GC11/24

IN THE MATTER	of the Gambling Act 2003
AND	an appeal by **PUB CHARITY LIMITED** against refusal of application to amend class 4 venue licence application for the **WAVE BAR**

BEFORE THE GAMBLING COMMISSION

Members:	S W Hughes KC (Chief Gambling Commissioner) S C L Pearson W A Acton S T Shaw C M Risk
Date of Appeal:	18 May 2024
Date of Decision:	9 August 2024
Date of Notification of Decision:	22 August 2024

DECISION ON AN APPEAL BY PUB CHARITY LIMITED AGAINST REFUSAL OF APPLICATION TO AMEND CLASS 4 VENUE LICENCE FOR THE WAVE BAR

Introduction

1. Pub Charity Limited ("**Appellant**") appealed to the Gambling Commission ("**Commission**") against a decision by the Secretary for Internal Affairs ("**Secretary**") refusing to amend the Appellant's class 4 venue licence, specifically in respect of the address at which the Wave Bar in New Brighton, Christchurch ("**Venue**") would operate.

Background to Appeal

2. The Venue has long been a bar located at 2 New Brighton Mall, New Brighton, Christchurch ("**Existing Venue**"). A class 4 venue licence is currently held by the Appellant for gaming machines to be operated at the Existing Venue. As the Venue licence has floor plans showing 18 gaming machines, a licence will have been held since at least 17 October 2001.

3. On 9 September 2021, the Christchurch City Council adopted a Gambling and TAB Venues Policy. The policy is to withhold consent under section 98 of the Gambling Act 2003 ("**Act**"), (all references are to this Act unless otherwise stated) to allow any increase in class 4

gaming venues or class machine numbers, except when two or more corporate societies are merging.

4. On 24 August 2023, after a declaratory proceeding had been brought against the Secretary by Feed Families Not Pokies Aotearoa Incorporated ("***FFNPA***"), challenging the lawfulness of the Secretary approving what had come to be known as *Waikiwi* premises movements without requiring territorial authority consent under the Act, the Secretary sent an email to the wider gambling industry advising that there had been a recent reconsideration of his view of the law and he considered that such movements likely required territorial authority consent. The communication advised that the Secretary would only continue to apply to the High Court decision in *ILT Foundation v The Secretary for Internal Affairs*[1] ("***Waikiwi***") to applications for such movements made prior to 21 September 2023.

5. On 1 February 2024, the Appellant lodged a GC4A application to amend the Venue's address from 2 Brighton Mall to 77 Brighton Mall ("**New Venue**"), and to update the Venue's floor plan to show the proposed floor plan at the New Venue. The application was made with reference to the *Waikiwi* decision which held that the terms "venue" and "place" under the Act are distinct, with a "venue" capable of acquiring a new "place" while remaining the same "venue", provided that four criteria were met. The effect of the *Waikiwi* decision was to treat such movements of premises as continuing to remain the same venue, such that territorial authority consent was not required. As a result, they would not be affected by local sinking lid policies. The application was accompanied by a letter which set out that the four criteria from *Waikiwi* would be met and attached a floor plan for the new site, an agreement to lease, and an affidavit deposing to the proposed primary activity of the New Venue. The letter noted that the reason for the premises movement reflected in the amendment sought was pending redevelopment of the current site and adjacent premises. The covering email requested an immediate amendment of the Appellant's licence to reflect the address of the new site.

6. On 15 February 2024, the Department of Internal Affairs ("**Department**") communicated informally to the Appellant its view that the amendment application should be refused. The Appellant responded, the following day, requesting a formal decision.

7. On 19 February 2024, the High Court released the decision in *Feed Families Not Pokies Aotearoa Incorporated v Secretary for Internal Affairs*[2] ("***FFNPA* decision**"), declaring that minor *Waikiwi* movements were relocations (meaning the replacement of one venue with another) under the Act, as amended in September 2013. As a consequence, all relocations

[1] [2013] NZHC 1330.

[2] [2024] NZHC 217.

since September 2013 required territorial local authority consent. However the *FFNPA* decision preserved as unaffected, for the time being, venue licences which had already been amended in reliance on the *Waikiwi* decision.

8. By letter dated 22 March 2024, the Secretary proposed to refuse to amend the Appellant's class 4 venue licence, on the basis that the *FFNPA* decision had declared that all site movements, including *Waikiwi* movements, were relocations that required territorial authority consent and no such consent had been presented. The Secretary gave the Appellant 20 working days to make written submissions on the proposal.

9. The Appellant ceased gaming operations at the Existing Venue on 2 April 2024. On 30 April 2024, the Appellant sought an extension to the four week inactivity period specified by section 71(1)(g) after which notification of inactivity and subsequent surrender of the class 4 licence would be required under sections 71(1)(g) and 79(1)(a). The extension was sought on the basis that the amendment application had yet to be determined.

10. On 6 May 2024, Lisa Vuong of the Department sent an email to the Appellant advising that no submissions had been received in relation to the proposal to refuse the application to amend. The Appellant's counsel responded the same day advising that a submission would be made but a response to a request under the Official Information Act 1982 ("**OIA**") was awaited. On 8 May 2024, the Department advised the Appellant that no OIA request had been received and gave the Appellant an additional 5 working days to make submissions. On 13 May 2024, the Appellant made submissions opposing the Secretary's proposal to refuse.

11. On 17 May 2024, the Secretary issued a decision letter refusing to amend the Appellant's class 4 venue licence.

12. The covering email also advised the Appellant that the Secretary had decided not to agree to the requested inactivity extension because the reason for the request (awaiting a decision on a pending amendment application) did not meet the Secretary's policy requirement of an unforeseen circumstance outside the control of the Appellant. The covering email requested the surrender of the venue licence within five working days. Although recorded in this decision as part of the factual background, the events related to inactivity at the Venue since 2 April 2024 have no bearing on the issues raised by the appeal.

13. On Saturday, 18 May 2024, the Appellant filed a notice of appeal against the decision of 17 May 2024 refusing the amendment application.

Decision under appeal

14. By the letter of 17 May 2024, the Secretary gave notice refusing to amend the Appellant's class 4 venue licence. The letter advised that the reason for the refusal to amend the licence was that the *FFNPA* decision had declared that all site movements, including *Waikiwi* movements, were relocations which required territorial authority consent for amendment of the class 4 venue licence. As the Appellant had not provided evidence that the relevant territorial authority had consented to the relocation, the Secretary was required, under section 73(5)(b) and 67(1)(f) to refuse the application.

