

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA
REGARDING THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

In the Matter of the Protest of:

DIANNE JACOB, COUNTY
SUPERVISOR, DISTRICT 2, *et al.*

Against the Issuance of a License to:

JAMUL INDIAN VILLAGE
DEVELOPMENT CORPORATION and
SAN DIEGO GAMING VENTURES,
L.L.C., dba HOLLYWOOD CASINO
JAMUL,
14191 Highway 94, Jamul, CA 91935,

Applicants.

File No. 47-562483

Reg. No. 16084762

OAH No. 2017020457

DECISION

John Lewis, Chief Administrative Law Judge, Department of Alcoholic Beverage Control (department), State of California, heard this matter on November 16 and 17, 2016, in La Mesa, California. Following the hearing, while the record remained open, Judge Lewis received an ex parte communication that resulted in his disqualifying himself from deciding the case. On February 7, 2017, the department delegated its final decision-making authority in this matter to the Office of Administrative Hearings. The parties stipulated the administrative law judge assigned by the Office of Administrative Hearings would decide the case on the record. On September 6, 2017, Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, heard closing arguments in La Mesa, California.

Carrie L. Bonnington, Attorney at Law, represented applicants Jamul Indian Village Development Corp. and San Diego Gaming Ventures, L.L.C., doing business as Hollywood Casino Jamul (Hollywood Casino).

Jacob L. Rambo, Chief Counsel, and Jennifer M. Casey, Attorney III, Office of Legal Services, represented the department.

Thomas D. Bunton, Senior Deputy County Counsel, County of San Diego, represented protestants Dianne Jacob, County Supervisor, District 2, and the County of San Diego (County protestants).

Patrick Webb, Attorney at Law, represented himself and protestants Helen Comer, Steven Comer, Donna Foster, Kevin Foster, Shannon Foster, Veronica Hoban, Robert Jackson, John Munnik, Kathryn 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, Debra Webb, Sara White, and Schuyler White (Webb protestants).

William A. Adams, Attorney at Law, represented protestants Glenn Revell, Marcia Spurgeon, and a number of unidentified protestants who appeared at the November 16, 2016, hearing.¹

The names of protestants who did not appear at any time during the hearing or otherwise participate in this matter are contained in Appendix A, section 2. Pursuant to Business and Professions Code section 24015, subdivision (g), their protests are deemed withdrawn.

The record was closed and the matter submitted for decision on September 6, 2017.

SUMMARY

Applicants, operators of an Indian casino located in an unincorporated area of San Diego County, seek an on-sale retail license to sell alcoholic beverages throughout the casino. The County of San Diego, San Diego County Sheriff, Jamul-Dulzura Union School District, and numerous individuals protested the application. Protestants raised numerous concerns, most of which related to the effect the casino and sale of alcoholic beverages would have on the rural, two-lane highway that is the primary access to the Jamul community. Although protestants raised legitimate concerns with the impact the casino and alcoholic beverage service might have on the surrounding area, a preponderance of evidence established that granting a conditional license is not contrary to the public welfare or morals.

¹ The list of protestants who appeared at the hearing are contained in Appendix A, section 1, of this decision. Prior to the start of the hearing, Mr. Adams compiled a list indicating the names of protestants whom he was representing. Although this list was presented to Judge Lewis, it was not contained within the record of proceedings. Mr. Adams did not make a copy of the list, so other than the two noted individuals, Mr. Adams does not know the identity of his clients, nor is it known if any protestants declined Mr. Adams's representation.

ISSUES

Whether issuance of the license would be contrary to the public welfare or morals on the basis that: (1) the applied-for premises is currently operating illegal gambling and is a public nuisance; (2) it would create a traffic problem in the area and increase collisions on an already unsafe highway; (3) it would create law enforcement problems or result in an increase in crime; (4) it would create a nuisance to the community by interfering with a church, schools, and residential areas; (5) it would lead to an over-concentration of alcohol outlets in the area; (6) the notice of the license application was not properly posted; and (7) the restrictions on the license are not sufficient.

FACTUAL FINDINGS

Background

1. On September 28, 2015, applicants 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 (premises or casino) under the name “Hollywood Casino Jamul.”

