SOUTHAMPTON CITY COUNCIL

LICENSING COMMITTEE

9TH APRIL 2015

ROYAL PIER WATERFRONT

DECISION

1. The Committee is grateful to those parties and members of the public who attended the meeting and engaged in a constructive discussion.

2. The Committee has carefully considered all of the documents contained in its agenda papers, the supplemental agenda papers and the authorities bundle. It does not repeat the contents of any of that material here.

3. The Committee has also listened carefully to the cogent arguments advanced by the parties, and has taken all such arguments into account. It does not deal here with every matter advanced, but only the main matters necessary for it to reach its decision.

4. The Committee reiterates that it comes to its decision entirely independently of, and uninfluenced by, any other actions or statements by any other part of the Council. It is a statutory licensing committee and is concerned only with matters arising under the Gambling Act itself.

5. The following represents the unanimous view of the Committee.

6. Having considered the documentary material and listened to the flow of debate at the hearing, the Committee reaches the following factual conclusions:

    (1) RPW has failed, for reasons which it has not explained, to provide any of the basic information to the applicants to enable them to formulate their Stage 2 bids.

(2) This dearth of information will have been apparent to the applicants at the time of the Committee hearing on 16th December 2014 and at all times since, yet it is only today that any applicant has made it clear that they are still lacking such basic information, such that it is not possible for a Stage 2 bid to be made on the revised deadline of 16th April, on an informed basis or at all.

(3) Due to the dearth of basic information, no applicant is able to state that any proposal, be it for the casino location zone as originally proposed or sites WQ2, 3 or 4, is a viable or a commercial proposition.

(4) Conversely, however, other than Grosvenor's suggestion that the original location is less attractive to them than WQ2, 3 or 4, there is no actual evidence that the casino in its originally proposed location would be any less viable than on WQ2, 3 or 4.

(5) The first time that it was raised that the casino may need to drop to a lower level was in RPW's letter dated 31st March 2015. The first time it was actually proposed was by Kymeira at the hearing itself.

(6) In RPW's letter it stated that it was putting together information concerning the casino that would be made available to all applicants. In the event, it failed to do even that. It did not seek to defend the allegation made by all applicants present that it had provided no information at all.

(7) Neither any applicant nor RPW itself claimed responsibility for the suggestion that the casino should be moved to WQ2, 3 or 4. For example, in Grosvenor's written submissions at page 37 they stated that all five applicants were caught by the decision of the developer to move the physical position of the casino. This was expressly disavowed by RPW, which intimated that Grosvenor was the moving force behind the change. Although the Committee expressed some perplexity at what it saw as a lack of frankness at some level, in the event it has not affected the outcome of this hearing.

7. Against that background, the Committee can now proceed to deal with the issues raised.

8. The first issue is whether it is open to any applicant to show their casino at Stage 2 of the competition on plots WQ2, 3 or 4.

9. The issue effectively breaks down into two: can the provisional decisions to grant the provisional statements in each case be taken to encompass plots WQ2, 3 or 4; if not can the Council accept Stage 2 applications for those plots in any event?

10. Having heard the arguments, the Committee is satisfied that principles and conclusions set out in the Council's letter to the Lucent Group dated 26th February 2015 are correct, subject to what is mentioned below in relation to Genting.

11. For Aspers, Mr. Heslop QC pointed to the application plan and the red line drawn which did encompass the wider site. However, it is quite clear from the application form itself and the documented appended to it that the location of the casino applied for was the casino location zone shown on the plan bounded by the blue line.

12. He also argued that the Council's advice note set out at paragraph 5 of the report and/or his own oral submissions to the Stage 1 hearing meant that the application was for the wider site including plots WQ2-4. The Committee disagrees. The application form and plan have a statutory status in that they represent what has been applied for, what is consulted upon and what is granted. That cannot be affected by what the Council said, because it was up to the applicant what it applied for, and in this case what it applied for was clearly shown. Nor can it be affected by an oral statement made to a hearing; otherwise the scope of a grant could be affected by a chance remark unheard by members of the public who decided whether or not to object to the application based on the contents of the application form and plan the subject of statutory consultation.

13. Mr. Heslop also suggested that no member of the public or indeed the Committee could have been misled by what was being applied for. In fact, Mrs. Cassy was very clear that she and the members of Friends of Town Quay Park had a clear belief that

the application was for the casino location zone. This impression was shared by the members of the Committee itself.

14. The essential point made by Grosvenor in their written submissions is that permitting flexibility is for the overall good of the area. However, this does not answer the prior question of what has so far been granted, which does not turn on the merits of permitting migration.