Relevant legislation

15. The following provisions of the Act relevantly cover the process and requirements for amending a class 4 venue licence:

> **65 Application for class 4 venue licence**
>
> …
>
> (2) An application must be on the relevant standard form and be accompanied by—
>
> (a) a description of the venue and its location; and
>
> (b) a territorial authority consent if required under section 98; and
>
> …
>
> (d) a statement by the applicant of how it proposes to minimise the risk of problem gambling and underage gambling at the class 4 venue
>
> …
>
> (j) evidence that the class 4 venue is not to be used mainly for operating gaming machines; and
>
> …
>
> (l) evidence that the venue is suitable in all other respects to be a class 4 venue.
>
> …
>
> (5) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.
>
> (6) The Secretary may request from the applicant any further information that the Secretary considers necessary to consider the application properly.
>
> **67 Grounds for granting class 4 venue licence**
>
> (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that—
>
> …
>
> (b) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimised; and

…

(f) the territorial authority has provided a consent (if required under section 98); and

….

(k) the class 4 venue is not used mainly for operating gaming machines; and

…

(p) the risk of problem gambling at the venue is minimised; and

…

(r) there are no other factors that are likely to detract from achieving the purpose of this Act; and

(s) the applicant is able to comply with all other applicable regulatory requirements.

69A Continuing obligations of corporate society in relation to class 4 venue licence

A corporate society that holds a class 4 venue licence must, in relation to class 4 gambling conducted at the class 4 venue for which the licence is held, ensure that, at all times,—

(a) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimised; and

…

(e) the venue is not used mainly for operating gaming machines; and

….

(g) the risk of problem gambling is minimised.

73 Amending class 4 venue licence

(1) A corporate society must apply to the Secretary to amend its class 4 venue licence if the corporate society proposes to—

…

(c) change any condition of the licence or any procedure that is a condition of the licence.

(2) An application must be on the relevant standard form and be accompanied by any items listed in section 65 that the secretary requests in order to consider the application and effect the amendment.

…

(4) Sections 66 and 67 apply to an application for amendment as if it were an application for a class 4 venue licence.

(5) The Secretary must refuse to amend a class 4 venue licence if—

…

(b) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 67; or

(c) the Secretary is not satisfied that the applicant complies with section 69A; …

…

16. In September 2013, section 97A came into force. It allows for relocations under the Act and relevantly provides:

> **97A Effect of relocation**
>
> (1) This section applies when—
>
> (a) a territorial authority has adopted a relocation policy (as defined in section 101(5)); and
>
> (b) in accordance with that policy, the territorial authority grants consent in respect of a venue (the new venue) to replace an existing venue (the old venue); and
>
> (c) a new class 4 venue licence is granted in respect of the new venue.
>
> (2) When this section applies,—
>
> (a) the Secretary must cancel the class 4 venue licence that relates to the old venue, in which case—
>
> (i)the cancellation takes effect on the date on which the new class 4 venue licence takes effect; and
>
> (ii) there is no right of appeal against the cancellation; and
>
> …

17. Section 101 (following amendment in 2013) requires territorial authorities to adopt class 4 venue policies, which may include relocation policies, having regard to the social impact of gambling within their districts:

> **101 Territorial authority must adopt class 4 venue policy**
>
> (1) A territorial authority must, within 6 months after the commencement of this section, adopt a policy on class 4 venues.
>
> (2) In adopting a policy, the territorial authority must have regard to the social impact of gambling within the territorial authority district.
>
> (3) The policy—
>
> …
>
> (c) may include a relocation policy.
>
> (4) In determining its policy on whether class 4 venues may be established in the territorial authority district, where any venue may be located, and any restrictions on the maximum number of gaming machines that may be operated at venues, the territorial authority may have regard to any relevant matters, including:
>
> (a) the characteristics of the district and parts of the district:
>
> …
>
> (d) the cumulative effects of additional opportunities for gambling in the district:
>
> …

> (5) A **relocation policy** is a policy setting out if and when the territorial authority will grant consent in respect of a venue within its district where the venue is intended to replace an existing venue (within the district) to which a class 4 venue licence applies (in which case section 97A applies).

18. Section 102 requires each territorial authority to review its class 4 venue policy every 3 years and, on the next review after the commencement of the Gambling Harm Reduction Amendment Act 2013, which added provision for relocation policies, to consider specifically the inclusion of a relocation policy having regard to the social impact of gambling on high-deprivation communities within the district.

19. Section 67(1)(f) refers to the requirement for satisfaction that territorial authority consent has been obtained if required by section 98, which relevantly provides:

> **98 When territorial authority consent required**
>
> A territorial authority consent is required in the following circumstances:
>
> ….
>
> (c) if a corporate society proposes, in accordance with a relocation policy of the territorial authority, to change the venue to which a class 4 venue licence currently applies.

20. The following provisions concern continuity of gambling operations at class 4 venues:

> **71 Significant changes in relation to class 4 venue licence must be notified**
>
> (1) A corporate society holding a class 4 venue licence must notify the Secretary, and provide details, if any of the following things occur: —
>
> …
>
> (g) the corporate society has not conducted class 4 gambling at the venue for a period of more than 4 weeks (in which case the class 4 venue licence must be surrendered, under s 79(1)(a), unless the Secretary agrees that the venue may remain inactive for a further specified period).
>
> …
>
> **79 Surrender of class 4 venue licence**
>
> (1) A corporate society —
>
> (a) must surrender a class 4 venue licence to the Secretary in the circumstances described in section 71(1)(g)
>
> …

21. An appeal to the Commission against a decision by the Secretary to refuse to amend a class 4 venue licence is relevantly provided for by section 77, as follows:

> **77 Appeal to Gambling Commission regarding class 4 venue licence**
>
> (1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—

…

(d) refuse to amend a class 4 venue licence held by the corporate society; or

…

(2) An appeal must be in writing and must be made within—

(a) 15 working days after the date of the notice of the Secretary's decision; or

(b) any longer period that the Gambling Commission allows if an application for an extension is made within the time period specified in paragraph (a).

(3) The Gambling Commission—

(a) may request any information from the corporate society or the parties to the agreement or the venue manager or the Secretary; and

(b) is not bound to follow any formal procedure; and

(c) does not need to hold a hearing; and

(d) must consider any information provided by the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary.

(4) The Gambling Commission may—

(a) confirm, vary, or reverse the decision of the Secretary; or

(b) refer the matter back to the Secretary with directions to reconsider the decision.

(5) The Gambling Commission must give notice of—

(a) its decision, with reasons, to the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary; and

(b) the date on which its decision takes effect (which may be a date that is later than the date on which it makes the decision).

22. Class 4 venue is defined in section 4 to mean "a place used to operate class 4 gambling".[3]

23. The purpose of the Gambling Act is set out in section 3 as follows:

(a) control the growth of gambling; and

(b) prevent and minimise harm from gambling, including problem gambling; and

(c) authorise some gambling and prohibit the rest; and

(d) facilitate responsible gambling; and

(e) ensure the integrity and fairness of games; and

(f) limit opportunities for crime or dishonesty associated with gambling and the conduct of gambling; and

(g) ensure that money from gambling benefits the community; and

(h) facilitate community involvement in decisions about the provision of gambling.

