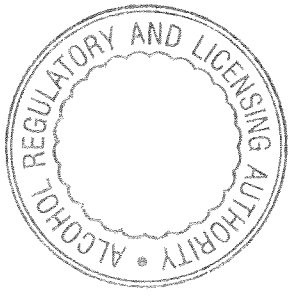
[2017] NZARLA PH 247 – 254

ARLA	284091/2015, 284307/2015, 284393/2015, 284394/2015, 284395/2015, 284404/2015, 284408/2015, 284011/2015
IN THE MATTER	of the Sale and Supply of Alcohol Act 2012
AND	
IN THE MATTER	of appeals pursuant to section 81 of the Act
BETWEEN	**REDWOOD CORPORATION LIMITED, NEW ZEALAND POLICE, FOODSTUFFS NORTH ISLAND LIMITED, SUPER LIQUOR HOLDINGS LIMITED, MEDICAL OFFICER OF HEALTH, PROGRESSIVE ENTERPRISES LIMITED, SALUTATION HOTELS LIMITED and TAKAPUNA RESIDENTS GROUP** Appellants
AND	**AUCKLAND CITY COUNCIL** Respondent
AND	**HOSPITALITY NEW ZEALAND INCORPORATED, ALCOHOL HEALTHWATCH, DANCE TILL DAWN, OTARA GAMBLING AND ALCOHOL ACTION GROUP, THE MILL HOLDINGS LIMITED and INDEPENDENT LIQUOR (NZ) LIMITED, SKYCITY AUCKLAND LIMITED and THE HEALTH PROMOTION AGENCY** Section 205 parties



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BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly
Members: Ms J D Moorhead
Mr R S Miller

HEARING at AUCKLAND on 13-17 February, 27 February-3 March, 6-10 March, and 28-31 March 2017 (with closing submissions in reply received in writing on 1 June 2017)

APPEARANCES

Mr R Brabant and Ms S Darroch – for Redwood Corporation Limited
Mr T G H Smith – for the New Zealand Police
Mr I J Thain and Ms I Scorgie – for Foodstuffs North Island Limited
Mr J D Young and Ms Brookman – for Super Liquor Holdings Limited
Mr D R La Hood – for Medical Officer of Health
Mr A W Braggins and Ms R M Steller – for Progressive Enterprises Limited
Mr S R Mitchell and Mr Lynch for Takapuna Residents Group

Mr P M S McNamara and Mr T R Fischer – for respondent

Mr J D Young and Ms Brookman – for Hospitality New Zealand Incorporated
Mr S R Mitchell and Mr Lynch – for Alcohol Healthwatch
Mr R M Warner – for Dance Till Dawn
Dr G J Hewison – for Otara Gambling and Alcohol Action Group
Mr J R Welsh and Ms J Duffin – for SkyCity Auckland Limited
Ms C Edmondson – for the Health Promotion Agency

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] The Sale and Supply of Alcohol Act 2012 (the Act) provides that the Auckland City Council (Council) may have a local policy relating to the sale, supply, or consumption of alcohol (or two or more of those matters), within the Auckland district.

[2] Following its adoption by the Council on 13 May 2015, and in accordance with the Act, the Council publicly notified a provisional local alcohol policy (PLAP) for Auckland.

[3] Eight parties filed appeals with the Alcohol Regulatory and Licensing Authority (Authority) against various elements of the PLAP on the ground that those elements are unreasonable in the light of the object of the Act. A further eight parties were granted leave by the Authority to and to be heard in relation to those appeals.

[4] The appeals were heard by the Authority by way of a public hearing over four weeks in February and March 2017, and closing submissions were received by the Authority by 1 June 2017.

Summary of Decision

[5] After considering the appeals, the Authority is satisfied that the following elements of the PLAP are unreasonable in light of the object of the Act. The Council is accordingly asked to reconsider these elements (s 83(2)).

[6] The first element is clause 4.3.1 of the PLAP which proposes for Auckland, region-wide maximum off-licence trading hours of 9.00 am to 9.00 pm. Specifically, the Authority is satisfied that the 9.00 am restriction on opening is unreasonable in light of the object of the Act. Given that the opening hour forms part of the same element as the maximum closing hour, however, the Authority asks the Council to reconsider clause 4.3.1 of the PLAP in its entirety.

[7] The second element is comprised of cls 4.3.2 and 4.3.3 of the PLAP (i.e. the policy on the hours within which alcohol may be delivered from remote sellers). These clauses are considered to be unreasonable in light of the object of the Act because s 77(1)(e) of the Act precludes a policy in a PLAP which seeks to restrict delivery times for remote sellers.

[8] In addition, the Authority acknowledges that the Council considers that there are 'shortcomings' with the drafting of four other clauses in the PLAP, namely:

a) cl 4.2.2 (which requires the District Licensing Committee (DLC) and the Authority, when determining whether to impose conditions on the renewal of off-licences of the kinds described in cl 4.2.3, to have regard to a Local Impacts Report prepared under cl 3.1);

b) cl 4.2.3 (which defines the kinds of off-licences relevant to cl 4.2.2);

c) cl 4.5.1(c) (which recommends the consideration of discretionary conditions for off-licences relating to single sales); and

d) cl 4.5.1(d) (which recommends the consideration of discretionary conditions for off-licences relating to the afternoon closing of premises near Education Facilities).

[9] The Authority is satisfied that the Council should reconsider these elements.

Statutory Framework

[10] The statutory framework for the adoption of a PLAP is set out in ss 75 to 97 of the Act. Section 75 of the Act provides that the Council has a discretion to adopt a local alcohol policy (LAP). If the Council chooses to adopt a LAP, then it must be produced, adopted and brought into force in accordance with ss 75 to 97 of the Act.

[11] As set out in s 75(2) of the Act, a LAP can provide differently for different parts of its district. The LAP can also apply differently to premises for which licences of different kinds are held or for which applications have been made.

[12] Section 77 of the Act sets out the policies which may be included in a LAP (and no others). These are:

[a] location of licensed premises by reference to broad areas;

[b] location of licensed premises by reference to proximity to premises of a particular kind or kinds;

[c] location of licensed premises by reference to proximity of facilities of a particular kind or kinds;

[d] whether further licences (or licences of a particular kind or kinds) should be issued for premises in the district concerned, or any stated part of the district;

[e] maximum trading hours;

[f] the issue of licences, or licences of a particular kind or kinds, subject to discretionary conditions; and

[g] one-way door restrictions.

[13] Section 77(3) specifically states that a LAP must not include policies on any matter not relating to licensing.

[14] Section 78 of the Act provides that if the Council wishes to adopt a LAP, it must first produce a draft LAP. In producing a draft LAP, the Council must have regard to:

[a] the objectives and policies of its district plan;

[b] the number of licences of each kind held for premises in its district, and the location and opening hours of each of the premises;

[c] any areas in which bylaws prohibiting alcohol in public places are in force;

[d] the demography of the district's residents;

[e] the demography of people who visit the district as tourists or holidaymakers;

[f] the overall health indicators of the district's residents; and

[g] the nature and severity of the alcohol-related problems arising in the district.

[15] Section 93 of the Act provides that a LAP may contain a policy more restrictive than the district plan, but may not authorise anything forbidden by the district plan.

[16] After producing the draft LAP, if the Council wishes to continue with it, the Council must produce a provisional LAP (PLAP) by using the special consultative procedure defined in s 5(1) of the Local Government Act 2002, to consult on the draft policy. In producing the PLAP, the Council must again have regard to the matters set out in para [14] above.

[17] Upon developing the PLAP, the Council must give public notice of the PLAP, the rights of appeal against it, and the ground on which an appeal may be made (s 80).

[18] The persons or agencies entitled to appeal against any element of the PLAP are those that made submissions as part of the special consultative procedure. An appeal must be filed with the Authority within 30 days of the public notification of the PLAP. The only ground on which an element of the PLAP may be appealed is that it is unreasonable in light of the object of the Act (s 81(4)). That object as set out in s 4(1) of the Act, is:

[a] the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and

[b] the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.

[19] The harm caused by the excessive or inappropriate consumption of alcohol includes:

[a] any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and

[b] any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph [a].

[20] When hearing an appeal, the Authority is treated, within the scope of its jurisdiction, as a Commission of Inquiry under the Commission of Inquiry Act 1908 and that Act applies with any necessary modifications (s 20).

[21] Section 83(1) of the Act requires the Authority to dismiss an appeal against an element of the PLAP if the Authority:

[a] is not satisfied that the element is unreasonable in the light of the object of the Act; or

[b] is satisfied that the appellant did not make submissions as part of the special consultative procedure on the draft LAP.

[22] The Authority must ask the Council to reconsider an element of the PLAP if the Authority is satisfied that:

[a] the appellant made submissions as part of the special consultative procedure on the draft LAP; and

[b] the element is unreasonable in the light of the object of the Act.

[23] An appellant has no right of appeal against the decision of the Authority (s 83(4)).

[24] If the Authority asks the Council to reconsider an element of the PLAP, the Council must:

[a] resubmit the policy to the Authority with the element deleted;

[b] resubmit the policy to the Authority with the element replaced with a new or amended element;

[c] appeal to the High Court against the Authority's finding that the element is unreasonable in the light of the object of the Act; or

[d] abandon the PLAP.

[25] Where the Council resubmits the LAP with an element replaced or with a new or amended element, the Authority must deal with the element as if it were an appeal against the earlier element (s 86).

[26] Section 87 then provides that if the Authority is satisfied that every element it asked the Council to reconsider has been replaced by a new or amended element

that is not unreasonable in the light of the object of the Act, the amended PLAP is adopted when the Authority makes its decision.

[27] Finally, s 97 of the Act provides that a LAP must be reviewed using the special consultative procedure:

[a] no later than 6 years after it came into force; and

[b] no later than 6 years after its most recent review was completed.

Elements Under Appeal

[28] The elements of the Auckland PLAP under appeal are:

a) clauses 2.1.1 and 2.1.2 (relating to the definition and extent of the 'City Centre' and 'Priority Overlay Areas') and related provisions in cls 1.1.1-1.1.4 (explanatory notes, interpretation and definitions and commencement) and the associated maps in appendixes 1 & 2;

b) clauses 3.1.1 - 3.1.5, 4.1.1, 5.1.1 - 5.1.5 and 5.2.2 - 5.2.3 (relating to the Local Impacts Reports policy tool);

c) clauses 4.1.2 - 4.1.3 (rebuttable presumption against the issuing of new licences in neighbourhood centres);

d) clauses 3.2.1, and 4.1.4 - 4.1.7 (relating to the temporary freezes on the issue of new off-licences in the City Centre and Priority Overlay sreas, and the rebuttable presumption against the issuing of new licences in these areas following the expiry of the temporary freeze);

e) clause 4.3.1 (maximum trading hours for off-licences in the Auckland region);

f) clauses 4.3.2 and 4.3.3 (hours within which alcohol may be delivered from remote sellers);

g) clauses 4.2.1 – 4.2.3, 4.4.1 - 4.4.3 and 4.5.1 – 4.5.2 (discretionary conditions);

h) clauses 4.4.4 - 4.4.5 (register of alcohol-related incidents);

i) clauses 5.3.1 (maximum trading hours for new and existing on-licences outside the City Centre); and

j) clauses 5.3.2 and 5.3.3 (maximum trading hours for new and existing on-licences within the City Centre).

