

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF COMMERCE,
COMMUNITY AND ECONOMIC DEVELOPMENT**

In the Matter of)
)
Lashbrooks' Ranch, Inc.) OAH No. 05-0402-TOB
) Agency Case No. 0501-05-052

NOTICE TRANSMITTING FINAL DECISION

Attached is the Department of Commerce, Community and Economic Development's (DCCED's) final decision in this matter, which the Commissioner's designee adopted on August 24, 2006.

A party may request reconsideration of the decision by filing a petition under 12 AAC 12.845 within 20 days after issuance of the decision. Send the motion for reconsideration to the following address:

Office of Administrative Hearings
Attn. DCCED
P.O. Box 110231
Juneau, Alaska 99811-0231

At the same time, send a copy of the petition to the opposing party's legal counsel, or to the opposing party if not represented by counsel.

Judicial review of DCCED's decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED this 25th day of August, 2006.

By: _____

Kim Rechin
Office of Administrative Hearings

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

AAG Drinkwater
D. Burton
A. Lee Peterson

Signature

Date

8.25.06

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
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IN THE MATTER OF)	
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LASHBROOKS' RANCH, INC)	Case No. OAH 05-0402-TOB
)	Agency Case Nos. 0501-05-052
_____)	

DECISION AND ORDER

I. Introduction

Lashbrooks' Ranch, Inc. ("Lashbrooks'") appeals from an Amended Notice of Suspension of Tobacco Endorsement and Imposition of Civil Penalty issued by the Division of Corporations, Business and Professional Licensing ("the division"). Administrative Law Judge Dale Whitney heard the appeal on February 13, 2006 in Anchorage. Attorney Dan Burton represented Lashbrooks' Ranch, Inc. Assistant Attorney General Cynthia Drinkwater represented the division. This case was initially joined with another case, *In the Matter of Houston Lodge, Inc.*, that was based on some of the same facts. Houston Lodge, Inc. withdrew its request for an evidentiary hearing, and recommended penalties for Houston Lodge, Inc. are addressed in a separate proposed decision. For Lashbrooks', the administrative law judge recommends that a civil penalty in the amount of \$5000 be imposed in this case, along with suspension of the right to sell tobacco for 45 days.

II. Facts

Standing at Mile 57.1 of the Parks Highway is a roadhouse building containing a restaurant, a bar, and some lodging facilities. For purposes of this case, the building and premises are referred to as "the lodge." The actual name of the business that has occupied the lodge over the last year is a matter of some dispute; before March, 2005, the establishment was known as the Houston Lodge.

Some time in the past, the Houston Lodge had been operated by a Mr. Wallace and his wife, Louise Wallace. The Wallaces sold the business to Rosemary Burnett and her husband in a handshake deal with no written contract, except for a note on the realty. The Burnetts operated the lodge as a corporate entity, Houston Lodge, Inc. When Mr. Wallace and Mr. Burnett passed away at about the same time, the business had been doing fine, with only a \$25,000 debt left on the note. With the help of her son, Richard Johnson, Ms. Burnett continued to operate the business, but the health of the business began to deteriorate for various reasons, including a period of road

construction that blocked access to the building for about two years. Falling behind on the payments for the note, Ms. Burnett took a high-interest loan to cover expenses, using her home as collateral. As late fees on the loan mounted, Ms. Burnett fell into financial distress. Around this time she also suffered a heart attack, which limited her ability to maintain the business.

At some point, Mike and Sandy Lashbrook heard that the Houston Lodge was for sale, and they made inquiries. They found that because of the unknown profitability of the existing enterprise and lack of business records, financing would be difficult or impossible to arrange. The Lashbrooks and Ms. Burnett were unable to arrange a financing scheme for an immediate sale that would be able to timely satisfy the due-on-sale clause in the note to Ms. Wallace.

