

IN THE MATTER of the Sale and Supply of Alcohol Act 2012 (“Act”).

AND

IN THE MATTER of an application by **Lads Brewing Company Limited** for a new Off-licence pursuant to s.100 of the Sale and Supply of Alcohol Act 2012 (“Act”), in relation to the premises situated at 47 Anzac Parade, Durie Hill, Whanganui, to be known as the “Lads Brewing Company”.

BEFORE THE WHANGANUI DISTRICT LICENSING COMMITTEE

Chairman: Stuart Hylton
Member: Rob Moore
Member: Annette Main

HEARING at the Whanganui District Council Chambers on Thursday 19 January, 2023.

APPEARANCES

Andrew Solesbury	Applicant
Hamiora Rangi	Applicant
Steve Turfrey	Whanganui District Council Chief Alcohol Licensing Inspector – In opposition
Alan Thomson	Senior Constable, NZ Police – In opposition
Jillian Job	Delegated Authority to act on behalf of the Medical Officer of Health – In opposition

DECISION OF THE COMMITTEE

Application

[1] On the 2 December 2022, **Lads Brewing Company Limited “Applicant”** made application for a new Off-licence (Remote Sales and Brewery Cellar Door type) in relation to the premises situated at 47 Anzac Parade, Whanganui, to be known as the “Lads Brewing Company”.

[2] The proposed premises currently operates a Tavern Style On-licence (Brewery) and seeks to expand to sell products made on site to patrons for consuming off-site. The applicant currently brews their brand of beer on-site for sale to patrons on the premises and wholesaled to various Off-licence premises. The applicant also leases part of the premises to ‘Good Bones’ who distil various types of spirits for sale on-site and via wholesale.

[3] The applicant seeks to sell alcohol made on their premises to customers from their premises (Cellar Door) and via on-line technologies (Remote Sales – s.40 endorsement).

[4] The property is located within the Whanganui suburban area known as Durie Hill that is zoned ‘Outer Commercial’. This is within a public alcohol ban area.

[5] The proposed licensed area is defined in a floorplan provided with the application dated 10 November 2022 and is the same as that provided for in respect of their On-Licence. This includes the external courtyard area known as the ‘Garden Bar area’ and lies within their property boundaries. This is a very small premises confined by site, Building and Town Planning restrictions. The maximum statutory site occupancy is set at 95 persons.

[6] It is proposed to locate the off-sales (over the counter) to their front door space (roller door) located on the South West aspect of the building. The premises is located within an area where the sale of alcohol is a permitted activity. The principal entrance is located on the southern side of the property boundary (driveway access) from Taylor Street.

[7] The applicant has four directors/shareholders and leases the premises with renewal rights through to 2029.

[8] The applicant seeks (over the counter) hours of Monday to Sunday, **between 11.00am and 9.00pm**. The applicant is proposing to comply with s. 59 delivery requirements for the remote sales aspect of the application. The applicant’s on-licence hours are 11.00 am and 12.00 midnight.

[9] The applicant seeks a ‘supervised’ designation for the premises.

Public Notification of Application

[10] The application was publically notified in accordance with s. 101 of the Act. One public objection or notice of desire to be heard was received by the Chair of the Safer Whanganui Alcohol and Other Drug Reference Group. The grounds for the objection were that the application falls outside the off-licence premise 'Cap' under Council's LAP. The objection was not heard or considered due to it being received well outside the statutory timeframe.

Agency Reports

[11] The application was sent to the Inspector, Medical Officer of Health and NZ Police for their statutory reports. All three reporting agencies filed reports of **opposition**. All three reporting agencies stated their opposition relates primarily to the application not according with the current Local Alcohol Policy "LAP" 'cap' for Off-licence premises (excluding Supermarkets and Grocery Stores) for Whanganui i.e. the 'cap' is thirteen Off-licence premises which is currently exceeded.

Inspectors Opposition

[12] The Inspector in his written report, states the grounds for **opposition** as being –

- *The Local Alcohol Policy (LAP) provides for a maximum of thirteen 'Off Licence' premises (excluding Supermarket and Grocery stores) within the Whanganui District. That limit is already achieved meaning in terms of the LAP, it is not appropriate for Whanganui to accommodate this application for an additional off licence.*
- *This application if granted provides for a potential precedent within the Whanganui District for further off licences despite the CAP on Off-Licence premises.*
- *Amenity and good order*
- *Object of the Act*

[13] In relation to the **LAP** the Inspectors report stated – *"The limit is already met meaning in terms of the LAP, any additional licence will be contrary to the intent and purpose of the policy. This application is made for a new off - licence pursuant to Section 32(1)(a), Sale and Supply of Alcohol Act 2012 which is a type of Off - licence that is subject to the cap (13) prescribed in Clause two of the Local Alcohol Policy 2019. Whanganui District already exceeds the prescribed cap by having 15 applicable premises. Whilst the DLC is not bound by the LAP, it is my submission that the cap that was developed following an extensive, evidence based special consultative process should be applied to this application".*

[14] In terms of the '**Amenity and Good Order**' the Inspectors report stated – *"It may be likely that an increase in patronage and site attendance occurs specifically related to their having on Off-Licence and that a Distillery is now co-located. Given there are two licensed premises beside each other (Lads and The Cobb and Speedway Garage) with the addition of a distillery, matters of amenity and good order*

and ensuing increased vehicular and pedestrian traffic densities must be considered as having potential to negatively impact into the local neighbourhood”.

