

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

**AB-9672**

File: 47-562483 Reg: 16084762

DIANNE JACOB, SUPERVISOR, DISTRICT 2, et al.,  
Appellants/Protestants,

v.

JAMUL INDIAN VILLAGE DEVELOPMENT CORPORATION and  
SAN DIEGO GAMING VENTURES, LLC,  
dba Hollywood Casino Jamul,  
Respondents/Applicants,  
and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Adam L. Berg

Appeals Board Hearing: August 2, 2018  
Los Angeles, CA

**ISSUED OCTOBER 2, 2018**

Appearances: *Appellants/Protestants:* Thomas D. Bunton, County of San Diego, as counsel for Dianne Jacob, Supervisor, District 2; Patrick D. Webb, of Webb & Carey APC, as counsel for Helen Comer, Steven Comer, Donna Foster, Kevin Foster, Shannon Foster, Veronica Hoban, Robert Jackson, John Munnik, Theresa Murphy, Michael Murphy, Jocelyn Parker, Mclain Parker, Patrick Parker III, Linnea Peltola, Nadja Pretty, Sean Pretty, Dawn Scialabba, Larry Scialabba, Paul Scripps, Patricia Terry, Gregory Tyree, Kathleen Tyree, Patrick Webb, Debra Webb, Sara White, and Schuyler White; and William A. Adams, of Norton Moore & Adams LLP, as counsel for Glenn Revell, Marcia Spurgeon, and Does I through X.

*Respondents/Applicants:* Carrie L. Bonnington, of Pillsbury Winthrop Shaw Pittman LLP, as counsel for Jamul Indian Village Development Corporation and San Diego Gaming Ventures LLC.

*Respondent:* Jennifer M. Casey as counsel for the Department of Alcoholic Beverage Control.

## OPINION

Dianne Jacob, Supervisor, District 2, et al., appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> issuing an on-sale general eating place license to applicants/respondents Jamul Indian Development Corporation and San Diego Gaming Ventures, LLC.

## FACTS AND PROCEDURAL HISTORY

On September 28, 2015, respondents Jamul Indian Village Development Corporation and San Diego Gaming Ventures LLC filed an application for a type 47 on-sale general eating place license to sell alcoholic beverages at the premises located at 14191 Highway 94, Jamul, California (hereinafter "the casino"), under the name "Hollywood Casino Jamul."

The Department investigated the application pursuant to Business and Professions Code section 23958 and recommended that a license be issued subject to six conditions, summarized as follows: food must be sold at all times that alcoholic beverages are sold; sale of distilled spirits by the bottle is prohibited; no "happy hour" or reduced price alcoholic beverage promotion is permitted; off-premises sale of alcoholic beverages is prohibited; peace officers and Department employees are authorized to visit and inspect the premises at any time; and persons under 21 years of age are not permitted in any room where gaming activities are conducted.

The Department received 590 verified protests, of which 188 protestants requested a hearing. Of the protestants, three were government entities: the County of

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1. The decision of the Department, dated October 25, 2017, is set forth in the appendix.

San Diego, the San Diego County Sheriff's Department, and the Jamul-Dulzura Union School District.

The issues the protestants raised fell into a number of categories: the casino was operating illegally because it was not on Indian land; granting the license would create traffic problems and increase collisions; granting the license would create a law enforcement problem and increase crime; granting the license would create a nuisance to the community; granting the license would lead to an overconcentration of licenses in the area; the premises did not properly post notice of the license application; and the proposed license restrictions are inadequate.

The administrative hearing was held over the course of three days. The first two days, November 16 and 17, 2016, were overseen by Department ALJ John Lewis. However, following the hearing, while the record remained open, ALJ Lewis received an ex parte communication that resulted in his voluntary recusal from the case. The Department therefore delegated its final decision making authority in this matter to the Office of Administrative Hearings. The parties stipulated that the ALJ assigned by the Office of Administrative Hearings would decide the case on the record. The final hearing date, September 6, 2017, entailed only closing arguments, and was overseen by Office of Administrative Hearings ALJ Adam L. Berg.

During the course of the administrative hearing, applicants Jamul Indian Village Development Corporation and San Diego Gaming Ventures, LLC presented testimony from Richard St. Jean, General Manager of San Diego Gaming Ventures LLC; from Leo Espelet of the transportation consulting firm Kimley-Horn, who served as Lead Transportation Traffic Engineer for the casino project; from Captain Tim Lepper of the El

Cajon office of the California Highway Patrol (CHP); from Department Licensing Representative Edith Wallen; and from Kerry Patterson, an attorney for Lewis Roca Rothergerber Christie LLP. The protestants presented testimony from Murali Pasumarthi, an engineer with the County of San Diego Public Works Department's Traffic Engineering Group; from Captain Marco Garmo of the San Diego County Sheriff's Department; from Nadine Bennett, Superintendent of the Jamul Dulzura Union School District; from Eileen Poole, a retired CEO/Principal of Steele Canyon High School; from local resident and retired Commander of the San Diego Sheriff's Department Glenn Revell; and from local residents Tracie Nelson, Nadja Pretty, Roland Heuschele, and Karen Toggery. The Department presented testimony from Supervising Agent in Charge Jennifer Hill.

The evidence and testimony established that on September 26, 2016, the Jamul Indian Village (JIV), a federally recognized Indian Tribe, entered into a management agreement with applicant Jamul Indian Village Development Corporation, a wholly owned enterprise of the JIV, and with applicant San Diego Gaming Ventures, LLC. The management agreement granted San Diego Gaming Ventures the exclusive right to manage, operate, and maintain the gaming facility, which was situated on two parcels of land designated 59708004 (Parcel 04) and 59708005 (Parcel 05).

Pursuant to the Indian Gaming Regulatory Act and applicable regulations, the National Indian Gaming Commission Chairman approved the management agreement.

San Diego Gaming Ventures is a subsidiary of Penn National Gaming, a regional operator that runs and manages 27 properties across the country. Richard St. Jean, the Vice President of Penn National and General Manager of San Diego Gaming Ventures,

testified that he is responsible for the day-to-day operations of the casino. In the past 23 years, he has managed 11 gaming properties across the country.

The casino complex encompasses approximately 2.2 million square feet, which includes the parking lot and garage. The premises is approximately 160 to 170 thousand square feet, with 100 thousand square feet open to the public. In addition to the gaming area, the casino has four restaurants and a food court that contains four eateries. The casino floor and restaurants are located on a single level, with the exception of the beer garden, which is located on the second and fourth levels. There are no physical barriers separating the restaurants from the casino floor, nor are customers restricted from consuming or purchasing alcoholic beverages on the casino floor.

The casino is open to the public 24 hours a day, seven days a week. Persons under the age of 21 are not permitted on the property. This prohibition is posted at the entrances and enforced by the casino's security officers, who are stationed at all the entrances. Security employees have scanners that swipe identification cards to ensure authenticity. For patrons appearing to be younger than 30, the casino provides wristbands. The casino has a contract with the Sheriff's Department to provide a deputy five days a week, eight hours a day. The deputy is on the premises from 6:00 p.m. to 2:00 a.m. Peak hours at the casino are Friday and Saturday evenings and Sunday during the day.

The casino received an Interim Operating Permit (IOP) in August 2016, which included the six license conditions contained in the Petition for Conditional License. Additionally, the casino voluntarily limited the sale of alcoholic beverages to start at

10:00 a.m. until last call, at 1:30 a.m. Alcoholic beverages are permitted to be sold and served on the casino floor. St. Jean testified that the percentage of beverages sold on the casino floor is small compared with what is served in the restaurants. Overall, approximately 75 percent of the casino's sales are food and 25 percent are alcoholic beverages. Food is available for purchase 24 hours a day. There are self-serve stations on the casino floor that dispense water and soda to patrons.

Approximately four weeks prior to the hearing, the casino implemented a shuttle service to help alleviate traffic congestion and provide an alternative means for patrons to get to the casino. The casino also uses taxis and ride-sharing services when requested. These transportation options are contained in the casino's transportation policy.

The casino has approximately 1,000 employees. The casino's beverage service policy was developed in accordance with the American Gambling Association's code of conduct. The casino has implemented an Alcohol Awareness Training Program for all service employees and most front-of-house employees. Additionally, all employees who are involved in the sale of alcoholic beverages receive a training program known as TIPS (Training Intervention Procedures), which provides instruction on dealing with customers under the influence. Employees are directed to ask for identification for anyone appearing to be under the age of 30 who does not have a wristband.

St. Jean testified his employees are held to a high standard with respect to the enforcement of alcohol policies. Employees are subject to accelerated discipline for allowing minors on the floor or for over-service.

The JIV and the County entered into service agreements for fire protection and an intergovernmental agreement outlining the JIV's commitment to the County and mitigation measures. The JIV has committed to the County annual payments of approximately \$2.55 million (with five percent annual increase) to fund fire service personnel and equipment and approximately \$275,000 for law enforcement. It also provided one-time payments of \$3.771 million to improve County roadways, \$80,700 for law enforcement, and initial purchase of fire equipment.

