13 August 2018

From: Colin Bridle
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Tokoroa, South Waikato

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Copy: Hon Nanaia Mahuta
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Request for inquiry into the South Waikato District Council

1. The Feed Families Not Pokies Society Incorporated Society (FFNP or "we") requests that the Office of the Auditor General undertake an investigation into the governance and decision-making of the South Waikato District Council (SWDC), especially with regard to its involvement in a Class 4 venue merger involving three club venues in the South Waikato District.
2. Members of FFNP have taken a close interest in the SWDC's decision to grant consent to the development of a new 30-machine Class 4 (or "pokie") venue in Tokoroa, and subsequent related decisions.
3. Over that time the members have acquired information through Official Information Act (OIA) requests and other sources, which have given rise to significant concerns about the adequacy, propriety, and even legality of decisions made by SWDC and the way they were made. FFNP was recently incorporated to provide a vehicle for fund-raising and advocacy to prevent the merger from going ahead.
4. The reason we have approached the Office of the Auditor General with our concerns, rather than the Ombudsman's Office, is not because of any one of the issues outlined below, but because all of them, taken together, represent a pattern of behaviour by and within the SWDC that we consider to be improper.
5. We believe that our concerns are serious enough to warrant an inquiry by the Office of the Auditor General (OAG). If an OAG inquiry found those concerns to be justified, then we believe its report must be brought to the attention of the Minister of Local Government.
6. We also believe that some of the matters we raise represent patterns of behaviour that may be found in councils elsewhere in the local government sector and warrant a Report prepared by the OAG to better guide local authorities, in their approach to making decisions under the Gambling Act 2003.

Background to this request

7. FFNP was formed by a group of concerned citizens seeking initially to prevent the creation of a new 30-machine pokie venue in Tokoroa.

8. This new venue would be created by merging three existing club venues: The Putaruru Memorial Services Club, and The Olde Establishment, merging with Pockets 8-Ball Incorporated Society. The Club would then operate two venues, with 48 machines between them, in a high deprivation community. This can only increase the social and economic harm of Class 4 ("pokie") gambling in Tokoroa, which is abhorrent to us.

9. The venue merger is proceeding under the provisions in section 95 of the Gambling Act 2003, which requires a three-step process:

   (a) The South Waikato District Council first provides a ***consent***, according to its Class 4 Venue policy [section 101], and then;

   (b) The Minister of Internal Affairs then gives ***approval*** to the merger [section 95(1) to (4)], and then;

   (c) The Secretary of Internal Affairs must issue a Class 4 Venue ***licence*** for the venue [section 95(5)].

10. The first two steps have been taken, and the Secretary of Internal Affairs (Secretary) is now considering issuing a new Class 4 venue licence. FFNP has written to the Secretary raising concerns about the validity of the SWDC consent and the Minister's approval, both of which are required by the Gambling Act before a licence can be issued.

11. We believe there are compelling reasons for the High Court to overturn the licences on judicial review, and we are now discussing that matter with the Department of Internal Affairs with the assistance of our legal advisers.

12. We believe that SWDC's decision to grant consent to the merger could also have been overturned on judicial review, but that is not our intention. The Secretary's decision is a more immediate concern.

13. Nevertheless, the way the South Waikato District Council made its decision to grant consent to the proposed new 30 machine venue, and its subsequent administrative decisions and actions are deeply problematic. We believe these matters are serious enough to warrant an investigation by the Office of the Auditor General. They are set out below under the headings:

    - Class 4 venue policy
    - Decision to grant the merger
    - Treaty of Waitangi obligations
    - Merger decision contrary to policy
    - Application of LGA section 80
    - Officer delegations to "refresh" the merger consent
    - Financial interests in approving the merger
    - Ongoing issues

Class 4 venue policy

14. Section 101 of the Gambling Act 2003 requires that every local authority must have a Class 4 Venue policy, and that it be made using the Special Consultative Procedure under the Local Government Act, and that it must give notice of the proposed policy to organisations representing Māori in its district.

