

**IN THE MATTER** of the Gambling Act 2003  
**AND** of an application by  
**SKYCITY AUCKLAND LIMITED** to designate the  
VIP Members' Room as  
gambling area

**BEFORE THE GAMBLING COMMISSION**

Members: P Chin (Chief Gambling Commissioner)  
K M Ford  
M M Lythe  
P Stanley  
G Reeves

Date of Application: 18 August 2004 (filed 18 August 2004)

Date of Decision: 22 October 2004

Date of Notification of Decision: 19 November 2004

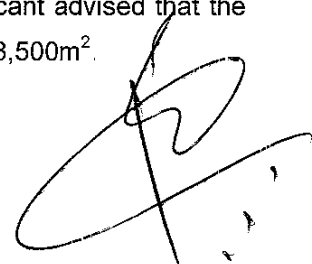
**DECISION**

**ON APPLICATION BY SKYCITY AUCKLAND LIMITED TO  
DESIGNATE THE VIP MEMBERS' ROOM AS GAMBLING AREA**

**Application**

1. SKYCITY Auckland Limited (the "**applicant**") applied on 18 August 2004 under section 139 of the Gambling Act 2003 (the "**Act**") to include a new condition in its casino venue licence, specifying a new VIP Members' Room as gambling area. The applicant requested that the designation take effect from 29 October 2004.
2. Condition J of the applicant's venue licence provides that:

The gaming area of the casino shall be that area or those areas delineated in red on the plan or plans lodged for that purpose with the Authority, or such amended area or areas as the Authority may from time to time approve in writing.
3. The gambling area approved by the Casino Control Authority (the "**Authority**") pursuant to Condition J and the Casino Control Act 1990 was shown on the plans marked "A" and "B" submitted by the applicant as part of its application. The applicant advised that the total gambling area at the date of the application was approximately 8,500m<sup>2</sup>.



4. The additional area proposed to be designated was shown on Plan "C" submitted by the applicant as part of its application. The area in question comprised in the VIP Members' Room is approximately 400m<sup>2</sup>. The grant of the application would therefore result in an approximate 4.7% increase to the overall size of the existing gambling area.

#### **Key issues**

5. Key issues for the Commission in determining the application included the following:
- (a) The role of the Commission. The applicant submitted in its application that the primary decision relating to the establishment of the VIP Members' Room had already been made by the Authority and that the Commission had only a "technical approval" role in relation to the specification of it as gambling area.
  - (b) Compliance of the proposal with the statutory criteria set out in section 139(2) of the Act, and section 139(2)(d) in particular. Section 139(2)(d) requires that any new or amended condition specified by the Commission "must not permit an increase in the opportunities for casino gambling". In determining whether the effect of the proposed change would increase the opportunities for casino gambling overall, the Commission was required, for the first time, to interpret the statutory language of sections 11, 12 and 139(2) of the Act. The Commission then made an assessment, based on factual information provided by the applicant, of whether the proposal would in all the circumstances give rise to an increase in opportunities for casino gambling.
  - (c) The form of any variation to Condition J or new condition, a matter raised by the Secretary for Internal Affairs (the "**Secretary**").

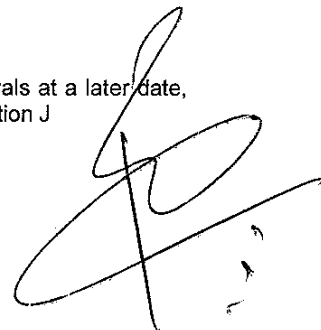
#### **Decision by the Authority**

6. At the time of the application, the VIP Members' Room was already under construction, pursuant to approvals granted previously by the Authority.
7. The Authority advised the applicant, by letter dated 11 December 2003, that:

The Authority agreed on 5 December 2003 to approve, pursuant to Conditions A2 and I1 of SKYCITY Auckland Limited's premises licence, amendments, alterations and extensions to the casino premises that are substantially in accordance with the proposal relating to the new VIP facilities as submitted for approval in the letter dated 20 November 2003

