IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 139/2021
[2023] NZSC 45

BETWEEN	WOOLWORTHS NEW ZEALAND LIMITED Appellant
AND	AUCKLAND COUNCIL First Respondent
	ALCOHOL REGULATORY AND LICENSING AUTHORITY Second Respondent
	FOODSTUFFS NORTH ISLAND LIMITED Third Respondent

SC 140/2021

BETWEEN	FOODSTUFFS NORTH ISLAND LIMITED Appellant
AND	AUCKLAND COUNCIL First Respondent
	WOOLWORTHS NEW ZEALAND LIMITED Second Respondent
	ALCOHOL REGULATORY AND LICENSING AUTHORITY Third Respondent

Hearing:	13–14 September 2022
Court:	O'Regan, Ellen France, Williams, William Young and Cooper JJ
Counsel:	J S Cooper KC, A W Braggins and B D Huntley for Woolworths New Zealand Ltd I J Thain and I E Scorgie for Foodstuffs North Island Ltd P M S McNamara, T R Fischer and C J Ryan for Auckland Council

D R La Hood and S B McCusker for Medical Officer of Health as Interested Party

Judgment: 5 May 2023

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the Auckland Council costs of $35,000.

REASONS
(Given by William Young J)

Table of Contents

	Para No
Introduction	[1]
Background to the 2012 Act	[7]
The 2012 Act	[12]
Purpose provision	[13]
The object of the 2012 Act	[14]
Provisions as to local alcohol policies	[15]
How a local alcohol policy is implemented	[17]
Process by which a local alcohol policy is produced	[22]
Reviews	[28]
The Auckland PLAP	[29]
The Licensing Authority's decision	[37]
Licensing Authority's statement of applicable legal principles	[39]
Resolution of appeal against challenged elements	[43]
The approach of the High Court	[48]
The Court of Appeal approach	[63]
Our approach to the appeal	[78]
The role of the Licensing Authority on an appeal under s 81	[79]
Did the Court of Appeal take an inappropriately narrow approach to the role of the Licensing Authority?	[88]
The 9 pm closing time	[92]
The new off-licence restrictions	[98]
One loose end	[101]
Disposition	[103]

Introduction

[1] Under s 75 of the Sale and Supply of Alcohol Act 2012 (the 2012 Act), a territorial authority may have a policy relating to the sale, supply or consumption of alcohol within its district (a local alcohol policy). A necessary step in the process leading up to the finalisation of such a policy is the production by the territorial authority of a provisional local alcohol policy. In 2015, the Auckland Council produced such a policy (the Auckland PLAP). For the purposes of this appeal, what is material is that the Auckland PLAP:

(a) provided for 9 am to 9 pm maximum trading hours for all off-licences throughout Auckland (the trading hours restriction); and

(b) restricted the granting of new off-licences by imposing:

(i) a rebuttable presumption against the granting of new off-licences in certain neighbourhood areas; and

(ii) a temporary freeze on the granting of new off-licences in certain other areas followed (once the temporary freeze lapses) by a rebuttable presumption against the granting of such licences in those areas.

We will refer collectively to these terms of the Auckland PLAP as the "new off-licence restrictions".

[2] The appellants ("Woolworths" and "Foodstuffs") operate New Zealand's two major supermarket chains. Alcohol (restricted to beer, wine and mead[1]) is sold from their supermarkets under off-licences.[2] They appealed against the Auckland PLAP to the Alcohol Regulatory and Licensing Authority (the Licensing Authority) under s 81

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1 Sale and Supply of Alcohol Act 2012 [2012 Act], s 58.

2 Under the 2012 Act, there are four types of licences: see ss 13–22. Generally, an on-licence allows the licensee to sell and supply alcohol for consumption on the premises and to permit the consumption of alcohol on the licensed premises. An off-licence allows the licensee to sell alcohol for consumption off the premises. Club licences allow licensees to sell and supply alcohol to authorised customers for consumption on the licensed premises. Finally, special licences provide for the sale and supply of alcohol for particular events.

of the 2012 Act. This was on the sole statutory ground of appeal that a number of the elements of the Auckland PLAP, including the trading hours and new off-licence restrictions, were unreasonable in the light of the object of the 2012 Act (being the safe and responsible sale, supply, and consumption of alcohol and the minimisation of harm caused by excessive or inappropriate consumption of alcohol).[3]

[3] The Licensing Authority relevantly held that the opening hour component of the trading hours restriction was unreasonable but upheld the 9 pm closing time and the new off-licence restrictions.[4] It therefore required Auckland Council to reconsider the trading hours restriction. Because issues as to other challenged elements of the Auckland PLAP have fallen away, we will confine, as far as we can, our discussion to the 9 pm closing time and the new off-licence restrictions.

[4] Woolworths and Foodstuffs sought judicial review of the Licensing Authority's decision. In a judgment delivered on 27 February 2020, Duffy J found for them in relation to the 9 pm closing time and the new off-licence restrictions. She set aside the Licensing Authority's decision in relation to them.[5] She also held that another of the elements of the Auckland PLAP, providing for local impacts reports, was ultra vires and unreasonable.[6] This aspect of her judgment has not been appealed but, as we will explain, has some materiality to the new off-licence restrictions.

[5] In the judgment now under appeal, the Court of Appeal reversed Duffy J's judgment in relation to the 9 pm closing time and the new off-licence restrictions.[7]

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3 The sole statutory ground of appeal is set out in s 81(4) and the object of the 2012 Act is found in s 4.

4 *Redwood Corp Ltd v Auckland City Council* [2017] NZARLA PH 247–254 (Judge K D Kelly and Members Moorhead and Miller) [Licensing Authority decision].

5 *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293 [HC judgment]. The separate proceedings brought by Woolworths and Foodstuffs were dealt with together by the High Court Judge. Redwood Corp Ltd (which had also appealed against the Auckland PLAP to the Licensing Authority) also brought judicial review proceedings, but Duffy J dealt with Redwood's claim in a separate judgment: see *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 971. In that judgment, the High Court Judge set aside the Licensing Authority's decision in relation to Redwood's appeal, directing the Authority to reconsider its decision. That judgment has not been appealed and we say no more about it.

6 The High Court Judge also found that an element of the Auckland PLAP concerning discretionary conditions was ultra vires and unreasonable, but that aspect of the judgment was not appealed and is not otherwise relevant to the appeal to this Court.

7 *Auckland Council v Woolworths New Zealand Ltd* [2021] NZCA 484 (Kós P, Miller and Goddard JJ) [CA judgment].

The effect of the judgment was that the Licensing Authority's decision was re-instated in relation to the closing hours and new off-licence restrictions.

[6] Woolworths and Foodstuffs obtained leave to appeal to this Court. In granting leave, the Court observed:[8]

> Although we grant leave to appeal in general terms, the Court is primarily interested in whether the Court of Appeal's judgment proceeded on the basis that an appeal [to the Licensing Authority] will only succeed if there is not a "real and appreciable possibility" that the element of the provisional policy challenged will minimise alcohol-related harm (so that proportionality considerations are not material) and, if so, whether this is correct.

Background to the 2012 Act

[7] The Sale of Liquor Act 1989 (the 1989 Act), the precursor to the 2012 Act, marked a shift in the legislative policies that had previously been adopted in relation to the sale of alcohol. The earlier legislation had been premised on an understanding that restrictions on selling alcohol (and particularly in relation to licences to do so) would reduce alcohol abuse and related harm.[9] Under the 1989 Act, applicants seeking a licence were no longer required to show that the licence was "necessary or desirable".[10] Rather, any applicant and premises that met the 1989 Act's criteria might be licensed.

[8] In a 2010 Report, the Law Commission | Te Aka Matua o te Ture concluded that the 1989 Act had not reduced alcohol-related harm.[11] Indeed, problems associated with alcohol-related harm had become worse, with the proliferation of outlets identified as a likely contributing factor.[12] Levels of such harm were high, for both

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8 *Woolworths New Zealand Ltd v Auckland Council* [2022] NZSC 46 (William Young, Glazebrook and Ellen France JJ) [SC leave judgment] at [1] (footnote omitted).

