SUBMISSIONS ON BEHALF OF

GLOBAL GAMING VENTURES (SOUTHAMPTON) LIMITED

AND

GLOBAL GAMING VENTURES LIMITED]

IN RELATION TO A SPECIAL SCC LICENSING COMMITTEE HEARING ON 9TH APRIL 2015

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1. Introduction

Southampton City Council ('**SCC'**) has decided to convene a special meeting of its Licensing Committee on 9th April 2015 to consider three issues relating to the future conduct of the Gambling Act 2005 Large Casino Competition (**the 'Competition'**). SCC has asked that all parties detail their position in respect of the issues in hand in advance of the hearing.

Accordingly, these submissions are made on behalf of Global Gaming Ventures (Southampton) Limited ('**GGVS' or the 'GGV Applicant'**) which is an affiliated company of Global Gaming Ventures Limited **('GGV')**.

2. Summary of the GGV Applicant's views on SCC's Key Questions

The GGV Applicant's submissions in relation to the key issues raised by SSC can be summarised as follows:

Issue raised by SCC	*GGV Applicant's Submission*	*Reference*
1. In the case of each of the applicants, may they show the proposed casino on any or all of plots WQ2, WQ3 or WQ4 at Stage 2 of the casino licence competition	**No. Applicants may not show the proposed casino on any or all of plots WQ2, WQ3 or WQ4 at Stage 2** The premises for which the licence is issued after completion of Stage 2 must be the same premises as those described in the Stage 1 application. This, in turn, means that the premises must be both (1) the same as set out in the narrative description of the premises in the Stage 1 application and (2) located within the boundaries indicated by the applicant on the plans accompanying such Stage 1 application. SCC's own legal advice from leading counsel is quite clear on this. The matter was also addressed in detail in the Leeds casino competition (where GGV was a party) and a clear decision was arrived at that the casino location could not move between Stage 1 and Stage 2. It appears from the plans submitted on Page 11 (in Appendix 1) of the Licensing Committee papers for the hearing that plots WQ2, WQ3 and WQ4 are not even contiguous with the Royal Pier Waterfront ('**RPW**') site	**Para 6** **Para 7** **Authorities Bundle (Leeds Decision)**

	itself as a significant part of Mayflower Park is located between them. GGV submits that there is accordingly no basis on which these blocks of land could be regarded as forming a single premises with the RPW site even if the relevant applicants had tried to define it in Stage 1 (which, in fact, they did not do anyway, presumably because they, like GGV, were unaware that this additional land was related to RPW and/or potentially available as a location for the casino). GGV also notes that WQ2,WQ3 and WQ4 do not appear to form part of 'the site' referred to in the disclosure in Para 15.12 of SCC's Gambling Policy regarding a possible *ex ante* preferred site (albeit that such preference must, in any event, be disregarded by the Licensing Committee for the purposes of the Competition).	
2. *Does SCC have a discretion to accept new applications following the completion of Stage 1 and, as is the case here, the commencement of Stage 2 of the competition*	**No. There is no discretion to accept a late Stage 1 application after Stage 2 has commenced. There is also no discretion anyway to accept a late application for the purpose of improving the prospects of one applicant (or class of applicant) in the Competition.** The limited discretion provided to SCC under the Gambling (Inviting Competing Application for Large and Small Casino Premises Licences) Regulations 2008 ('the Gambling Act Regulations') cannot and does not extend to these circumstances. A discretion to accept a late Stage 1 application cannot exist after Stage 2 has started. This is clear, if for no other reason, because Stage 2 does not start until after the expiry of the period for appeals and challenges arising from Stage 1 which would clearly not be possible in relation to a late Stage 1 application accepted after Stage 2 has commenced. Furthermore, in the absence of re-opening Stage 1, a late applicant with a new or changed scheme would entirely circumvent the regulatory tests in Stage 1 The position here is even worse. After the hearing on 16th December 2014, the SCC Licensing Committee stated that Stage 2 would '*commence on 1st January 2015 and close on 16th April 2015'*. Given that the Licensing Committee hearing on 9th April cannot consider any substantive late applications (since there is none disclosed so far) any such applications would necessarily be submitted or determined not only after the	**Para 9**

