

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9047

File: 47-423392 Reg: 08070211

BEAR RIVER CASINO, dba Bear River Casino
11 Bear Paws Way, Loleta, CA 95551-9684,
Appellant/Licensee

v.

SINGLEY HILL HOMEOWNERS ASSOCIATION
P.O. Box 755, Loleta, CA 95551
Respondent

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: October 7, 2010
San Francisco, CA

FILED NOV 23 2010

Bear River Casino, doing business as Bear River Casino (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license for having failed to comply with a condition on its license, a violation of Business and Professions Code section 23804.

Appearances on appeal include appellant Bear River Casino, appearing through its counsel, George Forman, and respondent/protestant Singley Hill Homeowners Association, appearing through its counsel, Michael E. Vinding. Department of Alcoholic Beverage Control counsel, Dean Lueders, was also present.

¹The decision of the Department, dated June 15, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide public eating place license was issued on July 26, 2006. Thereafter, Singley Hill Homeowners Association (the Association) filed an accusation against appellant charging it failed to comply with a condition on its license (condition 8) requiring it to make certain intersection alterations.

An administrative hearing was held on April 29, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented. The evidence established that, while certain road improvements required by a related license condition (condition 7) had been completed,² the intersection alterations required by the condition in question (condition 8) had not, because of the intervention of the Bureau of Indian Affairs, the California Department of Forestry, and, indirectly, Humboldt County.

Subsequent to the hearing, the Department issued its decision which determined that, through no fault of its own, appellant's failure to complete the alterations required by license condition 8 did in fact constitute a violation of the condition. The evidence established, and the administrative law judge (ALJ) found, that appellant was prevented from complying with the condition by the United States Bureau of Indian Affairs, which withheld its approval of the improvements and alterations because they would be on, and would affect, tribal-owned lands. Since the license condition was imposed on the license pursuant to an agreement between appellant and the Association, pursuant to which the Association withdrew its protest against issuance of the license, the ALJ

² Condition 7 provides:

The licensee shall widen and improve Singley Road for the 0.3 mile between the premises and the US 101 interchange to meet Humboldt County standards.

concluded that the only appropriate remedy was to treat the condition as having been violated; he ordered the license revoked, but stayed the effective date of the order for two years, the stay to become permanent once appellant was in compliance with the condition. Such an order, he said, will provide finality for all parties:

The order recommended here may appear harsh at first but it is the only method that will provide finality for all parties. It provides ample time for Respondent to do what is necessary to comply with Condition #8. If Respondent is not able to comply with Condition #8 because of their [*sic*] inability to obtain approval from the Bureau of Indian Affairs then Respondent can seek to obtain a different license. A new investigation can be conducted, protests if any can be filed and a new hearing can be conducted to determine whether or not a license should issue, and if issued, whether or not there should be any conditions placed upon that license.

Appellant filed a timely notice of appeal in which it raises the following issues:

(1) It in fact complied with condition 8; (2) the finding that compliance with condition 8 was a legal impossibility rendered the Department order of revocation an abuse of discretion; (3) the Association failed to prove that it had existence, standing, or authority to pursue the accusation; and (4) appellant was prejudiced by the undue latitude given to the Association's non-attorney representative by the ALJ.³ Appellant has also filed a Request to Remand to the Department of Alcoholic Beverage Control for Consideration of New Evidence, together with the supporting declaration of Leonard Bowman, Chairman, Bear River Band of Rohnerville Rancheria.

³ Neither of issues (3) and (4) have any real substance, and need be discussed only briefly. There were protests from a number of individual homeowners, and there is no requirement that a homeowners' association have any formal structure. The minimal "assistance" provided by the ALJ to the Association's non-attorney spokesperson was no more than any conscientious ALJ would have provided to a pro per litigant, and afforded the Association no real advantage.

DISCUSSION

Appellant describes a number of steps it took in its efforts to comply with condition 8, all of which were thwarted by some level of government intervention or as a result of objections by Association members. It installed physical barriers at the intersection of Singley Road and Bear River Drive, and posted signage prohibiting turns. The Bureau of Indian Affairs (BIA), which had jurisdiction over Bear River Drive because of its location on tribal land, objected and ordered the barriers and signs removed as unsupported by Humboldt County traffic counts. Appellant then installed speed bumps on Singley Road. These were removed after Singley Road residents did not approve them as an acceptable solution. Despite these setbacks, appellant argues, it continued diligently to work with BIA, Cal Trans, other government entities and the Association to seek an acceptable way of discouraging traffic on Singley Road.

