

#### 4. GAMBLING CONSENT APPLICATION – SUMNER RSA

<b>General Manager responsible:</b>	General Manager Regulation and Democracy Services, DDI 941-8549
<b>Officer responsible:</b>	Legal Services Manager
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#### PURPOSE OF REPORT

1. The purpose of this report is to advise the Regulatory and Planning Committee on an application by the Sumner-Redcliffs RSA (Inc.) (the RSA) for territorial authority consent under the Gambling Act 2003, for four gaming machines at their venue in Wakefield Avenue, Sumner, and to recommend to the Council that it be accepted.

#### EXECUTIVE SUMMARY/BACKGROUND

2. The RSA applied for territorial authority consent from the Council in December 2005 for four gaming machines, and it was granted by Council staff in January 2006. However, Council staff did not realise that in December 2005 the RSA's gambling licence from the Department of Internal Affairs (DIA) had been surrendered for more than 6 months. This meant that, in accordance with the Council's Gambling Policy applicable at that time, the consent should not have been granted.
3. Council staff had sought advice from DIA (for the purposes of the consent application) about the number of machines operating at the RSA venue in September 2003. DIA gave this information (confirming that it was four machines) but did not tell the Council that the venue did not have a current licence. The Council's application form had a section requiring the applicant to provide documentation relating to "DIA venue approval verification". The RSA provided a copy of their previous licence with their application, but that licence had expired on 30 September 2003. Staff did not seek further information from the applicant as to whether it held a current licence.
4. The RSA needed the consent from the Council so it could apply for a new licence from DIA for the same number of machines as it had previously operated. DIA granted the licence even though it should have been aware that the territorial authority consent was not the correct one for the licence that it granted<sup>1</sup>. The consent was granted under section 98(d) of the Gambling Act 2003 but the RSA actually needed a section 98(c) consent.
5. In July 2007 New Zealand Community Trust (NZCT) emailed the Council questioning the issue of the consent to the RSA. The Council's response to NZCT was also copied to DIA, and it noted that if NZCT were correct, and the RSA had not held a licence for over 6 months, then the Council should not have issued the consent, but neither should DIA have issued the licence. The Council considered that it was an issue for DIA to resolve. This was because the Gambling Act 2003 allows for DIA to cancel or suspend licences, but does not provide for a Council to take any similar actions in relation to consents it has issued.
6. At a meeting in September 2007 at the RSA's premises, Council staff advised the RSA of the situation as it stood at that time: that it appeared the Council should not have issued the consent, and that DIA would be advised and would likely follow the matter up with the RSA. (The RSA are correct in their application when they say copies of the correspondence with NZCT and DIA were not provided at that time, but that does not mean they were not aware of the issue about their consent.)
7. Despite DIA advising the Council in November 2007 that it would be contacting the Caversham Foundation (who was the holder of the licence), it appears it did not, and only took action to cancel the licence in the middle of 2008 (as a result of another application being made to them concerning the RSA premises). In order for the RSA to keep operating its four gaming machines the RSA needs to obtain a new licence from the DIA, and in order to apply for that licence they need a new territorial authority consent under the Gambling Act 2003.

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<sup>1</sup> The DIA fact sheet on class 4 gambling notes that the "Department will refuse to consider an application for a licence or an amendment unless the relevant territorial authority consent has been granted and said consent is proper and lawful in all respects."