2. The department investigated the application pursuant to Business and Professions Code² 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.

3. The department received 590 verified protests of which 188 protestants requested a hearing. Of the protestants, three are governmental entities: the County of San Diego, the San Diego County Sheriff’s Department, and the Jamul-Dulzura Union School District.

4. The issues protestants raised can be broken down into several broad categories, each containing specific concerns raised by the protestants who appeared at the hearing. The issues and concerns are:

The casino is operating illegal gaming because it is not on Indian land: Applicants have not established they have property rights to the land; the casino has been illegally built on an Indian cemetery; construction has violated an easement to the cemetery; the land is not

² All future statutory references are to the Business and Professions Code unless otherwise specified.

“Indian Land” under federal law, use of the land violates the 2000 State-Tribal Compact; and a license should not be granted until lawsuits related to the Jamul Indian Village are resolved.

Granting a license would create traffic problems and increase collisions: State Route 94 (SR-94) is the only means of accessing Jamul, it is used extensively by residents to commute to work, and it is the only access to the four local schools; increased traffic from the casino and drivers who consumed alcohol will lead to traffic collisions and fatalities; Caltrans has rated the road an “F”, and the road has a greater number of traffic collisions than other rural roads in the County; there are many student drivers associated with the high school on SR-94, they are more likely to be involved in a collision; students frequently walk on the shoulder of SR-94 and are at risk of being struck by a drunk driver; increased traffic will hamper emergency service response to the community; increased collisions will drain emergency service resources; students and school busses travel on SR-94 daily; SR-94 is heavily used by commercial trucking travelling to and from the Mexican border; SR-94 is a common bicycle route, cyclists are in danger from drunk drivers; the area is susceptible to wildfires, and increased traffic could prevent residents from safely evacuating; cigarette butts thrown from vehicles could ignite a fire; and increased traffic and drunk drivers pose a risk for collisions with livestock.

Granting a license would create a law enforcement problem and increase crime: The casino will overburden local law enforcement; it will attract the criminal element to the community; it will increase drunk driving; SR-94 is a corridor for human and drug trafficking; and the casino will promote alcohol abuse.

Granting a license would create a nuisance to the community: There are four schools and a home for disabled persons in the area; the casino is located in a residential area; noise and traffic would interfere with residents’ quiet enjoyment; there is a church adjacent to the property; it would disturb a wildlife refuge nearby that attracts school-aged visitors; it would disrupt the rural nature of the community.

Granting a license would lead to an over-concentration of alcohol outlets in the area: There are four liquor stores in a four mile radius; there is no public convenience or necessity; there are other places to purchase alcohol in the area; a license transfer from a restaurant to a casino is not permissible.

The premises did not properly post notice of the application: The notice was posted behind secured fences at a construction site, and people could not view the notice because of the construction.

The proposed license restrictions are not adequate: There is no provision for oversight to prevent patrons from overconsuming at different bars; restrictions should limit consumption on the gaming floor; restrictions should be similar to those in other casinos in the area.

5. On October 13, 2016, Jennifer Hill, the department's Supervising Agent-in-Charge, San Diego District Office, filed the Statement of Reasons pursuant to Section 24013, subdivision (b)(1), stating that the license would not be contrary to the public welfare or morals and recommended the issuance of the license subject to six conditions.

The Premises

6. 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 applicant San Diego Gaming Ventures, LLC. The management agreement authorized San Diego Gaming Ventures the exclusive right to manage, operate and maintain the gaming facility, situated on two parcels of land designated 59708004 (Parcel 04) and 59708005 (Parcel 05).

Pursuant to the Indian Gaming Regulatory Act and regulations (25 U.S.C. §§ 2711(a)(1) & 2710(d)(9); 25 C.F.R. Part 531), the National Indian Gaming Commission Chairman approved the management agreement.

7. 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, a vice president of Penn National and the general manager for San Diego Gaming Ventures, testified at the hearing. Mr. St. Jean is responsible for the day-to-day operations of Hollywood Casino. In the past 23 years, he has managed 11 gaming properties across the country.³

8. 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 premises 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.

9. The premises is open to the public 24 hours a day, 7 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

³ This decision comes approximately 11 months after the hearing. For consistency with the transcripts, all referenced time frames relate to the hearing date, not the decision date, unless otherwise indicated.