8. The Authority's letter of 11 December further stated that:

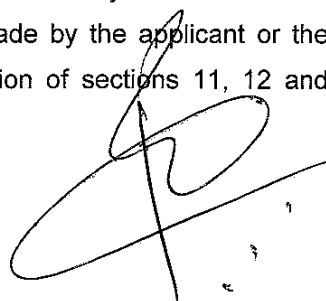
We look forward to receiving applications for consequential approvals at a later date, including for the redesignation of the gaming area in terms of Condition J



9. In making its decision to approve the construction of the VIP Members' Room, the Authority had before it:
- (a) a letter from the applicant dated 20 November describing the proposal and the reasons for it, together with a sketch plan; and
  - (b) a legal submission from counsel for the applicant, Gillian Coumbe, addressing the construction of sections 11 and 12 of the Act and their potential application in respect of the construction and use of the VIP Members' Room. The same legal submission was lodged in support of the application made to the Commission.

#### **Application to Commission**

10. The applicant originally wrote to the Commission on 9 August 2004, requesting approval for the designation of the VIP Members' Room pursuant to Condition J, that Condition containing a power which the Authority had reserved to itself for changes in the designation of gaming area.
11. The Commission advised the applicant by letter dated 18 August 2004 that it was unable to grant the approval sought under Condition J, without amendment, and that in order to specify new gambling area, the Act contemplated an application being made by the licence holder to vary or specify a new condition under section 139 of the Act.
12. The applicant submitted, under cover of a letter dated 18 August 2004, an application under section 139 to specify a new licence condition as outlined above.
13. At its meeting on 20 August 2004, the Commission resolved that there were no persons affected by the proposal and that the Executive Director should notify the Secretary of the application in accordance with section 140 of the Act.
14. The Secretary's submissions were received on 8 September, and the applicant was given an opportunity to comment on those.
15. The Commission visited the VIP Members' Room under construction on 13 September.
16. Given the importance of the issues of statutory interpretation, the Commission sent to the Secretary and the applicant, for their information and comment, independent legal advice received by it on the question of the construction of sections 11 and 12. The applicant made further legal submissions on the point, which were considered by the Commission. The Secretary declined to comment on the submissions made by the applicant or the legal advice received by the Commission on the construction of sections 11, 12 and 139(2).

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**Statutory criteria**

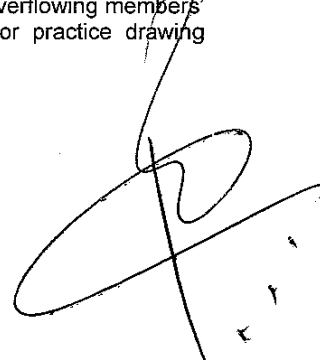
17. Section 139(1) of the Act provides that the Commission may specify, vary, or revoke conditions of a casino licence by an application by the holder of the casino licence, at the request of the Secretary, or at the Commission's own initiative.
18. Section 139(2) of the Act provides that:
  - (2) A condition of a casino licence specified under subsection (1)–
    - (a) must be consistent with this Act; and
    - (b) must contribute to achieving the purposes of this Act; and
    - (c) must contribute to the efficient and effective administration of this Act; and
    - (d) must not permit an increase in the opportunities for casino gambling; and
    - (e) may relate to any matter, including the matters specified in Schedule 1, within the confines of paragraphs (a) to (d).
19. The Act contemplates that the Commission can vary or specify new conditions to provide additional or different gambling areas. This follows from the definition of “gambling area” in section 2, as meaning “for a casino venue, that part of the venue that is specified by the Gambling Commission under section 139 ... as an area where casino gambling is permitted ...”. Further, Schedule 1, clause 7, identifies “the designation of gambling areas within a casino” as a condition that may attach to a casino licence.
20. Section 140 of the Act sets out the procedure for specifying, varying or revoking casino licence conditions. The Commission is required to allow the holder of the casino licence, the Secretary, and any other person affected to make written submissions to the Commission within 20 working days after the date of being notified of the application by the Commission. Following on from this, the Commission may also seek comments from the casino licence holder.
21. The Commission is required under section 140(5) to notify the applicant and Secretary of its decision and the reasons for it, their rights to appeal the decision, and process for doing so.
22. Sections 11 and 12 of the Act are of key relevance in the current context, and provide as follows:

