

1. FURTHER REPORT ON THE APPLICATION FOR A CONSENT UNDER THE GAMBLING POLICY BY NZ METROPOLITAN TROTTING CLUB INC



General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
Officer responsible:	Legal Services Manager
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PURPOSE OF REPORT

1. The purpose of this report is to advise the Council further in relation to the submissions from the NZ Metropolitan Trotting Club Inc (NZMTC) made to the Regulatory and Planning Committee, and on a number of questions asked by the Committee at its meeting on 3 June 2010.

BACKGROUND

To the NZMTC application

2. The NZMTC wrote to the Council in December 2009 requesting that the Council either grant them a territorial authority consent, or that the Council vary its Gambling Venue and Totalisator Agency Board (TAB) Venue Policy (Gambling Policy) to allow them to obtain a consent. That letter and a report from staff were considered by the Committee at its meeting on 3 June 2010.
3. NZMTC made a deputation to the Committee, including a written submission, and advised the Committee that they no longer sought a variation of the policy but wanted the Council to grant them a territorial authority consent under the Gambling Act 2003. If the Council were to grant a territorial authority consent to NZMTC, it would be as an exception to its Gambling Policy.
4. If NZMTC obtain a territorial authority consent it can then apply to the Department of Internal Affairs (DIA) for a class 4 venue licence, to have gaming machines on site at Addington Raceway.
5. There were various matters raised in the NZMTC submission, and also questions that were asked by the Committee, on which the Committee sought a further report from staff. This report should be read together with the staff report that was before the Committee on 3 June 2010 (**Attachment 1**).

To the Gambling Act and its linkage with the Racing Act and racing entities

6. Class 4 gambling is gambling that involves a gaming machine and may only be conducted by a corporate society that holds both an operator's licence for the gambling and a venue licence for the place at which the gambling is conducted.
7. As NZMTC have noted in its submission, racing clubs (and the New Zealand Racing Board) are corporate societies under the Gambling Act 2003 for the purposes of both a class 4 operator's licence or a class 4 venue licence. They also have other "special" recognition under the Gambling Act, as identified in section 9 of the NZMTC written submission.
8. Territorial authorities are required under section 101 of the Gambling Act 2003 to have a class 4 venue policy and under section 65D of the Racing Act 2003 to have a Board venue policy. The Council's Gambling Policy covers the requirements for a policy under both of those Acts, and the Board venue part of the Gambling Policy has not changed since the first policy was adopted in 2004. In the 2009 review the Gambling Policy was identified as "...a "sinking lid" policy, and its purpose is to prevent any increase in the numbers of gambling venues or machine numbers in the city."
9. A Board venue is a stand alone TAB operated by the New Zealand Racing Board – territorial authority Board venue policies do not deal with TABs in pubs or clubs or on-course at race tracks. The Racing Act 2003 specifies that a Board venue means the premises that are owned or leased by the New Zealand Racing Board and where the main business carried out at the premises is providing racing betting or sports betting services.

QUESTIONS FROM THE COMMITTEE/MATTERS RAISED IN THE NZMTC SUBMISSION

Statistics on the numbers of machines per capita

10. The total number of machines for Christchurch City, including Banks Peninsula, (total population (including those under 18) approximately 372,600 as at 2009) show that as at 31 March 2009 Christchurch had 1871 machines, which represents 9.48 per cent of the total number of machines in the country. This is approximately one machine for every 200 residents.
11. Since 31 March 2006 machine numbers in the district have dropped from 2099 to the current figure of 1871.
12. Figures for the other cities/districts that had more than 500 machines are:

District & population (as at 2009)	2006 Figures	2009 Figures	No of machines per capita
Auckland City (444,100)	1749	1497 (7.58%)	1/297
Dunedin City (123,700)	723	608 (3.08%)	1/203
Hamilton City (140,700)	584	556 (2.82%)	1/253
Lower Hutt City (102,100)	627	541 (2.74%)	1/189
Manukau City (368,600)	1023	986 (5%)	1/373
North Shore City (225,800)	662	651 (3.3%)	1/347
Tauranga (112,600)	615	597 (3.02%)	1/188
Wellington City (195,500)	907	831 (4.21%)	1/235

(Statistics obtained from the Department of Internal Affairs website and Department of Statistics website)

