

FILED/ENDORSED
NOV 30 2012
By J. ZGRAGGEN
DEPUTY CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

BINGO INNOVATIONS OF CALIFORNIA, INC., et al.,
Petitioners,
v.
CALIFORNIA GAMBLING CONTROL COMMISSION, et al.,
Respondents.

Case No. 34-2012-80001139-CU-WM-GDS
RULING ON SUBMITTED MATTER:
PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR MANDATORY
INJUNCTION

The Court heard oral argument in this matter on Friday, November 2, 2012 at 9:00 a.m. in Department 31, counsel for respondent having requested a hearing on the tentative ruling. Michael B. Montgomery appeared as counsel on behalf of petitioners. Deputy Attorney General Neil D. Houston appeared as counsel on behalf of respondents.

At the hearing, counsel for respondents informed the Court that the legislation that had been proposed to shift regulation of remote caller bingo from the State to the local level, which was referred to in the tentative ruling, was no longer pending before the Legislature, because the latest Legislative session had ended without enactment of the bill. Counsel for respondents also informed the Court that the parties had entered into a stipulation that petitioner's licenses and permits would remain valid while this case is pending. The Court will incorporate those factual corrections into its final ruling.

1 Counsel for respondents also asked the Court to review *County of San Diego v. State of California*
2 (2008) 164 Cal. App. 4th 580, and requested a formal statement of decision from the Court including a
3 specific factual finding as to whether funds to regulate remote caller bingo are “reasonably available” to
4 respondents as described in that case.

5 Respondents’ request for a formal statement of decision is denied. Under Code of Civil Procedure
6 section 632, a statement of decision is required only where there has been a trial of an issue of fact. (See,
7 *Davenport v. Unemployment Insurance Appeals Board* (1994) 24 Cal. App. 4th 1695.) There has been no
8 trial of any issue of fact in this case: the material facts are undisputed and the Court’s ruling addressed
9 only an issue of law, specifically, respondents’ legal duties with regard to regulation of remote caller
10 bingo.

11 The *County of San Diego* case, in particular, its reference to factual findings regarding the
12 “reasonable availability” of funds, is not applicable here. That case applied the principle, set forth in *Long*
13 *Beach Unified School District v. State of California* (1990) 225 Cal. App. 3rd 155, 180-181, that “[a] court
14 cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. However,
15 no violation of the separation of powers doctrine occurs when a court orders expenditures from already
16 existing funds. The test is whether such funds are ‘reasonably available for the expenditures in
17 question...’. Funds are ‘reasonably available’ for reimbursement when the purposes for which the funds
18 are appropriated are ‘generally related to the nature of the costs incurred...’” (Internal citations omitted.)

19 In the *City of San Diego* case, the Court of Appeal treated the availability of funds as a factual
20 issue, dependent upon evidence of agency budgeting and spending patterns, and held that where the
21

22 evidence does not show that targeted funds are reasonably available to be spent in response to a court
23 order, the court acts within its discretion in denying a petition for writ of mandate to enforce an
24 administrative duty. (See, 164 Cal. App. 4th at 600-603.)

25 In this case, the Court’s tentative ruling granting the petition for writ of mandate was limited to
26 directing respondents to comply with their undisputed statutory duty to regulate remote caller bingo. The
27 Court’s ruling did not identify, or target, any particular sources of funds or existing appropriations and did
28

1 not order respondents to spend any identified funds in order to perform their duties. The issue of whether
2 identified funds are “reasonably available” to be spent for the regulation of remote caller bingo
3 accordingly does not arise in this case, and no factual finding is required regarding the availability of such
4 funds.¹ Absent the need for a finding on this factual issue, no formal statement of decision is required.