	commencement of Stage 2 but after Stage 2 has actually closed.	
3. If so, should the Council exercise its discretion to accept such applications	**No. The situation here is one in which the exercise of a discretionary remedy would be completely unjustified and perverse.** As stated above, GGV is clear that SCC has no discretion to accept late applications at this point anyway. But even if it were accepted (and it is not) that such a discretion exists, there are numerous reasons why SCC should not exercise it in this particular case. These reasons include: • The overriding requirement of proceeding with a fair and transparent Competition process and not unfairly favouring one applicant or class of applicant. • Avoiding yet more delay (perhaps 5-6 months minimum for representations, Stage 1 hearings and possible appeals) to an already excessively prolonged and expensive process • The suggestion has arisen far too late in the process – just a few days before the end of Stage 2 and six months after the end of Stage 1. Accordingly, any late applications could only be considered after Stage 1 and Stage 2 have both closed. • SCC may well be asked to exercise its discretion repeatedly to allow late applications by several different parties (though probably for only one underlying scheme). Each of these applications will need to be considered separately. • The conduct of the potential late applicants is not such as to merit a discretionary remedy since the problems, (insofar as we can tell) appear to be of their own making (or that of their developer partner). • A lack of candour and transparency by the prospective late applicants about what the problem at RPW is, showing absence of the openness and good faith that is required of those seeking discretionary assistance • The RPW applicants have taken months to raise the issue of a discretionary late Stage 1 application with SCC when they fully knew that time is of the essence in a casino competition.	

3. Importance of fairness and transparency

SCC is legally required to conduct the Competition in accordance with the DCMS Code of Practice and the principles of natural justice. The Competition must be fair (and seen to be fair) and transparent and properly conducted.

At the hearing on 16th December GGV argued, and the Licensing Committee agreed, that the rules of the Competition (including the timetable) could not legitimately be changed midway through the process simply for the benefit of one applicant, sub-set of applicants or an individual development scheme.

The full text of this ruling is contained in the combined Authorities Bundle supplied to the Licensing Committee on behalf of all of the Competition applicants, however we particular draw your attention to the following extract:

'The Committee rejects the proposal that the procedure be aborted. The Committee has no reason to believe that the framework which it adopted for the granting of casino licences is unfair, and any challenge to it should have been brought when it was adopted. To abort the procedure now would, as GGV submitted, potentially allow yet further applicants into the competition, which would be unfair on existing applicants, and would result in a great deal of aborted costs.'

Adding extra 'competitive tension' or the uncertain prospect of possible additional benefits are also not a legitimate reason for making the process unjust and/or unfair. This remains the case today, just as it was in December, even though some of the RPW applicants (the '**RPW Applicants**') have now re-badged their original December suggestions (delay or starting again) under a new name (discretionary re-opening of Stage 1)

No reason has been advanced by the RPW Applicants or Lucent for the proposed move to the new land at WQ2, WQ3 and WQ4. We surmise that this failure to disclose is because the move arises, *inter alia* from fatal flaws or other material weaknesses in the earlier RPW scheme and the RPW Applicants are concerned that disclosure of these fatal flaws or other material weaknesses in the RPW scheme will undermine their chances in Stage 2 of the Competition, whatever the outcome of the hearing on 9th April.

This lack of transparency and apparent gaming of the system is completely at odds with the clean hands that should be expected of someone asserting that they should be the beneficiary of a discretionary remedy. This is particularly the case if some of the RPW Applicants have privately informed the SCC Licensing or Economic Development teams (or parts thereof) of the problems with the RPW site whilst withholding the same information from other competing applicants.

4. SCC preferences outside the Competition process must be disregarded

SCC's published Gambling Policy Para 15.12 discloses an *ex ante* policy preference to see the casino licence awarded to RPW. We trust, however, that it is accepted all round that any such SCC preference **must not** be allowed to influence the conduct of the Competition by

the Licensing Committee which must manage the Competition on an open and fair basis in accordance with the statutory provisions. 1 This is also very clearly stated in the Gambling Policy. We reproduce the following extract to show exactly what was set out:

'15.12 Southampton City Council intends to enter into a contract with development partners for the Royal Pier development and a casino element is intended to be part of the Royal Pier development with an application for a large casino premises licence forthcoming in relation to the site. This information is set out here so as to ensure that potential applicants are aware of this likelihood so as to ensure transparency. As a consequence, there can be no reason for the procedure to be or be perceived to be unfair in any way or perceived to be unfair by any applicant.

15.13 The Licensing Authority's decision will not be prejudged and where advice is sought, this will be impartial advice.'

We submit that SCC's preference for RPW was determined largely or entirely on the basis that the casino was to be situated in or near the building referred to in the plans as RP2.1 on the southern tip of RPW and on land to be reclaimed from the Test as part of a large regenerative scheme there. We submit that this policy preference did not extend to and does not extend to the existing land on the other side of Mayflower Park and referred to as WQ2, WQ3 and WQ4.