### ***The Surrounding Area – State Route 94***

The casino is located on SR-94, also known as Campo Road. In Jamul, SR-94 is a two-lane rural road that runs north-south. There is no physical median, and the two lanes are separated only by a double yellow line. There are generally no streetlights on the highway, except where it intersects with some other major roads. When approaching the casino from San Diego and the surrounding urban areas from the north, vehicles must travel approximately six miles on the two-lane road. The road is winding with many side streets that intersect the road at acute angles. The casino is accessible only by SR-94. Entrance to the casino from SR-94 is off of Daisy Drive. California Department of Transportation (Caltrans) is the state agency responsible for maintenance of SR-94.

Leo Espelet is a civil engineer with Kimley-Horn and Associates, a civil and transportation engineering consulting firm. He has 12 years' experience in transportation planning and traffic engineering. Espelet is the lead transportation traffic engineer for the Hollywood Casino project. In this capacity, he is the lead engineer for some of the improvements on SR-94 and has worked closely with Caltrans on the project.

On April 7, 2009, the JIV entered into a settlement agreement (hereinafter the "Agreement") with Caltrans to fund and construct certain road improvements at various locations on SR-94 in addition to upgrading the access to the casino itself. The JIV committed \$20 million to fund these projects. Applicants installed a temporary traffic signal at Daisy Drive, the main driveway entrance to the casino. SR-94 was also widened at the entrance to provide additional turn lanes in and out of the casino. According to Espelet, construction of the traffic signal and turn lanes were required by Caltrans, and applicants agreed to install them before the casino could open to the public. Improvements at the intersection have not yet been completed, but Espelet predicted that all the modifications, including a permanent traffic signal, would be installed by the first quarter of 2017.

Additionally, the JIV agreed to make road improvements at six other locations on SR-94 to mitigate additional traffic caused by the casino's operations. Espelet testified that he expected those improvements to be completed within two years; however, this was dependent on acquiring right-of-ways and relocating some existing utilities. Of the six additional improvements, only one was in the process of being completed. No construction has begun on the remaining five improvements.

Espelet was involved with several studies to determine the amount of additional traffic SR-94 would experience after the casino opened. The JIV prepared a Tribal Environmental Evaluation that estimated the increase in traffic as a result of the casino. The evaluation predicted an increase of 9,000 average daily trips. After the casino opened, Espelet performed driveway counts to determine the number of vehicles entering and departing the casino. Two weeks after opening day, traffic began to



normalize and there were approximately 4,200 trips per day Monday through Thursday. On Fridays and Sundays, there ranged from 5,200 to 5,800 daily trips, and on Saturday, there were approximately 7,200 trips.

Espelet believed that the intersection of SR-94 and Lyons Valley Road is rated an "F" by Caltrans based on traffic congestion. Anything below a "C" is considered unacceptable. It was estimated that the additional traffic caused by the casino would result in six additional intersections operating at an unacceptable level. These intersections would continue to operate at this level until the road improvements were completed.

Murali Pasumarthi manages the traffic engineering group for the San Diego County Public Works Department, where he has worked for eight and a half years. Pasumarthi has a bachelor's degree in civil engineering and a master's degree in traffic engineering. His primary responsibility with the County is to ensure that the approximately 2,000 miles of roads maintained by the County are safe and efficient. Pasumarthi testified that improvements in front of the casino have not been completed, and it is still an active construction site.

Pasumarthi reviewed Caltrans' environmental impact report regarding the SR-94 project. According to the report, the increased traffic resulting from the casino would cause operating conditions at various intersections on SR-94 to fall below acceptable levels, and intersections already operating at unacceptable levels to become worse. According to the report, if road improvements are not in place by the time the casino opens, the casino operation would result in significant traffic impact. Generally, the improvements involved adding turn pockets at various intersections and two additional

traffic signals. Pasumarthi also explained that SR-94 has a number of intersections that create conflict points. He also noted that the presence of the high school approximately 1.7 miles from the casino introduces young drivers, who have relatively little driving experience, into the mix.

Because SR-94 is maintained by Caltrans, the County has no authority to make improvements to the road. Based on the environmental reports, there are many improvements needed even without the existence of the casino. The JIV agreed to fund these improvements. These deficiencies are exacerbated by the additional casino traffic.

In March 2016, Caltrans produced a Final Environmental Impact Report (EIR) reviewing the proposed SR-94 improvements funded by the JIV. The project begins in the north at SR-94 and Jamacha Boulevard and ends approximately 1,800 feet south of the casino. The project includes improvements to five intersections along this stretch of road. The Level of Service is a rating system used by Caltrans to evaluate the effectiveness of an intersection to move traffic. An "A" through "C" rating is considered acceptable. "D" through "F" ratings are considered unacceptable. Prior to the casino project, only one intersection on this stretch of road was operating at an unacceptable level. However, the additional traffic resulting from the casino was predicted to cause conditions at various intersections on this section to fall below an acceptable level of service.

The CHP is the state agency with primary jurisdiction for enforcing traffic laws on SR-94. Captain Tim Lepper is in charge of CHP's El Cajon Command, where he has been stationed for the past 28 years. CHP did not file a protest against the issuance of a

license to the casino, but according to Captain Lepper, CHP defers to the law enforcement agency that has jurisdiction over the establishment, and it stays neutral as to whether a license should be granted. Prior to the casino's opening, he met with representatives from the casino regularly to discuss traffic mitigation and safety concerns. CHP has a reimbursable service contract with the JIV to provide traffic services. For example, on opening day, CHP officers assisted with directing traffic, which had become backed up for several miles.

Several other casinos are located in the El Cajon Command, including Barona Casino, which is also located on a rural two-lane road. Captain Lepper testified that an increase in traffic volume does not necessarily make a road more dangerous. According to Captain Lepper, increased traffic can lead to an increase in traffic collisions but can also reduce the number of injuries or fatalities because of the slower speeds due to congestion. In the several weeks following the opening of the casino, Captain Lepper was not aware of any collision that involved a person consuming alcoholic beverages at Hollywood Casino. However, he will continue to monitor the statistics to determine where best to deploy his officers and enforcement efforts.

Captain Lepper was asked about various conditions placed on the license at Barona Casino. Captain Lepper testified that if the conditions placed on that license were imposed on the proposed license at issue they could possibly reduce the consumption of alcoholic beverages and potentially help with road safety. Captain Lepper testified that the premises has a comprehensive alcohol policy and training program.

***The Department's Investigation***

Edith Wallen has worked for the Department for 15 years, two of which were as a licensing representative. In that capacity, she is responsible for investigating whether the Department should grant or deny an application. She was assigned to investigate the application for the proposed premises. This was Wallen's second licensing investigation.

Jennifer Hill is Supervising Agent-in-Charge for the Department's San Diego District Office. She has held that rank for the past 11 years and has been with the Department for 22 years. She supervises licensing and enforcement matters in the district.

Wallen received over 1,000 protests in connection with the application, of which approximately 590 were verified. As part of her investigation, she visited the casino on three occasions. Wallen determined that there was not an undue concentration of alcohol licenses in the census tract, 213.04, as there was only one other license, and three licenses are allowed. The census tract was not considered a "high crime" area based on standardized statistical data obtained from the Sheriff's Department. Wallen determined there were no residences within 100 feet of the licensed location or any consideration points within 600 feet. The closest residence was approximately 1,300 feet away, and the closest school was approximately 1.4 miles from the proposed premises. Wallen confirmed that notice of the alcohol license application was properly posted for 30 days.

The Department determined the casino is exempt from local zoning requirements based on its understanding that the casino is located on sovereign tribal land. The

County protest did not contend that the casino was in violation of local zoning laws or that the establishment was an unlawful gambling establishment.

Wallen testified that she reviewed all the verified protests. One of the main concerns she gleaned from reviewing the protests was road safety on SR-94. CHP is the law enforcement agency with primary jurisdiction for traffic on SR-94. Wallen obtained and reviewed CHP statistics relating to traffic collisions for SR-94. The Department also consulted with Caltrans and was advised that Caltrans' main concern was that the road improvements in front of the casino be completed prior to opening. The Department advised Caltrans that the improvements immediately in front of the casino has been completed. However, Caltrans never communicated with the Department that it was not satisfied with the work that had been completed or indicated that the casino's opening should be delayed for any reason. Caltrans did not file a protest in this matter.

Wallen contacted Captain Dave Moss, who at the time was in charge of the Rancho San Diego command that filed the protest on behalf of the San Diego County Sheriff's Department. He recommended six conditions be placed on the license. The Department imposed three of the six recommended conditions on the license, but did not impose a time restriction or prohibition of sales and consumption on the casino floor. The casino agreed to hire a deputy to provide law enforcement services at the casino for 40 hours per week.

Wallen contacted Darren Gretler, Assistant Director of the County's Planning and Development Services, and Supervisor Jacob, who filed protests on behalf of the County. The main concern from the County was that the JIV had not completed the

agreed-upon traffic mitigations on SR-94. Although Caltrans agreed that the casino could open as long as the improvements directly in front of the casino were complete, the County contended that all improvements should be completed before the casino opened. Wallen concluded that the County's other concerns were addressed by the casino agreeing to provide 24-hour food service, making arrangements with car-sharing services to provide transportation, evaluating implementation of a shuttle service, and providing its employees a recognized training program for alcoholic beverage service.

