

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BELLE OF SIOUX CITY, L.P.,)	Case Nos.	CVCV009254
)		CVCV009316
Petitioner,)		CVCV009383
)		CVCV045760
vs.)		
)		BRIEF IN SUPPORT OF
IOWA RACING AND GAMING)		RESPONDENT IRGC'S
COMMISSION; SCE PARTNERS,)		RESISTANCE TO PETITION
LLC.; and MISSOURI RIVER)		FOR JUDICIAL REVIEW
HISTORICAL DEVELOPMENT, INC.,)		
)		
Respondents.)		

The Iowa Racing and Gaming Commission (IRGC) submits the following brief in resistance to Petitioner Belle of Sioux City, L.P.'s Petition for Judicial Review:

TABLE OF CONTENTS

	<u>Page No.</u>
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	3
STATEMENT OF THE CASE	5
ARGUMENT	10
I. BELLE MAY NOT COLLATERALLY ATTACK THE IRGC'S CONTESTED CASE DECISION AND THE COURT'S RULING ON JUDICIAL REVIEW IN POLK COUNTY NO. CVCV0047791 THROUGH THE PRESENT ACTION	13
II. THE IRGC LAWFULLY GRANTED MRHD A LICENSE TO CONDUCT GAMBLING GAMES AND SCE A LICENSE TO OPERATE A GAMBLING STRUCTURE FOR THE HARD ROCK HOTEL AND CASINO IN SIOUX CITY	14
A. <i>An Operating Agreement is Required</i>	14

<i>B. Iowa Code Section 97F.7(2)(c) Not Applicable</i>	16
<i>C. Refusal to Extend Operating Agreement / License Alternative Reasonable.</i>	19
<i>D. Updates to Application Reasonably Allowed</i>	22
<i>E. Belle Was Afforded All Process Due</i>	24
CONCLUSION	26

STATEMENT OF THE ISSUES FOR REVIEW

I. WHETHER BELLE MAY COLLATERALLY ATTACK THE IRGC'S CONTESTED CASE DECISION AND THE COURT'S RULING ON JUDICIAL REVIEW IN POLK COUNTY NO. CVCV0047791 THROUGH THE PRESENT ACTION?

Authorities

Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17 (Iowa 2012).

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567 (Iowa 2006).

II. WHETHER THE IRGC LAWFULLY GRANTED MRHD A LICENSE TO CONDUCT GAMBLING GAMES AND SCE A LICENSE TO OPERATE A GAMBLING STRUCTURE FOR THE HARD ROCK HOTEL AND CASINO IN SIOUX CITY?

Authorities

H & Z Vending v. Iowa Dep't of Inspections and Appeals, 593 N.W.2d 168 (Iowa Ct. App. 1999).

In re Trust of Willcockson, 368 N.W.2d 198 (Iowa Ct. App. 1985).

Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564 (Iowa 1976).

Iowa Coal Mining Co., Inc. v. Monroe County, 555 N.W.2d 418 (Iowa 1996).

Jones v. University of Iowa, 836 N.W.2d 127 (Iowa 2013).

Keokuk County v. H.B., 593 N.W.2d 118 (Iowa 1999).

Shors v. Johnson, 581 N.W.2d 648 (Iowa 1998).

Tuerk v. State, Dep't of Licensing, 123 Wash. 2d 120 (Wash. 1994).

Iowa Code § 17A.12.

Iowa Code § 17A.18(3).

Iowa Code § 99F.3.

Iowa Code § 99F.4.

Iowa Code § 99F.4D(2).

Iowa Code § 99F.5(1).

Iowa Code § 99F.6.

Iowa Code § 99F.6(1).

Iowa Code § 99F.7.

Iowa Code § 99F.7(2)(c).

Iowa Code Ch. 725.

491 Iowa Admin. Code § 1.5(1).

491 Iowa Admin. Code § 1.5(3).

491 Iowa Admin. Code § 1.7.

491 Iowa Admin. Code § 5.1.

491 Iowa Admin. Code § 5.4(8).

STATEMENT OF THE CASE

Nature of the Case: Petitioner Belle of Sioux City, L.P. (Belle) seeks judicial review pursuant to Iowa Code chapter 17A of multiple actions taken by the IRGC concerning casino licensing in Woodbury County, Iowa.

