

IN THE MATTERof the Sale and Supply of Alcohol Act
2012 (the Act)**AND****IN THE MATTER**of an application by General
Distributors Limited for an off licence
pursuant to s.100 of the Act in respect
of premises situated at 83 Weld
Street, Blenheim, Marlborough District
known as "Countdown Redwoodtown"**BEFORE THE MARLBOROUGH DISTRICT LICENSING COMMITTEE**Chairman: John Leggett
Member(s): Graeme Barsanti, Elizabeth (Liz) Hawthorne**HEARING** at Blenheim on Thursday 31 March 2016**Appearances**

Duncan McGill and Joanne McNaught (for the applicant)

Andrew Lindsay (Medical Officer of Health), Coral Hedley and Carol McIntosh (Nelson Marlborough
District Health Alcohol Licensing Officers)

Karen Winter, Rachel Mercer and Alice Boyce (Licensing Inspectors)

Michael Porter (Police Licensing Sergeant)

RESERVED DECISION OF THE DISTRICT LICENSING COMMITTEE (DLC)**Introduction**

The application was received on 20 January 2016 which seeks an off licence for a newly constructed Countdown supermarket in respect of the premise situated at 83 Weld Street, Blenheim. There is an existing supermarket on the adjacent site which is to be replaced by the new supermarket, due to open on 14 April 2016.

The criteria found in Section 105 of the Sale and Supply of Alcohol Act 2012 applied to this application.

The application was advertised and no public objections were received.

There was no opposition from the Police.

The licensing inspector and the Medical Officer of Health opposed the application in regard to the single alcohol area.

The proposed days and hours of opening are Monday to Sunday 7.00 am to 10.00 pm.

Location of the premise

The premises is located at 83 Weld Street, Blenheim. This is the urban shopping area of Redwoodtown. It is located close to a church and is located within short walking distance (160m)

from Redwoodtown School The nearest residential dwellings are located across the road from the supermarket. However there has been a supermarket operating on the adjacent site for many years.

Opposition

The Medical Officer of Health provided a report on 23 February 2016 pursuant to Section 103(3); the report opposed the granting of the off-licence in regard to the proposed single alcohol area. The report author, Alcohol Licensing Officer, Coral Hedley, advised they that they are waiting for further information, including a revised plan of the alcohol area and therefore in the interim were opposing the application.

The Licensing Inspector provided a report on 14 March 2016. The report stated *The plan supplied only describes a single alcohol area for alcohol display. The area described is immediately to your right as you enter the premises and currently includes the end of the shelving where it faces the produce display units. I do believe that the single alcohol area is between the entrance to the premises and the main body of the premises, or between the main body of the premises and the points of sale. However I do believe the applicant could go further in limiting (so far as is reasonably practicable) the exposure of shoppers in supermarkets to displays and promotions of alcohol by removing it from the end of shelves facing the produce area.*

Hearing

Evidence was presented by way of written material from:

- Joanne McNaught, Operations Manager (South Island), for Progressive Enterprises Limited.
- Coral Hedley, Alcohol Licensing Officer, Nelson Marlborough Public Health Services.
- General Distributors Limited (the applicant), presented by Duncan McGill (Duncan Cotterill).
- Medical Officer of Health, Nelson Marlborough District Health Board (Andrew Lindsay).

Joanne McNaught read her Statement of Evidence, A number of questions were answered. A point raised was the lack of consultation with agencies during the initial planning phase of the new supermarket. Consultation with the reporting agencies at this point may have alleviated the objections raised when the reporting agencies reported on the off-licence application and the supermarket was physically built.

Coral Hedley read her Brief of Evidence. Duncan McGill in cross examining Ms Hedley's evidence enquired of the Medical Officer of Health his opposition to the application especially in regard to the location and exposure elements of the Act. This led to a discussion on the interpretation of the single alcohol area as defined in section 113(5)(b)(i).

Duncan McGill read the applicant's Submission.

Andrew Lindsay read his Submission.

We noted that a number of emails were copied to the Secretary of the DLC prior to the hearing, regarding negotiations between the reporting agencies and Duncan McGill acting for the applicant. We noted that the applicant had agreed to three concessions to the application, being:

- Increasing the height of the shelving at the entrance from 1.5 metres to 1.8 metres (i.e. more than the suggested 1.7 metres);
- No end of aisle alcohol displays; and
- End of aisles will only contain grocery items and the height of these will be no less than the height of the adjoining alcohol displays.

We also note that the proposed change to the perimeter of the single alcohol area was not agreed to. The Medical Officer of Health advised that the opposition to the application still stood.