Authority's Decision and Reasons

[29] Each of the elements under appeal is addressed below. Before doing so, however, the Authority addresses the legal principles which are raised by the appeals.

Legal Principles

The test to be applied by the Authority

[30] The test that the Authority is required to apply in these appeals is whether the elements are unreasonable in light of the object of the Act (s 81(4)). This test was discussed in *Hospitality New Zealand Incorporated* v *Tasman District Council* [2014] NZ ARLA PH 846 (the *Tasman* decision) and *B & M Entertainment Limited & Ors* v *Wellington City Council* [2015] NZ ARLA PH 21−28 (the *Wellington* decision). The 'reasonable person' test applies qualified by the words "in the light of the object of the Act". The test is what an informed objective bystander (i.e. the Authority) considers unreasonable having regard to the object of the Act. The two parts of the test require separate consideration but as we said in *Tasman* at [43],

> "*ultimately those two considerations merge in the ultimate test… The test combines the two concepts….*"

[31] The onus of proof is on the appellant. The standard of proof is 'on the balance of probabilities'. In *Tasman* we said at [36]:

> "*the onus is on the appellant to satisfy the Authority that the appealed element is unreasonable in light of the object of the Act. The very wording of the ground of appeal places that onus on the appellant. Should an applicant fail to discharge its onus on the balance of probabilities then there would be no need for a territorial authority respondent to do anything.*"

[32] In *Wellington*, we decided that the proportionality principles used in bylaw cases apply (per *Meads Brothers Limited* v *Rotorua District Licensing Agency* [2002] NZARLA 308). That is, it is likely that the policies in a PLAP will be unreasonable in the light of the object of the Act if:

(a) the proposed measures constitute a disproportionate or excessive response to the perceived problems;

(b) the proposed measures are partial or unequal in their operation between licence holders;

(c) an element of the PLAP is manifestly unjust or discloses bad faith; or

(d) an element is an oppressive or gratuitous inference with the rights of those affected.

[33] Added to these, as we said in *Wellington* and again in *Foodstuffs South Island & Ors v Dunedin City Council* [2016] NZARLA PH 212-26 (the *Dunedin* decision), if an element is *ultra vires* s 77 of the Act, being the empowering provision relating to the contents of a PLAP, then the element will be deemed unreasonable in the light of the object of the Act. Illegality must always be evidence of unreasonableness.

[34] In the present appeals, the Police submit that the proportionality principles in bylaw cases should not be read into the Act as to do so would amount to a 'gloss' being put on the statutory language which should only be done in cases where it is necessary to make the Act work.

[35] The Authority does not agree. The proportionality principles help give effect to the test in s 81(4). They go to determining 'reasonableness' as qualified by the Act. The principles do not seek to achieve an effect which is beyond the policy in the Act

as determined by Parliament. There is nothing in the proportionality principles which invites the Authority to find an element of a PLAP to be unreasonable because the Authority might consider that element to be an insufficient response to perceived local problems.

[36] As we said in *B H Williamson & Ors v Christchurch City Council* 18 August 2016 NZARLA 284961/2016 PH, what might be the best policy response to an issue is for the Council alone.

Object of the Act

[37] In *Dunedin* we said the Act seeks to strike a balance that minimises excessive and inappropriate consumption without unduly impinging on safe and responsible consumption.

[38] The Police, Medical Officer of Health and Alcohol Healthwatch submit that there is no basis for the suggestion that the Authority must weigh in the balance something akin to a 'right' to consume (or sell) alcohol. Instead, the first limb of the object of the Act, they submit, simply states that when people choose to consume alcohol the object of the Act is to ensure that the sale, supply and consumption of alcohol is done safely and responsibly. The object of the Act does not mean that there is a requirement in a PLAP to protect a public 'right' to consume alcohol, or to not "unduly impinge" on alcohol consumption.

[39] To the extent that it is necessary for determining these appeals, the Authority agrees that the object of the Act does not create a statutory 'right' to safely consume alcohol. The Act regulates the sale, supply and consumption of alcohol so that is undertaken safely and responsibly and the harm caused by excessive or inappropriate consumption is minimised. The point is simply that the object of the Act has two limbs. In regulating the sale, supply and consumption of alcohol, as we said in *Dunedin*, the Act seeks to strike a balance between these two limbs. In determining whether an appealed element is unreasonable in light of the object of the Act, the Authority must have regard to both limbs.

Precautionary Principle

[40] In *Tasman*, we said that the precautionary principle applies to the development of a local alcohol policy (at [54]). This was deduced from *My Noodle Ltd v Queenstown-Lakes District Council* (Court of Appeal) [2009] NZCA 564; 2010 NZAR 152. There Glazebrook J said at [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: ...."*

[41] In *Wellington*, we reiterated this saying that a precautionary approach, provided there is an evidential basis supporting it, can be used to see if a PLAP will achieve the statutory object (at [18]). And, in the *Foodstuffs North Island v Thames-Coromandel District Council* [2015] NZARLA PH 129-131 (the *Thames-Coromandel* decision) we found that the circumstantial evidence adduced by the respondent was

sufficiently strong to provide the evidential basis of the adoption by the respondent of the precautionary principle (at [24]).

[42] More recently in *Dunedin*, we said at [26]:

> *"Consistent with the policy nature of a PLAP, a respondent is entitled to trial a local control where it considers that control will respond to a local problem. Where it can be shown that a proposed control may have a positive effect locally, the Authority will be slow to dismiss that policy".*

[43] In short, provided there is an evidential basis for the adoption of the precautionary principle, if the Council considers its local alcohol policy has the possibility of meeting the object of the Act, then the Council is entitled to test whether that possibility is a reality.

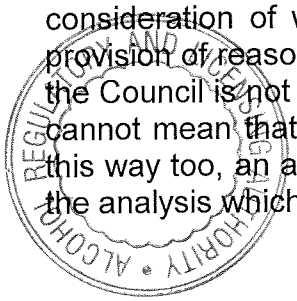
Provision of Reasons

[44] Progressive Enterprises Limited has submitted that little if any weight should be given to the Council's reasons for the elements of the PLAP unless they are set out in the explanatory document accompanying the PLAP. In doing so, Progressive Enterprises seeks to draws a distinction between the explanatory document and reasons proposed after the development of the PLAP and, in particular, those reasons provided after the Council has viewed the evidence of the parties on appeal.

[45] It is submitted by Progressive Enterprises Ltd that retaining an element in local alcohol policy for reasons that were not identified by the Council when first adopting the draft local alcohol policy removes the policy from its democratic process. Those new reasons, it is suggested, renders the element as serving a purpose other than what was intended by the Council.

[46] The test in the Act is not whether the Council has explained itself fully when adopting the draft local alcohol policy. As we said in *Tasman* and *Wellington* at [52] and [15] respectively, the burden is on the appellant to prove its case. The Council does not have to justify an element appealed against. However, where reasons are provided, those reasons will be scrutinised in any appeal to see if the Council has carefully weighed the concerns of submitters as to the effects of the policy against the minimisation of alcohol-related harm. Reasons provide transparency and indicate to the Authority, on considering an appeal, that the authors of the PLAP took into account the object of the Act and the matters set out in s 78(2) when preparing the PLAP.

[47] This does not mean that on appeal the Council is constrained in its explanation or defence of its PLAP. Reasons will assist the parties when considering whether or not to appeal an element of the PLAP. Reasons will also assist the Authority's consideration of whether an appeal against those elements is made out. But the provision of reasons cannot relieve the appellant of the burden of proving its case. As the Council is not required to justify the elements appealed against, a lack of reasons cannot mean that the Council is prevented from justifying an element on appeal. In this way too, an accompanying explanatory document to a PLAP is not substitute for the analysis which underpins the PLAP.



Omissions

[48] In *Wellington*, we said at that an element that does not exist in a PLAP is not an element at [95]. There, an appellant sought to insert a definition into the PLAP which was not there. We said the appeal could not succeed.

[49] In the present appeals, the Police, the Medical Officer of Health, Alcohol Healthwatch and the Takapuna Residents Group are appealing the exclusion of Pt Chevalier and Takapuna from the Priority Overlay areas defined by the Council. It is submitted by the Council that as these parties are disputing the omission of areas from the definition of the overlay area in clause 2.1.1, their appeals cannot succeed due to lack of jurisdiction.

[50] There is a distinction between the mere absence of an element in a PLAP, as was the case in *Wellington*, and an element in a PLAP which might be unreasonable in light of the object of the Act because of some aspect of it. In these appeals, it is submitted by the Takapuna Residents Group that where alcohol-related harm is clearly and objectively demonstrated to be high for an area, the failure to include that area as part of the Priority Overlay element of the PLAP is unreasonable. Similarly, the Police, the Medical Officer of Health and Alcohol Healthwatch submit that an appeal against the Priority Overlay areas on the basis that certain areas have been excluded from them is not an appeal against the omission of an element. Rather, the appeal is brought against the content of an existing element.

[51] The Authority agrees with these distinctions. Where an element can be found in a PLAP — as opposed to there being no element at all — the Authority has jurisdiction to consider the appeal in respect of it.

[52] This does not amount to the Authority directing that areas ought to be included as part of the Priority Overlay areas, as submitted by the Council, or that the Authority is stepping into the Council's role as policy-maker. As set out in s 83(2) of the Act, if satisfied that the elements appealed against are unreasonable in light of the object of the Act, the Authority must ask the Council to reconsider the element appealed against. Upon reconsidering the element, the Council may resubmit the PLAP with the element deleted or replaced by a new or amended element. As we said in *B H Williamson* at [37], given that a local alcohol policy is a local policy response to potential alcohol-related harm, it is appropriate that the only party able to define, or redefine an element of a PLAP is the respondent Council. That the element may need to be reconsidered does not amount to a direction that some element ought to be included in the PLAP. That latter position is beyond the jurisdiction of the Authority for the reasons already stated.

[53] Notwithstanding that the Authority agrees with the appellants on the narrow issue of jurisdiction, for the reasons set out below the Authority does not consider that the appeals have been made out.

Te Tiriti o Waitangi

[54] The Otara Gambling Alcohol Action Group submits that the Treaty of Waitangi or its principles, or both, apply to the Act and the Council's decision making under the Act. Further, it is submitted that the Council is bound by the Treaty by s 4 of the Local Government Act 2002. As the Council has consulted with Māori on the PLAP, and the Independent Māori Statutory Board, Iwi, and Māori have generally contributed to the development of the PLAP, it is submitted that the policy elements

of the PLAP are "*shielded from challenge*" on the basis that they are unreasonable in light of the object of the Act.