After some further discussion, Ms. Burnett and the Lashbrooks decided to work out a plan whereby the Lashbrooks would purchase an option on the lodge real estate and take over management of the business. The Lashbrooks believed that, with a different approach to management, the business could become profitable. The Lashbrooks and Ms. Burnett hoped that after a year or two of sustained and documented profitability the Lashbrooks would be able to attract a lender and exercise their option on the premises. Toward this end, Ms. Burnett and the Lashbrooks entered into a contract entitled "Mutual Management Agreements."¹ The official parties to the contract were the Lashbrooks "in their individual capacities and as promoters for a corporation or limited liability company or companies they intend to form," and Rosemary Burnett and Richard Johnson in their "individual capacity as well as their capacity as officers and shareholders of the corporations (all collectively called "Houston Lodge" hereafter in this agreement) whose address is P.O. Box 940047, Houston, Alaska."

The contract purported to employ the Lashbrooks "to manage the financial and business operations of The Houston Lodge, other than those duties related to operation and control of the liquor licenses, which must be retained by Rosemary Burnett and/or Richard Johnson, in order to avoid violating state or federal liquor laws." The agreement gave the Lashbrooks "complete control over all money of the corporation." Ms. Burnett and Houston Lodge did not have the authority to terminate the agreement until January 1, 2018, except for cause, whereas the Lashbrooks had authority to terminate the agreement at any time. The Lashbrooks were given full authority over all accounts related to the business. Houston Lodge was required to immediately fire all employees, and the Lashbrooks took responsibility for hiring and supervising all new personnel, except to the extent Ms. Burnett needed to exercise authority to maintain the liquor license. The contract gave

the Lashbrooks "complete charge of purchasing and all financial transactions of The Houston Lodge, and complete charge of all business operations of any kind" except to the extent necessary to avoid violation of liquor laws. The contract provided that Houston Lodge, Inc. would pay the Lashbrooks \$3,500 per month for their services, and it specifically stated that the Lashbrooks would retain all rights to the names "The Ranch" and "Lashbrooks' Ranch."

The contract also provided that

The Lashbrooks may provide management services individually or through a corporation or limited liability company, of which they are the principal shareholders and officers. If they elect to transfer those duties to a company, then the transfer shall constitute a novation and shall substitute the company as a party, with [*sic*] and the Lashbrooks shall have no further personal responsibility under the management contract."

At the same time the contract was executed on March 9, 2005, Ms. Burnett and Mr. Johnson also conveyed to the Lashbrooks an option to purchase the real estate on which the lodge was located.

As soon as the contract was executed, the Lashbrooks took possession of the lodge and began operating it. Ms. Burnett continued to participate in the enterprise, offering substantial advice, consulting on the extensive décor and menu changes, and exercising authority when necessary in matters related to the serving of alcohol. But for the most part, the Lashbrooks were in charge of day-to-day operations. If a business disputes arose, Ms. Burnett's authority was limited to offering advice, except that she had the final say in any matter involving the sale of alcohol.

Upon taking over operations, the Lashbrooks immediately went about creating a new public persona for the business. Ms. Lashbrook prepared an article for submission to the Talkeetna Times, which ran the story with the following lead:²

Formerly the Houston Lodge, Lashbrooks' Ranch, now managed by Sandy and Mike Lashbrook as of March 10th, has a fresh, new "country" look and feel. Sandy and Mike will manage the operation (with the exception that the owner still maintains, operates and controls the liquor licenses) until they exercise their exclusive option to buy the Lodge in the near future. "We're keeping what was great about the Houston Lodge, and adding a new country decor along with tasty home-cooked meals all day long into the mix, plus live music every Friday and Saturday night," says Sandy. "The Ranch," as it's fondly referred to by the "Ranch hands," indeed has a fresh new look, including all new carpeting, a new laminate dance floor, and a gigantic stage for the weekly entertainment. You'll also see a few cattle skulls, a couple of saddles, and a few cow hides on the walls. "The bands play mostly Country and Classic Rock, which makes for great dance music," says Mike, who's been the drummer and a lead singer for the popular Ken Peltier Band for over four years.

¹ Exhibit 2.

² Exhibit 5, p. 9.