Wallen contacted Superintendent Nadine Bennett of the Jamul-Dulzura Union School District, who filed a protest on behalf of its board. Bennett reported that 595 students travel on SR-94 to get to school, and the highway is already dangerous with one of the highest fatality rates in the county. Bennett was concerned about the increase in accidents and intoxicated drivers. Wallen contacted Caltrans in an attempt to obtain crash statistics for SR-94 compared with other state highways, but Caltrans does not maintain such statistics.

Wallen recognized that road safety and traffic were the most frequent issue raised in the community protests. Wallen obtained statistics from CHP showing total collisions, injuries, fatalities, DUI involvement, and DUI arrests on an 11.33 mile stretch of SR-94, which includes the casino. CHP does not maintain statistics to address whether SR-94 is more dangerous or has more collisions than other comparable roadways.

Wallen determined there were no schools or playgrounds within 600 feet of the casino. However, there is a church or chapel within 600 feet of the casino. Wallen went to the church and spoke with a woman who she believed was in charge of the church,

but she did not record the person's name. The woman gave Wallen a tour of the church and said it was mainly used for funerals. The woman said there had not been any regular worship there as long as she could remember, and it was open only to members of the tribe. Wallen estimated the church seats no more than 50 people. Wallen said she did not investigate any further, such as checking to determine who owned the church or whether any services were regularly held at the church. Wallen did not speak with any official from the Roman Catholic Diocese of San Diego to determine who owned the church. She concluded the church was used only for special events such as funerals and baptisms.

Kerry Patterson is an attorney with Lewis Roca Rothgerber Christie LLP, a firm representing the JIV. Patterson has travelled to the JIV reservation since 2009 and is aware of the church adjacent to the casino. Patterson testified the church is not open to the general public and is used for tribal events. She said the Catholic Church does not perform any ceremonies there.

Hill did not believe the St. Francis Xavier Church met the statutory definition of a consideration point because it does not have a regular membership or services. The fact that it is occasionally used for special events does not necessarily make it a consideration point. After the issue of the church was raised at hearing, Hill checked the San Diego Diocese website as well as a Catholic Church directory; St. Francis Xavier is not listed as a parish or church. The only parish listed on the website in Jamul is S. Pius X on Lyons Valley Road. Hill acknowledged that the Department never confirmed who owned the property where the church is situated.

Wallen addressed concerns that the casino is close to a fire station and that traffic could impede the fire department from responding to emergencies. Wallen received a letter from the San Diego Rural Fire Protection District stating that it was not protesting the application. The JIV spent \$1.4 million to purchase a ladder and pumper truck for the Jamul fire station. Additionally, the JIV agreed to contribute to the County \$2.5 million annually to improve fire service protection.

Wallen was aware that Steele Canyon High School was located on SR-94 approximately one mile from the casino. There is also a middle school and primary school within two miles. None of the schools are located within 600 feet of the casino, and therefore were not consideration points.

The Department determined the six conditions it imposed on the license sufficiently addressed the issues raised by protestants. Wallen testified that the Department does not place conditions on a license based on conditions imposed on other licenses of similar establishments. She explained that each premises is unique, and conditions are tailored to each establishment. Wallen was not familiar with the conditions the Department placed on the licenses of other casinos in the area.

Wallen testified that the Department lacks jurisdiction to place conditions on the license relating to unlicensed areas, such as requiring road improvements be made on SR-94. Hill testified she was in contact with Caltrans officials prior to the Department approving the license application. Caltrans specifically informed her that it wanted the signal light at Daisy Road and the dedicated turn lanes to be completed before the casino opened to the public. At no point did Caltrans ever raise the issue with the



Department that other improvements to SR-94 were not completed or express concern about the issuance of an IOP.

### ***The Protestants***

Marco Garmo is a captain with the Sheriff's Department and has been with the department for 24 years. He is in charge of the Rancho San Diego Command, which is responsible for providing law enforcement services for Jamul. Through the years, Captain Garmo has dealt with numerous individuals who were impaired by alcohol. In his experience, individuals react to alcohol differently. Some can be under the legal limit and exhibit outward signs of intoxication, while others can be well over the legal limit and not exhibit signs of being intoxicated. Captain Garmo was at a presentation the applicants conducted regarding their responsible drinking program. He was very impressed by the presentation, which indicated the casino would serve patrons one drink an hour. However, he testified that the policy can be difficult to enforce in practice. He testified the casino has a robust security system including cameras and personnel, but during peak times, it can be difficult to enforce the one-drink per hour policy. He noted that patrons could get drinks from multiple restaurants or on the floor, which makes it difficult for an individual server to know how much the patron has consumed. He was impressed that the casino intended to use alcohol dispensers to measure a determined amount, which reduces the possibility that a bartender would over-pour.

Captain Garmo testified that the nature of casinos, and the fact that they are open 24 hours a day, attract people who are under the influence of drugs or alcohol, especially central nervous system stimulants. Casinos also tend to attract a criminal

element. Captain Garmo testified that the road conditions of SR-94 increase the risk that an individual who has consumed alcoholic beverages will have an accident.

Captain Garmo testified that, in his experience, not all casino patrons arrive at the casino sober. He said his deputies recently arrested a person for being drunk in public who arrived at Hollywood Casino already intoxicated. Captain Garmo agreed that, if a casino does not serve alcoholic beverages, customers may still arrive intoxicated or find another way of consuming alcoholic beverages.

Captain Garmo's territory includes the Sycuan Casino and two other casinos located in the neighboring SDDS command. Hollywood Casino is significantly smaller than the Barona and Sycuan casinos. Captain Garmo testified that the Sycuan Casino had to wait three or four years before it received its liquor license, which gave law enforcement time to gauge the impact the casino had on the community. He said his department has not had a similar opportunity to evaluate Hollywood Casino. After the casino opened, its security officers identified an individual who was intoxicated before entering the casino. The off-duty deputy arrested him for being drunk in public. He said applicants have done a good job working with his deputies. Captain Garmo was aware that the JIV committed to paying the sheriff's department a yearly sum to help defray the additional costs of enforcement associated with the casino.

Captain Garmo wanted applicants' license to be denied in order to give his department time to gauge the impact of the casino on the community. He thought applicants should be treated consistently with other casinos, which were required to operate without a liquor license for some time. He wanted to be able to look at crime statistics over a several-year period without the service of alcohol before making a

decision as to whether to support the application. Even with additional conditions proposed by some of the protestants, Captain Garmo would not support the application.

Protestant Nadine Bennett is Superintendent of the Jamul-Dulzura Union School District. The district has three campuses that serve 600 students as well as a preschool with 12 students. Approximately 160 students take the bus on any given day. Because SR-94 and other rural roads are winding, the bus drivers receive additional training. There is also international traffic coming across the Mexican border, where there is a commercial port-of-entry. She believed 90 percent of the parents commute using SR-94 and two-thirds of her students must use SR-94 to get to school. Steele Canyon High School, which is located approximately one mile from the proposed premises, is a charter school under the Grossmont High School District.

Bennett had concerns that the additional traffic associated with the casino and individuals driving under the influence might pose a danger to her staff, students, and families. She said people use her campuses beginning at 6:00 a.m., and events can continue until 11:00 p.m. The high school has many athletic and special events outside of school hours. Bennett believed there have been a number of fatalities on SR-94 and she was concerned about the increased traffic and impaired drivers.

Eileen Poole lives approximately three miles from the casino. She retired two years ago as principal of Steele Canyon High School, where she served for seven years. The school is a charter school that serves approximately 2,200 students and employs approximately 135 staff members. The school is located on SR-94, which is the only means for students to access the school. The school has a bus service, but most students arrive by private car. Additionally, a number of students walk to school on

the shoulder of SR-94 or on a dirt path that runs alongside the highway. Athletic teams also run on the road because there is no other place for them to train. During the seven years she was principal, three students were killed on SR-94, and one parent was killed on a side street. One of Poole's students died after being struck by a vehicle when she was walking on the shoulder.

Poole had many concerns about granting the casino a liquor license. She noted that every year, approximately 500 students get their driver's license, which means the road is heavily used by new and inexperienced drivers. Poole said that if a liquor license were issued, she would like to see the completion of road improvement mitigations as a condition. She noted that the high school is also used as a community center, hosting events outside of school hours.

Glenn Revell lives approximately six and one-half miles from the casino. He is also president of the Jamul Action Committee, an organization that has fought construction of the casino. Revell has personally been involved with several lawsuits against the JIV. Revell is a retired Sheriff's Department Commander; he worked in the Sheriff's Department for 28 years. As a Commander, he oversaw multiple captains and lieutenants. Revell completed a 40-hour basic accident investigator course and had continuing training in accident investigation. He had experience in dealing with impaired individuals both in traffic and non-traffic related situations.

When Revell commanded the Santee station, which serviced the Barona Casino, he protested its license application. He noted that prior to receiving a license, Barona Casino had been giving away alcoholic beverages, and he had a concern that it was entirely unregulated. He estimated it was two to three years before Barona was granted

its license. He also had concerns about the rural road that services Barona Casino, and the further risks posed by serving alcoholic beverages. Revell thought that SR-94 is more dangerous than the road approaching Barona due to the high volume of commercial trucks on SR-94 as a result of the commercial port-of-entry. On behalf of the Sheriff, he recommended a number of conditions be placed on Barona's license. Revell believed the following conditions should also be placed on the applicants' license if granted: Alcohol sales and consumption should be limited to the dining establishments. This condition is appropriate because serving alcoholic beverages and food allows for alcohol to be more quickly metabolized. Revell is concerned about service of alcoholic beverages on the casino floor, because people will drink without having food. There should be a prohibition on dancing and live entertainment because people tend to drink more at these events. The hours of service should be restricted until after the bulk of students are done commuting from campus due to the number of inexperienced drivers on SR-94. Alcohol sales should not exceed food sales. Finally, the casino should be required to provide a shuttle service.