9 See, for example, the discussion of the policy behind the precursor legislation (the Sale of Liquor Act 1962) in *Meads Brothers Ltd v Rotorua District Licensing Agency* [2002] NZAR 308 (CA) at [24] where the Court observed that in "marked contrast with its predecessors the [1989] Act does not provide for general economic regulation of the liquor industry" and departs from the idea that licensing helps diminish liquor abuse, an idea that had been "at the heart of licensing systems in New Zealand since 1881".

10 As was required under the Sale of Liquor Act 1962, s 74.

11 Law Commission | Te Aka Matua o te Ture *Alcohol in our Lives: Curbing the Harm* (NZLC R114, 2010) [2010 Report] at ch 3, particularly [3.23]–[3.29].

12 The Law Commission considered the relationship between drinking and the availability of liquor in detail in ch 6. See in particular [6.29] and the conclusion at [6.45]–[6.46].

those consuming alcohol and those affected directly or indirectly by the consumption of alcohol by others.[13]

[9] The Commission was of the view that:[14]

> … a new focus is needed if New Zealand is to achieve a reduction in alcohol-related harms. We consider it to be essential that the object of the new Act sets out aims that relate directly to the broad spectrum of alcohol-related harms. We are convinced that the current state of alcohol-related harms means a new approach is warranted. The object of the new Act should signal this. The legislation needs to take a wider focus than that of simply contributing to the reduction of liquor abuse. Preventing liquor abuse is clearly important, but there are wider effects of alcohol use and misuse that should be emphasised, such as crime, disorder, public health, accidents, the amenity of public places and the resource use of our public services. The problems related to alcohol in New Zealand are at a point where a more proactive approach to addressing harms is needed.

[10] The Commission proposed reforms which included restrictions on opening hours and allowing more local input into licensing policy and decisions. Among the Commission's proposals were restrictions of various kinds on supply.[15]

[11] The Commission's proposals were largely reflected in the 2012 Act.[16]

The 2012 Act

[12] We set out relevant parts of the legislative scheme below.

Purpose provision

[13] The 2012 Act contains a purpose statement:

> **3 Purpose**
>
> (1) The purpose of Parts 1 to 3 and the schedules of this Act is, for the benefit of the community as a whole,—

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13 See generally at ch 3.

14 At [5.42].

15 See the summary at [8] and [36].

16 The explanatory note to the Alcohol Reform Bill 2010 (236-1) which later became the 2012 Act records that the Bill draws on the Law Commission's 2010 Report and implements the Government's decisions in relation to the recommendations advanced in that Report. This is consistent with a Cabinet Paper in which, the Minister of Justice, Hon Simon Power, proposed to accept most of the Law Commission's 153 recommendations in whole or in part: see Office of the Minister of Justice "Alcohol Law Reform" (5 August 2010).

(a) to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2); and

(b) to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act.

(2) The characteristics of the new system are that—

(a) it is reasonable; and

(b) its administration helps to achieve the object of this Act.

The object of the 2012 Act

[14] The object of the 2012 Act is set out in s 4:

4 Object

(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).

Provisions as to local alcohol policies

[15] Under s 75, a territorial authority may have a local alcohol policy:

75 Territorial authorities may have local alcohol policies

(1) Any territorial authority may have a policy relating to the sale, supply, or consumption of alcohol within its district (or to 2 or all of those matters).

(2) A local alcohol policy—

(a) may provide differently for different parts of its district; and

(b) may apply to only part (or 2 or more parts) of its district; and

(c) may apply differently to premises for which licences of different kinds are held or have been applied for.

(3) A local alcohol policy must be produced, adopted, and brought into force, in accordance with this subpart.

(4) No territorial authority is required to have a local alcohol policy.

[16] Section 77 sets out what a local alcohol policy may contain:

77 Contents of policies

(1) A local alcohol policy may include policies on any or all of the following matters relating to licensing (and no others):

(a) location of licensed premises by reference to broad areas:

(b) location of licensed premises by reference to proximity to premises of a particular kind or kinds:

(c) location of licensed premises by reference to proximity to facilities of a particular kind or kinds:

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

(e) maximum trading hours:

(f) the issue of licences, or licences of a particular kind or kinds, subject to discretionary conditions:

(g) one-way door restrictions.

…

(3) A local alcohol policy must not include policies on any matter not relating to licensing.

How a local alcohol policy is implemented

[17] Section 43(1)(b) establishes "default national maximum trading hours" for the sale of alcohol on premises for which an off-licence is held. These are the hours between 7 am and 11 pm. But, under s 45(1)(a), a local alcohol policy setting maximum trading hours prevails over the default trading hours. As well, under s 50,

a one-way door restriction in a local alcohol policy must be complied with. Section 89 provides that elements of a local alcohol policy addressing maximum trading hours and one-way door policies must be treated as secondary legislation for the purposes of s 161A(2) of the Local Government Act 2002 and what is now subpart 2 of pt 5 of the Legislation Act 2019.

[18] Other aspects of a local alcohol policy are not secondary legislation (under s 89(1)(b) of the 2012 Act) and are primarily given effect to, if at all, through the grant and renewal of licences.

[19] Section 105(1) specifies the criteria to which the Licensing Authority or a licensing committee[17] must have regard to:[18]

> (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—

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17 Licensing committees are appointed by the relevant territorial authority under s 186 of the 2012 Act. Section 187 sets out their functions, which includes the ability to consider applications for licences.

18 Emphasis added.

(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.

[20] Section 105(2) states:

> The authority or committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence.

[21] A local alcohol policy is thus one of the statutory criteria to which a licensing committee or the Licensing Authority must have regard in deciding whether to grant a licence.[19] A licensing committee or the Licensing Authority may refuse to issue a licence if that would be inconsistent with a local alcohol policy.[20] A licence may be issued subject to conditions if it would be inconsistent with the policy to issue it without those conditions.[21] Applications for variation or cancellation of existing conditions on a licence are also assessed by reference to the relevant local alcohol policy.[22] Finally, s 133(2)(b) empowers the Licensing Authority or the licensing committee to impose conditions on an existing licence sought to be renewed where non-imposition would be inconsistent with a local alcohol policy.[23]

Process by which a local alcohol policy is produced

[22] Under s 78, a territorial authority wishing to adopt a local alcohol policy must produce a draft policy. Section 78(2) provides:

(2) When producing a draft policy, a territorial authority must have regard to—

---

19 See also s 142(1)(d) of the 2012 Act in respect of special licences.

20 Section 108. See also ss 142(1)(d) and 145 for special licences.

21 Section 109. See also s 146 for special licences.

22 Section 120(8) which requires the Licensing Authority or licensing committee to have regard to any inconsistency between the conditions as proposed to be varied and any relevant local alcohol policy. See also s 120(7). Note that s 120 does not apply to special licences.

23 Section 133(1) otherwise precludes consideration of a local alcohol policy in the decision as to whether to renew a licence.

(a) the objectives and policies of its district plan; and

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

(c) any areas in which bylaws prohibiting alcohol in public places are in force; and

(d) the demography of the district's residents; and

(e) the demography of people who visit the district as tourists or holidaymakers; and

(f) the overall health indicators of the district's residents; and

(g) the nature and severity of the alcohol-related problems arising in the district.

Consultation with the Police, inspectors, and Medical Officers of Health is also required.[24]

[23] Under s 79, the next step in the process is for the territorial authority to consult on the draft policy using the "special consultative procedure" provided for in s 83 of the Local Government Act.[25] Relevantly, the special consultative procedure requires a territorial authority to provide opportunity for submissions. After completing that process, the territorial authority may produce a provisional local alcohol policy. When producing a provisional policy, the territorial authority must again have regard to criteria in s 78(2) of the 2012 Act.

[24] Section 81 provides that anyone who made submissions during the consultative procedure may appeal to the Licensing Authority against any "element" of the provisional local alcohol policy.[26] The sole ground on which "an element of" the policy can be appealed against is that it "is unreasonable in the light of the object of this Act".[27]

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24 Section 78(4).

25 "Special consultative procedure" is defined in s 5 of the 2012 Act as having the meaning given by s 5(1) of the Local Government Act 2002 which, in turn, defines the procedure as being that prescribed by s 83 of the Local Government Act.

26 Rights of appeal are triggered by the territorial authority giving public notice (required under the 2012 Act, s 80) of the provisional policy, rights of appeal against it, and the ground on which an appeal may be made. The Police and Medical Officers of Health are also given rights of appeal under s 81(2).