[55] The Authority disagrees. As stated in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at p 210, the Treaty of Waitangi does not form part of New Zealand's municipal law unless, and to the extent that it is incorporated in legislation.

[56] As set out in *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at p 517, the principles of the Treaty are "*the underlying mutual obligations and responsibilities which the Treaty places on the parties*". These principles are primarily 'protection', 'preservation', and 'partnership'. These obligations, however, are not unqualified. In *New Zealand Māori Council v Attorney-General*, the Privy Council held, at p 517, that:

> *"With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.*
>
> *Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Māori property.... The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Māori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust."*

[57] Section 4 of the Local Government Act 2002 states:

> **"In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes."**

[58] Section 4 does not impose the principles of the Treaty on local government. Instead, s 4 restates that it is the Crown's responsibility to take appropriate account of the principles of the Treaty. Section 4 states that principles designed to increase Māori participation in local government decision-making have been included in Parts 2 and 6 in order for the Crown to meet its responsibilities. In *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799, Duffy J, stated at [33] that "*Section 4 expressly addressed the Treaty of Waitangi and recognises the need for local authorities to facilitate Māori participation in local authority decision-making processes.*" This requirement is provided in parts 2 and 6 of the Local Government Act 2002.

[59] This is consistent with the generally accepted position that local government is not directly subject to the Treaty of Waitangi because it is not a party to the Treaty, the parties to the Treaty being the Crown (which does not include local governments) and Māori. While local governments have the statutory obligation to facilitate Māori participation in local government decision-making, local governments do not have obligations under the Treaty.

[60] The Act does not incorporate the Treaty or its principles. While s 94(1) of the Act states that a local alcohol policy must be consistent with the Act and the general law, as already stated the Treaty is not part of the general law of New Zealand. As a result, it has no authority in relation to local alcohol policies. Moreover, there is no basis for the position that decisions made in consultation with Māori or decisions that take the Treaty or its principles into account are not reviewable by a court. In fact, the opposite has been held in respect of decisions which do or should take Treaty principles into account. In *New Zealand Maori Council v Attorney-General (supra),* the Privy Council stated at p 524, that:

> *"The Solicitor-General and the majority of the Court of Appeal (if this is what they were saying, which is by no means clear) were mistaken in suggesting that as the question of the manner in which the Crown chooses to fulfil its obligations under the Treaty is a matter of policy the Court has no power to intervene unless the Court is satisfied that the policy is unreasonable in a Wednesbury sense. The question is a matter on which the Court must form its own judgment on the evidence before the Court."*

Relief Available

[61] In respect of its appeal, Redwood Corporation Limited seeks relief by way of the deletion or amendment of elements of the PLAP if those elements are found to be unreasonable in light of the object of the Act. For the reasons already stated, this relief cannot be granted by the Authority. At best, the Authority can ask the Council to reconsider the elements appealed against.

[62] However, for the reasons set out below, the Authority is not satisfied that the appeals by Redwood Corporation have been made out.

The elements under appeal

[63] The Authority now turns to each element which is the subject of an appeal.

Definition and extent of City Centre and Priority Overlay Areas (clause 2.1 and Appendices 1 & 2)

[64] The Council proposes that in the City Centre and areas defined as 'Priority Overlay' areas, there should be a temporary freeze on the issue of new off-licences for a period of 24 months. Then, following the expiry of that 24 month period, there should be a rebuttable presumption against the issuing of new off-licences.

[65] Aside from the substance of the appeals (relating to these aspects of the Council's proposed location and density policies) which is discussed below, the definition of the City Centre and Priority Overlay areas themselves are the subject of appeals.

[66] In defining the City Centre, Progressive Enterprises submits that the Council did not apply the risk-based approach which was used to identify Priority Overlay areas. Instead, it is submitted that the Council defined the City Centre based on it being an entertainment hub, that is, for an ulterior purpose to the object of the Act.

[67] Progressive Enterprises also appeals the Priority Overlay areas on the basis that they are defined by a set of proxy measures for alcohol-related harm, supplemented by information from local boards. And in Progressive Enterprises view, the Priority Overlay areas are defined for the purpose of restricting off-licences. That is, these areas have not been defined for the purpose of addressing potential alcohol-related harm in at-risk communities. And, in light of Auckland's growth strategy in the Auckland Unitary Plan, it is submitted that the definition of these areas will result in an unequal and disproportionate policy effect on supermarkets and grocery stores compared to other types of off-licences (i.e. bottle stores).

[68] It is also submitted that many of the Priority Overlay areas have a lower than average rate of alcohol-related harm than the Auckland average, which is itself lower than the New Zealand average. And, the Priority Overlay areas, aside from South Auckland, do not show any correlation between supermarkets and alcohol-related harm.

[69] Progressive Enterprises also submits that it is illogical that the PLAP imposes restrictions on new off-licences in the City Centre and Priority Overlay areas but does not put any restrictions on new on-licences given the impact of on-licences on alcohol-related harm.

[70] In short, Progressive Enterprises submits that it is unreasonable in light of the object of the Act to restrict off-licences by reference to areas defined without consideration of alcohol-related harm in that area, particularly when these areas have seen only limited growth in off-licences in recent times.

[71] The Police, Medical Officer of Health and Takapuna Residents Group, in turn, appeal the Priority Overlay areas based on the fact that they do not include the areas of Pt Chevalier and Takapuna. The Takapuna Residents Group submits that there is significant alcohol-related harm in the Takapuna community. The Takapuna Residents Group adduced graphic evidence of the alcohol-related harm experienced in Takapuna and submits that in the face of this direct observational evidence, and the evidence of the Police, it is unreasonable not to have included Takapuna as a Priority Overlay area when it meets the Council's risk profile.

[72] For its part, the Council submits that the omission of Pt Chevalier and Takapuna from the Priority Overlay areas was simply the logical outcome of an evidence-based process undertaken by the Council.

[73] Redwood Corporation, in turn, appeals the proposed maximum trading hours for on-licences in the Auckland region of 8.00am to 3.00am the following day. In the alternative, Redwood Corporation appeals the exclusion of the existing mixed-use business area on Newton Road between the North Western motorway and Symonds Street from the City Centre fringe. That is, Redwood Corporation challenges the boundary of the City Centre as defined by the PLAP. In Redwood's view, the boundary is arbitrary because it is defined by reference to the City Centre zone in the Auckland Unitary Plan rather than by reference to evidence of harm caused by excessive or inappropriate consumption of alcohol beyond the boundary.

[74] The evidence of Ms Turner, Policy Analyst at the Auckland City Council is that when determining the Priority Overlay areas, the Council had regard to demographic information, the nature and severity of alcohol-related harm, the health of residents and the nature and number of existing licences in Auckland, as required by s 78(2) of the Act.

[75] Specifically, Ms Turner's evidence is that the Council undertook analysis which considered both alcohol-related offending and 'at-risk' populations groups. These at-risk groups were identified by reference to research by Auckland's health authorities to support the development of the local alcohol policy, and a literature review undertaken by the Council's Research, Investigations and Monitoring Unit. This research identified alcohol-related harm based on socio-economic and ethnic populations. On the basis of this research the Council formed the view that different types of interventions are warranted to address the different levels of alcohol-related harm being experienced in Auckland. In addition, the Council reviewed geo-coded Police crime data for September 2013 to September 2014 and identified that some communities in Auckland experience greater levels of alcohol-related harm than others. The Council mapped this alcohol-related crime in Auckland against 2013 deprivation scores for Auckland and concluded that the most deprived areas also match closely with the areas experiencing the most alcohol-related crime. These findings also align closely with hazardous drinking statistics.

[76] This process was undertaken, Ms Turner said, in two "rounds". The first round was undertaken in late 2013 and early 2014 for determining the areas for inclusion in the draft local alcohol policy. A second round was then undertaken in late 2014 and early 2015 for the purposes of the PLAP. The Priority Overlay areas were identified having regard to the proportion of residents aged 15 to 24 yrs, the proportion of Māori and Pacific peoples, the proportion of peoples living in high deprivation areas, and the number of alcohol-related incidents drawn from police data per 1000 residents. Regard was also had to areas requested by submitters, where those requests were supported by these indicators.

[77] The evidence of Inspector Shanan Gray, North Shore Police Area Commander is that between 1 July 2012 and 30 June 2013, Police attended 151 alcohol-related incidents in Takapuna between the hours of 10.00 pm and 2.00 am. The last Thursday of the month is particularly of concern to Police as Thursday night is student night and once a month a single bar in Takapuna has a special licence until 3.00 am. The evidence of the Police is consistent with the graphic evidence presented by the Takapuna Residents Group of alcohol-related harm on Hurstmere Road particularly as a result of the special licence.

[78] Ms Turner also gave evidence of how the City Centre definition was arrived at. This was not an arbitrary definition on the part of the Council by sole reference to the Auckland Unitary Plan. As Ms Turner pointed out, licences are more concentrated in the city centre (particularly late-trading premises). The demography of the city centre differs from other parts of Auckland. There is a high concentration of young people living in the city centre including full time students who account for approximately one-third of the city centre residents. And the area is covered by alcohol bans. Alcohol-related harm is heightened in the city centre.

[79] In response to questions from Redwood Corporation's counsel, Ms Turner clarified that the city centre was defined by reference to alcohol-related harm in the first instance and the Unitary Plan boundary was adopted to make the policy more able to be implemented. In Ms Turner's words:

> *"...we've used the same definition rather than coming up with one that is nearly exactly the same."*

[80] The Authority considers that the Council has followed a robust process of analysis in determining the Priority Overlay areas based on the criteria it used.

These criteria are, by definition, proxies which help identify areas where alcohol-related harm may be greater in some areas relative to others. There is nothing untoward in this and there is nothing before the Authority that challenges those criteria.

[81] The Authority is also of the view that alcohol-related harm in Takapuna and Pt Chevalier was considered by the Council against its criteria for analysis. Relative to other parts of Auckland, Takapuna ranked lower in terms of all four criteria employed by the Council. So too did Pt Chevalier. Undoubtedly different results may have resulted from the use of different criteria or different weight being applied to the criteria used by the Council, but that does not make the Priority Overlay areas unreasonable. The Authority accepts that Council applied a risk-based approach to identifying the Priority Overlay areas.

[82] The Authority does not consider that the Priority Overlay areas have an unequal and disproportionate policy impact on supermarkets and grocery stores compared to other types of off-licences. This is discussed below in relation to the impact of the "freeze" and "rebuttable presumption" elements of the PLAP.

[83] Similarly, the Authority does not consider that it has been established that the City Centre boundary has been defined arbitrarily simply because it is defined by reference to the Auckland Unitary Plan. The city centre was defined by reference to alcohol-related harm first and referenced against the Unitary Plan boundary to more easily implement the policy.