Statement of Facts and Course of Proceedings: The Iowa Racing and Gaming Commission “shall have full jurisdiction over and shall supervise all gambling operations governed by [Iowa Code chapter 99F].” Iowa Code § 99F.4. Among the specific powers assigned to the IRGC is the responsibility to license qualified sponsoring organizations and the operators of excursion gambling boats and other gambling structures in the state of Iowa. Iowa Code § 99F.4(2). When doing so, IRGC is instructed to “investigate applicants and determine the eligibility of applicants for a license and to select among competing applicants for a license the applicant which best serves the interests of the citizens of Iowa.” Iowa Code § 99F.4(1). The IRGC alone “shall decide the number, location, and type of gambling structures and excursion gambling boats licensed under [Iowa Code chapter 99F].” Iowa Code § 99F.7(1).

Missouri River Historical Development, Inc. (MRHD) was first licensed on December 1, 1994 to conduct gambling games at the Belle of Sioux City / Argosy Casino, an excursion gambling boat located in Sioux City, Iowa. See Appendix in Support of IRGC’s Resistance to Petition for Judicial Review (hereafter “IRGC App.”) at 5 (IRGC Chronology). MRHD partnered with Belle of Sioux City, L.P., to operate the casino and Belle was licensed by the IRGC as an excursion gambling boat operator. Id. MRHD’s

relationship with Belle was governed by a contract between the parties. See IRGC App. at 15-29 (Management and Operation Agreement).

On December 29, 2011, the IRGC received a combined application from MRHD and Belle to renew their respective gaming licenses for the 2012-2013 licensing term. IRGC App. at 30-47 (2012-2013 License Renewal Application). This application was materially insufficient, however, in that the parties did not submit the required operating agreement that would cover the entirety of the licensing term. IRGC App. at 30, 44. Instead, the application form acknowledged that the operating agreement between MRHD and Belle was scheduled to expire on July 6, 2012 and that “renewal or extension of an operating agreement pursuant to Iowa Code Chapter 99F through the applicable time period of the requested license *is necessary.*” IRGC App. at 30 (emphasis added).

At its March 8, 2012, meeting, the IRGC was informed that despite ongoing negotiations, MRHD and Belle had not yet reached an agreement concerning their operating agreement. IRGC App. at 75 (Minutes of 3/8/2012 IRGC Meeting). Belle and MRHD were warned that a new operating agreement would have to be submitted to the IRGC no later than its June 7, 2012 meeting to enable Commission approval prior to the July 6, 2012 expiration date of the parties’ prior agreement. IRGC App. at 76. For this reason, the IRGC approved Belle’s and MRHD’s license applications conditioned on the parties negotiating and submitting a new operating agreement to the Commission by June 7, 2012. IRGC App. at 78.

Unfortunately, the IRGC learned at its June 7, 2012 meeting that the parties were not successful in their efforts to negotiate a new operating agreement. IRGC App. at 88 (Minutes of 6/7/2012 IRGC Meeting). Instead, a representative of Penn National Gaming, Belle's parent company, proposed that the IRGC allow Belle to partner with a new, unlicensed QSO. IRGC App. at 89. Noting that the contingency placed upon renewal of the Argosy's licenses was not met, the IRGC voted to accept new applications from all interested parties, including Belle and MRHD, to build and operate a land-based gaming facility in Woodbury County. IRGC App. at 91-93. The IRGC then voted to extend Belle's and MRHD's licenses for the Argosy Casino through March 31, 2013, conditioned upon the parties agreeing to an extension of their operating agreement through that date. IRGC App. at 93.

A belatedly executed extension of MRHD's and Belle's now expired operating agreement was presented to the IRGC for approval at the Commission's July 12, 2012 meeting. IRGC App. at 73 (Proposed Extension Agreement), 95 (Minutes of 6/7/2012 IRGC Meeting). Because the parties could not reach a mutual agreement as to the length of their proposed extension to their operating agreement, the IRGC refused to approve the extension. IRGC App. at 95-98. MRHD later repudiated any purported agreement it may have had to extend the parties' operating agreement. IRGC App. at 103-04 (Minutes of 8/23/2012 IRGC Meeting).

Faced with the prospects of no eligible casino operators in Woodbury County given the expiration of Belle's and MRHD's operating agreement, the IRGC proceeded

with its earlier decision to accept and evaluate applications for a new land-based casino in the Sioux City area. IRGC App. at 99-100 (Discussing Application Timeline). Four proposals were ultimately submitted, one from Siouxland Strong and proposed operator Warrior Entertainment, one from MRHD and proposed operator Sioux City Entertainment, Inc.¹ (SCE), and two from Greater Siouxland Improvement Association (GSIA) and proposed operator Belle. Following extensive vetting, the IRGC voted 3-2 at its April 18, 2013 meeting to award licenses to SCE and MRDH to develop and open a Hard Rock branded hotel and casino in downtown Sioux City (Hard Rock project). IRGC App. at 134-41 (Minutes of 4/18/2013 IRGC Meeting); see also IRGC App. at 105-11 (Minutes of 11/15/2012 IRGC Meeting – Financing Presentations), 113-24 (Minutes of 1/10/2013 IRGC Meeting – Project Presentations), 125-32 (Minutes of 3/26/2013 IRGC Meeting – Sioux City Site Visits and Public Hearing). The IRGC formally denied the remaining Woodbury County proposals at its June 6, 2013 meeting. IRGC App. at 143. The Sioux City Hard Rock Hotel and Casino opened for business on August 1, 2014.

