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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT PALMER

State of Alaska  
Office of Administrative Hearings

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LASHBROOKS' RANCH, INC.,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	Case No. 3PA-06-1966CI
STATE OF ALASKA, DEPARTMENT	)	
OF COMMERCE, COMMUNITY AND	)	OAH No. 05-0402-TOB
ECONOMIC DEVELOPMENT,	)	
	)	
Appellee.	)	
	)	

DECISION & ORDER

Lashbrooks' Ranch, Inc. appeals the State of Alaska, Department of Commerce, Community and Economic Development's June 26, 2006 Decision & Order ("Decision") imposing a civil penalty and suspension of the right to sell tobacco.

**BACKGROUND & CASE HISTORY**

In March 2005 the Lashbrooks entered agreements to manage the Houston Lodge and to purchase an option to buy the lodge.<sup>1</sup> The agreements provided the Lashbrooks with full authority over all financial and business operations of the lodge except those directly related to the operation and control of the liquor licenses. The Lashbrooks immediately took over active management of the lodge, newly christened as Lashbrooks' Ranch, and operated it at all times relevant to this case.<sup>2</sup>

<sup>1</sup> Agency Record ("R.") at 231-237.  
<sup>2</sup> R. at 8-13.

There has been a cigarette vending machine at the lodge since long before the Lashbrooks took over.<sup>3</sup> The cigarette vending machine was owned and serviced by Tri-Valley Vending. Tri-Valley Vending had a valid tobacco endorsement at all times relevant to this case.

On May 3, 2005 the Department issued to Lashbrooks a notice of suspension of tobacco endorsement and imposition of civil penalty ("Notice").<sup>4</sup> In the Notice the Department asserted that (1) Lashbrooks was doing business without a valid business license and that (2) Lashbrooks engaged in the sale of tobacco without a valid tobacco endorsement. The Notice provides that unless the Lashbrooks requested a hearing within 15 days their right to obtain a tobacco endorsement or to sell tobacco would be suspended for 45 days and that they would have to pay a \$5000.00 civil penalty.

On May 16, 2005 Sandra Lashbrook wrote to the Department advising that she would be requesting a formal hearing and she wrote that "in the meantime, until this issue is resolved, we have unplugged the cigarette vending machine and [the lodge] is no longer dispensing tobacco products at this time."<sup>5</sup> Sandra Lashbrook later testified that they did not unplug the machine because it was hard-wired into the wall but that they did put an 'out of order' sign on it.<sup>6</sup>

Department investigator Donald Faulkenburry visited the lodge on July 22, 2005 and purchased cigarettes from the cigarette vending machine which was located in plain

<sup>3</sup> R. at 8-13.

<sup>4</sup> R. at 418-423.

<sup>5</sup> R. at 412-414.

<sup>6</sup> R. at 8-13.

view of the lodge employees. Faulkenburry later testified that there was no 'out of order' sign on the machine.<sup>7</sup>

A hearing was held on February 13, 2006. The presiding administrative law judge entered a Decision and Order on June 26, 2006. The Decision provides that the Lashbrooks did not have the requisite tobacco endorsement and for this violation a 45 day tobacco sales suspension and a \$5000 penalty were imposed. The Department adopted the Decision as the final administrative order in this matter on August 24, 2006.<sup>8</sup> The Lashbrooks moved for reconsideration in September 2006 and the Department denied reconsideration in October 2006.<sup>9</sup> The instant appeal followed.

#### JURISDICTION

The superior court has jurisdiction to hear appeals from final orders in administrative agency proceedings pursuant to AS 22.10.020(d), AS 44.62.560(a), and Alaska Rule of Appellate Procedure 601(b).

#### STANDARD OF REVIEW

Courts employ four recognized standards to review administrative decisions:<sup>10</sup> (1) the substantial evidence test for questions of fact;<sup>11</sup> (2) the reasonable basis test

<sup>7</sup> R. at 8-13.

<sup>8</sup> R. at 19.

<sup>9</sup> R. at 1-5.

<sup>10</sup> Brandal v. State, Commercial Fisheries Entry Commission, 128 P.3d 732, 735 (Alaska 2006).

<sup>11</sup> Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. Fraiman v. State, Dept. of Admin. Div. of Motor Vehicles, 49 P.3d 241, 244 (Alaska 2002). When applying the substantial evidence test, the reviewing court views the evidence in favor of the findings, and where the evidence is conflicting, the reviewing court will not reweigh the evidence and substitute its judgment for that of the trier of fact. Raad v. Alaska State Comm'n for Human Rights, 86 P.3d 899, 904 (Alaska 2004). If there is substantial evidence both supporting and opposing an agency's finding of fact, the reviewing court must affirm the agency's decision. Cowen v. Wal-Mart, 93 P.3d 420, 426 (Alaska 2004).

for questions of law or fact involving agency expertise;<sup>12</sup> (3) the substitution of judgment test for questions of law where no expertise is involved;<sup>13</sup> and (4) the reasonable and not arbitrary test for review of administrative regulations.