There are a number of clear reasons why we draw this conclusion, including the very name 'Royal Pier ***Waterfront'*** (our italics). (WQ2 WQ3 and WQ4 are not on the waterfront). In discussions with SCC officers over many years and at earlier hearings (e.g. at Stage 1 or on 16th December 2014) no reference was ever made to a location outside the RPW site (as generally understood).

Furthermore we have been told that SCC has regularly referenced its policy preference with statements about reclaiming land from the River Test, regeneration of the waterfront area, moving the Red Funnel terminal and 'anchoring' a major infrastructure project.

GGV asserts that these statements are not consistent with the use of the WQ2, WQ3 and WQ4 land and therefore the SCC Gambling Policy disclosure in this context did not and does not extend to having a preference for a scheme outside the RPW site itself (i.e. outside the areas marked RP on the plan in the Licensing Committee pack). A scheme in a different location does not become an RPW scheme merely because the developer calls it an RPW scheme.

We also note that all five RPW Applicants appear to have believed that the possible locations for a casino on the RPW site did not in any event include land on the other side of Mayflower Park such as WQ2, WQ3 and WQ4.

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[1] *SCC's preference for RP is a legally irrelevant consideration for the purposes of the Competition and must not be applied so that it precludes the proper exercise of discretion. (R v Harrow LBC ex p Carter (1992) 91 LGR 46.)*

For example, Aspers clearly identifies the address and location of its proposed casino as a 'Casino Location Zone, Boundary of Premises' which is a much larger area than its 'Proposed Casino Demise' and which therefore allows for some adjustments during final master-planning and constructions. However this 'Casino Location Zone goes nowhere near WQ2, WQ3 and WQ4. We submit that this is because (a) Aspers did not anticipate the casino ever being on this land and (b) including this land in its blue-lined 'Casino Location Zone' would have left the application open to challenge on the basis that this could not reasonably have been regarded as a single premises. We submit that Genting's application may have been informed by a similar analysis.

That is why none of them properly referenced such land in their narrative descriptions at Stage 1 and/or the accompanying redlined and/or blue-lined plans and is also why the careful guidance given by SCC and Lucent in this regard did not identify or specify or otherwise direct applicants to consider this land. GGV can confirm that until it received the copy correspondence from SCC earlier this month it had no idea that any of the parties was considering the WQ2, WQ3 and WQ4 land as a possible location.

It is equally unclear whether any such SCC preference for RPW has been reviewed in light of the unspecified recent and continuing delays and other problems with the RPW scheme generally, the existence of which, we presume, SCC like everyone else was unaware of until recently. Whether SCC would maintain a preference for RPW in its Gambling Policy whilst knowing of these problems is unclear. Fortunately, however, the Competition is there to permit the Licensing Committee to make a proper and informed judgement about the maximisation of the public benefits with full knowledge of these issues.

The relevance of the above is that GGV would normally expect a council to reject out of hand a request at this point from an existing or prospective applicant which wanted either to move its application to a new location or which asked for a discretionary acceptance of a new Stage 1 application. We submit that the Economic Development Department of SCC has bent over backwards to accommodate the RPW and the RPW Applicants with the risk that such applicants will be perceived to get a more sympathetic hearing than they deserve or other applicants would receive.

In any event though, the preferences of SCC (whether fair and legitimate or not and up to date or not and covering WQ2, WQ3 and WQ4 or not - and we submit in each case they are not) **must not** be allowed to influence the Licensing Committee's management of the Competition. [2] This must be managed impartially in accordance with the legislative rules. This applies to consideration of moving sites between Stage 1 and Stage 2, to using discretion to accept a late application and also to any consideration of a decision to stop the Competition and start a new one for the purpose of permitting a new scheme (e.g. a 'WQ2 Casino') to compete with the existing applicants. This would be obviously and manifestly

[2] *Neither the existence of a development agreement between SCC and Lucent at RP, nor SCC's stated preference for the RP site should affect the exercise of their discretion. A claimant may challenge an exercise or non-exercise of discretion by a local authority on the ground that the discretion has been fettered by an agreement between the authority and a third party.* (*R v Liverpool Corporation ex p Liverpool Taxi Fleet Operators' Association [1972] 2 QC 299*)

unfair as the Committee itself recognised on 16th December 2014 in the decision referred to above.

In this context we note two further points:

a. SCC Website

The official website of SCC currently contains the statement that *'The new casino is likely to be located at the proposed £450 million Royal Pier development although two of the bids were for different sites'*.
(http:www.southampton.gov.uk/news/article.aspx?id=tcm:63-365043).