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- 11 No increase in casino gambling**  
A person must not increase the opportunities for casino gambling.
- 12 What is increase in casino gambling**
- (1) Decisions on what constitutes an increase in the opportunities for casino gambling are a function and responsibility of the Casino Control Authority, until section 297 of this Act comes into force, and of the Gambling Commission after that
- (2) An increase in the opportunities for casino gambling includes but is not limited to-
- (a) an increase in the number of gaming machines unless the increase is accompanied by a reduction in the number of table games that the Casino Control Authority, or the Gambling Commission, believes is proportionate:
- (b) an increase in the number of table games unless the increase is accompanied by a reduction in the number of gaming machines that the Casino Control Authority, or the Gambling Commission, believes is proportionate:
- (c) an increase in total player space at table games unless the increase is accompanied by a reduction in other opportunities for casino gambling that the Casino Control Authority, or the Gambling Commission, believes is proportionate
- (3) Opportunities for casino gambling are not increased-
- (a) by increases, in the Auckland casino, that comply with the order for the Variation of Conditions of Casino Premises Licence dated 6 December 2002:
- (b) by gambling conducted by the New Zealand Racing Board referred to in section 120

### Submissions by applicant

23. The Commission understood that the VIP Members' Room was intended to provide improved facilities for VIP customers. At the time of the application, two areas were in use for VIP customers – the existing Members' Room, which is used predominantly for local VIP guests, and the rear pit in Alto, which is used for international visitors. It was understood that on completion, the applicant would relocate the existing Members' Room to the new VIP Members' Room, and that the applicant would then proceed to upgrade and convert the existing Members' Room to private rooms for international VIP guests. Once the existing Members' room was upgraded, the applicant advised that the rear pit in Alto would be closed.
24. As set out in the applicant's letter to the Authority dated 20 November, the rear pit of Alto was considered unsuitable for VIP patrons for the following reasons:
- ... it lacks dedicated facilities such as toilets, cashiering facilities and food and beverage and does not compare favourably with the class of facilities offered by our overseas competitors. ... The larger floor area will address the capacity constraints currently experienced during peak periods which has forced the overflowing members' business on to the tables in Alto. This is recognised as poor practice drawing unwanted attention to members from other patrons.



25. In its application, the applicant addresses section 139(2) criteria and submits, in support of the application to designate the VIP Members' Room, that:
- (a) the designation of the gambling area "is a technical consequence" of the Authority's previous approval;
  - (b) the proposal contributes to the purposes of the Act by limiting authorised casino gambling to the confines of the specified gambling area (thereby prohibiting the rest);
  - (c) the proposal contributes to the efficient and affective administration of the Act by providing certainty as to the area designated as the gambling area by the Commission;
  - (d) in approving the construction of the new facilities the Authority has already determined that the facilities would not increase the opportunities for casino gambling;
  - (e) the condition relates to one of the matters set out in Schedule 1 of the Gambling Act 2003;
  - (f) there are no parties affected by the proposal because designation "is a technical requirement and has no impact on any person beyond the impact of the approval already given by the Authority".

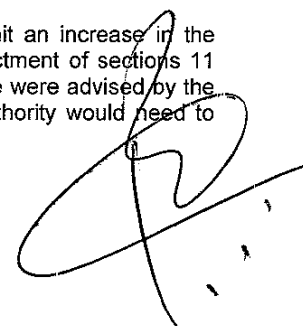
#### **Submissions by the Secretary**

26. The Secretary declined to comment on matters of statutory interpretation and raised no objection to the proposal. The only question raised by the Secretary related to the form of the amendment to be adopted, proposing that the Commission should amend Condition J, rather than specify a new licence condition.