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.

10. 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 has 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. Mr. St. Jean testified that the percentage of beverages sold on the casino floor is small compared to what is served in the restaurants. Overall, approximately 75 percent of the casino's sales are food and 25 percent 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.

11. Approximately four weeks prior to the hearing, the casino implemented a shuttle service to help alleviate traffic congestion and provide 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.

12. 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 that is provided 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 and who does not have a wristband.

13. Mr. St. Jean said his employees are held to a high standard with respect to the enforcement of the alcohol policies. Employees are subject to accelerated disciplinary action for cases involving allowing minors on the floor or for over-service.

14. The JIV and the County entered into service agreements for fire protection and an intergovernmental agreement outlining the JIV's commitments 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

15. The premises 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.

16. 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. Mr. 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.

17. The JIV entered into an 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 Mr. 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 Mr. Espelet predicted that all the modifications, including a permanent traffic signal, would be installed by the first quarter of 2017.

18. Additionally, the tribe agreed to make road improvements at six other locations on SR-94 to mitigate the additional traffic caused by the casino's operations. Mr. Espelet testified that he expected these 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.

19. Mr. Espelet was involved with several studies to determine the amount of additional traffic SR-94 would experience after the casino opened. The tribe prepared a Tribal Environmental Evaluation that estimated the increase in traffic as a result of the casino. The evaluation estimated an increase of 9,000 average daily trips would be added. After the casino opened, Mr. 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.

20. Mr. 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 is 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.

21. 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. Mr. 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. Mr. Pasumarthi testified that improvements in front of the casino have not been completed, and it is still an active construction site.

22. Mr. Pasumarthi reviewed Caltrans's 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. Mr. 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.

23. 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.

24. 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.

25. The California Highway Patrol (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 tribe to provide traffic services. For example, on opening day, CHP officers assisted with directing traffic, which had become backed up for several miles.

26. Several other area casinos are located in the El Cajon Command, such as 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. A consequence of 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.

27. 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

28. 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 Ms. Wallen's second licensing investigation.

29. 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.

30. Ms. 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. Ms. 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. Ms. 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. Ms. Wallen confirmed that notice of the alcohol license application was properly posted for 30 days.⁴

⁴ Photographs were received that showed two posted notices. One was on the exterior fence of the construction site, the other on a large entrance sign at the entrance to the construction site. Although several protestants stated that they could not approach the construction site in order to view the notice, the pictures showed that the notices could be viewed without gaining access to the construction site. Applicants established they were properly posted.

31. The department determined that the premises is exempt from local zoning requirements based on its understanding that the premises is located on sovereign tribal land. The County protest did not contend that the premises was in violation of local zoning laws or that the establishment was an unlawful gambling establishment.

32. Ms. Wallen testified that she reviewed all of 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. Ms. Wallen obtained and reviewed CHP statistics relating to traffic collisions for SR-94. The department also consulted with Caltrans and was advised that Caltrans's 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 had been completed. Ms. Wallen was aware that none of the other road improvements to SR-94 had 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.

33. Ms. Wallen contacted Captain Dave Moss, who at the time was in charge of the Rancho San Diego command and who 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.

34. Ms. 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-on traffic mitigations on SR-94. Although Caltrans agreed that the casino could open as long as the in improvements directly in front of the casino were complete, the County contended that all improvements should be completed before the casino opened. Ms. Wallen concluded that the County's other concerns were addressed with 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.

35. Ms. Wallen contacted Superintendent Nadine Bennet from the Jamul-Dulzura Union School District, who filed a protest on behalf of its board. Ms. Bennet 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. Ms. Bennet was concerned about the increase of accidents and intoxicated drivers. Ms. 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.

36. Ms. Wallen recognized that road safety and traffic were the most frequent issue raised in the community protests. Ms. 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.

37. Ms. Wallen determined that there were no schools or playgrounds within 600 feet of the proposed premises. However, there is a church or chapel that is within 600 feet of the casino. Ms. 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 Ms. Wallen a tour of the church and said it was used mainly 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. Ms. Wallen estimated that the church seats no more than 50 people. Ms. 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. Ms. Wallen did not speak with any official from the Roman Catholic Diocese of San Diego to determine who owned the church. She concluded that the church was used only for special events such as funerals and baptisms.