Starting in March 2005, the Lashbrooks advertised the business as “Lashbrooks’ Ranch (formerly Houston Lodge).”³ At one point it was advertised as “Lashbrooks’ Ranch, Inc. (Formerly Houston Lodge),”⁴ and elsewhere it was advertised as “Lashbrooks’ Ranch, Formerly Houston Lodge (Now DBA Lashbrooks’ Ranch).”⁵ The menu welcomed patrons to “The Ranch, now managed by the Lashbrooks.”⁶ According to its business license, Lashbrooks’ Ranch, Inc.’s sole line of business is management of companies and enterprises. In July of 2005, the Lashbrooks learned that it was a violation of either liquor or business licensing laws to advertise without showing Houston Lodge, Inc. as the principal business entity. From then on that name was included in all promotional materials, sometimes in finer print, as in the flyer shown in Exhibit 5, page 4: “LASHBROOKS’ RANCH, Houston Lodge Inc., DBA Lashbrooks’ Ranch.”

At the hearing, Ms. Lashbrook testified that from March, 2005, until the time of the hearing in February, 2006, the business lost at least \$119,000, and probably another thirty or forty thousand that she advanced out of her personal funds. The Lashbrooks never collected the \$3500 monthly salary that the contract guaranteed them. Ms. Lashbrook testified that as of the hearing date, the Lashbrooks had made a decision to give up on the venture and exercise their privilege of terminating the contract, and that the Lashbrooks would be giving the keys back to Ms. Burnett and closing all accounts in the name of Lashbrooks Ranch, Inc. Ms. Burnett testified that she had contacted her lawyer and intended to initiate termination of the contract for cause.

Since the time that Ms. Wallace owned the lodge, there has been a cigarette machine and several other types of vending machines in the lodge, including a pool table and a dart board. All of these machines have been constantly owned and serviced by a company called Tri-Valley Vending. Tri-Valley Vending has had a valid tobacco endorsement at all times, but it was not aware that its clients also needed an endorsement, and it never advised them to obtain one. During the time that the Lashbrooks were operating the business, a Tri-Valley employee would regularly service the machines and remove the quarters. For most of the machines, income was divided between Lashbrooks’ Ranch, Inc. and Tri-Valley when the Tri-Valley employee serviced the machines and removed the quarters. Tri-Valley retained all income from the cigarette machine. Tri-Valley’s basis for retaining the cigarette revenue was that Ms. Burnett had apparently sold some darts belonging to Tri-Valley, so the vendor was retaining the cigarette machine money to pay off the

³ Exhibit 5, pp. 7, 15, 18.

⁴ Exhibit 5, p. 8.

⁵ Exhibit 5, p. 6.

⁶ Exhibit 5, p. 20.

darts. There was never any accounting or paperwork recorded for these transactions, and there is no known written contract or agreement between Tri-Valley and either Lashbrooks' Ranch, Inc. or Houston Lodge, Inc.

On May 3, 2005, the division issued a Notice of Suspension of Tobacco Endorsement and Imposition of Civil Penalty to Lashbrooks' Ranch, Inc. On May 16, 2005, Ms. Lashbrook wrote a letter to the division's Acting Chief Investigator in which she stated that she would be requesting a formal hearing, and advising that "in the meantime, however, until this issue is resolved, we have unplugged the cigarette vending machine and the Houston Lodge is no longer dispensing tobacco products at this time."

In her testimony, Ms. Lashbrook stated that upon receiving the notice, the machine was not unplugged. She stated that somebody had attempted to unplug the cigarette machine, but found that it was hard-wired into the wall. Rather than actually unplugging the machine, Ms. Lashbrook testified that an "out of order" sign was placed on the machine, and that all of the patrons were generally aware that cigarettes were not available for the time being.

An investigator for the division, Donald Faulkenburry, testified that on July 22, 2005, he visited the establishment at the request of the assistant attorney general handling this case. Investigator Faulkenburry testified that on that day he visited the establishment with another division employee around lunch time and bought lunch, paying for the meal with a credit card. The credit card receipt was headed with the business name "Lashbrooks Ranch, Inc." He testified that there was nothing about the cigarette vending machine to indicate that it was not in service, and that in full view of a waitress or counterperson he got up, walked to the machine, put some money into it and obtained a pack of cigarettes. Investigator Faulkenburry testified that in spite of the obviousness of his purchase in plain view of the counter, nobody from the establishment made any effort to interfere.

