(1)(b) can not become an application under s.7(1)(a), or as finally reached in this application under s.7(1)(a) and (b) "without formality". Mr Ladd further cited a decision of this Authority on an application by Birkenhead Licensing Trust LLA Decision No. 195/97 at page 10 where we said that Gallen J did not elaborate as to what formality would be required but, presumably, he was contemplating the lodging of a fresh application, or at the very least, fresh public notification of an amended application.

In Kyriak Gallen J was considering an appeal in respect of an off-licence and said at page 186:-

"I do not think that an application which starts out under s.36(1)(c), can without formality, become during the course of the proceedings, an application under s.36(2)(b). The two are entirely separate and require different considerations to be taken into account."

In effect His Honour was saying that an application for an off-licence in respect of a stand alone bottlestore could not, without formality, become during the course of the proceedings an application for an off-licence authorising the sale of liquor as an appropriate complement to other goods sold in the premises. His Honour's observation can be distinguished on the facts of the present application. As submitted by Mr Dormer for the applicant Oman originally sought an on-licence in respect of a Lodge, and continued to do so at the hearing. This is not a case of an application starting out seeking a licence for a restaurant and becoming, during the course of proceedings, an application for a hotel. It was an Auckland City Team Planner - not the applicant - who changed the references in the s.9(1)(e) certificates from s.7(1)(b), to s.7(1)(a) and finally to s.7(1)(a) and (b). In Kyriak (supra) at page 183 Gallen J said:-

"Decisions of a planning nature are to be made by the appropriately qualified authority and subject to the procedures within which those authorities act."

In accord with His Honour's observation on the morning of the second day of the hearing of the present application the Authority moved to foreshorten consideration of planning issues by giving the following ruling:-

"Certificate number 3, issued for the purposes of section 7.1(a) and (b) of the Sale of Liquor Act 1989 certifies that the proposed use of the premises for dining and consumption of liquor as part of a home occupation is a permitted use and meets the requirements of the Resource Management Act 1991.

Counsel for the applicant has indicated that if the on-licence sought is granted, use of the premises pursuant to that licence will be limited to the sale and supply of liquor to, and the consumption of liquor by, lodgers and their invited guests not exceeding 20 in total. The exact wording of the undertaking to be given to that effect has yet to be determined.



Yesterday and this morning there has been much mention of activities at Florence Court that have contravened the Auckland City District Plan and that such activities will occur in the future. If they do that is a matter for Auckland City Enforcement Officers. It is open to objectors represented at today's hearing to seek a declaration, enforcement orders or interim enforcement orders from the Environment Court pursuant to the Resource Management Act.

A query has been made as to whether Mr R Blakey, the Team Planner who signed the certificate, had regard to the wording of section 7.(1)(a) and (b) of the Sale of Liquor Act before issuing the certificate. We can accept that in the course of issuing similar certificates Mr Blakey would be aware that he was giving a certificate approving use of the premises for the sale and supply of liquor to lodgers and diners.

This morning Mr H C Perkins, Acting Team Leader Consents, Auckland City Council Environments, has on oath confirmed that Auckland City stands by certificate number 3. The Authority accepts that certificate and consistent with previous decisions, will not go behind it."

Suitability of Applicant

Mr Ladd called four residents of Omana Avenue and one from Mountain Road who had lodged objections to the application. They told us of concerns regarding past activities at Florence Court that did not comply with the Residential 2a zoning of the property or "home occupations" permitted as of right (i.e. without requirement for a Resource Consent). Such activities included:-

1. A commercial function to launch several new models of Mercedes vehicles. A witness said that on that occasion there could have been up to 100 persons and Omana Avenue was blocked with vehicles. *"One particular problem was a large vehicle transporter which delivered the new vehicles to Florence Court for the promotion".*
2. Advertisements in a magazine called "Bride and Groom", and on the Internet, advertising Florence Court (described by the witness as the *"most stately home in the street and ... the most admired property in the area other than Government House"*) as being available for wedding functions *"which again will create congestion and noise."*
3. A 50th birthday party held as an evening function including a band. *"The band was inside but could be heard not less than two houses away and the noise carried on well after midnight".*

Evidence given by Mrs A E MacKenzie included:-

We believe that an application for a liquor licence for a "lodge" is the thin edge of the wedge and that the Applicant will seek by incremental steps to turn the property into a fully commercial operation with alcohol freely consumed whereby the whole nature of the property will be changed to the detriment of the neighbourhood.