In the interim, Belle submitted an application seeking renewal of its operator's license at the Argosy Casino for the 2013-2014 licensing term. IRGC App. at 48-72 (2013-2014 License Renewal Application). Belle submitted its renewal application knowing that MRHD, the only QSO licensed to conduct gambling games at the Argosy, had not signed off on the application despite Belle's best efforts to procure MRHD's acquiescence. IRGC App. at 48.

¹ Now known as Sioux City Partners, L.L.C.

MRHD, however, did not seek renewal of its license to conduct gambling games for the Argosy Casino. At the time of Belle's renewal application in December 2012, MRHD had already submitted an application with SCE for new gaming licenses for the proposed Hard Rock project and had no desire to continue its partnership with Belle. MRHD's license to conduct gambling games at the Argosy Casino subsequently expired on April 1, 2013. IRGC App. at 215-16.

At its August 15, 2013 meeting, the IRGC voted to deny renewal of Belle's operator's license at the Argosy Casino for the 2013-2014 term due to Belle's lack of an operating agreement with a QSO licensed to conduct gambling games in Woodbury County. IRGC App. at 148-51, 157-58. Following a contested case hearing, the IRGC affirmed its decision to deny renewal of Belle's operator's license and ordered the Argosy Casino closed on or before July 1, 2014.² IRGC App. at 189-99 (IRGC Decision and Order). The IRGC's license denial and closure order was affirmed on judicial review. IRGC App. at 200-29. After the Iowa Supreme Court overruled Belle's motion to stay the IRGC's order pending appeal, the Argosy Casino closed on July 30, 2014.

In an effort to replace MRHD as its partnering QSO, Belle did seek in late 2013 approval from the IRGC for an operating agreement between itself and GSIA for the Argosy Casino. IRGC App. at 153-56 (Minutes of 11/21/2013 IRGC Meeting). The

² The District Court granted Belle a temporary stay of the IRGC's closure order pending final submission and a ruling on judicial review. The Iowa Supreme Court granted Belle temporary relief pending a ruling on Belle's motion for stay pending appeal, which the Court ultimately denied on July 25, 2014.

IRGC denied approval of this contract because GSIA was not licensed to conduct gambling games in Iowa. IRGC App. at 155-56.

GSIA later submitted an application to the IRGC seeking a license as a QSO to conduct gambling games at the Argosy Casino. IRGC App. at 159-60 (12/23/2013 Letter of Lorraine May re: GSIA Application). IRGC staff acknowledged receipt of GSIA's application and noted that it would be considered by the IRGC consistent with past agency practice once GSIA submitted to the Iowa Division of Criminal Investigation all fees and paperwork necessary for the completion of a required background investigation. IRGC App. at 164-65, 172-73. GSIA, however, failed to submitted the required DCI fees and forms that would have enabled the IRGC to process GSIA's application. See IRGC App. at 187-88 (2/3/2014 Letter of Brian Ohorilko).

Additional facts will be mentioned in the course of the IRGC's argument as necessary.

ARGUMENT

In exercising its licensing duties, the IRGC is vested by statute with sizable discretion. See Alfredo v. Iowa Racing and Gaming Comm'n, 555 N.W.2d 827, 831 (Iowa 1996) ("The legislature has empowered and obligated the commission to regulate all gambling operations governed by Iowa Code chapter 99F . . ."). The IRGC may accordingly take any and all "action as may be reasonable or appropriate to enforce [chapter 99F] and the commission rules." Iowa Code § 99F.4(13).

The truly unique circumstances of an existing casino operator allowing its operating agreement with its non-profit partner to lapse coupled with that non-profit's failure to seek renewal of its license to conduct gambling games necessitated the IRGC's intervention and action in order to preserve the jobs, wages, tax revenue, and charitable distributions generated from an ongoing Sioux City gambling operation. In response, the IRGC lawfully solicited, evaluated, and approved MRHD's and SCE's application for a land-based casino in Woodbury County. The Court should affirm all challenged actions of the IRGC.