Appellant argues, and we are inclined to agree, that it could not have been intended that its obligation to fully comply with condition 8 arose immediately upon issuance of the conditional license. Indeed, it undertook, and completed, at substantial expense, road improvements required by a related license condition (condition 7), even though the cost (approximately \$1.5 million) was far greater than the anticipated cost of compliance with condition 8.

The Department's order, which stayed its execution for two years, the stay becoming permanent if and when appellant achieved compliance with condition 8, effectively recognizes that full compliance was not expected to be simultaneous with issuance of the license. While it is doubtful that anyone expected, at this late date, the non-fulfillment of the obligation of the condition, it cannot be said that it was the product of foot-dragging. That being the case, and it appearing from the representations made

in appellant's request for a remand to the Department that a new federal agency has jurisdiction over the intersection in question, one with an attitude more favorable to appellant's objectives, it would seem that an order of remand be appropriate for several reasons. First, a remand would provide an early opportunity for the Department to confirm that appellant had complied, or substantially complied, with the obligation of condition 8, and to be current with appellant's progress while the Department once again has jurisdiction. In addition, the Association would be in a position to voice its views to the Department. Finally, appellant could avoid the risk that time and money would be wasted by its pursuit of a remedy destined never to earn the Department's approval.

The essence of appellant's request for a remand is seen in the papers filed in support of its request for a remand. Appellant has succeeded in causing the transfer of jurisdiction over the roads in question away from the BIA, to the Tribe, subject to the more receptive Federal Highway Administration of the Department of Transportation (DOT). (See Exhibit 1 to Request to Remand, etc.) It has developed a plan to control traffic at the intersection which would involve the use of a barrier system similar to the barrier system that BIA had rejected. (See Exhibit 2 to Request to Remand, etc.) Even though there are some loose ends that need to be tended to, there is ample time between now and the June 2011 deadline of the Department's order for appellant to provide a solution acceptable to all parties concerned.

This is simply not a case where an otherwise qualified applicant should be denied a license because caught between two or more conflicting levels of government, none of which have ever said no solution to the conflict is possible.

ORDER

This matter is remanded to the Department for such further proceedings as may be necessary and appropriate in light of our comments herein.⁴

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.

APPENDIX

STATE OF CALIFORNIA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

FILE : 47 - 423392

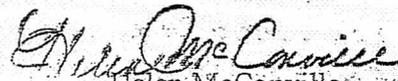
REG. : 08070211

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on June 15, 2009.

THIS DECISION SHALL BECOME OPERATIVE AUGUST 6, 2009.

Sacramento, California

Dated: June 15, 2009


Helen McConville

Supervisor, Hearing and Legal Unit

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9 of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capital Mall, Suite 1245, Sacramento, CA 95814.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

RECEIVED

MAY 29 2009

Alcoholic Beverage Control
Legal Unit

IN THE MATTER OF THE ACCUSATION AGAINST:

Bear River Casino
dba Bear River Casino
11 Bear Paws Way
Loleta, CA 95551-9684

Respondent,

} FILE: 47-423392

} REG: 08 070 211

} LICENSE TYPE: 47

} PAGES: 180

} REPORTER: Katherine Wayne

} Atkinson-Baker Court Reporters

On-sale General Public Eating-place License.

} PROPOSED DECISION

Administrative Law Judge John W. Lewis heard this matter at Eureka, California, on April 29, 2009.

This accusation was brought by the Singley Hill Homeowners Association [Association] pursuant to Section 24201. Noel Krahforst is a member of the Singley Hill Homeowners Association and represented Association at the hearing.

Respondent Bear River Casino was represented by Michael Acosta, Attorney-at Law.

Complainant Association seeks to discipline Respondent's license on grounds Respondent failed to comply with two conditions endorsed upon its license in violation of California Business and Professions Code¹ Section 23804. (Exhibit 1.)

Department Staff Counsel Dean Leuders was present at the hearing but did not participate as the Department was not a party to this accusation.

Respondent requested a hearing to present its defense to the charges in the Accusation. (Id.)

Oral and documentary evidence was received at the hearing and the matter was argued and submitted for decision on April 29, 2009.

¹ All subsequent statutory references are to said Code unless otherwise specified.