27 Section 81(4).

[25] Section 83 prescribes how the Licensing Authority is to deal with an appeal:[28]

> **83 Consideration of appeals by licensing authority**
>
> (1) The licensing authority must dismiss an appeal against an element of a provisional local alcohol policy if it—
>
> (a) is not satisfied that the element is unreasonable in the light of the object of this Act; or
>
> (b) is satisfied that the appellant did not make submissions as part of the special consultative procedure on the draft local alcohol policy concerned.
>
> (2) The licensing authority must ask the territorial authority concerned to reconsider an element of a provisional local alcohol policy appealed against if it is satisfied that—
>
> (a) the appellant made submissions as part of the special consultative procedure on the draft local alcohol policy concerned; and
>
> (b) the element is unreasonable in the light of the object of this Act.
>
> …
>
> (4) The appellant has no right of appeal against the decision of the licensing authority.
>
> (5) Subsection (4) does not limit or affect the Judicial Review Procedure Act 2016.

Pausing at this point, we note that the expression "element" is not defined in the 2012 Act.

[26] Sections 84(1) and 86 provide:

> **84 Actions territorial authority may take if asked to reconsider element of provisional policy**
>
> (1) If the licensing authority asks a territorial authority to reconsider an element of a provisional local alcohol policy, the territorial authority must—
>
> (a) resubmit the policy to the licensing authority with the element deleted; or

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[28] We refer to the language as it is currently. Section 83(5), as it was at the time of the Licensing Authority decision, referred to the Judicature Amendment Act 1972.

(b) resubmit the policy to the licensing authority with the element replaced with a new or amended element; or

(c) appeal to the High Court against the licensing authority's finding that the element is unreasonable in the light of the object of this Act; or

(d) abandon the provisional policy.

…

86 Effect of resubmission of provisional policy to licensing authority

(1) The licensing authority must deal with the resubmission of a provisional local alcohol policy under section 84(1)(b) or 85(2)(b) as if it were an appeal against every new or amended element that has replaced an earlier element appealed against; and sections 81 to 85 apply accordingly.

(2) The licensing authority may deal with all or any part of the resubmission in private.

(3) Subsection (2) overrides subsection (1) and section 82.

[27] Section 87 deals with the point in time at which a local alcohol policy is adopted. For present purposes, what is material is that this is 30 days after all appeals have been resolved or, where there has been a resubmission, when the Licensing Authority concludes that the amended provisional local alcohol policy is not unreasonable in light of the object of the 2012 Act. Once these conditions have been satisfied, the territorial authority gives public notice of the adoption of the local alcohol policy and brings it into force by resolution.[29]

Reviews

[28] A local alcohol policy must be reviewed every six years.[30]

The Auckland PLAP

[29] The Auckland PLAP applies to the entire district of the Auckland Council but identifies particular areas of concern in which special policies apply. They are the City Centre, the Priority Overlay (which comprises named suburban centres) and Neighbourhood Centres.

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29 2012 Act, s 90.
30 Section 97.

[30] As previously noted, for the purposes of this appeal the two relevant elements of the Auckland PLAP are the trading hours restriction and the new off-licence restrictions. As well, the element providing for local impacts reports has some materiality to the new off-licence restrictions, although the aspect of the High Court judgment dealing with that element was not appealed.

[31] The trading hours restriction was provided for in this way:

> 4.3.1. Pursuant to sections 77(1)(e) and 45 of the Act, the maximum trading hours for off-licences in the Auckland region are 9am to 9pm, Monday to Sunday.

As well, cl 3.4 provided that no licences should be issued with longer trading hours than specified in the Auckland PLAP and that the Licensing Authority or the licensing committee may issue licences with more restrictive hours.

[32] With respect to the new off-licence restrictions, the key policies were:

> 4.1.2. For the issuing of off-licences in Neighbourhood Centres, the Council's policy position is that there should be a Presumption against the issuing of New Off-licences (outlined at 3.3) in these areas from when the Policy comes into force.

[33] For the issuing of off-licences in the City Centre and the Priority Overlay, cls 4.1.4 and 4.1.6 of the Auckland PLAP recorded that:

> (a) There should be a Temporary Freeze (outlined at 3.2.) on the issue of New Off-licences in the area.
>
> (b) Immediately following the expiry of the Temporary Freeze there should be a Presumption against the issuing of New Off-licences (outlined at 3.3.).

[34] "Temporary Freeze" is explained in cl 3.2.1 in the following way:

> 3.2.1 The Council's policy position is that:
>
> (a) there should be a Temporary Freeze in the areas specified at 4.1.4. [the City Centre] and 4.1.6 [the Priority Overlay]; and
>
> (b) where the Temporary Freeze applies, the [licensing committee] and [the Licensing Authority] should refuse to issue any New Off-licences for the first 24 months of the Policy being in force.

[35] "Presumption" is addressed in cl 3.3:

> Presumption
>
> 3.3.1. The Presumption is that applications for New Off-licences should be refused in the areas specified at 4.1.2. [Neighbourhood Centres], 4.1.4. [the City Centre], and 4.1.6. [the Priority Overlay].
>
> 3.3.2. This Presumption may be rebutted by the applicant.
>
> Deciding whether the presumption is rebutted
>
> 3.3.3. In deciding whether the Presumption is rebutted by the applicant under clause 3.3.2, the [licensing committee] and [the Licensing Authority] should have regard to:
>
> (a) the Local Impacts Report
>
> (b) information provided, and representations made, by the applicant.

[36] Local impacts reports were provided for in cls 3.1.1–3.1.5. These were to be provided by the Auckland Council Alcohol Licensing Inspectorate and address features of the locality to which the application related (such as the number and types of other licences, sensitive sites and so on).

The Licensing Authority's decision

[37] The Licensing Authority held a four-week hearing at which Woolworths and Foodstuffs and a number of interested parties were represented. It heard a significant amount of factual and expert evidence on alcohol-related harm and its association with the sale and supply of alcohol and the specific elements in the Auckland PLAP that were challenged. The length of this hearing and the detail of the factual analysis may suggest a misunderstanding of the role of the Licensing Authority. This was to check that the Auckland PLAP was reasonable in light of the object of the 2012 Act. It was not the conduct of a de novo merits analysis of the policy choices of the Auckland Council.

[38] We first address how the Licensing Authority decision expressed the applicable legal principles governing the appeal under s 81 of the 2012 Act before turning to how the appeal against the challenged elements was resolved.

Licensing Authority's statement of applicable legal principles

[39] The Licensing Authority referred to its statutory task in resolving the appeal in this way:

> [30] The test that the Authority is required to apply in these appeals is whether the elements are unreasonable in light of the object of the [2012] Act (s 81(4)). This test was discussed in *Hospitality New Zealand Incorporated v Tasman District Council* [2014] NZ ARLA PH 846 (the *Tasman* decision) and *B & M Entertainment Limited & Ors v Wellington City Council* [2015] NZ ARLA PH 21–28 (the *Wellington* decision). The 'reasonable person' test applies qualified by the words "in the light of the object of the Act". The test is what an informed objective bystander (i.e. the Authority) considers unreasonable having regard to the object of the Act. The two parts of the test require separate consideration but as we said in *Tasman* at [43],
>
> > "ultimately those two considerations merge in the ultimate test … The test combines the two concepts …."
>
> [31] The onus of proof is on the appellant. The standard of proof is 'on the balance of probabilities'. In *Tasman* we said at [36]:
>
> > "the onus is on the appellant to satisfy the Authority that the appealed element is unreasonable in light of the object of the Act. The very wording of the ground of appeal places that onus on the appellant. Should an applicant fail to discharge its onus on the balance of probabilities then there would be no need for a territorial authority respondent to do anything."

[40] It then went on:

> [32] In *Wellington*, we decided that the proportionality principles used in bylaw cases apply (per *Meads Brothers Limited v Rotorua District Licensing Agency* [2002] NZARLA 308). That is, it is likely that the policies in a [provisional local alcohol policy] will be unreasonable in the light of the object of the [2012] Act if:
>
> (a) the proposed measures constitute a disproportionate or excessive response to the perceived problems;
>
> (b) the proposed measures are partial or unequal in their operation between licence holders;
>
> (c) an element of the [provisional local alcohol policy] is manifestly unjust or discloses bad faith; or
>
> (d) an element is an oppressive or gratuitous [interference] with the rights of those affected.