Standard of Review: When exercising judicial review over an administrative decision, the Court is empowered by the Iowa Administrative Procedure Act to reverse, modify, or grant other appropriate relief to a petitioner only if the petitioner's substantial rights have been prejudiced by an agency action that was undertaken in violation of a provision of Iowa Code section 17A.19(10). Mycogen Seeds v. Sands, 686 N.W.2d 457, 464 (Iowa 2004). The Iowa Supreme Court has consistently held that judicial review under Iowa Code chapter 17A is at law, not *de novo*. See, e.g., Allen v. State, 528 N.W.2d 583, 587 (Iowa 1995). Constitutional claims, however, are reviewed *de novo*. Houck v. Iowa Bd. of Pharmacy Exam'rs, 752 N.W.2d 14, 17 (Iowa 2008).

Because none of the IRGC's actions challenged by Belle in this judicial review proceeding constitute a "contested case" within the context of Iowa Code chapter 17A, the Court should apply the scope and standard of review applicable to the review of "other agency action." See Greenwood Manor v. Iowa Dep't of Pub. Health, State Health

Facilities Council, 641 N.W.2d 823, 834 (Iowa 2002); Sindlinger v. Iowa State Bd. of Regents, 503 N.W.2d 387, 389 (Iowa 1993). Evidence taken by the Court during the review of other agency action should be used for the “limited purpose of highlighting what actually occurred at the agency level in order to facilitate the court’s search for errors of law or unreasonable, arbitrary, or capricious action.” Sindlinger, 503 N.W.2d at 390.

Reviewing courts are to give appropriate deference to those matters vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(c), (l) & (m), 17A.19(11); see Houck, 752 N.W.2d at 16-17; Mosher v. Department of Inspections and Appeals, Health Facilities Div., 671 N.W.2d 501, 508-09 (Iowa 2003). Because the IRGC is clearly vested with authority to interpret Iowa Code chapter 99F’s gaming licensing scheme, both the IRGC’s legal interpretations and its application of law to the facts found are entitled to heightened deference and can only be reversed if they are “irrational, illogical, or wholly unjustifiable.” National Cattle Congress, Inc. v. Iowa Racing and Gaming Comm’n, No. 07-0412, 2008 WL 2042653 at *1 (Iowa Ct. App. May 14, 2008) (finding entitlement to deference); see Iowa Code §§ 17A.19(10)(l) & (m); see Alfredo v. Iowa Racing and Gaming Comm’n, 555 N.W.2d 827, 831 (Iowa 1996) (“The legislature has empowered and obligated the commission to regulate all gambling operations governed by Iowa Code chapter 99F”).

It is ultimately Belle’s burden to demonstrate both the invalidity of the IRGC’s actions and the resulting prejudice. Iowa Code § 17A.19(8)(a) (“The burden of

demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.”); see Hill v. Fleetguard, Inc., 705 N.W.2d 665, 671 (Iowa 2005).

I. BELLE MAY NOT COLLATERALLY ATTACK THE IRGC’S CONTESTED CASE DECISION AND THE COURT’S RULING ON JUDICIAL REVIEW IN POLK COUNTY NO. CVCV047791 THROUGH THE PRESENT ACTION.

In support of its petition, Belle reiterates many arguments that were rejected by this Court in a related judicial review proceeding that affirmed the IRGC’s denial of the renewal of Belle’s license to operate the Argosy Casino. See IRGC App. at 200-29 (Ruling on Petition for Judicial Review – Polk Co. No. CVCV047791). Belle is not entitled to another opportunity to litigate those issues upon which it has already received an adverse final judicial ruling. *Res judicata* bars its present attempt to do so.

Issue preclusion, or collateral estoppel, is a form of *res judicata* that prevents parties “from relitigating in a subsequent action issues raised and resolved in a previous action.” Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa 2012); see Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006) (“Under issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, the same issue cannot be relitigated in later proceedings.”). A party seeking to invoke issue preclusion must establish four elements:

(1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Employers Mut. Cas. Co., 815 N.W.2d at 22.

This Court's ruling affirming the IRGC's decision to deny Belle's application to renew its casino operator's license meets all four of these criteria to bar Belle's present attempt to again bring the exact same questions of law and fact before the Court. Thus, to the extent that Belle now seeks to relitigate the IRGC's interpretation of Iowa's gaming licensing scheme, the expired status of MRHD's license to conduct gambling games at the Argosy Casino, the inapplicability of Iowa Code section 17A.18(2) to preserve either MRHD's or Belle's licenses for the Argosy, the legality of the IRGC's decision to deny renewal of Belle's operator's license, and the constitutionality of the IRGC's actions in denying renewal of Belle's operator's license, those arguments have all been the subject of a final judicial ruling that may not be collaterally attacked through the present action.

