

IN THE MATTER of the Gambling Act 2003

AND an appeal by **BLUESKY COMMUNITY TRUST** against a decision to cancel the class 4 venue licence for Edinburgh Castle

BEFORE THE GAMBLING COMMISSION

Members: S W Hughes KC (Chief Gambling Commissioner)
S C L Pearson
S T Shaw
C M Risk

Date of Appeal: 25 May 2025

Date of Decision: 9 November 2025

Date of Notification of Decision: 27 November 2025

DECISION ON AN APPEAL AGAINST DECISION BY THE SECRETARY TO CANCEL THE CLASS 4 VENUE LICENCE FOR EDINBURGH CASTLE

Introduction

1. BlueSky Community Trust ("**BlueSky**") appealed against the decision of the Secretary for Internal Affairs ("**Secretary**") to cancel the class 4 venue licence for the venue known as Edinburgh Castle, located at 215 Symonds Street, Eden Terrace, Auckland 1010 ("**Venue**").

Background to appeal

2. On 9 October 2024, the Secretary issued a proposal to cancel the class 4 venue licence for the Venue. On 16 December 2024, written submissions in opposition on behalf of BlueSky were received by the Secretary. By letter dated 6 May 2025, the Secretary notified a decision to cancel the class 4 venue licence for the Venue on the basis that he was not satisfied that the venue is not used mainly for operating gaming machines and was not satisfied that the Venue is a suitable class 4 venue.
3. On 23 May 2025, BlueSky filed a notice of appeal with the Commission which raised the following grounds:
 - (a) the Venue is not used mainly for operating gaming machines;

- (b) the Venue is suitable in all other respects to be a class 4 venue; and
- (c) BlueSky can comply with all other applicable regulatory requirements.

Filing the appeal suspended the effect of the cancellation decision until the Commission's decision on the appeal.¹

4. In accordance with its usual process, the Commission initially received a copy of the relevant file of the Secretary. On 15 August 2025, the Commission received written submissions in support of the appeal, along with supporting affidavits of Jie Guo and XinYan Chen. On 12 September 2025, the Secretary filed written submissions in opposition and a supporting affidavit of Fiona Auld. On 3 October 2025, BlueSky filed submissions in reply, with a second affidavit of Jie Guo.

Applicable statutory provisions

5. Section 74 of the Gambling Act 2003 ("**Act**", all statutory references below are to the Gambling Act 2003 unless otherwise stated) provides the Secretary with a discretion to suspend or cancel a class 4 venue licence on certain express conditions. Section 74 relevantly reads:

(1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that—

(a) any of the grounds in [section 67](#) are no longer met; or

(b) the corporate society is failing, or has failed, to comply with all relevant requirements of this Act, including the obligations set out in [section 69A](#), minimum standards, game rules, *Gazette* notices, and licence conditions; or

...

(2) In deciding whether to suspend or cancel a class 4 venue licence, the Secretary must take into account the matters in section 67.

(3) The Secretary may exercise the power of suspension conferred by this section in respect of any breach that falls within any of paragraphs (a) to (d) of subsection

(1) whether or not—

(a) the breach continues at the time that the power is exercised or is proposed to be exercised:

(b) a penalty is prescribed for the breach.

¹ See section 78(2)(b)(ii).

6. Section 67 of the Act sets out the grounds for granting a class 4 venue licence. The relevant parts of the test for the grant of a licence are set out below:

(1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that—

...

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

...

(q) the proposed venue is suitable in all other respects to be a class 4 venue; and

...

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

7. Section 69A sets out a set of continuing obligations of the licensed corporate society in relation to a class 4 venue licence, the obligations relevant to this appeal being as follows:

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

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

...

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

(g) the risk of problem gambling is minimised.

