BEFORE THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation Against: BEAR RIVER CASINO BEAR RIVER CASINO 11 Bear Paws Way Loleta, California 95551-9681 LICENSE: On-Sale General Public Eating Place	File No.: 47-423392 Reg. No.: 08070211 **SINGLEY HILL HOMEOWNERS ASSOCIATION'S REPLY BRIEF**

This action is summed up as follows: The Licensee argues the administrative law judge's decision from 2009 was wrongly decided, while the complainant argues the decision was correct. The question is whether the prior decision withstands (yet again) further attack.

BRIEF PROCEDURAL HISTORY

Condition No. 8, as agreed upon by all parties, states:

> 8. The licensee shall modify the entrance from Singley Toad [sic] 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.

Condition No. 8 was the result of arms-length negotiations to protect the local homeowners from the ongoing, public safety issue resulting from the effects of serving alcohol to casino patrons.[1] The solution agreed upon in 2006 was simple: Singley Hill Homeowners Association ("SHHA") promised that all protests would be dropped, thereby giving up any rights it had, in

[1] The hearing demonstrated that the concerns of SHHA members that intoxicated drivers were departing Licensee's casino were well founded at that time and the present time. Under cross-examination, Licensee's employees admitted that they knew intoxicated patrons, as well as intoxicated employees, were leaving the casino.

exchange for a promise by Licensee, as embodied in Condition No. 8, that the access road would be altered.

On April 29, 2009, Judge Lewis found that, "Respondent [Bear River Casino] is not now, nor have they ever been, in compliance with Condition #8." (Findings of Fact, at para. 12.)

Following an unsuccessful appeal of the April 29, 2009 decision, Bear River Casino ("Licensee") now opposes revocation of its type 47 (On-sale General Public Eating Place License) for the following reasons:

1. Licensee has not violated Condition No. 8.
2. If Condition No. 8 has been violated, Licensee should not be penalized.
3. Literal compliance with Condition No. 8 is not possible.
4. If Condition No. 8 is retained, the most recent proposal should be accepted as full compliance *prior to construction of the proposed intersection.*

Before addressing each of these four arguments, it must be noted that nothing has changed since April 2009: The Licensee is not now, nor has it ever been, in compliance with Condition No. 8.

REBUTTAL OF LICENSEE'S ARGUMENTS

1. Licensee has not violated Condition No. 8.

Within the argument that Licensee has not violated Condition No. 8, Licensee makes several additional arguments, each of which will be addressed in the order presented.

Licensee's primary argument – that it has complied with Condition No. 8, a condition that Licensee proposed and subsequently agreed upon – is not grounded in reality. There has been no change to the physical conditions at the entrance to Licensee's casino since the time of the April 29, 2009 ruling (or at any time since 2006) wherein Judge Lewis found an utter failure to comply.

Within this argument, Licensee also argues that the burden of proof is on SHHA as this is an accusation. Licensee is wrong. SHHA already met that burden when the accusation was sustained and reduced to an order as embodied in the April 29, 2009 decision. To date, Licensee has unsuccessfully appealed Judge Lewis' decision. Thus, the burden of proof is on Licensee.

Licensee also argues that Condition No. 8 is impossible to perform in part because it was

imposed upon the parties by the Department's legal counsel. This is mischaracterization of fact: Former ABC chief counsel John Pierce did assist in the wording of Condition No. 8 subject to the approval of both parties. The concept of Condition No. 8 originated with the Licensee when it rejected SHHA's request for a new separate casino entrance claiming it was too expensive.[2]

More importantly, over the last five (5) years, there are several examples of other proposals offered by Licensee that were never implemented.[3] The most recent example was discussed at the May 19, 2011, hearing in Eureka, California. At that time, Licensee's expert, Netra Khatri, of Laco Associates, admitted that Licensee could, in fact, comply with Condition No. 8. This testimony was elicited when ALJ Lewis cross-examined Mr. Khatri about whether the Licensee's plan complies with the terms of Condition No. 8 and whether there were other possible ways in which Licensee could comply:

> JUDGE LEWIS: Mr. Khatri, you're familiar with the -- the history of this -- this intersection and what has gone on since its inception in 2005, I guess?
>
> THE WITNESS: Since 2008, yes.
>
> JUDGE LEWIS: Okay. But you're aware of what happened before then?
>
> THE WITNESS: Yes. I have got all input from the project manager.
>
> JUDGE LEWIS: You've read condition No. 8, sir?
>
> THE WITNESS: Yes.
>
> JUDGE LEWIS: Okay. Now, let me ask you this, okay? I just want your opinion. I don't want anything else. You're an engineer; I'm not. Is it possible -- is it possible for the tribe to legally comply with condition No. 8?
>
> THE WITNESS: Yes.
>
> JUDGE LEWIS: Okay. How? Tell me how.
>
> THE WITNESS: By this design.