15. So far as Genting is concerned, the Council's letter of 26th February 2015 suggested that the position was ambiguous, and that there was at least room for argument that the position of the casino was not fixed by the blue line but was moveable within the red line. However, the Committee considers that the ambiguity is to be resolved against Genting for the reasons explained in writing by GGV, namely that the descriptor in the application was that the casino was to be built on land reclaimed from the River Test, which clearly does not include plots WQ2, 3 and 4. Genting knew that the Council considered the position ambiguous, and knew that the hearing was being convened to consider these matters, but has elected not to attend or even make submissions, leaving the Committee with no choice but to reach its conclusions unassisted by contrary argument. However, the Committee does take the view that GGV's point is correct and that it is impossible to reconcile a statement that the casino will be built on land reclaimed from the river with a suggestion that the casino is to be built on existing land some considerable distance away.

16. The remaining part of the first issue is whether the Committee has a discretion nonetheless to allow applicants to move their proposed casinos to different locations at Stage 2. For the reasons given in the Council's letter of 26th February 2015, and as accepted or contended by at least two of the applicants appearing at the hearing, the answer is no. The location of the casino at Stage 2 is to be the same location as the casino the subject of the provisional grant at Stage 1. In any event, even if there were a discretion, it would plainly be wrong to exercise it in favour of such a large migration from a multi-use building as part of a wider development to a stand-alone site facing an important park, when such a move would have been strongly opposed by the representative groups appearing before the Committee today, and conceivably by

others. To do so without the consultation inherent at Stage 1 would in the Committee's view be plainly unacceptable in terms of democracy and transparency.

17. The second issue is whether the Committee has a discretion to permit new Stage 1 applications to be made for plots WQ2, 3 or 4 and, if so, whether it should exercise it in favour of such applications.

18. The Committee considers that it does have such a discretion. As has been observed, regulation 7(2) of the Gambling (Inviting Competing Applications for Large and Small Casinos) Regulations 2008, confers a discretion upon the licensing authority, and does not seek to limit that discretion temporally or in any other way.

19. However, the Committee does not consider that it would be appropriate to exercise its discretion in favour of such a course. This would involve re-opening Stage 1 of the process even once Stage 2 of the process has commenced, and over 9 months after the original Stage 1 applications were received. It would inconvenience members of the public who have already devoted time and energy to participation in these processes and who would now be engaged in opposing the new proposal. It would risk delaying the entire process by an indeterminate period because of the potential for appeal of the Stage 1 decisions. Notably, neither those applicants seeking the exercise of the discretion nor the developer could offer any evidence, let alone assurance, that the exercise of latitude would even bring forth a viable scheme since, seemingly, no viability analysis has been conducted by anybody. Nor, as has been stated above, is it at all clear that the casino cannot be developed in its original location or that the Royal Pier development will founder unless the casino is permitted to migrate. While there are arguments in favour of re-opening Stage 1, including that applicants who wish to invest in Southampton may otherwise be disadvantaged by conduct of the developer which is outwith their control, the merits of latitude need to be weighed against the demerits. It is, at root, a balancing exercise. In the view of the Committee, the balance falls against allowing an untested new site to come into the mix.

20. This leaves the issue recently raised of whether the level of proposed casino can be lowered whilst remaining within the same footprint.

21. The position is as follows:

- Aspers stated in their application that the casino would be located on the ground floor of a building with four or more levels.
- Genting stated that it would be located at ground and mezzanine levels of a building anticipated to have three or more upper levels.
- GGV stated that the casino would be at the ground floor level of a multi-storey building.
- Grosvenor stated that it would be at ground floor level with three or more upper levels.
- Kymeira stated that it would be at ground floor with principal entrance from the street with other uses above on four levels plus mezzanine.

22. Thus, all of the applicants are more or less in the same boat so far as descriptors are concerned.

23. The only party to argue in favour of being permitted to drop a level was Kymeira. Mr. Walsh QC suggested that there was a discretion to permit movement at Stage 2. However, for the reasons given above and in the letter of 26th February, there is none. He also relied on an argument that section 205 of the Gambling Act 2005 was predicated on the ability to alter features between the provisional statement granted and the ensuing premises licence application. However, that is an entirely different matter from the question of whether the location can be altered between Stages 1 and 2 of the provisional statement application itself. In any case, the Committee disagrees that in the specific context of the casino licensing competition it is open to an applicant to gain a grant of a provisional statement for site A, whose regulatory compliance will have been assessed at Stage 1 and benefits will have been assessed at Stage 2, and then try to get a grant of a premises licence thereafter based on a different site entirely. That, it seems to the Committee, would subvert the whole basis of the competitive process. The Committee therefore rejects the notion of discretion.