15. The SWDC Class 4 Venue policy 2013, under which the decision to permit the Tokoroa venue merger to proceed was made, said that the council could decide on venue mergers on a sole discretion (case-by-case) basis. The relevant part of its 2013 policy was:

> **2. Clubs and Ministerial Discretion**
>
> (a) In the case of two or more clubs wanting to merge, section 95 of the Act will apply.
>
> (b) Council at its sole discretion may grant site approval for two or more clubs wishing to merge.
>
> (c) Council reserves the right to consider any club merger against the possible harm and/ or wellbeing of the wider community. Furthermore, the objectives of the Class 4 and Racing Board Venue Policy will be considered by Council prior to its formal decision.
>
> (d) Site approval will not be granted if one or more of the merging clubs are located outside of the district.

16. We suggest that a policy of making decisions on a "sole discretion" or case-by-case basis is not a legitimate approach in a Class 4 Venue policy. The policy should provide greater certainty to club venue operators, and transparency to the citizens of the district, about what decisions the council would make if two or more clubs were to seek a merger.

17. Making a "policy" of deciding matters case-by-case is, in effect, making a policy not to have a policy. It defeats the intent of Section 101 of the Gambling Act, and could also defeat one of the purposes of the Act, in section 3(h), to: *"facilitate community involvement in decisions about the provision of gambling"*.

18. When SWDC made its decision to grant the merger, on 3 December 2015, it did so in a "public excluded" part of the council meeting, with a "confidential" officers' report. There was no public notification, and no opportunity for public submissions or hearings of such submissions.

19. That decision was made contrary to one of the purposes of the Gambling Act, and contrary to the general provisions for decision-making in section 76 of the Local Government Act - but nevertheless in compliance with the provisions of the council's Class 4 Venue policy.

20. The South Waikato District is not the only territorial authority in New Zealand to adopt a case-by-case decision making process as part of its Class 4 venue policy. Queenstown Lakes District did so, until its policy was revised on 2018, and Buller District currently still does (although it is due for review this year)

21. We note that Buller District's policy (page 6) includes a requirement that all applications for new venues require public notification and hearings of the applicant and objectors at a full council meeting, so it does not defeat the purpose of the Act:

METHODS OF IMPLEMENTATION

The decision on Council consents will be made by full Council following a hearing at which the applicant and everybody who has made a written submission on the application will have the opportunity to be heard.

22. It seems to us that there ought to be clearer guidance, which all councils can follow, regarding whether decisions can be made on a case-by-case basis when, in our view:
    (a) The decisions must adhere to the requirements of Section 76 of the Local Government Act 2002, and;
    (b) The council should make each decision as if it were making a policy under the relevant Act.
23. In the case of a decision regarding Class 4 venues under the Gambling Act 2003, specifically the Council would then be obliged to:
    - take into account the social impacts of gambling in its district, per Section 101(2),
    - make the decision in accordance with the special consultative procedure in section 83 of the Local Government Act 2002, per Section 102 (1), and
    - give notice to organisations representing Māori in the territorial authority district of the Council's proposal to make such a decision, per Section 102(1)(b).
24. Appended for your information (Appendix 1) are:
    - A copy of the 2013 South Waikato District Gambling Class 4 and Racing Board venue policies.
    - A copy of Buller District's equivalent policies, for comparison.
25. Copies of the agenda item and minuted decision of the SWDC, when it gave consent to the 30-machine venue merger, are included in Appendix 3.

Treaty of Waitangi obligations

26. The "sole discretion" clause, and the way it was implemented in SWDC's case, led that Council to breach its obligations to Māori under the Treaty of Waitangi and may have led the Minister of Internal Affairs to also breach the Treaty of Waitangi.
27. The Gambling Act and Local Government Act, between them, make territorial authorities responsible for notifying and consulting with Māori, and providing opportunities for Māori to participate in decision-making when they make Class 4 Venue policies or, as we have outlined above, when making decisions in the absence of a clear policy statement. Parliament has thereby delegated to territorial authorities, by legislation, an obligation to honour the Treaty of Waitangi principle that a decision-maker must be fully informed about the impact of a policy or decision on Māori.
28. Under section 95 of the Gambling Act, in a case where two or more club venues wish to merge, the council first has to give consent, before the Minister of Internal Affairs may approve the merger. The Minister, in giving approval, must rely on the territorial authority to have honoured the principles of the Treaty when granting consent.