Kerry Patterson is attorney with Lewis Roca Rothgerber Christie LLP, a firm representing the JIV. Ms. Patterson has travelled to the JIV reservation since 2009 and is aware of the church adjacent to the casino. Ms. Patterson testified that 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.

Ms. Hill did not believe that 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, Ms. 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. Ms. Hill acknowledged that the department never confirmed who owned the property where the church is situated.

38. Ms. Wallen addressed concerns that the casino is close to a fire station and that traffic could impede the fire department from responding to emergencies. Ms. 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.

39. Ms. 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 proposed premises, thus they were not consideration points.

40. The department determined that the six conditions it imposed on the license sufficiently addressed the issues raised by protestants. Ms. 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. Ms. Wallen was not familiar with the conditions the department placed on the licenses of other casinos in the area.

41. Ms. 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. Ms. 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 on SR-94 were not completed or express concern about the issuance of an IOP.

The Protestants

42. 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 his 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, 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 that the premises 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 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 are located in the neighboring SDSO 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 that 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.

43. 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, her 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 that two-thirds of her students have to 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.

Ms. 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. Ms. Bennett believed there have been a number of fatalities on SR-94 and she was concerned about the increased traffic and impaired drivers.

44. Eileen Poole lives approximately three miles from the casino. She retired two years ago as principal of Steel 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 Ms. Poole's students died after being struck by a vehicle when she was walking on the shoulder.

Ms. 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. Ms. 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, housing events outside of school hours.

45. 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. Mr. Revell has personally been involved with several lawsuits against the JIV. Mr. 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. Mr. 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 Mr. 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. Mr. 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. Mr. Revell believed that the following conditions should also be placed on applicants' license if granted: Alcohol sale 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. He 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.

46. Protestant Tracie Nelson lives approximately two-and-one-half miles from the casino. She is a wildlife reserve manager for 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 the road north of the casino than on other County roads. She feared that the added volume of traffic from the casino will only be made worse by adding alcohol into the equation. Ms. 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.

47. 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. Ms. Pretty now takes a detour to avoid the most dangerous section of SR-94.

48. 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 at San Ysidro. He was concerned about the commercial vehicle 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.

49. 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. Ms. Toggery said there were regular church services at the church until Deacon Clark retired, the date of which was not clear. Ms. Toggery said there have not been weekly services, since. And Ms. 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. Ms. Toggery did not protest the application.

LEGAL CONCLUSIONS

1. Article XX, section 22 of the California Constitution delegates the exclusive power to license a premises for the sale of alcoholic beverages in this state to the department. The department may in its discretion deny an alcoholic beverage license if “it shall determine for good cause” that the granting 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.” (*Ibid.*; *Rondon v. Alcoholic Beverage Control Appeals Bd.* (2007) 151 Cal.App.4th 1274, 1281.)

Burden and Standard of Proof

2. In a protest matter, the burden is on the applicant to establish that it is entitled to a license. (*Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471.) The standard of proof is the preponderance of evidence. (Evid. Code, §§ 500, 115.) “Preponderance of the evidence” means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party who had the burden of proving it. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.)

Relevant Legal Authority

3. Business and Professions Code section 23958 requires the department to 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 to investigate all matters connected that may affect the public welfare and morals. The department must deny an application for a license if either the applicant or the premises for which a license is applied does not qualify for a license. The department further must 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.

4. Business and Professions Code section 23800, subdivision (a), authorizes the department to place reasonable conditions on a license where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions.

5. Under Business and Professions Code section 23801, the conditions authorized by Section 23800 may cover any matter relating to the privileges to be exercised under the license, the personal qualifications of the licensee, the conduct of the business or the condition of the premises, which will protect the public welfare and morals, including, but not limited to, restrictions as to hours of sale and employment of designated persons.

6. Business and Professions Code section 23958.4, subdivision (a), provides:

For purposes of Section 23958, “undue concentration” means the case in which the applicant premises for an original or premises-to-premises transfer of any retail license are located in an area where any of the following conditions exist:

(1) The applicant premises are located in a crime reporting district that has a 20 percent greater number of reported crimes, as defined in subdivision (c), than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency.

