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3 **BEFORE THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL**
4 **OF THE STATE OF CALIFORNIA**
5

6 In the Matter of the Accusation Against:

7 BEAR RIVER CASINO

8 BEAR RIVER CASINO
9 11 Bear Paws Way
Loleta, California 95551-9681

10
11 LICENSE: On-Sale General
Public Eating Place

File No.: 47-423392

Reg. No.: 08070211

**SINGLEY HILL HOMEOWNERS
ASSOCIATION'S OPPOSITION BRIEF**

12
13 **PROCEDURAL HISTORY**

14 Bear River Casino ("Licensee") sought a type 47 (On-sale General Public Eating Place
15 License) license. In order to settle numerous protests, Licensee met with the complainant,
16 Singley Hill Homeowners Association ("SHA"). After arms-length negotiations, the parties
17 forged a mutually agreeable solution to protect the local homeowners from the ongoing effects of
18 serving alcohol to casino patrons.¹ The solution was simple: SHA promised that all protests
19 would be dropped, thereby giving up any rights it had, in exchange for conditioning the license.
20 The condition, known as Condition No. 8, states:

21 8. The licensee shall modify the entrance from Singley Toad [sic] to
22 Bear River Drive so that public vehicular ingress and egress is
23 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.

24 As a result of Licensee agreeing to Condition No. 8 (and other conditions), a license was
25 issued on July 26, 2006 by the Department of Alcoholic Beverage Control ("Department").
26

27 ¹ The hearing demonstrated that the concerns of SHA member that intoxicated drivers were departing Licensee's
28 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.

1 It is undisputed that Licensee failed to make the required modifications to the entrance to
2 Singley Road from the date the license was issued to the present time. In short, nothing has
3 physically changed from July 2006 to the present.

4 As a result of Licensee's failure to honor the terms that it had previously agreed to SHA
5 lodged an Accusation under the Alcoholic Beverage Control Act and the State Constitution on
6 December 24, 2008. The Accusation asserted that the Licensee failed to comply with Condition
7 No. 8.

8 On April 29, 2009, pursuant to California Business and Professions Code section 23080,
9 Administrative Law Judge John W. Lewis ("ALJ Lewis") conducted a hearing and then issued a
10 Certificate of Decision, including Findings of Fact, on May 20, 2009 ("2009 Decision"). In
11 particular, ALJ Lewis found that, "Respondent is not now, nor have they ever been, in
12 compliance with Condition #8." (Findings of Fact, at para. 12.)

13 Licensee appealed the Decision of ALJ Lewis to the Appeals Board and SHA opposed.
14 On appeal, the standard is that the underlying ruling is presumed correct. (*Denham v. Superior*
15 *Court* (1970) 2 Cal.3d 557.) The presumption favoring correctness of the lower decision places
16 the burden of proving reversible error on the appellant. (*Marriage of Behrens* (1982) 137
17 Cal.App.3d 562; *Rossiter v. Benoit* (1979) 88 Cal.3d 706.) The appellate body is concerned with
18 the result, not the reasoning. (*Bealmear v. Southern Cal. Edison* (1943) 22 Cal.2d 337.)

19 On January 25, 2011, the Appeals Board issued a decision. The Appeals Board did not
20 overturn the decision and thus found that the result was correct.²

21 Because SHA was successful at both the initial hearing and then on appeal, the doctrine
22 of "law of the case" applies. "The doctrine of 'law of the case' deals with the effect of the *first*
23 *appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating

24 ² The review following appeal is constrained by the California Constitution, Article XX, section 22, which provides
25 that: "Review by the board of a decision of the department shall be limited to the questions whether the department
26 has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required
27 by law, **whether the decision is supported by the findings, and whether the findings are supported by**
28 **substantial evidence in the light of the whole record.**" (Emphasis added.) Case law holds that the department's
decision after an administrative hearing 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.)

1 a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it
2 determinative of the rights of the same parties in any subsequent retrial or appeal in the same
3 case.” (9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, § 895, p. 928.) As the Supreme Court
4 explained in *Kowis v. Howard* (1992) 3 Cal.4th 888, 893, the law of the case means when an
5 opinion expresses a principle or rule of law necessary to the decision, that principle or rule
6 becomes the law of the case and must be adhered to throughout its subsequent progress, both in
7 the lower court and upon subsequent appeal.

8 The 2009 Decision rendered by ALJ Lewis, and affirmed by the Board, sets forth the law
9 of the case under the section entitled, “CONCLUSIONS OF LAW,” wherein it states:

10 1. Article XX, Section 22 of the California Constitution and Section
11 24200(a) provide that a license to sell alcoholic beverages may be
12 suspended or revoked if continuation of the license would be
contrary to public welfare or morals.