II. THE IRGC LAWFULLY GRANTED MRHD A LICENSE TO CONDUCT GAMBLING GAMES AND SCE A LICENSE TO OPERATE A GAMBLING STRUCTURE FOR THE HARD ROCK HOTEL AND CASINO IN SIOUX CITY.

A. An Operating Agreement is Required

Belle once again misstates and seeks to minimize the statutory role a qualified sponsoring organization serves in Iowa's unique gaming licensing structure while inflating the privilege that it, as a contracted casino operator, possesses. Any statutory analysis of Iowa's gambling laws must begin with the understanding that all wagering and gambling devices are illegal in the state of Iowa unless subject to an express statutory exemption or safe harbor. Iowa Code ch. 725; see H & Z Vending v. Iowa Dep't of

Inspections and Appeals, 593 N.W.2d 168, 170 (Iowa Ct. App. 1999). The wagering on gambling games that is authorized by Iowa Code chapter 99F and subject to IRGC's supervision and oversight is legal only "*when conducted* on an excursion gambling boat, gambling structure, or racetrack enclosure at authorized locations by a licensee as provided [by law]." Iowa Code § 99F.3 (emphasis added). Unlike in other jurisdictions, only a QSO may apply for a license *to conduct* gambling games in Iowa. Iowa Code § 99F.5(1).

Contrary to Belle's urgings, a QSO is much more than a mere conduit through which a casino operator funnels a set portion of gambling revenue to charitable endeavors. A licensed QSO in Iowa holds the very thing a licensed casino operator can never obtain on its own, the privilege to conduct gambling games. See Iowa Code §§ 99F.4, 99F.5(1), 99F.7. A casino operator in Iowa therefore must partner with a QSO licensed by the IRGC. Iowa Code §§ 99F.4, 99F.5(1), 99F.7; 491 Iowa Admin. Code § 1.7.

What Iowa law does not require is that a QSO hire a separate casino operator. A licensed QSO may choose to operate its own casino *or* it may enter into an operating agreement with a third party to operate a casino on the QSO's behalf. Iowa Code §§ 99F.5(1), 99F.7(2)(c); 491 Iowa Admin. Code § 1.5(1). If a third party acts as a casino operator for a licensed QSO, that party must procure a license to operate a casino from the IRGC. Id. All operating agreements are subject to IRGC approval prior to implementation. Iowa Code § 99F.7(2)(c); 491 Iowa Admin. Code § 5.4(8). Iowa law

simply does not bestow upon a licensed casino operator any right or authority to operate a casino or to allow gambling games to be conducted on the operator's property in the absence of a valid operating agreement with a licensed QSO.

B. Iowa Code Section 97F.7(2)(c) Not Applicable

Belle asserts that the IRGC illegally awarded gaming licenses to MRHD and SCE to develop and open the Hard Rock project in violation of Iowa Code section 99F.7(2)(c). This code section provides that:

A person awarded a new license *to conduct* gambling games on an excursion gambling boat or gambling structure in the same county as another licensed excursion gambling boat or gambling structure shall only be licensed to operate an excursion gambling boat or gambling structure that is located at a similarly situated site and operated as a substantially similar facility as any other excursion gambling boat or gambling structure in the county.

Iowa Code § 99F.7(2)(c) (emphasis added). Belle's arguments ignore the plain language of this code section and confuse its limited contractual privilege to operate a casino with the statutory authorization to actually conduct gambling games.

Iowa Code section 99F.7(2)(c) offers no protection to Belle in the present case as it governs the issuance of new licenses to *conduct* gambling games, a license Belle does not possess and never has possessed. The license issued to a QSO to conduct gambling games at a particular excursion gambling boat or gambling structure is separate and distinct from the license issued to the business entity that has been hired to operate a casino on that licensed QSO's behalf. But for its relationship with its former licensed

QSO, Belle had no ability to legally offer gambling games to the public at the Argosy Casino. Belle's relationship with MRHD was governed solely by the terms of their now expired operating agreement. To the extent that this code section references the operation of an existing gambling structure or excursion gambling boat, it must be remembered that under Iowa Code chapter 99F, the licensed QSO is ultimately responsible for operation of the casino where its gambling games are located, whether on its own or through the hiring of a third-party operator.