FINDINGS OF FACT

1. The Accusation was filed by Singley Hill Homeowners Association on December 24, 2008. (Exhibit 1).
2. Department issued a type 47 (On-sale General Public Eating-place) license to Respondent at the above-identified location [Licensed Premises] on July 26, 2006.
3. There is no record of prior Departmental discipline against Respondent's license.
4. When Respondent submitted the application for this license numerous protests were filed, primarily by members of the Singley Hill Homeowners Association. A hearing was scheduled at that time.
5. A settlement agreement was reached between the Protestants and Respondent prior to the record being opened. In exchange for Protestants withdrawing their protests, Respondent agreed to a set of conditions. The Department then issued the license in July, 2006, subject to those conditions. (Exhibit 2). Among those conditions are the following:
 - “8. The licensee shall modify the entrance from Singley Road to Bear River Drive so that public vehicular ingress and egress is available only to and from the south on Singley Road. The modified entrance or a separate entrance shall provide access to the premises from the north on Singley Road for emergency vehicles only.”
 9. The licensee shall exercise no off-sale privileges pursuant to Business and Professions Code Section 23401.”
6. Thomas Mattson is employed by the Humboldt County Department of Public Works. He is a civil engineer and has been involved with the issues involving the roads near Respondent's casino in some capacity since 2006. Singley Road is a county road and is the only road that leads to Respondent's casino. Humboldt County requires an encroachment permit before any work can be done to a county road. Shortly after this license issued Respondent obtained the appropriate permit and paid to have Singley Road widened as was required by Condition #7.
7. During this same time frame Respondent placed barriers and K-rails on reservation property at Singley Road to prohibit right turns onto Singley Road when exiting the

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casino property. This was done to comply with Condition #8. Not long afterwards the United States Bureau of Indian Affairs became aware of the barriers (which were on tribal property) and ordered Respondent to immediately remove the barriers. The barriers were then removed.

8. The United States Bureau of Indian Affairs has ultimate authority to determine what can and cannot be done relating to roads located on reservation property. In other words, Respondent cannot place barriers or modify the roads on reservation property to comply with Condition #8 without the approval of the Bureau of Indian Affairs.

9. Respondent then attempted to close Singley Road from the north to comply with Condition #8. Although this was acceptable to the concerned parties, the California Department of Forestry (Cal Fire) advised all that fire regulations prohibit such a road closure.

10. The Bureau of Indian Affairs then requested Humboldt County to conduct a traffic count to determine if there was any increase in traffic on Singley Road north of Respondent's casino. That count was done and showed no increase in traffic on Singley Road beyond Respondent's casino. (Exhibit B).

11. Currently there are two alternative plans presented by Respondent to comply with Condition #8. Both plans are acceptable to Humboldt County officials. Both alternatives require some encroachment onto tribal lands and therefore approval by the Bureau of Indian Affairs is necessary. Both alternatives have been submitted to the Bureau of Indian Affairs and are awaiting review. Until the time of this hearing no action has been taken by the Bureau of Indian Affairs.

12. Respondent is not now, nor have they ever been, in compliance with Condition #8.

13. In 2008 Respondent applied for a Type 20 (Off-sale Beer & Wine) license for a convenience store / gas station located on tribal property adjacent to the casino. That license was not protested and it was issued by the Department. It is a separate license from that issued to Respondent's casino. (20-468242) This Type 20 license does permit off-sale privileges at the convenience store / gas station. (Exhibit 8).

14. Condition #9 prohibits off-sale privileges at the Type 47 license that covers the casino. No evidence was presented to establish that Respondent violated Condition #9. The Department did receive complaints regarding Condition #9. Those complaints were investigated and determined to be unfounded.

15. Except as set forth in this Decision, all other allegations in the Accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, Section 22 of the California Constitution and Section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 23804 provides that violation of a condition placed upon a license constitutes the exercise of a privilege for which a license is required without the authority therefor and is grounds for suspension or revocation of the license.
3. Cause for suspension or revocation of Respondent's license was established in accordance with the Constitutional and code sections cited above and Findings of Fact, paragraphs 4 through 12, for the violations alleged in Count 1 of the Accusation. Continuance of the license without imposition of discipline would be contrary to public welfare and morals.
4. Cause for suspension or revocation of Respondent's license was **not** established in accordance with the Constitutional and code sections cited above and Findings of Fact, paragraphs 13 and 14, for the violations alleged in Count 2 of the Accusation.

PENALTY CONSIDERATIONS

1. Complainant recommends that the Type 20 license held by Respondent be suspended indefinitely until such time as Respondent is in compliance with Condition #8. However, that is not possible since the Type 20 license is not the subject of this Accusation.
2. Respondent requests that a finding be made that it is legally impossible for Respondent to comply with Condition #8 and that it be removed from the Petition for Conditional License.
3. Condition violations are considered serious violations, since without the conditions, the license would in all likelihood not have issued. In 2006 when this matter was scheduled to be heard as a protest matter, numerous protestants appeared at the hearing. Lengthy negotiations resulted in a compromise and the matter was settled instead of conducting the hearing. The Petition For Conditional License (Exhibit 2) was the end result of the settlement. Respondent agreed to accept the conditions and the protestants agreed to withdraw their protests. The license issued subject to those conditions.
4. By all accounts, Respondent has done everything within its power to comply with Condition #8. No one has even suggested that Respondent was "dragging their feet" in any way.