8. Section 313(1)(d) makes provision for regulations for declaring venues to be suitable or unsuitable to be a class 4 venue. Regulation 4(a) of the Gambling (Harm Prevention and Minimisation) Regulation 2004 (“**Regulations**”, all subsequent references to regulations are to these regulations unless otherwise stated) provides that a venue is declared to be unsuitable to be a class 4 venue if “the primary activity” of the venue “is anything other than onsite entertainment, recreation, or leisure focused on persons 18 years and over”. Regulation 4 also lists a number of express exclusions, both within sub-reg (a) and subsequently in sub-regs (b) to (g). Those exclusions include fast food outlets or similar, amusement parlours and arcades, and internet or cyber cafes or any other venue at which the primary activity is electronic media (including games).
9. If the Secretary proposes to suspend, cancel, or refuse to renew a class 4 venue licence, the Secretary must follow the procedure set out in section 75. The procedure involves notification of the proposal, the reasons for it and the rights and procedures to be followed. Provision is then made for receipt of written submissions in response, their consideration by the Secretary and, if a proposal to cancel proceeds, notice of the date on which it takes

effect, the reason for it and the right to appeal and the appeal process. In this case, the prescribed process was followed, as summarised in paragraph 2.

10. If a corporate society wishes to challenge the Secretary's decision, section 77 provides for an appeal to the Gambling Commission. Section 77 relevantly provides as follows:

(1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—

....

(e) suspend or cancel a class 4 venue licence held by the corporate society.

....

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

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

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

(3) The Gambling Commission—

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

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

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

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

(4) The Gambling Commission may—

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

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

(5) The Gambling Commission must give notice of—

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

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

BlueSky's submissions

11. BlueSky referred to the established practice of the Commission hearing matters *de novo*, meaning that it considers matters afresh and has regard to all the information then before it, irrespective of whether the Secretary had that information when the decision under appeal was made, enabling the Commission to exercise the statutory discretion in a different manner, without need to find that the Secretary's discretionary decision making power was wrongly exercised.

12. BlueSky's submissions addressed the two reasons given for the cancellation of the venue licence:
- (a) whether the main use of the Venue is operating gaming machines; and
 - (b) whether the Venue is suitable because the primary activity there is onsite entertainment, recreation, and leisure focused on persons aged 18 years and over.

Main use

13. The Commission had previously held, in appeal decisions in *The Southern Trust re Windsock Tavern* (GC22/06), *First Sovereign Trust re Whiskey Jacks* (GC43/06) and *KTJ Investments Limited re Galaxy Function Centre* (GC25/12), that, when determining whether or not a venue is "used mainly" for operating gaming machines, an overall assessment of the venue needs to be made (with no one matter being individually determinative) having regard to the relative floor area, the prominence of the gaming machines, the promotion and extent of other activities, the venue's revenue streams and the number of activities offered for public participation. In relation to those factors, BlueSky submitted as follows:
- (a) With only 10 gaming machines, the gaming room comprised only approximately 5% of the Venue's total floor area, which is significantly less than the proportion of 30% of the venue considered in the Windsock Tavern appeal.
 - (b) External signage had been removed, and the prior gaming lounge signs had been blacked out. When entering the Venue, the hotel reception area has the greatest prominence.
 - (c) Twice as many accommodation rooms are now available for short term public stays compared to gaming machines. The room occupancy is strong and is frequently used for short term stays by tourists. The remainder of the Venue includes:
 - (i) seven large televisions playing live sport;
 - (ii) pool tables;
 - (iii) a karaoke system;
 - (iv) a darts board;
 - (v) phone charging stations; and
 - (vi) an outdoor smoking/vaping/recreation area.

- (d) Patron presence is a more accurate indicator of “use” than revenue in a low-cost venue like the Venue. BlueSky engaged Servco to undertake a head count of the public downstairs area. Its report showed that across one week in June 2025 and one week in July 2025 there were 633 people observed in the gaming room, compared with 758 outside the gaming room.
- (e) Comparing revenue from the non-gambling parts of the Venue to revenue from the gaming machines is not always a fair indicator of use, by reference to the previous decisions of the Commission concerning Windsock Tavern² and Galaxy Function Centre³ which acknowledged that revenue is only one of many factors to be considered and not always representative of how a venue is used.
- (f) The revenue received by the Venue from gambling is in decline. In June 2025 the revenue split was 52% from accommodation and food versus 48% from gaming income. The proportion of accommodation improved in July 2025 with a 53% to 47% split. Mr Guo opined that income figures do not reflect the full scope of the Venue activity because it has free offerings that generate no income.