GGV respectfully considers it most unattractive that other parts of SCC are second guessing the eventual decisions of the Licensing Committee and the outcome of the Competition in this fashion. There is no basis upon which to decide that such an outcome is 'likely' or otherwise.

b. Separation of functions

GGV continues to be deeply troubled by the inability of SCC to maintain a proper separation between its different functions. After the most unfortunate private meeting between SCC Licensing and Lucent/Kymeira on 30th September we thought this would be well understood and respected. Yet we note, for example, that on 26th February 2015 an officer of the Economic Development part of SCC sent the legal advice of SCC's QC about licensing matters to Lucent, the RPW developer (which is also the parent company of an RPW Applicant). The officer asked them whether '*you intend to share [the advice] with [the other applicants] or whether you wish us to do so*'. It should have been obvious that all applicants were entitled to see the advice contemporaneously and should not have to rely on Lucent to supply it. Lucent did not, in fact, share the advice and it was two weeks later that other applicants received it from the Legal and Democratic Services unit of SCC (which we would have expected to deal with the matter in any event).

5. The process has been too protracted and further delays are unacceptable

The casino premises licence which is the subject of the Competition was authorised by the Gambling Act 2005 which received Royal Assent 10 years ago next month. By any standards, the process of issuing the Southampton licence has been extraordinarily prolonged. Whilst a part of the delay is for reasons outside the control of SCC, it should be noted that that the first of the Gambling Act 2005 casinos (Newham) actually opened in late 2011 (three and a half years ago). Southampton is still some way from issuing the licence let alone getting to the point at which construction can commence or the casino can be opened. This results in a loss of benefits to SCC and the city and its citizens as well as prejudice to the applicants who legitimately wish to progress their projects in a timely fashion.

Public policy requires that at some stage the importance of reaching a decision acquires primacy over other considerations. This is why the Competition is structured as it is, with a strict and public timetable and clearly defined procedures. It is unacceptable that this process should be abandoned or delayed to assist one scheme/group of applicants who

want to re-jig their applications in order to improve their chances in Stage 2. This point was addressed in the SCC Licensing Committee hearing on 16th December 2014 and, we are pleased that the Committee concurred and chose to press on with the Competition.

6. <u>Stage 1/Stage 2 premises must be the same and redlining is fixed</u>

We do not propose to repeat the advice of SCC's QC on this matter as set out clearly and in detail in the letter of 26th February from Ms Compton of SCC to Lucent. We note that Mr Kolvin, who advises SCC, is the most eminent barrister active in this field and has been involved in most of the Gambling Act 2005 competitions. We understand his reasoning and regard his main conclusions as being an accurate statement of the settled law as it is now well understood by casino operators (including GGV) and many other specialist lawyers and professionals in the UK casino industry.

GGV recognises that the rules regarding the location of casinos are particular to the political and legislative circumstances under which these licenses came into being. GGV's principals were involved in discussions with DCMS Ministers and other legislators at the time the Gambling Act 2005 was being finalised and taken though parliament. Gambling Act 2005 casinos (unlike earlier Gaming Act 1968 casinos) are not permitted to move or to relocate. The point at which the location is 'locked in' for this purpose must necessarily be Stage 1.

The public policy reason for this is partly that councils should not be placed in a position whereby they approve one scheme only to find pressure later for the licence to be used in a different scheme. However it is also about the need to get to a proper and timely conclusion. If new or amended schemes could arise during Stage 2 then it is obvious that fairness and due process would require that such new or amended schemes would have to go through the same Stage 1 tests as other applications. If this were not the case then the Stage 1 regulatory tests would be entirely circumvented. However replaying Stage 1 for the new scheme entering the Competition during Stage 2 would require a period for representations (28 days) and a period for appeals (3 months). Since Stage 2 cannot start (or re-start) until the appeals period has ended, there would potentially be significant further delay with the risk that yet further delays might follow if other parties then changed their schemes. There would be no end to the process.

It therefore follows that the Stage 2 applications must be for the same scheme as the Stage 1 applications. The shift by the RPW Applicants to WQ2, WQ3, and WQ4 would involve moving several hundred metres to a location which is actually closer to GGV's Watermark site than it is to the original RPW casino site. The WQ2, WQ3 and WQ4 land would seem not to be contiguous to the remainder of the RPW site as there is a part of Mayflower Park in the middle.

We consider that, on the basis of the information currently available to us, the lack of physical proximity and commercial or other linkages between WQ2, WQ3 and WQ4 and the earlier RPW casino location would not permit these to be legitimately regarded as one single premises for the purposes of the Competition, even had the RPW Applicants tried to describe them in this way in their applications (which they did not).