Thus, as the only party to ever hold a license to conduct gambling games at the Argosy Casino, MRHD and MRHD alone is the true party in interest to contest the issuance of a second license to conduct gambling games in Woodbury County to another QSO in violation of 99F.7(2)(c). Though MRHD is now joined as a party to this action, it is not challenging the IRGC's actions. Belle therefore lacks standing to pursue a defense of MRHD's interests and legal rights under Iowa Code chapter 99B through the pending judicial review. See Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 567 (Iowa 1976) ("Ordinarily, a party lacks standing to raise the rights of others."); see In re Trust of Willcockson, 368 N.W.2d 198, 202 (Iowa Ct. App. 1985) ("When a question presented to a court by an individual having no standing to raise the issue, the court is deprived of jurisdiction over the question.").

As the holder of a license to conduct gambling games on a riverboat in Woodbury County at the time, MRHD had the unequivocal statutory right to seek from the IRGC, and the IRGC had the power to give to MRHD, permission to open a land-based casino.

Iowa Code § 99F.4D(2). Belle's acquiescence or permission was not necessary before the IRGC could grant a request from MRHD to convert its license to conduct gambling games on an excursion gambling boat to one that allows gambling games to occur at a land-based gambling structure. See Iowa Code § 99F.4D(2). As noted by the Court in its remand ruling: "While the commission did not follow the exact procedure of Section 99F.4D to convert a license from riverboat gambling to land-based gambling, the result was the same as if it had." 2/14/2014 Ruling Following Remand at p. 20.

As a contractor of MRHD, any protection to be afforded Belle over its financial investment in the Argosy Casino was not statutorily granted, but rather lied in the terms of its former operating agreement with MRHD. Thus, to the extent that Belle believes that it has been injured by the IRGC as a result of any action or inaction attributable to MRHD, Belle's remedy, if any, has always been found in a lawsuit for alleged breach of contract against MRHD, not a judicial review action against the IRGC.

Regardless, Iowa Code section 99F.7(2)(c) is inapplicable to the facts of this case as there has never been any Commission action taken at any time that resulted in two licenses to conduct gambling games being in existence at the same time in Woodbury County. It is undeniable that MRHD did not sign off on Belle's renewal application to continue its operation of the Argosy Casino in Sioux City through the 2013-2014 license term. IRGC App. at 50. Nor did MRHD submit an application at that time in its own name for renewal of its license to conduct gambling games at the Argosy Casino. By not signing off on and submitting a renewal application, MRHD's license to conduct

gambling games at the Argosy expired on April 1, 2013. IRGC App. at 215-16. Only after MRHD's license to conduct gambling games at the Argosy had lapsed, did the IRGC vote at its April 18, 2013 meeting to award new licenses to MRHD and SCE for the development of the Hard Rock project. IRGC App. at 140-41.

Nor did Iowa Code section 17A.18(2) in any way extend either Belle's or MRHD's respective gaming licenses past March 31, 2013. To invoke the protections of Iowa Code section 17A.18(2), a party must make "timely and sufficient" application for renewal. Because Belle and MRHD did not submit a license renewal application in December 2011 that had all required information, including the terms of an operating agreement that was effective throughout the entirety of the 2012-2013 license term, Belle's and MRHD's gaming licenses for the Argosy Casino did not continue by operation of law beyond the July 6, 2012 expiration date of the parties' operating agreement. IRGC App. at 218-19; see Tuerk v. State, Dep't of Licensing, 123 Wash. 2d 120, 126 (Wash. 1994) (holding that a renewal application was not "timely and sufficient" where a licensee failed to provide required information).

For the reasons stated above, the IRGC did not violate Iowa Code section 99F.7(2)(c) when it voted to authorize MRHD to conduct gambling games at the new land-based Hard Rock Hotel and Casino in Sioux City.

C. Refusal to Extend Operating Agreement / License Alternative Reasonable

Iowa law requires that an operator of a casino in the state of Iowa partner with a QSO that is licensed by the Commission to conduct gambling games at a specific

excursion gambling boat or other gambling structure. Iowa Code §§ 99F.4, 99F.5(1), 99F.7; 491 Iowa Admin. Code § 1.7. A licensed casino operator such as Belle has no statutory right to randomly select any non-profit entity to serve as a QSO for the casino it operates, nor may it substitute a QSO without the IRGC first granting that QSO the right to conduct gaming at a particular place upon application and proper vetting. Iowa Code § 99F.7 (“*The commission* shall decide the number, location, and type of gambling structures and excursion gambling boats licensed under this chapter.”).

