

**MINUTE EXTRACT FROM THE NON-PUBLIC MINUTES OF THE COUNCIL MEETING HELD ON TUESDAY
28 MARCH 2017**

C4 PROVISIONAL LOCAL ALCOHOL POLICY - NEXT STEPS

Crs Kate Wilson and Chris Staynes declared interests as a holder of a manager's certificate and a director of a company with alcohol interests respectively, withdrew from the meeting at 3.49 pm.

The Provisional Local Alcohol Policy (PLAP) was appealed to the Alcohol Regulatory and Licencing Authority (the Authority). The Authority agreed with the appellants regarding some of the substantive matters that were subject to appeal. Where the appeals were successful the Authority had referred the relevant provisions back to the Council for reconsideration. The balance of the elements was beyond challenge although the PLAP could not be made operative until all matters were resolved.

The report provided a summation of the Authority's decision and discussed the options that were now available for the Council.

The report followed a Councillor briefing on 28 February 2017 at which Council's legal advisors summarised the appeal decision and provided an initial assessment of the options available to Council. The judgement and legal advice were attached and the report provided a high level summary and initial assessment of the options available to the Council.

The Council's legal advisors were at the meeting to provide further comment and information and speak to the various matters detailed in the report and supporting documents.

Bridget Irving (Gallaway Cook Allan) and the General Manager Community Services responded to questions from Councillors and provided additional information.

Moved (Cr David Benson-Pope/Cr Christine Garey):

That the Council:

- a) **Approves** resubmission of the Provisional Alcohol Policy to the Alcohol Regulatory and Licensing Authority (ARLA) with the following changes:
 - i) A two year trial period for off licence hours of 7am-10pm would be run followed by a further two year restriction of 7am-9pm. A research study would be developed in consultation with the University, Medical Officer of Health and Police to gather data on alcohol related harm during this period.
 - ii) Removal of Moratorium element of the Provisional Local Alcohol Policy (PLAP).
 - iii) Removal of requirement mandatory provision of an Alcohol Management Plan with licence applications and the amendment of elements to provide for conditions to be imposed at the discretion of the DLC.

Motion carried (CNL/2017/077)

PROVISIONAL LOCAL ALCOHOL POLICY - NEXT STEPS

Department: Customer and Regulatory Services and Community Services

REASONS FOR CONFIDENTIALITY

Grounds:	S48(1)(a) - The public conduct of the part of the meeting would be likely to result in the disclosure of information for which good reason for withholding exists under section 7.
Reason:	S7(2)(g) - The withholding of the information is necessary to maintain legal professional privilege.
In particular:	The report contains legal options relating to the the Local Alcohol Policy and possible legal strategies for progressing the matter.

EXECUTIVE SUMMARY

1. The Provisional Local Alcohol Policy (PLAP) was appealed to the Alcohol Regulatory and Licensing Authority (the Authority). The Authority agreed with the appellants some of the substantive matters that were subject to appeal. Where the appeals were successful the Authority has referred the relevant provisions back to the Council for reconsideration. The balance of the elements are beyond challenge although the PLAP cannot be made operative until all matters are resolved.
2. This report provides a summation of the Authority's decision and discusses the options that are now available for Council.
3. This report follows a Councillor briefing on 28 February at which Council's legal advisors summarised the appeal decision and provided an initial assessment of the options available to Council. The judgement and legal advice are attached and this report provides a high level summary and initial assessment of the options available to Council.
4. Council's legal advisors will be at the meeting to provide further comment and information and speak to the various matters detailed in the report and supporting documents.

RECOMMENDATIONS

That the Council:

- a) **Approves** resubmission of the Provisional Alcohol Policy to the Alcohol Regulatory and Licensing Authority (ARLA) with the following changes:
 - i) A two year trial period for off licence hours of 7am-10pm would be run followed by a further two year restriction of 7am-9pm. A research study would be developed in consultation with the University, Medical Officer of Health and Police to gather data on alcohol related harm during this period.
 - ii) Removal of Moratorium element of the Provisional Local Alcohol Policy (PLAP).
 - iii) Removal of requirement mandatory provision of an Alcohol Management Plan with licence applications and the amendment of elements to provide for conditions to be imposed at the discretion of the DLC.