Protestant Tracie Nelson lives approximately two and one-half miles from the casino. She is a wildlife reserve manager for the California Department of Fish and Wildlife, and resides on one of the properties. In emotional testimony, she said she feared for her children's safety. She said her daughter is on the verge of obtaining a driver's license, and she believes SR-94 is extremely dangerous. She researched collision statistics and found a much higher fatality rate on the section of road north of the casino than on other County roads. She feared that the volume of traffic from the casino will only be made worse by adding alcohol into the equation. Nelson also stated

that the notice of the pending application was not properly posted, and when she attempted to stop to read the notice, she was chased off by construction crews.

Protestant Nadja Pretty has lived in Rancho Jamul Estates for the past two and one-half years, approximately a mile south of the casino. She and her husband have three children. She drives on SR-94 multiple times a day. Several weeks before the hearing, she was driving at night and stopped at the traffic light in front of the casino. She observed a car leaving the casino without its headlights on. The car proceeded onto SR-94 and continued to travel without lights for approximately two miles. On another occasion she observed a car coming out of the casino without its headlights on. She also observed pedestrians climbing over concrete barriers to access the casino. She did not believe there is adequate public transportation. Pretty now takes a detour to avoid the most dangerous section of SR-94.

Roland Heuschele has lived in Jamul since 1997. He is a retired Chief Inspector for the legacy United States Customs Service and was in charge of the port of San Ysidro. He was concerned about the commercial traffic coming from Tecate and the number of semi-trucks that use SR-94 coming north from the border. The port-of-entry at Tecate is approximately two miles from the intersection of SR-94, approximately 15 miles south of the casino. Tecate is a small port-of-entry but has a separate commercial facility to accommodate trucks entering the United States. He estimated 170 trucks pass through the port each day.

Until 2007, Karen Toggery lived in a trailer behind the Jamul Indian Cemetery on and off for 20 years. St. Francis Xavier Church is located next to the cemetery. Over the years, she attended 20 or 30 funerals or wakes at the church, including services for

several family members. She is able to get to the church via an easement from SR-94. Toggery said there were regular church services at the church until Deacon Clark retired, the date of which was not clear. Toggery said there have not been weekly services since. Toggery is not allowed to go to the church, presumably due to a rift with the JIV. She was last there three or four years ago for a wake. Toggery did not protest the application.

After the final administrative hearing date, the ALJ issued and the Department adopted a decision overruling the protests and issuing the license subject to the six conditions set forth in the Petition for Conditional License, plus a seventh condition limiting hours of sale. (Exh. A-4; Legal Conclusions, ¶ 16.)

Appellants/protestants then filed this appeal making several contentions. Appellants/protestants County of San Diego and County Supervisor Dianne Jacobs (hereinafter the "County protestants") contend (1) the casino should have been required to fulfill its agreement to improve SR-94 before the license issued. Appellants Revell, Sturgeon, and Does I-X (hereinafter the "Adams protestants") contend (2) the interim Department Director's ex parte communication improperly affected the outcome of the license application due to ALJ Lewis' recusal; (3) the Department failed to give proper notice of the continued administrative hearing; and (4) the license conditions are unreasonable, arbitrary, and insufficient in light of the danger the license presents to the community. The remaining appellants/protestants (hereinafter the "Webb protestants") contend (5) the JIV cannot legally operate a casino, and is therefore creating a

gambling nuisance sufficient to mandate denial of the license.<sup>2</sup> The first and fourth issues will be addressed together.

Finally, several protestants (5) seek judicial notice or informal consideration of evidence outside the administrative record.

## DISCUSSION

### I

The County protestants contend the Department should not have granted respondents a license until respondents completed promised road improvements outlined in the Agreement between the JIV and Caltrans. (See Settlement Agreement, Exh. P-1.) The County protestants argue that respondents' agreement with Caltrans constituted a "binding obligation" to complete the improvements before the casino opened. (App.Br., County Protestants, at p. 3.) They claim the road improvements were "designed to enhance traffic safety for all drivers, including those who are intoxicated and their potential victims." (*Id.*, at pp. 3-4.) They write, "[i]t is also undisputed that the road improvements include features such as widening and the addition of traffic signals/turns [*sic*] lanes, which will make SR-94 safer for all drivers, including those who are intoxicated." (*Id.*, at p. 6.) They further contend that the ALJ acknowledged the increased risk of intoxicated drivers and that increased congestion "could of course

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2. The Webb protestants' brief is 60 pages long and is aimed largely at the validity of the Compact between the JIV and the State of California. The Webb protestants contend, among other things, that the JIV was not a federally recognized tribe in 1934, and therefore cannot receive land in trust; that the land on which the casino is situated was never transferred in trust; that the land on which the casino is situated was granted to individual half-blood Indians living there in 1978, and not to the JIV; and that respondent failed to carry its burden of proving it was legally allowed to operate a gambling facility on the land in question. These arguments implicate the scope of this Board's jurisdiction, and will therefore be addressed together.



impact the safety of a road" (*id.* at p. 6), and yet granted the license. (*Id.*, at pp. 5-6.)

The County protestants emphasize their fear that the promised road improvements will never be completed. (*Id.* at pp. 7-8.)

The Webb protestants incorporate the County protestants' argument by reference. (App.Br., Webb Protestants, at p. 60.)

Applicants/respondents JIV and San Diego Gaming contend the issue was properly addressed and decided by the ALJ, and that there is a "complete lack of evidence to support the requisite nexus between Appellants' traffic and road condition concerns and the legal issues to be decided." (Reply Br., at p. 12.) Moreover, they argue that the County protestants' "underlying factual assumption for this argument, that JIV failed to complete necessary improvements before opening to the public, is incorrect," since Caltrans agreed the casino could open provided "certain improvements in front of the casino," including a traffic light and turn lane, were completed. (*Ibid.*) According to respondents, both Caltrans and the Department confirmed the improvements in front of the casino were completed in August 2016, before issuance of the IOP. (*Ibid.*)

The Department counters that it cannot impose license conditions requiring improvements to SR-94 because SR-94 is not under the control of the licensee. (Dept.Br., at p. 16.)

In their closing brief, the County protestants contend they "never asked the [ALJ] to order the [JIV] to complete the road improvements," but instead argued "it was contrary to the public welfare to grant the liquor license when the risks 'associated with the sale of alcoholic beverages' could have been easily reduced—by denying the liquor

license unless or until the road improvements the [JIV] agreed to build are completed." (Closing Br., County Protestants, at p. 1.) They further contend that Caltrans' failure to protest the license is irrelevant, and argue that "[i]t is just as plausible that [Caltrans] decided not to protest the license for political reasons that have nothing to do with whether the Casino should receive a liquor license." (*Id.*, at p. 10.)

Ultimately, the county protestants emphasize that issuance of the license will result in an increase in drunk driving on SR-94 (*id.*, at p. 9) and that "[t]he undisputed evidence establishes that the safety risks could be reduced by requiring the [JIV] to complete the road improvements before the liquor license is granted." (*Id.*, at p. 11.)

It is undisputed that Caltrans, the other party to the Agreement, did not protest issuance of the license. (See generally App.Br., County Protestants; App.Br., Webb Protestants; Legal Conclusions, ¶ 13 ["Caltrans did not protest the application and agreed that the casino could open so long as the improvements immediately in front of the casino were completed."]; Findings of Fact, ¶ 41 ["At no point did Caltrans ever raise the issue with the department that other improvements on SR-94 were not completed or express concern about the issuance of the IOP."]; Exh. D1.)

The Adams protestants echo many of the traffic concerns outlined by the County protestants. However, the Adams protestants contend the conditions placed on the license, found by ALJ Berg to be sufficient, are arbitrary and unreasonable, and pose a danger to the public. (App.Br., Adams Protestants, at pp. 12-15.) They compare the conditions imposed on the applied-for license with those of other nearby casinos. (*Id.*, at pp. 13-14; see also Exh. P-2.) They argue that two nearby casinos, the Barona Casino and the Sycuan Casino, have respectively 22 and 18 license conditions, while

respondents' license has only seven. (App.Br., Adams Protestants, at p. 13; see also Exh. P-2.) They acknowledge that each license must be evaluated independently, but argue that at least 14 of Barona's conditions could apply equally to respondents' casino. (App.Br., Adams Protestants, at p. 14.)

The Adams protestants argue the applied-for license is high-traffic and high-risk, that over a thousand people protested the application,<sup>3</sup> and that casino policies alone are insufficient since business practices can change. (*Id.*, at pp. 14-15.) They conclude by asking the Board to either reverse the decision entirely, or to remand for additional conditions to be imposed. (*Id.*, at p. 15.)