[15] In terms of the **‘Object of the Act’** the Inspectors report stated – *“Matters of possible intoxication at the venue (On-Licence) and then their purchasing additional alcohol (Brewery and Distillery) for off-site consumption - these matters must be considered as a real potential to increase (not minimise) harm. This provides the grounds for the Inspector’s objection related to the purpose of the Act” and “... as previously noted; any increase in alcohol production and patronage with the consuming of alcohol related to their On-Licence and then followed by the purchasing of additional alcohol for off-site consumption must be considered as a real potential to increase (not minimise) harm. The Inspector provides opposition to the application on the grounds that when considering matters related to the LAP, amenity and good order, and potential for increased alcohol manufacture and supply - the purpose of the Act cannot be achieved.”*

Police Opposition

[16] The Police in their written report, simply stated their **opposition** was based on the fact the application does *“not meet the requirements of the Whanganui Local Alcohol Policy.”* We assume Police to mean clause 2.1 of the LAP i.e. Cap on Off-licence premises.

MOH Opposition

[17] The Medical Officer of Health in his statutory report **opposes** the application on the grounds of section 108 of the Act for the reason the *application “is in conflict with Policy 2.1 of the Local Alcohol Policy”*, i.e. Cap on new off-licences.

LAP Development

[18] The Committee considered, in its decision making, documents previously made available from Council around the LAP development and annual reviews. These documents were produced during the hearings for *M7 Limited new Off-licence application 2020* and *Whanganui Distilling Company Limited new Off-licence December 2022*. These included most of Council’s LAP development files from as far back as 2012 including research reports, surveys, Council meeting agendas, minutes, decisions and appeals to the PLAP.

Hearing in General

Applicant’s Evidence

[19] The applicant confirmed to the Committee that they were seeking a cellar door (over the counter) style off-licence, with a s. 40 endorsement (remote sales). The applicant intends to sell only alcohol produced on the premises through this licence i.e. from LAD’s Brewery and Good Bones distillery both located on the premises at 47 Anzac Parade, Whanganui.

[20] The applicant submitted and talked to a paper showing the products both Lads Brewing and Good Bones Distilling manufacture, their % alcohol content and price comparisons with similar products sold through other Whanganui supermarkets and bottle stores.

[21] The comparison showed LAD's IPA beer (LAD's strongest alcohol by volume "ABV") compared with 'scrumpy' cider sold from New World Supermarket. It showed the LAD's IPA as being 40% less in ABV than the 'scrumpy' whilst being 91% more in cost. The paper also compared 'Good Bones' vodka with Smirnoff vodka from Liquorland Whanganui which showed Good Bones vodka being 30% less in volume, 2.5% higher in ABV and 234% more cost than the bottle store Smirnoff vodka. The paper also compared other LAD's products with similar products of other off-sale outlets with similar results.

[22] Mr Solesbury, on behalf of the applicant, argued these comparison results show LAD's intent was to sell a limited, by volume and type, high-end quality alcohol product with prices that reflect this. For these reasons Mr Solesbury contended that their off-licence sales would be less likely to encourage indiscriminate harmful drinking i.e. "if a person was prone to harmful drinking habits why would they pay over 200% more for a high end product from our outlet when they can pick up a higher ABV product in far greater quantities for the same spend from a neighbouring bottle store or supermarket?".

[23] The applicant acknowledged the intent of the local LAP 'cap' but contended that their type of off-licence was not considered during the development of the 'cap' and that their application was low risk compared with the big volume low cost outlets such as bottle stores and supermarkets.

[24] The applicant stated they were currently selling their brewed products via wholesale to various outlets however customers were seeking off-sale opportunity, especially visitors who enjoyed their high end brewed products and would like to purchase some to take home or order online.

[25] In answer to Committee questions the applicant said they were happy with a condition limiting sales to onsite produced alcohol and advised supplier agreements prevented the applicant reducing prices of their products once an off-licence was issued.

[26] Answering Committee lead questions the applicant advised the premises were currently operating its On-licence Thursday to Saturday and that the demand for over the counter sales was either to take to a subsequent party or take home.

[27] In answer to a question from the Police, the applicant advised 1800 litres was the total amount of product LAD's could produce monthly on their premises. In relation to a Police visit recently to their premises where a named duty manager was found to be absent and non-contactable, the applicant explained they had got it wrong and have learnt from the incident. Mr Solesbury explained the duty manager should have been changed on the display board with the appointed acting duty manager. LAD's had now implemented a ten-point checklist prior to opening each day to address this and other potential issues identified. Mr Solesbury said he welcomed Police's

graduated response model to this incident along with an offer to talk to staff as a training opportunity.

[28] The Inspector asked whether the applicant knew at the time the Lad's on-licence was granted in October 2022 whether a distiller ('Good Bones') would co-locate? The applicant advised it was as they were distilling on-site prior to opening.

