

**FAR NORTH DISTRICT LICENSING COMMITTEE  
ON-LICENCE RENEWAL AND VARIATION - TAVERN  
MINUTE**

**NZDLCFN/01/289/MIN [2021]**

**IN THE MATTER OF** Sale and Supply of Alcohol Act 2012 (the Act)

**AND**

**IN THE MATTER** of an application by Duke of Marlborough Business Limited pursuant to Section 120 of the Sale and Supply of Alcohol Act 2012 for the renewal of an On Licence held in respect of premises situated at 35 The Strand, Russell, Far North District known as Duke of Marlborough Hotel

**AND**

**IN THE MATTER** of an application by Duke of Marlborough Business Limited pursuant to Section 127 of the Sale and Supply of Alcohol Act 2012 for the Variation of an On Licence held in respect of premises situated at 35 The Strand, Russell, Far North District known as Duke of Marlborough Hotel



### **Subpart 3- Licensing Process: On-Licences, Off-Licences and Club Licences**

#### ***Applications for licences***

#### **Section 127: Application for renewal of licence**

- (1) The holder of a licence may apply in accordance with this section to renew the licence.
- (2) Every application for renewal-
  - (a) Must be filed with the licensing committee with which the application for the licence was filed; and
  - (b) Must be made no later than 20 working days before the expiry of the licence, or by such later date (not being later than the date of the expiry of the licence) as the licensing committee may allow; and
  - (c) Must be made in the prescribed form and manner; and
  - (d) Must contain the prescribed particulars; and
  - (e) If it relates to any premises, must be accompanied by a statement by the applicant that-
    - i. The owner of the building in which the premises are situated provides and maintains an evacuation scheme as required by section 21B of the Fire Services Act 1975; or
    - ii. Because of the building's current use, its owner is not required to provide and maintain such a scheme; or
    - iii. Because of the nature of the building, its owner is exempt from the requirement to provide and maintain such a scheme; and
  - (f) Must be accompanied by the prescribed fee

- (3) The applicant must comply with the notification requirements set out in Section 101; but public notice of the application must be given within 10 working days after filing the application not 20.

### **Section 120: Variation of conditions**

- (1) The holder of a licence may at any time apply to the licensing committee to vary or cancel and condition of the licence (whether the condition was imposed by the licensing authority or the committee)
- (2) The application must be made in the prescribed form and manner and be accompanied by any prescribed fee.
- (3) The applicant must comply with the notification requirements in Section 101.
- (4) A person may object to the grant of the application if he or she has a greater interest in the application than the public generally.
- (5) Every objection must comply with the requirements set out in Section 102(2) to (5).
- (6) Section 103 and 104, with any necessary modifications, apply to applications under this section.
- (7) In considering the application, the licensing authority or licensing committee concerned must have regard to any relevant matter that is specified in Section 105.
- (8) In deciding whether or not, or to what extent, to vary any conditions imposed on a licence, the licensing authority or licensing committee concerned must have regard to any inconsistency between the conditions as proposed to be varied and any relevant local alcohol policy.

### **Nature of the Variation**

The applicant has sought a redefinition of the premises licensed area to include the alfresco dining area, as currently authorized pursuant to the Far North District Councils 'Control of the Use of Public Places Bylaw 3222.1. Authority ALF-49 refers. This authority expires 30 June 2021.

### **Licensing Inspectors Report**

The licensing inspector by report advises the applicant has held Council approval to occupy public space since 2010. But records this authority is inconsistent with the Councils Alfresco Dining Policy and that consideration will be required as to whether the alfresco licence is renewed when it represents for its annual renewal 1 July 2021.

The following is an extract from the licensing inspectors report:

*The required location map, photographs and floor plan for the variation have been provided and date stamped as received by the Far North District Licensing Committee as at 23 June 2021.*

*The alfresco dining area for which the variation application pertains to is an outdoor alfresco dining area located on public space across the road from the premises, covering an area of 44m x 3m. The alfresco dining area located on public space across the road from the premises does not exceed the premises front boundary points.*

*The Northland Transport Alliance (NTA) have confirmed that this public space is located along a legal carriageway. The NTA have requested that the applicant has 'Health & Safety' processes in place to ensure staff and patrons are safe when using the public space for the purpose of alfresco dining.*

