

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

IN THE MATTER OF)	
)	
Ketchikan Entertainment Center)	Case No. OAH 07-0180-TOB
dba Roller Bay Bar)	Agency Case No. 0501-07-093
_____)	

DECISION

I. Introduction

The Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing (“the division”), notified Ketchikan Entertainment Center LLC (“KEC”), doing business as Roller Bay Bar, that it was suspending KEC’s entitlement to hold a business license tobacco endorsement for 45 days and was imposing a civil fine of \$5,000.00. KEC requested a hearing. The Commissioner of Commerce, Community and Economic Development referred the case to the Office of Administrative Hearings to establish the facts and recommend a decision. Administrative Law Judge Dale Whitney heard the case on June 25, 2007. George Tipton represented KEC by telephone. Assistant Attorney General Cynthia Drinkwater represented the division. Because the division has not proved that Ketchikan Entertainment Center violated AS 43.70.075, no penalties should be imposed.

II. Facts

The following facts were established by the testimony of Investigator Faulkenburry and Mr. Tipton at the hearing.

The licenses and events of this case all relate to a single large building located at 2050 Sea Level Drive in Ketchikan. This building is divided into three departments; a bar, a pizza restaurant, and a bowling alley that is apparently no longer in operation. There are two main entry doors on one side of the building that lead into a corridor providing access to all three of the departments. On the other side of the building are three separate doors, one leading into each specific department. There are no signs inside the building identifying the different departments, but the interior is divided such that a patron can see the difference between the bar, the restaurant, and the bowling lanes. There are no signs inside the building that mark or designate separate businesses. The building as a whole is known to the Ketchikan public as “The Entertainment Center.”

The Entertainment Center is owned by a business entity that, in one form or another, has essentially consisted of George Tipton and David and Lori Coates and has been known by some variation on the words “Ketchikan Entertainment Center.” The entity had been a partnership, but some time around 1999 the partners reorganized as Ketchikan Entertainment Center, LLC, a limited liability company, with each of the former partners now members of the LLC.

On November 5, 1999, Lori Coates submitted a business license application for Ketchikan Entertainment Center, LLC.¹ The application form contains a box for “Business Classification Code (choose one 4-digit number from the code list on the back).” Ms. Coates wrote in, “5800” to this question. The form then directed the applicant to list business activities in order of importance. Ms. Coates wrote, “Food Service (restaurant), Lounge and Bowling (Food & alcohol sales). The form also asks, “do you sell tobacco products?” and directs applicants to pay an additional \$25.00 if the answer is affirmative. Ms. Coates checked a box stating “no” to the tobacco question, and indicated that the fee enclosed was \$50.00, which did not include the additional \$25.00 that would be required for a tobacco endorsement.²

The division responded with a form stating that it could not issue the license without further information.³ The division typed into a box for “OTHER” information needed the following:

Due to changes in the business classification codes in describing your business activities, we are furnishing you a list of the new codes for reference. Please choose the 2-digit LOB (line of business) code as well as the 4- or 6-digit Primary Activity code and Secondary Activity code (if any) to describe your business best. The primary and secondary activity codes should fall under the same LOB. If your business falls under more than one LOB you will need more than one license. If your primary or secondary activity is a 6-digit code you will need a current occupational or professional license before a business license can be issued. Please provide us these information [*sic*] as highlighted in the enclosed business license application and send it back together with this letter.

Ms. Coates returned the form with the handwritten notation, “From what I understand, we will need another business license because of LOB’s. Enclosed is a second check for \$50.00 for the second bus. license along with the second application. Please let us know if this is incorrect.”⁴ Ms. Coates enclosed two applications forms, one for the business name Ketchikan Entertainment Center, LLC in line of business 71 and one for Ketchikan Entertainment Center in line of business 72.⁵ Neither of these applications indicated that the business would be selling tobacco. In response, the

¹ Exhibit 1, page 6.

² *Id.*

³ Exhibit 1, page 5.

⁴ *Id.*

⁵ Exhibit 1, pages 2-3.

department issued two business licenses on January 10, 2000: License number 273635 for an entertainment or amusement center, such as a bowling alley, and license number 273645 for a full-service restaurant.⁶ Investigator Faulkenburry testified that a tobacco endorsement had been issued for license 273645 some time in 2005 when the business license was renewed, and that it is valid through 2007. The records available to Investigator Faulkenburry do not show whether endorsements were issued prior to the current licensing period, and there was therefore no evidence as to when KEC first acquired an endorsement. There is evidence as to whether KEC may have been selling tobacco prior to 2005.

KEC has renewed its two business licenses biennially since they were issued in 2000. According to Mr. Tipton, on November 10, 2006, the state conducted a sting operation in which a minor (apparently without success) attempted to purchase both alcohol and cigarettes at the Entertainment Center. At that time, the officer in charge of the sting inspected one of KEC's business licenses, and advised a KEC employee that KEC appeared to lack a tobacco business license endorsement. However, the officer was looking at license number 273635, and he did not see license 273645, which did have a tobacco endorsement.