This Board reviews an appeal using the substantial evidence rule and is bound by the Department's factual findings absent an abuse of discretion:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

On appeal, the burden lies with appellants to show that substantial evidence does not exist:

The substantial evidence rule requires the trial court to start with the presumption that the record contains evidence to sustain every finding of

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3. According to the ALJ's findings, there were 590 verified protests. (Factual Findings, ¶ 3.) Of these, 188 protestants requested a hearing. (*Ibid.*)

fact. [Citation.] The burden is upon the appellant to show there is no substantial evidence whatsoever to support the findings. [Citation.] The trier of fact . . . is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence. [Citation.]

(*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].)

"[W]here there is no conflict in the evidence supporting the finding, then 'the conclusions or determinations reached present questions of law subject to review for correctness, jurisdictional excess or any resulting abuse of discretion.'" (*Sepatis v. Alcoholic Bev. Control Appeals Bd.* (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729], quoting *Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 35 [152 Cal.Rptr. 285].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) "Trial court findings must be supported by substantial evidence on the record taken as a whole. Substantial evidence is not [just] any evidence—it must be reasonable in its nature, credible, and of solid value." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834].)

Section 25658 of the Business and Professions Code supplies the grounds for which the Department may deny a license:

Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions

of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall deny an application for a license or for a transfer of a license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

The department further shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4.

(Bus. & Prof. Code, § 23958.)

The ALJ reached the following conclusions of law:

12. By far the most pervasive issue, raised by almost all protestants, relates to claims that the additional traffic and intoxicated drivers caused by the proposed premises would create dangerous conditions and excessive congestion on SR-94. SR-94 is a winding, rural two-lane highway that is essentially the only access to the Jamul community and used heavily by local residents. The road has a number of access points where visibility is limited. The highway is heavily used by commercial trucks coming from the border. A high school is located on the highway, and many students walk to school on the road's shoulder. For an approximate 11 miles [*sic*] stretch of highway, there has been at least one fatal collision every year in 2013, 2014, and 2015.

A number of protestants claim that Caltrans has designated SR-94 as an "F" because it is unsafe. However, the Caltrans designation of certain intersections as having a level of service as an "F" or "unacceptable" relates to traffic congestion, and not road safety. Although congestion could of course impact the safety of a road, the numerous protests claiming that SR-94 has received an "F" rating because it is dangerous is not entirely accurate. Nor was there any evidence establishing that SR-94 is any more dangerous than other similar county highways. Prior to the casino construction, the stretch of SR-94 beginning at the Jamacha Boulevard intersection extending just south of the casino had one intersection that Caltrans designated as operating at an unacceptable level of service. Without mitigation, the casino was expected to cause five additional intersections to operate at an unacceptable level. Although the casino has not produced the 10,600 average daily trips originally projected, there is no doubt that the casino's operation has produced additional traffic on SR-94. As of the date of the hearing, only one intersection, immediately in front of the casino, had undergone improvements.

13. The county contends that a license should not be granted until the JIV completes all road improvements it agreed to perform when it entered into a stipulated settlement with Caltrans. In that settlement, the JIV agreed to complete the improvements prior to opening to the public. The county contends that applicants are in breach of their contractual obligations. However, Caltrans did not protest the application and agreed that the casino could open so long as the improvements immediately in front of the casino were completed. Mr. Espelet credibly testified that the JIV is diligently working to complete the improvements and meet their contractual obligations with Caltrans. There are numerous factors that can delay construction, including obtaining right-of-way and other permits. Withholding an alcoholic beverage license as leverage to compel the JIV to complete the road projects would be arbitrary and capricious as there is a lack of a substantive nexus between the license and the roadway project. Nor can the County plausibly contend that the road improvements are needed to obviate the impact of the liquor license. While it is uncontested that construction of the casino will increase traffic and cause traffic problems without mitigation, there was no evidence to establish that the increase in traffic is a result of the casino serving alcoholic beverages. Likewise, the County's contention that an increase in intoxicated drivers will make the roadway more dangerous if the construction projects are not completed is speculative and not supported by evidence.

Applicant's failure to complete certain traffic improvements is a separate issue from whether granting a license is contrary to the public welfare. Although it is understandable that the County wishes to have the improvements completed as soon as possible, withholding a liquor license as a negotiating tool is not authorized by law.

14. As previously noted, there is no question that construction of the casino has created, and will continue to create, additional traffic on SR-94. It is possible that an increase in vehicle traffic could result in an increase in the number of collisions on the stretch of highway. It is also possible, as noted by Captain Lepper, that increased traffic may reduce speeds, which will actually result in a decrease of both collisions and the severity of collisions that do occur. However, there was no evidence that granting the casino a liquor license will be the cause of any increase in collisions.

15. Similarly, it is possible that because the casino will be serving alcoholic beverages, one might expect an increase in intoxicated drivers on SR-94. Protestants' concern about this issue is understandable; there is no question that intoxicated drivers pose a grave danger to themselves and others. Protestants raised the following factors that they believe will increase the risk of alcohol-related collisions on SR-94: Schools are located nearby with many student drivers on the roadway; SR-94 has heavy commercial truck traffic; it is one of the only access roads in Jamul; a number of bicyclists use the highway; students walk on the shoulder of

the highway to get to school; emergency vehicles could be prevented from timely responding to emergencies due to traffic; and there is increased risk of collision with livestock.

Of course there are risks associated with the sale of alcoholic beverages. Although risk cannot be eliminated, it can be reduced. Here, the six conditions on the license serve to reduce the risk that casino patrons will over-consume and depart the casino under the influence. In addition, applicants have taken voluntary steps to decrease the risk that their customers will pose a danger to the community. The casino implemented a comprehensive alcohol training program for its employees. The training will assist employees in identifying and dealing with individuals who may be intoxicated. Under the policy, no individual who is obviously intoxicated will be permitted to enter the casino, and employees will assist intoxicated patrons with obtaining transportation. The casino requires that patrons be at least 21 years of age. Anyone appearing to be under the age of 30 will be asked for identification or provided a wristband. Applicants indicated they will strictly enforce these policies, and employees who do not follow them will be subject to termination. Other policies, such as limiting the hours of sale, providing water and soda stations throughout the casino, having drink dispensers that limit the amount of alcohol per serving, and establishing transportation options for customers are all positive steps applicants have taken. Security officers and deputy sheriffs will help to enforce these policies.

16. Some protestants requested that, if a license is granted, additional conditions be added similar to those on the licenses of other local casinos. Specifically, they requested a restriction of the sale and consumption of alcoholic beverages on the casino floor and limiting the hours of operation. With the alcohol and transportation policies the casino has implemented, applicants established that alcohol sale and consumption need not be restricted to eating establishments in order to protect the public welfare. The casino has voluntarily restricted alcohol sales to begin at 10:00 a.m. This restriction is reasonably tailored to reduce the consumption of alcoholic beverages and will reduce the risk that patrons will drive intoxicated during the morning commute hours after having been served at the premises. The casino has voluntarily restricted these hours, which is a reasonable restriction to protect the public welfare; accordingly it will be made a license condition.

(Legal Conclusions, ¶¶ 12-16.)

This Board finds fault in the ALJ's reasoning with regard to the safety of SR-94. The ALJ concluded first that "there is no question that construction of the casino has created . . . additional traffic on SR-94." (Legal Conclusions, ¶ 14.) Second, he

concluded that "it is possible that because the casino will be serving alcoholic beverages, one might expect an increase in intoxicated drivers on SR-94." (Legal Conclusions, ¶ 15.) He went on to list the factors raised by protestants' evidence and testimony which, when combined with an increase in intoxicated drivers, pose a threat to public welfare. These factors include nearby schools with student drivers; heavy commercial truck traffic; the lack of other access roads in Jamul; the number of bicyclists using the highway; students walking on the shoulder to school; the potential inability of emergency vehicles to timely respond; and the risk of collisions with livestock. (*Ibid.*)

These factors, when combined with drivers under the influence, pose a very real threat to the safety of the Jamul community. Nevertheless, the ALJ concluded that while these risks could not be eliminated, they could be "reduced." (*Ibid.*) He went on to conclude that two factors, the conditions imposed on the license and the casino's business practices, rendered these risks to the welfare of the community acceptable. (*Ibid.*)

The conditions imposed on the license, however, are limited:

- 1 At all times when the premises is exercising the privileges of their license, the sale of food, in compliance with Section 23038 of the Business and Professions Code, shall be offered and available for purchase.
- 2 The sale of distilled spirits by the bottle for same day or future consumption is prohibited.
- 3 No "happy hour" type or reduced price alcoholic beverage promotion shall be allowed.
- 4 The sale of alcoholic beverages for consumption off the premises is strictly prohibited.



- 5 Peace officers, as listed in Section 830.1 of the California Penal Code, and the Director and other persons employed by the Department of Alcoholic Beverage Control for the administration and enforcement of the Alcoholic Beverage Control Act are hereby authorized to visit and inspect the proposed premises as outlined in red on form ABC-257 dated 09/23/2015, at any time the undersigned is exercising the privileges authorized by the license on such premises.
- 6 Persons under 21 years of age shall not be permitted to remain in any room where Class II and Class III gaming activities are being conducted unless the person is en route to a non-gaming area of the facility; except that employees not engaged in the sale or service of alcoholic beverages shall be permitted to remain in such area(s) in the performance of their duties as employees.