[84] Otherwise, the Authority is not satisfied that it has been shown that it is illogical that the PLAP imposes restrictions on new off-licences in the City Centre and Priority Overlay areas but does not put any restrictions on new on-licences given the impact of on-licences on alcohol-related harm. The proposed cls 5.1.4 - 5.1.5 and 5.2.2 – 5.2.3 impose restrictions on on-licences in the Priority Overlay areas. Given the nature of off-licences, it has not been shown that these restrictions are unreasonable in light of the object of the Act because they are different from those which apply to on-licences.

[85] For these reasons, the Authority is not satisfied that the definition of the Priority Overlay areas and the definition of the City Centre are themselves unreasonable in light of the object of the Act.

Local Impacts Report (clauses 3.1.1, 4.1.1, 4.2.1 – 4.2.3, and 5.1.1 of the PLAP)

[86] Clauses 4.1.1 and 5.1.1 of the PLAP propose that when determining whether to issue a licence for premises that have a risk profile of "low" to "very high" as per the Sale and Supply of Alcohol (Fees) Regulations 2013, the DLC and the Authority should have regard to a "Local Impacts Report". As previously noted, cls 4.2.1- 4.2.3 have similar provisions in relation to renewal applications.

[87] The purpose of the report is to provide the DLC and the Authority with information relevant to their respective decision-making functions under the Act (cl 3.1.1). Responsibility for preparing the Local Impacts Report is proposed to rest with the Licensing Inspector.

[88] Progressive Enterprises and Foodstuffs North Island Limited submit that there is uncertainty about the production, application and utility of the Local Impacts Report

but in any event, the Local Impacts Report is *ultra vires* s 77 of the Act. Foodstuffs also submits that as the temporary freeze and rebuttable presumption are linked to elements of the Local Impacts Report, if the Local Impacts Report is found to be ultra vires those inter-related elements must also be reconsidered by the Council.

[89] Foodstuffs submits that the requirement for inspectors to prepare Local Impacts Reports and the direction that the DLC and the Authority should have regard to the report, are not permitted policies under s 77(1) of the Act, the Local Impacts Reports not being a policy on one of the matters listed in s 77(1). In Foodstuffs' submission, the relevant clauses of the PLAP are instead policies on what information inspectors are to provide to the DLC and the Authority and to what information the DLC and the Authority must have regard. The PLAP also makes it mandatory for the inspector to prepare the report when the inspector is required by s 197(4) of the Act to act independently in the performance of its function. For these reasons, it is submitted, the Local Impacts Report elements are *ultra vires* s 77 of the Act.

[90] For its part, the Council submits that while s 77(1) does not expressly refer to mechanisms such as Local Impacts Reports, nor does s 77(1) preclude them. Section 77(1) says that a local alcohol policy may include "*policies on*" any or all of the matters listed relating to licensing (and no others). The Council submits that the words "*policies on*" indicates that it was intended that territorial authorities have a degree of latitude when formulating local alcohol policies and that Local Impacts Reports are intended to provide information that will assist the DLC or the Authority make a determination on the matters in s 77(1)(a) and (d).

[91] The Authority does not consider that Local Impacts Reports are ultra vires s 77(1) of the Act. This is because Local Impacts Reports are merely information. The Explanatory Document to the PLAP states at [26] that the PLAP:

> "*includes a special reporting process to help inform the DLC and ARLA's decisions about the location and density of new licences. It recommends that a Local Impacts Report should be prepared for certain licence applications in certain locations.*"

[92] The information sought includes information on existing premises within the reporting area, the presence of sensitive sites (such as early childhood centres, education facilities, addiction treatment facilities, or marae) in the reporting area, transportation options, land uses in the area, and the nature and severity of alcohol-related harm in the area, amongst other things. Currently, there is nothing preventing this information from being put before the DLC or the Authority, and the information can already be provided by any of the reporting agencies under s 103 of the Act. As Mr Court, Alcohol Licensing Inspector for the Council said, the contents of a Local Impacts Report is generally what can be in an inspectors' report but nevertheless it is expected that the Local Impacts Report will "*be faster and more consistent*".

[93] The Local Impacts Report is not a policy, and as such it is not precluded by s 77(1) of the Act. The Local Impacts Report does not guide a decision-maker. The PLAP merely requires that in certain types of applications (determined by reference to risk and the locations set out in Appendix 5 to the PLAP), 'more' information than might otherwise be put before a decision-maker, is to be considered.

[94] The Local Impacts Report will facilitate consistent reporting and decision-making across the Auckland region. To this extent, the Local Impacts Report is akin to an internal 'information standard' which seeks to articulate best practice. While a

local alcohol policy may not be the ideal place to state such a requirement or standard, given it is not a policy, its presence in the local alcohol policy is not precluded by s 77(1). Were it not there, the Local Impacts Report could still be given effect to by reporting agencies.

[95] Some of the information that the Inspector is required to produce depends on that information first being provided to the Inspector by another agency. For example, crime data from the Police. This again, however, does not mean the Local Impacts Report is unreasonable in light of the object of the Act. Clause 3.1.4 states that the Local Impacts Report should address the matters set out in that clause "*to the extent the information is available*". If certain information from other reporting agencies is not available to the Inspector, then it need not be included. Whether it is available is a matter for agreement between reporting agencies as part of the implementation of the report.

[96] The Authority does not consider that independence of the Inspector is compromised by the mandatory nature of the Local Impacts Report. The Council is not seeking to dictate the way the Inspector may interpret, comment on, or make a recommendation to the DLC based on the information in the report. Nor does the Local Impacts Report fetter the ability of the Police, Medical Officer of Health or Inspector to provide a s 103 report. The Police's and Medical Officer's of Health discretion under s 103 of the Act to oppose an application is not impacted by the Inspector providing a Local Impacts Report. Section 103 reports are not constrained by the fact that certain information is to be put before the Committee or Authority. To the extent that Local Impacts Reports will be *"more consistent"* than s 103 reports, accords with the function of the chief licensing inspector to foster consistency in the enforcement of the Act (s 197(6)).

[97] An applicant will not be prejudiced by fulsome information being before the DLC. The applicant will have a copy of that information when seeking to satisfy the DLC of the criteria in s 105 of the Act. Applicants will have the same information available to them as the DLC such that they can dispute that information if required, to satisfy the Authority of the matters in s 105 of the Act.

[98] Progressive Enterprises argues that a Local Impacts Report without context could prove problematic. For example, where Police are required to provide crime data in respect of an application but choose not to oppose the application, the decision-maker may still be encouraged to decline the application on the basis of the crime-statistics despite there being no advice from the Police about what these statistics mean and despite the fact that the Police may themselves not share the concerns.

[99] The Authority does not agree this is problematic. Regardless of the lack of opposition, it is the decision-maker who must be satisfied that the criteria in the Act are met. An applicant should not be able to shelter behind the fact that reporting agencies may not have put fulsome information before the DLC or Authority in respect of a licensing application.

[100] As we have recognised in licensing applications before the Authority, it can be very difficult for communities to have input into licensing decisions which affect them when there is no opposition from reporting agencies. Where there is no opposition, the absence of information that might have otherwise have been available to a decision-maker presents a real and difficult challenge for objectors who wish to mount an objection. The Local Impacts Report will go some way to ensuring all

information relevant to a licensing application is before the DLC and the Authority. As Ms Turner told the Authority, the idea for Local Impacts Reports came out of community concerns around schools, and such issues not being taken into account in licensing decisions. To the extent that this is not happening, as counsel for the Takapuna Residents Group put it, this information is:

> "*the type of information that protects communities from alcohol-related harm. These reports will enable appropriate conditions to be put in place. They also recognise that the current process is not working effectively for communities.*"

[101] The fact that the DLC or Authority is to have regard to the information does not render the Local Impacts Report unreasonable. As Brown J said in *J & C Vaudrey Ltd v Canterbury Medical Officer of Health [2016] NZCA 53* at [41] the requirement to 'have regard to' a matter imports only an obligation to give genuine attention and thought to the stipulated matter.

[102] For these reasons, the Authority is not satisfied that the Local Impacts Report is unreasonable in light of the object of the Act.

Temporary Freeze and Rebuttable Presumption in City Centre and Priority Overlay Areas (cls 3.2.1, 4.1.4(a), 4.1.5, 4.1.6(a), and 4.1.7)

[103] As already noted, the Council proposes that in the City Centre and Priority Overlay areas, there is to be a temporary 'freeze' on the issue of new off-licences for a period of 24 months. Then, on the expiry of that period it is a rebuttable presumption that no new off-licences will be issued in the City Centre and Priority Overlay areas.

[104] Foodstuffs and Progressive Enterprises have appealed those elements of the PLAP that relate to the imposition of this temporary freeze and rebuttable presumption.

[105] It is submitted by both Foodstuffs and Progressive Enterprises that the rebuttable presumption is *ultra vires* s 77(1) of the Act as the rebuttable presumption is not a policy on whether further off-licences should be issued in stated parts of Auckland (per s 77(1)(d)). But even if it is not *ultra vires*, it is submitted that the rebuttable presumption is vague. While the elements state what sources of information ought to be considered when determining whether the presumption has been rebutted, the elements do not state the circumstances or matters which, if established, will rebut the presumption. This leaves the element subjective as it is unclear whether it will be applied strictly or flexibly, and it is unclear how much weight will be given to it by decision-makers. Progressive Enterprises also notes that if the freeze is not mandatorily imposed, as it does not actually operate as a 'freeze', the public will be confused as to its operation.

[106] Aside from the issue of vires, Foodstuffs and Progressive Enterprises submit that these elements are unreasonable in light of the object of the Act because they apply only to off-licences when on-licences are at least equal, if not greater, contributors to alcohol-related harm. It is submitted that the freeze and rebuttable presumption are inconsistent with the evidence that supermarkets and grocery stores are not associated with an increase in alcohol-related harm in the central business district, whereas other types of licenses are shown to increase harm. In this way, it is

submitted that the temporary freeze is a disproportionate response to the harm sought to be addressed.

[107] It is also submitted that the effect on supermarkets will be inconsistent with the Council's aspirations for its Unitary Plan and how that plan proposes to deal with anticipated growth in Auckland and the need for additional supermarkets and grocery stores in the central business district. And, these elements are likely to have unintended consequences for other parts of Auckland notably because, it is suggested, the freeze will constrain the ability of areas to be developed in response to changing demographics and city planning. Where demand exists for supermarkets in a Priority Overlay area, developers will be driven to develop on the edge of the area to avoid the freeze and rebuttable presumption. It is submitted that this is again, at odds with the Auckland Unitary Plan. These are particularly concerns for South Auckland and the CBD given the tight zoning restrictions on the location of supermarkets and grocery stores and the Independent Hearing Panel's finding that the zone provisions in the Unitary Plan need to be amended to provide land to cater for supermarkets and grocery stores.

