

10. DEFERRED APPLICATION BY CHRISTCHURCH WORKING MENS CLUB FOR TERRITORIAL AUTHORITY CONSENT UNDER THE GAMBLING ACT 2003

General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8549
Officer responsible:	Acting Legal Services Manager
Author:	Judith Cheyne, Solicitor, LSU (DDI 941-8649)

PURPOSE OF REPORT

1. The purpose of this report is to seek a decision from the Council on the application by the Christchurch Working Men’s Club (CWMC) for a Territorial Authority Consent (TA Consent), previously deferred by the Council on 8 June 2006.

EXECUTIVE SUMMARY

2. The CWMC applied to the Council for a TA Consent under the Gambling Act 2003, to transfer 18 gaming machines from its Oxford Terrace premises to be operated at its proposed new premises in Colombo Street. At the Council’s meeting on 8 June 2006, a report before the Council set out background information and legal advice regarding the application by the CWMC, with the recommendation that it be granted under sections 98(c) and 100 of the Gambling Act 2003, by applying section 80 of the Local Government Act 2002. The consent application needed to be considered against the Council’s Gambling Policy adopted in 2004. The Council was aware that a review of the Policy was about to take place, and resolved to defer consideration of the CWMC application until the outcome of the Policy review was known.
3. The CWMC made a submission on the policy review, that was reported to the Council on 23 November 2006, at which time the Council adopted its new Gambling Policy. As a result of its submission, the CWMC received a letter dated 28 November 2006 about the new policy, but a decision on the deferred application by CWMC has never been made by the Council.
4. The Council is only able to grant a territorial authority consent if it is in accordance with its policy. The consent which the CWMC needs is a consent under section 98(c) of the Gambling Act 2003, but the Council’s new Gambling Policy states that the Council “*will not grant consent under section 98 of the Gambling Act 2003 ...*”. Under its new policy the Council cannot rely on section 80 to grant the consent (as it may have been able to do with its former policy), as at the time the policy was considered by the Council, the CWMC situation had been considered by it, and ruled out from inclusion in the policy. The Council would be acting ultra vires (beyond the powers of its policy and the Gambling Act 2003) if it were to grant the consent.
5. This means the Council only has two options available to it in relation to the application:
 - decline the deferred application; or
 - defer it for a further period while the Council drafts amendments to the policy, that would allow it to grant a consent to the CWMC, and consults on those amendments in accordance with the special consultative procedure under the Local Government Act 2002.

FINANCIAL IMPLICATIONS

6. There are no financial implications for the Council if it declines the application but if it chooses the option of further deferring the application to amend and consult on the policy there will be financial expenditure in carrying out the consultation. Declining the application, and thereby preventing the CWMC gaming machines from operating, has a financial implication for the community in that there will be less gaming machine funds to distribute.
7. There may be financial implications in declining the application for the CWMC because in February last year their solicitor advised that “*there is a great deal of urgency associated with these matters, as our clients are heavily financially reliant on the operation of these machines for their cashflow (through site rental)*”. However, the CWMC is still operating 18 months after that letter so the financial implications may not be as great as first anticipated by them.

Do the Recommendations of this Report Align with 2006-16 LTCCP budgets?

8. There may be room within the Council budgets for special consultative procedures which may not be known before the budget is prepared, but this specific SCP would not have been contemplated at all, because the Gambling Policy review was only completed last year and another is not required by the Act for a further three years.

LEGAL CONSIDERATIONS

9. Section 100 of the Gambling Act 2003 requires that a Council must "*consider an application for a Territorial Authority Consent in accordance with its class 4 venue policy*". The Council's Gambling Venue and Totalisator Agency Board (TAB) Venue Policy adopted on 23 November 2006 provides:

"1. The Christchurch City Council will not grant consent under section 98 of the Gambling Act 2003 to allow any increase in class 4 gaming venues or class 4 machine numbers except in the circumstance set out below.

*2. The Christchurch City Council will grant a consent where two or more corporate societies are merging and require Ministerial approval to operate up to the statutory limit in accordance with section 95 (4) of the Gambling Act 2003. The total number of machines that may operate at the venue **must not** exceed 18 machines.*

....

7. If the Council amends or replaces this policy, it is required to do so in accordance with the special consultative procedure outlined in the Local Government Act 2002.

8. In accordance with the Gambling Act 2003, the Council will complete a review of the policy within three years of its adoption and then every three years thereafter."