All or most of the RPW Applicants did not, we submit, even know that the WQ2, WQ3 and WQ4 land was either available as a possible site for the casino and/or related to the RPW development proper at all when they submitted at Stage 1. For example, Aspers gives the address of its proposed casino as 'Casino Location Zone, Royal Pier Waterfront' and then shows the Casino Location Zone as being a (large) area covering the southern part of the RPW but terminating hundreds of yards from WQ2, WQ3 and WQ4. There is no basis to argue that premises described as being at a marked and delineated 'Casino Location Zone' on the southern tip of RPW actually extend to cover a plot of land on the other side of Mayflower Park and which is most clearly not in the indicated 'Casino Location Zone'.

The Committee will be aware that certain outside parties (including the Southampton Commons & Parks Protection Society, the City of Southampton Society and the Friends of Town Quay Park) sought to make representations about the RPW Stage 1 applications. It might be expected that some of these bodies or others, will seek to make similar (or different) representations about the new proposed location at WQ2, WQ3 or WQ4 (which immediately adjoin Mayflower Park). How is this to occur if the RPW Applicants' schemes change privately between Stage 1 and Stage 2? Sending these parties details of the hearing on 9th April will not suffice, if for no other reason than (1) there is not enough time for them to consider the matter and frame their representations and (2) there may also be other unidentified parties who wish to make representations and who have not been contacted.

It is clearly unrealistic to imagine that representations could only be made at the point when the premises licence has been granted and is being varied to bring it into line with the new (and completely different) scheme because if the representations were found to be valid at that point then the entire Competition would need to start again. That cannot be correct.

7. The Leeds Case

GGV was itself involved in the similar situation which arose in 2013 in Leeds and which was argued at length by leading counsel in front of the Licensing Committee there. The Leeds Licensing Committee Decisions are included in the Authorities Bundle.

In Leeds, the applicant (GGV) wished to change its casino location to a different part of the same Eastgate Development because the developer (Hammerson – who are also GGV's partners in Southampton) had altered the scheme phasing in the period between Stage 1 and Stage 2 of the casino competition. The intention was to operate the casino in one part of Eastgate initially and then move it back to the original preferred space when construction had been completed some years later.

The move being sought by the applicant was to a location to the other side of a road (Eastgate) which runs through the middle of the Eastgate scheme (which is a very large and regenerative two phase urban retail and leisure project). The new proposed location was, in fact, just 50 yards or so north of the original location and was part of the same single mall scheme.

The decision in Leeds was very clear though and it was that the Stage 2 location had to be on 'all fours' with that described at Stage 1. No moving of the location was permitted.

Leeds Council was also asked to consider exercising discretion and accepting a late Stage 1 application to permit the applicant to submit a revised redline including an additional part of the Eastgate complex. The application was made during Stage 2 of the Leeds competition (just as in Southampton). The application was rejected.

For the record, what GGV and Hammerson did after this decision was to accept that this was the law taking its course. GGV went on to win the Leeds casino competition with a scheme on the original location and construction of the renamed 'Victoria Gate' complex has now been underway for well over a year with the casino opening scheduled for September 29th 2016.

8. Impossible to distinguish the Genting application

Mr Kolvin's advice to SCC tentatively floats the idea of a distinction between the Genting Stage 1 application for RPW and the other RPW Applicants on the basis that the Genting plans show a boundary line which apparently includes the WQ2, WQ3 and WQ4 land.

We consider that any attempt to draw such a distinction is doomed to fail because the Genting Stage 1 application states:

> ***'The application relates to the following premises or proposed premises:***
>
> ***Casino premises to be known as Genting Casino and to be constructed on plot of land to be reclaimed from the River Test (and expected to be situated at building identified as Building RPW2 1) Royal Pier Waterfront, Mayflower Park, Southampton SO14 2AQ (and as more particularly shown on the site plan accompanying this application)'***

The plan accompanying the application identifies the Genting Casino site by means of a blue-lined area on the southern part of the Royal Pier and which is captioned '*Expected boundary or perimeter of the casino*'. This location is consistent with the narrative description.

We consider that claiming that the WQ2, WQ3 and WQ4 land falls within the narrative description of the premises given above is a complete non-starter. It is quite obvious that no reasonable person reading this description of 'reclaimed land' 'at building RPW2.1' 'as shown on the plan' could conclude that it actually means a plot of non-reclaimed land on the other side of Mayflower Park a quarter of a mile or so to the North and nowhere near Building RPW2.1 or the 'expected boundary or perimeter of the casino' as shown on the plan and indeed not even contiguous with the RPW site itself.

The casino site boundary is, in reality, clearly the blue line, which is no less effective for being blue rather than red. The red line has no practical significance because it is not connected either to the narrative description or to the mind of the applicant. The words in the legend which suggest that the red line is the boundary of the 'premises' do not change this because the legend gives no definition of what this means and in any case the legend cannot overrule the much more detailed narrative description of the premises in the substantive text.