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[2] Notably, Licensee never argued against Condition No. 7 also worded by John Peirce and also subject to approval by both parties. Instead, Licensee implemented Condition No. 7 within approximately two years, without argument, protest, or appeal.

[3] For example, Tribal engineer Alex Culick (Winzer & Kelly Engineering) was present at the Sonny Lo hearing (July 11, 2006) when Condition No. 8 was inserted as part of the negotiated settlement and an entrance modification plan was submitted to us for review by the tribal attorney (Acosta) shortly thereafter. The plan attached to a MOU (see exhibit No. 4 Lewis Accusation hearing April 29, 2009) restricted casino traffic from both directions. It was never implemented due to BIA interference but in reality due to conflict with the tribe's developmental plans.

THE WITNESS: Yes.

JUDGE LEWIS: **Okay. And you think that this is the only way to comply with condition No. 8?**

THE WITNESS: **Not the only, but this is one of them.**

(2011 Transcript, pp. 108-109, emphasis added.)

Thus, Licensee's argument that it complied with Condition No. 8 lacks merit and must be rejected out of hand as there have been no changes to the public vehicular ingress and ingress in over five (5) years. Thus, Licensee has acted so passively with regard to its affirmative duty that a violation has already been established.

2. <u>If Condition No. 8 has been violated, Licensee should not be penalized.</u>

Licensee's argument that a penalty is not appropriate necessarily concedes the point that Licensee has not complied with Condition No. 8.

As such, SHHA contends that the original decision of requiring compliance within two (2) years of the effective date of the order is more than reasonable. In other words, this current round of appeals should result in an order requiring Licensee to comply with Condition No. 8 in no more than two (2) years. This would provide Licensee with sufficient time to comply with any legal requirements in obtaining approvals from the County. (Note: Since the Bureau of Indian Affairs has relinquished jurisdiction the County is, apparently, the only public entity having jurisdiction over the intersection).

If, after that two year period, Licensee has not complied, the license should be revoked -- as this is the only means to ensure compliance.

3. <u>Literal compliance with Condition No. 8 is not possible.</u>

As noted above, this argument lack credibility as Licensee's own expert testified that compliance, in several different forms, was possible.

4. <u>If Condition No. 8 is retained, the most recent proposal should be accepted as full compliance.</u>

Licensee argues that its most recent proposal, although not yet constructed, nonetheless amounts to substantial compliance. Given that Licensee has made several proposals, including

amounts to substantial compliance. Given that Licensee has made several proposals, including some of which were rejected by the BIA (which is no longer involved in this matter), a mere proposal certainly does not, and cannot, amount to compliance.

This position must be rejected for the reason stated above, but also because when viewed against the historical facts. At the time the parties agreed to Condition No. 8, the Tish Non house did not exist, Edith's House (Tish Non administrative office) did not exist and the cross traffic to Brenard Road (and the housing across the street from the casino) did not exist. Nor did the gas station.

In addition, Licensee's most recent actions of clearing of land to expand the existing parking lot, coupled with its four (4) story hotel, casino expansion, sports bar expansion, community center (across the street), and outdoor events center, demonstrate that Licensee has attempted to construct an environment wherein it can claim SHHA is unreasonable for insisting upon enforcement of a five (5) year old agreement.

In other words, Licensee is solely responsible for creating the conditions it now complains of and blame can only rest with Licensee.

LICENSEE FAILED TO REBUT SHHA'S ARGUMENTS AND THEREFORE CONCEDES THE ARGUMENTS MADE IN THE OPENING BRIEF

Licensee does not dispute the arguments made in SHHA's opening brief and therefore concedes the following three arguments:

- The prior decision by Judge Lewis was the correct decision.
- The law of the case doctrine dictates that Condition No. 8 be, once again, upheld as reasonable as a matter of law.
- The proposal for an interchange does not amount to substantial compliance.