10. The only TA consent the Council can grant is where two or more corporate societies are merging and seeking Ministerial approval under section 95, and the resulting number of machines will not exceed 18. The Gambling Policy does not provide for, or discuss in any way at all, the situation in which CWMC finds itself.
11. However, when the policy was being considered by the Council last year the CWMC submission alerted the Council to its position, and supported option 5 of the consultation document (which proposed a less restrictive policy). The report from the Submissions Hearings Panel that went to the Council also discussed draft wording that staff had prepared that would allow the transfer of machines from one venue to another in restricted circumstances (although only for a maximum of nine machines). The report states that the Panel concluded that such a provision "*would not fulfil the purposes of the Act to control the growth of gambling and could create difficulties of a commercial nature in that gaming machines would become a tradeable item*" and the Panel did not recommend the proposed wording be included in the new policy.
12. This means the Council would not have the same basis to act inconsistently with its new policy and apply section 80, as had been suggested in June 2006 in relation to its old policy. The advice to the Council in June last year was that section 100 of the Gambling Act 2003, which requires a consent application to be considered "*in accordance with*" the Council's policy, could be given a narrow or wide interpretation (there was no applicable case law providing any guidance on this section). If a narrow interpretation to the wording was applied, then the Council could not grant the application (even then) because that would not be in accordance with the strict wording of the policy. But if a wide interpretation was taken, then the Council (by also applying section 80), could look to the Council's intentions behind the old policy as coming within section 100 and being "*in accordance with*" the policy.

13. As the CWMC situation was clearly in its mind in considering matters leading to the forming of the new policy, even if a wide interpretation of section 100 was applied, the Council cannot now rely on its intentions in adopting the policy to grant their application. Therefore the application can only be declined (any other decision would be ultra vires, in terms of its new policy and the Gambling Act 2003), or deferred for a further period, so that a policy change can be sought that would allow the Council to grant the application.
14. The policy can only be amended in accordance with the special consultative procedure. This would require the Council to draft an amendment that would provide for the CWMC situation (for example, by using the wording proposed by staff to the Hearings Panel, but only allowing consent applications of that type to be made during the next year, or something similar). A statement of proposal and summary of information on the amended policy would need to be prepared, approved by the Council and distributed/publicly notified, providing for a period within which submissions can be made on the proposal, of not less than one month. If anyone requests to be heard in relation to their submission then the Council must also provide for this, before making a final decision. There is no guarantee that even after this process the Council would amend the policy as proposed in the consultation, so the CWMC may still end up in the position that the Council can only decline its application.

Have you considered the legal implications of the issue under consideration?

15. As above.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

Do the recommendations of this report support a level of service or project in the 2006-16 LTCCP?

16. Not applicable.

ALIGNMENT WITH STRATEGIES

Do the recommendations align with the Council's strategies?

17. Declining the application will align with some of the principles in the Council's Strong Communities strategy, but possibly not others, particularly if declining the application caused this historic club to go out of existence (it first opened in 1880 and is one of the oldest clubs in New Zealand). In the report to Council in June last year information was given to the Council that there would be critical financial implications for the CWMC if the TA consent was not granted. However, the CWMC signed its lease for the new premises, moved, and is still currently in business despite the TA consent not being granted last year.

CONSULTATION FULFILMENT

18. The Council already has an idea of community views generally in relation to gambling, although not in relation to this specific matter, as a result of the submissions on the Gambling Policy last year. The vast majority of submissions were strongly opposed to any liberalisation of the Council's former policy. If the Council opts to defer the application then further consultation will be carried out.

STAFF RECOMMENDATION

It is recommended that the Council decline the application.

BACKGROUND (THE ISSUES)

19. In 2005, the CWMC decided to sell its Oxford Terrace premises for financial reasons, and move to leased premises (the former Bailey's 818 pub in Colombo Street). The CWMC had held a class 4 venue licence prior to 17 October 2001 so they had no need to apply to the Council for a TA Consent under section 98(d) of the Gambling Act 2003. However, in order to transfer to the Colombo Street site, the CWMC either had to apply directly to the Department of Internal Affairs (DIA) before 25 November 2005 (without a TA consent, because the Colombo Street premises had only been de-licensed by DIA on 25 May 2005) or, if the application was made after 25 November 2005, the CWMC had to apply first to the Council for a TA consent, and then to the DIA.
20. The TA consent that the CWMC requires (due to it falling outside the six month period) is one under section 98(c), where a class 4 venue licence is being applied for and a licence has not been held by any society for the venue within the last six months. A venue for which a new class 4 venue licence is granted (which would follow from a TA Consent being granted under section 98(c)) would normally only allow nine gaming machines to be operated at the venue. However, the CWMC has also applied to the DIA under section 96 for Ministerial approval to operate 18 machines at the new venue. Section 96 provides that before a corporate society can apply for that approval, they must be able to prove or demonstrate certain matters, including, under section 96(1)(e), that the society "*has obtained a territorial authority consent for the venue, either without a condition on numbers of machines or with a condition on numbers that is consistent with the number of machines that it is proposed to operate at the venue*".
21. What the CWMC is seeking in its applications to the Council and to DIA is equivalent to the situation where two societies merge and operate from one premises, with only 18 gaming machines. Because Bailey's 818 has already de-licensed, there is no actual merging of the societies, but CWMC wants to operate 18 machines from the old Bailey's 818 premises. In effect, if the TA consent could be granted by the Council there would be no increase in machine numbers in the city because the CWMC are simply taking their old machines with them.
22. When the decision on whether or not to grant the TA consent came to the Council in June last year, the report provided the Council with three options: decline the consent, defer the consent application, or, the preferred option, grant the consent under sections 98(c) and 100 of the Gambling Act 2003, by applying section 80 of the Local Government Act 2002.
23. The Council was aware that a review of its Gambling Policy was about to take place, and resolved as follows:

"GAMING - TERRITORIAL AUTHORITY CONSENT

*The staff recommendation was not adopted. It was **resolved**, instead that the application be **deferred** until the outcome of the gaming review was known.*

(Note: Councillor Corbett declared an interest in this item, and retired from the Council Chamber during the discussion and voting thereon.)"