At the conclusion of the hearing a site visit was undertaken.

Comment on section 105 of the Act

Section 105 of the Act applied to this application:

105 Criteria for issue of licences

- (1) *In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:*
- (a) *the object of this Act:*
 - (b) *the suitability of the applicant:*
 - (c) *any relevant local alcohol policy:*
 - (d) *the days on which and the hours during which the applicant proposes to sell alcohol:*
 - (e) ***the design and layout of any proposed premises:***
 - (f) *whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:*
 - (g) *whether the applicant is engaged in, or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:*
 - (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 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.*

The common ground at this hearing was that the only issue was in relation to section 105(1)(e) of the Act.

Comment on section 105(1)(e) of the Act

We note the leading authority in the interpretation of this section is the decision of Gendall J in the High Court decision of *Christchurch Medical Officer of Health v J & G Vaudrey Limited* [2015] NZHC 2749 [6 November 2015] (Vaudrey).

We accept the submissions made by the applicant's solicitor, Duncan McGill, in the application of this decision. The following is an abstract from Mr McGill's submission:

Design and layout of premises: s 105(1)(e)

- 24 In the case of an application for an off-licence which is a supermarket, the DLC must impose a single area condition if it grants a licence. Relevantly, s 112(1) of the Act provides:

“The licensing authority or licensing committee concerned must ensure that, when it issues or renews an off-licence for premises that are a supermarket or grocery store, it imposes on the licence a condition describing one area within the premises as a permitted area for the display and promotion of alcohol.”

- 25 The High Court has held²² that this is an evaluative exercise requiring the relevant body to:

- 25.1 Be satisfied that the proposed area is a single area;
- 25.2 Be satisfied that the proposed area complies with s 113(5)(b);
- 25.3 Consider whether the proposed plan limits, so far as is reasonably practicable, the exposure of shoppers to displays, promotions and advertisements for alcohol.

²¹ *B & M Entertainment Limited & Ors v Wellington City Council & Ors* [2015] NZARLA PH 21-

28

²² *Vaudrey* at [14][d]

26 The Court held that in undertaking this evaluative exercise, it is the role of the DLC to describe the single alcohol area.²³ It is not limited to simply accepting or rejecting the plan submitted by the applicant. Rather, the DLC must describe an area which it considers complies with the above criteria after hearing evidence and submissions from the parties.²⁴

27 Counsel submits that the area proposed by the applicant, at **exhibit 2** of Ms McNaught's statement, complies with the relevant criteria for the following reasons.

Is the proposed area a single area?

28 Section 113(2) of the Act provides that an alcohol area must be described by means of a plan or footprint. The Applicant has provided a plan which depicts one area as the permitted area for the display and promotion of alcohol.²⁵

Does the area comply with s 113(5)?

29 The relevant part of s 113(5) for this Application is as follows

- "(5) The authority or committee must describe an alcohol area within the premises only if, in its opinion,—
- (a) it is a single area; and
 - (b) the premises are (or will be) so configured and arranged that the area does not contain any part of (or all of)—
 - (i) any area of the premises through which the most direct pedestrian route between any entrance to the premises and the main body of the premises passes..."

30 The High Court in *Vaudrey* gives little guidance on how s 113(5) is to be interpreted.

31 Section 113(5)(b) does not restrict the ability of the single alcohol area to be close to one of the restricted areas, or indeed in view of the main body or entrance of the premises. As such, the fact that alcohol may be near to the

²³ *Vaudrey* at [14][d]

²⁴ *Vaudrey* at [14][d]

²⁵ Ms McNaught's statement at exhibit 2

entrance or visible to a customer who enters the store does not mean that the single alcohol area contravenes the Act.

32 **Exhibit 2** shows that the alcohol area is located at to the right upon entry. Ms McNaught's view is that the main body of the supermarket is the area comprising aisles one to eleven.²⁶ It is submitted that the most direct pedestrian route between the entrance and main body of the store is to move straight ahead or left upon entry.

33 The fact that a customer may pass by the single alcohol area when moving towards the produce or bakery section does not mean that the alcohol area is in a prohibited area. It is submitted that the word "through" in the Act cannot be taken to mean "passing by." The Authority in *Lockyer Holdings* provided commented as follows:

"Bypassing the area is a different concept from going through it. It is going through a single alcohol area that it prohibited in terms of section 113(1)(b) of the Act."²⁷

34 For the reasons above, it is submitted that a customer does not pass *through* the single alcohol area when moving in the most direct pedestrian route from the entrance to the main body and the proposed single alcohol area therefore complies with s 113(5)(b).