5 The Court accordingly will affirm the tentative ruling granting the petition for writ of mandate
6 with the factual corrections stated above. The Court also has revised one sentence on page 6 of the
7 tentative ruling to read as follows: “Respondent Commission will be responsible for finding the money it
8 needs to comply with the Court’s orders, or for finding other means of compliance that do not require
9 additional funding.” The final ruling of the Court is as follows:

10 **Introduction**

11 This is a petition for writ of mandate under Code of Civil Procedure section 1085 in which
12 petitioners allege that respondents California Gambling Control Commission and its individual members
13 have failed to comply with their mandatory statutory duty to regulate remote caller bingo, in particular by
14 licensing qualified entities to conduct the game.² Respondent Commission acknowledges the statutory
15 mandate but argues that it is impossible for it to comply, because the Legislature has ceased making the
16 appropriations required to support respondent Commission’s activities related to remote caller bingo. For
17 the reasons set forth below, the Court finds that the petition and request for injunctive relief have merit,
18 and will grant relief in favor of petitioners.
19

20 **Factual and Legal Background**

21 The relevant facts, and much of the applicable law, are not in dispute.³

22
23 ¹ Similarly, no factual finding is required on the issue of whether it is possible for respondents to comply with their
24 legal duties without improperly expending funds that have been appropriated for other purposes, for example, by
25 assigning existing personnel of the Commission, who are paid through appropriations from funds with other
26 designated purposes, to perform limited additional duties related to remote caller bingo. Although respondents raised
this issue in oral argument, they presented no evidence on it, and did not demonstrate that they could only comply
with the writ by expending funds appropriated for other purposes. The Court therefore did not address or resolve any
factual issues regarding possible means of compliance with the writ.

27 ² Petitioners assert no claims against the members of the Commission in their non-official capacity. All of the
respondents therefore will be referred to in this ruling collectively as “respondent Commission”.

28 ³ Each side has submitted a request for judicial notice. Only one of the items in the requests is objected to:
respondent Commission objects to petitioner’s request for judicial notice of an opinion of the Legislative Counsel

1 Article IV, section 19(c) of the California Constitution provides that the Legislature "...by statute,
2 may authorize cities and counties to provide for bingo games, but only for charitable purposes."

3 Pursuant to that authorization, in 2008 the Legislature enacted the Remote Caller Bingo Act,
4 effective January 1, 2009. Remote caller bingo allows multiple charitable organizations in different
5 locations to play the same bingo game simultaneously. The game's caller conducts the game through real-
6 time video broadcast from a central location. The Act, the most important parts of which were codified in
7 Penal Code section 326.3, provides that respondent California Gambling Control Commission "...shall
8 regulate remote caller bingo, including, but not limited to, licensure and operation." (Penal Code section
9 326.3(q)(1).)

10 Penal Code section 326.3(q)(3) governs the funding for respondent's regulation of remote caller
11 bingo under the Act. It provides:

12 "(A) Every application for a license or approval shall be accompanied by a nonrefundable fee, the
13 amount of which shall be adopted by the commission by regulation.

14 "(B) Fees and revenue collected pursuant to this paragraph shall be deposited in the California
15 Bingo Fund, which is hereby created in the State Treasury. The funds deposited in the California Bingo
16 Fund shall be available, upon appropriation by the Legislature, for expenditure by the commission and the
17 department exclusively for the support of the commission and department in carrying out their duties and
18 responsibilities under this section and Section 326.5.

19 "(C) A loan is hereby authorized from the Gambling Control Fund to the California Bingo Fund
20 on or after January 1, 2009, in an amount of up to five hundred thousand dollars (\$500,000) to fund
21 operating, personnel, and other startup costs incurred by the commission relating to this act. Funds from
22 the California Bingo Fund shall be available to the commission upon appropriation by the Legislature in
23

24
25 dated February 8, 2012, addressed to Senator Lois Wolk, responding to her inquiry regarding whether the
26 Commission has the legal authority to terminate the remote caller bingo program and to decline to perform its duties
27 in connection with that program. Respondent Commission's objection is well-taken. Opinions of the Legislative
28 Counsel are properly subject to judicial notice as legislative history. (See, *Kaufman & Broad Communities v.
Performance Plastering, Inc.* (2005) 133 Cal. App. 4th 26, 31.) The opinion offered here post-dates the enactment of
the Remote Caller Bingo Act and thus has no relevance as legislative history. With that exception, the requests for
judicial notice are granted.

