

**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

ISSUED NOVEMBER 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.