Response to points/critiques raised in the NZMTC submission

13. Staff have the following comments on points in the written submission, that are not otherwise dealt with below:

NZMTC submission	Council staff comments
<p>Para 7.5 – this is not a new venue; it has had a licence before and the Council made an exception when the Christchurch Working Men’s Club (CWMC) were in the same situation and outside the six month window</p>	<p>The difference between the NZMTC situation and CWMC is that NZMTC’s licence ended in October 2004, which is considerably longer than the timeframe within which the CWMC licence had expired (which was only just outside six months at the time they first came to the Council).</p>
<p>Section 9 Generally – Parliament supports the racing industry</p> <p>Para 9.2</p>	<p>Parliament may support the racing industry (which has the traditional background of racing and other sports betting, not running gaming machines), but has left it to territorial authorities to make its own “rules” about the control of gaming machines/class 4 gambling in their districts.</p> <p>Although promoting controlling and conducting race meetings and the payment of stakes is an “authorised purpose” in the Gambling Act 2003, that does not necessarily mean it is “equated” with charitable purposes and non-commercial purposes, as NZMTC state. It is simply another “authorised purpose”, but is not necessarily the same type of authorised purpose as a charitable purpose, etc.</p>
<p>Para 10.4 – this is a venue where there have been gaming machines previously</p>	<p>Council staff understand that although NZMTC may have had machines in 2003, and this is clearly shown in the records, they were never in use. From a practical point of view therefore there were not machines in operation at the venue previously, so in that sense this is an increase in machines in Christchurch. It is also an increase in machines from the number of machines in place in 2006 when the Council adopted the current policy and in 2009, when it reaffirmed the 2006 policy.</p>
<p>Section 12 – Inaccuracies in staff report</p> <p>Para 12.9</p>	<p>Council staff accepts the NZMTC submission that it is a club under the Gambling Act as well as being a racing club.</p> <p>The difference between NZMTC and Sumner Redcliffs RSA is that NZMTC did have an opportunity to submit on the 2006 Policy, in 2006 (although it does not appear that they did, although the NZ Racing Board did submit). The decision in 2009, following the review, affirmed the 2006 Policy without change.</p>

If this club merges with another club that does have machines, can they be moved to this site as of right.

14. The Gambling Policy does provide for consent to be granted where two or more corporate societies are merging and require Ministerial approval under section 95 (4) of the Gambling Act 2003. The total number of machines that may operate at the venue must not exceed 18 machines.
15. However, NZMTC can only merge with one other club and have the machines moved to their site if NZMTC already had a class 4 venue licence, which it does not. However, if it merged with two or more other clubs, at least two of which had class 4 venue licences then it could be a possibility. Section 95 of the Gambling Act 2003 states that:

- “(1) This section applies to 2 or more corporate societies that the Minister is satisfied are clubs and—
- (a) **2 or more of which hold class 4 venue licences;** and
- (b) can each demonstrate a significant history of—
- (i) operating as clubs for club purposes; and
- (ii) operating the number of machines specified in any class 4 venue licences held immediately before making an application to the Minister under subsection (2); and ...”

Can the TAB establish gaming machines on the site as of right under the Policy? What is the consent process required if it wanted to do this?

