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 OPPOSITION BRIEF**

INTRODUCTION

Appellant/Licensee Bear River Casino ("Licensee") appeals the ruling of the Administrative Law Judge raising four arguments:

1. The Licensee complied with Condition No. 8 of the liquor license.
2. The Administrative Law Judge's findings amount to an abuse of discretion.
3. The complainant lacks standing.
4. The Licensee was unfairly prejudiced because the complainant was not represented by counsel.

The complainant, Singley Hill Homeowners Association, by and through Jim McVicker, ("Singley Hill") opposes the appeal because Licensee's arguments lack merit.

BACKGROUND

Licensee sought a type 47 (On-sale General Public Eating-place) license. In order to settle numerous protests, Licensee reached an agreement that the license was subject to several conditions. Among those conditions Licensee agreed to was Condition No. 8 which 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.

As a result of Licensee agreeing to Condition No. 8 (and other conditions), a license was issued on July 26, 2006.

It is undisputed that the Licensee failed to make the required modifications to the entrance to Singley Road since the license was issued.

As a result of Licensee's failure to honor the terms that it had previously agreed to, Singley Hill lodged an Accusation under the Alcoholic Beverage Control Act and the State Constitution on December 24, 2008. (Exhibit 1, at pg. 3-5.[1]) The Accusation asserted that the Licensee failed to comply with Condition No. 8.

On April 29, 2009, pursuant to California Business and Professions Code section 23080, ALJ Lewis conducted a hearing and then issued a Certificate of Decision, including Findings of Fact, on May 20, 2009. (The Certificate of Decision and the Transcript of the hearing are attached as separate Exhibits Y and Z, respectively.) In particular, ALJ Lewis found that, "Respondent is not now, nor have they ever been, in compliance with Condition #8." (Findings of Fact, at para. 12.) Licensee appeals the Decision of ALJ Lewis.

Singley Hill opposes the appeal and asks that the appeal be dismissed with prejudice.

ARGUMENT

"In licensing matters before the Department of Alcohol Beverage Control it is the Applicant who bears the burden of proof in establishing that they are entitled to the license sought." (Government Code section 11504; Coffin v. Alcoholic Beverage Control Appeals Bd. And Barona Tribal Gaming Authority, Real Party in Interest (2006) 139 Cal.App.4th 471.)

Licensee's arguments, addressed in the order presented in its Opening Brief, lack credibility, defy logic and must be disregarded.

1. The Licensee agreed to, yet refused, to comply with Condition No. 8.

Licensee initially argues (somewhat tongue-in-cheek) that it was impossible to comply with Condition No. 8, but then admits that Condition No. 8 should "be construed not to place the

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[1] All references to exhibits in this Opening Brief correspond to the Exhibit List prepared at the April 29, 2009 hearing before Administrative Law Judge John W. Lewis ("ALJ Lewis"). The entire Exhibit List is attached hereto because the decision on appeal must only be based upon evidence contained in the record of the proceedings before the department. (Business and Professions Code section 23083(a).) Neither Licensee, nor Singley Hill, may introduce extra-record evidence.

Licensee in immediate violation, but to give a reasonable time to complete this condition." (Opening Brief, pg. 2, ln. 13-17.) (See Civil Code section 1657 – "reasonable time.")

Next, Licensee argues that the temporary placement of barriers and K-rails on reservation property amounted to compliance with Condition No. 8. (Opening Brief, pg. 3, ln. 4-5.) The compliance argument is disingenuous. A simple comparison to Condition No. 7 demonstrates the lack of credibility. Condition No. 7 requires, "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." (Emphasis added.)

That widening was completed by 2008 and thus within a reasonable amount of time.

The failure to act on Condition No. 8 within a reasonable amount of time is further demonstrated by a brief review of Licensee's letter of August 14, 2006, less than a month after the license was issued. (Exhibit 4.) This letter demonstrates that Licensee understood that it was required to comply with Condition No. 8 within a reasonable amount of time. Licensee stated that due to delays in obtaining approvals from Humboldt County and the Army Corp of Engineers, "construction will likely begin in early spring 2007, rather than this construction season, as was previously hoped."

Moreover, as set forth in the January 30, 2006 letter from Winzler & Kelly, Licensee's engineers, Licensee understood that the intersection would require design and construction modification. (Exhibit A, which includes detailed design and construction plans.)

Instead of making such design and construction modifications (as shown in the attached detailed plans) Licensee erected temporary barriers on its property (not the intersection) without the approval of the Bureau of Indian Affairs ("BIA"). For unknown reasons, Licensee failed to obtain the approval of the BIA, which ultimately ordered those barriers removed. (Opening Brief, pg. 3, ln. 5-6.) This failure is striking in that the BIA later approved of the proposed improvements to Singley Road as set forth in a December 12, 2008 letter to Congressman Thompson. (Exhibit B.) In other words, the Tribe created the problem by not seeking approval.