*Located within the approved alfresco dining space are three Council owned seats. The Council's District Facilities Department have confirmed that they "are not in favour of work and associated costs to Council in relocating existing park benches that exist for the wider public, free for use". It is recommended that the Applicant is able to exclude the public park benches from his licensed alfresco dining area. It is understandable by having a licensed alfresco dining area with public park benches amongst it will create issues for the Applicant to be able to adequately monitor the sale, supply and consumption of alcohol in the approved alfresco dining area – it is recommended that the Applicant reports any 'Alcohol Control Bylaw' breaches to Police as Police Officers have the powers of enforcement under the 'Alcohol Control Bylaw'.*

*From a telephone conversation had with the Applicant on 25 May 2021, the Applicant has confirmed that he would be prepared to remove the public park benches at his own expense, the Applicant would need to discuss this request with the Council's Infrastructure & Asset Management Department. On 23 June 2021, a 'Request for Service' reference number RFS4066636 was lodged and assigned to the Council's Infrastructure & Asset Management Department to consider the Applicants request to remove the three Council owned seats that are situated within the Applicants approved alfresco dining area located on public space. This request is currently being considered by the relevant Department.*

*The applicant has requested that the alfresco dining area for which the variation application pertains to is designated Supervised".*

#### **Objection subsequently withdrawn**

The licensing Inspectors reports:

*"One objection was received in opposition from the Northland Transport Alliance (NTA) dated 19 May 2021. The NTA objection was pursuant to sections 105c and 105h of the Sale and Supply of Alcohol Act 2012.*

*In regard to the NTA objection under section 105c of the Sale and Supply of Alcohol Act 2012, there is no local alcohol policy in the Far North District, however the 'Alcohol Control Bylaw 2018' which was adopted by Council on 13 December 2018 and commencement date was 19 December 2018.*

*The Strand, Russell is included in the alcohol control area under map 19 of the 'Alcohol Control Bylaw 2018'. A link to the current 'Alcohol Control Bylaw 2018' can be found at the following link: <https://www.fndc.govt.nz/files/assets/public/objectivedocuments/governance-and-executivemanagement-qem/bylaws/alcohol-control/alcohol-control-bylaw-2018.pdf>.*

*Alcohol control areas under this Bylaw does not include 'Licensed Premises' as explained in the 'Explanatory notes' of the Bylaw document which reads 'Alcohol control areas do not apply to licensed premises, which can include situations where a special license has been issued for a specific event. Licensed premises can include areas of public places such as footpaths.'*

*In regard to the NTA objection under section 105h of the Sale and Supply of Alcohol Act 2012, the operator has been occupying the public space since 2010 and held Council approval as per approval reference ALF-49. A copy of the current Council alfresco approval is included with the application.*

*It would appear that the process for Council approval to occupy public space has not been consistent in terms of consultation with relevant stake holders such as NTA, Community Board or Public.*

*The objection from the NTA was later withdrawn on 3 June 2021 and a copy of their request to withdraw their objection is included in the application file."*

### **For completeness**

There are three operators located along The Strand in Russell who currently hold Council approval to occupy public space for the purpose of alfresco dining.

At present there is only one operator permitted to serve alcohol along the Strand in Russell, this operator is 'Sambrosis Limited trading as Seaside' holder of ON-Licence 01/ON/002/2021 with an expiry/renewal date of 15 March 2022.

### **Section 131**

Section 131 of the Act establishes the matters to which the committee must have regard when considering whether to renew a licence:

- (1) In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:
  - (a) The matters set out in paragraphs (a) to (g) (j) and (k) of Section 105 (1).
  - (b) Whether (in its opinion) the amenity and good order of the locality would be likely to be increased by more than a minor extent by the effects of a refusal to renew the licence
  - (c) Any matter dealt with in any report from the Police, an Inspector or a Medical Officer of Health made by virtue of section 129:

- (d) The manner in which the applicant has sold (or as the case may be sold and supplied) displayed, advertised or promoted alcohol.
- (2) The Authority or Committee must not take into account any prejudicial effect that the renewal of the licence may have on the business conducted pursuant to any other licence.

A renewal on-licence specifically does not capture subsections (h) and (i) of Section 105 of the Act. These are the two sections that relate specifically to amenity and good order.