Once MRHD’s license to conduct gambling games at the Argosy Casino lapsed, Belle had no choice but to cease operation of the Argosy until such time as another QSO qualified and was licensed by the IRGC upon application to conduct gambling games at that location. Ultimately, the decision to license a new entity to conduct gambling games as a QSO in Iowa is left solely to the IRGC’s discretion. At most, Belle could only assist another non-profit in navigating the IRGC’s application process.

IRGC did solicit applications for the development of a land-based casino in Woodbury County in the fall of 2012, but only after efforts between Belle and MRHD to negotiate an extension of their operating agreement broke down and they failed to present the IRGC with a new agreement by June 7, 2012. Review of the IRGC’s meeting minutes for the months preceding June 7, 2012, reveal a Commission that was patiently encouraging Belle and MRHD to work out their differences and extend their working relationship. Belle answered the IRGC’s concerns and encouragement not by finalizing an extension of its operating agreement with MRHD, but by approaching the IRGC at its

June 7, 2012 meeting with a request to replace MRHD with a new, yet to be licensed QSO for the Argosy Casino. IRGC App. at 88-89.

The IRGC did not abuse its discretion by refusing to accept Belle's belated efforts to extend its operating agreement with MRHD. The IRGC established a firm deadline of June 7, 2012 for Belle and MRHD to present an executed extension agreement for approval. Then IRGC Administrator Jack Ketterer had warned the parties that “[i]f there is no agreement between the qualified sponsoring organization and the operator . . . the Commission would be obligated to look elsewhere.” IRGC App. at 76. Rather than heeding Mr. Ketterer's warning, Belle overplayed its hand by refusing MRHD's proffered extension until after the IRGC's June 7, 2012 meeting and the new application process had already been opened.

By the time Belle agreed to an extension, it was too late to seek IRGC approval before the existing operating agreement expired. Thus, Belle had no one but itself to blame for the fact that it found itself in July 2012 without a valid operating agreement with MRHD for the Argosy Casino. After that date, Belle's and MRHD's squabbles as to the length of the purported extension and MRHD's ultimate repudiation of the agreement further bolstered the IRGC's decision not to revisit the question and to continue on with the proposal process for a new land-based Woodbury County casino.

Nor did the IRGC abuse its discretion by refusing to accept Belle's efforts to substitute an unlicensed non-profit entity for MRHD. To the extent that Belle desired to substitute GSIA for MRHD as the licensed QSO for the Argosy casino, GSIA did not

exhaust all required administrative remedies, the most fundamental of which was filing an application with the IRGC accompanied by all requisite fees and documentation.³ IRGC App. at 164-65, 172-73. It is well established under Iowa law that a party must exhaust available administrative remedies before seeking relief in the courts. Keokuk County v. H.B., 593 N.W.2d 118, 122 (Iowa 1999) (citing Shors v. Johnson, 581 N.W.2d 648, 650 (Iowa 1998); see also Iowa Coal Mining Co., Inc. v. Monroe County, 555 N.W.2d 418, 431 (Iowa 1996) (“before a party can call upon the court to act, the party must have exhausted any remedy available before an administrative agency.”). Thus, the IRGC committed no errors of law in refusing to consider GSIA for licensure until the missing DCI forms and background fees are remitted.

D. Updates to Application Reasonably Allowed

Belle accuses the IRGC of violating “Iowa law” by allowing SCE to update its anticipated financing terms for its proposed Sioux City gaming facility. Iowa Code chapter 99F permits the IRGC to consider all information it deems pertinent when deciding gaming licensing questions. See Iowa Code §§ 99F.4, 99F.6, 99F.7. No provision of the Iowa Code prohibits a party from amending an application for a gaming license after submission. Nor does the IRGC have any specific administrative rules addressing the subject.

³ Friends of Woodbury County, the original non-profit Belle sought to license as a QSO for the Argosy Casino in July 2012, has never applied to the IRGC for a license to conduct gambling games.

In establishing an application timeline, the IRGC does advise all potential applicants of its informal policy that no amendments may be made to the scope of a proposed casino project after submission. See IRGC App. at 99-100. The IRGC, however, does reserve the right to solicit additional information or clarification from an applicant at any time. Id. If a casino proposal is ultimately chosen for licensure, the selected applicant must build the project in substantially the same form as represented to the IRGC in its proposal. See IRGC App. at 141. The IRGC adopted this policy in response to applicants adding amenities or altering the physical scale of their proposed projects in an attempt to one-up competing bidders.