[29] In answering a further question by the Inspector whether price was an effective limiter on consumption, the applicant stated *"yes in my opinion and experience generally it is however can't say it will be for every person. If people have an issue with alcohol they are going to look for lower cost products"*.

[30] Mr Solesbury answered further question by the Inspector stating most patrons attending his On-licence premise *"stay for one or two over a couple of hours although it varies"*. He advised he had a good relationship with the 'Cobb' owner who operate a Tavern type premises across the road. He said they could often see patrons who may be ejected from the Cobb walking across the road where they can 'turn them around' before they enter Lad's premises.

Inspector's Evidence

[31] Chief Alcohol Licensing Inspector, Mr Turfrey, filed a report offering opposition to the application. The stated grounds for the reported opposition is summarised in paragraph [12] to [15].

[32] Additionally the Inspector noted in his report –

- (a) The applicants premises was located within a general area known as Durie Hill which has a deprivation index score of 6 suggesting an average, to above average level of deprivation.
- (b) Socio-economic deprivation increases the likelihood of experiencing alcohol related harm, at least in part due to consumption patterns and rates of alcohol-use disorders. Moreover, emerging evidence suggests alcohol-related harm may actually drive social and economic inequalities.
- (c) The Off-licence matrix related to risk profile is low. The risk matrix conclusion related to their site and for their On-Licence is Medium. The Inspector concludes a low level of risk may be achievable in regard to their Off-Licence practices where the mitigations provided in the Host Responsibility Policy are complied with at all times. The applicant impresses as genuinely motivated to mitigate and minimise any potential for non-compliance or harm. The applicant would appear to have a significant personal and vested interest in ensuring the ongoing success of any approved alcohol licence.
- (d) It may be likely that an increase in patronage and site attendance occurs specifically related to their having on Off-Licence and that a Distillery is now co-located. Given there are two licensed premises beside each other (Lads and The Cobb and Speedway Garage) with

the addition of a distillery, matters of amenity and good order and ensuing increased vehicular and pedestrian traffic densities must be considered as having potential to negatively impact into the local neighbourhood.

- (e) Matters of possible intoxication at the venue (On-Licence) and then their purchasing additional alcohol (Brewery and Distillery) for off-site consumption - these matters must be considered as a real potential to increase (not minimise) harm. This provides the grounds for the Inspector's objection related to the purpose of the Act.
- (f) An inspection of the premises was most recently undertaken on the afternoon of 11 November 2022. No issues were identified during the inspection that would prevent the granting of the application and the issue of an on-licence (sic).
- (g) The applicant is subject to many layers of professional scrutiny and licensing compliance assessments, including those related to registration as a 'Brewery' and 'Distillery'. The applicant has a significant personal interest in ongoing compliance and safety and thereby, this license's success if it is concluded in their favour and issued. The applicant has significant experience related to brewery practices and the proposed Licensed Managers have a reasonable experience. No known concern is evidenced. I believe the applicant is suitable and therefore I do not challenge their suitability. It is considered that a licence issued in this circumstance would be professionally managed by the applicant.

[33] The Inspector gave background to the Council LAP, particularly in relation to this application, clause two specifying the District wide limit on off-licensed premises. He noted the cap being set by Council at thirteen (excluding supermarket and grocery stores) for Whanganui, which was the number of applicable Off-licence's at the time of LAP drafting. During the final stages of drafting the LAP and before implementation, a 14th Off-licence was able to be issued meaning there were 14 premises within the Whanganui District that make up the cap. These were listed as:

Premises Name	Address	Type	Cap #
Big Barrel Riverside	33 Somme Parade	Bottlestore	1
Big Barrel Victoria Avenue	379 Victoria Avenue	Bottlestore	2
Big Barrel Whanganui East	59a Jones Street	Bottlestore	3
Big Barrel	94 Puriri Street	Bottlestore	4
Blackbull Liquor	1 Polson Street	Bottlestore	5
Blackbull Liquor	129 Duncan Street	Bottlestore	6
Blackbull Liquor	13 Purnell Street	Bottlestore	7
Blackbull Liquor*	446 Victoria Avenue	Bottlestore	8
Blackbull Liquor	43a Dublin Street	Bottlestore	9

Liquorland	291 - 293 Avenue	Victoria	Bottlestore	10
Roots Brewing Co.	43 SH3		Cellar Door	11
Windermere Gardens	313 SH3 North		Cellar Door	12
Whanganui East Club	101 Wakefield street		Club Off Licence	13
Castlecliff Club	4 Tennyson Street		Club Off Licence	14
M7	379 Victoria Avenue		Off Licence	15

[34] The Inspector noted a further Off-licence application by Whanganui Distilling Company was pending. We further note this license has been subsequently issued by this Committee.

[35] In his report the Inspector contends that as the cap is already met, any additional licence will be contrary to the intent and purpose of the LAP. Further the Inspector argues the LAP and the object of the Act share a common goal and therefore to be in conflict with the LAP is, in his view, to be in conflict with the object of the Act.

[36] The Inspector contends that the 'cap' was developed following extensive, evidenced based special consultative process and therefore should be applied to this application.

[37] At the hearing Mr Turfrey raised the issue of potential precedent granting this application may cause resulting in the object of the Act not being able to be met. He also reiterated his reports concern that the "voice of the people" were represented in the LAP and should be listened to.