- h) 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.
- i) Whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that-
  - i. They would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but
  - ii. It is nevertheless desirable not to issue any further licences:

#### **Section 105: Criteria for issue of licences**

As stated above the matters to which a licensing authority or the licensing committee concerned must have regard in relation to a renewal application are restricted to sections (a) to (g) (j) and (k):

- a) The Object of the 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.
- h) 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.
- i) Whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that –
  - (i) They would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but
  - (ii) It is nevertheless desirable not to issue any further licences.
- j) Whether the applicant has the 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.

## Section 120

Critically, as this is an application for a renewal as well as a variation subsection (7) reintroduces the requirement for the District Licensing Committee to have regard to Section 105 matters in completeness.

In this regard Section 106 sets the characteristics to which the committee must assess compliance with section 105 matters.

## Section 106: Considering effects of issue or renewal of licence on amenity and good order of locality

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 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 purposes for which those premises will be used if the licence is issued.

(2) In forming for the purposes of section 131(1)(b) an opinion on whether the amenity and good order of a locality would be likely to be increased by more than a minor extent by the effects of a refusal to renew a licence the licensing authority or a licensing committee must have regard to the following matters (as they relate to the locality)

- a) Current and possible future noise levels
- b) Current and possible future levels of nuisance and vandalism.

## In consideration of Section 105, 106 and 131 matters

In considering this application the first matter to which we must have regard is that the applicant's current licence to occupy public space is (as stated by the licensing inspector) inconsistent with the Far North District Councils Alfresco Dining Policy. A copy of which is appendices to this decision. The specific section of the Policy that appear non-compliant are recorded below:

- Councils' policy specifies that both pedestrian and vehicular traffic flow must be maintained in a sensible and safe manner.
- The maximum area in which the extended operation can take place must leave a minimum of 1.5 metres clear access for pedestrian traffic.

- No tables, chairs or displays are permitted where the proposed area is adjacent to a bus-stop, taxi stand, pedestrian crossing, Council seating or rubbish bins.
- Maintain both pedestrian and vehicular traffic flow in a sensible and safe manner.
- The maximum area in which the extended operation can take place must not exceed the premises front boundary points and must leave a minimum of 1.5 metres clear access for pedestrian traffic.

Although the objection from the Northland Transport Alliance was subsequently withdrawn the correspondence attached to the application raises legitimate concerns regarding public safety as the area is legally defined as public road.

Correspondence and photographs contained within the application identify this area is settled with Council seating. Correspondence on file states that the Councils District Facilities Department have confirmed that they *“are not in favour or work and associated costs to Council in relocating existing park benches that exist for the wider public, free for use.”*

The maximum area in which the extended operation can take place must not exceed the premises front boundary points. This statement is subjective in that it can be read as being the area not exceeding the total width of the buildings footprint as appears captured in the current authority. Equally it can be interpreted as being contiguous with the premises front boundary by not exceeding it. The District Licensing Committee are not experts on the application of the policy. We are entitled to rely on subject experts to provide clarity where ambiguity exists. In this application clarity has not been provided.

The practical application of the Alfresco Dining Policy requires that applications which meet all criteria can be approved at a staff level. All other application, including those which are declined, are to be approved by the relevant Community Board. It appears as if this process has not been followed.

Case law on the matter of the application of certificates issued by a territorial authority relates specifically to the application of the Resource Management Act 1991 and the Building Code. In this regard the Court has held that Licensing Committees and the Licensing Authority do not have the authority to enquire into the validity of an authority. In *Kyriak v Opuu General Store Ltd* [1993] (HC) per Gallen J, the High Court held that if a certificate purports to come from a local authority and is signed by a person who purports to be signing on behalf of the local authority, the licensing committee or licensing authority cannot go behind that and is entitled to rely on a presumption that the formalities within the territorial authority have been complied with.

Whilst this section of the Act is silent on the application of By-Laws the commentary in Westlaw goes on to state that *“If there is no valid certificate and it is clear that the proposed use of the premises do not match then the licensing committee and the Licensing Authority will lack jurisdiction to consider the application. In such cases, the Authority has in the past regarded the file as incomplete and referred it back for further certificates to be provided.”*



In further consideration of this matter, the Licensing Inspector acknowledges in her report that the authority for the alfresco dining licence was issued in error stating “It would appear that the process for Council approval to occupy public space has not been consistent in terms of consultation with relevant stake holders such as NTC, Community Board or public and that Council will need to consider whether it renews the alfresco dining licence now that it is aware the alfresco dining area is located on a legal road.”