16. The TAB cannot establish gaming machines on site as of right under the Gambling Policy. The New Zealand Racing Board (the Board) is entitled, as of right under the Gambling Policy, to be granted a TAB/Board venue consent, but that does not lead to them being entitled to have gaming machines.
17. The NZMTC appear to be interpreting clauses 1 and 3 of the Gambling Policy incorrectly (see 10.1 of their submission). It seems to be their view that the consent that can be granted to the Board under clause 3 of the policy is a section 98 consent.
18. However, clause 3 of the Gambling Policy is the policy required pursuant to section 65D of the Racing Act 2003. That policy relates to the requirement in section 65A of the Racing Act 2003, that a territorial authority consent is required if the Board proposes to establish a Board venue (a “s65A consent”). This meaning is clear from the use of the words “to establish a Board venue” in clause 3, which wording has been the same since 2004, and was not changed in the draft 2006 policy consulted on or adopted. There is no reference in clause 3 to a class 4 venue licence or establishing a class 4 venue.
19. Clause 1 of the Gambling Policy could be more clearly worded, but it appears that in referring to “except in the circumstance set out below” this refers to the fact that there is to be no increase in class 4 venues or machines except in the circumstance set out in clause 2. It is not the case that clause 2 (or clause 3) means that a consent under section 98 is needed or will be given by the Council. This is clear when the background to the Gambling Policy is examined.
20. In 2006, following consultation on a more liberal policy than the original 2004 policy, the Hearings Panel determined after the submissions process that it was appropriate to continue with a more restrictive policy and recommended:
- “That the Council adopt the policy set out in Appendix 2, such policy representing the continuation of the Council’s present policy, with the deletion of the former provision relating to applications for consent under section 98(d) of the Gambling Act 2003, as such provision is now redundant.”*
21. In the report to the Council that resulted in the adoption of the 2004 policy it was noted, in describing the chosen option (the moratorium option – later described by Council as a “sinking lid” policy) that:
- “This approach would mean that all class 4 venues licensed on or before 17 October 2001 would be able to continue. All new venues would be disallowed. No additional gaming machines would be allowed at existing venues. TAB venue consent would be granted. **TABs with electronic gambling machines are subject to the same requirements as class 4 gambling venues**, while other TAB venues may be established in the city, subject to meeting City Plan.”*
22. Obtaining a section 65A consent (under clause 3 of the Gambling Policy) does not allow, on its own, a class 4 venue licence to be obtained. Under section 65 of the Gambling Act 2003, only a consent under section 98 allows an applicant to apply for a class 4 venue licence, not a section 65A Racing Act consent. Only once the applicant obtains the class 4 venue licence (and there is a class 4 operators licence in place) can gaming machines then be operated at the venue.

23. The correct interpretation of Council's Gambling Policy is that no consents under section 98 will be granted and the only time that new machines or an increase in machines will be allowed is in the situation described in clause 2 of the Policy, when there is a merger of two or more clubs.
24. To answer the second part of the question above, if the TAB/Board wished to establish gaming machines at the Addington Site they would need to apply for a consent in the same way as NZMTC are currently doing, which would be as an exception to the Gambling Policy.

Is NZMTC required to make a formal consent application?

25. The Gambling Policy provides that all applications for consents (being consents under the Gambling Act 2003 and the Racing Act 2003) must be made on the approved form, and that the consent fee is \$150 (inclusive of GST), which is reviewed annually through the Annual Plan process.
26. In the NZMTC letter dated 23 December 2009, which generated the first report to the committee, NZMTC requested that the Council consider either varying its Gambling Policy or granting a consent as an exception to the Gambling Policy. It was not considered appropriate to require a formal application for consent and payment of a fee when it was not clear that a consent was actually being applied for.
27. Now that the NZMTC has made it clear in their written submission that they are applying for a consent, they have been asked to complete a formal application and pay the \$150 fee.

NZMTC's involvement in the review of the Gambling Policy in 2009, and whether that is a special circumstance warranting an exemption in relation to their consent application

28. Any involvement or lack of involvement by NZMTC in the Gambling Policy review last year is not a special circumstance for the Council in deciding whether or not the Council should grant a territorial authority consent under section 98(c) of the Gambling Act 2003 to NZMTC, as an exception (inconsistent decision) to its Gambling Policy.
29. By way of background to the Policy review, the 2009 review was the second statutory review. The first was in 2006, which was done as special consultative procedure and, as noted above, the policy ultimately adopted reaffirmed the Council's previous "sinking lid" policy in respect of gaming machines in the city.
30. For the 2009 review, Council staff, under the direction of the Gambling Venue Policy Review 2009 Working Party, contacted a number of people and sought a number of reports. This was to put the Working Party, and ultimately the Council, in a position to give appropriate consideration to community views on the policy review.
31. Although the chairman of the NZMTC had contacted the chair of the Working Party in 2009 about the review, and its desire to make a submission, NZMTC were never formally contacted by staff or the Working Party about the review. This appears to have resulted from an oversight, rather than any intention to exclude NZMTC. However, other stakeholders that were representative of bodies with pro-gambling interests did have input into the review (see paragraphs 16 and 17 of the 2 June 2010 report). In light of the Council discretions in sections 77–81 of the Local Government Act 2002, the level of consultation, discussion and consideration carried out was considered to meet the requirements in the Act.
32. As outlined in the previous staff report, the Working Party and the Council considered six alternative options, with the most likely alternative to retaining the "sinking lid" policy, being one that would assist businesses who already had machines. The alternative amendment would cap venues and numbers at present levels and would also allow businesses to relocate their machines. If an amendment to the policy to this effect had been proposed (and ultimately adopted), that would not have assisted the NZMTC, because they do not currently have machines. They would still be in the position that they would need to apply for a consent as an exception to the policy. Only option 4 (having no restrictions on venues or machines) would have assisted the NZMTC, but this was the original proposal in the 2006 policy, that was rejected by the Council, following its consideration of submissions.