24. However, that is not the end of the issue. The Committee takes the view that in the normal case "ground floor" means the floor nearest the ground. However, the notable feature of this case is that there is no ground. The site is currently the sea. No elevations are shown in the plans. No datum levels are given. The precise finished levels are therefore a matter for the developers and operators. Two casinos could therefore be devised at entirely different levels, each being at ground floor level.

25. To take an example, the casino might be built on a level which is open to the air at the back but underground at the front. It might then be termed by the operator the basement, the ground floor or the first floor. It may have a street passing its entrance for customer drop-off, even if the street has development on a platform above it. The developer might legitimately term the street as being at ground floor level.

26. In the particular circumstances of this case, therefore, the Committee does not believe that the ultimate level of the casino is set in stone: rather it is writ in water. For that reason, the Committee does not consider it appropriate to dictate to the developer or the operators that the casino has to be fully or partially open to the air on all, or indeed any, sides. It is entitled to term the base floor the ground floor, at whatever datum level it happens to be.

27. Although the Committee views this as a matter of right rather than a matter of discretion, it does not consider that in so far as this implies some flexibility in the interpretation of the provisional decision to grant, then the approach disadvantages any party. For members of the public, it is extremely unlikely that putting the casino out of sight underground will occasion more protest than placing it in full view. For those applicants who are competing with the Royal Pier site, it is a tenuous argument at best that the casino may not move up or down within the same footprint. The only reason to object would be to try to eliminate a competitor.

28. The final question is whether the deadline for submission of Stage 2 bids should be extended. The Committee has given anxious consideration to this issue. It involves weighing a number of imponderables. On the one hand, the Committee has great sympathy for the submissions of those parties which are ready to submit their bids for

different sites, and which have assembled the information and worked hard to put in their bids on time. Why should the advantage they have secured through their diligence be set at nought by overlooking the dilatoriness of others? Furthermore, there has already been a considerable delay in the progress of Stage 2 following the extension granted in December 2014, at which point the Committee specifically rejected the proposal of a July 2015 deadline. To accede to a further delay now would be to grant something previously rejected. What is more, the deadline throughout has been clear, and it has only been at this hearing that any party has even suggested that it needs to be moved yet again. It is being moved to accommodate the submission of a scheme whose viability is currently unknown. Finally, if the Committee has refused permission for Stage 1 to be re-opened, why should it permit Stage 2 to be extended? This is an undeniably powerful suite of arguments.

29. The contrary arguments are also weighty. It is fair to say that there has been at least room for legitimate debate as to whether the application site can or should be shown as WQ2, which debate has occasioned delay. The reality is that, given the imminence of the deadline, to refuse any extension would be to terminate the prospect of any candidate scheme on the Royal Pier site. The Committee parts company with GGV when it submits that the Committee may not even take account of the benefits of the Royal Pier site since that would be to prefer one applicant over another. Rather, the entire purpose of the competition is to benefit the area and the people of Southampton, and to refuse the oxygen of an extension would be to choke off five of the seven applications made in this case and any of the potential benefits of the casino on the Royal Pier site. Further, the analysis of the case as GGV versus the rest is inaccurate. GGV have never withdrawn their candidacy for the Royal Pier site. The situation is different from a re-opening of Stage 1, which involves a different site altogether and an indeterminate delay because of the possibility of appeals by disappointed applicants or objectors.

30. For the Committee, these are finely balanced arguments. However, the decisive point for the Committee is that while the delay has been, on any view, regrettable to say the least, responsibility for it does not lie with the applicants. While it took some robust questioning from the Committee to arrive at a clear understanding of the

situation, it has become obvious that the applicants have done their level best to get information. It is a source of considerable concern for the Committee that discussions apparently started so late, seemingly only briefly before the Stage 1 hearings. But that should have left quite long enough for appropriate information to be furnished to the applicants to enable them to submit their bids, particularly given the note of urgency which will have been injected into the proceedings by the extension decision in December 2014, which set a clear deadline. But the applicants have been unstinting in their efforts to elicit the information they need from RPW. The Committee is extremely loath effectively to impose the ultimate sanction on those applicants, who want to invest in Southampton for the good of the economy and citizens of Southampton, on account of the default of another.

31. In these very difficult circumstances, the Committee has decided on narrow balance that it ought not yet turn its back on Royal Pier. It has decided to grant a further 3 months from today, i.e. noon on 10th July 2015, for the submission of the Stage 2 bids. From the tenor of this decision, it will be appreciated that any further extension is most unlikely to be viewed with equanimity.

Matthew Tucker
Chairman

10th April 2015