Suitability

- 14. BlueSky accepted that, to be suitable, the primary activity of a class 4 venue must be entertainment, recreation or leisure focused on persons over 18 years old as specified in Regulation 4(a). Mr Guo’s evidence confirmed that access to the hotel was now restricted to persons aged 18 years and over. As to primary activity, 166 class 4 venue licences record “hotel” as the primary activity.
- 15. Contrary to what it understands to be the Secretary’s view that hotels must have an alcohol licence be suited to class 4 gambling, BlueSky submitted that it is possible for class 4 venues to have an entertainment, recreation or leisure focus in the absence of alcohol consumption. It pointed to a well-known link between alcohol consumption and gambling related harm, citing several studies and articles in support.
- 16. BlueSky submitted that a hotel would be suited to be class 4 venue if it were primarily a place where people spent their free time away from obligations such as work, education, and domestic chores, and on activities that are relaxing and/or enjoyable. Only 3% of guests identified their stay as being for business, while ninety percent of guests said it was for tourism. Relaxing, eating and making use of the Venue’s activities were all submitted as justifying a conclusion that onsite entertainment, recreation, or leisure was the Venue’s primary use.

² Decision GC22/06.

³ Decision GC25/12.

17. BlueSky submitted that, since the approximately eleven inspections by the Secretary's staff in late 2024 and early 2025, there had been considerable changes made to the Venue. The Venue's main use is not class 4 gambling, and its primary activity is leisure, focused on persons over 18 years of age.

The Secretary's submissions

18. The Secretary accepted that changes had been made to the Venue since the proposal to cancel the licence on 9 October 2024. The changes included:
- (a) the addition of three additional accommodation rooms;
 - (b) the reduction in the number of gaming machines from 18 to 10;
 - (c) the addition of a new karaoke system, three arcade video games, a computer, several televisions, a dart board and a small collection of books; and
 - (d) the removal of gaming signage at the Venue and the removal of gaming advertising on the accommodation booking websites.
19. After BlueSky asked the Department of Internal Affairs ("**DIA**"), in its submissions opposing the cancellation proposal, to inspect the Venue again over the following three months, DIA inspectors made an additional 15 visits between December 2024 and April 2025. The visits included observing activity at the Venue, interviewing staff members, analysing financial information provided and considering the additional evidence provided by BlueSky on 10 April 2025. The Secretary was not convinced about the effect of the changes and, on 6 May 2025, notified the decision to cancel the class 4 venue licence.
20. The Secretary addressed the same central issues on the appeal as BlueSky.

Main use

21. The Secretary observed that, in the Windsock Tavern decision,⁴ the Commission held that use under section 67(1)(k) concerns use by the public, not the venue operator, and that "mainly" means "for the most part" or "in the main", denoting relativity of use compared to other activities, rather than mere size. The determination involves a factual enquiry culminating in an overall assessment of the venue.

⁴ Decision GC22/06.

22. The Secretary acknowledged that comparative revenue share is one indicator, but not the sole indicator, of use. However, because an overall assessment of the venue is required, it is not helpful to compare individual aspects of other cases where all aspects considered are not the same. For example, while in the Windssock Tavern decision,⁵ 30% of the floor area was assigned to gambling compared with 5% at the Venue, there was a significant difference in that that former venue offered a full bar and cocktail service.
23. The main use of the Venue is listed as “hotel” but, as hotel operation does not constitute a single activity, the various activities which take place in each hotel need to be considered when assessing what the main use of the venue is:
- (a) As the text of section 67(1)(k) does not limit “use” of a venue to activities, all uses by the public of the Venue must be considered when determining its main use. Information gathered by DIA staff from 30 December 2024 to 14 April 2025 revealed an average occupancy rate of 68% of available rooms. The latest information, provided in the affidavit of Jie Guo dated 13 August 2025, indicated similar or lower levels of occupancy.
 - (b) Since October 2023, the Venue has not served alcohol following the loss of its alcohol licence. The range of food and non-alcoholic beverages served include a bed and breakfast offering, a bar snack menu, non-alcoholic beverages and a buffet style dinner offering after 5.00pm or 6.00pm. DIA staff did not observe anyone eating during their visits. Venue staff told DIA inspectors that food was served most frequently after 8.00pm but, during a visit on 5 January 2025, a manager told an inspector at approximately 9.00pm that no food had been served that day. Over the two-month period of February and March 2024, revenue from food was \$3,542.16 and for June 2025 was \$4,876.48 indicating that dining is not a leading or primary activity at the Venue.
 - (c) None of the other activities (karaoke, pool, television, arcade video games, darts, phone stations and an outdoor smoking/vaping area) produce any income for the Venue. The Secretary suggested that their offering is an attempt to draw attention away from gaming machines being the main use of the venue. During DIA’s visits, inspectors noted very low levels of non-gaming use by members of the public. The Secretary suggested that the photos produced by BlueSky reflected the exception, rather than the norm, at the Venue.