BACKGROUND

- 5. In June 2015, the Council adopted a Draft Local Alcohol Policy (DLAP) for consultation. Following that consultation the DLAP was amended and the PLAP notified. Some elements of the PLAP were subsequently appealed to the Authority.
- 6. The Authority has now issued its decision (Attachment 1) where it found against Council on many of the grounds that were appealed.

DISCUSSION

- 7. Broadly speaking, the issue before the Authority was one of “reasonableness” and what was unreasonable in light of the object of the Sale and Supply of Alcohol Act 2012 (the Act).
- 8. The decision of the Authority details its findings on reasonableness and concludes that some of the elements in the PLAP did not meet this test.
- 9. The Council’s legal representatives have reviewed the decision and provided a summary (Attachment 2).
- 10. In its decision, ARLA stated that Council is entitled to ‘trial a local control where it considers that control will respond to a local problem’. This suggests that elements that might otherwise be ‘unreasonable’ if they were a permanent element, may be reasonable if included in a PLAP as a trial subject to further investigation and review as to their efficacy. This finding appears to be consistent with the Court of Appeal decision in *My Noodle Ltd v Queenstown Lakes District Council* which related to a decision on the previous Sale and Supply of Liquor Act.

Maximum Trading Hours for Off Licence Premises

- 11. An option that has been discussed with Police, University and the Medical Officer of Health is a proposal to trial a reduction of off licence hours. A trial would address the Authority’s concern that there was a lack of evidence in the local context to support a reduction of hours.

12. The University, Medical Officer of Health and Police have indicated their willingness to help design a study to measure the effect of reduced evening off licence hours. A two year trial period for off licence hours of 7am-10pm could be run followed by a further two year restriction of 7am-9pm. The research study would gather data on alcohol related harm during the trial periods which would inform a subsequent review of the LAP.
13. If the evening hours element were amended and a trial proposed, this could be mediated with submitters to the PLAP. The Council could then resubmit the amended PLAP to the Authority for approval. If the PLAP was again appealed and referred back, an appeal to the High Court would still be an option.
14. Based on further analysis it was considered that there are insufficient grounds to pursue a reduction or a trial reduction of the morning off licence hours from 7am to 9am.

Moratorium

15. The merit of pursuing the North Dunedin off licence moratorium needs to be considered.
16. One option would be to alter the moratorium element to apply to all types of off licences i.e. to include premium wine shops and breweries. However, this may still be subject to the 'reasonableness' argument.
17. The suggestion for a moratorium in the PLAP arose from concerns about the availability of alcohol to the 'vulnerable' population living in the area. However, on further analysis, it may be appropriate to remove this element from the PLAP completely, noting that over recent years the number of off licences in the area of the proposed moratorium has remained relatively static between 9 and 10 licences. One off licence, 'Super Liquor Dunedin' in Malcolm Street, is about to close and relocate to the existing McDuff's brewery site in Great King Street resulting in a net decrease of one. Recently an off licence in the Gardens shopping area ceased trading after being open for less than a year.

Conditions and Provision of an Alcohol Management Plan

18. At the PLAP hearing, the council conceded that the Act does not enable discretionary conditions for Alcohol Management Plans to be made compulsory. The elements need to be amended to provide for conditions to be imposed at the discretion of the DLC. This could easily be achieved by exchanging 'will' for 'may' and removing the requirement to provide an Alcohol Management Plan as part of the application.