29. In this case, the SWDC did not discharge that obligation, and the Minister of Internal Affairs (Hon Peter Dunne, at the time) also made his decision to approve the merger without consulting with Māori. We believe there has been a breach of the Treaty involving both the SWDC and the Minister.

30. The Gambling Act is not the only Act under which a Minister can give approval for a decision or action, based on consent given, or a recommendation made, by a local authority. The requirements for establishing special housing areas under the *Housing Accords and Special Housing Areas Act 2013* provide another example (although without an explicit Treaty requirement, in that case).

31. This issue provides a further reason why councils should make proper Class 4 venue policies, in keeping with the requirements of the Gambling Act, and not give themselves permission to make case-by-case decisions instead. You will note that Buller District's "Methods of Implementation" (above) do not include a requirement to inform or consult with Māori, for example.

32. Ministers of the Crown, their advisers, and legislation drafters should also be aware of this issue. The delegation of Treaty responsibilities to local authorities ought not create a mechanism by which the Crown can avoid or ignore those responsibilities, whether or not they know they are doing so.

33. Appended for your information (Appendix 2) are:
    - The Secretary of Internal Affairs' briefing paper to the Minister of Internal Affairs, recommending that he approve the merger proposal.
    - The Minister's subsequent letter to the applicants, granting approval for the merger.

Merger decision contrary to policy

34. One of the stated policy objectives in the published SWDC Gambling Policy 2013 was: *"To avoid additional concentrations of gambling venues within the district",* and the first policy statement was that *"Council will not grant consent for the establishment of any new Class 4 venues, board venues, or gaming machines as of the adoption of this policy."*

35. The decision to allow the merger was contrary to the objective of the policy, regarding the concentration of gambling venues, in two ways:

    (a) The merger would involve the transfer of nine Class 4 machines from the Putaruru District Memorial Services Club (in Putāruru) to a new 30-machine venue in Tokoroa, thereby increasing the concentration of Class 4 gambling in Tokoroa.

    (b) The merger would also allow the creation of two venues 75 meters apart on Bridge Street, with a total of 48 Pokie machines between them, increasing the concentration of venues within the town centre.

36. The merger was also directly contrary to the Council's policy that it would not grant consent to *"any **new** Class 4 venues"*, because the merger proposal did in fact involve the amalgamation of three existing venues onto the site of a new Class 4 venue.

37. Also, the creation of the new venue could plausibly be considered the relocation of one of existing venues, rather than the creation of a new venue. But in that interpretation

the merger proposal would then require the application of specific rules regarding relocations, which appear on the last page of the policy:

> **7. Where Class 4 Gambling Venues and Board Venues may be established on relocation**
>
> (a) Any Class 4 venue (which is not a club) and any Board venue may be established in the District in accordance with clause 6, where it is a permitted activity under the South Waikato District Plan, or where resource consent to undertake the activity has been granted by Council.
>
> (b) Any Class 4 venue or Board venue established under clause 7(a) shall not be located within 200 metres of any kindergarten, early childhood centre, school, place of worship, hospital, nursing home, rest home, or other community facility.
>
> (c) Any Class 4 venue which is a club may be established in the District in accordance with clause 6 where it is a permitted activity under the South Waikato District Plan or where a resource consent to undertake the activity has been granted by Council but no such venue shall be located within 100 metres of any kindergarten, early childhood centre, school, place of worship, hospital, nursing home, rest home, or any other community facility.

38. The lawyer acting for the applicants in the Tokoroa merger proposal raised the issue of relocation and the applicability of this clause, in a letter dated15 June 2015, because a 'relocated' venue would clearly violate of those rules in the policy.

39. That letter was appended to the agenda item when the council made its decision to approve the merger, so the council was not unaware of the issue, and still made its decision contrary to this part of the policy.