⁵ Decision GC22/06.

- (d) The Secretary submitted that the evidence of Mr Chen is of minimal value because neither the “main use” test under section 67(1)(k) nor the “primary activity” test under Regulation 4(a) are concerned with head counts. Headcounts do not indicate what people at the Venue were doing. The headcount evidence contrasts strongly with the observations of DIA inspectors who saw very few people at the Venue who were not gambling. Further visits to the Venue by DIA staff after receiving BlueSky’s evidence were consistent with their earlier observations that most people present at the Venue were gambling.
- (e) Throughout all the periods considered by the Secretary, venue payment income earned from hosting gaming machines had been more than that earned from non-gaming activities. For example, financial analysis from 1 October 2024 to 21 March 2025 showed that 66.7% of total income received by the Venue was gaming related. Even with the reduction in gaming machines from 18 to 10 in December 2024, from 12 December 2024 to 21 March 2025, gaming related revenue was still the primary source of income for the Venue at 61.3%.
- (f) If consideration were given to the total value of gambling activity at the Venue, for the period January to March 2025, total gaming machine proceeds for the Venue were \$551,034.23, which was just over nine times the income that the Venue earned from food and accommodation of \$59,429.98. As a result, non-gaming revenue is only 10.79% of gaming machine revenue. As to the relationship between gaming machine proceeds and venue payments, the latter payments may not exceed 17% of the former.
- (g) The Secretary also observed that there was no explanation for the choice of sample weeks by Mr Guo and that the bank statements exhibited to his affidavit could not be verified.
- (h) Most patrons observed during DIA visits to the Venue had been gambling. Venue staff comments made to DIA’s inspectors during visits were consistent with their observations that patrons mostly gambled when at the Venue.
- (i) The Venue manager had told inspectors that he spent most of his time looking after the class 4 gaming. Similarly, another manager said that he spent very little time on hotel related activities.
- (j) Overall, the Secretary submitted that, while there are a range of other activities offered at the Venue, as a matter of fact, what mainly happens at the Venue is gambling on gaming machines.

Suitability

24. The Secretary submitted that, even if the Venue were not used mainly for operating gaming machines, it is not suitable as a class 4 venue under section 67(1)(q) of the Act. Regulation 4(a) declares any venue to be unsuitable as a class 4 venue if the primary activity is anything other than onsite entertainment, recreation, or leisure focused on persons 18 years and over.
25. In the Windsock Tavern decision,⁶ the Commission held that main use and primary activity at a venue are not synonymous. The concept of main use is a broad concept that is not limited to activities which means that use of a venue could include the occupation of hotel rooms by members of the public. However, Regulation 4(a) has a narrower focus being concerned with activities that take place at a venue. The Secretary submitted that mere occupation of a hotel room, without any specific associated activity, does not amount to an activity for the purposes of Regulation 4(a).
26. The Secretary argued that the provision of accommodation alone is something other than “onsite entertainment, recreation or leisure”, and is not focused on persons 18 years and over. There was provision online to book for children to stay at the hotel and there were suggestions of children’s activities.
27. BlueSky’s submissions misrepresented the Secretary’s position on the consumption of alcohol. It is not the Secretary’s position that class 4 venues, including hotels, must provide alcohol to be suitable; rather it is the case that most hotels have alcohol licences, such that the bar/lounge area is clearly onsite entertainment and the primary activity of the venue. The consumption of alcohol having a negative effect on peoples’ gambling activities is not a relevant consideration under Regulation 4.