OPTIONS

19. The legal summary details a range of options that are available to Council. The advantages and disadvantages of each are outlined below.
20. Following consideration at the workshop and consultation with the University of Otago, Police, and Medical Officer of Health, the recommended option is to focus on the Off Licence Premises evening hours element. This would entail a research study to gather alcohol related harm data. The moratorium element would be removed. The requirement to provide an Alcohol Management Plan as part of the application would be removed; the element would be rectified by exchanging 'will' for 'may' so that conditions would be imposed at the discretion of the DLC.

Option One – Revisit the evening hours for off licence premises element of the PLAP and resubmit (recommended option)

21. This option would involve:

- a) The development of a research study in consultation with the University, Medical Officer of Health and Police. A two year trial period for off licence hours of 7am-10pm would be run followed by a further two year restriction of 7am-9pm. The research study would gather data on alcohol related harm during the trial periods which would inform a subsequent review of the LAP. This would be proposed to the appellants and included in the new PLAP.
- b) Removal of Moratorium element of PLAP.
- c) Removal of requirement mandatory provision of an Alcohol Management Plan. Amend elements to provide for conditions to be imposed at the discretion of the DLC.

Advantages

- ARLA has indicated that the use of trials to test the efficacy of LAP elements is an acceptable approach that would pass the 'reasonableness' test.
- Any restrictions imposed by the Council to reflect local control that have been achieved to date (on-licence trading hours and off-licence proximity to sensitive facilities for example), would be retained.
- Opportunity to gather data on alcohol related harm that will be useful in when considering future policy or regulation.

Disadvantages

- Delay in achieving an operative LAP while the research study is designed and negotiation with submitters.
- New off-licence applications for North Dunedin would be accepted and processed on a case by case basis as is the status quo, although now subject to the new provisions covering proximity to sensitive facilities.

Option Two – Remove the relevant element(s) of the PLAP and resubmit

22. All elements of the PLAP that were found to be "unreasonable" or *ultra vires* could be removed. Regulation would revert to provisions of the Act for those policies not covered by the LAP.
23. These elements were:
 - Maximum morning trading hours for off licence premises being reduced from 7am to 9am,
 - Maximum evening trading hours for off licence premises being reduced from 11pm to 9pm,
 - Restriction on hours for delivery of remote sales,
 - Moratorium of further off licence premises in North Dunedin,
 - Compulsory conditions for Alcohol Management Plan, and
 - Requirement for an application to include a section 100(f) certificate.
24. Removing these elements and resubmitting would the PLAP would most likely result in it being confirmed and becoming operational.

25. While the rules in applicable to the deleted matters would revert to the provisions of the Act, the remaining provisions of the PLAP would apply providing the Council the desired greater degree of local control in those aspects.

Advantages

- It is highly likely the PLAP (if amended in this way) would be confirmed by the Authority.
- The Act provides mechanisms through sections 110-117 to regulate issues similar to those that were found to be unreasonable (see legal advice for breakdowns).
- The Council would be able to adopt the PLAP immediately providing some certainty for the Council and the hospitality and business sector.
- No on-going costs.

Disadvantages

- New off-licence applications for North Dunedin would be accepted and processed on a case by case basis as is the status quo, although now subject to the new provisions covering proximity to sensitive facilities.
- Does not give effect to Council's intention of tighter controls around hours for the sale of alcohol from off licences, the moratorium on further off-licences and other conditions.

Option Three – Abandon the LAP entirely

26. Council could abandon the existing LAP and rely solely on the provisions of the Act, noting that any restrictions that have been achieved to date (on-licence trading hours and off-licence proximity to sensitive facilities for example), would be lost.

Advantages

- There would be no further costs to the Council
- The Act would provide clear parameters for the sale and supply of alcohol in Dunedin.

Disadvantages

- Any restrictions imposed by the Council to reflect local control that have been achieved to date (on-licence trading hours and off-licence proximity to sensitive facilities for example), would be lost.
- There may be a perception from the community that their views have been ignored

Option Four – Recommence the DLAP process

27. Council could abandon the existing LAP and recommence the DLAP process using the experience gained to date. This would enable Council to address many of the Authority's concerns.