...

My understanding is that the company has a wedding of 250 guests booked for the 18th of December. This will create huge amount of traffic congestion at that time and alcohol would be a usual part of the function."

It is relevant to mention here that:-

1. By letter dated 29 September 1998 Mr Roger Sharpe, City Enforcement Officer, wrote to Mr Sax:-

"All the planners agree that the 'Lodge' facility can be considered as a 'home occupation', and permitted.

The Council Planners have stated though, that if the Lodge facility increased in size and scale, then the activity would not be permitted. In such instances, a Resource Consent would be required".

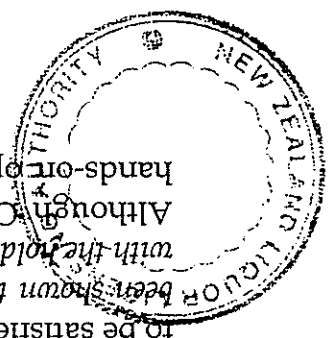
2. By letter dated 17 May 1999 Mr Sharpe wrote to Mr Roger Bartley - one of the neighbouring objectors - including:-

"It has been pointed out to Mr Sax that he requires a Resource Consent to be approved before further non-charitable functions can occur on the site. -
Mr Sax has agreed to apply for a Resource Consent for functions, such as weddings and parties. Such an application will be lodged in the next couple of weeks."

Objecting witnesses and their counsel suggested that the fact that over seven weeks had elapsed since Mr Sax had indicated he would make an application for a Resource Consent "in the next couple of weeks", without him having done so, raised a question as to Mr Sax's credibility. In particular the objectors had concerns as to whether assurances given by Mr Sax in a letter to neighbouring residents dated 19 April 1999 - and at the hearing - as to the limited nature of Lodge/Homestay activity would be complied with.

The Authority has some empathy with the concerns of neighbours of Florence Court but feels they can be best met by a form of undertaking to be finalised later in this decision.

To refuse an application for an on-licence on grounds of suitability the Authority has to be satisfied, on the balance of probabilities, that "... the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of a licence" per Holland J in Appeal by Sheard [1996] NZAR 61 at 69. Although Oman Holdings Limited is the applicant, Mr and Mrs Sax will be the hands-on operators of Florence Court. Evidence adduced at the hearing has not



persuaded us that they are not likely to carry out properly the responsibilities that go with the holding of a licence.

Trading Hours

Section 14(7) of the Act provides that in determining the days on which and the hours during which liquor may be sold the Authority may have regard to the site of the premises in relation to neighbouring land use. The applicant seeks a 24 hour licence Monday to Sunday. The Authority viewed Florence Court and had regard to the area of the buildings and grounds, and distances to neighbouring residential properties. We are satisfied that providing the limited "Lodge/home occupation/accommodation" use outlined by Mr Sax is responsibly operated such limited activities can take place under a 24 hour licence without inconvenience to neighbours. Any unwarranted inconvenience to neighbours that might eventuate in fact would bring forth complaints and an Inspector's or Police application pursuant to s.132 of the Act.