BlueSky’s submissions in reply

28. In addition to addressing the issues of main use and suitability under Regulation 4(a), BlueSky’s reply submissions addressed the receipt by the Commission of factual information other than by sworn evidence.

Evidential matters

29. BlueSky submitted that the Secretary had relied on what it called “historical” factual information and presented that information to the Commission in the form of unsworn statements in legal submissions, a practice contrary to the Commission’s practice note. BlueSky acknowledged that section 77(3)(d) requires the Commission to have regard to all

⁶ Decision GC22/06.

information provided, but referred to the Commission's decision on the appeal by *Perry Foundation re the Panmure Superbowl*,⁷ in which, it was submitted, the Commission had said that unsworn evidence should not be given the same weight as sworn evidence.

30. In relation to hearsay evidence, while it was conceded that the Commission is able to consider it, the Commission had held, in a decision on a pre-hearing application by *The Lion Foundation*⁸ that it may, if appropriate, reduce the weight which it attaches to such evidence.

Main use

31. BlueSky agreed with the Secretary that all uses by the public of the venue must be considered, that the Venue's use comprises the provision of accommodation, food, and entertainment activities and that the enquiry is a factual one made with respect to the whole of the class 4 venue. It did not, however agree that the main use test is not concerned with headcounts and submitted that headcounts are the most indicative evidence of main use.
32. The issue for determination by the Commission is what the current main use of the venue is, not what it has been in previous years, suggesting that the "historical" evidence is of questionable relevance in that assessment.
33. While Secretary had described the gaming area as prominently positioned at the front of the venue, BlueSky submitted that there was no sworn evidence which described the gaming area/machines as prominent. The evidence of Mr Guo for the appellant described other things, such as the hotel reception area and large screens, as prominent.
34. BlueSky submitted that the Secretary either agreed with, or did not present, any evidence to the contrary about, the extent of other activities undertaken. BlueSky made the following submissions in response to those of the Secretary:
- (a) BlueSky relies on the evidence of Mr Chen on head counts which is sworn and independent. The Secretary could have undertaken a similar analysis to BlueSky but elected not to do so.
 - (b) Some of the evidence that the Secretary had provided is hearsay, for example reference to the number of people that Mr Scott observed. The effect of that evidence is challenged because it records the number of people in the gaming room, not necessarily gambling.

⁷ Decision GC14/06.

⁸ Decision GC06/06.

(c) BlueSky objected to the use of historical data and the unsworn observations referred to in the Secretary's submissions about the historical data, saying that Mr Guo's evidence is that the historical reflections were not representative of current activities. The inspectors' observations were made at off peak times, with no Saturday observations and only one Sunday observation, and were not taken of the hotel rooms. Concerns were also raised about the methodology used to count people present in the gaming room as each inspector would record the number of people in the gaming room when they observed it, but they would not consider whether each had seen the same person.

(d) BlueSky also objected to the unsworn hearsay evidence of comments by former Venue staff and argued that they were not reflective of the Venue's current use.

35. BlueSky submitted that the information which the Secretary used to analyse the revenue streams is historical (the most recent used being March 2025) and unsworn, and was not reflective of the current use of the venue. As the Secretary has access to the Venue's weekly gaming revenue, he could check whether any of the information in Mr Guo's affidavit was incorrect. The evidence provided by BlueSky could be verified as being correct by the Secretary's forensic accountant because the same information was obtained under section 333 notices. Recent revenue data shows that the Venue's accommodation and food income was 59% of its revenue compared with 41% from venue payments.

36. BlueSky challenged the Secretary's submissions concerning the absence of observations of people consuming food. There was food available during one of DIA's visits, and the other times were outside of usual dining hours.

Suitability

37. BlueSky submitted that there is no doubt that the Venue is restricted to people over the age of 18. The reference on <aucklandcityhotels.net> to it being available to people under the age of 18 was incorrect and has since been amended.

38. A hotel is not listed as an unsuitable venue in Regulation 4; to the contrary, the application form for a class 4 venue licence lists "hotel" as a primary activity for a business which is available for selection. This is what the primary activity of the Venue is listed as in the venue licence. An activity does not need to involve vigorous physical exertion to be a leisure activity. From a guest's perspective staying in a hotel is an activity; it is part of a holiday experience.