13 2. Section 23804 provides that violation of a condition placed upon
14 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.

15 3. **Cause for suspension or revocation of Respondent’s license**
16 **was established in accordance with the Constitutional and code**
17 **sections cited above and Findings of Fact, paragraphs 4 through**
18 **12, for the violations alleged in Count 1 of the Accusation.**
19 **Continuance of the license without imposition of discipline would**
20 **be contrary to public welfare and morals.**

21 4. Cause for suspension or revocation of Respondent’s license was
22 not established in accordance with the Constitutional and code
23 sections cited above and Findings of Fact, paragraphs 13 and 14, for
24 the violations alleged in Count 2 of the Accusation.

25 (Emphasis added.) The doctrine of the law of the case, coupled with the fact that Licensee
26 unsuccessfully appealed the 2009 Decision, puts an extremely high burden of proof on
27 Licensee.³ This is because ALJ Lewis found that there was good cause for Licensee’s
28 revocation, subject to a two-year effective date. ALJ Lewis concluded as a matter of law that,
“Continuance of the license without imposition of discipline would be contrary to public welfare

³ It is undisputed that the appellant bears the burden of proof as SHA has already successfully prosecuted its case. Moreover, in licensing matters before the Department of Alcoholic Beverage Control it is the Applicant (Licensee) 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.)

1 and morals.” This conclusion was prophetic: See footnote 1, above, regarding Licensee’s
2 employees admitting knowledge of intoxicated patrons and employees departing the casino.

3 The Board remanded the matter to ALJ Lewis for two reasons: (1) to determine what
4 Licensee has done to comply and (2) give the parties opportunity to voice their positions. The
5 Board granted ALJ Lewis broad authority, “for such further and additional proceedings as may
6 be necessary and appropriate in the ALJ’s sole discretion.”

7 That discretion resulted in proceedings held on May 19, 2011, in Eureka, California.

8 It is relevant to note that concurrent with the appeal, Licensee filed a request to modify or
9 remove Condition 8 of the license with the Department. Thus, while this matter is pending,
10 Licensee is also seeking to have Condition No. 8 modified or removed from its license. (See
11 Exhibit 1, Order of March 4, 2011, by Matthew Botting, General Counsel, Department of
12 Alcoholic Beverage Control (“March 2011 Order”).)

13 During the course of the May 29, 2011 hearing, Licensee did not argue compliance with
14 Condition No. 8. Instead, Licensee argued that its proposed plan, if constructed, would amount
15 to substantial compliance with Condition No. 8.⁴ At no point during the hearing or in any
16 briefings has Licensee argued that it has in fact complied or substantially complied. Thus
17 Licensee now seeks an order from ALJ Lewis that the proposed plan is acceptable (i.e., amounts
18 to substantial compliance). In essence, Licensee is seeking an advisory opinion from ALJ Lewis
19 in order to avoid expenditures that could potentially result in less-than full compliance with
20 Condition No. 8.

21 Notably, Licensee’s argument that strict compliance with Condition No. 8 was
22 “impossible” was ultimately rebutted by their own expert witness. Netra Khatri, the Laco
23 Associates engineer, admitted that Licensee could, in fact, comply with Condition No. 8. This
24 testimony was elicited when ALJ Lewis cross-examined Mr. Khatri about whether the
25 Licensee’s plan complies with the terms of Condition No. 8 and whether there were other
26 possible ways in which Licensee could comply:

27
28 ⁴ 2011 Transcript, 252:4-7 (closing argument by Mr. Foreman).

1 JUDGE LEWIS: Mr. Khatri, you're familiar with the -- the history
2 of this -- this intersection and what has gone on since its inception in
2005, I guess?

3 THE WITNESS: Since 2008, yes.

4 JUDGE LEWIS: Okay. But you're aware of what happened before
then?

5 THE WITNESS: Yes. I have got all input from the project
6 manager.

7 JUDGE LEWIS: You've read condition No. 8, sir?

8 THE WITNESS: Yes.

9 JUDGE LEWIS: Okay. Now, let me ask you this, okay? I just want
10 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?

11 THE WITNESS: Yes.

12 JUDGE LEWIS: Okay. How? Tell me how.

13 THE WITNESS: By this design.

14 JUDGE LEWIS: This design?

15 THE WITNESS: Yes.

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

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

19 (2011 Transcript, emphasis added.)