8. The Council's current (2006) Gambling Policy does not provide for territorial authority consent to be granted in this situation under section 98(c). However, last year under similar circumstances, the Council granted the Christchurch Working Men's Club (CWMC) a territorial authority consent, by applying section 80 of the Local Government Act 2002, and making a decision that was inconsistent with the policy.
9. The RSA asks the Council to deal with its application on the same basis as the CWMC application and sets out the reasons why the RSA considers the consent should be granted (see Attachment 1). In summary, the RSA contends that the Council's aims and policies are still being achieved if a new consent is granted to them, because in the Sumner area the number of machines and sites in total has reduced. Allowing the RSA to continue with four machines still means a total reduction of 22 machines in the Sumner area. They also point out that they have operated and will continue to operate their machines in a responsible manner, and that there is a positive impact for the community in the RSA having the machines because of the grants the RSA is able to make to local groups such as the Surf Life Saving Club and Life Boat Institution. The RSA application also points out that the RSA has a mature membership, and they are the primary users of the machines, and are strongly in favour of keeping them. The RSA has a strong commitment to the welfare of its members, and the Sumner-Redcliffs RSA Welfare Trust Inc. is a separate body established for this purpose.
10. It should also be noted that, although not referred to in the application, the RSA representatives who met staff in September 2008, advised that the reason the RSA had not held a licence for a time in 2004/2005 was that due to a number of different factors members attending the RSA had declined. When it came to the end of the year the disbursement of grants was below what DIA required, and the RSA had to surrender their licence. From 2005, the RSA had a change of management, the premises were rebuilt/refurbished, and the numbers of members and finances improved. The RSA decided it was worthwhile to reinstate its four gaming machines, not realising that because their licence had been given up that meant they were in a different position than if the licence had continued from 2003.
11. If the Council decides to grant the consent in accordance with section 80 then it needs to clearly identify the inconsistency, the reasons for the inconsistency and also identify any intention to amend the policy to accommodate the decision. Further information on these requirements is set out in the legal considerations section below. Other relevant considerations for the Council in determining whether or not to grant the application in this case are outlined in the following paragraphs.
12. In the Gambling Act 2003, clubs (which are by definition bodies that are "not for pecuniary gain") are treated differently from other corporate societies, by being given "special" treatment in sections 95 and 96, which allow for clubs to have a larger number of gaming machines at their venues than other "non-club" venues, whether as a result of a merger of clubs or not.
13. A review of the other consents issued by the Council under section 98(d) of the Gambling Act 2003 has been carried out and it appears there is only one other consent that the Council has issued in respect of a club (besides the RSA and CWMC consents). That was for the Hoon Hay Club (consent was granted in January 2005) but that club is now no longer in operation. All the other consents were issued in respect of licenced premises which were not clubs, and were all issued in 2004.
14. This means that the same type of situation, where the Council granted consent to a club under its former Gambling Policy, and it may have been under the wrong provision of the Gambling Act, giving rise to problems for the club with DIA, cannot occur again. Since November 2006, the new policy has been in force and it does not provide for the Council to grant any consents except where there is a merger of clubs under section 95, so there should also not be any similar problems arising in relation to the current Gambling Policy.

15. Although the RSA situation is not exactly the same as the CWMC situation, so the advice from Buddle Findlay (received at the time of the CWMC matter) is not exactly on point,<sup>2</sup> it does provide the basis for the Council to act in a similar way in this case, if the Council chooses to do so. If the Council does, then it will need to note that the reason for the inconsistency is that this situation was also not a matter which was directly contemplated by the Council in developing its policy. If the Council were to grant this consent, then in relation to the "sinking lid" approach which the Gambling Policy provides for (by only allowing for new consents in very limited circumstances) there would, technically, be an increase in machines. But allowing the RSA to have four gaming machines at this venue means this is the same number at that venue as when the Gambling Act 2003 came into force and the Council adopted its first policy. So in this sense there is no increase in gaming machines and it can therefore be regarded as being in accordance with the spirit of the policy.
16. The Council really only has two practicable options in this case: to approve or decline the application. Deferring the application (until say the Policy is reviewed next year) would only leave the RSA in limbo for that time, and may not change the ultimate result. When the CWMC application was deferred, DIA allowed them to keep operating their machines during the intervening period. The RSA are not able to do so in this case because DIA has cancelled its licence.
17. The recommendation is that the Council approve the RSA's application, under section 98(c) and 100 of the Gambling Act 2003, and by applying section 80 of the Local Government Act 2002, for all of the following reasons (and as detailed above):
  - this venue is a not for profit club;
  - the Council will not be faced with this exact situation again
  - the application is only for four gaming machines (which is the same number that was at this venue in September 2003), and
  - for the other reasons outlined in the RSA application (summarised in paragraph 9 above).