The IRGC, however, reasonably allows gaming license applicants to update their financial standing and financing options as market conditions evolve. On the contrary, it would be highly impractical and potentially injurious to an accurate vetting of licensing proposals if an applicant was locked into financing options proposed several months prior to a final decision in the IRGC's licensing process. The IRGC would expect to be informed of any adverse developments in an applicant's financial standing in addition to giving applicants the benefit of any upturns or improvements. Only then can IRGC fairly and accurately judge the financial viability of a casino license applicant.

All applicants that made financing presentations to the IRGC at its November 15, 2012 meeting had sufficiently firm financial commitments, including SCE, to permit each applicant to continue with the application process. IRGC App. at 105-111. The applicants understood that alterations to their financing would be contemplated as

conditions warranted. For example, in its presentation, Warrior Entertainment acknowledged that it may need to seek millions of dollars from yet to be identified local investors to replace speculative historic tax credits. IRGC App. at 107. Even at its January 10, 2013 project presentation, Warrior Entertainment discussed bringing an additional 15% in equity ownership from local Iowa investors. IRGC App. at 116.

Allowing SCE the reasonable option to update its financing for the Hard Rock project was far from unprecedented. Belle suffered no measurable prejudice as a result of the IRGC accepting and considering SCE's amended financing options.

E. Belle Was Afforded All Process Due

Lastly, Belle claims that it was divested of its license to operate the Argosy Casino in violation of its constitutional due process rights. Again, the question of Belle's eligibility to maintain its license for the Argosy Casino was the subject matter of a contested case hearing, and the IRGC's license denial and closure order was affirmed on judicial review. See IRGC App. at 189-99 (IRGC Decision and Order), 200-29 (Ruling on Petition for Judicial Review). As discussed above, the Court has already ruled that the IRGC did not violate Belle's due process rights in ordering the closure of the Argosy Casino and that ruling may not be collaterally attacked in this case. See IRGC App. at 222-25.

Regardless, Belle's due process rights were not impugned by the IRGC. Each license issued by the IRGC, whether to conduct gambling games or to operate a casino, is a privilege, not property. 491 Iowa Admin. Code § 5.1. To retain the privilege to either

conduct gambling games or operate a casino, each licensee must submit a completed and signed renewal application form annually to the IRGC. Iowa Code § 99F.6(1); 491 Iowa Admin. Code § 1.5(3). The burden of proving qualification for the privilege to receive and maintain any type of gaming license is on the licensee at all times. 491 Iowa Admin. Code § 5.1.

In the absence of a protected property interest, constitutional due process protection does not inhere. E.g., Jones v. University of Iowa, 836 N.W.2d 127, 145 (Iowa 2013) (“First, we must determine whether we are dealing with a protected liberty or property interest”). Thus, the only procedures applicable to proceedings concerning Belle’s former gaming license were those prescribed by the Iowa Administrative Procedure Act, Iowa Code chapter 17A. See Iowa Code § 17A.18(3).

As required by Iowa Code chapter 17A, Belle received notice of the exact issue giving rise to the denial of the renewal of its license. IRGC App. at 222-25; see Iowa Code § 17A.12. Belle engaged in extensive discovery, received all of the time it wanted over the course of two days to present its case, cross-examined witnesses, presented arguments and briefing on legal matters involved, and the case was presided over by the IRGC with the assistance of a trained Administrative Law Judge. See IRGC App. at 189-99. Given this, Belle could not (and still cannot) identify any procedural deficiency in the IRGC’s conduct of the contested case concerning Belle’s privilege to operate the Argosy Casino that was contrary to or otherwise violated Iowa Code chapter 17A. IRGC App. at 225.

CONCLUSION

For the above-stated reasons and those urged in its previous filings, the Iowa Racing and Gaming Commission requests that Petitioner Belle of Sioux City, L.P.'s Amended Petition for Judicial Review be denied in its entirety.

THOMAS J. MILLER
IOWA ATTORNEY GENERAL

/s/ Jeffrey C. Peterzalek
JEFFREY C. PETERZALEK
Assistant Attorney General
Department of Justice
Administrative Law Division
Hoover Building, 2nd Floor
1305 E. Walnut
Des Moines, Iowa 50319
Ph: (515) 281-4213
Fax: (515) 281-4209
E-mail: Jeffrey.Peterzalek@iowa.gov

/s/ John R. Lundquist
JOHN R. LUNDQUIST
Assistant Attorney General
Department of Justice
Administrative Law Division
Hoover Building, 2nd Floor
1305 E. Walnut
Des Moines, Iowa 50319
Ph: (515) 281-3658
Fax: (515) 281-4209
E-mail: John.Lundquist@iowa.gov
ATTORNEYS FOR IOWA RACING &
GAMING COMMISSION

All parties served electronically