39. BlueSky submitted that matters that have a negative effect on people's gambling, in this case alcohol, are relevant to the determination of the appeal. In interpreting the provisions of the Act, regard should be had to its purpose, which includes to prevent and minimise the harm from gambling and to facilitate responsible gambling. It submitted that "adopting an interpretation that permits alcohol free venues to host class 4 gambling is entirely consistent with both these express purposes".

Discussion

Evidential matters and standard of proof

40. The BlueSky submissions raised concerns about the Secretary's submissions referring to information which was either hearsay or presented in unsworn form. Both parties acknowledged that the appeal was *de novo* in nature, with the Commission required to consider matters afresh, and having regard to all information provided, as stipulated in section 77(3)(d). In addition, section 226(3) expressly permits the Commission to receive evidence that would not be admissible in a court.
41. The Commission's Practice Note says that its "preference is to receive from the parties to an appeal an agreed statement of facts covering relevant factual matters which are not in dispute. Beyond this, factual material must be presented to the Commission by way of a sworn affidavit."⁹
42. The Commission has previously considered the relationship between the Practice Note on the one hand and section 77(3)(d) on the other hand, observing in the *Panmure Superbowl* decision¹⁰ that, while the Commission must consider all information before it, it is free to determine the weight to be placed on particular information received. When the facts are contentious, Commission cautioned that, "unsworn statements in legal submissions ... as part of information provided to the Commission ..., may not receive the same weight".¹¹ This statement may be contrasted with the BlueSky submission summarised at paragraph 29 above. Similar comments were made in the decision on pre-hearing application made by *The Lion Foundation*.¹²
43. The Commission accepts that much of the information on which the Secretary relied was recorded in submissions, rather than in affidavit evidence. However, the submissions identified the sources of the information referred to, being contemporaneous business records (job sheets, financial viability analysis by DIA, Edinburgh Castle Patron Activity and

⁹ Gambling Commission Practice Note at [28].

¹⁰ Decision GC14/06, at [25]

¹¹ Decision GC14/06 at [26].

¹² Decision GC06/06 at [15], [18], and [24]-[25].

Hotel Occupancy reports and interview notes) which were held by the Commission since receiving the Secretary's file. The affidavit evidence filed by the Secretary, being the affidavit of Fiona Auld, the Manager of Operations of the Auckland Operations team, exhibited her personal job sheets from her two most recent visits to the Venue and the job sheets from Senior Regulator, Craig Scott, who accompanied her on those visits. Such identification of sources of information positively affects the weight which the Commission is prepared to accord to that information.

44. The Commission notes that the appellant did not adduce sworn evidence to refute directly the hearsay or unsworn statements submitted by the Secretary, even as it related to statements attributed to its employees. The failure to challenge directly the truth of hearsay statements is relevant to the Commission's consideration of the weight to be accorded to them.
45. As observed previously, ultimately the Commission decides the weight to be given to contentious information before it, whether hearsay or unsworn. The Commission notes that, on this occasion, the dispute between the parties as to evidence relates to the inferences to be drawn from the facts described by each, with no direct conflict of evidence to be resolved. The comments in earlier decisions of the Commission concerning weight were likely related to the need to resolve direct conflicts about matters of fact (i.e., whether something happening at a particular date and time). In this appeal, the Commission's key assessments were not ultimately affected by the technical evidential concerns raised by BlueSky.
46. In addition, the evidential matters raised need to be considered in the context of the decisions required by the appeal. The decision under appeal is to cancel the class 4 venue licence for the Venue. A decision to cancel under section 74 is ultimately discretionary but requires the prior establishment of one or more of the prerequisite grounds. Relevantly to this appeal:
 - (a) The first ground is satisfaction that the grounds under section 67 are no longer met. In that regard, section 67(1)(k) and (q) require the Secretary (and the Commission on appeal) to be satisfied that the Venue is not used mainly for operating gaming machines and that it is suitable to be a class 4 venue (which Regulation 4 defines as one whose "primary activity" is not "anything other than onsite entertainment, recreation, or leisure focused on persons 18 years and over"). The section 67 standard is satisfaction on the part of the decision maker of a positive characteristic of the Venue, with doubt resulting in a lack of satisfaction about the ground. The focus is inherently present, albeit that the past can often inform assessments about the present.