Advantages

- This would allow the Council to address the Authority's concerns.

Disadvantages

- There would be significant resource required to undertake this process again. Although staff have not yet had an opportunity to quantify the costs of this option.
- There would be a significant time delay of a number of years before a LAP was effective in Dunedin.

NEXT STEPS

28. If the recommended option is adopted:

- a) Approach the University, Police and MOH to discuss trial design for off-license hours.
- b) Design trial (2-3 months).
- c) Develop revised PLAP provisions (2 months).
- d) Carry out preliminary discussions with appellants about revised provisions (1 month).
- e) Notify revised provisions to submitters (2 months).
- f) Resubmit revised provisions to ARLA for approval. If consensus with parties achieved this process will be unlikely to require a hearing.

Signatories

Author:	Adrian Blair - Group Manager Customer and Regulatory Services Simon Pickford - General Manager Community Services
Authoriser:	Simon Pickford - General Manager Community Services

Attachments

	Title	Page
A	Dunedin PLAP Appeals - Final Decision	
B	ARLA Decision - Provisional Local Alcohol Policy	

SUMMARY OF CONSIDERATIONS

Fit with purpose of Local Government

This decision relates to providing a regulatory function and it is considered good-quality and cost-effective.

Fit with strategic framework

	Contributes	Detracts	Not applicable
Social Wellbeing Strategy	☒	☐	☐
Economic Development Strategy	☒	☐	☐
Environment Strategy	☐	☐	☐
Arts and Culture Strategy	☐	☐	☐
3 Waters Strategy	☐	☐	☐
Spatial Plan	☒	☐	☐
Integrated Transport Strategy	☐	☐	☐
Parks and Recreation Strategy	☐	☐	☐
Other strategic projects/policies/plans	☒	☐	☐

The LAP contributes positively to a number of Council strategies and projects. It links directly to the Social Wellbeing strategy's priorities of healthy and safe people while supporting the city's desire to support vibrant, sustainable and resilient communities. It also links to the Economic Development strategy by maintaining business vitality and making Dunedin a compelling destination by revitalising the city centre. However, it is acknowledged that some may consider the LAP as anti-hospitality. The LAP is also aligned with the Spatial Plan priorities of supporting a liveable city by creating a healthy and safe environment, and a vibrant central city and local centres. The LAP also contributes positively to the City Safety Project which is concerned with the safety of people using the inner city.

Māori Impact Statement

Members of the Māori Participation Working Party and Arai Te Uru Whare Hauora were briefed on the elements of the draft LAP and the submission process.

Sustainability

The LAP has no direct implications for sustainability.

LTP/Annual Plan / Financial Strategy / Infrastructure Strategy

There are no known implications for the LTP/Annual Plan/Financial Strategy.

Financial considerations

The recommended option will have associated costs to run the research study but these have not been quantified. Any costs will be met from within existing budgets.

Significance

Due to the high degree of community interest in the development of the LAP, the Special Consultative Procedure as outlined in section 83 of the Local Government Act was used to engage with the community at various levels. However, the decision on the next steps is not significant in terms of the Council's Significance and Engagement Policy.

SUMMARY OF CONSIDERATIONS***Engagement – external***

There has been engagement with Galloway Cook Allan for legal advice, the Police Area Commander, the University of Otago Vice Chancellor and the Medical Officer of Health in the preparation of this report. All are fully supportive of the recommended option and have indicated their willingness to contribute to the research study.

Engagement - internal

There has been engagement with the Executive Leadership team in the preparation of this report.

Risks: Legal / Health and Safety etc.

None identified.

Conflict of Interest

None identified.

Community Boards

Community Boards were sent copies of the original LAP consultation documents and given the opportunity to respond. There has been no specific engagement with Community Boards in the preparation of this report.