[38] Mr Turfrey was asked about the Council's annual LAP clause 2.4 review and why this type of licence (Lads Brewery) was not considered during LAP development or Lap review. The Inspector agreed that as far as he was aware this type of off licence was not discussed during LAP development. He further advised that his role within the annual review was to provide information on how the LAP clause was working. The last review considered boutique distillery/brewery type premises and this will be further considered during the next review.

[39] In answer to a question whether he would oppose the application on the basis of amenity and good order if there was no 'cap', Mr Turfrey advised the hearing that the concerns raised at the initial hearing, were still valid. Mr Turfrey further advised that the original amenity and good order survey undertaken last year just prior to the issue of the On-licence, had not been repeated.

[40] The Inspector talked of potential nuisance value caused by parking congestion up and down the street as well as migration and intoxication concerns given the proximity of the 'Cobb' to LAD's and the increased patronage to both establishments.

[41] When asked whether he was in Whanganui when the "Red" was a popular On and Off-licence and whether he believed the residents in the area had grown used to a quieter street, Mr Turfrey said was aware of the popularity of the 'Red' many years

ago however over the past few years residents had been used to a much quieter licensed premises.

[42] Under questioning from the Police, the Inspector advised that he accompanied the Police on an inspection of the Lad's Brewery On-licence on the 6 January 2023. During an initial inspection it was noted the named duty manager was not present and was not able to be contacted. During a further subsequent inspection later that night the same result and non-compliance was encountered.

[43] The Inspector advised that the Licensee was contacted following the incident to talk through the non-compliance using a graduated response model. This included the offer of staff training which was welcomed by the applicant.

Police Evidence

[44] Senior Constable Thomson reported in opposition on behalf of Police on the grounds the application is contrary to the Local Alcohol Policy 'Cap' s.105 (1)(c). He said there was already sixteen LAP impacted Off-licences in Whanganui.

[45] Senior Constable Thomson advised that Police had no calls for assistance or intervention concerning the LAD's Brewery since opening last year. With regards to the incident on the 6 January 2023, he believed there had been confusion on the licensee's part however everybody's learnt from that incident and steps put in place to limit any reoccurrence.

[46] Senior Constable Thomson said harm (alcohol) is present in our community and whilst 'Lad's' is a low risk premises, low risk still constitutes risk.

Medical Officer of Health Evidence

[47] The Medical Officer of Health reported in opposition to the application on the basis the application is contrary to the Local Alcohol Policy i.e. s. 108.

[48] Jillian Job, delegate on behalf of the Medical Officer of Health, advised the Committee the opposition was based on non-accordance with the LAP and not with any issues with the applicant's suitability, premises, processes, hours etc.

[49] Jillian Job further advised she has concerns regarding on-line sales generally along with the applicants proximity to the 'Cobb'.

Committee's Decision and Reasons

[50] In considering this application the Committee had regard to the criteria under s.105 and provisions of s.108 of the Act i.e.

105 Criteria for issue of licences

(a) the object of this Act:

(b) the suitability of the applicant:

(c) any relevant local alcohol policy:

(d) the days on which and the hours during which the applicant proposes to sell alcohol:

(e) the design and layout of any proposed premises:

(f) whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:

(g) whether the applicant is engaged in, or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:

(h) whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence:

(i) whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that—

(i) they would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but

(ii) it is nevertheless desirable not to issue any further licences:

(j) whether the applicant has appropriate systems, staff, and training to comply with the law;

(k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.

108 Licence may be refused if contrary to local alcohol policy

The licensing authority or licensing committee concerned may refuse to issue a licence if—

(a) there is any relevant local alcohol policy; and

(b) in its opinion, the issue of the licence, or the consequences of the issue of the licence, would be inconsistent with the policy.

[51] In terms of section 105 criteria that were in question with this application, the Committee heard issues raised in relation to the LAP (s. 105(c)), amenity and good order of the locality (s. 105(h) and the object of the Act (s.105(a)).

[52] The application appeared in accordance with all other s.105 matters. Indeed, reporting agencies commented in their reports on the applicant's suitability, knowledge and systems suitable to hold such a licence. The Committee notes the applicant presented his application professionally at the hearing and presented as a responsible entity to hold an off-licence.

[53] All three reporting agencies were opposing the application principally on the basis it did not meet Council's LAP 'Cap' provisions for off-licences.

[54] This is the third time this Committee has been asked to determine an application that does not accord with the Council's LAP. The first time was in December 2020 when *M7 Limited* applied for and were granted a cellar door/remote sales off-licence. The second time was in December 2022 when *Whanganui Distilling Company Limited* applied for and were granted a Remote Sales and Distillery Cellar Door type off-licence for their premises up at Upokongaro.

[55] This licence application before us is similar in type to *M7 Limited and Whanganui Distilling Company Limited* operations, including selling niche, high end, higher priced low volume types of alcohol. We also acknowledge the three applications had some differences especially alcoholic ranges and volumes.

[56] Accordingly, our decision will reference the *M7 Limited and Whanganui Distilling Company Limited decision*, where necessary, as these are our benchmark decisions from which we must establish consistency, where warranted.