In other words, Licensee proposed, understood and agreed to Condition No. 8. Licensee understood it had to comply with Condition No. 8 (as well as No. 7) within a reasonable amount

of time. Licensee knew and understood that it would be required to obtain governmental approvals. However, Licensee neither obtained governmental approvals (*i.e.*, the BIA (although the BIA has no authority over the intersection), the County, CalTrans, etc.) nor complied within a reasonable amount of time (as demonstrated by its compliance with Condition No. 7).

Licensee's first argument lacks credibility and should be rejected on appeal.

2. ALJ Lewis' findings are supported by law and reason.

In a twisted reading of ALJ Lewis' decision, Licensee first claims the ALJ found that it was "impossible to comply with Condition No. 8." (Opening Brief, pg. 3, ln. 17-19.) To accomplish this reading, Licensee takes one sentence out of context and flips it on its head.

A cursory review of Paragraph 7 demonstrates the opposite is true. Paragraph 7 states:

> 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.

In other words, ALJ Lewis found that it was incredulous for Licensee to agree to something that was impossible; Licensee would only agree to what was possible.

This finding was likely founded in Licensee's letter of August 14, 2006 (Exhibit 4, noted above) wherein Licensee proposed significant design and construction changes in furtherance of fulfilling its obligation under Condition No. 8 as well as the January 30, 2006 letter from Licensee's engineers (Exhibit A, also referenced above).

Such a tortured reading of the decision should be rejected on its face.

Licensee next argues that the Department of Alcohol and Beverage Control ("ABC") lacks jurisdiction to order Condition No. 8. (Opening Brief, pg. 4, ln. 15-23.) Ignoring the obvious rebuttal argument – that the Tribe agreed to the condition, it was not "ordered" by ABC – the assertion is legally false.

Rice v. Rehner, (1983) 463 U.S. 713, is the leading case holding that Congress authorized state regulation of liquor licensing for Indian lands. In Rice, the respondent, an Indian trader, operated a general store on an Indian reservation (Pala Tribe). The tribe had adopted a tribal

ordinance permitting the sale of liquor on the reservation, provided the sales conformed to state law. The Indian trader sought an exemption based on sovereign immunity for the sale of liquor without a license. The court held that he was not entitled to the exemption, and that Congress authorized, rather than pre-empted, state regulation over Indian transactions of this nature.

In holding that Congress authorized state regulation of liquor licensing for Indian lands, it held that the role of tribal sovereignty in a pre-emption analysis varies with the particular notions of sovereignty that have developed with tribal independence. With respect to liquor transactions, "tribal sovereignty implicated by imposition of California's alcoholic beverage regulation only exists insofar as the state attempts to regulate respondent's sale of liquor to other members of the Pala tribe on the Pala reservation." (Id. at p. 721.) The court recognized that: "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." (Id. at p. 722.)

For example, the court noted that the colonists regulated Indian liquor trading before this Nation was formed and Congress exercised its authority over these transactions as early as 1802. Because of the lack of tradition of self-government in the area of liquor regulation, it is not necessary that Congress expressly indicate a state's regulatory authority, provided that the state has jurisdiction to regulate the licensing and distribution of alcohol.

The Rice court cited to White Mountain noting, "there can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area, in the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.'" (White Mountain Apache Tribe v. Bracker, (1980) 448 U.S. 136, 143.)

The Rice court found that 18 U.S.C. section 1161[2] expressly authorized, rather than pre-empted, state regulation over Indian liquor transactions noting that the legislative history of section 1161 indicates that Congress intended to remove federal prohibition on the sale and use

[2] Section 1161. "Application of Indian liquor laws," states: "The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

of alcohol imposed on Indians in 1832.

Additionally Rice held, that it is "clear that Congress viewed section 1161 as abolishing federal prohibition, and legalizing Indian liquor transactions as long as those transactions conformed both with tribal ordinances and state law." (Rice, supra, 463 U.S. at 728.)

In Fort Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994), the 9th Circuit expanded the ruling in Rice, and held that states also have the power to impose criminal prosecutions for violations of their respective laws regulating liquor licenses. (Id. at 428.) The court held that the states have an interest in enforcing its liquor laws, if necessary, through criminal prosecutions. The states' interest is heavier in the balance than the Indian community's interest in self-government and tribal sovereignty. (Id. at p. 432.)

Fort Belknap was heavily supported by Rice's notion that section 1161 delegated part of the federal government's regulatory authority to tribes and the other part to the states. (Id. at p. 433.) Overall, states have an interest in regulating their state liquor laws, and it logically follows they should be able to prosecute those that violate those laws.