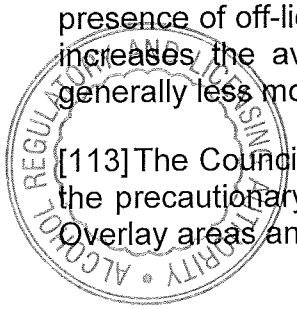
[108] In this regard too, it is submitted that the Council has failed to recognise the role of supermarkets in improving the economic well-being and social amenity of communities at a localised level and their importance to development of a more efficient city.

[109] In Foodstuff's and Progressive Enterprises' view, the benefits of the temporary freeze will also only be marginal because a restriction on new supermarkets and grocery stores will make only a very limited impact on the actual accessibility of alcohol given that most Priority Overlay areas already contain a supermarket or grocery store. Further, the elements are not sufficiently connected to the risk of alcohol-related harm in some of the Priority Overlay areas as, in some cases, the rates of alcohol-related harm are lower than both the Auckland average and the national average.

[110] Finally, Foodstuffs and Progressive Enterprises submit that cl 4.1.3 which states that cl 4.1.2 overrides cl 4.1.1 is ambiguous which adds to its unreasonableness. Similarly for cls 4.1.5 and 4.17.

[111] SkyCity submits that while the freeze may have a chilling effect on new licence applications, particularly where investment in a new building is required, the freeze cannot fetter the DLC or the Authority, and accordingly the freeze cannot operate as a prohibition on new licences.

[112] The Council, on the other hand submits that restricting the issue of new off-licences in the Priority Overlay areas is likely to minimise alcohol-related harm given the correlation between off-licence density and alcohol-related harm. And the Priority Overlay areas have been identified on the basis of relevant risk factors. The presence of off-licences in Neighbourhood Centres, particularly in residential centres, increases the availability of alcohol to at-risk populations. These populations are generally less mobile due to the areas being areas of high deprivation.



[113] The Council submits that given this, there is sufficient evidential basis to invoke the precautionary principle in relation to new off-licences in the City Centre, Priority Overlay areas and Neighbourhood Centres.

[114] The Authority considers that the freeze and rebuttable presumption elements, at best, provide guidance to the Committee and the Authority on the Council's preferred outcome. They do not operate automatically to prevent the issue of off-licences in all cases. A licence may still be issued where an applicant, in light of the information contained in the Local Impacts Report, satisfies the DLC or Authority that a licence should be granted.

[115] The Authority does not agree that the rebuttable presumption is *ultra vires* s 77(1) of the Act. The rebuttable presumption is a policy that goes to whether further licences should be issued for stated parts of Auckland. In the Authority's view, the rebuttable presumption falls within the types of policies permitted by s 77(1)(d) of the Act and provides some guidance to the DLC and the Authority on the Council's preferred treatment and outcome of certain licensing applications.

[116] As the parties have acknowledged, these elements do not act as a prohibition on the issue of licences. Because the local alcohol policy is but one of the matters in s 105 to which the DLC or the Authority must have regard to when deciding whether to issue a licence, a licence may still be issued depending on the weight given to the local alcohol policy relative to the other matters in s 105. While the Council hopes that the DLC or Authority will give significant weight to the freeze and rebuttable presumption, that remains a matter for the decision-maker.

[117] The rebuttable presumption is able to be considered on a case by case basis having regard to the information in the Local Impacts Report and information put forward by the applicant. As the circumstances of each application will vary, the rebuttable presumption simply requires that in certain cases, the information required to persuade the DLC will be greater than what might otherwise be the case. The effect of this is that the rebuttable presumption may require the applicant to provide more information to the DLC to satisfy it that the criteria in s 105 have been met. Alternatively, the applicant may need to state how the applicant proposes to address a matter of concern. This will, in time, lift the quality of applications.

[118] The Authority is also not persuaded that there will be unintended consequences for Auckland as a result of the PLAP or that the freeze or rebuttable presumption is disproportionate in effect. While there will undoubtedly be development pressures arising from the application of the Auckland Unitary Plan as regards supermarkets in residential areas (which may see some supermarkets developed outside Priority Overlay areas), the Authority consider that this impact is overstated. The freeze and rebuttable presumption are not intended to operate in metropolitan centres. Nor will they apply to town centres or local centres unless those centres are in the Priority Overlay areas. As the Authority heard from Mr Andrews, Team Manager Resolutions within the Resource Consents Department of the Council:

> *"Supermarkets are already well-established in the City Centre and Priority Overlay. The Priority Overlay affects a relatively small proportion of centres. The Neighbourhood Centre zone anticipates smaller scale supermarkets where land size allows. New off-licences for supermarkets are not precluded in the City Centre or Priority Overlay (after the temporary freeze) or in Neighbourhood Centres; there is simply a higher threshold for granting because the presumption against granting must be rebutted. For these reasons I consider that Mr Foster overstates his concerns that the PLAP will "drastically change the zoned opportunity for supermarket and grocery store growth."*

[119] And, as Mr Foster, independent planning consultant and Director of Zomac Planning Solutions Limited, for Progressive Enterprises acknowledged under cross-examination:

> *"with a typical type of supermarket that the Progressive builds these days I would expect that it should have more that 50% chance of rebutting [the presumption]".*

[120] The Authority does not agree the rebuttable presumption is not sufficiently connected to the risk of alcohol-related harm in respect of neighbourhood centres. The evidence of Dr Cameron, Associate Professor in the Deprtment of Economics at the University of Waikato, for the Council is that off-licence density is associated with higher levels of violent offences, sexual offences, and drug and alcohol offences. And, under cross-examination, in response to questions about whether there was a risk assessment of different neighbourhood centres, Ms Turner said:

> *"... the risk is about the type of centre and the way that makes alcohol more accessible than it would if the store located in a larger centre that wasn't so residential in nature. So that's the risk analysis that was undertaken."*

[121] Finally, the Authority does not share the view that cl 4.1.3 is ambiguous or vague. Clause 4.1.3 means that over and above the Committee having regard to a Local Impacts Report (cl 4.1.1), in neighbourhood centres there is a presumption against new licences (cl 4.1.2), which presumption may be rebutted having regard to the information in the Local Impacts Report and any other information put forward by the applicant (cl 3.3.3). The same applies in the case of cls 4.1.5 and 4.17.

[122] For these reasons, the Authority does not find that it has been established that the temporary freeze or rebuttable presumption is unreasonable in light of the object of the Act.

Off-licence Trading Hours of 9.00 am to 9.00pm (cl 4.3.1)

[123] The current off-licence trading hours are 7.00 am to 11.00 pm, which are also the default national maximum trading hours set out in s 43 of the Act.

[124] Prior to the coming into force of s 43, the Sale of Liquor Act 1989 did not specify the hours of operation of licensed premises. Hours were dealt with by way of a discretionary licence conditions.

[125] Clause 4.3.1 of the PLAP now proposes that the maximum trading hours for off-licences in the Auckland region are to be 9.00 am to 9.00 pm, Monday to Sunday inclusive. The Explanatory document accompanying the PLAP says that these hours:

> *"...limits the availability of alcohol, in particular: Young people's exposure to alcohol in the morning; and to legal age users at times when prior consumption of alcohol is more likely to influence purchase choices and there is strong evidence of alcohol-related harm occurring (that is, late in the evening)."*

[126] Before the Authority, the Council submitted that reducing off-licence trading hours is not unreasonable in light of the object of the Act due to a number of factors. It is submitted that there are elevated levels of alcohol-related dwelling violence and disorder (i.e. domestic violence) throughout the day and week rising from 7.00 am, and peaking at 12.00 midday, 4.00 pm and 7.00 pm. Changing the morning opening hours from 7.00 am to 9.00 am is intended to reduce the exposure of young people

to alcohol in the morning. It is intended also to reduce opportunities for alcoholics and problem drinkers to commence the consumption of alcohol earlier in the day. At the other end of the day, reducing the closing hours from 11.00 pm to 9.00 pm is intended to reduce the opportunities for off-licence sales which the Council says are more likely to lead to harmful drinking.

[127] Foodstuffs and Progressive Enterprises have appealed this element of the PLAP. Both submit that the proposed maximum off-licence trading hours are unreasonable in light of the object of the Act because they would constitute a disproportionate or excessive response to perceived problems and that they are an oppressive or gratuitous interference with the rights of people affected. The Council, on the other hand, says that a 12 hour trading period allows for the safe and responsible sale and supply of alcohol without having a significant economic impact on off-licence sales so as to amount to a disproportionate response to the problem of alcohol-related harm across Auckland. It is further submitted that the restrictions at both ends of the day are aimed at at-risk drinkers (e.g. younger drinkers) rather than those who drink safely and responsibly.

[128] Foodstuffs and Progressive Enterprises submit that due to the geographic size of Auckland, the diversity of individuals and communities within Auckland, and the large variation in alcohol-related harm between different parts of the region, Auckland cannot reasonably be treated as if it were a single homogenous area for the purposes of the PLAP. Moreover, because the PLAP proposes the same maximum off-licence trading hours for all parts of the region, and to all communities, those hours cannot be said to be a response to local issues. In this way, it is submitted that the maximum off-licence trading hours element is a:

> "*blunt 'blanket' policy which would apply regardless of any local issues as to alcohol-related harm, but in addition would impose on all communities in the region the most substantial off-licence trading hours restriction of anywhere in New Zealand.*"

[129] In Foodstuffs' submission, there is no evidence to justify such a policy applying to those parts of the region where alcohol-related harm is relatively low, particularly when the aggregate of alcohol-related harm in Auckland, considered as a whole, is no worse than the rest of New Zealand generally.

[130] Foodstuffs submits that the maximum off-licence trading hours element is premised on the 'availability or total consumption theory' rather than anything specific or local to Auckland and its residents. It is submitted that instead of seeking to address issues that arise in Auckland, the element is an attempt by the Council to impose what the Council considers to be 'better' default hours than those specified by Parliament in s 43(1)(b) of the Act.

[131] In addition, it is submitted that because consumers are able to shift the time in which they purchase off-licence alcohol, off-licence trading hours restrictions will not control consumption except perhaps for those who are unable to purchase their alcohol at other times, or who fail to plan ahead.

[132] In contrast, the Police, Medical Officer of Health and Alcohol Healthwatch submit that notwithstanding that there are fewer national and international studies relating to the association between alcohol-related harm and off-licence trading hours than for on-licence hours, there remains a basis for concluding that the proposed restrictions will help reduce alcohol-related harm. Given the level of alcohol-related

harm in Auckland, it is submitted that it is appropriate for the Council to take a precautionary approach to off-licence hours.

Night (Closing Hour) Restriction

[133] The Council says that restricting the sale of off-licence alcohol after 9.00pm is aimed at preventing opportunities for late-night 'top-up' alcohol purchases and excessive 'pre-loading' and 'side-loading' and corresponding high levels of intoxication.