33. It should also be noted that option 3, rejected by the Working Party and Council was:

“Amend Clause 2 of the status quo to accommodate section 96 consent applications of the Gambling Act 2003 as suggested by Alastair Sherriff in his legal opinion of 3 October 2007 (page 8):

*“2. The Christchurch City Council will grant a consent for up to 18 machines where two or more corporate societies are merging and require Ministerial approval to operate in accordance with section 95(4) of the Gambling Act 2003. The Christchurch City Council will grant a consent for up to 18 machines pursuant to section 98(c) and 100 of the Gambling Act 2003 to a corporate society which is a club which requires Ministerial approval to operate more than 9 gaming machines in accordance with section 96 of the gambling Act 2003. The total number of machines that may operate at the venue, whether section 95 or 96 applies, **must not exceed 18 machines.**”*

34. On the recommendations of both the Working Party and the Regulatory and Planning Committee, the Council concluded that the statutory review required under the Gambling Act 2003, did not lead it to find that any amendment to its policy was required. That meant a special consultative procedure was not required, because there would be no amendments to the policy.
35. The fact that NZMTC were not specifically contacted in 2009 about the review is not a matter that is relevant to its application for a section 98(c) consent. In making a decision on the consent, the Council is required to consider its current Gambling Policy, and, in this instance, it must also consider the matters in section 80 of the Local Government Act 2002. In light of the discussion above, NZMTC's lack of involvement in the Gambling Policy review would not appear to amount to an adequate reason for the Council to act inconsistently with its policy.

More detail about the process of Council's consideration of an exemption from the Gambling Policy

36. The Council's current Gambling Policy (adopted in 2006 and reviewed without change in August 2009) does not provide for a territorial authority consent to be granted in this situation to NZMTC. The Council's Gambling Policy is a “sinking lid” policy, and its purpose is to prevent any increase in the numbers of gambling venues or machine numbers in the city. The consent sought by NZMTC, as outlined in the earlier report, could not be granted under the Gambling Policy.
37. The Council could, however, act inconsistently with the Gambling policy, and grant the consent, by applying section 80 of the Local Government Act 2002. Section 80 provides that the local authority must identify certain matters if a decision it is to make is significantly inconsistent with any policy adopted by the Council. Under section 80 the Council needs to:
- (a) Clearly identify the inconsistency (in this case if a consent was granted, the inconsistency would be granting the consent contrary to the terms of the Gambling Policy).
 - (b) Give reasons for the inconsistency (why has the Council determined it is appropriate to act inconsistently, which requires identification of the factors for, and against, granting a consent (the executive summary of the NZMTC submission, outlines their five key reasons in support of the consent being granted; this report, and the previous staff report also identify factors that would support the consent not being granted).
 - (c) Identify any intention to amend the policy to accommodate the decision (if the Council granted the consent, the Council would need to consider whether this type of situation might arise again and whether it needs to amend the policy as a result).

STAFF RECOMMENDATION

That the Council refuse the New Zealand Metropolitan Trotting Club's application for a consent under section 98(c) of the Gambling Act 2003 by way of making an inconsistent decision with its Gambling Venue and Totalisator Agency Board (TAB) Venue Policy.

COMMITTEE RECOMMENDATION

Councillor Wells moved:

That the Council refuse the New Zealand Metropolitan Trotting Club's application for a consent under section 98(c) of the Gambling Act 2003 by way of making an inconsistent decision with its Gambling Venue and Totalisator Agency Board (TAB) Venue Policy.

The motion was seconded by Councillor Williams and when put to the meeting was declared **carried** on Division No. 1 by 4 votes to 1, the voting being as follows:

For (4): Councillors Buck, Shearing, Wells and Williams.

Against (1): Councillor Broughton.