1 the annual Budget Act. [...]

2 “The commission may assess and collect reasonable fees and deposits as necessary to defray the
3 costs of regulation and oversight.”⁴

4 The Legislature initially made appropriations to respondent Commission from the California
5 Bingo Fund in the annual Budget Acts for fiscal years 2009-2010 and 2010-2011.

6 Shortly after the Remote Caller Bingo Act became effective, respondent Commission promulgated
7 regulations that provided for interim licensure of manufacturers, distributors, vendors, fiduciaries, site
8 managers and callers involved in remote caller bingo. It did so in an effort to further the legislative intent
9 of the enabling legislation, to avoid delays in implementing the Act, and to avoid disruption of fundraising
10 efforts by nonprofit organizations using remote caller bingo. Respondent Commission planned to develop
11 full licensing regulations in accordance with the standards of the Gambling Control Act.

12
13 Petitioner Bingo Innovations of California, Inc. (“BICI”) is a corporation engaged and licensed in
14 the business of providing remote caller bingo sessions for charities and other non-profit entities in the
15 State of California. Respondent Commission granted petitioner BICI’s applications for interim licenses as
16 a manufacturer and distributor of bingo equipment and as a manager for remote caller bingo in 2010.⁵

17 The full licensing regulations were never developed. On June 30, 2011, the last day of fiscal year
18 2010-2011, the most recent Legislative appropriation for respondent Commission’s activities expired. The
19 Legislature made no appropriations to respondent Commission from the California Bingo Fund for fiscal
20 years 2011-2012 or 2012-2013.⁶ In its briefing, respondent Commission acknowledges that there is a
21 positive balance in the California Bingo Fund, but asserts that it cannot use those funds absent a

22 Legislative appropriation.⁷ Respondent Commission thus was left without funding from the only legally-
23 available source from which to support its regulatory activities under the Remote Caller Bingo Act.

24 ⁴ The omitted portions of the statute list conditions to which the loan from the Gambling Control Fund shall be
25 subject, and are not relevant to the issues raised in this case.

26 ⁵ The other named petitioners are the Desert Hot Springs Elks Lodge, which is a non-profit organization and a bingo
licensee, and Robert Rubio, a taxpayer and former Past Exalted Ruler of his Elks Lodge. Respondent Commission
27 makes no challenge to the standing of any of the petitioners to bring this action.

28 ⁶ It is not apparent from the record before the Court why the Legislature made no appropriations in these years.

⁷ See, Respondent’s Opposition to Petition for Writ of Mandate and Complaint, page 2:3-6.

1 On May 26, 2011, in anticipation of the imminent expiration of its last legislative appropriation,
2 respondent Commission issued a letter that was sent to, among others, all of its current licensees. The
3 letter stated:

4 "The California Gambling Control Commission's (Commission) current funding authority for the
5 Remote Caller Bingo Program, which is a loan from the Gambling Control Fund, and limited-term
6 positions expire on June 30, 2011. Without that funding authority and those positions, the Commission
7 cannot perform work related to the Remote Caller Bingo Program after that date. The Commission is not
8 authorized under State law to use other funding sources to cover program costs. Due to lack of funding,
9 the Commission will be required to terminate its activities related to the Remote Caller Bingo Program
10 effective July 1, 2011."⁸

11 The letter further stated that legislation had been introduced "...to allow for the continuation of the
12 Remote Caller Bingo Program as a streamlined program regulated at the local level, just as traditional
13 bingo is now regulated." The legislation "...would eliminate the role of the Commission in the regulation
14 of remote caller bingo, including the licensure of remote caller bingo, the approval of remote caller bingo
15 equipment, and the approval of bingo card-minding devices."