[134] The Authority heard evidence from Alcohol Healthwatch and medical practitioners. Professor Jennie Connor, epidemiologist and Chair in Preventive Social Medicine at the University of Otago Medical School, for Alcohol Healthwatch gave evidence of studies that while evidence of reduction in harm from specific reductions in trading hours of off-licences is sparse, overseas studies support the relationship between off-licence trading hours and alcohol consumption and harm. Professor Connor went on to say that:

> *"New Zealand population survey data from the International Alcohol Control Study showed that purchases from off-licences in New Zealand after 10pm were approximately twice as likely to be made by heavier drinkers (those drinking larger quantities and/or more frequently). Closing off-licences earlier could be expected to particularly reduce access to alcohol for heavy drinkers, who suffer, and cause, the most alcohol-related harm."*

[135] The Authority also heard from Dr Rainger, independent health consultant and designated Medical Officer of Health, and from a number of senior emergency department doctors including Dr Anil Nair, Dr Iris Chan, Dr Willem Landman, and Dr Tom Mulholland for the Medical Officer of Health. The Authority also heard first hand from residents in Takapuna of alcohol-related harm they experienced in their community.

[136] Dr Rainger gave evidence that an Australasian College for Emergency Medicine (ACEM) snapshot of hospital presentations showed that in 2016, 15.4% of all presentations in Auckland were alcohol related, in comparison to 8.3% nationally. In 2013, those figures were 19.3% compared to 18% nationally. Dr Rainger gave evidence that restricting the availability of alcohol is widely recognised as one of the best policies for addressing unacceptable levels of alcohol-related harm. According to Dr Rainger, the most reliable evidence for minimising alcohol harm shows that there are five policies which are effective for reducing alcohol-related harm including: reducing availability of alcohol either through hours of opening or numbers of retailers; restrictions on marketing of alcohol product; drink driving countermeasures including reducing the drink driving limit; increasing price; and increasing the purchasing age. Out of these five policies, reducing the availability of alcohol was highlighted as one of the top three policy options in terms of cost effectiveness to implement and its effectiveness for reducing harm from alcohol.

[137] Dr Landman, Clinical Director at Waitemata District Health Board, for the Medical Officer of Health, in turn gave evidence of the impact of pre-loading and "re-loading" (or side-loading). Dr Landman gave evidence that the consumption of a large quantity of alcohol in a short period of time increases the risk of intoxication and a person may not feel the effects of alcohol resulting in becoming extremely intoxicated. This also impairs thinking processes so that often a decision to side-load is made in a severely intoxicated state. Both Dr Mulholland, Senior Medical Officer in

the Auckland City Hospital, Department of Medicine, and Dr Landman also spoke of the effects of fatigue from being awake in the early morning impairing thinking processes which compound the risk of alcohol-related harm. This was also supported by Dr Connor for Alcohol Healthwatch.

[138] Dr Nair gave evidence that there is little health data that shows the relationship between alcohol-related emergency department presentations and the source of the alcohol associated with the presentations but the Auckland Hospital Emergency Department Report shows that alcohol-related presentations around 1.00 am on Saturday and Sunday mornings indicates that off-licences are the source of last drink in the majority of cases. While this does not show where alcohol was purchased prior to this last drink (and with on-licences still open at this time the harm cannot be categorically linked to off-licences), the suggestion is that off-licence premises are a contributor to late night alcohol-related presentations .

[139] The Authority also heard evidence from Dr Clough, Senior Economist at the New Zealand Institute of Economic Research, for the Council, that up to 80% of alcohol sold in Auckland is sold from off-licence premises. That is, most of the alcohol consumed in Auckland is consumed in an unlicensed venue.

[140] Ms Turner for the Council, in turn, gave evidence that across the week, region-wide violent and disorderly offending steadily rises from 7.00 am, and between 7.00 am and 8.00 am offending doubles climbing to a peak at 12.00 midday before peaking at around 12.00 midday, 4.00 pm and 7.00 pm. At, or around, 12.00 midnight there is a sharp drop-off in violent and disorderly offending. This pattern of reported violence and disorderly offending for Auckland, said Ms Turner, correlates with the current off-licence opening hours of 7.00am to 11.00pm. And, Ms Turner gave evidence that in 2016, 86% of offenders nationally had their last drink somewhere other than in licensed premises.

[141] Ms Natalie Hampson, Associate Director at Market Economics Limited, for Progressive Enterprises, gave evidence showing that there is a rise in both dwelling and non-dwelling related violent and disorderly offending in the late evening. There is a rise in dwelling offences after midnight which then starts to drop off after 1.00 am. Non-dwelling offences start to rise earlier — after 10.00 pm — and peak at 12.00 midnight before starting to drop off again. Again, the overall the pattern of violent and disorderly offences between the hours of 7.00 am and 12.00 midnight correlates with off-licence trading hours.

[142] Ms Turner also gave evidence that the research both overseas and in Auckland strongly supports this correlation between the temporal availability of alcohol and the incidence of alcohol-related harm, and this research recommends that decreasing hours is a means to reduce alcohol-related harm.

[143] In terms of the effectiveness of the element, of the 811 "public-facing" off-licences (i.e. retail bottle stores and supermarkets) in Auckland, the most common closing time is 11.00 pm (52%) although 81% close between 9.00pm and 11.00pm. Having regard to the actual trading hours of premises, 65% of off-licences will likely be impacted by the closing hour restriction in the PLAP such that, in the Council's view, the PLAP will represent a real reduction in alcohol-related harm once implemented.

[144] The Authority also heard evidence that 25% of Aucklanders had reported risky drinking behaviour in the 'last four weeks' and that those most likely to be engaging

in risky drinking are younger people aged 15 to 24, those in South/South-East Auckland, and Māori and Pacific populations. Ms Turner gave evidence from the *Attitudes and Behaviours towards Alcohol Survey* undertaken by the Health Promotion Agency, that of those people who presented in the Auckland City Emergency Department, 28% live in the most deprived areas (which are included in the Priority Overlay areas). These at-risk groups are the ones who are most likely to be affected by the 9.00 pm closing hour as purchasing off-licence alcohol is likely to be a cheaper source of alcohol than from on-licences. This evidence is consistent with the evidence of Dr Clough who said that the 9.00 pm restriction is most likely to target young persons who engage in pre-loading behaviour. Dr Clough gave evidence that young people between the ages of 18 to 24 yrs currently do most of their alcohol spending between 9.00 pm and 11.00 pm.

[145] The Authority heard evidence that pre-loading is a well-planned activity, and as a result it was submitted that off-licence trading hours restrictions will not control consumption except perhaps for those who are unable to purchase their alcohol at other times, or who fail to plan ahead. While this may be true generally, Sergeant Matthews, Police Officer stationed at Counties Manukau District Headquarters, for the Police gave evidence that pre-planning is not a feature of lower socio-economic groups where the relationship between the purchase of alcohol and consumption is more immediate. That is, because the opportunities for stockpiling alcohol are limited, alcohol is not consumed when it is not available to be purchased.

[146] Notwithstanding that evidence of reduction in harm from specific reductions in trading hours of off-licences is sparse, there is evidence to establish a relationship between off-licence trading hours and alcohol consumption and harm. Given the level of alcohol-related harm in Auckland, the Authority does not consider that it has been established that the closing hour restriction is unreasonable in light of the object of the Act. Given this evidential basis for the closing hour restriction, if the Council considers the closing hour restriction for off-licences has the possibility of meeting the object of the Act, then the Council is entitled to test whether that possibility is a reality.

Morning (Opening Hour) Restriction

[147] Turning to the restriction on morning hours, the Council submits that the restriction on the sale of alcohol before 9.00 am will help reduce the availability of alcohol to those with alcohol dependencies and other vulnerable drinkers, avoid the exposure of minors to alcohol before school, and avoid 'post-loading' behaviour.

[148] Foodstuffs and Progressive Enterprises submit that there no evidence that the exposure of young people to alcohol before 9.00 am will lead to excessive or inappropriate consumption of alcohol or to alcohol-related harm. Instead the evidence shows that alcohol-related harm is lowest in the morning. In any event, even if the restriction is in place, alcohol will still be on display in supermarkets and grocery stores prior to that time and young people will still be exposed to alcohol advertising before school hours.

[149] The explanatory document accompanying the PLAP says the most common opening time for off-licence premises in Auckland is 9.00 am. Progressive Enterprises submits that this fails to take into account the difference between supermarkets and grocery stores, and bottle shops. Bottle shops, it is submitted, do not have the same customer base to warrant opening until 9.00 am or 10.00 am. But, in any event, the most common opening time is irrelevant to the object of the Act.

Given bottle shops do not open until later, it is submitted the restriction on opening hours only affects supermarkets. Further, the evidence shows that the restriction on morning hours will not make a material difference in some parts of Auckland.

[150] On the other hand, the opening hour restriction restricts the ability of those who do wish to purchase or consume alcohol safely and responsibly. This differential treatment of bottle shops and supermarkets and grocery stores, and the impact on the latter's customers, it is submitted, means the opening hours restriction on off-licences is a disproportionate response to the problem sought to be addressed.

[151] Foodstuffs also submits that there is no evidence that restricting opening times will reduce alcohol-related harm in relation to alcoholics. Alcoholics will still be able to purchase alcohol at other times of the day. And, the restriction in opening hours does not mean their dependency on alcohol will be lessened in any way. Similarly, it is submitted that there is no evidence that restricting opening times will reduce post-loading especially as those who might be purchasing alcohol for the purposes of post-loading are unlikely to be able to do so anyway if they are intoxicated.

[152] During the hearing, Ms Hampson gave evidence for Progressive Enterprises which highlighted a spike in violent and disorderly behaviour at 1.00 pm. Amongst other things, the Council submits that a restriction on off-licence morning sales will reduce this spike by cutting down on the drinking time in the morning which may be impacting on this spike. Ms Turner for the Council gave evidence based on a 2011 national survey, that those people who purchase alcohol in the morning are more likely to be heavy drinkers. And Mr Poole, Operations Manager Auckland Bridge, Salvation Army, for the Council gave evidence that those suffering from alcohol addictions could be spontaneously tempted to drink if they see off-licences open. It is also argued that the time between the purchase of alcohol and its consumption may be contributing to an increase in drink driving offences between the hours of 10.00am to 11.00am and 11am to 12.00 midday.

[153] Having regard to the evidence before the Authority, the Authority is not satisfied that there is a sufficient evidential basis to a support an opening hour restriction. The cause of the 1.00 pm spike referred to in Ms Hampson's evidence was not satisfactorily explained. The Authority is not satisfied that off-licence morning sales causes or contributes to this spike and therefore cannot be satisfied that a restriction on off-licence morning sales might reduce it.

[154] The evidence that those people who purchase alcohol in the morning may be more likely to be heavy drinkers, and those suffering from alcohol addictions could be spontaneously tempted to drink when passing by an off-licence, and that early morning purchases of alcohol may be contributing to an increase in drink driving offences in the late morning is, at best, circumstantial.