(2) As to on-sale retail license applications, the ratio of on-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the applicant premises are located.

7. Business and Professions Code section 23789, subdivision (a), provides that the department is authorized to refuse the issuance of any license for premises located within the immediate vicinity of churches and hospitals.

8. Business and Professions Code section 23985 provides:

After filing an application to engage in the sale of any alcoholic beverage at any premises, notice of intention to so commence shall be posted in a conspicuous place at the entrance to the premises. The applicant shall notify the department of the date when such notice is first posted. No license shall be issued for the premises until the notice has been so posted for at least 30 consecutive days.

Discussion

9. Jamul is a rural community that has remained largely undeveloped; the construction of a 100,000 square foot casino expected to attract thousands of daily visitors will no doubt change the tenor of the community. Under most circumstances involving large development projects, residents have local elected officials, accountable to their constituents, who can shape and limit the scope of a large development project. In this case, County officials had no direct control over the decision to permit construction of a casino in Jamul, a decision that was made largely by state officials in accordance with California voters' decision to allow gambling on tribal lands. In general, the protests reflect a feeling that people in the community were deprived of a voice and that the casino was imposed on them against their will.

However, the manner in which the casino was approved and built is not the issue in this case; the issue is solely whether approval of an alcoholic beverage license will be contrary to the public welfare or morals. Construction of the casino has affected and will continue to affect the surrounding community. Nonetheless, the *general* impact of the casino on the surrounding area cannot be conflated with the issue of whether granting a license to sell alcoholic beverage is contrary to the public welfare or morals. Many protestants

opposed the license because they opposed the casino's presence; but for the department to deny a license because of community opposition to the casino would be an arbitrary and capricious abuse of authority.

GAMBLING ON CASINO PREMISES CONSTITUTES A PUBLIC NUISANCE

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.⁵ Specifically, protestants claim the land was neither a reservation nor trust land over which a federally recognized tribe in 1934 lawfully exercised governmental power.⁶ Under California Constitution Article IV, section 19, subdivision (f), Class III⁷ 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 engaged in illegal gambling, which

⁵ The Indian Gaming Regulatory Act (IGRA), Title 25 U.S.C. section 2701 *et seq.*, creates a framework for regulating gaming activity on Indian lands. IGRA defines "Indian lands" as "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." (25 U.S.C. § 2703(4).) IGRA sets out detailed procedures for Indian tribes seeking to conduct Class III gaming, which is allowed on Indian lands only if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." (*Id.* at § 2710(d)(1)(C).) Negotiations for a gaming compact begin at the request of an "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted." (*Id.* at § 2710(d)(3)(A).) If negotiations are successful, the tribe and the state will enter into a compact to allow class III gaming subject to the approval of the Secretary of the Interior. (*Id.* at § 2710(d)(3)(B).)

⁶ The Indian Reorganization Act (IRA), enacted in 1934, authorizes the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians (25 U.S.C. § 5108 [formerly § 465]), and defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." (*Id.* at § 5129 [formerly § 479].) In *Carciere v. Salazar*, (2009) 555 U.S. 379, the United States Supreme Court addressed the issue of whether the Secretary of the Interior could take land into trust under the IRA for the Narragansett Tribe. That tribe did not receive federal recognition until 1983. (*Id.* at 384.) The Court held that the phrase "now under Federal Jurisdiction" contained in section 5129 [formerly 479], referred to tribes that were under federal jurisdiction when the IRA was enacted in 1934. (*Id.* at p. 395.) Because the Narragansett Tribe was not then under federal jurisdiction, the Secretary of Interior did not have authority to take the parcel of land into trust.

⁷ "Class III Gaming" is defined under 25 U.S.C. section 2703(8) and includes casino games, slot machines, and horse racing.

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.⁸ 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 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 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

⁸ The JIV received federal recognition in 1982, and continue to receive such recognition. (47 Fed.Reg. 53130-03 (Nov. 10, 1982); 81 Fed.Reg. 26826-02 (May 4, 2016).)

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.⁹ 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 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.