20 ARGUMENT

21 1. The Licensee can, but has not, complied with Condition No. 8.

22 Licensee admits it has not complied with Condition No. 8 in the five (5) years it has been
23 in place.

24 Instead, Licensee seeks to have ALJ Lewis accept the proposed implementation of its
25 intersection plan as substantial compliance with Condition No. 8.

26 As noted immediately above, Licensee's own expert engineer indicated that full
27 compliance with Condition No. 8 is feasible. For reasons not explained at the hearing, Licensee
28 chose not to pursue those other feasible alternatives.

1 In light of Mr. Khatri's admission that there are feasible methods to fully comply with
2 Condition No. 8, the only method to ensure finality is to affirm the 2009 Decision.

3 2. A finding of less than full compliance is premature, will usurp the modification petition
4 process and strip SHA of its rights.

5 As noted in the March 2011 Order, Licensee's Motion/Petition for Reconsideration is
6 being "treated as a petition to modify or remove Condition 8 on the license" and has been
7 "referred to the Department's Santa Rosa district office for consideration." (March 2011 Order,
8 p. 2.) Thus, any consideration of an argument to modify Condition No. 8 is premature. SHA
9 was not afforded sufficient notice of the "substantial compliance" argument, nor a sufficient
10 opportunity to hire its own experts to develop Mr. Katri's admission that there are other feasible
11 methods available to fully comply with Condition No. 8. Such arguments would be best heard
12 before the Santa Rosa office considering the modification petition.

13 A corollary issue arises in that if Licensee's argument of substantial compliance is
14 accepted in this proceeding, such an acceptance would usurp the modification process which is
15 already underway. This would cause a significant injustice upon SHA, not on Licensee. This is
16 because if Licensee continues with its petition to remove Condition 8 - following a decision by
17 ALJ Lewis that Licensee has substantially complied with Condition No. 8 - ALJ Lewis' decision
18 would merely be advisory. In other words, Licensee would continue to chip away at Condition
19 No. 8 by initially having its proposed intersection deemed satisfactory substantial compliance
20 and thereafter proceeding with the petition to have the entire condition removed.

21 In sum, Licensee succession of appeals and petitions would strip SHA of the benefit of
22 the bargain it struck with Licensee and strip SHA of its rights. As noted in the 2009 Decision:
23 "Complainant is entitled to receive what they bargained for, and that is compliance with all of
24 the conditions. The original protestants, complainant here, relinquished their opportunity to have
25 their objections heard by an administrative law judge and a decision issued in exchange for
26 Respondent's promise to comply with the conditions." (2009 Decision, pg. 5, para. 8.)

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1 On the other hand, affirming the 2009 decision would put Licensee in a better position
2 for four reasons. First, Licensee would achieve finality. Licensee could proceed under the
3 alternative plan acknowledged by the engineer, Mr. Khatri.

4 In the alternative, *following* construction of an interchange, Licensee could request
5 modification of Condition No. 8 should it actually, not merely theoretically, prove impossible to
6 construct an interchange that complies with Condition No. 8. This is the only way to ensure that
7 the intersection is actually constructed -- something that may not occur should Licensee continue
8 with its petition to remove Condition No. 8.⁵

9 Third, and perhaps more importantly, Licensee is always free to obtain a different license.
10 This result was explicitly suggested in the 2009 Decision: "If Respondent is not able to comply
11 with Condition #8 because of their inability to obtain approval from the Bureau of Indian Affairs
12 then Respondent can seek to obtain a different license. A new investigation can be conducted,
13 protests if any can be filed and a new hearing can be conducted to determine whether or not a
14 license should issue, and if issued, whether or not there should be any conditions placed upon
15 that license." (2009 Decision, pg. 5, para. 10.)

16 Fourth, affirming the 2009 Decision would provide Licensee with a reasonable period of
17 time to comply (arguably an extremely generous period of time to comply given Condition No. 8
18 was agreed upon over five (5) years ago).

19 CONCLUSION

20 The only way to ensure finality is to sustain the 2009 Decision. This is true because
21 Licensee can comply with the explicit terms of Condition No. 8.

22 A finding that "substantial compliance is sufficient" will invade the province of the
23 pending modification before the Department's Santa Rosa office.

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

27 _____
28 ⁵ (Notably, SHA believes the petition to remove Condition No. 8 would likely be denied if the 2009 Decision is affirmed because the Appeal Board gave such great latitude to ALJ Lewis.)

1 interchange.