### **Second Matter**

The second matter to which I must have regard is the proposed designation of supervised. In reality given this is public road which transitions into public beach the practicalities of enforcing supervised access only will be extremely challenging for the applicant.

Russell is an area that is popular with tourists over the peak summer holiday season and restricting access from this area given its interface with the beach and road, alongside providing shelter from the existing amenity trees would be challenging.

The committee need to consider the practicalities of imposing a supervised designation on this area and note the commentary from the Councils Facilities Department whereby they recommend excluding the public park benches from the alfresco dining area.

As stated above this will create significant challenges for the applicant in monitoring and enforcing the conditions of the licence should it issue.

### **Third matter**

At 44m x 3m the area in question is not small. The Medical Officer of Health has recommended the installation of a barrier. The NTA has not supported a barrier but has sought a Health and Safety process to ensure staff and patrons are safe when using public space for the purposes of alfresco dining.

The District Licensing Committee are not experts in this matter and are entitled to rely on statements made by subject experts on the matter of public safety.

### **Proliferation**

Section 105(2) specifically requires that the district licensing committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence. Accordingly, the fact that one other licensed premise holds an authority to supply alcohol for onsite consumption is excluded as one of the matters to which we must have regard.

Proliferation on the other hand is one of the criteria required to be considered as part of our Section 106 analysis.

We know Russell currently has one other authority that permits the sale, supply and consumption of alcohol in a public place via the premises current Alfresco Dining Licence and On-Licence.

We are aware this places restrictions on the publics unfettered and free access to all parts of the foreshore along the Strand.

What we are not clear on is the cumulative effects that could be imposed on the community by allocating further public space that would restrict public access to unaccompanied minors.

For completeness, the current alfresco dining policy does not place restrictions on unaccompanied minors being present.

### **Deliberation**

The committee are required to have regard to all matters specified in sections 105 and 106 of the Act.

At this time, the committee have insufficient information to enable us to make an informed decision on the application of subsections (e) (h) and (i) of Section 105 and Section 106 of the Act.

Specifically, we record the absence of clarity on the use of public road, proliferation, the application of designations in a public place, the purposes for which land near the premises is used and the loss of public amenity.

The committee are unable at this time to determine if amenity and good order of the locality would be adversely impacted by the grant of the authority.

We have been advised of concerns expressed by the NTA in regard to public safety, this matter remains outstanding.

We have been advised of concerns expressed by the Councils Facilities Department in regard to the relocation of public amenities. At this time, this matter remains outstanding.

The committee are unable to be satisfied as to the legitimacy of the Alfresco Dining Licence given statements made by the licensing Inspector. For completeness we are not unsympathetic to the situation the licensee finds themselves in. This appears to be an historic matter that has arisen from a misunderstanding of what an alfresco dining licence permitted.

Accordingly, the simplest way to address this, in lieu of the fact the alfresco licence expires in 4 days is to refer this matter back to the territorial authority for a new Alfresco Dining Licence to be issued.

It is our expectation that the Alfresco Dining Licence application will be referred to the relevant Community Board in compliance with the policy who will be able to provide a report back to the committee addressing the substantive matters raised in this minute.

### **SUBSTANTIVE LICENCE RENEWAL**

For completeness, the Far North District Licensing Committee record that there are no matters in regard to the suitability of the applicant to continue to hold an authority for the premises pursuant to Section 127 of the Act based on the premise's current authority.

### **DECISION**

The Far North District Licensing Committee in considering all of the matters to which we must have regard are unable, at this time, to arrive at a positive finding.

The Far North District Licensing Committee acting pursuant to Sections 187 and 188 of the Sale and Supply of Alcohol Act 2012 directs that the application be referred back to the Far North District Licensing Agency.

The matter of the substantive licence renewal will be held over until such time as the application for the variation has been disposed of.