[3] The meaning of class 4 gambling is set out in section 30 and comprises a set of criteria.

Appellant's submissions

24. The Appellant lodged an appeal against the Secretary's decision on 18 May 2024 and filed submissions on 20 June 2024. The appeal challenged the Secretary's decision to refuse to amend the Appellant's class 4 venue licence and argued that the refusal decision was the result of inadequate resourcing for decisions by the Secretary and the delay which resulted. The Appellant submitted, in relation to the purported delay, as follows:

    (a) There were 19 days, including part days, between the application being lodged and the release of the *FFNPA* decision.

    (b) The application was capable of being granted on the day that it was made, 1 February 2024.

    (c) The Secretary had demonstrated his ability to consider submissions, obtain advice and make formal decisions within five days, including part days, by issuing the formal refusal decision (on 17 May 2024) within five days of the Appellant making submissions on the proposal to refuse (on 13 May 2024).

    (d) It is inappropriate for the Appellant's rights to be determined by resourcing decisions leading to delays in processing applications which could have been approved.[4]

25. The Appellant submitted further as follows:

    (a) It is inappropriate for the Secretary to refuse to consider and determine an application based on the applicable law at the time that it was made.

    (b) It is unlawful to refuse to consider and determine applications in anticipation of a future change in the interpretation of the law.[5]

26. The Appellant submitted that there were five ways in which the Commission or Secretary could address the alleged injustice arising from refusal and lawfully amend the licence.

The Commission and Secretary can and should phase in the interpretation from the FFNPA *decision in a manner similar to the* Matata *decision.*

27. The Appellant submitted that the Commission and Secretary should allow a grace period, similar to that allowed by the Commission in *Appeal by Pub Charity Limited re Matata Hotel* GC03/21 ("***Matata***"), within which the Appellant's application may be considered under the

[4] *Foodstuffs (Auckland) Limited v Commerce Commission* [2004] 1 NZLR 145 (PC) at [33] and [37].

[5] *New Zealand Racing Board re TAB Kapiti Lights and TAB Mangere Bridge* GC09/16.

Waikiwi precedent, despite the *FFNPA* decision. The Appellant's submissions in support of the argument were as follows:

(a) In *Matata,* the Commission gave societies a grace period within which they could lodge applications to preserve their position as it had been prior to commencement of a practice, which the Secretary had encouraged, which relied upon an earlier incorrect interpretation of the Act.

(b) The Commission had previously considered that the consequences of new interpretations of existing law should be managed fairly to avoid "serious consequences",[6] and that operators should be able to regain positions that would be lost owing to understandable misapprehensions about the law.[7]

(c) The Secretary had provided guidance on applying for relocation under the *Waikiwi* precedent which is a long-established practice lasting more than a decade.

(d) If the interpretation from the *FFNPA* decision is applied from the date of the decision, it will result in "serious consequences" for societies and the Appellant.[8]

(e) This case is analogous to *Matata* in that a society had acted in accordance with the Secretary's guidance, and a long-established practice which has now been determined to be contrary to the law, with serious consequences for the society.

The licence amendment should be backdated to prior to the FFNPA *decision*

28. Alternatively, the Appellant submitted that, in order to address the licensing delay, the Commission should direct the Secretary to issue a licence amendment backdated to prior to the *FFNPA* decision on the following basis:

(a) It is well settled that the Commission and Secretary have the power to backdate venue licences.[9]

(b) The licence should be backdated because:

(i) strictly applying the *FFNPA* decision would be unfair;

(ii) commercial arrangements have been entered into based on a prior reasonable interpretation of the Act;

[6] Appellant's submissions at [41]; *Matata* at [10.23].

[7] *Air Rescue Services Limited* GC26/10; *Kiwi Gaming Foundation re Woodend Tavern* GC19/21.

[8] Appellant's submissions at [44].

[9] *Air Rescue Services Limited* GC26/10; *Air Rescue Services Limited* GC14/15; *Grassroots Trust Limited* GC09/20; *Youth town Inc* GC10/20; *Matata.*

(iii) the exercise of the discretion will be one-off, so future applicants will not be able to claim reliance on prior established practice.

Position adopted by Christchurch City Council

29. The Appellant submitted that the position adopted by Christchurch City Council should weigh in favour of exercising the discretion to adopt a phase-in approach or to backdate the licence amendment for the following reasons:

(a) The application to amend the licence was refused because the territorial authority had not provided consent. However, Christchurch City Council, when reviewing its gambling venue policy, declined to include a relocation policy in part because it considered that the *Waikiwi* precedent would sufficiently accommodate situations where refusing to allow a venue to relocate would cause hardship. Council Minutes from 27 September 2018 indicated that Christchurch City Council had relied on advice from the Department that *Waikiwi* movements would continue to be allowed.

(b) Christchurch City Council had previously published on its website that *Waikiwi* movements were permitted.

The application should be considered in accordance with the law at the date of application

30. The Appellant submitted that the likely cause of the delay in amending the licence was not a genuine lack of time or resources but a decision by the Secretary to refuse to consider the application based on an expectation that the result of the *FFNPA* proceeding would be a decision preventing further *Waikiwi* movements. The Secretary was neither permitted nor required by the Act to consider future High Court decisions and was required to apply the law as it was. In doing so the Secretary had failed to render a decision recognising the right for an application to be determined in accordance with the law that applied at the time and deprived the Appellant of the opportunity of a favourable determination of the application.

31. The Appellant submitted that the current situation was, in this respect, analogous to that considered by the Commission in *New Zealand Racing Board re TAB Kapiti Lights and TAB Mangere Bridge*[10] and that, citing statements from that decision in support[11], the application should be considered in accordance with the law as it was at the time of the application.

[10] GC09/16.

[11] At [8.18], [8.22] and [8.24].

The relocation of the Venue was effective upon notification to the Secretary

32. The Appellant submitted that the *Waikiwi* movement was effective upon its notification to the Secretary in the application form submitted on 1 February 2024, and was therefore preserved under the *FFNPA* decision on the following basis:

(a) *Waikiwi* applications do not require new licences.

(b) The address of a venue is part of the description of the venue.

(c) Section 71(1)(f) only requires societies to notify the Secretary if the address of a venue changes because the address constitutes part of the "nature" of a venue.

(d) The wording of section 70(1)(f) of the Act indicates that the location of a venue is part of the information on a licence and not a condition of the licence.

(e) The Secretary was notified and did not require a licence amendment application under section 71(4).

(f) Amendment of the licence to reflect the new address can take place as part of the renewal of the licence.