24. The special consultative procedure on the Gambling Policy duly took place with submissions heard by a Council Hearings Panel (hearings and deliberations of the panel being conducted on 22 and 25 September and 2, 3 and 25 October 2006). Those submissions included one made by the CWMC, that alerted the Council to its position, and supported option 5 of the consultation document (which proposed a less restrictive policy).
25. The recommendation of the panel was that the Council adopt option 4 of the 5 options consulted on, which provided for the retention of the Council's current policy with the deletion of the reference to consents under section 98(d), which had become a redundant provision because of the passage of time. Recommendations were also made in respect of representations to be made from the Council to central government, including seeking a more effective framework aimed at reducing gambling harm, legislative changes to permit councils to cancel TA consents, and a downscaling of gaming opportunities in New Zealand.

26. All submitters, including the CWMC, received a letter dated 28 November 2006, advising of the result of the consultation, the policy adopted by the Council and the representations to central government that were to be made. Since that date further correspondence has been exchanged with the CWMC and the DIA in relation to the history of this matter and the Council's new policy and both parties were advised that "*the Council does not have the ability to grant a Territorial Consent under Section 96 in terms of either its old or its current policy...*". However, the TA consent application originally deferred by the Council on 8 June 2006, has never been put back before the Council for a formal decision on that application to be made by the Council.

THE OBJECTIVES

27. To make a decision in respect of the deferred TA consent application by the CWMC.

THE OPTIONS

28. The Council has two options available to it in relation to the application:
- (1) decline the deferred application; or
 - (2) defer it for a further period while the Council drafts amendments to the policy, that would allow it to grant a consent to the CWMC, and consults on those amendments in accordance with the special consultative procedure under the Local Government Act 2002.

THE PREFERRED OPTION

29. Decline the deferred application.

ASSESSMENT OF OPTIONS

The Preferred Option - Decline the deferred application

	Benefits (current and future)	Costs (current and future)
Social	Supports the downscaling of gaming opportunities in Christchurch, which was a representation the Council made to central government	None
Cultural	Nothing specific	None
Environmental	Less gaming machines in the community	None
Economic	None	Less gaming machine funds to be distributed in the community
Extent to which community outcomes are achieved: May contribute to "a well governed city" by not carrying out a further review of this policy.		
Impact on the Council's capacity and responsibilities: None		
Effects on Maori: Nothing specific - generally across the whole community this option supports the downscaling of gaming machines/opportunities.		
Consistency with existing Council policies: Consistent with the Gaming Policy and the representation that the Council made to central government about the need to continue the downscaling of gaming opportunities.		
Views and preferences of persons affected or likely to have an interest: The Council already has an idea of community views generally in relation to gambling, as a result of the submissions on the Gambling Policy last year. The vast majority of submissions were strongly opposed to any liberalisation of the Council's former policy, and, as a result, it would seem that the community would likely prefer this application was declined. The preference of the CWMC will be that it not be declined.		
Other relevant matters: Not aware of any.		

Option 2: Defer the application for a further period to amend the policy

	Benefits (current and future)	Costs (current and future)
Social	Community consulted	None
Cultural	Nothing specific	None
Environmental	None	None
Economic	None	Cost of the special consultative procedure
<p>Extent to which community outcomes are achieved:</p> <p>May contribute to “a well governed city” because the special consultative procedure would be used to consult on this specific issue, but introducing a further review of this policy so recently after the last review tends to suggest a lack of proper governance.</p> <p>Impact on the Council’s capacity and responsibilities:</p> <p>Minimal</p> <p>Effects on Maori:</p> <p>Deferring the application to provide for further consultation will allow Maori views on the specific proposal to be given</p> <p>Consistency with existing Council policies:</p> <p>Not applicable – this option seeks to amend a policy</p> <p>Views and preferences of persons affected or likely to have an interest:</p> <p>The CWMC preference would be to have a consent and are therefore more likely to support this option which might lead to that result. By using the special consultative procedure the community’s more specific view on the widening of the policy to cater for CWMC’s situation would more clearly be known, although the Council is already aware that the vast majority of submissions last year were strongly opposed to any liberalisation of the Council’s former policy.</p> <p>Other relevant matters:</p> <p>Not aware of any.</p>		