

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

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BELLE OF SIOUX CITY, L.P.,

Petitioner,

vs.

IOWA RACING AND GAMING  
COMMISSION; SCE PARTNERS,  
LLC; MISSOURI RIVER HISTORICAL  
DEVELOPMENT, INC. and CITY OF  
SIOUX CITY,

Respondents.

CASE NO. CVCV009254  
(CV9316, CV9383, CV045760)

**CITY OF SIOUX CITY'S  
RESISTANCE TO BELLE OF  
SIOUX CITY, L.P.'S BRIEF IN  
SUPPORT OF PETITION FOR  
JUDICIAL REVIEW**

COMES NOW the City of Sioux City, Iowa ("City"), and submits its brief in resistance to Belle of Sioux City, L.P.'s ("Belle") Brief in Support of Petition for Judicial Review.

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### **PRELIMINARY STATEMENT**

This is an action in the Iowa District Court in and for Polk County pertaining to four Petitions for Judicial Review filed on behalf of Belle. Belle is contesting actions of the Iowa Racing and Gaming Commission (“IRGC”) concerning the award of a land based gaming license in Woodbury County, Iowa. Belle has repeatedly alleged the IRGC acted in violation of Iowa Law and in doing so acted arbitrarily, capriciously, and unreasonably. Additionally, Belle maintains that the IRGC violated Belle’s due process rights in the award of a gaming license for a land based casino. The City of Sioux City filed a Motion to Intervene in this consolidated action and by order of the Court on March 3, 2014 the City’s Motion was granted. The City timely submits this Brief in resistance to Belle’s Brief in Support of Petition for Judicial Review. Additionally, the City hereby joins in the Resistances and Briefs submitted by all other respondents in this matter.

### **RELEVANT BACKGROUND**

The City hereby incorporates the facts as accurately outlined by the Court in its July 14, 2014 Ruling on Petition for Judicial Review on Emergency Motion for Stay.

### **STANDARD OF REVIEW**

Belle’s consolidated Petitions for Judicial Review challenge “other agency action” by the IRGC. The standard of review for “other agency action” under Iowa Code § 17A.19(3) is reviewed for reasonableness. *Greenwood Manor v. Iowa Dep’t of Public Health, State Health*

*Facilities Council*, 641 N.W.2d 823, 831 (Iowa 2002). “The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting the invalidity.” Iowa Code § 17A.19(3) This Court, in its February 14, 2014 Ruling, held that the IRGC’s issuance of a license in Woodbury County should be given deference, “given the IRGC’s broad discretion to regulate gambling and to set the requirements for licensure...” February 14, 2014 Ruling. An agency’s actions must be determined in accordance with the standards of review set forth in Iowa Code §§ 17A.19(10) and (11), as viewed at the time that action was taken, not in hindsight. *Id.* This matter involves both questions of law and questions of law and fact. Accordingly, this Court must determine whether the IRGC’s decisions and actions were “based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law in the discretion of the agency or based upon an irrational, illogical, or wholly unjustifiable application of law to fact.” Iowa Code § 17A.19(10)(l)-(m).

## **ARGUMENT**

### **I. The IRGC’s Decision to Open Bidding for a Land-Based Casino in Woodbury County was Legal.**

#### **A. Belle’s First Three Petitions for Judicial Review Cannot Succeed**

Belle has incorrectly asserted in its first three Petitions for Judicial Review that the IRGC acted unlawfully in opening up a public bidding process and soliciting bids for a land based casino in Woodbury County. Belle has also alleged the IRGC erred when denying Belle’s efforts to replace Missouri River Historical Development (“MRHD”) with another Qualified Sponsoring Organization (“QSO”). Lastly, Belle contends the IRGC acted unlawfully when it justifiably refused to approve an extension of Belle and MRHD’s operating agreement.

##### **1. Belle did not have an operating agreement with MRHD**

Belle did not in its first three Petitions for Judicial Review and does not currently argue that it had an operating agreement with MRHD after July 7, 2012. Rather, Belle alleges in its first three Petitions for Judicial Review that it was not required to have an operating agreement with its QSO, MRHD. However, this assertion is contrary to Iowa Code § 99F.5(1) which states:

An operating agreement entered into on or after May 6, 2004, between a qualified sponsoring organization and an operator of an excursion gambling boat or gambling structure shall provide for a minimum distribution by the qualified sponsoring organization for educational, civic, public, charitable, patriotic, or religious uses as defined in section 99B.7, subsection 3, paragraph "b", that averages at least three percent of the adjusted gross receipts for each license year.

This court has also previously addressed Belle's argument that an operating agreement was not required:

Implicit in this code section [Iowa Code § 99F.5(1)] is a requirement that a Qualified Sponsoring Organization and an operator will have an operating agreement. The code section also gives the IRGC broad discretion to determine what information should be in an application for a gambling license. IRGC rules require approval of all agreements between QSOs and operators. *See* February 14, 2014 Ruling at 21.

Clearly, the IRGC was correct in its interpretation of Iowa Law when it required Belle to have an operating agreement with MRHD and that failure to obtain such an agreement and seek approval by the IRGC constituted a fatal flaw.