Mr. Tipton testified that in response to this information, he contacted the owner of the cigarette vending machine, whom he believed had paid the division for an endorsement to one of KEC's business licenses, to confirm that the payment had been sent.

Mr. Tipton then contacted the division. A division employee told Mr. Tipton that his business licenses were defective, because they had been issued in the name of the business owner, Ketchikan Entertainment Center, LLC, and not the name of the two individual businesses, Godfather's Pizza and Roller Bay Bar. The division sent Mr. Tipton two applications for new business licenses, with the names "GODFATHER'S PIZZA" and "ROLLER BAY BAR" typed in the boxes for the business names. The division also sent a separate "Tobacco Endorsement" form for Roller Bay Bar. The codes for the lines of business had been typed in as well. In response, Mr. Tipton sent the following letter to the division on December 3, 2006:

Enclosed are the applications for Godfathers Pizza and Roller Bay bar with a Tobacco endorsement for Roller Bay. Also Enclosed is a check for \$200 for the business license for Godfathers and one year for the tobacco endorsement for Roller Bay. I am not paying the \$100 for the Roller Bay business license because I have already paid it when I renewed the license in October 2005, which is good thru December 2007. You are the one requesting the change and it is absolutely ludicrous that this existing license cannot be utilized for the one of the one's you are requiring. The ownership, address, entities are all the same. The only

⁶ *Id.*

difference is a DBA, which you are requiring. These businesses have been here for 23 years and I have personally filled out paperwork in the past that reflected a restaurant, a bar and a bowling center, and no one from the department ever questioned those renewals. They just issued the business license as I now have it (copy attached).

Mr. Tipton checked the following two boxes on the Roller Bay application: “Annual License \$100” and “Tobacco Endorsement \$100 each location.” He also returned the tobacco endorsement form indicating 2050 Sea Level Drive as the location where tobacco would be sold.

The division contacted Mr. Tipton to say that the application for Godfather’s Pizza could not be issued, because the name had already been used in Alaska. After some discussion by phone, fax and email, Mr. Tipton told the division to use the name “Godfather’s Pizza – Ketchikan.” The division then issued license number 902262 for Roller Bay Bar and 902688 for Godfathers Pizza – Ketchikan. Of the \$200 that Mr. Tipton enclosed, the division apportioned \$100 to each business license, but it did not issue the requested tobacco endorsement for Roller Bay Bar. Eventually, after some telephone and email communications, Mr. Tipton sent in another application for a tobacco endorsement for Roller Bay Bar with another \$100, and the division issued a tobacco endorsement for business license number 902262 on May 16, 2007. Ketchikan Entertainment Center, LLC now has four valid business licenses and two tobacco endorsements for the Entertainment Center.

Investigator Faulkenburry testified that he first became aware of Ketchikan Entertainment Center when tobacco tax investigators from the Department of Revenue went to Ketchikan and checked area businesses for compliance with the state’s tobacco tax requirements. The tax investigators contacted Investigator Faulkenburry and advised him that they had been to the bowling alley in Ketchikan and found that tobacco was being sold, but they did not see a tobacco endorsement on a business license. Investigator Faulkenburry found that a tobacco endorsement was on file for Ketchikan Entertainment Center at the address in question, but “the investigators for the Department of Revenue were unclear whether the establishment they had visited was named Ketchikan Entertainment Center or was named something else. They were simply unclear about it.” The division employee who had advised Mr. Tipton to obtain new business licenses expressed an opinion to Investigator Faulkenburry that Mr. Tipton did not intend to comply with the law, but there is no evidence in the record indicating how the business or businesses in the Entertainment Center are marketed and held out to the public, other than Mr. Tipton’s description of the building and his testimony that people in Ketchikan know the building as The Entertainment Center. Though it was not offered as evidence, the fax cover sheet Mr. Tipton used to send documents to

the OAH and the division has a large header reading, “Ketchikan Entertainment Center, 2050 Sea Level Drive, Ketchikan AK 99901” with a phone and fax number. The bottom of the page has three cartoon drawings of a couple seated at a table, a bowling ball striking pins, and a pizza pie with respective names and phone numbers for Roller Bay Bar, Ketchikan Bowling Center, and Godfather’s Pizza below the drawings. A word after “Roller Bay” has been crossed out, and “Bar” has been written in its place with a pen. The words “Ketchikan Bowling Center” have been lined out with a pen.

III. Discussion

According to AS 43.70.075(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. A person may not apply for an endorsement under this section for a location or outlet if an endorsement issued for the same location or outlet is currently suspended or revoked. An endorsement issued for a location or outlet to a person in violation of this subsection is void.

