

IN THE MATTER of the Gambling Act 2003
AND of an application by
**DUNEDIN CASINOS
LIMITED** to approve
construction of a smoking
area

BEFORE THE GAMBLING COMMISSION

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

Date of Application: 7 December 2004 (filed 8 December 2004)

Date of Decision: 15 December 2004

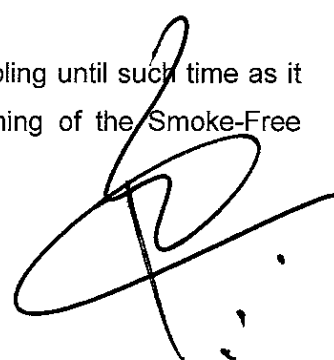
Date of Notification of Decision: December 2004

DECISION

**ON APPLICATION BY DUNEDIN CASINOS LIMITED
TO APPROVE CONSTRUCTION OF A SMOKING AREA**

Application

1. Dunedin Casinos Limited (the "**applicant**") applied to the Gambling Commission (the "**Commission**") under section 139 of the Gambling Act 2003 (the "**Act**") to:
 - (a) amend condition 1.2 of its casino venue licence to provide the Commission with powers to approve changes to the design, development, construction, fitout and operation of the casino;
 - (b) grant approval to the construction of a smoking area as described in a plan prepared by architects Warren & Mahoney numbered A1.4 showing an area marked "new smoking balcony"; and
 - (c) provide that the smoking area is not to be used for gambling until such time as it ceases to be used as an "open area" within the meaning of the Smoke-Free Environments Act 1990.

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Key issues

2. The principal issues for consideration of the Commission included whether:
 - (a) it was appropriate for the Commission to adopt the powers formerly exercised by the Casino Control Authority (the "**Authority**") under condition 1.2;
 - (b) the proposal complied with the statutory criteria set out in section 139(2) of the Act, and the requirement not to increase opportunities for casino gambling, in particular; and
 - (c) to exclude the smoking area from the designated gambling area.

Licence condition

3. Condition 1.2 provides as follows:

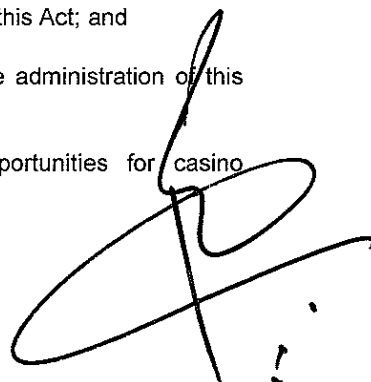
The licence holder shall ensure that the casino is designed, developed, constructed, fitted out, commissioned for operation and operated generally in accordance with the licence holder's application as submitted to the Authority, subject to such changes as the Authority may from time to time approve or require in writing.

4. The amendment sought by the applicant was as follows (emphasis added):

The licence holder shall ensure that the casino is designed, developed, constructed, fitted out, commissioned for operation and operated generally in accordance with the licence holder's application as submitted to the Authority, **subject to changes, or which may be approved by the Commission from time to time in writing**.

Statutory criteria

5. 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 Commission's own initiative, or at the request of the Secretary of Internal Affairs (the "**Secretary**").
6. 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)

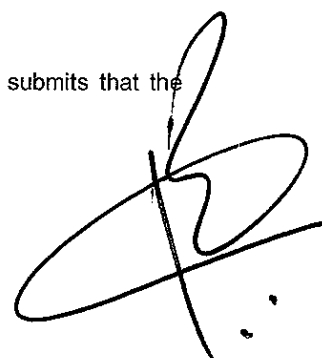
Submissions by the applicant

7. The proposal involved the construction of a smoking "balcony" inside the existing façade of the building in which the casino is located, in order to preserve the exterior of the building. The casino is situated in a historic building and its façade is protected under the district plan.
8. The area where the balcony is proposed to be constructed is currently within the designated gambling area and, the applicant submitted, should remain so. The applicant stated that the gambling area was limited, due to physical constraints imposed by the building. The applicant was reluctant to surrender part of the gambling area or reduce its size in case, in future, the balcony ceased to be used as a smoking area and the licence holder wanted to reintroduce gambling activities there. The applicant noted that it would almost certainly wish to reintroduce gambling if the smoking balcony proved unsuitable as an "open area" for the purposes of the Smoke-Free Environments Act. The applicant considered that if the area was excluded from the gambling area, and it was necessary to have to apply to the area redesignated, it may well be viewed as increasing in the opportunities for casino gambling.
9. The applicant indicated it would consent to a condition prohibiting gambling on the balcony while it is being used as an "open area" within the meaning of the Smoke-Free Environments Amendment Act 2003.
10. The applicant submitted that the application was consistent with the requirements set out in section 139(2) of the Act. In particular, it was noted that it was not intended to either increase gambling opportunities, nor increase the floor space designated as gambling area.
11. The applicant submitted that there are no affected parties to the application, and lodged with its application a letter of consent from Dunedin Casinos Management Limited, the operator of the casino.