**DATED** at Kerikeri this 27<sup>th</sup> day of June 2021.



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A L Court  
Chairperson  
Far North District Licensing Committee

### **Alfresco Dining Policy (#3116)**

#### **Background**

Café and restaurant owners benefit from increased business opportunities, and the wider community benefits by having a more vibrant commercial sector that is meeting the needs of a more discerning public.

This policy is driven by a growing number of requests for alfresco dining facilities and concerns raised by the public over the legality of this type of operation. This policy formalises the procedures and protocols for the application and the process for approving/declining alfresco dining licenses.

### **Objective**

To enable the private use of public space for outdoor dining.

### **Policy Statements**

Council's policy position in respect of alfresco dining is to:

- enable operators to legitimately occupy public space as an extension of their premises.
- create minimum standards for the upkeep and general maintenance of land used for this purpose.
- maintain both pedestrian and vehicular traffic flow in a sensible and safe manner.
- ensure the Council charges a fair rental for the use of these assets so as not to skew commercial considerations.
- ensure the applicant has adequate public liability insurance.
- ensure that provision is made for special events.

### **Application**

All requests to use a public space for outdoor dining must be lodged in writing to Council and along with the Alfresco Dining, Application for License, should provide the following information:

- a. Access requirements, including:
  - Footpath clearance, pedestrian access, and setback from the kerb
  - Location of street trees and underground services
- b. Safety and security requirements, including:
  - Location of chairs and umbrellas
  - Heating and lighting
  - Hours of Operation
  - Insurance Provision
- c. The standard and type of furnishing/fitout as well as a sketch plan.
- d. Extension of licensed premises and resource consents (where applicable).

### **Implementation Process**

1. Upon inquiry from potential applicant, and application checklist is sent, e.g., compliance conditions as outlined above. The applicant is asked to address these as part of their written request.
2. All applications are forwarded to Environmental Monitoring or Regulatory Services Manager.
3. Council staff (Environmental Monitoring) assess the application for compliance (site visit essential).
4. Approval will be given at staff level to those applications that meet all criteria. All other applications, including those which are declined, are to be approved by the relevant Community Board.
5. License details are entered into the computer for annual renewal, and the license is signed, and consent fees paid.

### **Minimum Conditions to Apply**

6. The maximum area in which the extended operation can take place must not exceed the premises front boundary points and must leave a minimum of 1.5 metres clear access for pedestrian traffic.
7. Letter of support from adjoining (either side but same side of the street) business owners or lessees is desirable.
8. The designated area and facilities provided must be cleaned and maintained to a standard acceptable to Council.
9. The space occupied is not to obstruct access to or egress from the premises or adjoining premises as per fire regulations.
10. No tables, chairs, or displays are permitted where the proposed area is adjacent to a bus-stop, taxi stand, pedestrian crossing, Council seating, or rubbish bins.
11. A sketch plan of the applicant's requirements is to be supplied with each application together with a description of the materials and design of the furniture to be used.
12. The consent is business and person specific. A change of ownership will require a new application to be lodged.
13. The owners must abide by the direction of authorised Council officers.
14. Council can revoke the consent if any conditions are not being met or any problem cannot be resolved.
15. Fees will be determined by Council and are payable before written consent is issued or as specified in the written consent. These fees can be found in Council's Fees and Charges Schedule.
16. Trading is limited to the area designated and time specified in the consent. The owner is required to remove tables, chairs, etc. at the end of each trading day unless otherwise specified.
17. No alcohol is to be served, supplied, or brought to the tables and chairs until the appropriate Liquor Licence includes the Alfresco Dining area, permitting such activities.

18. Council accepts no responsibility for any damage or physical injury caused by the owner's operation.
19. Public liability insurance of \$500,000 is to be carried by the owner.
20. Council reserves the right to temporarily suspend the consent for any special events, e.g., Christmas parades. Written notice will be given to the licence holder in advance.
21. Notwithstanding any of these conditions, any existing conditions shall remain, e.g., building consent, resource consent, or any other Council requirement.
22. Owners must comply with their resource consents and other licences (e.g., liquor licence) and seek at their own expense any additional approvals regarding the extension of their premises. Any approval granted by Council to use public space in accordance with this Alfresco dining policy will not automatically imply compliance with any other regulatory issue.
23. Parking contribution requirements are waived for applications requiring up to five (5) tables. Any number of tables over five may require a parking contribution which will be determined by the Planning Department on a case-by-case basis.