35 In any event, Ms McNaught has given evidence that all areas of the store are accessible without passing through the single alcohol area.²⁸ Counsel submits that in fact no direct route (let alone the *most* direct route) between the entrance and main body of the store passes through the single alcohol area.

Does the plan limit exposure of customers to alcohol so far as is reasonably practicable?

36 Section 113(1) provides:

- “(1) The licensing authority or licensing committee concerned must have regard to section 112(1)—
- (a) when describing an alcohol area; and

²⁶ Ms McNaught's statement at [36]

²⁷ *Lockyer Holdings (2007) Limited v medical Officer of Health (Mid Central Health) & NZ Police* [2015] NZARLA PH 191 at [20]

²⁸ Ms McNaught's statement at [36]

- (b) when taking any other action under this section; and
- (c) when forming any opinion for the purposes of this section.”

37 Section 112(1) provides:

“The purpose of this section and sections 113 to 114 is to limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol, and advertisements for alcohol.”

38 In *Vaudrey* Gendall J held that the role of the DLC when describing the single alcohol area is an evaluative one.²⁹ However, he went on to say that the entire Act endorses the proposition that any restriction must be proportionate.³⁰ The DLC’s role is not limited to a rubber stamping one, but nor can it impose absolute limits.³¹

39 The Court provided guidance on the following terms that are relevant to the DLC’s obligation to have regard to s 112(1) when describing a single area.

39.1 “Have regard to” bears its ordinary meaning. The decision maker must actively consider all matters, which requires them to understand all matters. The weight to be given to such matters is generally within the discretion of the decision maker.³² However, it is submitted that the DLC must also be mindful of the requirement of natural justice for a decision to have “proper evidential foundation.”³³

39.2 “Limit” does not amount to a total prohibition on exposure. To limit must be seen as to circumscribe, to restrict, or to reduce.³⁴ It is not capable of being interpreted as including a limitation so extensive that nothing else remains.³⁵

39.3 “So far as is reasonably practicable” is not absolute. The physical possibility or feasibility of a course of action is not synonymous with reasonable practicability. It involves a balancing exercise between the benefit sought to be secured and the sacrifices that would be occasioned by securing the benefit (such as cost, time, difficulty, and

²⁹ *Vaudrey* at [59]

³⁰ *Vaudrey* at [59][h]

³¹ *Vaudrey* at [59][h]

³² *Vaudrey* at [78]

³³ *Vaudrey* at [15][d]

³⁴ *Vaudrey* at [81]

³⁵ *Vaudrey* at [16][b]

inconvenience).³⁶ It is submitted that the benefit sought must be consistent with the purpose and object of the Act.³⁷ Inherent in the concept of "reasonably practicable" is the notion of proportionality.³⁸

- 40 The Court summarized the obligation of the DLC in relation to the single area condition as follows:³⁹

"[The] requirement is neither absolute nor de minimus. The relevant body is called upon to exercise its judgment as to whether, in each case, the limitation is condign... This requires a factual assessment of all relevant circumstances, including the size and layout of the supermarket. It must then ensure the objective sought to be secured is proportionate and reasonable when weighed against the sacrifices to be made in securing it."

- 41 It is submitted that the single alcohol area proposed by the applicant limits the exposure of shoppers to displays of alcohol for the following reasons.

- 41.1 The alcohol area is located to the right of the entrance and it is possible to access all areas of the store without passing through it.⁴⁰
- 41.2 There is no requirement in ss 112 or 113 of the Act for shoppers to not be able to see displays of alcohol while moving through the supermarket or even a requirement for shoppers to not be able to see displays of alcohol when moving from the entrance to the main body of the store.
- 41.3 Despite the fact that there is no restriction on visibility of alcohol in the Act, once customers have moved into the main aisles, the alcohol area is largely out of sight.⁴¹
- 41.4 Limitation does not mean a total prohibition on exposure.⁴² The Act permits the sale of alcohol in supermarkets, which means that it will be visible at some point as a customer moves through the store.

³⁶ *Vaudrey* at [87]

³⁷ *Vaudrey* at [14][g][iv]; The High Court made this statement in the context of determining the extent to which further conditions may be imposed.