#### **Role of the Commission**

27. As an initial matter, the Commission considered the submission of the applicant, that the Commission's role was a technical one, consequential on the approval already granted by the Authority
28. As stated in paragraph (d) of the application:

- (d) It is our submission that the condition does not permit an increase in the opportunities for casino gambling. Following the enactment of sections 11 and 12 of the Gambling Act on 18 September 2003, we were advised by the Authority that in any future decisions it made, the Authority would need to



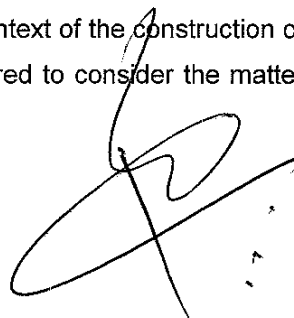
consider whether or not that decision would have the effect of increasing the opportunities for casino gambling

In our application to the Authority seeking approval to construct the new facilities we submitted that the proposal would not increase the opportunities for casino gambling under sections 11 and 12 of the Gambling Act and attached a legal opinion in support of that submission.

In approving the construction of the new facilities the Authority determined that the facilities would not increase the opportunities for casino gambling.

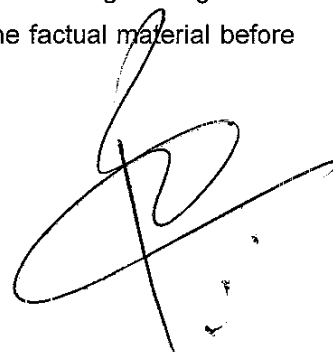
The expansion of the VIP facilities was considered and approved by the Authority in December 2003. That approval remains effective by virtue of the Gambling Act and is not part of the Gambling Commission's consideration. The redesignation of the gambling area to include those VIP facilities is a technical requirement and has no impact on any person beyond the impact of the approval already given by the Authority

29. Comments to this effect were reiterated in the supplementary legal submission dated 18 October 2004 made on behalf of the applicant. This stated that the Commission's consideration of sections 11, 12 and 139(2) "... should be limited to the particular issues arising in the context of the present applications only, and that the Commission need not revisit issues already determined by the Authority".
30. The Commission recognised that the applicant reasonably expected that the VIP Members' Room would be designated in due course when it obtained approval from the Authority for the construction of the facility. The Commission considered, however, that it was required under the Act independently to consider and determine the question of whether any increased opportunity for casino gambling arose. In particular, it was noted that:
- (a) the Authority in its decision approved the construction of the VIP Members' Room, but did not designate it as a gambling area and made no express finding on whether it would increase opportunities for gambling. It is logical that the construction of the facilities alone, without designating them as gambling area, would not increase opportunities for gambling. In the absence of an express determination that once designated, opportunities for casino gambling would not increase, the Authority could not be read as implicitly deciding that issue; and
  - (b) because the Authority did not designate the gambling area, the Commission was required to decide on the application before it, in accordance with section 139 of the Act. The Authority may previously have considered the question of compliance with sections 11 and 12 of the Act in the context of the construction of the VIP Members' Room, but the Commission is required to consider the matter afresh in the context of the designation proposal.