[41] Proportionality was, therefore, an important aspect of the analysis into whether an element was unreasonable in the light of the object of the 2012 Act. On the latter

point, the Licensing Authority said the Act's object (specified in s 4) does not create a statutory right to safely consume alcohol. Rather, s 4 recognises two limbs — safe and responsible alcohol use, and harm minimisation — which the Licensing Authority must attempt to balance.[31]

[42] Finally, the Licensing Authority re-affirmed that the so-called "precautionary principle" applied to the development of local alcohol policies and to appeals against challenged elements.[32] Provided there exists an evidential basis for the adoption of that principle, the Council is entitled to test whether the proposed control might respond to a local problem and the Authority "will be slow to dismiss that policy".[33]

Resolution of appeal against challenged elements

[43] The purpose of the trading hours restriction was to target high-risk purchases. In relation to the closing hour restriction, the Licensing Authority concluded that:

> [146] Notwithstanding that evidence of reduction in harm from specific reductions in trading hours of off-licences is sparse, there is evidence to establish a relationship between off-licence trading hours and alcohol consumption and harm. Given the level of alcohol-related harm in Auckland, the Authority does not consider that it has been established that the closing hour restriction is unreasonable in light of the object of the [2012] Act. Given this evidential basis for the closing hour restriction, if the Council considers the closing hour restriction for off-licences has the possibility of meeting the object of the Act, then the Council is entitled to test whether that possibility is a reality.

[44] The Licensing Authority took a different view of the proposed opening hour of 9 am. It considered there was limited evidence to support an opening hour restriction. In contrast, the later opening time of 9 am would inconvenience at least an appreciable number of people who shop before 9 am. It then went on to say:

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31 Licensing Authority decision, above n 4, at [37]–[39].

32 At [40]–[43] referring to *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 564, [2010] NZAR 152 which was subsequently applied by the Licensing Authority to the development of local alcohol policy in four decisions: *Hospitality New Zealand Inc v Tasman District Council* [2014] NZ ARLA PH 846; *B & M Entertainment Ltd v Wellington City Council* [2015] NZARLA PH 21–28; *Foodstuffs North Island v Thames-Coromandel District Council* [2015] NZARLA PH 129-131; and *Foodstuffs South Island v Dunedin City Council* [2016] NZARLA PH 212-26.

33 Licensing Authority decision, above n 4, at [42], citing *Foodstuffs South Island v Dunedin City Council*, above n 32, at [26].

> [156] … This inconvenience, while perhaps not large in the overall scheme of things, is a consequence of the disproportionate effect that the restriction on opening hours will have on supermarkets (and their customers).
>
> [157] In the absence of stronger evidence to … support an opening hour restriction, the Authority considers that, on balance, the opening hour restriction is unreasonable in light of the object of the [2012] Act.
>
> [158] The morning restriction is part of the same element as the evening restriction. Accordingly, all of clause 4.3.1 is deemed unreasonable in light of the object of the Act.

[45] With respect to the new off-licence restrictions, the Licensing Authority concluded that a robust process had been followed to identify the areas to which those restrictions would apply that was properly referable to the mitigation of alcohol-related harms.[34] This was in response to an appeal against how the City Centre and Priority Overlay areas were defined. The Licensing Authority then went on to say:

> [82] The Authority does not consider that the Priority Overlay areas have an unequal and disproportionate policy impact on supermarkets and grocery stores compared to other types of off-licences. This is discussed below in relation to the impact of the "freeze" and "rebuttable presumption" elements of the [Auckland PLAP].
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> …
>
> [84] Otherwise, the Authority is not satisfied that it has been shown that it is illogical that the [Auckland PLAP] imposes restrictions on new off-licences in the City Centre and Priority Overlay areas but does not put any restrictions on new on-licences given the impact of on-licences on alcohol-related harm. … Given the nature of off-licences, it has not been shown that these restrictions are unreasonable in light of the object of the [2012] Act because they are different from those which apply to on-licences.

[46] And a little later:

> [112] The Council, on the other hand submits that restricting the issue of new off-licences in the Priority Overlay areas is likely to minimise alcohol-related harm given the correlation between off-licence density and alcohol-related harm. And the Priority Overlay areas have been identified on the basis of relevant risk factors. The presence of off-licences in Neighbourhood Centres, particularly in residential centres, increases the availability of alcohol to at-risk populations. These populations are generally less mobile due to the areas being areas of high deprivation.
>
> [113] The Council submits that given this, there is sufficient evidential basis to invoke the precautionary principle in relation to new off-licences in the City Centre, Priority Overlay areas and Neighbourhood Centres.

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[34] At [80].

…

> [118] The Authority is also not persuaded that there will be unintended consequences for Auckland as a result of the [Auckland PLAP] or that the freeze or rebuttable presumption is disproportionate in effect. While there will undoubtedly be development pressures arising from the application of the Auckland Unitary Plan as regards supermarkets in residential areas (which may see some supermarkets developed outside Priority Overlay areas), the Authority consider that this impact is overstated. The freeze and rebuttable presumption are not intended to operate in metropolitan centres. Nor will they apply to town centres or local centres unless those centres are in the Priority Overlay areas. As the Authority heard from Mr Andrews, Team Manager Resolutions within the Resource Consents Department of the Council:
>
> > "Supermarkets are already well-established in the City Centre and Priority Overlay. The Priority Overlay affects a relatively small proportion of centres. The Neighbourhood Centre zone anticipates smaller scale supermarkets where land size allows. New off-licences for supermarkets are not precluded in the City Centre or Priority Overlay (after the temporary freeze) or in Neighbourhood Centres; there is simply a higher threshold for granting because the presumption against granting must be rebutted. For these reasons I consider that Mr Foster [for Woolworths] overstates his concerns that the [Auckland PLAP] will 'drastically change the zoned opportunity for supermarket and grocery store growth'."

[47] On this aspect of the appeals before it, the Licensing Authority concluded that it had not been shown that the new off-licence restrictions were unreasonable.

The approach of the High Court

[48] The High Court Judge, Duffy J, granted the applications for judicial review by Woolworths and Foodstuffs and remitted certain elements of the Auckland PLAP back to the Licensing Authority for reconsideration (as discussed below).

[49] Duffy J took the view that ss 3 and 4 of the 2012 Act (which set out the purpose and object of the Act respectively) make clear that the Act:

> [54] … strikes a balance between allowing safe and responsible consumption of alcohol and minimising the harm caused by excessive or inappropriate consumption. In this way, the [2012 Act] recognises a freedom to sell, supply or consume alcohol, in a reasonably safe and responsible way, while at the same time recognising a community freedom to take reasonable steps to protect its members from the harms caused by excessive or inappropriate consumption of alcohol, all of which are a cost and burden to the community as well as harmful to the individual consumer. ...

> [55] The provisions for the sale, supply and consumption of alcohol must indicate Parliament's view on what will generally achieve the [Act's] purpose and object, because otherwise they would not be in their present form. They are a general default standard from which there should be reason for departure. The presence of Part 2 Subpart 2 …, however, with provisions for [local alcohol policies], indicates that Parliament also recognises the [Act's] general provisions may require tailoring to meet specific features of individual communities, if the purpose and object of the [Act] are to be met. Accordingly, the elements of a [provisional local alcohol policy] need to be formulated with these matters in mind. …

[50] Duffy J considered that the Licensing Authority could only allow an appeal if of the view that the challenged element was one that "no reasonable territorial authority acting in light of the object of the [2012 Act] would adopt".[35] She therefore held that the Licensing Authority incorrectly articulated the test for determining "unreasonableness" for the purposes of s 81 of the 2012 Act.

[51] The High Court Judge found nothing in the 2012 Act to preclude operation of the precautionary principle. However, her Honour was concerned that the Licensing Authority may have thought that Auckland Council only had to have concluded that its PLAP would possibly achieve the object of the 2012 Act to justify the element under appeal. Properly interpreted, the principle should "reveal a circumstance where on the strength of the available evidence, when viewed from a precautionary approach" the Licensing Authority can be satisfied an element under appeal is not unreasonable.[36] She concluded that the limited reasons provided by the Licencing Authority meant that she could not assess if, how and why the Licensing Authority had applied the principle.[37]

[52] She considered that in determining whether or not the trading hours restriction was unreasonable, the Licensing Authority was required to justify not differentiating between supermarkets and grocery stores and other off-licences:

> [96] None of the submissions or evidence in support of reduced closing hours, to which [the Licensing Authority] refers, differentiates between supermarket and grocery store off-licences on the one hand and bottle store off-licences on the other. The alcoholic beverages that each group sells differ.