[57] As far as the Committee is aware, there is no appellate decisions by ARLA for similar applications that can guide our decision making.

The Local Alcohol Policy (LAP)

[58] Whanganui District Council's LAP came into full force on 2 December 2019 after a long development period starting in 2013. The LAP clause that is captured by this application is Clause 2 – District-wide limit on off-licensed premises which states -

2 District-wide limit on off-licensed premises

Policy

2.1. From the date this policy comes into force, no further new off-licences will be considered appropriate under this policy if the grant of that further new off-licence would bring the total number of off-licences in the region to 14 or more.

2.2. For the purposes of clause 2.1 above, a new off-licence does not include a new off-licence for a supermarket or grocery store.

2.3. For the purposes of clause 2.1 above, the total number of off-licences in the region excludes off-licences for supermarkets and grocery stores.

2.4. Clause 2.1 will be reviewed by the Whanganui District Council annually to ensure that this clause is not inconsistent with development objectives and potential in the Whanganui district.

Rationale

The application of this limit will only apply to off-licences, as on-licences and club licences provide a controlled drinking environment that is sufficiently regulated by the Act and corresponding regulations. Supermarkets and grocery stores are exempt due to the provisions of the Act regulating the kinds of alcohol sold, display and single-area conditions.

[59] At the time this application was made, the number of eligible off-licences captured by this clause was already over thirteen. The applications non accordance with this LAP clause is raised by all three reporting agencies.

[60] This Committee must *have regard* to the relevant LAP (s.105 (1)(c)); and may refuse to issue a licence if, in its opinion, the issue of the licence would be inconsistent with the LAP (s.108). However, neither s.105 (1)(c) nor s.108 require the Committee to give effect to the LAP.

[61] Sections 105 and 108 of the Act provide the Committee with broad discretion that would include granting a licence that may, on face value, be inconsistent with a LAP provided that, in the Committee's view, *an active intellectual process in which relevant factors are afforded the decision makers genuine consideration*. (see High Court comments in *Vaudrey*)

[62] In having regard to the LAP the Committee is cognisant of the Authority's decision in *Shady Lady Lighting Ltd v Lower Hutt Liquormart Ltd* [2018] NZARLA198 which was upheld on appeal and which is relied heavily on the High Court decision in *Christchurch MOH v J and G Vaudrey Ltd* [2016] 2NZLR382. At Para [66] the Authority held that -

(a) The phrase 'have regard to' bears its ordinary meaning;

(b) The decision maker must actively and thoughtfully consider the relevant matters;

(c) To do so requires the decision maker to correctly understand the matters to which he or she is having regard;

(d) The weight to be given to such matters is generally within the discretion of the decision maker;

(e) There will be cases where the matter(s) to which the decision maker is required to have regard are so fundamental or critical that they assume an elevated mantle.

[63] In relation to elevated mantle matters mentioned in (e) above, this Committee is of the view the object of the Act is of fundamental consideration, especially this particular applications likelihood to cause unsafe or irresponsible consumption of alcohol causing harm.

[64] The Committee also found the following comments of the High Court useful in *Christchurch MOH v J and G Vaudrey Ltd* [2015] NZHC2749:

[75] It is trite to say that having regard to something does not put the position as high as giving effect to it, which is synonymous with a directive to “implement”. Care must be taken not to elevate a requirement to “have regard to” to the standard of giving effect to. The standard “have regard to” has been described as a “jurisdictional prerequisite” to the exercise of a discretion, and involves an “active intellectual process” in which relevant factors are afforded the decision maker’s genuine consideration.

[76] In Canada it has been held that while the decision maker is not bound to follow something in relation to which it is required to have regard, it must consider that matter carefully in relation to the circumstances at hand, the objectives and statements as a whole, and what they seek to protect. In New Zealand it has been held there is not “any magic” in the words and that they require the decision maker to give genuine attention and thought to the required matters.

[77] This necessarily requires the decision maker to correctly understand the matters to which he or she is directed to have regard. However, in having regard, the weight to be given to statutory criteria will generally be a matter for the decision maker. Though in some cases it is apparent that there may be one or more factors which are “critical or fundamental” to the making of a decision. However, the requirement to have regard to a set of factors does not preclude having regard to other relevant matters, such as the purpose and object of an Act.

[65] The term “must have regard to” also appears in the Resource Management Act 1991, and similar statements have been made in terms of its application in that context. For example, in *Foodstuffs (South Island) Ltd v Christchurch City Council* the High Court states: *The requirement for the decision maker is to give genuine attention and thought to the matters set out in s.104, but they must not necessarily be accepted.*

[66] In this Committees decision *M7 Limited 2021*, Counsel for the Inspector submitted that this Committee “would have to identify some exceptional, or some unusual, or some distinctive feature, based on cogent and compelling evidence, to justify departure from the element in the LAP...”. The Committee agreed with Counsel to the extent that any departure from the LAP would need to be carefully justified and need to demonstrate how it is justified in terms of the object of the Act and risk of alcohol-related harm.

[67] In ‘having regard’ to the LAP the Committee’s starting position is that clearly the application is inconsistent with the plain words of Clause 2 of the LAP.