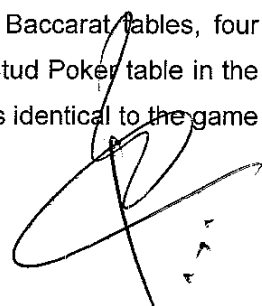


**Construction of sections 11, 12 and 132(2)(d) of the Act**

31. The key proposition advanced by counsel for the applicant was that a restrictive interpretation of sections 11 and 12 should be adopted, to the effect that unless there are increases in the number of places at tables or machines, there is no increase in opportunities in casino gambling. It was argued that, because the statutory words are “very broad and vague as to their precise scope”, a literal interpretation could potentially lead to absurdity.
32. Counsel for the applicant further submitted, in a supplementary legal submission dated 18 October 2004, that, in any event, interpretation of sections 11, 12 and 139(2) was “not a matter which need be determined by the Commission ... because, even as a wide literal approach ..., it is clear that the application, if granted, will not in **fact** lead to an increase in the opportunities to gamble”.
33. The interpretation of sections 11, 12 and 139(2) is fundamental to the ongoing exercise by the Commission of its regulatory functions. For this reason, it sets out its approach to the construction of those provisions.
34. Having considered the legal submissions by the applicant and independent advice received by it, the Commission decided that there was no need to reformulate the words used in the Act, and that there was no benefit in attempting to do so. The words of section 11 of the Act are simple, and the illustrations in section 12 are a helpful guide to Parliament’s intentions. The rephrasing suggested by counsel for the applicant - for example, to test whether there was “an increase in the number of gambling activities” or “increased gambling activities” - was considered to be less clear in ambit and effect than the statutory words. The Commission noted that its concern is required to be with an increase in **opportunities** for casino gambling.
35. It was noted that Parliament had not adopted a prescriptive, quantitative set of rules (by capping or prohibiting increases in such things as floor area, machines, table places, player numbers or turnover) Rather, section 12(2) provides a non-exhaustive list of matters which constitute an increase in opportunities. It was considered that the approach adopted by Parliament allowed for flexibility (with virtually nothing being inherently prohibited) so long as the overall effect of the changes is, in the assessment of the Commission, not likely to increase the opportunities for casino gambling. The decision, then, is an overall judgment, involving a weighing of the factual material before the Commission.

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36. In testing whether on the facts there was an increase in opportunities for casino gambling, it was agreed by the Commission that the “places at the table” analogy proposed by the applicant was an appropriate starting point. This was consistent with section 12(2), which identifies activities which inherently are likely to increase the opportunities for gambling (increasing the number of tables or machines, increasing the room for players at tables or machines, adding new forms of gambling activities) and would need to be the subject of offsetting reduction elsewhere to be approved. Beyond this the Commission considered that there may be other factors which, depending on the circumstances and taken overall, result in an increase in gambling opportunities. The Commission was of the view that consideration of other factors in a commonsense way should not be foreclosed by adopting a restrictive, “closed list” approach to the interpretation of section 12(2) as the applicant advocated, as Parliament did not seem to have intended the Commission to have restricted its judgment in that way.
37. The Commission had regard to the following facts in determining that, taken as a whole, the proposal would not increase the opportunities for casino gambling:
- (a) The applicant’s advice that there will be no increase in the number of tables at the casino as a consequence of opening the VIP Member’s Room. The Commission was advised by the applicant that 14 new tables were being built for the facility. In substitution, two will be removed from the rear pit of Alto and all 12 tables would be removed from the existing Members’ Room and placed in storage while the Members’ Room is closed temporarily for renovation. When it is reopened, the remaining four tables in the Alto pit will be moved into the Members’ Room, and the Alto pit closed.
  - (b) The applicant’s advice that, as a consequence of the proposal, the overall number of machines in use or in storage in the casino will not exceed the 1,647 the applicant is allowed to operate by virtue of their licence conditions referred to in section 12(3)(a). The applicant confirmed that while approximately 100 machines are currently in storage, this is because of temporary rather than permanent space constraints. The 12 gaming machines to be installed in the new VIP Members’ Room are intended to be sourced from existing stock (either machines in storage or on the floor).
  - (c) The applicant’s advice that there will be no increase in the number of places or wagering spots currently available at tables as a consequence of the designation. The applicant advised that it proposed to locate six Midi Baccarat tables, four blackjack tables, three roulette tables and one Caribbean Stud Poker table in the VIP new Members’ facility. The applicant advised that this is identical to the game

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mix on tables to be removed, with the exception of one table (roulette) which will replace a Pai Gow game currently located in the existing Members' Room. The applicant noted that a Pai Gow game may accommodate up to 21 players under the game rules. While the game of roulette does not impose any restrictions on the number of players that may participate in the game, the applicant stated that it did not believe it would be practical for more than 21 players to play roulette at any one time.