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35 See HC judgment, above n 5, at [61]. See also at [56]–[57], referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) and *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL).

36 HC judgment, above n 5, at [69].

37 At [71].

> The types of problems identified in the evidence of those supporting the [Auckland PLAP] are not problems one would usually associate with off-licence sales from supermarkets and grocery stores throughout the Auckland region. Why those outlets and their customers should be subject to reduced closing hours is not clear from this evidence. … The idea the examples given of alcohol-related harm can be associated with all bottle stores wherever located in the Auckland region is not self-evident.

[53] She concluded the Licensing Authority had not given reasons for finding that the same closing hours restriction should apply across all of Auckland:[38]

> [97] [The Licensing Authority's] dismissal of the appeals against the off-licence closing hours restriction must mean [the Licensing Authority] found it was not unreasonable in light of the object of the [2012 Act] for the same closing hours restriction to apply to all off-licences in the Auckland region. But, [the Licensing Authority] gives no reasons for this outcome. This is in circumstances where reasons for the outcome are not self-evident, nor can they be inferred from the evidence and submissions [the Licensing Authority] mentions in its decision. [The Licensing Authority] uses the language of "proof" in its conclusion; stating that it "does not consider that it has been established that the closing hour restriction is unreasonable…". [The Licensing Authority] also uses language which suggests it was influenced by the precautionary principle. … I consider these to be errors of law by [the Licensing Authority], which led to it wrongly dismissing the appeals of Woolworths and Foodstuffs.

[54] For the most part, the remainder of the High Court Judge's reasoning regarding the trading hours restriction elaborated on her conclusion at [97] that the Licensing Authority failed to provide sufficient reasons.

[55] She recognised that she might look to the evidence and submissions that were before the Licensing Authority for inferences about its reasons, but found the evidence linking off-licence trading hours with criminal offending was at best weak.[39] The evidence could not be accepted without considering the extent to which other causes (such as on-licence hours) might play a part, whether the harm was attributable to a type of off-licence rather than off-licences generally, and whether the pattern was district-wide.[40] No such consideration appeared on the face of the Licensing Authority decision. The High Court Judge went on to say that:[41]

> … without such consideration the correlation that [the Licensing Authority] purports to draw between off-licence trading hours and alcohol related

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38 Footnote omitted.
39 At [106].
40 At [107].
41 At [107] (footnote omitted).

> offending to support a blanket reduction in off-licence closing hours throughout the entire Auckland region appears to be no more than an expression of the post hoc ergo propter hoc fallacy. There is nothing inferentially available here to explain why [the Licensing Authority] dismissed Woolworths and Foodstuffs appeal.

[56] For similar reasons, she rejected the significance of evidence that many alcohol presentations at hospitals occur at around 1 am and 80 per cent of alcohol purchases are made from off-licences, remarking that:[42]

> Again, the extent of the contribution from off-licence suppliers, to what extent any such contribution by them could be attributed to all off-licence suppliers, rather than a particular type of supplier, in all districts, rather than some districts, was not touched on. Again, the failure to address those factors leaves [the Licensing Authority's] reasoning open to the inference it has fallen victim to the post hoc ergo propter hoc fallacy. Again, there is nothing inferentially available here to explain why [the Licensing Authority] dismissed Woolworths and Foodstuffs appeal.

[57] Similarly, the Judge discounted the significance of reported incidence of risky drinking behaviour among young people in certain populations in Auckland, their pattern of buying alcohol between 9 pm and 11 pm, and pre-loading and side-loading:

> [109] … [the Licensing Authority] took evidence from Ms Turner that 25 per cent of Aucklanders had reported risky drinking behaviour "in the last four weeks", that those most likely to engage in consumption in this way were young people between 15 and 24 years old, those living in south/south east Auckland and Māori and Pacific populations, and combined this evidence with evidence from Dr Clough that most young people between 18 and 24 years do their alcohol spending between 9pm and 11pm. [The Licensing Authority] does not say how the combined effect of this evidence would indicate the need for a blanket restriction on off-licence closing hours throughout the entire Auckland region, nor is it inferentially apparent.
>
> [110] … [the Licensing Authority] had heard evidence that pre-loading was a well-planned activity and heard submissions to the effect that this suggested the restriction of off-licence closing hours would not control alcohol consumption, except for those who failed to plan. [The Licensing Authority] expressly referred to and relied on a contrary submission from a Police Officer from the Counties Manukau district who said that pre-planning was not a feature of lower socio-economic groups, where the relationship between alcohol and consumption is "more immediate" and opportunities for stockpiling are more limited. For those persons alcohol is not consumed when it is not available. However, this evidence does not address whether such persons seek their supplies from all off-licences or whether they are drawn to those off-licence suppliers that supply alcoholic beverages with a higher alcohol content than beer, wine and mead, and only to those off-licences near to where they live or frequent. Logic would suggest such persons prefer

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[42] At [108].

> beverages with higher levels of alcohol for quick effect and are likely to purchase them from suppliers close to where they live and frequent. Again, [the Licensing Authority] does not say why it thought this evidence supported a blanket restriction on off-licence closing hours throughout the entire Auckland region, nor is it inferentially apparent.

[58] The Judge expressed the opinion that supermarkets and grocery stores are less likely to be associated with alcohol-related harm than are other off-licences:

> [112] Such evidence as there is of a link between reduced trading hours of off-licences, alcohol consumption and alcohol-related harm does not distinguish between the different types of off-licence suppliers. Supermarkets and grocery stores are restricted to selling beverages with a lower alcohol content. Supermarkets and grocery stores are not self-evidently associated with displays of excessive alcohol consumption or alcohol related harm, nor are those features generally associated with their customers. …

[59] She returned to the subject of default hours when concluding that the Council was obliged to consider the individual characteristics and needs of the various local communities within Auckland:[43]

> [113] The [2012 Act] recognises the freedom to consume alcohol in a reasonably safe and responsible way. Parliament considers 11pm closing hours for off-licences to be consistent with the purpose and object of the [Act], otherwise those hours would not have been adopted as default hours. As Foodstuffs submitted, Auckland Council's replacement of the default hours with the reduced hours in the [Auckland PLAP] appears to be an attempt to re-write the [Act] by substituting an earlier closing time for the statutory time, without proper regard being paid to the individual characteristics of the various local communities within Auckland and their respective needs.

[60] In the result, the High Court did not conclude that the closing hours restriction was unreasonable — that was not its task on judicial review of the Licensing Authority decision. Having said that, the Judge expressed doubt as to how "the comprehensive substitution of the [2012 Act's] provisions with the restrictions imposed by the reduced closing hours ... could ever satisfy the [Act's] requirements for a [provisional local alcohol policy]".[44] The Judge granted the application for review on the basis that the Licensing Authority had given insufficient reasons and remitted the closing hours restriction to the Licensing Authority for reconsideration.[45]

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43 Footnote omitted.
44 At [212].
45 At [213].

[61] As to the new off-licence restrictions, Duffy J took a broadly similar approach and concluded that the Licensing Authority had failed to provide reasons for treating supermarkets and grocery stores in the same manner as other off-licences, or for finding that a policy against new licences in the short term was not unreasonable.[46] Her Honour expressed similar doubts as to whether the new off-licence restrictions could satisfy the 2012 Act's requirements.[47]

[62] She also concluded that the provisions of the Auckland PLAP dealing with local impacts reports were ultra vires.[48] She set aside the Licensing Authority's decision on the local impacts reports and referred the appeals against those elements back to the Licensing Authority.[49] This aspect of her judgment has not been appealed.

The Court of Appeal approach

[63] Auckland Council appealed successfully to the Court of Appeal. The Court of Appeal set aside the High Court order remitting the Licensing Authority's decision on the appeals by Woolworths and Foodstuffs.[50]

[64] In addressing the object of the 2012 Act, the Court said:[51]

> [16] It will be seen that subs (1)(a) and (b) form a single object. The [2012] Act does not envisage that there will be conflict between the two subsections, or a need to balance one against the other. They are directed toward the same end. The Act permits the sale, supply and consumption of alcohol, provided *all* of those things are done safely and responsibly and provided the harm caused by excessive or inappropriate consumption is minimised.