(Exh. A-4, Petition for Conditional License.) The first four conditions are indeed aimed at discouraging excessive consumption. However, even if the JIV scrupulously complies with these conditions, the conditions do little to reduce the risk to the public welfare.

That a patron must pay full price for her drink, and may not buy a full bottle or take her drink outside, will do virtually nothing to prevent her from becoming intoxicated, getting into her car, and causing a collision on the long, narrow, congested stretch of SR-94.

(See Legal Conclusions, ¶ 12 ["SR-94 is a winding, rural two-lane highway that is essentially the only access to the Jamul community and used heavily by local residents"].) Conditions 5 and 6 are aimed, respectively, at enforcement and at underage drinking, and are even less helpful at curbing the risk of drunk drivers on SR-94.

As the ALJ noted, in light of the protests filed, the casino agreed to a seventh condition prohibiting sales before 10:00 a.m. (Legal Conclusions, ¶ 16.) While this limitation will reduce the risk of drunk driving during "morning commute hours," it does nothing to reduce the risk during other commute times, or to reduce the risk of collisions with commercial truck traffic or livestock. (*Ibid.*; see also Legal Conclusions, ¶ 15.)

Moreover, the ALJ's implied conclusion that morning commute hours increase the risks imposed by drunk driving undermines his earlier conclusion that increased traffic congestion could potentially slow traffic and reduce collisions. (Compare Legal Conclusions, ¶ 16, with Legal Conclusions, ¶ 14 ["It is also possible, as noted by Captain Lepper, that increased traffic may reduce speeds, which will actually result in a decrease of both collisions and the severity of collisions that do occur."].)

To compensate for deficiencies in the conditions imposed, the ALJ cites "voluntary steps" the casino has taken to reduce the risk of drunk drivers. These steps include comprehensive alcohol training; refusal of patrons who are obviously intoxicated; assisting intoxicated patrons with transportation options; requiring patrons be at least 21; requesting identification and providing wristbands to anyone who appears under 30; limiting hours of sale; providing water and soda stations; using drink dispensers to limit alcohol portions; and hiring security officers and deputy sheriffs.

The problem with these measures, as protestants point out, is that they are voluntary. They rely on the continued vigilance of the casino, its employees, and, in some cases, the patrons themselves. The casino is free to change its practices or reduce its standards. Its "comprehensive alcohol training program" may become less comprehensive, or vanish entirely; its alcohol portion-control dispensers may disappear; it may shut down any or all of its water and soda stations; it may pare down—or even eliminate—the presence of security officers should costs become excessive. If a patron has become obviously intoxicated and is headed for his car, who should intervene to assist him with transportation options? An employee? Or will the casino simply rely on the patron to independently seek out alternative transportation? And, in a community

admittedly so isolated and inaccessible, what transportation options are actually available? Voluntary steps, while admirable, are unreliable, particularly where, as here, the service of alcohol poses a very real threat to the welfare of the community.

The County protestants make much of the Agreement between the JIV and Caltrans, in which the JIV promised to fund road improvements aimed at reducing congestion along SR-94. (See generally App.Br., County Protestants.) The ALJ was correct, however, when he concluded that he did not have the authority to deny the license application based on the JIV's failure to fulfill the terms of that Agreement. (Legal Conclusions, ¶ 13.) Breach of an outside contract is not grounds for denial of a license.<sup>4</sup> (See Bus. & Prof. Code, § 23958.) Nor could the ALJ condition issuance of the license on the completion of the contract terms, since SR-94 is not part of the licensed premises under the JIV's control and therefore lies outside the Department's jurisdiction. (See Bus. & Prof. Code, § 23801 [limiting conditions to "any matter relating to the privileges exercised under the license, the personal qualifications of the licensee, the conduct of the business or the condition of the premises"].) This Board's authority is similarly restricted.

The existence of the Agreement, however, establishes that the JIV is aware of, and acknowledges, the effect the casino has and will have on congestion along SR-94.

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4. The County protestants contend the Agreement was designed to benefit the community, but the terms of the Agreement itself negate that argument. The Agreement is between the JIV and Caltrans only. (See Exh. P-1.) The Agreement explicitly states, "[t]his Agreement is not intended to, and shall not be construed to, create any right on the part of a Third Party to bring any action to enforce any of its terms." (Settlement Agreement, Exh. P-1, § 6(B).) The County protestants are not parties to the Agreement (*ibid.*), nor do they hold jurisdiction over road improvements on SR-94. (Findings of Fact, ¶ 23 ["Because SR-94 is maintained by Caltrans, the County has no authority to make improvements to the road."].)

It establishes that even if Caltrans did not protest the license, it has determined that casino traffic aggravates congestion along SR-94 enough to reduce the rating at a number of intersections. As noted above, the ALJ acknowledged the risks of drunk driving in congested traffic when he approved of a license condition restricting alcohol service during morning commute hours. (See Legal Conclusions, ¶ 16.)

The reality is that SR-94 was not engineered to accommodate the quantity of traffic the casino has created. An alcoholic beverage license will only inject drunk drivers into a highway that is already congested, narrow, remote, winding, and trafficked by livestock, commercial trucks, student drivers, bicyclists, and pedestrians. Moreover, SR-94 is essential to Jamul community access. Substantial evidence does not support issuance of the license; in fact, the evidence establishes that issuance of the applied-for alcoholic beverage license would put the welfare of the Jamul community at serious risk.

We therefore reverse the Department's decision and remand it for consideration of additional conditions—such as required shuttle service or the codification of the voluntary measures described above—specifically designed to alleviate the impact of drunk drivers along SR-94. Additional conditions should be tailored to address the specific facts and issues raised in this case. (See Bus. & Prof. Code, § 23800(a).) The additional conditions need not and should not merely duplicate conditions imposed on other casino licenses.

## II

The Adams protestants contend that ALJ Lewis' recusal following receipt of an improper ex parte communication infringed on appellants' due process rights. (App.Br.,

Adams Protestants, at pp. 10-11.) They argue it is "invaluable" that the judge who decides the case also hear the case in order to determine credibility and the weight of evidence. (*Id.*, at p. 11.) They further argue that in this case, ALJ Lewis had unique insights since he had, pursuant to a stipulation, visited the premises and walked through the casino. (*Ibid.*) They argue "ALJ Lewis was uniquely situated to render a fair ruling," but that "the Department's interference prevented him from doing so." (*Ibid.*)

The Administrative Procedure Act (APA) prohibits *ex parte* communication on the substance of a matter while the matter is pending. (Gov. Code, § 11430.10; see also § 11430.20 [exempting communications authorized by statute, or pertaining to issues of procedure or practice]; § 11430.30 [permitting certain internal agency communications].) The APA also provides remedies in the event that a presiding officer receives an *ex parte* communication. (See Gov. Code, §§ 11430.40, 11430.50, and 11430.60.)

One remedy specifically provided in the APA is the disqualification of the presiding officer: "Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the *ex parte* communication may be sealed by protective order of the disqualified presiding officer." (Gov. Code, § 11430.60.) "Section 11430.60 permits the disqualification of a presiding officer if necessary to eliminate the effect of an *ex parte* communication." (Law Revision Com. com. (1995) Gov. Code, § 11430.60.)

This Board is privy neither to the *ex parte* communication itself, which is duly sealed, nor to the unique concerns that led ALJ Lewis to recuse himself from this matter. However, he was specifically authorized to do so by the APA. Indeed, the

provision permitting disqualification to eliminate the effect of an ex parte communication operates to *protect* due process rights, not undermine them. Otherwise, a disgruntled litigant could delegitimize an entire proceeding simply by lobbing a particularly incendiary ex parte communication into the hands of an unsuspecting ALJ.

We trust ALJ Lewis saw cause to recuse himself and find no error in that decision.

### III

The Adams protestants contend the Department failed to provide notice of the third and final continued hearing to "hundreds of protestants." (App.Br., Adams Protestants, at p. 11.) Counsel for the Adams protestants objects that the Department, based on a waiver of notice instruction given by ALJ Lewis on the first day of hearing, expected him to notify all protestants of the continuance.<sup>5</sup> (*Ibid.*) Counsel for the Adams protestants argues the waiver was intended to apply only to protestants who signed on for temporary representation at the first hearing, not *all* protestants; that the Department, and not counsel for the Adams protestants, had sole possession of the full list of protestants; that there existed no authority to shift the cost of notifying hundreds of protestants to the Adams protestants and their counsel; and that the Department has lost track of the temporary representation list and cannot verify who was or was not on it. (*Id.*, at p. 12.) The Adams protestants argue that by failing to provide notice of the

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5. We have been unable to locate any reference to a waiver of notice in the record transcript. (See generally RT, vol. I.) However, both counsel for the Adams protestants and ALJ Berg refer to it. (See App.Br., at pp. 11-12; RT, vol. III, at p. 302.) Ultimately, the existence of the notice waiver is irrelevant to our analysis.

continued hearing to all protestants, the Department has violated protestants' due process rights, and the only remedy is reversal. (*Ibid.*)

"There is no statutory requirement of notice of a continued hearing." (*McPheeters v. Bd. of Med. Examiners* (1947) 82 Cal.App.2d 709, 715 [187 P.2d 116] [finding that appellant had actual knowledge of continued hearing date, regardless of whether he received formal notice].)