16 The letter also addressed the status of existing licenses, describing "...the Commission's plan to
17 ensure that we fulfill our legal and fiscal responsibilities to remote caller bingo while allowing those
18 activities which have been approved to continue. After the Commission's funding authority for remote
19 caller bingo ends on June 30, 2011, organizations, businesses and individuals that hold Commission-issued
20 licenses, permits and approvals as of that date may continue to operate under the authority of those
21 licenses or permits until their expiration, or, until the effective date of [the pending legislation], if it
22 becomes law, whichever is sooner. [...] In an effort to avoid the potential disruption of the operation of
23 remote caller bingo games, the Commission, at its June 16, 2011 meeting, will consider a staff
24 recommendation to extend all licenses, permits and approvals in effect on June 30, 2011 to May 31, 2012."

25 Finally, the letter stated that, after June 30, 2011, "...no further action on new or pending
26
27

28 ⁸ See, Declaration of Tina Littleton, par. 10 and Exhibit B.

1 applications will be taken by the Commission.”

2 Respondent Commission subsequently adopted the staff recommendation referred to above, thus
3 extending existing licenses and work permits to May 31, 2012.

4 As of the date of this ruling, the legislation to transfer regulation of remote caller bingo from
5 respondent Commission to the local level is no longer pending before the Legislature, not having been
6 enacted prior to the end of the last Legislative session. Respondent Commission has entered into a
7 stipulation with petitioners to extend their licenses and permits while this case is pending. Otherwise,
8 respondent Commission has taken no further action to extend existing licenses, and, as stated above, has
9 ceased acting on new license applications. Petitioner BICI states that more than one hundred potential
10 licensees are prepared to apply for licenses to participate in remote caller bingo games managed by
11 petitioner, but respondent Commission will not process those applications.

12
13 Petitioners seek issuance of a writ of mandate directing respondent Commission to resume its
14 regulation of remote caller bingo by considering remote caller bingo license applications and bingo site
15 license applications, and by issuing such licenses where regulatory conditions are met. Petitioners also
16 seek issuance of a mandatory injunction directing respondent Commission to extend existing licenses and
17 permits that expired on May 31, 2012 as the result of the Commission’s inaction.

18 **Discussion**

19 The Court finds that respondent Commission is subject to a mandatory, statutory duty to regulate
20 remote caller bingo, including by administering licensure and operation. That duty arises under Penal
21 Code section 326.3(q)(1), which, as described above, provides that respondent Commission “shall” do so.
22 Where the words of a statute provide that an administrative agency “shall” take specified action, such
23 language “...require[s] a finding that the duty imposed on the [agency] is mandatory in nature”, and a writ
24 of mandate may issue to require the agency to perform its duty. (See, *California Association of Health*
25 *Facilities v. Kizer* (1986) 178 Cal. App. 3rd 1109, 1114.)

26 Respondent Commission does not argue that it is not subject to a statutory mandate to regulate
27 remote caller bingo and to engage in licensing activities under the provisions of Penal Code section 326.3.
28

1 Instead, it contends that the court may not compel it to comply with the statutory mandate because the
2 Legislature, for reasons unknown, has failed to provide the necessary funding through annual
3 appropriations. Thus, respondent argues, it is legally unable to comply with its statutory duty.

4 Respondent's contention is not persuasive. This is not a case of legal impossibility, but of present
5 financial incapacity. Case law consistently has rejected the proposition that a state agency may justify
6 non-compliance with a statutory mandate based on lack of funding.