## **2. The IRGC's Refusals to Approve Extended Operating Agreements were not Arbitrary, Capricious or Unreasonable**

Belle has argued the IRGC's actions or inactions relating to several proposed operating agreement extensions violated Iowa Law. However, a closer look at the facts will reveal that not only did the IRGC provide direction in what it sought in an operating agreement, it actually extended the time for such an agreement to be reached and went as far to "conditionally" approve a license application. *See* February 14 Ruling, at 11.

Belle argues in its Brief that “the IRGC cannot manufacture a legal requirement and then unilaterally prevent Belle from complying with it simply to divest Belle of its license.” Belle’s Brief in Support of Petition for Judicial Review at 24. While in a broad viewing, this may be correct, it ignores the broad discretion which the IRGC is granted with regard to operating agreements. *See* Iowa Code § 99F.5. Iowa Administrative Code § 491-5.4 (8) states:

The commission shall approve all qualifying agreements that, in the commission’s sole opinion, represent a normal business transaction and may impose conditions on an approval. The commission may deny approval of any agreement that, in the commission’s sole opinion, represents a distribution of profits that differs from commission-approved ownership and beneficial interest.

When Belle failed to present an executed agreement between itself and MRHD at the June 7, 2012 IRGC meeting, Belle requested that the IRGC extend the license to the IRGC’s July 12, 2012 meeting, whereupon Belle would introduce a new QSO as its partner. *See* February 14 Ruling, at 11. The IRGC, with the discretion granted to it by Iowa Administrative Code and Iowa Code, declined to entertain this new approach by Belle and subsequently passed a motion to open up the Woodbury County license to all interested parties. *Id.* As such, the IRGC’s actions were lawful and should be affirmed.

**II. The IRGC’s Decision to Award a Land-Based Gaming License in Woodbury County to MHRD and SCE was Legal.**

**A. Belle’s Fourth Petition for Judicial Review Cannot Succeed**

Belle has alleged in its Fourth Petition for Judicial Review, filed on May 17, 2013, that the IRGC’s April 18, 2013 award of a gaming license to SCE was unlawful. Belle has also alleged in this Petition that announcing the closure of the Argosy Casino by the IRGC constituted unlawful and improper actions.

The actions taken on April 18, 2013 by the IRGC were anything but illegal. Iowa Code § 99F.4 grants the IRGC broad supervisory roles and full jurisdiction in considering applications for gaming licenses. The IRGC is given the power to and taxed with adopting rules:

1. 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 interest of the citizens of Iowa.
2. To license qualified sponsoring organizations, to license the operators of excursion gambling boats, to identify occupations with the excursion gambling boat operations which require licensing, and to adopt standards for licensing the occupations including establishing fees for the occupational licenses and licenses for qualified sponsoring organizations...

Iowa Code § 99F.4

Belle asserts that the IRGC violated its rules when it accepted and considered an amended application by SCE which revised its financing plan. Belle is correct in asserting the IRGC's RFP stated that an application could not be amended after the deadline. However, again, the IRGC is given wide discretion by Iowa Code § 99F.4 to investigate applicants and select the applicant which best serves the interests of the citizens of Iowa. *Id.* The IRGC has the authority to amend the rules it implements in an effort to select the best candidate for the citizens of Iowa. Nothing in Iowa Code § 99F.4 prevents the IRGC from amending its own rules in an effort to further the interests of Iowa Code § 99F.4. Rather, the Commission is empowered "to take any other action as may be reasonable or appropriate to enforce this chapter and the commission rules." Iowa Code § 99F.4 (13).

#### **B. Belle's Constitutional Rights Were Not Violated by the IRGC**

Belle has alleged that the IRGC violated its due process rights. The City agrees that Belle, like any other license holder, is entitled to due process of law. However, holding a casino gambling license is a privilege, and as such, the burden of proof to renew a license is on the

applicant. 491 I.A.C. §5.1. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Hedges v. Iowa Dep't of Job Servs.*, 368 N.W.2d 862, 867 (Iowa App. 1985).

Belle fails to assert it was denied any opportunity to be heard. Actually, the facts point to the contrary. At numerous IRGC hearings, which were noticed to the public in the prescribed manner, Belle made arguments and presented information to the commission. Belle also claims due process “requires that a license holder be given notice and a fair hearing *before* losing its license. Process given *after the fact* is not due process.” *See* Belle’s Brief, p. 17. While this statement is likely true, Belle fails to incorporate all of the facts in the present matter. Belle was given repeated opportunities to remedy its deficiencies, i.e. its lack of an operating agreement. Belle, likely due to its own misgivings, failed to reach an agreement with MRHD concerning an operating agreement. The fact that the IRGC conditionally approved a gaming license for MRHD and Belle, so long as an operating agreement was executed, contradicts Belle’s due process claims. Belle fails to point out the lack of any public hearing in which it was denied any opportunity to be heard. Belle also fails to present any evidence whereupon a hearing was requested and formally denied. Belle’s due process rights were not violated by the IRGC.

### **CONCLUSION**

The City prays the Court deny the four Petitions for Judicial Review filed in this matter by the Belle for the above stated reasons, and that this matter be summarily dismissed.

Date this 19<sup>th</sup> day of September, 2014.

Respectfully submitted,

CITY OF SIOUX CITY, IOWA

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## CERTIFICATE OF SERVICE

I hereby Certify that on September 19, 2014, I electronically filed the foregoing with the Clerk of Court using the EDMS system which will send notification of such filing to the attorneys of record.

/s/ Justin R. Vondrak