11. The remaining claims by the Webb protestants are also without merit. First, they claim that applicants have not demonstrated they obtained property rights from the property owner to operate a commercial enterprise selling liquor on property they do not own. However, under the 2016 Compact and the management agreement between the JIV

⁹ Section 18.9 titled “Representations” states the following:

(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.

and San Diego Gaming Ventures, applicants have authority to request a license for the proposed premises.

They contend that the casino was built on an Indian cemetery and applicants are responsible for digging up and desecrating the human remains. There was no evidence presented on the issue or how it relates to a liquor license application. Nor was there evidence to support the claim that use of the license would violate terms of the easement on the property for access to the Indian cemetery.

They further claim that a license would violate the terms of the 2000 Compact as it relates to an environmental impact report. This claim is rendered moot in light of adoption of the 2016 Compact, which occurred after this protest issue was raised. Again, no evidence was presented as to how this claim relates to the issuance of a liquor license.

Finally, they contend that the department should take no action on the application until civil litigation relating to the JIV is resolved. There is no basis for, and no authority cited, to justify withholding a decision on the license until all of the litigation related to the JIV has been concluded.

THE LICENSE WILL INCREASE TRAFFIC AND CAUSE DANGEROUS ROAD CONDITIONS

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 stretch of the 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.¹⁰

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 into 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

¹⁰ Alternatively, the County requested that the license be granted and immediately suspended until the roadway projects were completed. For the same reason, such a condition would be an abuse of discretion.

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. (Bus. & Prof Code, § 23801.)

17. It is recognized that there are fewer restrictions on this license than on the license for the Barona Casino located in San Diego. However, the department's authority to place restrictions on a license is based on individual circumstances identified by the department following an investigation. Captain Garmo, on behalf of the Sheriff, protested the license because he believed that the casino should operate for some time without a license in order for the Sheriff to analyze the impact on the community. He believes that it is only fair to treat each casino the same and noted that the Barona Casino had to wait several years before receiving a liquor license. However, such a wholesale requirement would be an abuse of discretion, as the decision to grant or deny a license must be made based on specific factual findings. There is no provision in the Alcoholic Beverage Control Act that permits the department to delay the granting of a license in order to permit time for a community impact evaluation. Denying the license in order to remain consistent with what has been

done in other similar situations is impermissible. A license may be denied only if granting the license is contrary to the public welfare.

18. Some protestants were concerned about the effect of the casino on local emergency services, including that traffic will hinder emergency response and incidents caused by the casino will tie-up resources. It is noted that the local fire protection district did not protest the application. Fears that increased traffic would impede emergency services from responding to emergencies, or that traffic congestion would prevent evacuation of the area in the event of a wildfire, are speculative. Likewise, there is no nexus between the sale of alcoholic beverages and a risk that a wildfire could be caused by cigarette butts. The JIV has committed to \$2.4 million to the County annually to augment fire protection for the community in order to compensate for the additional fire resources.

19. The remaining issues raised by protestants involving dangerous road conditions and traffic on SR-94, including the effects on school busses, the risk to student drivers, increased traffic during activities such a football games, and the danger of collisions with livestock, are speculative and lack a clear nexus to the issuance of the license as opposed to increased casino traffic in general.

THE LICENSE WILL CREATE A LAW ENFORCEMENT PROBLEM OR INCREASE CRIME

20. The proposed premises is not located within a “high crime” area within the meaning of Section 23958.4, subdivision (a)(1). Captain Moss originally protested the application and recommended additional license conditions similar to those on other casinos in the area. There was also a concern regarding an increase in crime due to understaffing of deputies. However, Captain Moss indicated the Sheriff’s Department would not withdraw the protest until all road improvements were satisfied. Captain Garmo, the new substation commander for the area, opposed the application so that the Sheriff could evaluate the effects of the casino on the community.

In addition to annual payments to the Sheriff’s Department, the casino has funded the staffing of a deputy sheriff for 40 hours per week. As previously noted, the casino’s alcohol policies and training will help reduce the occurrence of alcohol-related offenses. Although there was testimony that casinos can attract the criminal element, it was not established that granting the license would create a law enforcement problem, will overburden law enforcement, perpetuate human trafficking, or promote alcohol abuse.