[65] In commenting on the purpose provision in s 3 of the 2012 Act, the Court said:

> [20] … the new system of control is not only to be reasonable but also to help achieve the object of the [2012] Act, which differs very significantly from that of the [Sale of Liquor Act 1989]. In contrast to the 1989 Act, the reasonable system of control is not the [2012] Act's end in itself.

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46 At [150]–[156] and [212]–[213].
47 At [212].
48 At [184]–[189].
49 At [215].
50 CA judgment, above n 7, at [126].
51 Emphasis in original.

[66] It will be recalled that Woolworths and Foodstuffs had argued, and the High Court had agreed, that the 2012 Act requires a balance between a freedom to sell alcohol against the harm it causes. The Court of Appeal took a different view:[52]

> [22] … [Duffy J] considered that the [2012] Act balances a "freedom" to sell alcohol against a community freedom to take reasonable steps to protect people from harm. But there is no antecedent right or freedom to sell or supply alcohol; the right to do so is conferred under the Act and on its terms. Section 4 does not speak of balancing competing rights or freedoms, though it undoubtedly recognises that alcohol may be consumed lawfully and safely, and that alcohol-related harm cannot be eliminated. …

[67] The Court disagreed with Duffy J's view as to the significance of the default national trading hours specified in the 2012 Act.[53] It concluded that the default hours did not create a presumption in favour of such hours or require a local authority to justify a departure from them.

[68] In dealing with the role of the Licensing Authority, the Court said:[54]

> [35] … The Judge [held] that [the Licensing Authority] must decide whether the inclusion of an impugned element was something that no reasonable territorial authority acting in light of the object of the [2012] Act would have done, and she stated that unreasonableness is generally understood to mean *Wednesbury* unreasonableness. It was common ground before us that this was an error, for [the Licensing Authority's] task under s 83 is evaluative. We agree. It must decide for itself whether a given element is unreasonable in light of the Act's object. [The Licensing Authority] correctly took that approach in this case.
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> [36] The appeal standard has built into it a substantial degree of deference to the preferences of the territorial authority; only if an element is unreasonable in light of the [2012] Act's object may [the Licensing Authority] intervene, and then only by asking the territorial authority to reconsider. When exercising this jurisdiction [the Licensing Authority] must bear in mind that, … community preferences have a substantial role to play in deciding what is reasonable.

[69] As to proportionality and whether the approach taken by the courts in relation to by-laws and adopted by the Licensing Authority should be applied, the Court commented:[55]

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52 Footnote omitted.
53 At [25].
54 Footnotes omitted.
55 Footnotes omitted.

> [39] We accept Mr La Hood's submission, for the Medical Officer of Health, that [the Licensing Authority] erred to the extent it held that "the proportionality principles used in bylaw cases" apply under the 2012 Act. The context is not the same.
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> …
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> [41] What is not appropriately transferred from the bylaws context to alcohol regulation under the 2012 Act are the propositions that (a) the reasonableness of a bylaw depends in part on "whether or not public or private rights are unnecessarily or unjustly invaded" and (b) any bylaw must be unreasonable if it unnecessarily abridges or interferes with a public right without producing for local inhabitants a benefit that is "real and not merely fanciful". As explained …, under the 2012 Act there is no antecedent right to sell alcohol that must be balanced against a given control on supply. It is inherent in a licensing regime, and to be expected given the object of the 2012 Act, that controls may have an adverse economic impact on licensees. Nor is it necessary to prove that tangible harm reduction is more likely than not to result from a given policy element, as we explain below. …

[70] Returning to the Licensing Authority's role, the Court concluded that:[56]

> [53] Ultimately [the Licensing Authority] must be satisfied that a given element of a policy is unreasonable. Sometimes that may call for proof of facts on the balance of probabilities. An appeal may raise a question of past or present fact that is capable of proof to that standard. But an appeal may also raise factual propositions that are not capable of proof on the balance of probabilities. As [the Licensing Authority] plainly recognised, evidence of alcohol-related harm may not be directly traceable to a given licensee or class of licensee, but that does not preclude intervention if it may reduce the harm. [The Licensing Authority] may also be required to evaluate what will happen with and without a given policy element. Such an inquiry involves predictions about what might happen in future in two states of regulation, one current and the other hypothetical. Neither outcome is likely to be capable of proof on the balance of probabilities. It would be an error — because the object of the [2012] Act could not be achieved — to insist on proof that, for example, restrictions on trading hours will reduce alcohol-related harm. Rather, [the Licensing Authority] must make a decision on the information and evidence available to it, incorporating the likelihood that a given element will reduce alcohol-related harm. *A prospective benefit may be taken into account if there is a real and appreciable possibility that the element will deliver it*.

[71] Reinforcing this conclusion, the Court held that:[57]

> [62] … the appellate standard does not require that [the Licensing Authority] be sure a given element will reduce alcohol-related harm. *It suffices that there is a real and appreciable possibility that the element will do so*. As Mr McNamara submitted for the Council, this is consistent with the [2012] Act's requirement that an element be "reasonable" in light of the Act's

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56 Emphasis added and footnote omitted.

57 Emphasis added.

> object. This approach can be described as "precautionary", in that it admits remedial measures to reduce harm although their effects are uncertain.

[72] The Court therefore agreed there was room in the 2012 Act for the application of the "precautionary principle" recognised in case law, but it reached that conclusion by a more "direct route" of statutory interpretation quoted in the preceding paragraph.[58]

[73] On the role that community preference plays under the 2012 Act, the Court noted:

> [32] … Because [local alcohol policies] are the product of a process designed to discover and implement a community preference, they need not be evidence-based. If an objectively unreasonable preference finds its way into a proposed local alcohol policy, the remedy lies in an appeal to [the Licensing Authority].

[74] Summarising the Licensing Authority's reasoning on the trading hours issue, the Court remarked that:

> [80] The purpose of element 1 (trading hours) was that of targeting what the Council described as high risk purchases. … It will be seen that [the Licensing Authority] considered the evidence, though sparse, justified this element of the [Auckland PLAP] and it was reasonable for the Council to test the possibility that earlier evening closing hours would reduce the high level of alcohol-related harm in Auckland.

[75] The evidence referred to was "a good deal of factual and expert evidence about alcohol-related harm and its linkage to the sale and supply of alcohol".[59] The Court of Appeal then canvassed this evidence, finding that it "was sufficient to justify the restriction on closing hours".[60] The Court commented that:[61]

> [109] … It was not necessary that [the Licensing Authority] reach a final view about the relationship between trading hours and harm. It sufficed, as we have explained, that there was a *real and appreciable possibility* that an earlier closing time would reduce alcohol-related harm. And that, in essence, is what [the Licensing Authority] decided in the passage quoted … above, in which it referred to the evidence it had mentioned and concluded that there was an evidential basis for the closing hours restriction.

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58 At [62].
59 At [77].
60 At [105].
61 Emphasis added.

[76] For similar reasons, the Court differed from the High Court Judge's conclusion in relation to the new off-licence restrictions. The Court of Appeal said:[62]

> [118] … In its decision [the Licensing Authority] reviewed the evidence and arguments at length, concluding among other things that the definition of areas affected by the freeze/presumption was reasonable having regard to extensive evidence of harm there, that it was reasonable to distinguish between on-licences and off-licences for this purpose, and that there was evidence of an association between off-licence density and the more severe forms of alcohol-related harm. We accept … that the Judge again focused on the perceived absence of reasons for failing to discriminate among off-licence types. *We have already held that the [Auckland PLAP] need not do that, in circumstances where the evidence sufficiently justified the inference that there is a relationship between off-licence density and alcohol-related harm in these areas*. The evidence applied generally to off-licences.