The law is ambiguous so it is reasonable to grant the licence amendment

33. The Appellant submitted that the law is ambiguous. The Commission can and should prefer the judgment in *Waikiwi* to that in *FFNPA* and amend the Appellant's licence for the following reasons:

(a) Both the *Waikiwi* and *FFNPA* decisions are of equal standing. *Waikiwi* cannot be distinguished on the ground that section 97A was enacted afterwards, as the enactment of section 97A did not affect the validity of the *Waikiwi* decision, as confirmed by a 2019 decision of the Commission.[12]

(b) The *Waikiwi* decision dealt directly with interpretations of the defined statutory terms "place" and "venue", which are critical to the practice of *Waikiwi* relocations, while the *FFNPA* decision did not.

(c) The *FFNPA* decision contained clear errors. For instance, by declaring that a venue cannot be deemed to be the same venue under the Act when it is at a new place, the High Court outlawed moves within large shopping malls and within large certificates of title. This is contrary to the wide definition of place in section 4 which includes "a mall" and "land". Venues may also be demolished and rebuilt in a

[12] *New Zealand Community Trust* GC04/19.

slightly different location but remain within the same certificate of title. Such moves, without territorial consent, are established practice.[13]

(d) The *FFNPA* decision has been appealed to the Court of Appeal.

The FFNPA *decision is "bad law" and should be disregarded*

34. The Appellant submitted that the *FFNPA* decision is "bad law" and the Commission is free to follow the earlier *Waikiwi* decision, pending clarification from the Court of Appeal, on the following basis:

(a) Section 97A did not change the meaning of the terms "venue" or "place". Parliament also did not amend the definitions of those terms in section 4 when section 97A was enacted.

(b) Section 98(c) only applies where there is a relocation resulting in a change of venue. Parliament intended section 98(c) to apply only to section 97A relocations, which amount to changes in venue. A *Waikiwi* movement does not result in a change of venue, so small relocations within shopping malls and large certificates of title do not need territorial authority consent.

(c) The purpose of enacting section 97A was to encourage relocation of venues from high deprivation areas to more suitable locations.

(d) Community input into the location of venues is preserved by the existence of gambling venue policies. It would be unduly costly and time-consuming for all concerned to involve territorial authorities in *de minimis* premises movements.

Secretary's submissions

35. The Secretary submitted that the Commission should confirm the decision to refuse. There is no lawful mechanism by which the licence can be amended. A territorial consent is required before a licence can be amended for the following reasons:

(a) Section 73(5)(b) requires the Secretary to refuse to amend a class 4 venue licence if any investigations carried out by the Secretary cause him not to be satisfied about any of the matters specified in section 67.

(b) Section 73(4) applies section 67 to an application for an amendment as if it were an application for a class 4 venue licence.

[13] *New Zealand Community Trust* GC10/05; *Air Rescue Services Limited* GC35/11.

(c) Section 67(1)(f) requires the Secretary to refuse to amend a licence unless he is satisfied that the territorial authority has provided a consent if required under section 98.

(d) Section 98(c) requires a territorial authority consent if a corporate society proposes to change the venue to which a class 4 venue licence currently applies. The amendment application does so.

(e) The amendment application did not include evidence of territorial authority consent.

The application could not have been granted before the release of the FFNPA *decision*

36. The Secretary submitted as follows:

(a) There was neither sufficient time nor sufficient information to consider the Appellant's application prior to the release of the *FFNPA* decision, regardless of whether the Secretary had taken the view that he should not amend licences relying on the *Waikiwi* precedent.

(b) There was no unreasonable delay in processing the application.

(c) The Secretary did not fail to apply resources to the Appellant's application.

(d) It is not reasonable to rely on an application being considered and granted within 10 working days.

(e) There is a considerable process to follow before a decision to amend a class 4 licence can be made, even with a robust application for a venue that is ready to operate.

(f) The Venue had not taken steps to relocate physically. The information provided to the Secretary was therefore uncertain and prospective.

37. The Secretary argued that the Secretary could not have made a decision prior to being given information concerning the construction at the Venue, and information about the start date, for the following reasons:

(a) Floor plans are insufficient to confirm the layout of a venue; inspection of the actual premises is required. By way of example, at another of the Appellant's venues, which was the subject of a *Waikiwi* application, concerns around harm minimisation arose only after venue construction was near complete and the actual layout could be properly assessed.

(b) It appeared from information enclosed with the Appellant's GC4A application that construction at the new site had not yet commenced. The Secretary could not confirm the description or layout of the Venue. Both matters are information which is required to be included in a licence under section 70(1)(f).

(c) The lease for the new site was conditional on class 4 gambling being permitted to operate with 18 gaming machines at the Venue. Construction at the site could not have commenced prior to the licence being amended.

(d) Without confirming the layout of the New Venue, the Secretary could not be satisfied of the grounds specified by sections 67(1)(b), (k), (p), and (s) that:

(i) the possibility of persons under 18 years old gaining access to gambling would be minimised;

(ii) the main activity of the Venue would not be operating gambling machines;

(iii) the risk of problem gambling at the Venue would be minimised; and

(iv) the restrictions on the layout of venues, including the visibility of gaming machines and placement of ATMs imposed by regulations 5A and 5 of the Gambling (Harm Prevention and Minimisation) Regulations 2004, were satisfied.

(e) The Secretary requires notification of the date on which gambling would cease at the original site for it to be clear whether and when obligations arise under section 71(g) and subsequently section 79(1)(a).

(f) The detailed approach which the Secretary takes to amendment applications is not a box-ticking exercise, but a genuine attempt to ensure that all legal requirements can and will be complied with.

38. The Secretary submitted further that the Appellant had yet to provide any evidence that the new premises are under construction and could be inspected either by photographs of the nearly finished premises or in person. The Commission was therefore being asked to form a view on whether the new site would meet the requirements of the Act without being able to assess the new site properly. The Commission had previously considered that visiting an actual venue was helpful in making decisions about harm minimisation concerns.[14]

[14] *Appeal by Aotearoa Gaming Trust re Glasine's Café and Bar* GC07/22 at [56].

39. The Secretary argued that the Appellant's suggestion that the Secretary delayed considering the application or refused to consider the application was unsupported by the facts. The application was processed in the normal way; the regulator considered the information provided by the Appellant, clarified the approach with his manager, reviewed the application, considered the Department's interpretation of the law and refused to amend the licence (although the proposal to refuse was issued only on 22 March 2024 and the refusal decision issued on 17 May 2024). The Department's informally indicated view was said to be confirmed by the *FFNPA* decision, shortly after the consideration of the application.