If the applicant wanted the boundary of the premises for Competition purposes to be this red line then, as a minimum, the narrative description would have needed to be consistent with this. As noted above, however, we submit that the enlarged site (including WQ2, WQ3 and WQ4) is, in any event, obviously not capable of comprising a single 'premises' for the purposes of the Competition as there is no physical or meaningful commercial linkage between WQ2, WQ3 and WQ4 and the earlier specified RPW location. All or most RPW Applicants appear to have been entirely unaware in any event that this land was a possible casino location and/or formed part of the RPW scheme when they were preparing their Stage 1 applications. If they were aware, then we suggest that presumably they excluded the land from their premises description because they considered that this land could not possibly form a single premises with RPW for the purposes of the Competition.

9. <u>Lack of continuing SCC discretion</u>

The Gambling (Inviting Competing Applications for Large and Small Casino Premises Licences) Regulations 2008 ('the Gambling Act Regulations') do provide some discretion for councils to accept late applications for Stage 1.[3] This is not in contention. The same argument about using a discretionary late application to move location was advanced (unsuccessfully) in the Leeds case. However, the discretion is not an unlimited discretion and we submit that there is manifestly no discretion at all to accept a late application in the following circumstances:

a. <u>After Stage 2 has commenced</u>

The structure of the Competition is based on the assumption that Stage 1 has been completed before Stage 2 commences. There is a gap between Stage 1 and Stage 2 which is there to make sure that Appeals from Stage 1 have been dealt with and are resolved before Stage 2 starts in order to make this even clearer. The Stage 2 process is not to be cluttered up by holdover issues from Stage 1.

The Licensing Committee hearing on 16th December 2014 set the dates for Stage 2. The applicants were notified by Mr Grout on 1st January 2015 that *'this part of the process would commence today, 1st January 2015 and close on Thursday 16th April 2015'.* SCC's website currently states that '*On 16th December 2014 the Licensing Committee decided that stage two of the process will commence on 1 January 2015 and close on 16 April 2015 at 17:00*'.

As far as we are aware, no late applications have so far been made and the Licensing Committee is not expecting to consider any substantive applications on 9th April and will not be meeting again before 5pm on 16th April. Therefore any actual late application now would actually be submitted or determined after the closing of Stage 2 as well as Stage 1.

[3] *Statutory power conferred on local authorities for public purposes can validly be used only in the way that Parliament, when conferring that power, is presumed to have intended*. *<u>(R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd. – [1988] A.C. 858)</u>*

The process becomes completely unworkable if a council's discretion to accept a late entry extends into, let alone beyond, Stage 2. If the commencement of Stage 2 is not the backstop for a possible exercise of discretion what is the actual backstop date? Does it run for ever? What is the process? Should the entirety of Stage 2 be automatically stopped or recommenced when a late application is accepted? Or when the late application is made? Is there a prohibition on parties bringing back failed Stage 1 applications in a new form during or after Stage 2 and hence do failed Stage 1 applicants get a second or third chance to improve their applications? Could the licence actually be awarded whilst the Appeals process from a late Stage 1 applicant is still underway?

The complexities and risk of unfairness arising from the scenarios set out above show exactly why there was never any intention by the legislators that Stage 1 could be re-opened retrospectively during Stage 2 (or later) to allow in new schemes whether these are completely new ones or re-worked versions of troubled earlier applications.

b. <u>For ineligible purposes</u>

We submit that the discretion to accept late applications is there to permit applicants to correct administrative shortcomings or to deal with other minor, obvious or uncontested errors or problems. For example, there have been several situations in other casino competitions where applicants delivered their papers to the wrong council premises or were slightly late or missed out elements which were quickly spotted and easily corrected (such as a failure to identify a primary entrance).

The discretion is not there, however, to allow a council the means of influencing the outcome of the Competition which must be run and scored in accordance with the pre-determined rules. This applies equally to (1) influencing the outcome for the purposes of helping one class of applicant and (2) seeking to spice up the Competition by helping weaker schemes to compete better with stronger ones or (3) allowing in some completely new schemes.

Under the DCMS Code of Practice competitions are to be conducted fairly and be seen to be conducted fairly. Using the council's discretion to allow one applicant or class of applicant to polish up and improve or change their applications out of time (or indeed to submit completely new and different schemes) is so far from being a proper exercise of discretion that there can surely be no discretion whatsoever to accept a late application for this purpose.

10. <u>If a discretion does exist, it should not be used</u>

As noted above, GGV does not accept that there is a discretion to accept new Stage 1 applications either (1) this late in the process or (2) for the purpose of helping one class of applicant.