[77] The Court also firmly rejected the contention of Foodstuffs that the conclusion that the provisions as to local impacts reports were ultra vires meant that the clause which included a reference to such reports itself must be regarded as invalid or unreasonable:[63]

> [122] [The Licensing Authority] did rely on Local Impact[s] Reports when reasoning that the element was not ultra vires because licences could still issue, having regard to information contained in the Reports. But the Reports would duplicate responsibilities already assigned to reporting authorities under the [2012] Act; they were intended to ensure those authorities do their job consistently and thoroughly. It may be true that the Reports imposed stricter reporting requirements than the Act, but …, there is no express link between the Reports and the temporary freeze, and the rebuttable presumption refers to them in cl 3.3.3(a) only by requiring that licensing committees and [the Licensing Authority] should consider them when deciding whether to issue a licence. Element 2 functions without provision for the Reports.
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> [123] Mr Thain took a jurisdictional point, arguing that the decision to amend a local alcohol policy can be made by the territorial authority only after [the Licensing Authority] has referred the policy back for reconsideration. We do not agree. It is correct, as noted … above, that an appeal to [the Licensing Authority] addresses an element of a local alcohol policy, but "element" is not defined. Division into elements is a question of fact and judgement. In our view, the policy element dealing with Local Impact[s] Reports is cl 3.1, which provided for them as a "policy tool". The temporary freeze was a separate policy tool, provided for in cl 3.2, as was the rebuttable presumption, provided for in cl 3.3. They are discrete policy elements which the [Auckland PLAP] treats as separate tools and which [the Licensing Authority] might treat separately. The Reports were intended to apply to all licensing decisions, not just those affected by the temporary freeze and rebuttable presumption, which concerned new off-licences in specified areas.

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62 Emphasis added and footnotes omitted.

63 Footnotes omitted.

Our approach to the appeal

[78] With the background we have just provided in mind, we propose to deal with the appeal under the following headings:

(a) The role of the Licensing Authority on an appeal under s 81.

(b) Did the Court of Appeal take an inappropriately narrow approach to the role of the Licensing Authority?

(c) The 9 pm closing time.

(d) The new off-licence restrictions.

The role of the Licensing Authority on an appeal under s 81

[79] When it comes to an appeal to the Licensing Authority, the focus is on whether the element under challenge (necessarily considered in the context of the provisional local alcohol policy as a whole) is unreasonable in the light of the object of the 2012 Act. In agreement with the Court of Appeal,[64] we do not see it as particularly helpful to talk about the burden of proof. Rather, the persuasive burden is on the appellant. It is thus for the appellant to persuade the Licensing Authority that the element is unreasonable in light of the object of the Act. Again in agreement with the Court of Appeal,[65] we do not see unreasonableness for the purposes of s 81 as involving what is sometimes referred to as "*Wednesbury* unreasonableness". Rather, what matters is whether the Licensing Authority considers that the element is relevantly unreasonable.

[80] Material to the task of the Licensing Authority is the process that precedes the adoption of a provisional local alcohol policy.

[81] Sections 78 and 79 require preparation of a local alcohol policy to be preceded by a broad survey of the licensing status quo within the territorial authority's district

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64 At [53]. See the quoted excerpt of the Court of Appeal's reasoning above at [70].
65 At [35]. See the quoted excerpt of the Court of Appeal's reasoning above at [68].

followed by public consultation. This must take place in the manner provided for in s 83 of the Local Government Act and requires extensive and meaningful engagement with the public. Together, these provisions suggest that policies that are implemented by a local alcohol policy can be based on, or at least influenced by, community preference. That this is so is also consistent with the legislative history earlier outlined. To that extent, as the Court of Appeal recognised, such decisions do not have to be evidence-based. And more generally, the policies in a provisional local alcohol policy reflect policy choices of an elected territorial authority influenced by the preferences of its community. The policies address issues on which there is scope for a wide range of opinions. Analysis of their reasonableness (or unreasonableness) must reflect that. For these reasons, it would not be appropriate for the Licensing Authority to assess elements of a provisional local alcohol policy on the assumption that there can be only one right answer to any disputed question. Further, all aspects of a provisional local alcohol policy that are relevant to a challenged element or component must be taken into account. In the present case, this means that an assessment of the 9 pm closing time must be in the broader context of overall trading hours of up to 14 hours a day.

[82] There is no indication in the 2012 Act that departure from a licensing status quo requires particular justification. Most relevantly, the default national trading hours under s 43 are just what they say they are; a default regime subject to displacement by local alcohol policies. Requiring particular justification would risk undermining the special emphasis placed by the 2012 Act on community preference. Local communities should be free to express a preference for terms that differ from the licensing status quo. Thus, trading hours that are shorter (or longer for that matter) than those provided for as the default under s 43 do not have to be justified by reference to an assumption that the default trading hours represent a measure of reasonableness from which deviation is suspect. As well, although the s 78 factors mean that any local alcohol policy should be tailored to the district, including the preferences of the community in or to which it is to apply, there does not have to be anything particular about that district to warrant deviation from the status quo.

[83] When applying the statutory test, the Licensing Authority must address s 4 which sets out the object of the 2012 Act. We do not, however, see that as excluding

s 3 which explains the purpose of the Act. We read these sections together. The Act introduces a reasonable system of control on the sale and supply of alcohol that seeks to achieve closely related outcomes; that alcohol is sold, supplied and consumed safely and responsibly and harm from excessive and inappropriate drinking is minimised. The word "reasonable" is in s 3 and it is sensible to treat "unreasonable" for the purposes of ss 4 and 81(4) as being, in effect, the obverse of that. As well, the objects of safe and responsible "sale, supply, and consumption of alcohol" and minimisation of "the harm caused by the excessive or inappropriate consumption of alcohol" referred to in s 4(1)(a) and (b) are not opposites to be balanced against each other. Rather they pull in the same direction. This is because supply and sale of alcohol that is safe and responsible will tend to minimise alcohol-related harm.

[84] We agree with the Court of Appeal (and with the Licensing Authority) that a precautionary approach is open and that, in any event, a restriction may be justified on the basis of there being a reasonable likelihood that it will reduce alcohol-related harm, a point that we discuss in greater depth shortly. This is consistent with a line of cases that starts with the judgment of the Court of Appeal in *My Noodle Ltd v Queenstown Lakes District Council* under the 1989 Act and carries on through decisions issued under the 2012 Act.[66] It is, as well, consistent with our reading of ss 3 and 4.

[85] That does not mean that a reasonable likelihood of a challenged element reducing alcohol-related harm precludes a conclusion that it is nonetheless "unreasonable in light of the object of the Act". As the Licensing Authority decision in relation to opening hours shows, a combination of likely limited efficacy in terms of reducing alcohol-related harm and significant disruption/inconvenience to those who consume alcohol safely and responsibly (and those who sell alcohol in a safe and

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[66] *My Noodle Ltd v Queenstown Lakes District Council*, above n 32. The judgment concerned a challenge to conditions imposed on a particular licence under the 1989 Act. The Court said at [74] that the Liquor Licensing Authority (the predecessor of the Licensing Authority) was not required "to be sure that particular conditions will reduce liquor abuse". Rather, it was "entitled to apply the equivalent of the precautionary principle in environmental law". It stated the principle in these terms: "[i]f there is a possibility of meeting the statutory objective …, then it is entitled to test whether that possibility is a reality". Subsequently, the Licensing Authority endorsed the application of the precautionary principle to appeals brought under s 81 of the 2012 Act: see, for example, the authorities at above n 32.

responsible way)[67] may result in the restriction being held to be unreasonable in light of the object of the 2012 Act. Shopper convenience may be material to this because, as shown by s 3, the system for the control envisaged by the 2012 Act must be one that provides reasonable opportunities for the safe and responsible sale and supply of alcohol (while minimising alcohol-related harm). On the other hand, we see any general concept of a "freedom" to sell, buy or consume liquor as irrelevant to the required exercise. The only relevant rights to sell alcohol are those provided in the 2012 Act.

[86] Depending on the nature and extent of the restrictions proposed in a provisional local alcohol policy, an assessment of two factors will be required: (a) the reduction in alcohol-related harm likely to result if the element is in place; and (b) the likely disruption to safe and responsible drinking that it will cause. These two factors are incommensurables, meaning that an evaluative, perhaps impressionistic, assessment is required. That said, the required exercise can nonetheless be carried out in a logical way. In doing so, it is right to recognise that where a system for the sale and supply of alcohol is reasonable and safe with the restriction in place (which is how we are inclined to see 7 am to 9 pm opening hours), little (and perhaps no) likelihood of reduction in alcohol-related harm (in this case assessed against a counter-factual of 7 am to 11 pm trading hours) may be required, particularly where the restriction accords with the preference of the community.