[68] All tri-agencies reports opposed the application principally on the basis of the application’s inconsistency or non-compliance with Clause 2 of the LAP. This is not

surprising given all submitters were party to developing the LAP, including the desire for a 'Cap' for off-licence type premises. Therefore, it would seem entirely appropriate and consistent that these submitters would oppose an application, and indeed previous applications, that are inconsistent with the LAP.

[69] Whilst the starting point is that the application is inconsistent with the LAP, as a District Licensing Committee we are an inquisitorial body with powers under the Commissions of Inquiry Act 1908. As such we endeavour to understand the intention of this specific clause of the LAP as it relates to this application before us, including against the backdrop of the object of the Act.

[70] Ultimately the LAP was Council's to develop and adopt on behalf of its community. The Committee has taken its time to consider all the background material and submissions provided to it to refine our understanding of the LAP, in particular the intent of the 'cap' clause as authorised by Council. In doing so the Committee is also mindful of the importance of maintaining the integrity of the LAP.

Similarities/Differences between this application and that of M7 Limited

[71] In considering this application the Committee noted the real similarities between this application and the M7 Limited application. Both were for Cellar Door/Remote Sales of boutique, high quality, high cost and low volume alcohol. Both attracted opposition based on the LAP 'cap'.

[72] The difference in the application before us is that Lads Brewery is more remotely located than M7, surrounded by less licensed premises (especially off-licences), is surrounded by and potentially services a lesser deprived area, and selling alcohol from two brewers/distillers located at the venue. However essentially the perceived risks and potential harms this particular off-licence offers, are the same as M7 i.e. minor.

General Purpose or Intent of the LAP

[73] Generally the Committee is of the view that the LAP is not determinative of the application in this instance. As with the other applications this Committee has heard that has triggered the LAP 'Cap', Council did not provide any additional material to the hearing that assisted us understand the LAP, especially Clause 2, to any greater degree than during the *M7 Limited (2020)* and *Whanganui Distilling Limited (2022)* hearings. In our *M7 Limited decision dated 5 March 2021*, we said on this matter –

“[99] The Committee has endeavoured to assess the application by looking at the plain words of the LAP whilst considering the intent of the specific element of the LAP at issue i.e. the off-licence cap of Clause 2.1.

[102] ...there appears to be no attempt within this rationale to give reason for the specific cap. This leads the reader to speculate that Council must have thought off-licences, captured by this clause, have insufficient controls and result in excessive or inappropriate consumption of alcohol to cause harm sufficient to warrant policy intervention.

[103] ... Mr Staric advised Council during LAP development that ‘a major focus of the LAP was off-licences because they did not provide a safe, controlled environment for the consumption of alcohol.’

[104] ...The Committee found much of the evidence which informed the LAP objections/opposition to this application, was general in nature, general to alcohol consumption and lacking specific causal nexus to the elements of objection and opposition to this application.

[105] The Committee heard there were no off-licences of this application type in Whanganui at the time of LAP development and resolution.

[74] The Committee does not necessarily agree with the Inspectors contention that the LAP “reflects the values of a consulted and engaged community”. As expressed above, with all the off-licence applications that have triggered the LAP ‘cap’, the Committee has endeavoured to understand and look at both the purpose and process behind Council’s LAP in order to best ‘have regard’ to the policy document. We have found a number of gaps and inconsistencies that are at odds with the Inspectors contention in this regard.

Remote Sales

[75] Again in the *Whanganui Distilling Limited* hearing the Committee heard through the Council’s annual review of clause 2.1 of the LAP and through the Inspectors evidence that ‘Remote Sales’ were inadvertently captured by clause 2.1.

[76] Additionally the Inspector said in his view Remote Sales were low risk provided ‘we’ can control them, referencing problems with ‘out of town’ based remote sales licences. The applicant stated in his evidence that they would only sell alcohol produced on the premises.

[77] Similarly, in our *M7 Limited decision dated 5 March 2021*, we said on the matter of remote sales –

[109] The Committee heard little opposition/objection to the remote sales aspect of the application. We heard from Council, from their clause 2.4 review, that ‘remote sales’ were inadvertently captured by the off-licence cap. Council further noted in the review that ‘remote sales are a lower risk due to the time delay between purchase and receipt...

[110] Although the remote sales aspect of the application is still captured by the ‘cap’, based on the above information the Committee agrees with Council’s view that remote sales are a lower risk for the reason mentioned above but also for the fact they have specific sales controls as specified in s. 59 of the Act. These requirements assist to manage potential risks from this type of sale. Additionally, the Committee heard from the applicant that remote sales would be restricted to alcohol brewed by the manufacturer onsite and restricted to limited purchase quantities and days and times in line with Health Promotion Agency guidelines.

[111] For reasons mentioned above, this Committee is of the opinion that from an alcohol harm/risk perspective, the 'remote sales' aspect of this application, is minimal and should achieve an outcome of safe and responsible sale, supply and consumption of alcohol and that any harm caused by the excessive or inappropriate consumption of alcohol would be minimised.

Over the Counter Sales

[78] Similar to the Whanganui Distilling Company application, we heard from the applicant that over the counter off sales would be the least volume of sales when compared to remote sales and wholesale. Again over the counter sales will be restricted to alcohol produced on the premises i.e. Lads Brewery and Good Bones Distillery, which had a maximum of 1800 litres per month production.