40. The Secretary submitted that he was not bound to follow processes that he had followed in the past if he subsequently considered that those processes were unlawful. Despite applying his interpretation of the law, that *Waikiwi* movements were not permitted under the Act as amended in 2013, a matter on which he took legal advice and which was communicated to the applicant, he did not fail to process the appellant's application. It is irrelevant that the *FFNPA* decision is under appeal.

41. The Secretary argued that the *Matata* decision supported the position that the licence could not have been amended before the *FFNPA* decision was released. In that decision, the Commission had considered, in the context of a request to backdate a licence, whether an inquiry from the Secretary as to the date that class 4 gambling would commence at a venue constituted an unnecessary delay which weighed in favour of exercising the discretion to backdate the licence. The Commission considered that the inquiry was appropriate because the Secretary was obliged to be satisfied under section 67(1)(s) that the applicant would be able to comply with all other applicable regulatory requirements.[15]

42. Finally, the Secretary submitted that the onus was on the Appellant to satisfy the Secretary of the matters provided for by section 67. It had failed to do so, both prior to the *FFNPA* decision and in the current appeal.

The Matata *phase-in approach*

43. The Secretary argued that the new interpretation had, in fact, been phased in as the Secretary communicated to the industry on 24 August 2023 that applications made prior to 21 September 2023 would be considered under the *Waikiwi* precedent and that, if they could be granted prior to the *FFNPA* decision release, they would be.

44. The Secretary observed that the steps taken in the *Matata* appeal arose from the long-standing incorrect assumption by the Secretary and the gambling industry that there was

[15] *Matata* at [9.4].

a distinction between the number of gaming machines which are, and which may be, operated at a venue under sections 70(1)(g) and (h).

45. The Secretary submitted that *Matata* could be distinguished from the present case in two ways and should not be applied:

(a) The relief granted in *Matata* arose in the context of a decision of the Commission concerning interpretation of the Act as it applied to particular facts, rather than a statement of law from the High Court. The Commission can only determine the appeal before it.[16] An example of the Commission deciding how to manage, in the appeal before it, the consequences of an interpretation conclusion reached in the course of the appeal does not provide a proper basis for the Commission to take steps to manage the future consequences of a High Court declaratory judgment. The High Court did not specify that a phased-in approach should be taken and made clear that the Secretary was not free to reach decisions contrary to the law declared in the *FFNPA* decision.[17]

(b) The issue requiring management in *Matata* was unexpected, arising as a tangential issue on an appeal which neither of the parties had anticipated. In the present case, the Appellant would have known that a potential consequence of the FFPNA proceeding would be that *Waikiwi* movements would not be permitted without territorial authority consent. Neither the Secretary nor the Commission are expected to make decisions contrary to the law declared by the High Court in order to relieve the Appellant from the consequences of a risk taken with knowledge of the potential consequences.

Backdating the licence amendment

46. The Secretary argued that it would be inappropriate in this case to backdate an amended licence because:

(a) to be effective, the licence would need to be backdated to a date prior to the September 2013 amendments, as the *FFNPA* decision clarified the law from that date;

(b) as the maximum length of a licence under section 70(1A) is three years, to do so, the Secretary would have to issue at least 4 retrospectively amended licences. The Secretary doubted that he is empowered do so.

[16] *Bluegrass Holdings Limited* GC39/13.

[17] *FFNPA* decision at [44].

47. In response to the Appellant's submission that the Secretary did not apply appropriate resources to processing the application, the following was submitted:

(a) The application was handled in accordance with standard processes and procedures.

(b) 10 working days is not sufficient time to process and grant a complex licensing application.

(c) The Secretary is generally not prepared to amend a licence before the venue is ready to operate under the proposed amendments.

(d) In *Appeal by Grassroots Limited Re Lucky's Barcade and Social,*[18] the Commission considered an application filed two and a half weeks before the expiry of a continuing licence statutory period. The Commission observed that applicants should not expect successful applications, made towards the end of the key six month period, to be backdated. In that case, there was no prospect of the venue ever being ready to operate or the licence being granted by the end of the six month period.

(e) It is not for the Appellant to dictate the resources of the Secretary. Applicants cannot generally rely on urgency being granted, particularly where the Secretary has not agreed to process an application urgently and where considerable further work is required for the application to be granted.

(f) The Appellant knew of the Department's position that applications to amend class 4 venue licences relying on the *Waikiwi* decision received after 21 September 2023 would not be processed pending the anticipated High Court decision.

(g) There was no delay, and there was no refusal to process the application. The application was refused because the Secretary considered that the licence could not lawfully be amended.

Relevance of Christchurch City Council's position

48. In response to the Appellant's submission that the decision of Christchurch City Council not to adopt a relocation policy weighed in favour of exercising a discretion to backdate the licence or adopt a delayed implementation, the Secretary made the following submissions:

[18] GC09/20 at [37](a) and (c).

(a) What the territorial authority may have adopted as its policy if it were aware that *Waikiwi* would not continue to apply after the 2013 amendments was a matter of speculation.

(b) It is doubtful that the Secretary's advice concerning *Waikiwi* was material to the decision by Christchurch City Council not to adopt a relocation policy. As *Waikiwi* only permitted some very minor relocations, it would not have been a remedy for all situations where hardship may arise. Hardship was also not particularly relevant to assessing *Waikiwi* applications.

Applications must be considered in accordance with the law at the time of the application

49. The Secretary submitted that, in making his decision to refuse to amend the licence, he applied the law as it was at the time of the application, as the *FFNPA* decision declared what the correct interpretation of the Act had been since the September 2013 statutory amendments. Sections 67(1)(f) and 98(c), interpreted as declared in the *FFNPA* decision, required the Secretary to refuse to amend a licence unless territorial authority consent had been given and that is what he did.

Relocation effective upon notification

50. The Secretary submitted that the proposed relocation was not effective upon notification for the following reasons:

(a) A venue licence requires class 4 gambling to operate in a defined gambling area set out in a licence condition. The floor plan on the Venue licence recorded the address of the Venue as being 2 New Brighton Mall. If the floor plan of the New Venue were not identical in all respects, the Appellant would not be able to operate in accordance with that licence condition and therefore could not conduct class 4 gambling at the new site.

(b) Relocation has neither been approved by the Secretary in the form of an amendment nor effected in fact by the Appellant. The Appellant referred to a statement in the *FFNPA* decision that licences which had already been amended in reliance on the *Waikiwi* decision would not be invalidated. However, the licence had not been amended and the relocation had not taken place.

(c) It would be inconsistent with the scheme and purpose of the Act for class 4 venue licence holders to be able to relocate at will without approval by the Secretary.

(d) It would be inconsistent with *Waikiwi*, which concerned an application to amend a class 4 venue licence, to permit class 4 venue holders to move their venues without making an application to do so.