- (d) The applicant's advice that there will be no change to the size of the tables. The Commission was advised that some ergonomic design changes largely associated with adjustments to the layouts have been incorporated to address occupational health issues which reduces the reach required by dealers to conduct the game(s). The applicant advised that these changes would not affect players and would not create additional spaces for wagering.
- (e) Recognition that, while the proposal will increase the available floor area for gambling by 4.7%, lack of capacity was not, as the applicant advised, currently to be constraining gambling opportunities.

#### **Decision of Commission**

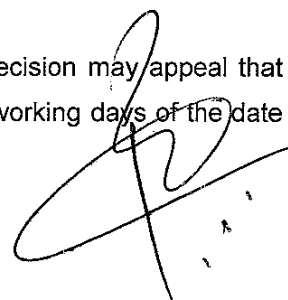
- 38. On the basis of the facts presented, the Commission was satisfied that, taken as a whole, amendment of the casino licence conditions to designate the VIP Members' Room was consistent with section 139(2) criteria and, in particular, would not increase the opportunities for casino gambling.
- 39. The Commission decided to designate the VIP Members' Room with effect from 29 October 2004, by amending Condition J as follows:

The gambling area of the casino shall comprise the following:

- (a) areas delineated in red shown on plans "A" and "B" as specified by the Casino Control Authority and the Casino Control Act 1990; and
  - (b) the area delineated in red shown on plan "C" dated 15 June 2004 as specified by the Gambling Commission under section 139 of the Gambling Act 2003.
- 40. Plans "A", "B" and "C" are appended to this decision, and will be appended to the licence.

#### **Right of appeal**

- 41. Pursuant to section 235 of the Act, a person affected by this decision may appeal that decision to the High Court. An appeal must be made within 15 working days of the date



of notice of the Commission's decision, or any longer period that the High Court may allow.