[87] When an element of a provisional local alcohol policy is challenged under s 81, the Licensing Authority's decision will almost always come down to whether the system as it would be with the provisional local alcohol policy (including the challenged element) in place is unreasonable in light of the object of the 2012 Act. By way of an obvious example, the reasonableness for the purposes of s 81 of a closing hour restriction cannot sensibly be assessed without regard to the overall opportunities that the system (as proposed under the provisional local alcohol policy) provides for the safe and responsible sale, supply and consumption of alcohol. We see issues of

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[67] See also the Departmental Report on the Alcohol Reform Bill 2010 (236-1). This referred to the object of reducing alcohol-related harm without "unduly impacting on responsible drinkers or imposing disproportionate regulatory costs on industry": see the Social Policy and Justice Group *Alcohol Reform Bill: Departmental Report for the Justice and Electoral Committee – Part One* (Ministry of Justice, May 2011) at [9].

unreasonableness as likely to come down to whether a restriction is a disproportionate limit on the sale and supply of alcohol, having regard to the likely impact of the restriction on ensuring the sale, supply and consumption of alcohol is safe and responsible and on harm minimisation. That said, we accept that it is conceivable that other considerations may come into play. For instance, arbitrariness or caprice in relation to a specific element may warrant particular consideration.

Did the Court of Appeal take an inappropriately narrow approach to the role of the Licensing Authority?

[88] It will be recalled that in granting leave to appeal, this Court expressed interest in whether:[68]

> … the Court of Appeal's judgment proceeded on the basis that an appeal [to the Licensing Authority] will only succeed if there is not a "real and appreciable possibility" that the element of the provisional policy challenged will minimise alcohol-related harm (so that proportionality considerations are not material) and, if so, whether this is correct.

It was common ground between that parties that the approach outlined would not be appropriate for the purposes of a s 81 appeal. And, as will be apparent from [86], we agree that this is so; this because we accept that there is scope for a proportionality exercise.

[89] We have set out the passages in the Court of Appeal judgment on which the appellants primarily rely. These deal with the rejection of the proportionality argument advanced by the appellants[69] and references to the significance of a likelihood that a challenged element would reduce alcohol-related harm, most particularly, statements to the effect that such a likelihood would "suffice".[70] We agree that they provide some support for the appellants' argument that the Court of Appeal did approach the case on the basis postulated. However, we are not persuaded the Court of Appeal did decide the case on that basis.

[90] We read the references to the required linkage — real and appreciable possibility of reducing alcohol-related harm — as simply referring to the sort of

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68 SC leave judgment, above n 8, at [1] (footnote omitted).
69 See [69], above.
70 See [71] and [75], and also [70], above.

linkage that may justify, rather than as a linkage that provides a conclusive justification for, a restriction. We think that the point the Court was making was that proof on the balance of probabilities of a reduction in harm was not necessary. To put this another way, the Court was not equating a real and appreciable possibility of harm reduction with "reasonableness" for the purposes of s 81 appeals.

[91] Likewise, we see the rejection of the proportionality argument advanced to it as confined to a rejection of the proposition that a restriction was required to be proportional in relation to its impact on a supposed general freedom to sell, buy and consume alcohol.[71] When the relevant remarks are read carefully, that is all that the Court actually said. And, as well, the Licensing Authority explicitly adopted a proportionality approach in other respects, most relevantly in assessing opening hours, without adverse comment from the Court of Appeal — something that would be surprising if the Court of Appeal was of the view that proportionality was irrelevant.

The 9 pm closing time

[92] We see no error of law in the conclusion of the Licensing Authority that the 9 pm closing time was not unreasonable in light of the object of the 2012 Act.

[93] The Licensing Authority reviewed extensively the evidence indicating that bringing the closing hour for all off-licences back to 9 pm was likely to reduce alcohol-related harm. It is true that, as the appellants claim, the Licensing Authority did not review the evidence they called which tended to downplay the significance of 9 pm to 11 pm alcohol sales from supermarkets in relation to alcohol-related harm. That, however, is not surprising; this for two reasons. The first is that the way the Licensing Authority decision was structured suggests that it accepted the evidence that it reviewed in detail. Secondly, and more importantly, the issue for the Licensing Authority was not whether the closing hour restriction would reduce alcohol-related harm. Rather, as we have said, it was whether there was a reasonable likelihood that it would. Given the evidence as a whole, it might be thought to be clear beyond argument that there was such a reasonable possibility or likelihood of the closing hours restriction reducing alcohol-related harm.

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[71] See CA judgment, above n 7, at [41].

[94] We suggested earlier in these reasons, the length of the hearing before the Licensing Authority might be thought to be indicative of a de novo merits approach to the appeal. The same sentiment applies to the amount of evidence called before the Licensing Authority on this issue. Such an approach is contrary to the more limited role that the Licensing Authority has under s 83(1)(a), which requires consideration of whether the challenged element is unreasonable in light of the object of the 2012 Act.

[95] We see as not making much sense the suggestions along the lines that a 9 pm closing time might have been appropriate in some but not all areas of Auckland or that there should have been a distinction between supermarkets and bottle stores. Localised closing hours restrictions would be likely to encourage purchasers to go to an adjacent area with longer trading hours to make purchases. And a 9 pm closing time confined to bottle stores would encourage purchasers to go to supermarkets to buy the alcohol no longer available at bottle stores.

[96] On the basis that the 9 pm closing time was likely to reduce alcohol-related harm, the only relevant counter-balancing proportionality consideration was the impact on customer convenience of not being able to buy alcohol between 9 pm to 11 pm. A broadly similar consideration had been influential in relation the proposed opening time of 9 am. But in relation to the 9 pm closing time, this argument did not prevail with the Licensing Authority. We see nothing untoward in relation to this distinction; this given:

(a) the correlation between trading hours and alcohol-related harm is stronger in relation to closing time than it is in respect of opening time; and

(b) a 9 pm closing time would have less effect on customer convenience than an earlier opening time.

[97] Looking at the situation in the round, the effect of the Licensing Authority's decision is that supermarkets can sell alcohol from 7 am to 9 pm. As a matter of common sense, it might be thought to be clear that a system that incorporates those trading hours is not unreasonable in light of the object of the 2012 Act.

The new off-licence restrictions

[98] There is one particular aspect of the challenge to this part of the Court of Appeal's judgment that we should briefly deal with. This is the contention of Foodstuffs that the inclusion of a reference to local impacts reports in cl 3.3.3 (dealing with the freeze and presumption elements) means that this clause must, in light of the judgment of Duffy J as to the local impacts report provisions of the Auckland PLAP being ultra vires, be regarded as also referred back to the Licensing Authority (and required to be referred back to the Auckland Council).

[99] On this highly technical and not particularly meritorious point, we are content to adopt the reasoning of the Court of Appeal set out above at [77].

[100] As to the more general challenge to the new off-licence restrictions, we are of the view that:

(a) The Licensing Authority was entitled to conclude, and gave adequate reasons for so concluding, that these restrictions were justified on the basis of the likelihood that they would reduce alcohol-related harm.

(b) The countervailing proportionality factor primarily relied on, which related to practical difficulties supermarkets might face in obtaining new off-licences, was adequately addressed.

One loose end

[101] As we noted, the Licensing Authority treated the trading hours restriction as a single, although composite element of the Auckland PLAP. On the referral back from the Licensing Authority, the Auckland Council abandoned the later opening time of 9 am and amended the Auckland PLAP to provide for a 7 am opening time. Foodstuffs appealed against the "new" element on the basis of a renewed challenge to the 9 pm closing time. This was treated as an abuse of process by the Licensing Authority but, on review, Fitzgerald J held that the appeal to the Licensing Authority could proceed.[72]

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[72] *Foodstuffs North Island Ltd v Auckland Council* [2019] NZHC 1697.

[102] For the reasons Fitzgerald J gave, the issue for the Licensing Authority on the second appeal in relation to the 9 pm closing time is not exactly the same as the issue it addressed on the first appeal; this given the effluxion of time since the first appeal and the possibility that there may have been some changes in circumstances since then. That said, the second challenge to the 9 pm closing time, particularly if it is persisted with after this judgment, is not redolent of apparent merit and it is one that the Licensing Authority may well feel able to deal with in private.

Disposition

[103] The appeal is dismissed.

[104] The appellants are to pay costs to the Auckland Council of $35,000.

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