7 In *California Association of Health Facilities v. Kizer, supra*, a statute directed the state
8 Department of Health Services to establish a subacute care program in health facilities and to develop a
9 rate for reimbursement for the program. The Department failed to do so, and an association of health care
10 facilities filed a petition for writ of mandate to require the Department to comply with the statute. After
11 the trial court granted the petition, the Department argued on appeal that issuance of the writ was
12 inappropriate because it ordered the performance of a useless act, in that the Legislature had not
13 appropriated any funds to support the reimbursement of facilities participating in the subacute care
14 program. The Second District Court of Appeal rejected this argument on the following basis, among
15 others: "[F]inancial distress is not a defense to issuance of a writ." [Citation omitted.] The Department
16 may not ignore its duty to act because it foresees purported fiscal difficulties on the horizon." (178 Cal.
17 App. 3rd at 1114.)

18
19 Similarly, in *Morris v. Harper* (2001) 94 Cal. App. 4th 52, the Legislature enacted statutes creating
20 the correctional treatment center licensing center licensing category in order to ensure that inpatient
21 medical services provided in California's correctional facilities met minimum health standards. The
22 statutes further required correctional medical centers to obtain licenses by a specified date, and directed the
23 Department of Health Services to develop regulations governing correctional treatment
24 centers, which it did.

25 Four years after the enactment of these requirements, the California Youth Authority ("CYA")
26 was operating all of its correctional medical centers without licenses, in violation of the statutes. A
27 physician filed a petition for writ of mandate seeking to compel CYA to comply with the state licensing
28

1 requirements. After the trial court granted the petition and issued the writ, CYA's Acting Director argued
2 on appeal that the writ should not issue because relief was unwarranted under the circumstances of the
3 case, asserting (among other arguments) that a writ was improper because CYA needed the cooperation
4 and approval of third parties in pursuing licensing. Specifically, he argued that "his ability to obtain
5 licenses is, in large measure, dependent upon the action, cooperation, and approval of, among others, the
6 Department of Finance and the Legislature." (94 Cal. App. 4th at 61.)

7 The First District Court of Appeal rejected the Acting Director's argument, stating:

8 "This argument simply ignores the reality of the situation. As [petitioner] Morris points out, if we
9 were to accept this argument, no public agency could be held to the requirements of state law. Numerous
10 cases illustrate that financial distress and dependence on third parties to provide funding for legally
11 mandated services does not constitute a sufficient basis for denying a writ of mandamus. [Citations
12 omitted.]

13 "In issuing a writ of mandate, the trial court compelled Harper to fulfill his legal duty by taking
14 the necessary steps to comply with the licensing requirements for correctional treatment centers. As the
15 above cited authorities illustrate, obtaining relief by means of mandate was appropriate even though
16 Harper will need the approval and cooperation of third parties to comply with the court's directive." (94
17 Cal. App. 4th at 62.)

18 Respondent Commission therefore cannot rely on the lack of Legislative appropriations as a valid
19 reason for declining to administer remote caller bingo as required by law. The Third District Court of
20 Appeal summed up the applicable principle succinctly in *Rogers v. Detrich* (1976) 58 Cal. App. 3rd 90,
21 103: "Arguments regarding financial costs incident to the granting of judicial relief, where such relief is
22 compelled by law, are properly addressed to the Legislature, not the courts."

23 In this case, respondent Commission's statutory duty is clear: it must regulate remote caller bingo
24 by, among other things, acting on applications for licenses. It is undisputed that respondent Commission
25 has stopped doing so. A writ of mandate is available, notwithstanding the Commission's financial
26 difficulties, to require it to resume performing its duty. Such relief is compelled by law. Any arguments
27
28

1 the Commission has regarding financial costs incident to the granting of the writ are, as stated above,
2 properly addressed to the Legislature, not the courts. Granting the writ to order respondent Commission to
3 act does not violate the established legal principle that courts cannot directly order the Legislature to
4 appropriate funds or order the payment of funds the Legislature has not appropriated. (See, *County of San*
5 *Diego v. State of California* (2008) 164 Cal. App. 4th 580, 594.) The writ will not be directed to the
6 Legislature or directly order any action by the Legislature. Respondent Commission will be responsible
7 for finding the money it needs to comply with the Court's orders, or for finding other means of compliance
8 that do not require additional funding.