- (b) The second ground is satisfaction about past or current non-compliance, on the part of the venue licence holder, with section 69A(e) which prohibits the Venue from ever being used mainly for operating gaming machines. Under the second ground, either past or present non-compliance suffices to establish a prerequisite ground for exercise of the discretion to cancel.
47. Although the main use of the Venue is common to both grounds, the first prerequisite ground requires satisfaction about the presence of a doubt about main use, while the second such ground requires the decision maker to be satisfied that either, currently or previously, the venue licence holder had not complied with the requirement that the venue not be used mainly for operating gaming machines. It is, therefore, possible to determine that the first ground is established (i.e. the presence of doubt) without it necessarily following that the second ground is also established. In both cases, the matter in issue is one of overall assessment about the Venue, rather than whether a particular event took place.
48. Past non-compliance with section 69A is a ground under section 74(1)(b) to exercise the discretion to cancel. Accordingly, contrary to BlueSky's submission that "historical" information is not relevant to the appeal, information concerning the results of earlier DIA inspections (from 2024 and early 2025) may be relevant to the decision under appeal, at least to that extent.
49. The question of suitability of the Venue, based on an assessment of its primary activity, arises under section 67(1)(q) so, similarly to the first ground, concerns the existence (or not) of a doubt.
50. The Commission has considered the burden and standard of proof for cancellation of licences on similar grounds in decisions on appeal by *Bluegrass Holding Limited* (GC10/14) and *Bluegrass Holdings limited and Stanmore Star Investments Limited re Sideline Bar* (GC11/14). The former decision involved cancellation of an operator's licence under section 58 and the second involved cancellation of a venue licence under section 74 but the text of the two provisions is materially the same, in that cancellation grounds both include any of the grounds for grant no longer being met and a current or past compliance failure of the society, and they both confer a discretion to cancel and an express requirement in exercising that discretion to take account of the grant grounds provision. The grant ground provisions were also materially the same in that they required refusal of the licence application unless the decisionmaker was satisfied on a list of matters.

51. In those decisions, the Commission held as follows:

- (a) Appeal decisions involve no particular onus on any party and involve no presumption in relation to the correctness or otherwise of the decision under appeal.¹³
- (b) The ground of compliance failure requires satisfaction on the balance of probabilities.¹⁴
- (c) Because lack of satisfaction requires refusal, the ground of lack of satisfaction with a grant ground merely requires doubt on the part of the Commission that the ground is established.¹⁵
- (d) The express requirement to take into account the grant grounds section in exercising the discretion to cancel means that lack of satisfaction of a grant ground supports a decision to cancel.¹⁶

Main use

52. A key assessment for the Commission concerns the main use of the Venue, specifically whether it is satisfied that its main use is **not** the operation of gaming machines, under section 67(1)(k), or that its main use is or has been the operation of gaming machines in breach of section 69A(e). The Commission proceeds on the statements of principle set out in its past decisions, principally the *Windsock Tavern* appeal¹⁷ and the *Galaxy Function Centre* appeal,¹⁸ as follows:

- (a) “Used mainly” in section 67(1)(k) (and logically for section 69A(e) as well) concerns how the class 4 venue is used for the most part or in the main. It addresses what in fact occurs, not what could potentially occur. The assessment is to be made in respect of the whole venue, not just the part used for operating gaming machines.¹⁹
- (b) It is a matter of overall assessment and impression. There are a number of factors that can be considered to assess use; no single factor is individually determinative of whether a venue is used mainly for operating gaming machines.²⁰

¹³ Decision GC10/14 at [26].

¹⁴ Decision GC10/14 at [27].

¹⁵ Decision GC10/14 at [28]-[30].

¹⁶ Decision GC10/14 at [31]. Decision GC11/14 at [44], [45] and [47].

¹⁷ Decision GC22/06.

¹⁸ Decision GC25/12.

¹⁹ Decisions GC 22/06 at [24] and GC25/12 at [14].

²⁰ Decision GC 22/06 at [27].