Undertaking

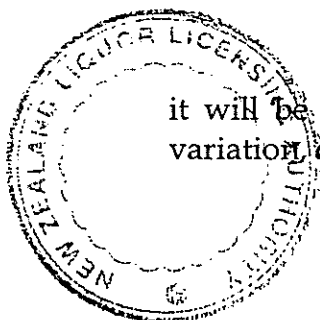
The wording of the undertaking given on behalf of the applicant by Mr Sax is as follows:-

- "1. The number of lodgers and diners will not exceed 20 at any time when liquor is being sold, supplied or consumed pursuant to the licence.*
- 2. Without a Resource Management Consent being first obtained the licensee will not allow any activity (at which liquor is served) including meetings, functions or entertainment, to be carried on within the buildings or grounds of Florence Court involving more than twenty persons in total.*
- 3. The undertaking in 2 above does not preclude any activity consistent with a resident's permitted use of their home, for which the City Council advises that no resource consent is required."*

We point out that should:-

1. The conduct of the business become other than as portrayed in the application, or
2. There be any breach of the above undertaking, or
3. The manner of operation of the premises brings it to the attention of the enforcement authorities

it will be open to them to lodge an application pursuant to s.132 of the Act for variation, cancellation or suspension of the licence.





A sign attached to the exterior of the premises, so as to be easily read by persons outside each principal entrance, stating the ordinary hours of business during which the premises will be open for the sale of liquor AND

The applicant's attention is drawn to s.25 of the Act obliging the holder of an on-licence to display:-

1. The expiry of 20 working days from the date of this decision. That period is the time provided by s.140 of the Act for the lodging of a notice of appeal.
2. Either Mr or Mrs Sax has obtained a general manager's certificate and the Authority has received confirmation from the District Licensing Agency that all relevant clearances have been obtained.

The licence shall not issue until:

- (a) Any person who is for the time being living on the premises, whether as a lodger or an employee of the licensee, or otherwise; OR
- (b) Any person who is present on the premises for the purpose of dining.

We are satisfied as to the matters to which we must have regard as set out in s.13 of the Act and we grant the applicant an on-licence authorising the sale and supply of liquor, for consumption on the premises, to -

A five page report from Mrs A M Carr, Auckland District Licensing Agency Inspector, dated 12 May 1999 concluded no opposition to the issue of the on-licence as applied for by Oman Holdings Limited. In an oral report at the hearing Mrs Carr submitted that providing the proposed use of the premises is permitted the on-licence should issue despite any misgivings expressed by neighbouring residents.

In an undated report received by the Agency on 23 April 1999 the Police advised no objection to the application.

Reports

The exact wording of the above undertaking is as determined by the Authority, after an exchange of correspondence since the hearing between our Secretary and the parties or their counsel. The wording is consistent with that used by Mr Sax at the hearing, and accepted by Mr Dormer and Mrs Carr. Mr Ladd for the objectors has reservations concerning the wording on Resource Management grounds. In these circumstances a form of wording has to be arrived at that the Authority considers fulfils the purpose for which it has been given. The exact wording cannot be negotiated with the parties as in that way finality may never be reached.

2. A copy of the licence, and of the conditions of the licence, attached to the interior of the premises so as to be easily read by persons entering through each principal entrance.

The entrance into the reception area is designated as the principal entrance.

The licence will be subject to the following conditions:

- (a) The licensee shall have available for consumption on the premises, at all times when the premises are open for the sale of liquor, a reasonable range of non-alcoholic refreshments:
- (b) Liquor may be sold only on the following days and during the following hours:
At any time on any day to -
 - (i) Any person who is for the time being living on the premises whether as a lodger or an employee of the licensee, or otherwise.
 - (ii) Any person who is present on the premises for the purpose of dining.
- (c) Food shall be available for consumption on the premises at all times when the premises are authorised to be open for the sale of liquor.
- (d) Each of the following parts of the premises is designated as a supervised area:
Any bar area.
- (e) The licensee shall ensure that the provisions of the Act relating to the sale and supply of liquor to prohibited persons are observed.

THE LICENSED PREMISES

In terms of Reg. 7 of the Sale of Liquor Regulations 1990 the sale or supply or consumption of liquor is authorised in the premises generally. The premises, located at 6 Omana Avenue, Epsom, Auckland are more precisely identified in a plan date stamped as received by the Liquor Licensing Authority on 27 May 1999.

DATED at WELLINGTON this 20th day of July 1999



Judge J P Gatley
Chairman