[79] We agree with the applicant and their evidence they produced analysing their premises products to that of other off-licence premises, that the alcohol produced on the premises was high end and relatively low volumes, governed by premise confines and boutique nature of the business.

[80] The Inspector in his report said *"Matters of possible intoxication at the venue (On-Licence) and then their purchasing additional alcohol (Brewery and Distillery) for off-site consumption - these matters must be considered as a real potential to increase (not minimise) harm. This provides the grounds for the Inspector's objection related to the purpose of the Act."*

[81] The Committee found these comments somewhat hypothetical and lacking real evidence, especially when linked to the Inspectors further comments in his report that - *"The Off-licence matrix related to risk profile is low. The risk matrix conclusion related to their site and for their On-Licence is Medium. The Inspector concludes a low level of risk may be achievable in regard to their Off-Licence practices where the mitigations provided in the Host Responsibility Policy are complied with at all times. The applicant impresses as genuinely motivated to mitigate and minimise any potential for non-compliance or harm. The applicant would appear to have a significant personal and vested interest in ensuring the ongoing success of any approved alcohol licence"*.

[82] We agree that in terms of alcohol harm this application based on the types and volumes of alcohol to be sold along with its location, is low risk. In our *M7 Limited* decision dated 5 March 2021, we said on the matter of 'over the counter sales' –

[112] Turning our attention to 'over the counter sales' aspects of the application, we observed that the "rationale" under Policy 2 of the LAP states that supermarkets and grocery stores are exempt due to the provisions of the Act regulating the kinds of alcohol sold, display and single-area conditions. Council obviously considered the risks and associated harm from alcohol sold from these two types of off-licences and felt they were already sufficiently covered by specific statutory controls i.e. limitation on kinds of alcohol sold and how alcohol is displayed.

[117] In short, the applicant's proposed off-licence is not a full-service bottle store which Council obviously had in mind when adopting Clause

2.1. This is not an off-licence type premise that sells bulk amounts of low-cost products. The Committee heard the application is for low batch, low volume sales of brewed beer at reasonably high prices reflecting the boutique nature of the product. All these elements, in the Committee's view, are at least like, and one could argue more controlled than, Supermarkets and Grocery stores that Council resolved to exempt from Clause 2.1 'cap' of the LAP.

[118] These controls whether regulatory, conditioned, or self-imposed, all have the effect of promoting the object of the Act in terms of –

(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.

Amenity and Good Order (s. 105 (h) and (i))

[83] The Inspector raised issues and has opposed the application on grounds of amenity and good order referencing increased patronage, increased alcohol (co-located distillery), upgraded neighbouring licensed premises leading to increased 'traffic', stated and evidenced damage to berms in street from an incident and concludes – *"that as proposed it is more likely that nuisance issues related to amenity and good order will occur where the addition of an off-licence option is provided"*.

[84] The Committee views on each of these amenity and good order issues in isolation is –

- We are not convinced an off-licence of this type will result in much if any increased patronage. We heard at the hearing that the most likely scenario of over the counter 'off' sales was out of towners who wanted to take some back 'home' or patrons who were going off to a party or home to watch the rugby. All these scenarios in themselves are unlikely to increase amenity and good order of the locality by more than a minor extent.
- We also heard at the hearing that the co-located distillery was onsite at the start of the applicant's on-licence application and therefore hardly attributable to diminished amenity and good order from this off-licence, if granted.
- The upgraded Red Lion On-licence has certainly increased in patronage and therefore will be contributing to increased patronage, car parking etc in the area generally. Apart from the one incident noted around damage to a berm this has not materially affected the amenity and good order of the area, as reported to us. We heard at the hearing that the neighbourhood survey undertaken prior to Lad's obtaining an On-licence has not been repeated as yet. A repeat survey of this nature would certainly provide good evidence in this regard.

[85] The Committee notes in paragraph [33] of *Tony's Liquor Upper Hutt Ltd [2014] NZARLA*, the Authority commented '*If the proposal was simply to sell a very high quality product without attempting to cater for the rest of the market, then it is possible that the amenity and good order of the locality would be reduced by only a minor extent*'. *We are of the view that this is the case in this particular application after taking all the evidence into account before us.*

[86] Similarly in this case, we have no compelling evidence that the issue of an Off-licence of this 'type' and location is likely to reduce amenity and good order by more than a minor extent.

Object of the Act

[87] Lastly, the Committee is required to consider the application in light of the object of the Act. That is having regard to the criteria in s.105, and having balanced the evidence before it, the Committee is required to consider whether the grant of the licence is consistent with the Act's object of minimising alcohol-related harm.

(1) The object of this Act is that—

(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.

(2) For the purposes of subsection (1), 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).

[88] The High Court commented in *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Limited [2018] NZHC 1123* at [46], Referring to *Re Venus NZ Ltd [2015] NZAR 1315* "... A licensing committee or Authority, after having regard to the criteria for renewal in s 131, is then to step back and consider whether there is any evidence indicating that granting the application will be contrary to the statutory object in s 4. Or, as Heath J articulated a "test": Although the "object" of the 2012 Act is stated as one of 11 criteria to be considered on an application for an off-licence, it is difficult to see how the remaining factors can be weighed, other than against the "object" of the legislation. It seems to me that the test may be articulated as follows: is the Authority satisfied, having considered all relevant factors set out in s 105(1)(b)–(k) of the 2012 Act, that grant of an off-licence is consistent with the object of that Act?" Our emphasis.