³⁸ *Vaudrey* at [83]

³⁹ *Vaudrey* at [88]

⁴⁰ Ms McNaught's statement at [39]

⁴¹ Ms McNaught's statement at [39]

⁴² *Vaudrey* at [81]

- 41.5 GDL elected to install shelving to the right of the entrance. This was depicted on GDL's original plan (exhibit 1 of Ms McNaught's statement) but its dimensions have been increased slightly following discussions with the MOH. The shelving will measure 1800 mm by 595 mm by 3202.5 mm. This means that alcohol will largely be not visible as a customer enters the store.⁴³
- 41.6 GDL has included end of aisle displays adjacent the alcohol area; they are on the ends of the three aisles that are within the alcohol area. Ms McNaught has confirmed that these will contain grocery items only and the displays will be no less than the height of the adjacent shelving. She has said that this means that customers will actually have to look down the aisles in the alcohol area in order to see the alcohol.⁴⁴
- 41.7 The Act does not require the single area has to be completely partitioned off from the rest of the store. Doing so would be inconsistent with the Law Commission's Report *"Alcohol in our lives: Curbing the harm"*⁴⁵ where the Law Commission stated at paragraph 8.38:

"...we believe in principle that the continued association between food and alcohol remains valid as part of an overall strategy to foster a more responsible and moderate drinking culture."

- 42 It is submitted that the plan submitted limits the exposure of shoppers to displays of alcohol so far as is reasonably practicable for the following reasons:

- 42.1 The area is relatively small compared with the overall floor area of the store.⁴⁶
- 42.2 Countdown Redwoodtown has designed its store layout, including the single alcohol area with CPTED guidelines at **exhibit 5** in mind.⁴⁷
- 42.3 The Act places no restriction on the products near to which a single alcohol area may be located. Supermarkets and grocery stores are

⁴³ Ms McNaught's statement at [40]

⁴⁴ Ms McNaught's statement at [41]

⁴⁵ Law Commission's Report 114, *"Alcohol in our lives: Curbing the harm"* (2010, Wellington)

⁴⁶ Ms McNaught's statement at [42]

⁴⁷ Ms McNaught's statement at [37.2]

permitted to sell alcohol and the very nature of supermarkets means that products are on display.

42.4 Relocating the area would have significant operational, financial and practical consequences for Countdown Redwoodtown in terms of time, cost, and convenience. These consequences are addressed in more detail below in relation to the MOH's proposal that the single alcohol area be redesigned.

42.5 It is not clear that any material benefit would be secured by relocating the single alcohol area.

42.6 Physical possibility is not synonymous with reasonably practicability.

43 For the reasons above, it is submitted that the single alcohol area complies with the requirements of ss 112 to 113 of the Act. Counsel respectfully submits that the DLC describe the single alcohol area in accordance with the applicant's plan.

DLC's discretion to impose further conditions – s 117

44 Section 117 of the Act provides:

- "(1) The licensing authority or licensing committee concerned may issue any licence subject to any reasonable conditions not inconsistent with this Act.
- (2) The generality of subsection (1) is not limited or affected by any other provision of this Act."

45 The High Court held that the DLC has a discretion to impose any further conditions which are reasonable and not inconsistent with the Act.

46 The DLC must have identified a risk which it seeks to abate or benefit which it seeks to secure, and the risk or benefit must be consistent with the object and purpose of the Act and must be a proportionate response.⁴⁸

47 The High Court in *Vaudrey* held that the condition must be no more restrictive than necessary and a condition which is "absurd, ridiculous, patently

⁴⁸ *Vaudrey* at [14][g]

unjustifiable, extreme or excessive, will not be reasonable.”⁴⁹ The Court summarized the position on reasonableness for the purposes of s 117 as follows:

“Ultimately whether a condition is reasonable will depend on an objective assessment of whether there is a rational and proportionate connection, between the identified risk or benefit, when weighed against all relevant considerations.”⁵⁰

48 The DLC is required pursuant to s 112(2) to impose a condition describing one area for the display of alcohol. It is submitted that no further conditions pursuant to s 117 are required or justified.

⁴⁹ Vaudrey at [101]

⁵⁰ Vaudrey at [14][h]

Decision

We acknowledge the opposition by the Medical Officer of Health and note that the evidence produced was well presented but we cannot accept his interpretation in relation to section 113(5)(b)(i).

We acknowledge the evidence of the Medical Officer of Health in relation to section 112(1) and the exposure of shoppers to displays and promotions of alcohol, however we are mindful of the decision in Vaudrey and the undertakings of the Store Manager and the applicant’s solicitor’s submissions in regarding of the limiting of advertising and promotional signage within the single alcohol area.

In making our evaluation under section 112(1), we agreed that the application with the concessions made by email trail and noted above, complies with section 112(1). This was confirmed by our on-site visit and discussion with the Store Manager on exactly how the single alcohol area was being arranged and presented.