THE LICENSE WILL CREATE A NUISANCE TO THE COMMUNITY

21. The department concluded that there are no consideration points within 600 feet of the premises within the meaning of Section 23789. There is dispute as to whether the St. Francis Xavier church, which abuts the casino’s property, is a consideration point. During her investigation, Ms. Wallen went to the church and spoke to an individual who claimed to be associated with the church. There was no information on this person’s identity or her relationship to the church, so the reliability of the information she reported to Ms.

Wallen cannot be determined. Although there was some discrepancy whether the church was used for functions other than funerals, regular services are not conducted there, and it does not appear that the church has an active membership. According to Ms. Hill, the church does not appear on the website for the Catholic Church or the San Diego Archdiocese. There were no protests from any individual claiming to have a connection to the church or the church's property owner, nor did anyone claiming to be from the church contact the department to express opposition or concern about the license.¹¹ The location of a church near the premises for which an on-sale liquor license is proposed does not, as a matter of law, require a finding that issuance of the license would be contrary to public welfare and morals. (*Koss v. Department of Alcoholic Beverage Control*, 215 Cal. App. 2d 489.) Assuming the St. Francis Xavier church is a "church" within the meaning of Section 23789, there was no evidence that the proposed premises will interfere with its functions such that issuance of a license would be contrary to public welfare or morals.

22. Although there are four schools in the vicinity, none are consideration points under Section 23789. The claims that a license would create noise and traffic, would interfere with residents' quiet enjoyment, and would disturb a wildlife refuge, were all speculative and insufficient grounds to justify denial of a license. Finally, there are no residences within 100 feet of the proposed premises. (Cal. Code Regs., tit. 4, § 61.4.)

THE LICENSE WOULD LEAD TO AN OVER-CONCENTRATION OF LICENSES IN THE AREA

23. The department properly concluded that, in census tract 213.04, there is only one other existing license and that three licenses are permitted. Therefore, there is not an over-concentration of licenses, and no showing of public convenience or necessity is required. (Bus. & Prof. Code, § 23958.4.) The existence of other outlets to purchase alcoholic beverages in other census tracts is irrelevant. Several protestants suggested that the license should be denied because it was being transferred from a restaurant, which is a different type of premises than a casino. There is no legal basis for this claim.

APPLICANTS DID NOT PROPERLY POST NOTICE

24. Under Section 23985, applicants were required to post a notice of intention to engage in the sale of alcoholic beverages in a conspicuous place at the entrance of the premises for 30 consecutive days. The department verified there were notices posted at two locations at the entrance to the construction site. Although several protestants claimed they could not stop to read the notices, and were ushered away by security, the posting was proper and the pictures showed that the public could approach and read the notices from SR-94. Judging by the community outpour, the notoriety of the casino, and number of protests received, adequate notice of the license is not an issue in this case.

¹¹ No evidence was received indicating who owned the property.

THE PROPOSED LICENSE RESTRICTIONS ARE NOT SUFFICIENT

25. As previously discussed, the conditions on the license are sufficient to ensure public protection. The conditions, in addition to the training provided to the casino's employees, in its security and law enforcement, are reasonable measures designed to ensure that the proposed premises does not become a law enforcement problem or threaten the public welfare.

Conclusion

26. The concern expressed by the protestants was sincere, genuine, and heartfelt. However, applicants have adopted meaningful policies and imposed procedures designed to reduce the risks associated with alcoholic beverage consumption. In doing so, applicants demonstrated an ongoing and conscientious effort to address the concerns raised by the protestants. Accordingly, applicants met their burden and established that granting the proposed premises a type-47 license, with reasonable conditions, will not be contrary to the public welfare or morals.

ORDER

The protests of the individuals listed in Appendix A, section 2, are withdrawn. The protests by the remaining individuals and government entities are overruled. The type-47, on-sale general eating place license shall be issued to applicants subject to the conditions set forth in the petition for conditional license and the additional condition as follows:

7) The sale, service, and consumption of alcoholic beverages shall be allowed on the premises only between the hours of 10:00 a.m. and 1:30 a.m.

Dated: October 25, 2017

This decision shall become effective on November 24, 2017.