[155] In terms of post-loading the Authority only heard limited evidence from Mr Fowler, Manager of the Mangere East Community Centre, for Alcohol Healthwatch of occurrences of all-night partying in Mangere. While Mr Fowler was of the view that access to alcohol earlier in the morning would have the potential to fuel and cause more alcohol-related harm, there was no evidence to substantiate this.

[156] On the other hand, Dr Fairgray, Director of independent research company Market Economics Limited, gave evidence that 43,000 to 55,000 households may shop before 9.00 am and 9% of purchases between 7.00 am and 9.00 am include alcohol. This means that it is expected that 3,870 to 4,950 households per year could

potentially be affected by the morning restriction on off-licence sales. This inconvenience, while perhaps not large in the overall scheme of things, is a consequence of the disproportionate effect that the restriction on opening hours will have on supermarkets (and their customers).

[157] In the absence of stronger evidence to a support an opening hour restriction, the Authority considers that, on balance, the opening hour restriction is unreasonable in light of the object of the Act.

[158] The morning restriction is part of the same element as the evening restriction. Accordingly, all of clause 4.3.1 is deemed unreasonable in light of the object of the Act.

[159] The Authority does not consider that the morning hour restriction is severable from the closing hour restriction. Whether the element could have been drafted as two elements is not something that the Authority needs to consider. The element is drafted as a single element. The Authority notes, however, that the construction of the element is similar to the construction of s 43(1)(a) which sees the maximum trading hours as including both an opening and closing hour component as part of the 'trading hours'. And the expression in s 77(1)(a) of the Act is "maximum trading hours". This implies both an opening and closing hour.

[160] Given this, the Council is asked to reconsider the maximum trading hours for off-licences (i.e. clause 4.3.1) noting, however, that the Authority considers that it is the opening hour aspect of the element that renders it unreasonable in light of the object of the Act.

Maximum Trading Hours for on-licences In the City Centre (8.00 am to 4.00 am the following day) (cls 5.3.2 and 5.3.3)

[161] Clauses 5.3.2 of the PLAP proposes that the maximum trading hours for on-licences in the City Centre are to be 8.00 am to 4.00 am the following day, Monday to Sunday.

[162] The Police, the Medical Officer of Health and Alcohol Healthwatch have appealed this element of the PLAP on the basis that they do not believe Parliament could have intended that a Council could adopt a PLAP which adhered to the maximum default trading hours for on-licences in circumstances where significant harm, of the type Parliament sought to minimise, was occurring within those maximum default trading hours. In the view of these appellants, where a Council chooses to adopt a PLAP and there are serious levels of alcohol-related harm in the city – as they submit there are in Auckland – and the trading hours chosen by the Council to apply through the PLAP do not address that harm, then those hours are unreasonable in light of the object of the Act. Put another way, when confronted with considerable evidence of alcohol-related harm in Auckland, and the fact that that harm was partially reduced following the imposition of the national maximum trading hours in the Act, it would be consistent with Parliament's intent, and the application of the equivalent of the precautionary principle to allow the appeals in respect of on-licence trading hours. It is submitted that as the hours 'do nothing' to address alcohol-related harm through evidence-based restrictions on on-licence trading hours, the element cannot meet the object of the Act.

[163] On the other hand, the Council submits that reducing on-licence trading hours in the City Centre from its existing maximum default closing time to an earlier closing time, as favoured by the appellants, would shift a 'closing time spike' in alcohol-related harm to earlier in the evening as people leave licensed premises en masse. Instead, by allowing for natural attrition to occur before 4.00 am, this will not happen. And, an earlier closing time in the City Centre could cause displacement of drinking to uncontrolled environments such as domestic settings or public places. That is, a greater restriction on on-licence trading hours would likely increase alcohol-related harm and aggravate violence and disorder problems at closing time.

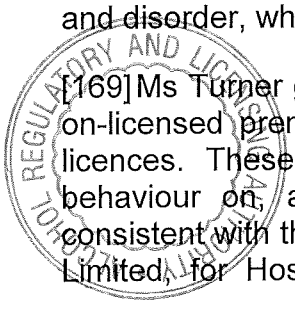
[164] The Council also notes that had it chosen not to state the maximum trading hours in the PLAP, there could be no appeal against the element. In such case, the national maximum trading hours of 8.00 am to 4.00 am in s 43(1)(a) of the Act would have applied, to the same effect. On any resubmission of these hours, it would remain open to the Council to simply delete the element (s 84(1)(a)), achieving the same result.

[165] Further, the Council submits that in setting the maximum trading hours for on-licences, the Council has adopted a 'package' approach for the City Centre including, for off-licences, maximum trading hours (with a closing time of 9.00 pm) and the temporary freeze. Their approach, they submit, is not 'do-nothing'.

[166] SkyCity Auckland Limited submits that the Police and Medical Officer of Health have not discharged their onus of demonstrating that this element is unreasonable in light of the object of the Act. Further, while the Council had the discretion to impose shorter hours, the City Centre hours are not unreasonable especially given that the Auckland City Centre is the primary retail and entertainment precinct of New Zealand's largest city.

[167] The Authority heard considerable evidence from the parties about alcohol-related harm in Auckland. Ms Turner, for the Council gave evidence that shows that alcohol-related violent and disorderly offending in the weekend peaks between midnight and 2.00 am on Friday and Saturday nights. Evidence from the Police is that alcohol-related violence also occurs on a Wednesday night due to Wednesday being student night in the CBD. Notwithstanding that the City Centre accounts for only 4% of Auckland's population, the Auckland central area experiences 11% of all reported violent and disorderly offending, 19% on non-residential violent and disorderly offending, 13% of all alcohol related driving offences, and 27% of all instances where the Police are required to take people home or to put them in custody because of high levels of intoxication.

[168] The Authority heard direct, extensive, and graphic observational evidence from the Police showing the level and type of violence and disorder associated with on-licence trading in the City Centre after 3.00 am. It is axiomatic that the problems in the City Centre are caused by those who remain there and keep drinking. While perhaps a small minority, this group has a disproportionate effect on total violence and disorder, which disorder the Police and others want to stop.



[169] Ms Turner gave evidence that Auckland has the highest density of both off and on-licensed premises in New Zealand with the City Centre alone having 567 on-licences. These on-licences have a negative impact on amenity through poor behaviour on, and around, on-licensed premises. This evidence was broadly consistent with the evidence of Mr Colgrave, Managing Director of Insight Economics Limited, for Hospitality New Zealand who said young people are more likely to

consume in the night time economy where a significant proportion of acute alcohol-related harm occurs, and are more likely to engage in risky behaviour after consuming alcohol.

[170] In this regard there appears to be no dispute with the evidence adduced by the Police about late night alcohol-related harm in Auckland associated with on-licences, especially on weekends. In the view of the Police, however, the Council was swayed by some submitters concerns that earlier closing times could lead to more alcohol-related harm rather than less because of the so-called 'closing time spike'. The evidence from Inspector Barnaby, Auckland City Police District Headquarters, however, is that the Police believe that a reduction in closing time in the City Centre will outweigh the inevitable spike that occurs whenever on-licences close.

[171] The Authority heard evidence about whether there was a 4.00 am closing spike that occurred with the introduction of the national maximum default trading hours. Ms Turner's evidence was that violence and disorder reporting at 4.00 am was the same in 2013 and in 2016 but the 2016 4.00 am peak was preceded by a sharp decline in offending between 2.00 am and 3.00 am. Police submit on the other hand, that this peak appears to occur only because of the sharp decline in offending in 2016 after 2.00 am and that the peak of offending in 2016 is the same level as the 4.00 am offending level in 2013. It follows, say the Police, that there is no support in the data for a concern that there will be an overall increase in acute alcohol-related harm from reduction in on-licence opening hours.

[172] Inspector Barnaby gave evidence that the closing time spike theory did not eventuate in Auckland or Wellington with 4.00 am closing. In any event, the Police gave evidence that they are confident that they can deal with any increase in crowd numbers if the closing hour is 3.00 am, and they would prefer to deal with it at 3.00 am instead of dealing with greater levels of alcohol-related harm that can be associated with an extra hour of drinking).

[173] The evidence of Dr Connor is that the reduction in trading hours of on-licence premises will reduce acute and chronic alcohol-related harm by virtue of the fact that alcohol consumed on on-licence premises contributes to the amount of alcohol consumed by the population. Dr Huckle, Senior Researcher at the SHORE & Whariki Research Centre in the College of Health at Massey University in Auckland, also gave evidence for the Police that in the New Zealand context, where there is a high density and clustering of bars (such as in Auckland), longer trading hours are associated with increases in acute alcohol-related harm.

[174] Notwithstanding the evidence of the Police, the Medical Officer of Health and Alcohol Healthwatch about the effects of an earlier closing hour, the Authority considers that the approach taken by the Council is not a 'do nothing' approach. The evidence establishes that the Council's approach to the maximum trading hours for on-licenses sits within the context of other initiatives applicable the City Centre (e.g. the temporary freeze on the issue of new off-licences in the City Centre and Priority Overlay areas). The Council has demonstrated through these elements that it is seeking to reduce alcohol-related harm in Auckland.

[175] That there is significant alcohol-related harm associated with on-licence premises, including the closing time spike is not in dispute. Instead, the appellants are arguing that the response to that alcohol-related harm should be an earlier closing time for on-licences. The position of the Council is that alcohol-related harm could increase at an earlier closing time given more people will be on the streets if

premises are closed prior to 4.00 am. That is, there will be fewer people on the streets, including intoxicated people, at 4.00 am than earlier in the night. The Police, however, prefer to deal with lower levels of intoxication that comes with less drinking time in on-licence premises.

[176] That the appellants propose a different response to the issue does not make the Council's position unreasonable in light of the object of the Act. They have applied other mechanisms alongside the trading hours as part of a package approach. The Authority is not satisfied that this is unreasonable.

[177] As we said in *B H Williamson* (supra), the test in s 83 is not whether some element other than the current element in the PLAP would be a better policy response to the issue being addressed. As per *Tasman*, the degree to which the element achieves the object of the Act is not one for the Authority. The Authority has no input unless it can be established by an appellant that an element of the PLAP is made for some ulterior purpose other than minimising alcohol-related harm, or that the element is a disproportionate response. In the present case, that fact that there are other potential policy responses to alcohol-related harm in Auckland does not make the element unreasonable in light of the object of the Act.

Maximum Trading Hours for on-licences outside the City Centre (8.00 am to 3.00 am the following day)(clause 5.3.1)

[178] The Police, Medical Officer of Health, Alcohol Healthwatch have also appealed element 5.3.1 which proposes to reduce the maximum trading hours for on-licences outside the City Centre from 8.00 am to 4.00 am the following day (per s 43(1)(a) of the Act) to 8.00 am to 3.00 am the following day. These appellants consider that the closing hours should be reduced further in line with their submission that the closing hour for on-licences in the City Centre should be reduced. It is submitted that if the Authority agrees that the approach taken with respect to on-licence trading hours in the City Centre is unreasonable in light of the object of the Act, then those elements that provide for on-licence opening hours until 3.00 am outside the City Centre must also be unreasonable.