9
10 The Court therefore grants the petition for writ of mandate. A writ of mandate shall be issued
11 pursuant to Code of Civil Procedure section 1085 directing respondent Commission forthwith to resume
12 regulating remote caller bingo under the provisions of Penal Code section 326.3 and any other applicable
13 law, including by acting on new and pending license applications.

14 Petitioners also seek issuance of a mandatory injunction requiring respondent Commission to
15 provide an additional extension to all licenses and permits that were in effect as of May 31, 2012, the date
16 the extension previously granted by the Commission expired. Respondent Commission's opposition
17 papers do not specifically address the request for injunctive relief.

18 The Court finds that the requested injunctive relief is appropriate in this case. An injunction is an
19 equitable remedy, and the equities weigh in favor of ordering that remedy here. The current situation is
20 not the fault of petitioners or any other licensees/permittees. Indeed, respondent Commission, recognizing
21 the difficult situation the lack of funding and the possible transition to local regulation posed for existing
22 licensees and permittees, previously extended the validity of their licenses and permits to May 31, 2012.
23 Respondent Commission apparently has been discussing an additional extension of existing licenses and
24 permits while legislation to reform the program is pending, and does not appear to object to such an
25 extension.⁹ It has not made any showing that a further extension for any existing licensee or permittee
26

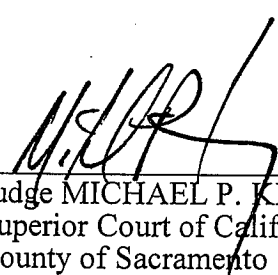
27 ⁹ See, for example, petitioners' Exhibit 9, respondent Commission's "February 21, 2012 Remote Caller Bingo
28 Meeting Recap" regarding the pending legislation, dated March 20, 2012, page 5: "The bill has an urgency because
the GCC has informed charities that only those charities/management companies licensed to conduct RCB as of June

1 would be against the public interest.

2 The Court accordingly will issue a mandatory injunction requiring respondent Commission to
3 provide a further extension of validity for all licenses and permits that were in effect as of May 31, 2012.
4 The extension shall remain in effect until respondent Commission resumes processing license and permit
5 applications (at which time it may require an application for renewal for any license or permit that would
6 have expired absent the extension), or until new legislation is enacted and implemented eliminating the
7 Commission's duty to regulate remote caller bingo, whichever occurs first.

8 In accordance with Local Rule 9.16, counsel for petitioners is directed to prepare a formal order,
9 incorporating this Court's ruling as an exhibit, a separate judgment, and a peremptory writ of mandate and
10 injunction; submit them to opposing counsel for approval as to form in accordance with Rule of Court
11 3.1312(a); and thereafter submit them to the Court for signature and entry of judgment in accordance with
12 Rule of Court 3.1312(b). The writ shall further command respondent Commission to make and file a
13 return within 60 days after issuance of the writ, setting forth what it has done to comply with the writ. The
14 Court shall reserve jurisdiction in this action until there has been full compliance with the writ.
15

16
17
18 DATED: November 30, 2012

19 
20 Judge MICHAEL P. KENNY
21 Superior Court of California,
22 County of Sacramento

23
24
25
26 30, 2011 can continue to play the game but the program will expire (and their licenses) on June 1, 2012. According
27 to Julie, the committee cannot guarantee that the bill will be heard prior to this expiration date; therefore, the bill
28 should be amended to change the expiration date to June 1, 2013. This allows the charities already licensed and the
management company to continue to use interim licenses up to June 1, 2013 unless legislation is enacted prior to that
date."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

Michael B. Montgomery
Attorney at Law
2627 Mission Street, Suite 1
San Marino, CA 91108

Neil D. Houston
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Superior Court of California,
County of Sacramento

Dated: December 3, 2012

By: J. Zraggen
Deputy Clerk 