There is no dispute the owner of the Entertainment Center and everything within it is Ketchikan Entertainment Center, LLC. Further, there is no dispute that at all times at least after October 31, 2005, Ketchikan Entertainment Center LLC held a tobacco business license endorsement for the location where tobacco was sold, which is at 2050 Sea Level Drive in Ketchikan. This endorsement is still in effect.

The division argues that the tobacco endorsement does not meet the requirements of the above statute because it was issued in the name of Ketchikan Entertainment Center, LLC not Roller Bay Bar. The division’s argument fails for two reasons. First, the division did not prove that Ketchikan Entertainment Center, LLC was doing business as Roller Bay Bar. Other than Mr. Tipton’s description of the premises, there is no evidence supporting the division’s assertion that Roller Bay Bar is held out to the public as a separate business entity from The Entertainment Center. Nobody testified about signage or advertising. Investigator Faulkenburry testified that the Revenue investigators didn’t know where they had been or what it was called. It may be that, as is often the case in rural Alaska and the smaller towns, businesses are known to locals and there is no need for signage and advertising. Mr. Tipton conceded that it isn’t entirely clear what the

businesses are officially called. He testified that the building is known as the Entertainment Center, and he described the different areas in the building as “departments.”

Under its own regulations, the division has the burden of proof in this case. The division did not prove by a preponderance of the evidence that the restaurant, bar, and bowling alley in the Entertainment Center are in fact held out to the public as separate, discrete business entities.

The second reason the division’s argument fails is that the statute in question, AS 43.70.075(a), requires that “a person ha[ve] a business license endorsement issued under this section for each location or outlet in a location where the person offers tobacco products for sale.” Ketchikan Entertainment Center, LLC, met this requirement. While the evidence does not establish it, it is possible that Ketchikan Entertainment Center, LLC has been in violation of AS 43.23.020(a), which requires a business license to include “the business name to be used by the licensee.” If so, perhaps appropriate action should be taken to enforce that statute. But there is no dispute that the entity that is the subject of this case is Ketchikan Entertainment Center, LLC, and that this entity had paid in full the appropriate fees and held in its possession a tobacco endorsement that clearly indicated it would be selling tobacco at 2050 Sea Level Drive in Ketchikan. There is no allegation that Ketchikan Entertainment Center, LLC sold tobacco or allowed the sale of tobacco from a vending machine at any other location than the Entertainment Center at 2050 Sea Level Drive.

Investigator Faulkenbury testified that, in his opinion, the legislature’s purpose in establishing the tobacco endorsement requirement was to generate a list of businesses selling tobacco to assist in enforcement of both tobacco tax requirements and to monitor for illegal sales to minors, as well as to generate revenue. Investigator Faulkenbury offered his opinion that if the endorsement is not in the precise name of the business, the businesses will not be inspected and the state could lose federal funding. Investigator Faulkenbury testified that if an investigator went with an undercover minor to attempt the purchase of cigarettes from Ketchikan Entertainment Center, and upon arrival at 2050 Sea Level Drive saw that name of the business was actually Roller Bay Bar or Godfather’s Pizza, “the most likely scenario in that case is that they would go to the next place on their list, particularly where the business, as in this case, is in a building with several other businesses as well.”

There was no evidence in this case about what an investigator would have seen from the outside at 2050 Sea Level Drive, but it appears quite possible from Mr. Tipton’s testimony that upon entering the building a person would be able to discern that cigarettes were available before the person was able to discern what business name might apply. The argument is questionable in

light of the fact that it was investigators inside the building checking for tax stamp compliance and sales to minors that brought The Entertainment Center to the division's attention. It appears that all of the aims of the statute were met in this case. It is also notable that the division refused to issue a license in the name that it believed should be used for the restaurant, "Godfather's Pizza," because it turned out that somebody else in the state also uses that name. The name that the division finally approved, "Godfather's Pizza – Ketchikan" is close to the actual name the division first indicated should be used, but nobody, including the division, has ever believed that to be the precise name held out to the public.

In any case, the division's burden is to prove a violation of the statute, not a violation of an investigator's opinion as to the intended spirit and practical workings of the statute, valid as that opinion may be. The statute required Ketchikan Entertainment Center, LLC, to have a tobacco endorsement for 2050 Sea Level Drive. The evidence does not establish that separate areas inside The Entertainment Center are separated to such a degree that they should be considered distinct "location[s] or outlets in a location." Ketchikan Entertainment Center, LLC has been in compliance with the statute during all times relevant to this case.

IV. Conclusion

Because Ketchikan Entertainment Center, LLC has been in compliance with AS 43.70.075 during all times relevant to this case, no penalties should be imposed.

V. Order

Upon adoption of this Decision as a final administrative decision in this matter, no penalties shall be imposed upon Ketchikan Entertainment Center, LLC for this case.

DATED this 31 day of October, 2007.

By: *Signed* _____
DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 44.33.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

DATED this 10th day of December, 2007.

By: Signed
Signature
Jennifer Strickler
Name
Acting Director
Title

[This document has been modified to conform to technical standards for publication.]