However, even if such discretion were to exist, GGV is of the view that the current situation is as far from justifying use of discretion as it is possible to envisage. This is for the following reasons:

a) *Fairness and transparency*

The Competition must be fair and must be seen to be fair. SCC is already on risk of being seen to appear biased in favour of the RPW Applicants (e.g. re the meeting on 30th September and the comments on SCC's own website referred to in Paragraph 4 above). Using a discretionary remedy in favour of one scheme (and it is only one scheme, albeit with several applicants) runs the risk of breaching the DCMS Code and of legal challenge.

The Licensing Committee must consider whether it would use its discretion in a similar fashion for other applicants. We submit that it would not.

b) *Delay/timeliness*

The design, preparation and conduct of the Competition has already been a tremendously prolonged and expensive process. Three additional months have already been added to the timetable as a consequence of the failed request for a much longer time extension by certain of the RPW Applicants in December 2014.

If SCC exercises its discretion to allow a late Stage 1 application then as an absolute minimum, a further 4-5 months will need to be added to the timetable to allow for representations and a period for possible appeals. This will further delay the receipt of financial and other benefits for SCC and the citizens of Southampton and it will also put the other applicants to considerable additional cost. Applicants such as GGV have organised their management teams and professional advisers so as to be ready for the submission of Stage 2 presentations on 16th April. Why should those who are ready to comply with the Competition timetable be penalised to help those who are not?

c) *Multiple late applications*

SCC would probably face several late applications requesting discretion. These would each be different. Possibly, some parties might wish to make new late applications whilst also keeping their existing RPW applications alive. Genting might choose to try to retain and distinguish its existing application, for example, hopeless though GGV consider this to be. Possibly completely new entrants might wish to join the Competition.

Whilst SCC would no doubt consider each application for discretion on an individual basis, we would see it as a recipe for disaster if different conclusions were reached or if there is no overall policy framework to deal with cases which, necessarily, will be subtly (or not subtly) different.

GGV's view is that the multiple nature of the discretionary remedy being asked for is not only inconsistent with fairness and the nature of any discretionary power but will result in inevitable further delay and wrangling. Opening Pandora's Box would produce disaster.

d) Applicant behaviour/Transparency

GGV expects that SCC would not wish to exercise its discretion to favour an applicant or a class of applicant which had failed to be candid and open in the manner in which it/they had participated in the Competition.

None of Lucent, Kymeira or the other RPW applicants appear to have shared with the Licensing Committee (let alone the other applicants) the nature of the problems currently affecting the first RPW scheme. We speculate that this is because they are worried that if the Committee becomes aware of these problems it will damage the RPW Applicants' chances of success in Stage 2, come what may. It would appear from the submissions by Aspers and Grosvenor that they have been aware of these problems for some time and indeed we presume that it was the same unspecified difficulties that caused Lucent to approach SCC to ask for a delay on 30th September 2014 (over six months ago).

But whatever the reason, it is surely not the behaviour to be expected of a party or parties asking for a discretionary remedy? Even if the RPW Applicants 'spill the beans' on April 9th and disclose what the problem is, this will be too late to allow proper consideration. If they wanted discretionary help they needed to behave in good faith.

e) Timing

It would seem likely that at the time of the December 16th 2014 Licensing Committee hearing (and probably for some considerable time before this) the RPW developers were aware of the problems with the RPW site. By 16th December 2014 they were certainly aware of the importance which GGV and SCC placed on a timely outcome.

Therefore it sits ill that months and months later there has still been no late application for SCC even to consider. The Competition is like other legal processes insofar as parties which wish to challenge the process need to move expeditiously so as to protect the legitimate interest of others in proceeding with certainty. The RPW Applicants are hopelessly out of time if they want to make late applications and have them considered on a discretionary basis. If there was a time for this it was many, many months ago before Stage 2 commenced. Interested applicants in the Competition have had many years to select an appropriate site for their application.

11. Potential prejudice to the GGV Applicant

The current situation continues to give rise to serious concerns. The GGV Applicant is entitled to expect that the Competition will be properly and fairly carried out in accordance with the DCMS Code of Practice and other applicable legal requirements and in accordance with the standards of fairness and propriety that can be expected of a major city council undertaking a quasi-judicial process. On this basis, GGV and the GGV Applicant (which are privately owned businesses) have incurred significant legal fees and architectural and design and other consultancy costs in relation to this competition as well as making an extremely large commitment of time and effort by their directors and senior management.