40. The letter suggested applying section 80 of the Local Government Act 2002, as a means of overcoming the proximity problem. That is a matter deserving of separate attention, which we traverse in the next section.

Application of LGA section 80

41. Section 80 of the Local Government Act 2002 permits a local authority to make a decision that is inconsistent with its policy, but it "must" also clearly identify that it has done so:

> **80 Identification of inconsistent decisions**
>
> (1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—
>
> (a) the inconsistency; and
>
> (b) the reasons for the inconsistency; and
>
> (c) any intention of the local authority to amend the policy or plan to accommodate the decision.
>
> (2) Subsection (1) does not derogate from any other provision of this Act or of any other enactment.

42. Neither the agenda item, nor the minutes, of the meeting at which SWDC granted consent for the merger mentioned, or complied with, section 80 of the Act although the Council's decision was clearly contrary to its Class 4 Venue Policy.

43. A letter from Mr Jarrod True (legal counsel for Pockets 8 Ball Club) to Mr John Anderson (Manager Environmental Health at South Waikato District Council and District Licensing Inspector), dated 15 June 2015, in paragraph 9 says that: *"It is not uncommon for section 80 of the Local Government Act 2002 to be used when the merits of a particular case warrant an exemption. Schedule A sets out four prior examples of where section 80 has been used."* Schedule A to his letter sets out four examples given that all pertain to "exemptions" to other councils' Class 4 venue policies.

44. We do not believe section 80 was intended to allow such "exemptions" to be made, in relation to the Gambling Act or any other Act. It seems reasonable that Parliament would allow a local authority to make decisions contrary to an existing policy in certain situations, such as when another statutory requirement creates a conflict with that policy or unforeseen and compelling circumstances arise.

45. But we believe it very unlikely that Parliament would state, as it does in s 100(1) of the Gambling Act that *"A territorial authority **must**... consider and determine an application for a territorial authority consent in accordance with its class 4 venue policy"* (emphasis added), but also provide it with the power to override that policy because some person thinks the merits of their particular case warrant an exemption.

46. If that were the case, then almost any person, subject to any council policy, might make such a claim and council meetings would be tied up with never-ending parade of claimants seeking exemptions. The entire reason for making "policy" decisions is to avoid arbitrary, piecemeal, and inefficient decision-making on a case-by-case basis.

47. Use of section 80 in this way also bypasses the requirements for public consultation and notifying Māori organisations, as specified in section 102 of the Gambling Act 2003.

48. The SWDC decision to grant its consent for the new 30-machine merged club venue points to two different issues regarding section 80 of the Local Government, which we believe OAG might consider:

    (a) The need for local authorities to be reminded that they must clearly acknowledge when they are making a decision contrary to policy – preferably in the minutes of the meeting at which such a decision is made, and;

    (b) The need for some guidance for local authorities about when it is appropriate to employ section 80 of the Local Government Act and, if doing so, what other matters should be considered; including the specific decision-making requirements for the original policy (if any), and the general decision-making requirements under section 76 of the Local Government Act.

49. Appended for your information (Appendix 3) are:

    - The agenda item for the SWDC to consider the merger proposal
    - The minuted decision of the SWDC in granting consent
    - The letter from Jarrod True, for the applicants,
    - A map prepared by FFNP showing the proximity of the proposed venue to various sites covered by section 7 (b) and (c) of the SWDC 2013 Class 4 Venue policy.

Officer delegations to "refresh" the merger consent

50. The Department of Internal Affairs (DIA) took nearly 12 months to process the Application before advising the Minister that he could approve the merger.

51. Under section 100(5) of the Gambling Act *"A territorial authority consent for a class 4 venue expires 6 months after its date of issue if no application for a class 4 venue licence in relation to the venue has been submitted."*

52. The applicants had been unable to make an application for a Class 4 venue licence because DIA took longer than six months to process the application and provide advice to the Minister. Therefore the consent had expired by the time the Minister gave approval.

53. In our view, the Minister's approval did not meet the test of s.95(1)(f) of the Gambling Act. This is a matter we have taken up with the Department as a reason not to issue a Class 4 venue licence.