CONCLUSION

SHHA has not taken an unreasonable position. SHHA seeks to ensure the safety of those living in the neighborhood and off the windy, narrow road called Singley Hill.

Licensee's has taken an unreasonable position in that it refuses to comply with a condition it suggested and attempts to cast blame on SHHA for the difficulties Licensee is experiencing as a

result of its (apparently) disorganized and unplanned expansion.

The decision suggested by SHHA is the only way to ensure finality and to sustain the 2006 Condition and the 2009 Decision. This is true because Licensee can comply with the explicit terms of Condition No. 8.[4]

As set forth in greater detail in the Opening Brief, a finding that 'substantial compliance is sufficient' will invade the province of the pending modification process before the Department's Santa Rosa office.

Moreover, even if "substantial compliance" is deemed sufficient (which would violate the doctrine of law of the case), the 2009 decision to revoke Licensee's license should be affirmed, subject to the two (2) years effective date, as Licensee has not yet constructed the proposed interchange.

In the alternative, insofar as this proceeding results in a decision that Licensee's proposed plan would amount to substantial compliance with Condition No. 8 if it were actually constructed, the prior decision should nonetheless be affirmed in all other respects. Licensee's proposal does not amount to compliance. In order to secure performance (something that has been lacking to date), the Department (and SHHA) must have the authority and mechanism to ensure compliance by way of a issuing an order revoking the On-sale General Public Eating Place license (Type 47), subject to a two (2) year effective date.

July 29, 2011

Michael E. Vinding
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[4] Licensee has rejected, out of hand, the suggestion that a kiosk would settle this matter. Licensee's refusal to compromise, much less discuss the costs of perhaps having the kiosk manned for limited hours, on limited days of the week, provides great insight into Licensee's tactic of attrition. The chipping away of Condition No. 8 in this matter, as well as its request to eliminate Condition No. 8 before the Santa Rosa hearing, amounts to no more than an unreasonable view of this public safety issue. Quite telling is the fact that Licensee has not provided the alleged costs associated with the construction of the kiosk.

Matter: *In the Matter of the Accusation Against Bear River Casino*
Dept of Alcoholic Beverage Control, File No.: 47-423392, Reg. No.: 08070211

PROOF OF SERVICE

I, Laurie C. Briggs, declare:

I am a citizen of the United States over the age of eighteen years and not a party to nor interested in the within entitled cause. I am employed at Brady & Vinding, located at 400 Capitol Mall, Suite 2640, Sacramento, California 95814.

On July 29, 2011, I served the attached, and all exhibits thereto:

SINGLEY HILL HOMEOWNERS ASSOCIATION'S REPLY BRIEF

X **BY U.S. MAIL [C.C.P. §1013(a)]** by enclosing one copy thereof in a sealed envelope, with postage thereon fully prepaid. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service, and that said correspondence is deposited with the United States Postal Service on the same day in the ordinary course of business. Said correspondence was addressed as set forth below.

_____ **BY U.S. MAIL [C.C.P. §1013(a)]** by enclosing one copy thereof in a sealed envelope, with postage thereon fully prepaid, and depositing with the United States Postal Service for mailing via certified mail, return receipt requested, upon the person(s) or the office of the person(s) at the address listed below.

_____ **BY PERSONAL SERVICE [C.C.P. §1011]** by personally delivering one copy thereof to the person and at the address set forth below.

_____ by causing personal delivery of one copy thereof upon the person or the office of the person at the address listed below.

_____ **BY OVERNIGHT DELIVERY [C.C.P §1013(d)]** by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for delivery via Federal Express (Priority Overnight) upon the person or the office of the person at the address listed below.

_____ **BY FACSIMILE [C.C.P. §1013(e)]** by sending a true copy via facsimile transmission (by use of facsimile machine telephone number 916-660-9554) of the above described document(s) to the interested parties, at the facsimile numbers listed below. The facsimile machine I used complied with California Rules of Court, Rule 2004, and no error was reported by the machine.

X **BY ELECTRONIC SERVICE [C.C.P. §1010.6]** by electronically mailing a true and correct copy through Brady & Vinding's electronic mail system to the e-mail address(es) set forth below, or as stated on the attached service list per agreement in accordance with C.C.P §1010.6.

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I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed at Sacramento, California, on July 29, 2011.

Laurie C Briggs

Laurie C. Briggs