The FFNPA *decision is a statement of the law*

51. The Secretary argued that it is not open to the Commission to hold that the High Court erred in law or otherwise to disregard the High Court's declaratory judgment. As a party to the *FFNPA* proceeding, the Commission is bound by the decision and is generally bound to interpret the law as it has been declared by the High Court. The Commission cannot lawfully pre-empt the appeal process nor overturn High Court decisions.[19] The Commission's power to confirm, vary or reverse the Secretary's decision must be exercised consistently with the law.

Submissions in reply

52. The Appellant filed extensive reply submissions.

53. It was argued that:

(a) on 15 February 2024, the Secretary had wrongly failed to consider the amendment application on its merits in accordance with the then current law and that the Commission should "step into the shoes of the Secretary" at that date in deciding the appeal (rather than at the date of the formal decision notified);

(b) in doing so, the Commission should apply only decisions prior to 15 February 2024;

(c) a positive decision was possible prior to the *FFNPA* decision;

(d) the extent of the consideration actually given by the Department was unnecessary (as the key issue was distance); and

(e) it did not require the fitout or alterations to be completed at the new premises before amendment was granted or the submitted plan to be verified by reference to the physical premises (as the Secretary could rely on the certified accuracy of the application).

54. In that regard, it was submitted, supported by affidavit evidence, that the Applicant and venue operator had subsequently elected to use an existing room as the proposed gaming room (rather than the room originally proposed in the application) and had recently invited inspections by the Secretary and the Commission. The reply submission also referred to

[19] *TAB Kapiti Lights and Mangere Bridge* GC09/16.

the usual practice of the Commission approving amendments to casino floor plans on the papers.

55. The reply submissions observed that the Secretary had decided not to expand his submissions to address the *Waikiwi* criteria, in order to allow a final decision to be made by the Commission, and had suggested that, if the Commission were prepared not to apply the *FFNPA* decision, the application should be referred back to the Secretary for consideration of all relevant criteria. Doing so would take 3-4 months and, if being able to operate was a requirement, a further 4 weeks would then be allowed; that timeframe would deal with the obligations relating to operation of a class 4 venue licence. It was suggested that, if the *Waikiwi* decision were applied, the Venue should qualify for a non-operation extension agreement as redevelopment, rebuilding or earthquake strengthening. Examples of numerous past extensions for such matters were provided.

56. The reply submissions also addressed a number of other matters which the Secretary identified as not having been the subject of positive satisfaction (in addition to the start date), including harm minimisation and primary activity (in the current absence of an alcohol licence). In the latter regard, the Commission was asked to consider carefully the consequential implications of insisting on an alcohol licence, including the encouragement of anti-gambling advocates lodging meritless alcohol licence objections to delay their issue with the intention of permanent loss of a class 4 venue licence (with affidavit evidence of that practice provided). A licence condition was put forward to satisfy the primary activity ground.

57. In response to the Secretary's submission that a phase-in approach to the *FFNPA* decision had been adopted in fact, it was argued that, in addition to the decision to accept applications only up to a certain dates being unlawful (as the Secretary must apply the current law), a phase-in for fairness must follow rather than precede the decision effecting change and that doing so was appropriately the role of the Commission rather than the High Court. It was argued that the *FFNPA* decision did not exclude a subsequent phase-in application because it referred to the Secretary's communication to the class 4 gambling industry of 24 August 2023 without criticism (despite the Appellant's criticism just referred to above) and the Secretary's decision was made in fact on 15 February 2024; if the Commission concluded that an approval decision should have been made then, it would be excluded from the application of the *FFNPA* decision as a prior amendment. The reply submissions also challenged both the suggestion that phase-in should be restricted to unexpected decisions and that the *FFNPA* decision was unexpected.

58. The reply submissions argued that backdating to September 2013 was unnecessary and that backdating to 15 February 2024, the date of the decision of Mr Holmes, would be appropriate and effective.

59. The reply submissions clarified the argument regarding relocation being effective on notification as being limited to relocations to the same place as the current venue. In such cases, it was argued that nothing is required from the Secretary, similar to effecting a change of manager. Although venue licences include a defined gambling area, in practice "a cross-over period and a period of practical tolerance" is allowed and it is common for gaming machines to be moved and to be operated before a new floor plan is signed off, with the venue licence showing only the old plan, without any enforcement action being taken. If backdated to 15 February 2024, the Commission could direct that the venue licence have no gaming area or both gambling areas (as section 70(2)(h) refers to "areas").

60. The reply submissions concluded by saying that the preferable course would be backdating the venue licence (presumably meaning the amendment) to 15 February 2024, bringing the amendment into the exempt class of prior decisions. Such a decision would be consistent with the legal precedent that existed at that date.

Analysis

Application of the Waikiwi *and* FFNPA *decisions*

61. The Commission started by considering the 2013 *Waikiwi* decision and the 2024 *FFNPA* decision. The High Court's analysis in the *Waikiwi* decision, which predated the Gambling (Gambling Harm Reduction) Amendment Act 2013, primarily rested on the definitions of "venue" and "place" under the Act. There was no specific provision for relocation of venues under the Act prior to the 2013 amendment; a change of venue required a new venue licence. New venue licences required local territorial authority consent under section 98, in accordance with the authority's venue policy which was required under section 101. The effect of *Waikiwi* was that, provided that four criteria were met, insignificant movements were not a change of venue because, although the place of the venue might change, the venue itself remained the same. An immediate effect of *Waikiwi* was to allow societies to effect very minor site movements without the need for territorial authority consent under section 98 and to preserve a right, under section 92, to continue to operate the number of gaming machines allowed as at 17 October 2001 (being a number which could not be authorised in the case of new licences under section 94).

62. The Gambling (Gambling Harm Reduction) Amendment Act 2013, which amended the Act with effect from September 2013, was intended to facilitate, if territorial authorities adopted suitable policies, the movement of venues from higher to lower deprivation areas, despite

sinking lid policies aimed at both preventing any increase in the number of venues and the general replacement of existing venues. The amendments provided mechanisms through which societies could apply for relocations and preserve rights which they held under their current licences[20] and required local authorities to consider the adoption of new relocation policies (which had not previously existed) which had regard to the social impact of gambling in high deprivation communities within each district.[21]

63. As recorded in *Appeal by New Zealand Community Trust*, GC04/19, after the 2013 amendments, which introduced relocation policies, came into effect four months after the release of the *Waikiwi* decision, the Secretary initially took the view that the continuing application of the *Waikiwi* decision was unaffected by the 2013 amendments. However, in May 2018, he reconsidered his earlier view and refused to approve movement applications without territorial authority consent. On appeal, in decision GC04/19, the Commission considered that it was bound by the *Waikiwi* decision and held that movements which had been held not to be changes of venue in terms of the *Waikiwi* decision continued not to constitute changes in venue (relocations) under the Act, following the 2013 amendments, and therefore did not require territorial authority consent under section 98(c).