Submissions to the Secretary

12. The Secretary submitted (by letter dated 13 December) that:

In order to be consistent with previous decisions, the Secretary submits that the smoking balcony should be excluded from the gambling area



Analysis

13. Regarding the proposal to provide itself with the same approval powers exercised by the Authority under condition 1.2, the Commission noted that in previous decisions it had accepted that it could make conditions which contemplated a level of administrative approval under casino licence conditions. It was recalled that the Commission had indicated in those decisions that it did not consider its power to do so to be unconstrained. It had been determined by the Commission that, in any given instance, the need to give primacy to statutory requirements (including consultation requirements with the Secretary and affected parties) needed to be balanced by the need for the Commission to operate efficiently.
14. In the circumstances, the Commission determined it to be appropriate to provide itself with the approval powers under condition 1.2 previously exercised by the Authority, and to amend condition 1.2 accordingly. The Commission noted in particular that:
- (a) it was anticipated that the design of the casino premises may be revised from time to time, and that it may be appropriate to provide an approval mechanism which did not involve amendment of the licence conditions in all circumstances;
 - (b) the Commission had amended similar licence conditions relating to the Auckland and Christchurch casinos to provide itself with the same approval powers formerly exercised by the Authority; and
 - (c) condition 1.2 may be the subject of further review and amendment in the context of the general review of licence conditions which the Commission had initiated.
15. In respect of section 139(2) criteria, it was noted that the construction and use of the smoking balcony would not give rise to an increase in opportunities for casino gambling as it was proposed that gambling activities be prohibited while the area was in use as a smoking area (thereby securing an effective reduction in the area within which gambling could occur).
16. The Commission noted the submission of the Secretary, proposing that the area be excluded from the designated gambling area for reasons of consistency. The Commission considered that consistency with its earlier decisions (relating to smoking decks at SKYCITY Auckland Casino and smoking areas at Christchurch Casino) was achieved by ensuring the proposed smoking area was not used for gambling activities.
17. The Commission considered the question of whether it was necessary for the approval of the Commission to be obtained if and when the applicant sought to cease using the area as a smoking area, and to reintroduce gambling activities. The Commission concluded

that increasing the space used for gambling activities would not, in the circumstances and of itself, lead to an increase in opportunities for casino gambling.

18. The Commission determined that if and when the area was to be reused for gambling activity, that the applicant should be required to notify the Commission and the Inspectorate in advance.

Decision of Commission

19. The Commission determined that there were no affected persons and was satisfied that the proposal was consistent with section 139(2) criteria. It decided unanimously to:

- (a) amend condition 1.2 of the applicant's casino venue licence to read as follows:

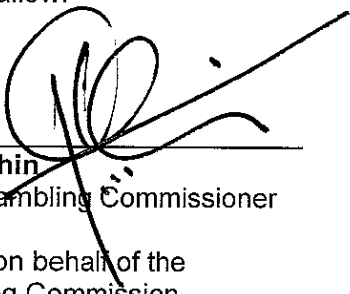
The licence holder shall ensure that the casino is designed, developed, constructed, fitted out, commissioned for operation and operated generally in accordance with the licence holder's application as submitted to the Authority, subject to such changes as the Authority may have approved or required, and subject further to such changes as the Commission may from time to time approve or require in writing.

- (b) approve changes in the design of the casino premises to permit the construction and use of a smoking balcony, as shown on plan A1.4 prepared by Warren & Mahoney, dated 7 April 1999;
- (c) grant approval on the basis that gambling activities are prohibited on the smoking balcony from the time it is commissioned for use as an "open area" within the meaning of the Smoke-Free Environments Act 1990 until such time as it ceases to be used for this purpose;
- (d) require the applicant to provide the Commission and the Inspectorate with 5 working days notice in writing of the date it proposes to commission the balcony for use as a smoking area, and of the date (if any) it proposes to cease to use the smoking balcony as an "open area" within the meaning of the Smoke-Free Environments Act 1990; and
- (e) require that, having advised the Commission and Inspectorate that it no longer intended to use the area as a smoking area, the applicant would be unable to revert to using the balcony as a smoking area without obtaining further approvals from the Commission.

Right of appeal

20. Pursuant to section 235 of the Act, a person affected by this decision may appeal the 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.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

22 December 2004