Any changes which result in an undue delay to the Competition (or abandonment and restarting of the Competition) or which permit other applicants to submit 'new, improved' schemes or otherwise prevent the Competition from proceeding in accordance with the announced timetable and methodology will be prejudicial to the GGV Applicant insofar as:

i. The RPW Applicants are advantaged and permitted to change (and presumably improve) their schemes or to submit new schemes and therefore the GGV Applicant has a reduced chance of winning the Competition

ii. Lucent, as developer of the RPW, is able to secure improved letting terms (e.g. a higher rent or a lump sum in exchange for its support) from parties (which potentially include another GGV affiliate) as a result of the delay and the move to WQ2, WQ3 and WQ4.

iii. The GGV Applicant is required to spend additional management time and effort and incur additional legal costs as a result of the need to address issues relating to the Competition process and which it believes have no merit.

In addition, GGV notes that its partners at Hammerson are faced with a series of important and time sensitive decisions about the scope and design of Phase 2 of the Watermark West Quays scheme. The additional delays and uncertainties around the Competition continue to add cost and difficulty to this and potentially threaten to damage the prospects for a timely, successful and optimal progression of this important project.

In our submission regarding the SCC hearing on December 16th, GGV said:

> *'The SCC Licensing Committee should make a clear determination that all SCC officers involved in running the Competition process (or managing or supervising such process or managing or supervising individuals involved in the process) are in a quasi-judicial position and accordingly are to refrain from:*
>
> *i. Lobbying for or otherwise supporting, advocating, assisting or advantaging any applicant*
>
> *ii. Being involved in any SCC decisions which may have the primary or secondary purpose of advantaging any Competition applicant*
>
> *iii. Meeting or otherwise discussing or corresponding with Lucent or any individual applicant or group of applicants about the conduct and progress of the Competition otherwise than through the formal and transparent Competition process.*

GGV wishes to make clear, for the avoidance of doubt, that without limiting the scope of the above, its clear view is that the Legal and Democratic Services Department should not be involved in any capacity as an advocate for the Royal Pier schemes and should be absolutely forbidden from seeking to change the rules and conduct of the Competition so as to advantage individual schemes or applicants.'

We remain very concerned that SCC officers are still not paying sufficient attention to the need for impartiality. For example, why was the licensing advice from Mr Kolvin disseminated via the Economic Development Department directly or indirectly to certain RPW Applicants on 26th February whilst it was not sent to others until 10th March? A two week delay is material in these circumstances and such a lack of even-handedness is a serious concern.

We therefore respectfully ask again that the Licensing Committee makes it quite clear that lobbying of the Committee itself or the Licensing and Democratic Services Department by other parts of SCC with a view to changing the rules (or the interpretation of the rules) to favour one class of applicant or one scheme is self-evidently unacceptable.

12. <u>Vital Action which the GGV Applicant is Seeking from SCC</u>

GGV recognises and welcomes that the Licensing Committee has clearly stated that it will at all times run the Competition on a fair and open basis in accordance with the DCMS Code and relevant legal requirements.

To this end, GGV respectfully asks that:

i) The Committee continues to conduct the Competition in accordance with the announced timetable and methodology.

ii) The Committee accepts the advice of leading counsel (as set out in the letter of 26th February 2015) and refuses to accept Stage 2 applications which purport to be on the WQ2, WQ3 and WQ4 land, whether from Aspers, Rank/Grosvenor, Kymeira and GGV(RP) Limited or from Genting.

iii) The Committee declines to accept the argument that the Genting application can be distinguished from the others so as to permit an application relating to WQ2, WQ3 and WQ4

iv) The Committee refuses to exercise discretion to accept any late Stage 1 applications on the basis that (a) it no longer has any such discretion as Stage 1 has ended and Stage 2 has commenced and (b) if it did have any such discretion this would not be a case where the exercise of such discretion is warranted.

13. <u>Other Points</u>

GGV remains very eager to develop and operate a casino in Southampton. It is a great city and GGV will be proud to be present here. GGV expects to develop an international standard casino which will be fitting and appropriate addition to a city of the standing (and with the ambition) of Southampton.

Phase 1 of the Watermark, West Quays scheme has recently begun full scale construction and will open late next year. A webcam has been installed and Committee members can view it on http://hammerson.reachtimelapse.co.uk/westquaywatermark/ if they wish to see the progress being made. GGV hopes very much that Phase 2, containing the casino, can be completed soon afterwards to bring additional regeneration, jobs, investment, vibrancy and other benefits to the city and its citizens whilst they are still young enough to enjoy them.

As we said in December, it is because of our enthusiasm to be in Southampton that we want to win (as we believe we can) in a fair, open and transparent Competition conducted to the highest standards and free of challenge. Such a Competition is surely a reasonable expectation.

Global Gaming Ventures Limited
Global Gaming Ventures (Southampton) Limited
31st March 2015