54. The matter we wish to bring to your attention is that the Department asked the applicant's legal advisor to provide evidence that a valid consent existed. A SWDC official then provided letters, dated 9 September 2016 and 17 March 2017, confirming that the SWDC did still give consent for the venue merger.

55. Our concern is that the council official did not possess a delegated authority from SWDC to make such a decision and was acting *ultra vires* in providing those letters of assurance. The absence of such a delegation is specifically included in the 2013 Gambling Class 4 and Racing Board venue policy (last page):

> **Relevant Delegations**
>
> Council has not delegated the decision-making required under this Policy.

56. Appended, for your information (Appendix 4), are:

    - A letter from SWDC officer Mr John Anderson to legal counsel for the applicant Mr Jarrod True; dated 10 December 2015, formally advising that SWDC had granted consent to the merger.
    - Two further letters sent by Mr John Anderson to Mr Jarrod True, confirming that SWDC had granted consent; both dated after the consent had legally expired (or the six month period).

Financial interest in approving the merger

57. When the SWDC met to consider the club merger proposal in Tokoroa, its minuted decision included a condition requiring Pockets (the Pockets 8 Ball Club Inc) to accept all liabilities of the Putāruru Club (the Putaruru District Services Memorial Club Inc):

> ***15/421 Resolved His Worship / Cr Shattock***
>
> *That Report No 2015–Docset ID 348881, [Application for Territorial Authority Consent], be received.*
>
> *That the merger application for the three clubs at 56 Bridge Street, Tokoroa be approved subject to the following - Pockets are to accept all liabilities for the Putāruru Club, entry to the gaming machines is to be located at the back entrance and discussions are to take place with the church.*

58. Because the meeting was held in a "public excluded" part of the meeting we do not know the nature or content of the discussions that led to that condition being placed on the consent.

59. However we subsequently obtained the Putāruru Club's audited financial statements for the year ending 31 March 2015 (from the online register of incorporated societies), and found the following note on page 11 of those statements:

> **8. Contingencies**
> At balance date the Club had a contingent liability to South Waikato District Council of $20,651 at balance date ($20,651 in 2014) for land lease rates charged against the Ranger Soccer Club property. An amount of $9,397 has been accrued in the Financial Statements being the amount the Club believes should be assessed under the terms of it's land lease with the South Waikato District Council.

60. We understand that the "Ranger Soccer Club property" is the land on which the Putāruru Club currently has its clubrooms, and it seems there may have been some anomaly or dispute over the amount of rates owed to SWDC by the club. Our perception, based on that information, is that SWDC's decision to grant consent to the merger may have been (at least in part) motivated by a desire by the Council to recover unpaid rates.

61. We are concerned that the SWDC may have had a financial interest in making a regulatory decision, and that this interest was not transparently declared by the Council at the time the decision was made.

62. Appended, for your information (Appendix 5), is:

    - A copy of the 2015 financial statements of the Putāruru Club.

Ongoing concerns

63. The reason we have approached the Office of the Auditor General with our concerns, rather than the Ombudsman's Office, is not because of any one of the issues outlined above. It is because all of them, taken together, represent a pattern of behaviour by and within the SWDC that is deeply concerning to us.

64. That pattern of behaviour is ongoing, as evidenced by the way in which SWDC recently reviewed its Class 4 venue policy, and how the SWDC District Licensing Committee has handled the alcohol licensing applications for the clubs involved in the merger.

Alcohol licensing

65. FFNP is taking various other actions to prevent the new 30-machine venue from being established. One of these actions is an appeal of the South Waikato District Licensing Committee's decision to issue an alcohol licence for the new venue.

66. We are taking that action because a Class 4 venue cannot have Class 4 gambling as its primary purpose. If the new venue cannot obtain an alcohol licence it is very unlikely that it will be granted a Class 4 venue licence.

67. The process of objecting to and appealing the alcohol licences is ongoing. We have identified a number of errors in the process that are of concern to us. We will not specify them here. Rather, we can provide that information if the OAG decides to inquire into the issues we have raised above.