#### **FINANCIAL IMPLICATIONS**

18. There are no financial implications in relation to granting this consent.

#### **Do the Recommendations of this Report Align with 2006-16 LTCCP budgets?**

19. Not relevant to this matter.

#### **LEGAL CONSIDERATIONS**

##### **Have you considered the legal implications of the issue under consideration?**

20. Section 100 of the Gambling Act 2003 requires that a Council must "*consider an application for a Territorial Authority Consent in accordance with its class 4 venue policy*". The Council's Gambling Venue And Totalisator Agency Board (TAB) Venue Policy adopted on 23 November 2006 provides:

*"1. The Christchurch City Council will not grant consent under section 98 of the Gambling Act 2003 to allow any increase in class 4 gaming venues or class 4 machine numbers except in the circumstance set out below.*

*2. The Christchurch City Council will grant a consent where two or more corporate societies are merging and require Ministerial approval to operate up to the statutory limit in accordance with section 95(4) of the Gambling Act 2003. The total number of machines that may operate at the venue **must not** exceed 18 machines.*

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<sup>2</sup> Which emphasised the fact that the CWMC needed the section 98(c) consent for the purposes of section 96 of the Act (a club seeking approval for 18 machines), but that the Council had never directly contemplated section 96 in developing its policy, and that allowing for a consent for 18 machines would still ultimately be acting in accordance with the spirit of the policy because there was no increase in machines in Christchurch.

7. *If the Council amends or replaces this policy, it is required to do so in accordance with the special consultative procedure outlined in the Local Government Act 2002.*

8. *In accordance with the Gambling Act 2003, the Council will complete a review of the policy within three years of its adoption and then every three years thereafter."*

21. The only consent the Council can grant is where two or more corporate societies are merging and seeking Ministerial approval under section 95, and the resulting number of machines will not exceed 18. The Gambling Policy does not provide for, or discuss in any way at all, the situation in which the RSA finds itself. This is similar to the CWMC situation, for which the Council granted territorial authority consent last year, after receiving external advice from Buddle Findlay (see report to Council on 4 October 2007:

<http://www.ccc.govt.nz/Council/proceedings/2007/October/CnclCover4th/SuppDeferredApplicationCWMC.pdf>

22. In the legal advice obtained in relation to the CWMC situation Buddle Findlay advised:

21. To grant a consent in terms of section 98(c), and 100, of the 03 Act to this Club in the expectation that it will use that consent to make application to the Minister for consent to run 18 machines under section 96 of the Act (absent any merger) would be clearly inconsistent with clause 1 and significantly inconsistent in my view with clause 2 of the 2006 Class 4 venue policy. On the other hand in relation to the spirit and intention of the 2006 policy, to grant such a consent under section 80 of the 02 Act would be consistent with the big picture and fundamental principle evident from clause 1 of the 2006 policy albeit not the current wording of the 2006 class 4 venue policy. So long as the Council was prepared to resolve **now** to review and amend in future the Class 4 venue policy to accommodate the decision it proposes now to consider making, in terms of section 80 of the 02 Act, making such an inconsistent decision now is a legal possibility.

23. It is clear from this advice the Council is able to make a decision that is inconsistent with its Gambling Policy provided it complies with section 80 of the Local Government Act 2002:

*"(1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify —*

- (a) the inconsistency; and*
- (b) the reasons for the inconsistency; and*
- (c) any intention of the local authority to amend the policy or plan to accommodate the decision.*

*(2) Subsection (1) does not derogate from any other provision of this Act or of any other enactment."*

24. The section 80 factors which the Council must clearly identify in making its decision are as follows:

- The inconsistency – it is clear from the express wording in the Gambling Policy that it does not provide for a consent to be granted in these circumstances.
- The reasons for the inconsistency – the Buddle Findlay advice relating to the CWMC application discusses the matters the Council considered and rejected in relation to the 2006 Gambling Policy:

18. I appreciate that in 2006 the Council's Hearing Panel (and then the Council) considered, and rejected, proposed amendments to the 2004 Class 4 venue policy concerning the possible transfer of gaming machines from one venue to another. However, as stated, I do not understand that that was the consideration and rejection of circumstances relevant to clubs caught by section 98(c) and wanting to use section 96 to obtain Ministerial approval. To be fair to Council officers who have given advice to date concerning the Club's present predicament after the adoption of the 2006 Class 4 venue policy, no one seems to have focussed (recently) on the unique and particular circumstances Parliament has specified and provided for in section 96 of the 03 Act. The 2006 Class 4 venue policy deals with section 95 circumstances which have been addressed. The 2006 propositions considered and rejected by Council involved as I understand matters, totally different circumstances. For example:

- the 2006 discussion applied to **all** Class 4 venues (not just clubs);
- the maximum machine numbers were **9** (not 18 as per section 96);
- section 96 was **not referred to** at all;
- there were severe specific geographical/location details;
- the concern and a significant reason for the rejection of these proposals was a **fear<sup>1</sup> of commercial tradeability** in venue/operation entitlements (completely inapplicable to not-for-profit clubs with rights under section 96).

While the CWMC application related to section 96, it is also clear from these factors that the Council never considered the type of situation the RSA finds itself in – a not for profit club needing a section 98(c) consent to allow it to reinstate machines that were below the maximum allowable, and that were in operation at the premises when the Council adopted its first policy/when the Gambling Act first came into effect, and

- Any intention to amend the policy to accommodate the decision – under section 102 of the Gambling Act 2003 the Council is required to review its Gambling Policy every 3 years. This means that the Gambling policy must be reviewed again next year, by November 2009. It is recommended that the Council identify that its intention is not to amend the policy at this time to accommodate its decision (if it decides to grant the application, but that during the upcoming review of the Policy the matter of section 98(c) consents being granted in this type of situation, and consents for the purposes of section 96 (as well as section 95) be considered as part of that review.

#### **Alignment with LTCCP and Activity Management Plans**

25. Page 113 of the LTCCP, level of service under democracy and governance.

#### **Do the recommendations of this report support a level of service or project in the 2006-16 LTCCP?**

26. As above.

## **ALIGNMENT WITH STRATEGIES**

### **Do the recommendations align with the Council's strategies?**

27. Declining the application will align with some of the principles in the Council's Strong Communities strategy, but possibly not others, particularly if declining the application means the RSA will no longer be able to make grants to community groups in its area.

## **CONSULTATION FULFILMENT**

28. The Council has an idea of community views generally in relation to gambling, although not in relation to this specific matter, as a result of submissions on the Gambling Policy in late 2006. In relation to internal consultation there has been liaison with the Inspections and Enforcement unit who administer consents under the Gambling policy.

## **STAFF RECOMMENDATION**

That the Committee recommend to Council that it grant the Sumner-Redcliffs RSA (Inc.) territorial authority consent application under section 98(c) of the Gambling Act 2003 and that the Council resolve (in order to comply with section 80 of the Local Government Act 2003) that:

- (a) A territorial authority consent is granted to the Sumner-Redcliffs RSA (Inc.) under sections 98(c) and 100 of the Gambling Act 2003 and by applying section 80 of the Local Government Act 2002, for the Sumner-Redcliffs RSA (Inc.) to operate four gaming machines from its premises at 34 Wakefield Avenue, Sumner, Christchurch.
- (b) This decision is made in the knowledge that it is inconsistent with the Council's Gambling Venue and Totalisator Agency Board Venue Policy.
- (c) The reasons for the inconsistency are that when the Council adopted the Gambling Venue and Totalisator Agency Board Venue Policy in 2006 the situation which the Sumner-Redcliffs RSA (Inc) is in, was not a matter that was directly contemplated by the Council in developing the Policy. That is, where a not-for-profit club needs a section 98(c) consent to allow it to recommence operation of the same number of machines that were in operation at the premises when the Council adopted its first Gambling policy, because, although the Department of Internal Affairs granted a licence to the club on the basis of a section 98(d) consent issued by the Council it then cancelled the licence, so the club has no other options that would allow it to continue to operate its machines.
- (d) The Council does not intend to amend the Gambling Venue and Totalisator Agency Board Venue Policy to accommodate the decision at this time, however, when the Council reviews the Policy in 2009, the matter of section 98(c) consents for clubs, and for the purposes of section 96 (in addition to section 95), will be considered as part of that review.