In order for this Board to reverse for lack of notice, the appellant must show the lack of notice was prejudicial. Prejudice is a constitutionally required showing: "No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Prejudice must be shown even where due process rights are implicated. (*Chapman v. Cal.* (1967) 386 U.S. 18, 21-22 [87 S.Ct. 824].)

Counsel for the Adams protestants raised a similar objection on the third and final day of hearing, before ALJ Berg. (RT at p. 301.) The following exchange took place:

MR. ADAMS: There is also another issue of whether verified Protestants that were present at the first hearing on November 16 were not represented and thus not given notice of today's hearing. . . .

[¶ . . . ¶]

And there were protestant—my understanding that the protestants that I represented were limited to the protestants who at the November 16th hearing signed on to a list to have me represent them.

It's never been my understanding that included all their five protestants. So at the very least, I believe, the verified Protestants who were at that hearing and did not sign on to have me represent them were probably supposed to have notice of this hearing.

ADMINISTRATIVE LAW JUDGE: And I understand the ambiguity. I wasn't clear exactly who was represented by you versus Mr. Webb other than the names that Mr. Webb has provided in his trial briefs.

As far as notice of today's hearing, though, I was under the impression that the verified—all of the verified Protestants that were present at the November 16th hearing were represented by one of the two attorneys and it's possible that—this list, you know, I can double-check.

I went through the materials, all the materials that were sent out by Judge Lewis and I didn't see any handwritten list or sign-in sheets, so I'm not sure if there is any way that I can correlate the people that were present with the ones that you identified as representing and, also, not knowing and you not knowing the names of the people that you represent, per se, is hard for me to make a determination at this point that the notice of today's hearing was improper.

So I'm going to continue with the hearing today. If there is a—again, not having any, you know—it's hard to not know if somebody was—if you don't know the names of the parties that you represent, it's going to be very difficult to come back—for somebody to say that they weren't represented.

But we'll deal with that challenge if it comes to that point.

(RT at pp. 301-303.)

Ultimately, the decision issued by ALJ Berg included a comprehensive list of the names of all protestants, including protestants who appeared at the hearing but were not expressly represented.<sup>6</sup>

Despite this list of names, the Adams protestants have identified no specific individual who was prejudiced by a lack of notice of the continued hearing.<sup>7</sup> Both the

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6. ALJ Berg deemed protests dismissed if the protestant was unrepresented *and* failed to make an appearance at the initial administrative hearing. (Proposed Decision, App. A, at p. 29.)

7. The Adams protestants themselves do not allege a lack of notice. (See App.Br., Adams Protestants, at pp. 11-12.) Nor could they show prejudice, even if they did not receive individual notice: it is undisputed that they were represented at the continued hearing by their chosen counsel. (See *ibid.*; see also RT, vol. III.)



alleged lack of notice and prejudice are therefore speculative, and speculative claims are insufficient to merit relief.

#### IV

Appellant contends, in detail, that the JIV has no legal claim to the land on which the casino is situated, and is therefore engaging in illegal gambling sufficient to constitute a public nuisance and mandate denial of the applied-for license. (App.Br., Webb Protestants, at pp. 1-60.)

The Webb protestants' argument relies on the contention that the applicants/respondents had the burden of proving as part of their alcoholic beverage license application that they had a valid claim to the land on which the casino is situated, and that the casino is operating legally. (See generally App.Br., Webb Protestants.) The Webb protestants argue that the applicants/respondents cannot meet this burden because the land on which the casino is situated has never been proclaimed a reservation or transferred to the JIV. (*Id.*, at pp. 11-44.)

The Webb Protestants further contend that the Compact between the JIV and the State of California does not authorize gambling on the casino premises—again because of JIV purportedly holds no legal claim to the land. (*Id.*, at pp. 45-50.)

This Board's jurisdiction is limited by the California Constitution and by statute. (See Cal. Const., art. XX, § 22; Bus. & Prof. Code, § 23084.) Review is limited to decisions of the Department. (Cal. Const., art. XX, § 22.) On appeal,

The review by the board of a decision of the Department shall be limited to the questions:

- (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
- (b) Whether the department has proceeded in the manner required by law.
- (c) Whether the decision is supported by the findings.
- (d) Whether the findings are supported by substantial evidence in light of the whole record.
- (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, § 23084; see also Cal. Const., art. XX, § 22.)

The Department's authority is also limited in scope. The Department is granted the authority to regulate alcoholic beverage licensing:

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.

(Cal. Const., art. XX, § 22.)

As noted in Part I, *supra*, section 23958 requires that the Department "make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license." (Bus. & Prof. Code, § 23958.) The statute also provides the grounds for which the Department may deny a license application. (*Ibid.*) A license may be denied, among other reasons, if the applicant or premises do not qualify, or if issuance of the license would be contrary to public welfare and morals.

In 2000, the Gambling on Tribal Lands Amendment was approved by California voters. It modified the California Constitution to allow the governor to negotiate tribal gaming compacts:

Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

(Cal. Const., art. IV, § 19(f).) Pursuant to the Gambling Control Act and Executive Order D-29-01, the authority to regulate gambling in the state was delegated to the California Gambling Control Commission. (See Bus. & Prof. Code, § 19811(b) ["Jurisdiction, including jurisdiction over operation and concentration, and supervision over gambling establishments in this state and over all persons or things having to do with the operations of gambling establishments is vested in the commission."].)

Jurisdiction over Indian gaming prosecutions is also limited by federal statute:

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

(18 U.S.C. § 1166.) The final sentence creates an exception only where the tribe has consented to transfer criminal jurisdiction to the state. (*Ibid.*)

It is undisputed that the state has executed a compact with the JIV. (Exh. A-21, hereinafter the "Compact"; see also App.Br., Webb Protestants, at pp. 45-50 [acknowledging existence of the Compact but arguing it "does not, and cannot by law"

allow gaming on the land on which the casino is situated].) The Compact, which was originally executed in 1999 and amended in 2016, includes provisions attesting to—and requiring proof of—the JIV's eligibility:

Sec. 18.9. Representations.

(a) The Tribe expressly represents that as of the date of the undersigned's execution of this Compact the undersigned has the authority to execute this Compact on behalf of the Tribe, including any waiver of sovereign immunity and the right to assert sovereign immunity therein, and will provide written proof of such authority and of the ratification of this Compact by the tribal governing body to the Governor no later than sixty (60) days after the execution of this Compact by the undersigned.

(b) The Tribe further represents that it is (i) recognized as eligible by the Secretary of the Interior for special programs and services provided by the United States to Indians because of their status as Indians, and (ii) recognized by the Secretary of the Interior as possessing powers of self-government.

(c) In entering into this Compact, the State expressly relies upon the foregoing representations by the Tribe, and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact through the undersigned. If the Tribe fails to timely provide written proof of the undersigned aforesaid authority to execute this Compact or written proof of ratification by the Tribe's governing body, the Governor shall have the right to declare this Compact null and void.

(d) Any bill from the Legislature to ratify this Compact shall not be signed by the Governor until the Tribe has provided the written proof required in subdivision (a) to the Governor.

(Exh. A-21, Compact, at pp. 104-105.) The amended Compact was executed on August 8, 2016, and was signed by Governor Brown and a representative of the JIV. (*Id.*, at p. 105.) The Compact was ratified by the Legislature on September 12, 2016. (Gov. Code, § 12012.77.) It was approved by the Secretary of the Interior on December 5, 2016. (81 Fed.Reg. 87585-01.)

Additionally, the JIV did consent to state criminal jurisdiction in the Compact, although it did so with an express limitation:

The Tribe hereby consents to [state] criminal jurisdiction; however, notwithstanding any other provision of this Compact or applicable law, *no Gaming Activity conducted by the Tribe pursuant to this Compact may be deemed to be a civil or criminal violation of any law of the State.*

(Compact, Exh. A-21, at p. 69, emphasis added.)

On appeal, the Webb protestants ask this Board to act as trier of fact, and to determine first that the JIV has no legal claim to the land on which the casino is situated, and second, that it is therefore engaging in illegal gambling—a criminal act—sufficient to constitute a public nuisance and mandate denial of the license.

The Webb protestants fundamentally misunderstand the limited jurisdiction of this Board. This Board's review is limited to decisions of the Department. (Cal. Const., art. XX, § 22.) It has no jurisdiction to review the Governor's execution of the Compact, the Legislature's ratification of it, or the Secretary of the Interior's approval of it—let alone to overturn the Compact wholesale and find the JIV is operating in violation of the law. (See Exh. A-21, Compact, at p. 69 [providing no gaming activity by the JIV may be found to be a violation of state law].) This Board certainly has no jurisdiction to review evidence outside the record in order to settle a dispute over tribal land rights that bears only the most attenuated connection to alcoholic beverage licensing.

The only question this Board may consider is whether, in refusing to address the same arguments below, the Department proceeded in the manner required by law. (See Bus. & Prof. Code, § 23084.)