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5. The problem here is the Bureau of Indian Affairs. The Department of Alcoholic Beverage Control has no authority over that entity. Nor does Humboldt County, Bear River Casino or the Singley Hill Homeowners Association.
6. In licensing matters before the Department of Alcoholic Beverage Control it is the Applicant who bears the burden of proof in establishing that they are entitled to the license sought. *Coffin v. Alcoholic Beverage Control Appeals Bd. and Barona Tribal Gaming Authority, Real Party in Interest*, 139 Cal.App.4th 471. In this case we do not know whether or not Respondent could have met this burden because of the settlement agreed to by the parties.
7. It does not seem fair to punish Respondent's license because of the inaction of the Bureau of Indian Affairs. However, Respondent did agree to comply with the conditions listed in Exhibit 2. It is unlikely that Respondent would have agreed to the conditions had they known that it was impossible to comply with Condition #8.
8. Complainant is entitled to receive what they bargained for, and that is compliance with all of the conditions. The original protestants, complainant here, relinquished their opportunity to have their objections heard by an administrative law judge and a decision issued in exchange for Respondent's promise to comply with the conditions.
9. If anyone is to attempt to force action by the Bureau of Indian Affairs it seems only appropriate to place that onus on the Respondent since they are the party who sought this license to begin with.
10. The order recommended here may appear harsh at first but it is the only method that will provide finality for all parties. It provides ample time for Respondent to do what is necessary to comply with Condition #8. If Respondent is not able to comply with Condition #8 because of their inability to obtain approval from the Bureau of Indian Affairs then Respondent can seek to obtain a different license. A new investigation can be conducted, protests if any can be filed and a new hearing can be conducted to determine whether or not a license should issue, and if issued, whether or not there should be any conditions placed upon that license.

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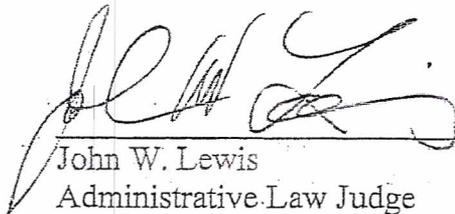
ORDER

Count 1 is sustained and Respondent's On-sale General Public Eating-place License is hereby revoked with the following provisions:

1. The effective date of the revocation shall be two years from the date that this proposed decision is adopted;
2. Should Respondent come into compliance with Condition #8 during that two year period then the revocation shall become permanently stayed;
3. The provisions of Rule 66 shall not apply to this premises if the license is in fact revoked;
4. In addition to existing legal notifications and postings, if Respondent seeks a new license or seeks to transfer a license to this premises, then Respondent shall notify each of the original protestants from the 2006 matter that a new license or transfer is being sought so that these individuals may have an opportunity to file protests if they so choose.
5. Such notifications shall be by U.S. Mail with proof of service.

Count 2 is dismissed.

Dated: May 20, 2009



John W. Lewis
Administrative Law Judge

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

BEAR RIVER CASINO
dba Bear River Casino
11 Bear Paws Way
Loleta, CA 95551-9684,
Appellant/Licensee,

v.

SINGLEY HILL HOMEOWNERS ASSC.
PO Box 755
Loleta, CA 95551,
Respondent,
and

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9047

) File: 47-423392
) Reg: 08070211

) **DECLARATION OF SERVICE**
) **BY MAIL**

I, DIANE HEFFINGTON, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 300 Capitol Mall, Suite 1245, Sacramento, CA; that on the twenty-third day of November 2010, I served a true copy of the attached **decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below, by placing same in an envelope, sealing said envelope, having it certified (except as noted), and depositing same in the United States mail in the City of Sacramento, County of Sacramento, State of California, with postage thereon fully prepaid:

George Forman
Attorney at Law
FORMAN & ASSOCIATES
4340 Redwood Highway, Suite E352
San Rafael, CA 94903

Robert Wieworka/Chief Counsel
Department of ABC
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
(Messenger Mail)

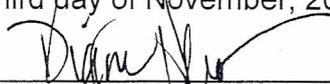
SINGLEY HILL HOMEOWNERS ASSC.
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dba Bear River Casino
11 Bear Paws Way
Loleta, CA 95551-9684

Cheryl Schmitt
Stand Up for California
PO Box 355
Penryn, CA 95663

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California, on the twenty-third day of November, 2010.



DIANE HEFFINGTON