[179] This submission is premised on the fact that the Council's reasoning not to reduce the trading hours further outside the City Centre was to avoid issues of migration which would result if a significant time gap existed between the City Centre and areas outside the City Centre.

[180] The Takapuna Residents Group appeals this element on the basis that the normal closing time for licences in Takapuna is 1.00 am and a 3.00 am closing time significantly increases the level of alcohol-related harm in the area due to more revellers coming to the area and the increased risk of anti-social behaviour and violent behaviour. The Takapuna residents adduced graphic evidence in relationship to one on-licence premises in Takapuna which has been granted a special licence to trade until 3.00 am on the last Thursday of each month for a period of some years. This premises, the residents submit, illustrates the risk of a 3.00 am closing. The concern is that because the DLC must have regard to the local alcohol policy when determining applications for licences under s 105, there is a risk that opening hours will be extended because a DLC might consider that it has little choice but to allow a premises to open until 3.00 am as this is a 'benchmark' set by the local alcohol policy.

[181] Redwood Corporation, on the other hand, submits that the closing hour should not be reduced. In effect, Redwood Corporation is appealing the exclusion of its property, the Pelican Club, from the City Centre as that means that the maximum trading hour for its premises is 3.00 am instead of 4.00 am.

[182] Redwood submits that "*there is no evidential basis for imposing an arbitrary reduction of one hour in the closing time for on-licences*". Redwood also submits that clauses 5.3.1 and 5.3.2 "*create an economic advantage for business holding on-licences that happen to be within the defined City Centre*". Redwood Corporation submits that the "*unexplained and arbitrary*" decision to confine the area where on-licences can trade to the area generally North of the motorway system and Stanley Street has no relationship to the safe and responsible, sale supply and consumption of alcohol and is not based on any evidence of harm caused by excessive or inappropriate consumption of alcohol beyond that boundary. In the absence of this link, Redwood Corporation submits that the element is a disproportionate or excessive response to a perceived problem.

[183] Ms Kingsnorth and Mr Grala gave evidence for Redwood Corporation. Ms Kingsnorth, manager of the Pelican Club, gave evidence that the Pelican Club will be severely disadvantaged if the PLAP is adopted as the Pelican Club will "*be out of step with every other brothel we compete with*". Ms Kingsnorth also gave evidence that while the quantity of alcohol sold in the Pelican Club is not significant, it is a residual source of income for the Club and is an essential part of the Club's experience for its clients.

[184] Mr Grala, Senior Planner and Auckland Planning Manager at Harrison Grierson, gave evidence that the provision of sexual services is a permitted activity under the Auckland Unitary Plan for both the City Centre and the Business Mixed Use zone in which the Pelican Club is located. As a consequence, having regard to the objectives and policies of these two zones, Mr Grala does not consider there is support in them for a restriction in the supply of liquor trading hours in the City Centre fringe area. Mr Grala also gave evidence that the Resource Management Act requires local authorities to avoid trade competition effects in the preparation of its district plans (or in this case, the Unitary Plan).

[185] Having regard to the submission of the Police, the Medical Officer of Health, Alcohol Healthwatch, as the Authority does not find the hours within the City Centre to be unreasonable in light of the object of the Act there is no corresponding reason to find the hours outside the City Centre unreasonable because of a concern relating to displacement.

[186] In terms of the appeal by the Takapuna Residents Group, the proposal in the PLAP is not for an expansion of the maximum trading hours, but is in fact a reduction in the maximum trading hours. The genuine concern of the residents that the DLC might consider that it has little choice but to allow a premises to open until 3.00 am is noted but the Authority finds no basis for assuming this will happen. Moreover the Authority does not see the change in hours as operating as a benchmark and would not expect the DLC to use it as such. The hours remain the maximum trading hours and the DLC would need to consider each application on its merits. It would be a perverse result if by reducing the maximum trading hours outside the City Centre, the DLC interpreted this as requiring it to grant licences for longer hours than it otherwise might based on the application before it.

[187] The Authority found the evidence of alcohol-related harm in Takapuna both graphic and compelling. But the evidence was centred around one premises which was used to illustrate concerns around the risk that the local alcohol policy might being used to expand licence trading hours to 3.00 am. In such a case, where a premises is potentially impacting on amenity and good order of an area that is a matter that can, and should properly, be addressed through the licensing process and by way of reports from reporting agencies rather than through a PLAP. As already noted, the Authority notes the Council seeks to improve this process, in part, through the Local Impacts Report. This is expected to go some way to alleviating the concerns expressed about this process.

[188] In respect of Redwood Corporation's appeal, s 78(2)(a) of the Act requires the Council, when producing its draft policy, to have regard, amongst other things to the objectives and policies of its district plan. The evidence of Mr Grala appears misplaced. The issue before the Authority is not whether the services of the Pelican Club are permitted activities under the Auckland Unitary Plan for both the City Centre and the Business Mixed Use zone. Redwood Corporation has not established that the Council has not had regard to its district plan. Rather, Redwood Corporation does not consider that the 3.00 am closing proposed is supported by the plan. Whether it is or not is not the test the Authority is required to apply. In any event, the Authority does not agree that the definition of the City Centre is arbitrary as submitted by Redwood Corporation. As already discussed, the City Centre was not defined by sole reference to the Auckland Unitary Plan. The Authority is satisfied that the City Centre was defined by reference to alcohol-related harm in the first instance and the Unitary Plan boundary was adopted to make the policy more easily able to be implemented.

[189] While Redwood Corporation submits that the economic impact on it will be shared by other premises for whom the national maximum default hours apply, it has not adduced any evidence in respect of these other premises.

[190] The onus of proof being on the appellant, the Authority does not consider that Redwood Corporation has established that 3.00 am is unreasonable in light of the object of the Act. And as already noted, the Authority has no jurisdiction to grant the primary relief sought by Redwood Corporation, namely the deletion of clauses 5.3.1 and 5.3.2 from the PLAP.

Hours of Delivery from Remote Sellers (cls 4.3.2 and 4.3.3)

[191] Clauses 4.3.2 and 4.3.3 of the PLAP state, in effect, that notwithstanding the maximum trading hours for off-licences in the Auckland region, remote sales of alcohol should not be delivered outside the hours of 6.00 am to 9.00 pm Monday to Sunday.

[192] Foodstuffs and Progressive Enterprises submit that these provisions are *ultra vires* s 77(1) of the Act.

[193] The Council, on the other hand, submits that these clauses are intended to provide for discretionary conditions to be applied to off-licences for the remote sales of alcohol rather than setting maximum delivery hours through the PLAP. The Council submits the wording of the element is discretionary rather than mandatory.

[194] While the Authority agrees the element says "*should*" rather than "*must*", the element is not found in the PLAP under the heading "*Policies on discretionary conditions to be applied to off-licences*" as are other discretionary elements (e.g.

those relating to prohibited persons). And cl 4.3.3 says that cl 4.3.2 (which sets out the policy position) overrides cl 4.3.1 (which set out the proposed maximum trading hours for off-licences). If they were not about maximum trading hours, this override provision would be redundant.

[195] In our *Dunedin* decision, we said that in respect of a similar provision, that the element is *ultra vires* the Act as s 77 does not apply to remote sellers. Section 49 of the Act (Remote sales exempted from trading hours restrictions), provides that a remote sale may be made at any time on any day subject to the restriction in s 59(1) on the delivery of alcohol sold by remote sale between the hours of 11.00 pm and 6.00 am the following day. As the restriction in s 59 is outside that part of the Act that relates to "Restrictions relating to trading hours" (i.e. ss 46 to 49), s 77(1)(e) does not permit a policy which seeks to restrict delivery times for remote sellers.

[196] For these reasons, the Authority is satisfied that elements 4.3.2 and 4.3.3 are unreasonable in light of the object of the Act.

Discretionary Conditions (cls 4.2 and 4.5)

[197] In addition to the elements discussed above, the Authority acknowledges that the Council considers that there are 'shortcomings' with the drafting of four other clauses in the PLAP, namely:

a) cl 4.2.2 (which requires the DLC and the Authority, when determining whether to impose conditions on the renewal of off-licences of the kinds described in cl 4.2.3, to have regard to a Local Impacts Report prepared under cl 3.1);

b) cl 4.2.3 (which defines the kinds of off-licences relevant to cl 4.2.2);

c) cl 4.5.1(c) (which recommends the consideration of discretionary conditions for off-licences relating to single sales); and

d) cl 4.5.1(d) (which recommends the consideration of discretionary conditions for off-licences relating to the afternoon closing of premises near Education Facilities).

[198] These clauses were the subject of an application by those appellants who consented to them being referred back to the Council for reconsideration ([2017] NZARLA 27-34).

[199] The Authority is satisfied that the Council should reconsider these elements. If these elements are resubmitted by the Council at a later date in an amended form, the Authority will deal with that resubmission as if it were a further appeal under the Act and ss 81 to 85 of the Act will apply accordingly (s 86).

Register of alcohol-related incidents (cls 4.4.4 - 4.4.5)

[200] Related to the conditions, Foodstuffs and Progressive Enterprises submit that a condition requiring a licensee to maintain a register of alcohol-related incidents is unreasonable as the PLAP sets out a framework where the condition applies by default, or that there is a presumption that such a condition will be imposed.

[201] Therefore, it is submitted that as s 77(1)(f) of the Act relates to the issue of licences subject to discretionary conditions, these clauses are ultra vires the Act.

[202]The Authority does not agree. Rather, as stated by the Council, that these clauses indicate the Council's preferred position in respect of their imposition does not mean that they will necessarily be imposed. The words "unless there is a good reason not to" in cl 4.4.1 means that the DLC and the Authority still retain the ability to no impose the condition and the conditions are, therefore, still discretionary in nature. There is nothing in the PLAP which fetters what the DLC or Authority may consider to be a good reason not to impose the condition.

Order

[203]The Authority orders the Auckland City Council to reconsider the following elements of its Provisional Local Alcohol Policy:

[a] cl 4.3.1 which proposes for Auckland, region-wide maximum off-licence trading hours of 9.00 am to 9.00 pm;

[b] cls 4.3.2 and 4.3.3 (i.e. the policy on the hours within which alcohol may be delivered from remote sellers).

[c] cls 4.2.2 and 4.2.3 (which requires the District Licensing Committee (DLC) and the Authority, when determining whether to impose conditions on the renewal of certain off-licences to have regard to a Local Impacts Report); and

[d] 4.5.1(c), and 4.5.1(d) (which recommends the consideration of discretionary conditions for off-licences relating to single sales and the afternoon closing of premises near Education Facilities).

[204]The Authority is satisfied that these clauses are unreasonable in light of the object of the Act.

[205]Pursuant to s 83(1) of the Act, the appeals against the remaining elements are dismissed.

DATED at AUCKLAND this 19th day of July 2017

District Court Judge K D Kelly
Chairperson
Alcohol Regulatory Licensing Authority