Class 4 venue policy review 2018

68. The Council reviewed its Class 4 Venue policy in 2018, and it was evident to members of FFNP that the chair of the committee, at public hearings on submissions to the policy and the deliberation hearing, did not manage the hearings with impartiality.

69. The council decided to "roll over" its existing policy without amendment which was reflected in the statement of proposal, despite the weight of public submissions indicating that amendment was needed. In our view the council did not approach its decision-making in an impartial manner.

70. One councillor, who was a member of FFNP (not a member of its management committee), was challenged by the Mayor as having a conflict of interest because of his involvement with the group. Other councillors, who had more substantial conflicts of interest because of their association with gambling interests, were not. Some of those councillors are also on the SWDC District Licensing Committee.

Mayor's manager of Pockets – Cr Wendy Cook

71. We are very concerned about these ongoing issues because we are aware that the Mayor, Jenny Shattock QSM, has a long-standing business relationship with Councillor Wendy Cook, who also is the manager of Pockets 8-Ball Club, and that this relationship has influenced and may continue to influence the Council's decision-making with regard to the proposed 30-machine venue.

72. The financial statements for Pockets 8-Ball, year ending 31 March 2005, show that Pockets made grants of $90,572 in 2005 and $51,178 in 2004 to TANGS (*Tokoroa, A Naturally Growing Success Charitable Trust*).

73. TANGS was formed as an initiative of the Mayor and Councillors of South Waikato District in 1996. Mayor Jenny Shattock was the manager and sole employee of TANGS at the time the Pockets 8-Ball grants were made. She later became Deputy Mayor of South Waikato District, and is now the Mayor.

74. In October 2003 a report in the South Waikato News noted that Wendy Cook had donated money for a TANGS initiative to combat graffiti in Tokoroa. We assume this was the amount of $51,178 recorded in the Pockets 8-Ball 2004 accounts for that financial year.

75. In 2008 the Liquor Licensing Authority heard an application for Pockets to obtain a liquor licence for a Class 4 (pokie) gambling venue in Rotorua. At paragraph 14 of the decision, the Authority notes that letters of support had been received by Mr John Anderson, a SWDC Licensing inspector and *"A similar type of letter was produced from the Deputy Mayor"*, the role held by Jenny Shattock at that time.

76. These sorts of entangled political and business relationships may not be uncommon in towns like Tokoroa, but we consider that in such cases a higher standard of transparency and declarations of interest is required than elsewhere, not a lower one.

77. Appended, for your information (Appendix 6), are:

- A copy of the relevant page from the 2005 financial statements for Pockets 8-Ball.
- Some pages from the Constitution and Rules of TANGS.
- The news item from the South Waikato News referred to above.
- The 2008 Liquor Licensing Authority decision not to grant an on-licence to Pockets for its venue in Rotorua.

78. A USB drive with video of the SWDC Gambling Venue Policy submission hearing and deliberations is being provided with the hard copy of this letter.

Conclusion

79. FFNP is determined to reduce the harm caused by Class 4 ("pokie") gambling in Tokoroa. We believe the best way to achieve that objective is to reduce the number of pokie venues and the availability of pokie gambling in our town.

80. To that end we are either pursuing, or considering taking action, through a number of channels simultaneously, including (but not limited to):

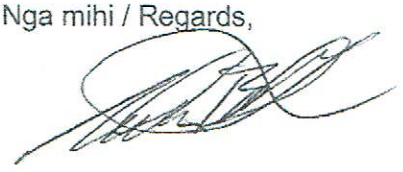
(a) This request for an inquiry into the governance and decision-making at South Waikato District Council by the Office of the Auditor General.

(b) withheld from public release

(c) withheld from public release

81. We recognise there is potential for overlap between or among these activities. For that reason we request that the OAG inquire into one part of our concerns; South Waikato District Council's role in consenting to and supporting the proposed new 30-machine pokie venue, and the wider implications about how the local authority sector makes its Class 4 venue policies, and makes decisions under those policies.

Nga mihi / Regards,



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