Ms. Lashbrook testified to her belief that Investigator Faulkenburry's purchase of cigarettes was a set-up orchestrated by Ms. Wallace. She stated that the "out of order" sign had been placed on the machine, and then

weirdly, the day that Mr. Faulkenburry shows up, actually it was the day after, we discovered the sign was mysteriously missing. It had not been missing virtually up until about the day or two that he arrived. We discovered it the day after. Which I thought was a little weird. But knowing that, knowing about all the things that Louise Wallace called, tried to sabotage and have investigated, and complained about and wrote letters, and I'm talking I had experience with that, I knew what had happened. She knew he was coming. And one of her cronies went in and surreptitiously took the sign off.

Ms. Lashbrook testified that after this discovery, an electrician or someone who at least had the ability to work with wiring was hired to disconnect the machine from the power.

When Investigator Faulkenburry visited the premises, he took pictures of the signs displayed at the business. A large pole sign showing some age displayed the words, "Houston Lodge, Cafe & Lounge, Liquor Store."⁷ This sign had an image of a burger and beer, with space for temporary lettering where the characters "2 AM" were displayed.⁸ The front of the building displayed a fairly elaborate painted wooden sign with an image of a brown bear eating a salmon, and the words "Houston Lodge Restaurant" painted in an ornamental Old West format.⁹ Near the road, a temporary canvas sign tied over a portable reader board displayed the words "The Ranch" under the inscription, "Now Managed by the Lashbrooks."¹⁰ This sign advised passersby "Breakfast (from 7 am), Lunch & Dinner Now Served!" and "Sara & Sylvia (formerly at Mahoney's) Now Cooking Here!" The bottom of this sign further informed the public, "LIVE MUSIC or Karaoke/DJ Every FRI/SAT NIGHT!" As shown in Investigator Faulkenburry's photograph, at the time of this visit the canvas portion of the sign had become partly detached, and the sign was not entirely visible unless a person held up the top corner.

III. Discussion

a. Lashbrooks' Ranch, Inc. is Liable for Allowing Sale of Tobacco from a Vending Machine at its Location or Outlet.

Count II of the Amended Notice of Suspension of Tobacco Endorsement is based on AS 43.70.075, which reads in part:

(a) unless a person has a business license endorsement issued under this section for each location or outlet in a location where the person offers tobacco products for sale, a person may not sell or allow a vending machine to sell in its location or outlet cigarettes, cigars, tobacco or other products containing tobacco as a retailer at that location or outlet. Each endorsement required under this section is in addition to any other license or endorsement required by law....

* * * * *

(k) if a person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violates a provision of (a)...of this section, the department may suspend the person business license endorsement or right to obtain a business license endorsement for a period of not more than

⁷ Exhibit 3, p. 7.

⁸ Exhibit 3, P. 7.

⁹ Exhibit 3, p. 8.

¹⁰ Exhibit 3, p. 9.

(1) 45 days....

* * * * *

(s) if a person violates (a) of this section, the department may impose a civil penalty not to exceed \$250 for each day of the violation. The total civil penalty imposed under this subsection for each violation may not exceed \$5,000. The civil penalty described in this subsection may be imposed in addition to a suspension of a business license endorsement or the right to obtain a business license endorsement ordered by the department under (k) or (o) of this section.

Lashbrooks' Ranch, Inc. concedes that there was a vending machine selling tobacco on the premises, and that it was aware of the fact. Lashbrooks' argues that it is not liable for a civil penalty or suspension of its right to hold a tobacco endorsement because the premises concerned was not Lashbrooks' location, and that Lashbrooks' Ranch, Inc. was not the person selling tobacco or allowing a vending machine to sell tobacco.

The essence of Lashbrooks' argument is that it was merely an agent or employee of Houston Lodge, Inc. and was therefore not responsible for the placement of the vending machine in the premises. Lashbrooks' argues that because it had not exercised its option to purchase the property, it is not liable under the statute because it did not own the premises. Lashbrooks' takes the position that it only did business with Houston Lodge, Inc., and did not do business with the public.