#### APPLICABLE LAW

AS 43.70.075(a) provides that a person may not sell or allow a vending machine to sell in its location or outlet cigarettes as a retailer at that outlet or location unless the person has a business license endorsement for that location or outlet. AS 43.70.110(4) defines the term "person" to include an individual, firm, partnership, joint venture, association, corporation, estate trust, business trust, receiver, or any group or combination acting as a unit.

#### POINTS ON APPEAL

The Lashbrooks claim five errors of law as their points on appeal:

- (1) the Department erred in relying on 12 AAC 12.020, which regulation is not authorized by any statutory authority;
- (2) the Department erred in assessing a fine five times as great as that usually made immediately payable, in a circumstance when

<sup>12</sup> See, North Star Alaska Housing Corp. v. Fairbanks North Star Borough, Bd. of Equalization, 778 P.2d 1140, 1144 n. 7 (Alaska 1989); Cool Homes, Inc. v. Fairbanks North Star Borough, 860 P.2d 1248, 1262 (Alaska 1993).

<sup>13</sup> Non-constitutional legal questions not involving agency expertise or fundamental policy are reviewed under the substitution of judgment test, where the reviewing court may substitute its own judgment for that of the agency, even if the agency's decision had a reasonable basis. Frیمان, 49 P.3d at 243. Questions of constitutional law are reviewed *de novo*. Pasco v. State, Dept. of Admin., Div. of Motor Vehicles, 45 P.3d 324, 326 (Alaska 2002).

- the appellant had filed an appeal and ceased to engage in the business in question;
- (3) the Department erred in determining that a tobacco endorsement was required of a party which neither owned the premises, nor owned the tobacco vending machines located on the premises;
- (4) the Department erred in adopting a novel interpretation of "ownership" without adopting regulations pursuant to the procedures prescribed by state law;
- (5) the Department erred in its interpretation of "sell or allow a vending machine to sell in its location or outlet" or in adopting a novel interpretation of those words without adopting regulations pursuant to statute.

The Lashbrooks also claim that the Department erred in its findings of fact concerning methods of disabling vending machines, and made findings which were unsupported by any evidence in the record on that subject.<sup>14</sup>

#### DISCUSSION

The Lashbrooks were required to have a tobacco endorsement. The Lashbrooks ran the lodge in all respects except those directly related to the liquor license, which is not at issue in this appeal. The cigarette vending machine was within the effective and actual control of the Lashbrooks, as demonstrated by the Lashbrooks' later action to disable the machine. The Lashbrooks allowed the sale of cigarettes at the lodge through the cigarette vending

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<sup>14</sup> Appellant's Brief at 1-2.

machine. The Lashbrooks meet the definition of "person" as that term is used in AS 43.70.075(a) and they are subject to the requirement of subsection (a) in that capacity. The Lashbrooks do not provide any support for their assertion that AS 43.70.075(1) in some way trumps the plain language of AS 43.70.075(a). Subsection (1) in no way contradicts the requirement of subsection (a) that a person allowing the sale of cigarettes through a cigarette vending machine have an endorsement. The Lashbrooks' lack of ownership of the premises or of the cigarette vending machine itself is immaterial. The Lashbrooks' third point on appeal is denied.<sup>15</sup>

To the extent the Department interpreted the phrase, "sell or allow a vending machine to sell in its location or outlet," the Department did not err in its interpretation of that phrase or any portion thereof. There is no ambiguity in the terms "location or outlet," and if there were it would not be relevant to the Decision on appeal herein. The Lashbrooks' citation to the *Croft* case is inapposite.<sup>16</sup> The Lashbrooks' fifth point on appeal is denied.<sup>17</sup>

To the extent the Department interpreted the term, "ownership," it did not err in its interpretation of that term. It does not appear that the Department interpreted the term at all. The term is not relevant to the Department's determination that the Lashbrooks violated the law because ownership is not necessary for a person to be required to have an endorsement. The Lashbrooks' citation

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<sup>15</sup> In deciding this point the court has applied the reasonable basis test; however, application of the substitution of judgment test, were that appropriate, would not change the result.

<sup>16</sup> *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064 (Alaska 1991).