- (c) While there can be a correlation between use and revenue, the relationship is not necessarily absolute and proportional. It would be unsound to treat revenue as the sole indicator of use. A multidimensional test is required.²¹
- (d) “Used mainly” is not necessarily the same as “primary activity”. While both concern relativity of use or activity, the test is different; primary activity is the leading activity but may not necessarily be the main use, if there are more than two activities.²²
53. The submissions raise the prospect of a further distinction, namely between the nature of “use” and “activity”, in the sense that not all use may take the form of activities. The Commission considers that the need for it to be satisfied about both main use and suitability (which requires assessment of primary activity) means that the distinction has little practical application on this appeal.
54. In making its assessments, the Commission has had to weigh the sworn assertions of the venue operator and the head count evidence against the information, derived from past observations by DIA inspectors and staff admissions made to them, about the actual activity at the Venue. In that regard, the distinction between actual and potential use or activity is important; much of BlueSky’s case (aside from the head count evidence) rested on availability of activities rather than their actual use.
55. The Commission observes that, while relative revenue streams are not solely determinative of main use, revenue disparity has tended to be discounted in the past only when there has been strong evidence of other actual use, including non-revenue producing use. In that regard, the relevant comparative revenue streams which relate to use of the Venue by the public are the total gaming machine receipts obtained at the Venue (not the venue payment made to reimburse the venue operator for operational costs incurred in conducting the class 4 activity for BlueSky) and the revenue generated from non-gambling activities, such as food and beverage sales and accommodation. The latter is only around 10% of the former.
56. The Commission acknowledges BlueSky’s criticism of the selection of the times for visits to the Venue by DIA inspectors as being outside the Venue’s busiest hours. It also notes the consistent observations made by DIA inspectors in numerous visits, comments made to them by former Venue staff and the size of the disparity between the total gaming machine revenue and all other revenue derived from the use by the public of the Venue. On balance, the Commission is not satisfied that the current main use of the Venue is not the operation of gaming machines as required by section 67(1)(k). That conclusion

²¹ Decision GC 22/06 at [35].

²² Decisions GC22/06 at [26] and GC25/12 at [14].

provides both the necessary condition for the exercise of a discretion to cancel the class 4 venue licence for the Venue and supports the exercise of the discretion to cancel.

57. The Commission has also concluded, on the balance of probabilities, that the main use of the Venue is currently, and has been in the past, the operation of gaming machines in breach of section 69A(e). That conclusion provides an alternative condition for the exercise of a discretion to cancel the class 4 venue licence for the Venue. The related current lack of satisfaction arising with regard to section 67(1)(k) supports a decision to cancel of the venue licence.
58. The Commission considers that the class 4 venue licence for the Venue should be cancelled.

Suitability

59. To be suitable as a class 4 venue, the primary activity of a venue must be entertainment, recreation or leisure focused on persons over 18 years old as specified in Regulation 4(a).
60. The Commission doubts that the harm minimisation objects of the Act²³ may be applied to the interpretation of section 67(1)(q) and Regulation 4(a) so as to create an unexpressed but implied exception, relating to the absence of alcohol, to what is stipulated in Regulation 4(a) as an unsuitable venue. The text of Regulation 4(a) does not permit such an implication. The Commission does not consider that the Secretary should cease to regard the service of alcohol as qualifying hotels, taverns and restaurants to be regarded as focusing on “entertainment, recreation or leisure” for those over the age of 18.
61. The Commission is satisfied that the primary activity at the Venue is focused on persons over 18 years old, but is the operation of gaming machines, and is not occupation of rooms or participation or other activities offered by the Venue. While that conclusion would satisfy Regulation 4(a) in isolation, it confirms that section 67(1)(k) is not satisfied and that the venue licence should be cancelled.

Decision

62. For the foregoing reasons, the Commission confirms the Secretary’s decision to cancel the class 4 venue licence for the Venue.

²³ Section 3(b) and (d).

63. The effect of section 78(2)(b)(ii) is that the class 4 venue licence remained in effect after the decision to cancel was appealed by BlueSky until the date which the Commission specifies under section 77(5). The Commission specifies 30 November 2025 as the date on which the class 4 venue licence for the Venue ceases to have effect.



Susan Hughes KC
Gambling Commissioner

for and on behalf of the
Gambling Commission

27 November 2025