[89] The Inspector specifically opposed the application on grounds the object cannot be achieved due to matters related to – "the LAP, amenity and good order, and

potential for increased alcohol manufacture and supply". Amenity and good order has been addressed above and increased alcohol manufacture and supply is limited by the premises confines and intention to only sell alcohol manufactured on site.

[90] The Committee does not agree with the Inspectors contention that by association "to be in conflict with the LAP is to be in conflict with the object of the Act" on the basis both relate to alcohol related harm. Each singular element of s. 105 criteria must be evaluated and be given regard to in our decision and then, as expressed in paragraph [87] we must step back and assess the application against s. 4 of the Act i.e. the object of the Act.

[91] It does not necessarily follow that if one or two aspects of the criteria (LAP included) 'raise issues' that the application fails the 'Object' test, nor vica versa. Ours is an evaluative exercise.

[92] As stated in both our M7 Limited and Whanganui Distilling Company Limited decisions, on the matter of 'object of the Act' we said –

[145] We agree with Council's comment, as recorded in paragraph [45], that remote sales off-licences are inadvertently caught by the LAP and therefore the remote sales aspect of this application is considered as being at the lower risk of harm under the object of the Act given the specific regulatory controls for remote sales under s. 59 of the Act and given the lag time between online purchase and receipt of alcohol.

[146] In terms of development of the LAP in question, Council applied its lens across harm caused by alcohol in its community and concluded there was enough evidence to include limits on the number of off-licences in the District. Furthermore, Council agreed that exemptions for Supermarkets and Grocery Stores were to be allowed due to the provisions of the Act regulating those kinds of alcohol sold, displayed and within single-area conditions i.e. s. 58, 112 and 114. To exempt Supermarkets and Grocery Stores, Council must have considered and determined that the harm from these two types of off-licences were sufficiently mitigated against to meet the object of the Act.

[147] The Committee heard enough evidence to suggest that the application before us, when considering the nature of proposed sales, type of alcohol, together with the limitations and control mechanisms proposed; is the same or less likely to cause harm when measured against Supermarkets and Grocery Store off-licences Council exempts from the 'cap'.

[148] Again, on balance and considering the evidence before it, the Committee is satisfied that grant of this licence is consistent with the Act's object

[93] The Committee reaches a similar conclusion for this application as well.

Conclusion

[94] In conclusion, for the reasons set out above, the Committee determines the application is not inconsistent with the object of the Act when taking into account the limited type and volume of alcohol being sold, its boutique and high end nature, the remote sales aspect and the location for over the counter sales.

[95] Whilst the application triggers the 'cap' clause of the LAP, the Committee does not believe this type of premises and operation was intentionally set out to be captured by the Council in its LAP. Coupled with the greater limitations and regulations associated with this type of application, we assess there's less potential for alcohol-related harm, than the exempted types of premises in the LAP.

[96] Accordingly, the application by **Lads Brewing Company Limited** for a new Off-licence (Remote Sales and Distillery Cellar Door type) in relation to the premises situated at 47 Anzac Parade, Durie Hill, Whanganui, **is approved.**

[97] The licence will not issue until the expiry of 10 working days from the date of this decision. That period is the time provided by s.155 of the Act for the lodging of a notice of appeal.

[98] The application is approved for one year and subject to the following conditions:

Applicant is authorised to sell by remote sale and over the counter, alcohol **(only that produced on the premises)** from the premises situated at 47 Anzac Parade, Durie Hill, Whanganui and known as "Lads Brewing", to any person for consumption off the premises and to deliver it or have it delivered by some other person somewhere else.

(a) Alcohol, produced on the premises, may be sold:

- **By Remote Sales: At any time on any day**
- **Over the Counter: Monday to Sunday, between 11.00am and 9.00pm.**

(b) No alcohol is to be **delivered** on:

**Good Friday, Easter Sunday, Christmas Day or before 1.00pm on Anzac Day, nor:
At any time after 11.00pm on any day and before 6.00am on the next day.**

- (c) Pursuant to Regulations 14 and 15 of the Sale and Supply of Alcohol Regulations 2013:
- (i) The licensee must take reasonable steps to verify that the buyer of any alcohol that the holder sells by remote sale (and, if a person other than the buyer is to receive it, to verify that the receiver) is not under the purchase age.
 - (ii) The licensee when selling alcohol by remote sale via the Internet must comply with any regulations made under the Act requiring information to be visible on the holder's website when people browse, enter, or otherwise access it.
 - (iii) The licensee when selling alcohol by remote sale by mail order must comply with any regulations made under the Act requiring information to be published in the holder's catalogues.

- (iv) The licensee when selling alcohol by remote sale by telephone must comply with any regulations made under the Act requiring information to be given to callers.

DATED at Whanganui this the 28 day of February 2023



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Chairman – Stuart Hylton