64. However, in the *FFNPA* decision released in February 2024, the High Court declared that, since September 2013, venue movements which had been permitted to proceed without territorial consent relying on the *Waikiwi* decision were changes in venue (relocations) under the Act as amended and therefore required territorial authority consent under sections 67(f) and 98(c).

65. Despite stating the effect of the law since September 2013, the *FFNPA* decision expressly preserved, pending any subsequent judicial review, licences which had already been granted or amended in reliance on the *Waikiwi* decision.[22] In preserving those licences, the High Court anticipated that the use of its discretion regarding remedies might mitigate the future impact of the retrospective invalidation of those licence grants or amendments.[23]

66. Against that background, the Commission is in no doubt that it is bound to apply the *FFNPA* decision as a correct statement of the prevailing law concerning venue movements since September 2013. It sees no lack of clarity or ambiguity in the decisions – the *Waikiwi* decision considered the Act prior to the 2013 amendments, while the *FFNPA* decision concerned the effect of those amendments on venue movements.

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[20] Section 97A.

[21] Sections 102(5A) and (5B).

[22] *FFNPA* decision at [44] and [47].

[23] At [46].

67. That conclusion disposes of several of the Appellant's arguments, namely that the *FFNPA* decision should not be applied because it is incorrect, unclear or ambiguous or that, if the law as at 1 February 2024 were applied, it would be other than as declared by the High Court in the *FFNPA* decision.

68. In the latter regard, there is an important distinction between the situation in *Appeals by New Zealand Racing Board re TAB Kapiti Lights and TAB Mangere Bridge*, GC09/16, on which the Appellant relies, and the present appeal. The context of the TAB appeals was unusual. They were brought against decisions by the Secretary refusing applications by reason of a statutory amendment which had not yet come into force. The Commission decided that it had been wrong to do so, and that the applicant was entitled to have the grant decision made in accordance with the law which applied at the date of the application. In order to preserve the position of the successful appellant, it ordered reconsideration of the applications on that basis, rather than applying the amendment which had since come into effect.

69. That is not the position in the present appeal. A major difficulty with the Appellant's argument is the assumed effect of the timing approach advocated. The *FFNPA* decision declared the legal effect of a statutory amendment which came into effect in September 2013, almost 10 years prior to the application; in contrast, the Commission's TAB decision concerned the effect of a statutory amendment that came into effect only after the application.

70. The argument also apparently relies on the Commission treating, as the relevant decision, the conclusion reached internally in the Department on 15 February 2024 and communicated informally, rather than the decision communicated formally on 17 May 2024, in response to which the appeal was filed. The argument is inconsistent with prior Commission decisions regarding what is required to engage its appeal jurisdiction, in which internal decisions (and informal advice of them) were rejected as amounting to a decision and holding that a decision by the Secretary requires a formal communication indicating finality of outcome.[24] That decision adopted the usual approach of the common law to the perfection of decisions, holding that such an approach was consistent with the text of the Act. There is no reason to think that the *FFNPA* decision should not be similarly understood in relation to the preservation of prior decisions.

71. The reply submissions addressed in detail a number of hypothetical matters which, it was argued, could have resulted in a positive final decision by 15 February 2024. However, it

[24] *Appeal by New Zealand Racing Board*, GC17/19.

is not necessary to address the conflicting submissions in that regard because no such decision was in fact made. Nothing in the present appeal provides a basis for the Commission to consider the merits of a prospective decision which was not, in fact, made.

72. That leaves for consideration the remaining arguments advanced by the Appellant, namely:

(a) The relocation of the Venue was effected upon notification of the change of address to the Secretary so no licence amendment was or is required.

(b) The Commission and Secretary can, and should, phase in the effect of the declaration in the *FFNPA* decision to ameliorate adverse consequences of its application to applicants, in a manner similar to the Commission's decision in the *Matata* appeal.

(c) The licence amendment should be backdated to a date prior to the *FFNPA* decision so that the *FFNPA* decision would have no application.

The first argument listed aims to avoid the application of the *FFNPA* decision entirely by treating the movement as not subject to any form of approval or consent and the rest ask the Commission to decline to apply the law as declared by the High Court by phasing in its effect or backdating the amendment.

No amendment necessary

73. The argument that venues can relocate by giving notice of a change of address gives rise to the proposition that no amendment to the licence was required so that, as long as the *Waikiwi* criteria were met in fact, the Appellant may operate from the new premises without the Secretary first amending the venue licence (despite an application to amend the licence having been made).

74. The argument that class 4 venue licence holders may relocate at will, without any form of approval from the Secretary, appears inconsistent with the *FFNPA* decision, as it concerns relocations, and more generally with the scheme and purpose of the Act but the argument was clarified in the reply submission as being confined to *Waikiwi* movements only with the suggestion that no prior confirmation of the criteria was required by the Secretary.

75. In the Commission's view, amendments to the licence were required before the Appellant could lawfully operate from the intended New Venue. The venue licence permits gambling to take place only in a gambling area defined by reference to a floor plan of the Existing Venue. At a minimum, amendment of the floor plan, which forms part of the conditions of the venue licence, was required prior to relocating lawfully to the New Venue. The position is tacitly accepted in the reply submissions, which endeavours to overcome the difficulty

arising from the floor plan with a reference to alleged past practices which did not enforce strict adherence to venue licence floor plans.[25] However, the Commission considers that there is a material difference between a legal right to operate without an approved floor plan and instances where that may not have been insisted upon in practice.

Phasing in or delaying implementation of the FFNPA decision

76. The phase-in argument asked the Commission to determine the appeal by delaying giving effect to the *FFNPA* decision to benefit applicants for whom its effect would be adverse. It drew an analogy with suggestions made by the Commission in concluding the *Matata* appeal[26] to allow licence holders a limited opportunity to recover positions which might have been lost, having regard to the Commission's decision on a particular aspect of licence content and continuity under section 92, as a result of contrary assumptions made previously across the entire class 4 sector and in guidance given by the Department. The opportunity suggested in the *Matata* decision involved seeking licence amendments which had previously been assumed not to be necessary by all concerned.

77. However, the Commission does not consider the present circumstances to be analogous to those in the *Matata* appeal for the following reasons:

(a) Most importantly, the *Matata* decision did not involve a declaratory judgment of the High Court. Rather the decision concerned implementation of a conclusion reached by the Commission in the course of the relief phase of an appeal. The issue had not been anticipated by the parties, was raised by the Commission only in the course of the hearing, and required a second round of submissions, in the course of which the appellant and the Secretary concurred. The Commission's decision was contrary to the submissions received from the parties and to longstanding industry practice encouraged by the Department. In reaching its decision regarding implementation, the Commission had express regard to the Act's statutory purpose, including the rights and interests of territorial authorities.