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

9 Dated: July 1, 2011

BRADY & VINDING

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By: 
Michael E. Vinding
Attorneys for Complainant
Singley Hill Homeowners' Association

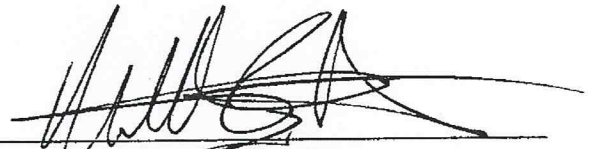
EXHIBIT 1

governs such matters and imposes certain procedural requirements on the Department, as well as requiring the petitioner to pay a fee of \$100.

Based upon a review of the Motion/Petition for Reconsideration, the record on file in this matter, the totality of circumstances, and the statutory requirements, the Department hereby denies the Motion/Petition for Reconsideration.

Normally the Department would not consider and rule on a petition to modify or remove conditions while a disciplinary action involving the condition(s) that is/are the subject of the request to remove or modify is pending. However, this case is unique in both the circumstances in which the disciplinary action arose and its procedural history. For those reasons, Respondent/Licensee's Motion/Petition for Reconsideration shall be treated as a petition to modify or remove Condition 8 on the license and is hereby referred to the Department's Santa Rosa district office for consideration as such—subject to prompt payment by Respondent/Licensee of the statutory fee of \$100.

Dated: March 4, 2011



Matthew D. Botting
General Counsel

For: Jacob Appelsmith
Director

**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, CA 95551-9684

FILE : 47-423392
REG. : 08070211

ON-SALE GENERAL EATING PLACE LICENSE

**DECLARATION OF
SERVICE BY MAIL**

under the Alcoholic Beverage Control Act.

The undersigned declares:

I am over eighteen years of age, and not a party to the within cause; my business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. I served by **CERTIFIED** mail a copy of the following documents:

ORDER

on each of the following, by placing same in an envelope(s) addressed as follows:

**BEAR RIVER CASINO
BEAR RIVER CASINO
11 BEAR PAWS WAY
LOLETA, CA 95551-9684**

**SINGLEY HILL HOMEOWNERS ASSC.
ATTN: NOAH KRAHFORST & JIM
MCVICKER
PO BOX 755
LOLETA, CA 95551**

**GEORGE FORMAN
ATTORNEY AT LAW
4340 REDWOOD HIGHWAY STE F228
SAN RAFAEL, CA 94903**

**CHERYL SCHMITT
STAND UP FOR CALIFORNIA
PO BOX 355
PENRYN, CA 95663**

**SCHARFF, BRADY & VINDING
ATTN: MICHAEL VINDING
WELLS FARGO BUILDING
400 CAPITOL MALL, SUITE 2640
SACRAMENTO, CA 95814**

Each said envelope was then, on March 4, 2011 sealed and deposited in the United States Mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 2011 at Sacramento, California.



Declarant

Eureka District Office(interoffice mail)

Division Office(interoffice mail)

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

3 **PROOF OF SERVICE**

4 I, Laurie C. Briggs, declare:

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

8 On July 1, 2011, I served the attached, and all exhibits thereto:

9 **SINGLEY HILL HOMEOWNERS ASSOCIATION'S OPPOSITION**
10 **BRIEF**

11 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.

14 _____ **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.

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

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

19 _____ **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.

22 _____ **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.

25 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.

28 ///

1 **PARTIES SERVED:**

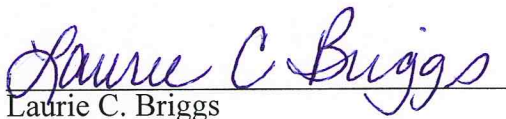
2 **Original to:**
3 Department of Alcoholic Beverage Control
4 3927 Lennane Drive, Suite 100
5 Sacramento, CA 95834
6 Email: Dean.Lueders@abc.ca.gov

Judge John W. Lewis
Administrative Law Judge
Department of Alcoholic Beverage Control
Administrative Hearing Office
P. O. Box 348210
Sacramento, CA 95834-8210
Email: Judy.Cain@abc.ca.gov

6 George Forman
7 Attorney at Law
8 4340 Redwood Highway, Suite F228
9 San Rafael, CA 94903
10 Email: george@gformanlaw.com

Cheryl Schmit
Stand Up for California
P. O. Box 355
Penryn, CA 95663-0355
Email: cherylschmit@att.net

11 I declare, under penalty of perjury under the laws of the State of California, that the
12 foregoing is true and correct. Executed at Sacramento, California, on July 1, 2011.

13 
14 Laurie C. Briggs

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