Therefore we grant the application for an off-licence in respect of premises situated at 83 Weld Street, Blenheim, Marlborough District known as "Countdown Redwoodtown" as received on 20 January 2016 with the concessions that were agreed to by email on 24 March 2016, being:

- Increasing the height of the shelving at the entrance from 1.5 metres to 1.8 metres (i.e. more than the suggested 1.7 metres);
- No end of aisle alcohol displays; and
- End of aisles will only contain grocery items and the height of these will be no less than the height of the adjoining alcohol displays.

with the area defined as per the plan dated 29 March 2016 (attached to the Statement of Evidence of Joanne McNaught as Exhibit 2).

DATED at Blenheim this

13th

day of

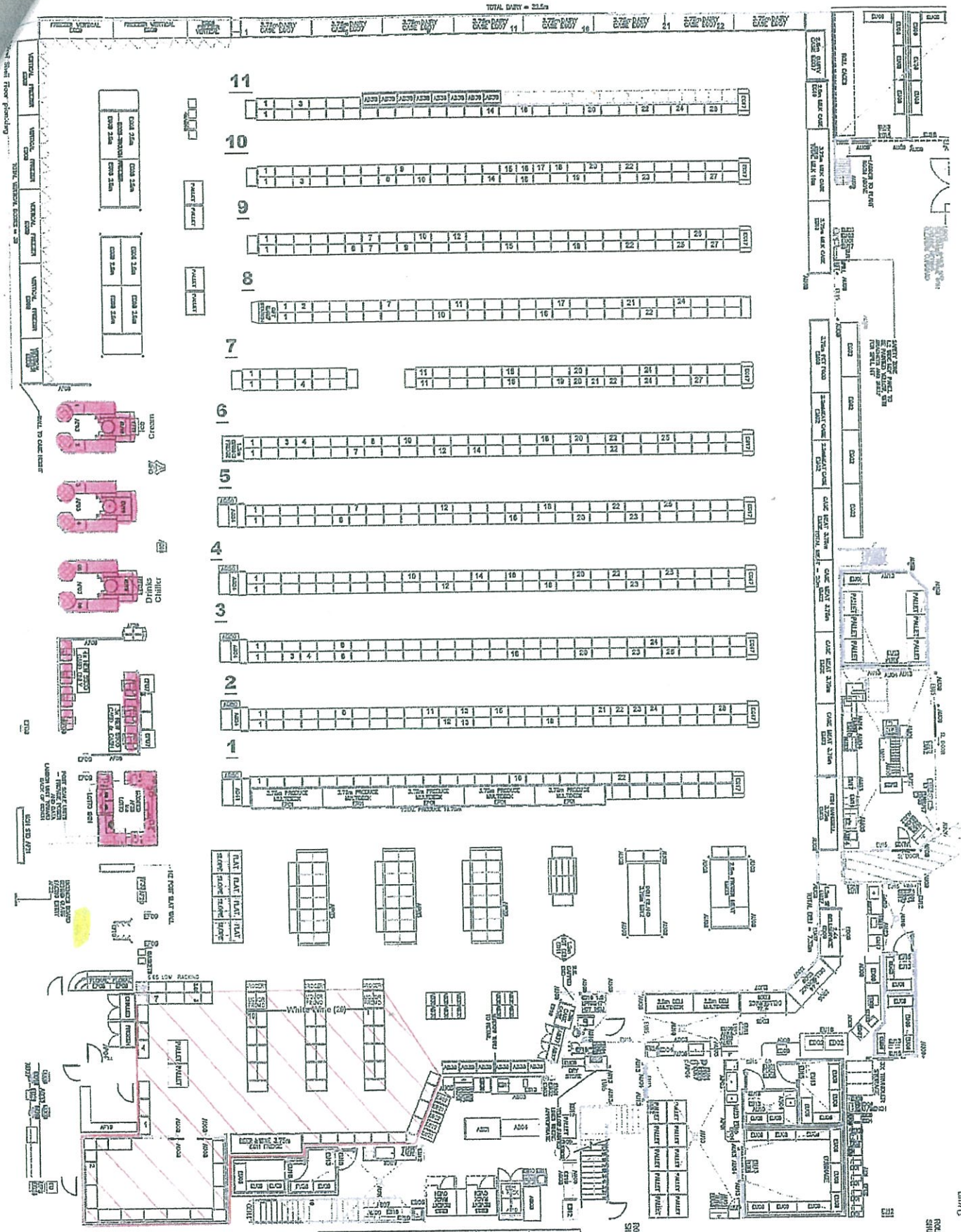
April

2016



Secretary
Marlborough District Licensing Committee





CD REDWOODTOWN 9212 29-03-16

= Single Alcohol Area
 = Point of Sale
 = Entry