(b) In contrast, the issue determined by the High Court in the *FFNPA* decision was known to be contentious in advance of the amendment application and the decision itself. The Department had indicated a cut-off for consideration of applications which relied on the *Waikiwi* decision because a decision in the *FFNPA* proceeding was expected and had the potential to affect the applicability of the *Waikiwi* decision.

[25] See the reference to" "a cross-over period and a period of practical tolerance" in paragraph 59 above.

[26] GC03/21.

(c) The Act's purpose and the rights and interests of territorial authorities under the Act were critical to the *FFNPA* decision and delaying its implementation would be inconsistent with the primacy accorded to those.

(d) Like the Commission's decision in *Matata*, the *FFNPA* decision included a determination of the correct construction and application of certain provisions of the Act, but also an indicative ruling regarding the scope of its future application, including what should be assumed to be preserved pending any future judicial review applications. The High Court's ruling on the scope of the *FFNPA* decision's application to other applications would be incompatible with the subsequent adoption by the Commission of the different approach to its recognition and implementation, as urged by the Appellant. The Commission declines to do so.

Backdating the amendment to avoid application of the FFNPA *decision*

78. The argument asked the Commission to reverse the Secretary's decision and to backdate its effect on the basis that doing so would avoid the effect of the *FFNPA* decision. The argument referred to decisions in which the Commission has granted backdated licences in the course of appeals (that is, set a commencement date prior to the appeal decision). The power to do so arises from the Act expressly limiting the end date, but not the commencement date, of venue licences.

79. The practice of backdating the commencement dates of venue licences arose in the context of section 92, which provides that societies which have held class 4 venue licences sufficiently continuously since 17 October 2001 may continue to operate the originally approved number of gaming machines. Unlike section 98(b), which concerns when an application is made, section 92 primarily concerns continuity of licence holding. The point of backdating the commencement date of venue licences on successful appeals is to preserve the continuity of licence holding in appropriate cases.

80. The present case is quite different. Not only has backdating the commencement of a licence never been done to avoid the effect of a declaratory judgment of the High Court, backdating the commencement of a licence would have no effect on the applicable law. The Appellant's argument does not have proper regard to the declaratory nature of the *FFNPA* decision (the meaning and effect of certain statutory amendments since September 2013) and the statements in it about its express scope and effect. Unlike a statutory amendment, the *FFNPA* declaratory decision did not effect any change in the law on its release.

81. While prior misapprehension of the law has been referred to in the reasoning in prior decisions involving backdating, it has been only one of several factors considered in deciding to backdate commencement of a licence.

82. The Commission is not prepared to backdate an amendment to 15 February 2024. Doing so would conflict with the fact of a class 4 gambling operation continuing at the Existing Venue until 2 April 2024, there is no sound reason to backdate, and backdating would not render the *FFNPA* decision inapplicable, as the argument assumes.

Relevance of Christchurch City Council's position

83. The Appellant argued that, while the refusal to amend the licence is the result of Christchurch City Council not giving consent to the relocation, the lack of consent by Christchurch City Council was the result of a venue policy which assumed that movements relying on the *Waikiwi* decision would be unaffected. As a result, the Commission should either backdate the licence amendment or apply a delayed phase-in approach.

84. In the Commission's view, the application required by sections 67(1)(f) and 98(c) involves no assessment of the merits of the relevant territorial authority's venue policy. Whether territorial authorities were advised by the Secretary, either directly or by statements on the Department website, that the 2013 amendments did not affect the continuing applicability of the *Waikiwi* decision or that they considered that relocation policies were unnecessary, despite *Waikiwi* movements differing fundamentally from the kinds of movement that the 2013 amendments were intended to facilitate, is irrelevant to determination of the appeal.

Other matters

85. The Commission sees no need to address the other matters raised by the Appellant in the reply submissions, such as the start date, primary purpose, harm minimisation and non-operation. They were not raised by the Secretary as reasons for the decision under appeal, only in rebuttal of an argument that a positive determination could have been made in less than 15 days (which does not affect the outcome, for the reason noted in paragraph 71 above). The Commission does not consider that it was necessary for the Secretary to address those matters after they were raised in reply; the failure to do so is quite different to the failure to address the evidence before the Commission in the *Appeal by Dragon Community Trust Ltd* (GC07/24) and the comments made in paragraph 66 of that decision have no application to the present appeal.

Conclusion

86. The Commission may confirm, vary or reverse a decision of the Secretary on appeal; or refer the matter back to the Secretary with directions to reconsider the decision.[27] The Commission's powers on appeal are ultimately constrained by the Act.[28]

87. Consideration of the effect of the *FFNPA* decision on the present appeal involves two elements:

    (a) What effect does it have on the scope of the Commission's powers on appeal to amend the Appellant's licence?

    (b) What, if anything, did it preserve?

88. In the *FFNPA* decision, the High Court declared that small site movements previously permitted under the *Waikiwi* decision without territorial authority consent have been, since the Gambling (Gambling Harm Reduction) Amendment Act 2013 came into effect in September 2013, relocations under the Act as amended, requiring territorial authority consent under section 98(c).

89. The Commission cannot exercise its power to confirm, reverse, vary or refer back the Secretary's decision in a way which is inconsistent with the *FFNPA* decision. As a result, the Commission could only grant, or direct the grant of, the licence amendment application, without territorial authority consent, if the circumstances were excluded from, or preserved by, the *FFNPA* decision.

90. However, the *FFNPA* decision does not exclude or preserve applications which were in train at the time of the decision. While the references to the kinds of prior decisions to be treated as unaffected by the *FFNPA* decision covered only three formulations, "licences amended",[29] "amended licences granted"[30] and, potentially, "unlawful decision",[31] the most natural reading of the decision would limit the matters which should be treated as unaffected to prior decisions to issue or amend class 4 venue licences which had already been made and would exclude applications which were merely in train without a decision having been made. As no decision had been made to amend the licence prior to the

[27] Section 61(4).

[28] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410-411.

[29] *FFNPA* decision at [2].

[30] At [47]

[31] At [44].

FFNPA decision, for the reasons set out in paragraph 70 above, nothing in the *FFNPA* decision excludes its application to the appeal.

91. Pursuant to the *FFNPA* decision, all venue movements since September 2013 require territorial authority consent and there was no decision to amend the Appellant's licence which has been excluded from the application of the *FFNPA* decision The Secretary was therefore required to be satisfied, under section 67(1)(f), that the Appellant had obtained territorial authority consent for the move and was not so satisfied. On appeal, the Commission is in the same position as the Secretary. Accordingly, it confirms the Secretary's decision to refuse to amend the Appellant's licence.

Susan Hughes KC
Gambling Commissioner

for and on behalf of the
Gambling Commission

22 August 2024