The preponderance of the evidence shows that Lashbrooks' Ranch, Inc. was doing business with the public, and regardless of ownership of the underlying real estate, the lodge was its "location or outlet." The essence of business is trade, the exchange of money for goods and services. When patrons came into the lodge and purchased food or lodging, they gave money to Lashbrooks' Ranch, Inc. Customers writing checks were directed to make payment to Lashbrooks' Ranch, Inc. Those using credit cards were required to sign for payment to Lashbrooks' Ranch, Inc., and the receipt showed payment made to Lashbrooks' Ranch, Inc.¹¹ While Ms. Lashbrook asserts that this was merely for convenience of accounting, the record is clear that Lashbrooks' Ranch, Inc. controlled the money it took in and decided what to do with it. The corporation did not merely enter figures in the books and hand the money over to Houston Lodge, Inc. Further, although the contract purported to grant the Lashbrooks the right to a salary, the Lashbrooks never collected any salary from Houston Lodge. To the contrary, Ms. Lashbrook contributed tens of thousands of

¹¹ Exhibit 5, p. 30.
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dollars of her own personal money into the enterprise, with no expectation of repayment other than to benefit if the enterprise prospered. These are the actions of an entrepreneur, not of an employee. Regardless of any provisions in the written contract, the legal status of the underlying real estate, or the line of business listed on its business license, Lashbrooks' Ranch, Inc. was in business with the public, and the outlet for its products was in the lodge.

A great deal of evidence in this case regarded the location's signage and the business's promotional materials. Lashbrooks' assertion that its signage and promotional materials using variations of the words "Lashbrooks'" and "Ranch" constituted nothing more than a part of the theme of the establishment is unpersuasive. The building had several older, permanent signs identifying it as Houston Lodge, with a new temporary sign identifying the business as "The Ranch" under the information that it was "NOW MANAGED BY THE LASHBROOKS." A reasonable conclusion a member of the public would be most likely draw is that a new owner had taken over the establishment but not yet changed the permanent signs. This impression would be reinforced upon viewing the menu, and confirmed on payment for any purchases.

Lashbrooks' argues that it is a victim of selective enforcement. According to this view, Investigator Faulkenburry unfairly worked in concert with Ms. Wallace to help sabotage the Lashbrooks so that she could foreclose on the lodge. The preponderance of the evidence does not support this assertion. Investigator Faulkenburry testified that when Ms. Wallace contacted him to initiate this case, he immediately sensed that she "had an axe to grind." The investigator testified that it is not uncommon for members of the public to report violations because they have some personal dispute with the license holder. The investigator testified that he informed Ms. Wallace that he would investigate the case, but only in accordance with the routine procedures he would use in any case, and that she would not be able to exercise any influence over the investigation. Ms. Wallace may have hoped to use the division to harm the Lashbrooks, but there is no evidence that the division investigated and pursued this case differently than it would have pursued any other similar case. To the contrary, it appears that the division routinely makes efforts to avoid the influence of people outside of the department with personal agendas, and that the division followed that practice in this case.

b. Penalties.

AS 43.70.075 provides for a suspension of the right to sell tobacco for up to 45 days, and a fine of \$250 for every day that the person allowed a vending machine in its location or outlet to sell tobacco, up to a maximum of \$5000. Because the vending machine was in operation for more than

20 days since Lashbrooks' Ranch, Inc. began doing business in the location, a fine of up to the maximum is allowed by law. Investigator Faulkenburry presented evidence showing that the majority of cases are typically settled without a hearing for a penalty of \$5000 with \$4000 of that amount stayed, contingent on future compliance with the statute. A 45-day suspension of the tobacco endorsement is typical in these cases.

The typical penalty should be the starting point for determining the penalty in this case. Lashbrooks' Ranch, Inc. should not be penalized because it opted for a hearing instead of agreeing to settle the case. Several factors in this case support a higher fine than is typical.