<sup>17</sup> In deciding this point the court has applied the reasonable basis test; however, application of the substitution of judgment test, were that appropriate, would not change the result.

to the *Strane* case is inapposite.<sup>18</sup> The Lashbrooks' fourth point on appeal is denied.<sup>19</sup>

The Lashbrooks' contention that the Department cited 12 AAC 12.020 extensively, erred in relying on 12 AAC 12.020, and that this regulation is not authorized by any statutory authority, is incorrect. The Department does not appear to have relied upon 12 AAC 12.020 and the Decision never mentions this regulation. The Department did not base its Decision on the "line of business" in which the Lashbrooks were engaged. The Alaska Administrative Code lists five statutes from which this regulation derives its authority: AS 08.55.010, 43.70.020, 43.70.090, 43.70.105, and 43.70.110. AS 43.70.020(a) seems to provide ample authority regarding the "line of business" language upon which the Lashbrooks base this point on appeal. For these reasons and those mentioned by the State in its brief,<sup>20</sup> the Lashbrooks' first point on appeal is denied.<sup>21</sup>

The civil penalty and suspension of the right to sell tobacco were not unreasonable under the circumstances. The imposition of the maximum fine is not excessive and represents a reasonable determination that the Lashbrooks were in effective and actual control of the lodge and therefore they were more responsible for the violation than was Houston Lodge or its owner, Ms. Burnett. The Lashbrooks allowed the sale of tobacco through the cigarette vending machine without an endorsement for

<sup>18</sup> *State v. Strane*, 61 P.3d 1284 (Alaska 2003).

<sup>19</sup> In deciding this point the court has applied the reasonable basis test; however, application of the substitution of judgment test, were that appropriate, would not change the result.

<sup>20</sup> Appellee's Brief at 11-13.

<sup>21</sup> In deciding this point the court has applied the reasonable basis test; however, application of the substitution of judgment test, were that appropriate, would not change the result.

approximately 175 days,<sup>22</sup> including the period of time between May 16, 2005 when Mrs. Lashbrook wrote in a letter to the Department that the lodge would not be selling tobacco and the time when Investigator Faulkenburry purchased tobacco from the vending machine on July 22, 2005. The Lashbrooks had the ability to disable, in some manner, the cigarette vending machine—as evidenced by the fact that they did so after the investigator's visit—but they failed to do so.

The Department's decision not to suspend some portion of the civil penalty is not irrational and finds support in the circumstances of this case. It would make no sense to suspend a portion of the fine to try to ensure future compliance with the law when the Lashbrooks were not going to be engaged in this business in the future and thus their future compliance was not a goal. The imposition of the maximum monetary penalty also makes sense when one considers that the 45 day suspension would have no practical effect upon the Lashbrooks because they were not going to be engaged in this business in the future. There is no evidence that the maximum allowable civil penalty was imposed because the Lashbrooks requested a formal hearing.

Consideration of all the facts and circumstances present in this case yields a determination that the imposition of the \$5000 civil penalty and 45 day suspension was not unreasonable. The Lashbrooks' second point on appeal is denied.<sup>23</sup>

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<sup>22</sup> The Lashbrooks' contention that there was proof of only one actual sale of tobacco and thus at most a \$250 fine would be appropriate ignores the fact that they were not fined for one actual sale on one particular day but rather they were fined for failing to have the proper endorsement for some 175 days.

<sup>23</sup> In deciding this point the court has applied the substantial evidence test as to the factual findings upon which the Decision was based, and also applies the obviously unreasonable standard enunciated in VECO, International, Inc. v. Alaska Public Offices Commission, 753 P.2d 703, 716 (Alaska 1988).



The Lashbrooks' assertion that the Department erred in its findings of fact concerning methods of disabling vending machines and made findings which were unsupported by any evidence in the record is incorrect. To the extent that the Department actually made findings of fact (as opposed to conclusions) on these topics, the findings are supported by the record. Ms. Lashbrook testified that an electrician disconnected the cigarette vending machine from its power source, thus providing ample support for the comment in the Decision that it was difficult to believe that someone couldn't have disconnected it from the power.<sup>24</sup> This point on appeal is denied.<sup>25</sup>

**CONCLUSION**

The Department's June 26, 2006 Decision & Order is **AFFIRMED.**

DATED this 1<sup>st</sup> day of August 2008 at Valdez, Alaska.

\_\_\_\_\_  
 Daniel Schally  
 Superior Court Judge, *pro tempore*



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<sup>24</sup> R. at 13.

<sup>25</sup> In deciding this point the court has applied the substantial evidence test.

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**CONCLUSION**

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DATED this 1<sup>st</sup> day of August 2008 at Valdez, Alaska.

\_\_\_\_\_  
Daniel Schally  
Superior Court Judge, *pro tempore*



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<sup>24</sup> R. at 13.

<sup>25</sup> In deciding this point the court has applied the substantial evidence test.