The ALJ addressed the Webb Protestants' arguments in his conclusions of law:

10. The Webb protestants' central claim is as follows: Applicants have failed to meet their burden of proving that the federal government has

qualified the land where the proposed premises is located for gambling.<sup>[fn.]</sup> Specifically, protestants claim the land was neither a reservation nor trust land over which a federally recognized tribe in 1934 lawfully exercised governmental power.<sup>[fn.]</sup> Under California Constitution Article IV, section 19, subdivision (f), Class III<sup>[fn.]</sup> gaming is permitted only on "Indian lands in California in accordance with federal law." Protestants claim that, because gambling at the proposed premises is not authorized by law, applicants are engaging in illegal gambling, which constitutes a per se public nuisance under Penal Code section 11225. As a result, granting a liquor license to such a premise would be contrary to the public welfare or morals and would create a law enforcement problem.

The Webb protestants do not dispute that the JIV is a federally-recognized tribe entitled to certain privileges and immunities, such as sovereign immunity.<sup>[fn.]</sup> Instead, they contend that applicants have not proven the land the proposed premises occupies is an Indian reservation or land taken under trust by the Secretary of the Interior as defined by IGRA (25 U.S.C. § 2703(4)). They contend, as such, applicants have not proven the land qualifies for gambling under IGRA, which in turn, is required in order to be legal under state law.

Both applicants and the department contend this tribunal lacks jurisdiction to decide whether the land qualifies for Indian gaming. They are correct. Applicants bear the burden to prove that issuance of the license is not contrary to public welfare and public morals; to do this, applicants need show only that the casino is operating in accordance with state law. Applicants are not required to prove that they are permitted to conduct gaming on tribal land.

Penal Code section 11225 provides that every building or place used for the purpose of illegal gambling as defined by state law or local ordinance is a nuisance that shall be enjoined or abated. Thus, whether the proposed premises is a nuisance, as the Webb protestants claim it is, depends on whether it is used for "illegal gambling as defined by state law." By constitutional amendment, the state authorized Tribal-State Gaming Compacts to allow gambling by "federally recognized Indian tribes on Indian lands in California in accordance with federal law." (Cal. Const. art. IV, § 19, subd. (f).) Applicant Jamul Indian Village Development Corporation is wholly owned by the JIV, a federally-recognized tribe. In 1999, the JIV entered into a Tribal-State Compact, in accordance with IGRA, which was signed by the Governor, and ratified by the Legislature. (Gov. Code, § 12012.25, subd. (a)(22).) The Secretary of Interior approved the Compact on May 5, 2000. (65 Fed.Reg. 31189-01 (May 16, 2000).) The State and the JIV recently amended the Compact (2016 Compact). The 2016 Compact was ratified by the Legislature effective September 12, 2016 (Gov. Code, § 12012.77) and approved by the Secretary of the Interior. (81 Fed.Reg. 87585-01 (Dec. 5, 2016)).

The first paragraph of the 2016 Compact explicitly states that the JIV is a federally recognized Indian tribe and that the State enters the compact pursuant to IGRA. The preamble of the 2016 Compact states that the JIV's "federal Indian lands were established in federal trust prior to 1988, creating a permanent Reservation for the Tribe in San Diego County. . . ." Section 4.2 of the Compact authorizes the JIV to operate not more than two gaming facilities engaged in Class III gaming on "eligible Indian lands held in trust for the Tribe located within the boundaries of the Tribe's reservation and trust lands as those boundaries exist as of the execution date of this Compact and on which Class III gaming may lawfully be conducted under the IGRA, as legally described in and represented on the map at Appendix A." Appendix A in turn is a map that identifies Parcel 4 and Parcel 5 as the "Jamul Reservation."

Mr. Webb counters that the validity of the 2016 Compact is conditioned upon "a final, non-appealable, factual adjudication on the merits, as to whether any land upon which the JIV seeks to gamble, qualifies for Indian gambling under IGRA." (Webb's Reply Brief to applicants' Opp. at p. 14.) Mr. Webb cites to Section 18.9 of the 2016 Compact for the proposition that the 2016 Compact is void because the JIV have not established the land was taken into trust.<sup>[fn.]</sup> However, the representations to which the Compact is contingent deal with the JIV's eligibility for special benefits and sovereign immunity, not whether the land was taken into trust. The compact required only that the JIV submit proof that the JIV ratified the Compact. Even if the Compact is *voidable* if any of the JIV's representations were not accurate, an administrative agency clearly lacks authority to declare the Compact void, which is what is required for Mr. Webb's arguments to gain any traction.

In conclusion, the 2016 Compact was authorized by IGRA and the California Constitution, it was signed by the Governor, ratified by the Legislature, and accepted by the Secretary of the Interior. The terms of the compact clearly indicate that the State has recognized that the JIV land qualifies for gaming. Thus, under the express terms of the Compact, Class III gaming at the proposed premises is authorized under state and federal law, and no violation of the California Constitution or Penal Code has been established. Applicants met their burden of proving that the proposed premises is operating in accordance with state law.

(Legal Conclusions, ¶ 10.)

We find no error in the ALJ's conclusions. Not only was the Department entitled to presume that the Governor and the Legislature properly entered into the Compact and rely on it as evidence that the JIV was operating in accordance (Evid. Code, § 664),

it was *required* to do so. The Department, which is tasked with the regulation of alcoholic beverages and not with the regulation of gaming on tribal lands, had no authority to question the validity of a Compact executed by the Governor, ratified by the Legislature, and approved by the Secretary of the Interior. It also had no authority to find the JIV's gambling activities violated state law. (18 U.S.C. § 1166; Exh. A-21, Compact, at p. 69.) The Webb protestants' arguments lie far outside the scope of the Department's jurisdiction.

The same is true on appeal before this Board. The Department properly relied on the Compact to establish that the JIV was operating in accordance with state law. This Board has neither the grounds nor the authority to conduct further inquiry.

## V

The Adams protestants request judicial notice of a news article discussing the financial health of the casino. (App.Br., Adams Protestants, at p. 15). The County protestants direct this Board to both the above-mentioned article and to a Caltrans webpage, but do not formally request judicial notice of either. (App.Br., County Protestants, at p. 8.) Finally, the Webb protestants seek judicial notice of 13 separate "grant deeds, official government documents, Solicitor's opinions and federal court decisions." (App.Br., Webb Protestants, at p. 51.)

Review by this Board is limited by the constitution to the record on appeal; where an appeal is filed from a department decision, "the board shall not receive evidence in addition to that considered by the department." (Cal. Const., art. XX, § 22.) "The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties." (Bus. & Prof. Code, § 23083.)



However, the Board may consider, among other questions, "[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084.) In such instances, the proper remedy is remand for reconsideration in light of the additional evidence. (Bus. & Prof. Code, § 23085.)

The Board's rules outline the procedure for bringing the Board's attention to such evidence:

When the board is requested to remand the case to the department for reconsideration upon the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department, the party making such request must, in the form of a declaration or affidavit, set forth:

- (a) The substance of the newly-discovered evidence;
- (b) Its relevancy and that part of the record to which it pertains;
- (c) Names of witnesses to be produced and their expected testimony;
- (d) Nature of any exhibits to be introduced;
- (e) A detailed statement of the reasons why such evidence could not, with due diligence, have been discovered and produced at the hearing before the department.

Merely cumulative evidence shall not constitute a valid ground for remand.

(Code Regs., tit. 4, § 198.) Additionally, the Evidence Code provides for both mandatory and discretionary judicial notice:

Judicial notice shall be taken of the following:

- (a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution.
- (b) Any matter made a subject of judicial notice by Section 11343.6, 11344.6, or 18576 of the Government Code or by Section 1507 of Title 44 of the United States Code.

(c) Rules of professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this state adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

(Evid. Code, § 451.)

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

(Evid. Code, § 452.)

The news article cited by the Adams protestants and the County protestants is not a proper subject of either mandatory or discretionary judicial notice. (See Evid. Code, §§ 451-452.) The article contains potentially prejudicial factual statements from a source that is not "of reasonably indisputable accuracy." Nor can the article be considered new evidence, since the casino's financial circumstances were not and are not at issue. The news article is irrelevant and improper.

The Caltrans website cited by the County protestants may be a proper matter for discretionary judicial notice, as the status of the road improvements is a readily verifiable fact, and the source—Caltrans—is of reasonably indisputable accuracy. (See Evid. Code, § 452.) However, as discussed above, the County is not a party to that Agreement, and the Department cannot condition the issuance of an alcoholic beverage license on completion of road improvements promised in a third-party contract. Moreover, it is undisputed that the casino has increased traffic and congestion along SR-94. Additional evidence on this point is merely cumulative.

The Webb protestants present a list of 13 documents of varying provenance, all of which are aimed at proving the purported illegitimacy of the JIV's claim to the land on which the casino sits, and by extension, its right to offer gambling at the casino. As discussed in Part IV, this issue lies far outside the jurisdiction of this Board. As such, the documents cited by the Webb protestants are irrelevant. Moreover, many of the documents, though not all, are not proper subjects for judicial notice; instead, they constitute evidence aimed at establishing a fact. This Board is not a trier of fact.

The Board therefore denies the requests for judicial notice from the Adams and Webb protestants, and strikes the references appearing in the brief filed by the County protestants.

ORDER

For the reasons described in Part I, the decision of the Department is reversed and remanded for consideration of additional license conditions.<sup>8</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
MEGAN MCGUINNESS, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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

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