In California, the ABC was created by a constitutional amendment (effective January 1, 1955) as an independent department of the executive branch of the state government. ABC has the exclusive power, in accordance with laws enacted, to license and regulate the manufacture, importation and sale of alcoholic beverage licenses. See Section 22 of Article XX, California Constitution.[3]

ABC has full jurisdiction to require that Indian gaming facilities comply with all state laws that pertain to liquor sales.

3. Singley Hill has legal standing.

California Corporations Code sections 1800 to 18035 concern unincorporated associations of which Singley Hill is one. Corporations Code section 18035 states, "'Unincorporated

[3] California Constitution Article XX, Section 22 states in pertinent part: "The State of California, subject to the internal revenue laws of the United States, shall have the right and power to license and regulate the manufacture, sale, purchase, possession and transportation of beverages within the State, and subject to the laws of the United States regulating commerce between nations and among the state shall have the exclusive right and power to regulate the importation, including exportation from the State, of alcoholic beverages ... The Department of Alcoholic Beverage Control shall have the exclusive power, ... to license manufacture, importation and sale of beverages in this State, and to collect license fees or occupation taxes on account thereof.

association' means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not."

The term "unincorporated association" covers any group whose members share a common purpose and who function under a common name. This includes churches, labor unions, political parties, professional or trade associations, socials clubs and homeowners' associations. (Barr v. United Methodist Church (1979) 90 Cal.App.3d 259; Tenants Ass'n of Park Santa Anita v. Southers (1990) 222 Cal.App.3d 1293 [unincorporated association of past and present tenants of a mobile home park had capacity to sue].)

Singley Hill is such an association.

Unincorporated associations may sue and be sued in the entity name and prosecute and defend legal actions. (Code of Civil Procedure section 369.5(a); American Alternative Energy Partners II, 1985 v. Windridge, Inc. (1996) 42 Cal.App.4th 551.)

Thus, Singley Hill has a right to prosecute this action.

As such, Licensee's argument that Singley Hill lacks standing is without merit.

4. Licensee was not prejudiced because Singley Hill failed to produce its governing documents and lacked legal counsel.

Without citation to statute or case law, Licensee implies that the rigorous standards of the California Code of Evidence apply to ABC hearings insofar as Licensee was not allowed to "voir dire the Petitioner regarding his credentials as a representative of a purported organization. No documentation was provided as to the existence, bylaws, nor [sic] representative designation or resolution of said purported organization." (Opening Brief, pg. 5-6, ln. 24-1.) As set forth in California Corporations Code section 18010, no such documentation is required.

Licensee also argues that Singley Hill was not held to the same standard as Licensee citing to 8 lines within the 4,975 lines contained in the 199 page transcript. Specifically, Licensee claims the following exchange (at page 31, lines 3-11) demonstrate undue prejudice (when Licensee asked to cross examine Singley Hill's representative):

> HEARING OFFICER LEWS: You know what, Mr. Acosta, I'm going to give you an opportunity to do that. Not right now.

MR. ACOSTA: Okay.

HEARING OFFICER LEWS: It was more of an opening statement that I heard.

MR. ACOSTA: That's right.

HEARING OFFICER LEWS: Like I said, I'm trying to give him as much leeway as I can.

In short, ALJ Lewis was allowing all leeway under the law. The exchange plainly does not rise to the level of unfair prejudice, particularly in light of the fact that Licensee was represented by an experienced attorney and Singley Hill was not.

Finally, Licensee's argument must be rejected as a matter of law since Licensee failed to object to ALJ Lewis' statement regarding the granting of "leeway" and as such waived that argument. (Gallant v. City of Carson (2005) 128 Cal.App.4th 705, 712-713 [when a judge fails to rule on evidentiary objections, they are deemed waived; it is counsel's job to tactfully remind the court at the hearing of the necessity to rule on the objections].)

CONCLUSION

This appeal is constrained in its scope by the California Constitution, section 22, which provides:

> Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

Case law holds that the department's decision will not be upset on appeal when supported by substantial evidence even though contradicted. (Molina v. Munro, 145 Cal. App. 2d 601, 302 Pac. 2d 819; Maxwell Cafe v. Department of Alcoholic Beverage Control, 142 Cal. App. 2d 73, 298 Pac. 2d 64; Dethlefsen v. State Board of Equalization, 145 Cal. App. 2d 561, 303 Pac. 2d 7; Kirchhubel v. Munro, 149 Cal. App. 2d 243, 308 Pac. 2d 433.)

Licensee has not met its burden because it has failed to show that the underlying decision was not supported by substantial evidence. As a matter of law, the appeal must be dismissed.

Signed: May _____, 2010, at Humboldt County, California.

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James McVicker
Singley Hill Homeowners' Association