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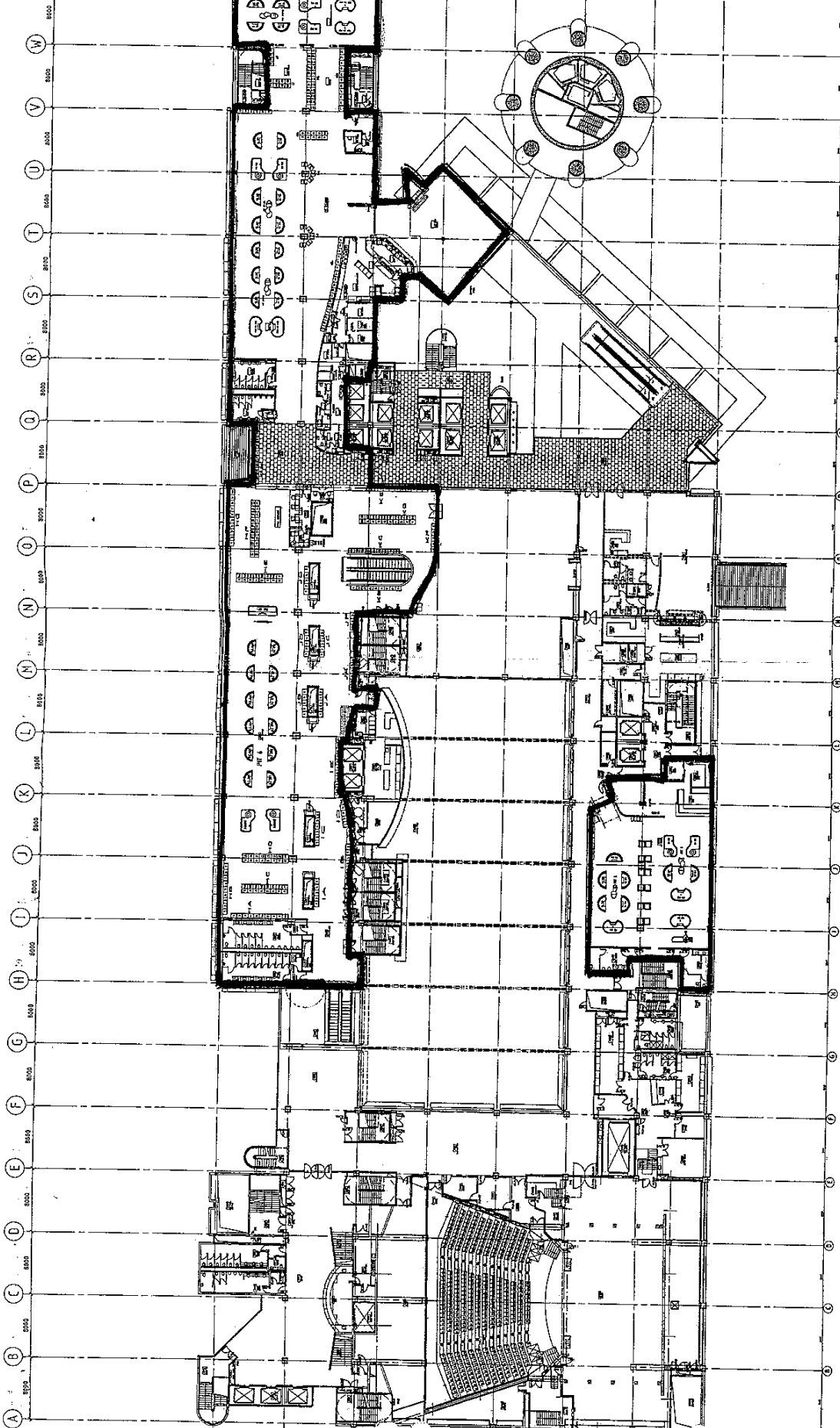
**Peter Chin**  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

19 November 2004



27/10/03  
 'B'



**SCHEDULE**  
 GAMING TABLES  
 ASIO 25  
 NSF 12  
 MEMBERS 12  
 TOTAL 49

**GAMING MACHINES**  
 ASIO 86  
 NSF 226  
 MEMBERS 377  
 TOTAL 689  
 GRAND TOTAL 738  
 APPE BY COCA 1247  
 AVAIL 3035

**SKY CITY - PODIUM  
 LEVEL 3 - FLOOR PLAN  
 GAMING LAYOUT FOR 01/12/03**

Refer to Revision 1 for Original Signatures  
 High Contractor shall verify all dimensions before commencing work.  
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REVISION	NO.	DATE	BY	CHK	APP
1	ISSUED FOR PERMIT	27/10/03	CM	CM	CM
2	ISSUED FOR EIA APPROVAL	27/10/03	CM	CM	CM
3	ISSUED FOR EIA APPROVAL	27/10/03	CM	CM	CM

**PERMIT INFORMATION**

Project No.	27/10/03
Scale	1:100
Drawn	CM
Checked	CM
Original Scale	A1 250
Reduced Scale	A3 500
Drawn Date	27/10/03
Checked Date	27/10/03
Approved for Construction	CM
Scale	1:100
Scale Date	27/10/03
Scale By	CM
Scale Check	CM
Scale Date	27/10/03
Scale By	CM
Scale Check	CM

**CLIENT AND PROJECT**

Sky City Entertainment Group  
 Gaming Areas Alterations and Additions



**ARCHITECTS**  
 Craig Craig Moller Architects  
 Craig Craig Moller Architects Ltd  
 Level 13 West Plaza  
 3 Albert St. PO Box 105 293  
 Auckland New Zealand  
 Telephone 64 9 357 0686  
 Fax 64 9 357 0687  
 Email admin@ccm.co.nz  
 www.ccm.co.nz

**SKY CITY  
 GRAND HOTEL**

**CM**