DocuSigned by:

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Pursuant to Government Code section 11521, subdivision (a), any party may petition for reconsideration of this decision. The power to order reconsideration expires 30 days after the delivery or mailing of this decision or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capital Mall, Suite 1245, Sacramento, CA 95814.

APPENDIX A

Section 1 (Protestants who appeared at the hearing not expressly represented)

Alva, Benjamin
Alva, Wendy
Amato, Dale
Amato, Janet
Beers, Chris
Beers, Donald
Beers, Vicki
Bennett, Nadine (Superintendent of the Jamul-Dulzura Union School District)
Betancourt, Ana
Braun, Michelle
Brown, Preston
Bullock, Robert
Casey, Eileen
Copland, Bonnie
Crum, Walter
Crum, Winona
Davis, Melanie
Defreitas, Jessica
Defreitas, Wendy
Dehart, Greg
Dehart, Michal
Dowling, James
Gathman, Elizabeth
Giordano, Samuel

Harman, James
Hendrix, Donna
Hertel, Lori
Hines, Danielle
Hines, Dennis
Hines, Diane
Hines, Nathan
Ignosci, Sandra
Ivy, Robby
Jones-Pittman, Vicki
Kaszuba, Michael
King, John
King, Lisa
Luecht, Janet
Luecht, Roger
Mangold, Stanley
Manos, John
Manos, Linda
Marks, Eileen
Mawn, Ann Kerin
McBride, Janet
McLlatchey, Anita
Mulder, Gerald
Mulder, Janet
Murphy, Thomas
Murrell, Nancy
Nelson, Tracie
Norton, James
Norton, Susan
Nowak, M
Parnell, Heidi
Parnell, Mark
Perry, Kimberly
Peterson, Cindy
Poole, Eileen
Poole, John
Reitz, Edward
Reitz, Janet
Revell, Cheryl
Rodriguez, Ruben
Rodriguez, Thalia
Rohbock, Susan
Ruiz, Eugene
Schneider, Guadalupe
Schneider, Norbert

Sitton, Diane
Sperling, Cassie
Stuyvesant, Joel
Summers, Cecila
Thomas, Diane
Thomas, Jarnes
Tyack, Jessica
Via, Constance
Via, Joseph
Wheeler, John
Williams, Jerry
Young, Terrence
Zieske, Laura

Section 2 (Unrepresented protestants who did not appear at hearing)

Back, Suzette
Betancourt, George
Bobczynski, Elyse
Bradham, Susan
Bradshaw, Alice
Bradshaw, Max
Callanan, Theresa
Coddington, Melissa
Coddington, Michael
Crooks, Joseph
Crooks, Mary Ellen
Davidson, John
Davis, Margaret
Davis, Robert
Defreitas, Thomas
Easter, Cindy
Ellsworth, Mary Ellen
Ellsworth, Robert
Engle, Ashlee
Evans, John
Frankenberg, Jerome
Freireich, David
Freireich, Windee
Gates, Cheryl
Gilmore, Robyn
Giordano, Myra
Goss, Gary
Greer, Kirsten
Hoffmann, Daniel

Hoffmann, Kristin
Hussong, Cannette
Keller, Susan
Krier, Virginia
Leon, Marco
Leon, Sarah
McDaneil, Cynthia
McMillan, Lorena
Melton, David
Miller, Susan
Mittricker, Frank
Moody-Geisler, Denise
Murphy, Florence
Murphy, Laura
Murphy, Robert
Murphy, Theresa
Naffziger, Janet
Novinskey, Zander
Nowak, Emma
Paulson, Christian
Paulson, Jennifer
Potter, John
Potter, Virginia
Redondo, Jorge
Rodriguez, Elena
Schwarz, Lalaine
Severson, Julie
Skocko, Susan
Smith, William
Spurgeon, Mike
Stalnaker, Michael
Thomas, Gerald
Via, Jr. Joseph
Waldon, Mari
White, Judith
White, William
Wilson, Danielle
Wilson, Kenneth
Wilson, Lilly
Wilson, Mitchell
Wilson, Rebecca
Wilson, Weston
Winters, Jack
Wooley, Jeffrey
Wooley, Kathleen