Because Lashbrooks' Ranch, Inc. has decided to give up the business and no longer operate as a retailer of tobacco, any suspension of the right to sell tobacco will have no effect in this case. Likewise, there is no point to staying of a penalty in this case in exchange for future compliance with the statute.

While it might be argued that culpability in this case could be shared with Houston Lodge, Inc., the greater responsibility rests with Lashbrooks' Ranch, Inc. The evidence showed that Ms. Burnett did the best she could to keep the business viable after her husband's death and her own heart attack, but she was aware there were problems with the ongoing operation of the business and that she was not able to take care of all of them. While she may not have been specifically aware of the tobacco endorsement issue, or done anything to try to resolve it, this particular issue could be counted within the array of matters overwhelming her in the operation of the lodge. Ms. Burnett was actively doing her best to get out of the business and turn it over to someone who had the resources and energy to identify and resolve such matters and to bring the business up to standards and profitability so that she could sell out of it and retire. There was a clear understanding that it was the Lashbrooks, as managers and ultimately as owners, who would be seeing to such matters and handling paperwork and business matters. After March of 2005, Ms. Burnett's only real role in the enterprise was to offer advice and to exercise authority in the field of liquor sales. The only reason she retained this authority was because the law required it until the Lashbrooks qualified to have the liquor license transferred to them and were able to pay for it and the rest of the business.

Finally and most importantly, it was Lashbrooks' Ranch that was in control of the operations of the premises after the notification of non-compliance with the tobacco statute. Lashbrooks', not Houston Lodge, had the ability and the responsibility to stop the sale of tobacco on the premises after the notice was issued. As between the two parties, Houston Lodge was not expected to oversee any day-to-day operations that were not related to the sale of alcohol. The parties did not

expect that Ms. Burnett or anyone from Houston Lodge would necessarily even be in the establishment on a given day, and under the contract she arguably lacked any authority to stop the sale of tobacco. Lashbrooks' Ranch, on the other hand, staffed the premises every day and supervised all the employees. The division served Lashbrooks' with notice of the violation, and Ms. Lashbrook assured the division in writing that the vending machine had been unplugged and tobacco sales would be halted until the matter was resolved. In fact, the machine was still plugged in, and at least on some days tobacco continued to be sold.

Ms. Lashbrook's assertion that the business was only selling tobacco after service of the notice because of a plot by Ms. Wallace lacks credibility. But even if it were entirely true, this factor is not deserving of consideration. Lashbrooks' Ranch had employees in the business constantly supervising during business hours. The cigarette machine was at all times within view of waiters or counterpersons. Ms. Lashbrook testified that "we walked by it a hundred times a day." According to her testimony, at the minimum it took the business two days to even notice that the sign indicating that the machine was out of order had been removed, and it could have been longer. Even if Lashbrooks' was the victim of a plot, it should have discovered the removal of the sign immediately, not after several days. It is difficult to believe that some method of physically disabling the machine, whether by cutting the power supply, calling Tri-Valley to remove the cigarettes in it, completely covering the machine, or some other method could not have been thought of. Investigator Faulkenburry testified that he purchased cigarettes with no difficulty from the staff. It is clear that even after it had been notified that it was not in compliance with the licensing laws, Lashbrooks' Ranch failed to exercise the oversight required of a person allowing the sale of tobacco at its location outlet.

IV. Conclusion

Under the circumstances of this case, suspension of the right to sell tobacco for 45 days and a civil penalty a fine of \$5000 with no amount suspended or stayed is an appropriate penalty. The administrative law judge hereby recommends such a decision.

V. Recommended Order

IT IS HEREBY ORDERED that Lashbrooks' Ranch, Inc. pay a civil penalty of \$5,000.00 within thirty days of the day this decision becomes final, or before an alternative time that may be determined by the division;

IT IS FURTHER ORDERED that Lashbrooks' Ranch, Inc. may not sell tobacco or allow a tobacco vending machine to operate at the premises located at Mile 57.1 Parks Highway, Houston, Alaska for a period of forty-five days to be specified by the division.

DATED this 26 day of June, 2006.

By:

DALE WHITNEY

Administrative Law Judge

