

Appeal of Departments' Recommendation of License Denial

Hearing before the Appleton Safety and Licensing Committee
September 24, 2025 – 5:30 p.m.

Presentation and appearance for Taste of Thai Appleton, LLC
d/b/a Mad Elephant

Garet Keane Galster – Smith Keane LLP



SmithKeane^{LLP}
INTELLECTUAL PROPERTY LAW

Introduction

- Counsel introduction
- Thank you for your time and attention
- Request
 - Taste of Thai hereby requests that the legally and factually deficient recommendations from the Police and Inspections Departments be rejected and its application for mechanical amusement device license be recommended by this committee for approval by the common council.
- Standard of proof / review – see *State v. Nixa*, 360 N.W.2d 52 (Wis. Ct. App. 1984)
- Preview of remainder of presentation
 - Insufficient legal and factual bases for recommendations
 - Identified machines are NOT illegal

Only One Recommendation

- Appleton Police Department (APD), through a memo authored by Lt. Goodin, recommends denial of ToT license application because,
 - “based on [his] knowledge and research into gambling machines, both listed machines are illegal in Wisconsin pursuant to Wis. Stat. § 945.03, Wis. Stat. § 945.035 and Wis Stat. § 945.04 and City of Appleton ordinance 9-52(3).”
 - “Due to these machines being deemed illegal in the State of Wisconsin...”
- Fire department approved the application.
- Inspections recommended denial, but based only on the APD letter. No separate analysis provided. Reversal of burden.

Legal Deficiency

- Lt. Goodin did not provide any information related to his “knowledge”
- Regarding state law, Lt. Goodin cited only Wis. Stats. §§ 945.03, .035, and .04
- 945.03 – acts that constitute commercial gambling
- 945.035 – display of exempt slot machines < 12/31/1974
- 945.04 – allowing [permitting] use of premises for commercial gambling
- None of the cited Wisconsin statutes defines “gambling machine,” under Wisconsin law

Legal Deficiency

- Regarding Appleton Ordinance, the ordinance allows for games (including games of chance) that are permitted by law.
 - The ordinance does NOT define “game of chance” or “device of chance”
- None of the cited Wisconsin statutes or ordinance defines “gambling machine,” under Wisconsin law, so there is no way that Lt. Goodin could base his recommendation on the cited provisions
- Accordingly, Lt. Goodin’s conclusion is wholly legally deficient

Factual Deficiency

- There is NO evidence that Lt. Goodin has ever seen a Big Daddy Games Skill Plus machine.
- There is NO evidence that Lt. Goodin has ever played on a Big Daddy Games Skill Plus machine.
- There is NO evidence that Lt. Goodin has ever undertaken a comparison of the Big Daddy Games Skill Plus machine to the appropriate legal definition under Wisconsin law.
- There is NO evidence that Big Daddy Games Skill Plus machines award anything of value

Factual Deficiency

- The playing of Big Daddy Games Skill Plus machines provides entertainment and amusement
- At last check, such games have entertainment value
 - Quick Hit – Google Play Store – 10,000,000+ downloads
 - Slotomania – Google Play Store – 50,000,000+ downloads
- Speculation as to use for gambling ignores gameplay intrinsic value
- Without seeing and/or using a Big Daddy Games Skill Plus machine and comparing such experience to the appropriate legal definition, Lt. Goodin’s conclusion that “these machines [are] deemed illegal” wholly factually deficient.

Recommendation should be rejected

- The recommendations of the Police and Inspections Departments are based solely on the APD Memo from Lt. Goodin.
- Lt. Goodin's recommendation is based on the conclusion that the "machines [are] deemed illegal in the State of Wisconsin and in the City of Appleton."
- Without having applied the correct legal definition, the APD recommendation is wholly legally deficient
- Without having even seen a Big Daddy Games Skill Plus machine, the APD recommendation is wholly factually deficient (speculative)
- Because the recommendation is wholly legally deficient and wholly factually deficient, the recommendation should be rejected

Machines Are NOT Illegal ~ Definition

- Even if the S&L committee does not reject the APD recommendation based on the above deficiencies, an analysis under the proper legal standard demonstrates machines are NOT illegal, they are legal
- None of the statutes cited by APD define a “gambling machine”
- Wis. Stat. § 945.01(3)(a), “A gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine.”

Machines Are NOT Illegal ~ Definition

- Wis. Stat. § 945.01(3)(a), “A gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine.”
- Focus on phrases “the award of which is determined by chance, even though accompanied by some skill”
- This is not defined in the statute.
- But see case law...

Machines Are NOT Illegal ~ Definition

- *State v. Dahlk*, 330 N.W.2d 611 (Wis. Ct. App. 1982) – interpreting “the award of which is determined by chance, even though accompanied by some skill” in connection with definition of “lottery”
- “Chance rather than skill must therefore be the dominant factor controlling the award in a lottery.”
- “Most jurisdictions apply the ‘dominant factor’ test, by which a scheme is a lottery if chance dominates even though some degree of skill or judgment is present.”

Machines Are NOT Illegal ~ Definition

- *State v. Hahn*, 586 N.W.2d 5 (Wis. Ct. App. 1998) – adopting *Dahlke* definition from “lottery” to definition of “gambling machine”
- “The requirement that chance predominates over skill gives sufficient warning to persons of reasonable intelligence who desire to comply with the law what conduct is proscribed by this element of the definition of ‘gambling machine’ and provides sufficiently objective standard for the trier of fact.”
- Chance does NOT predominate over skill in Big Daddy Games Skill Plus machines

Machines Are NOT Illegal ~

Mandatory Preview and Timing

- Chance does not predominate over skill
- Mandatory preview – displays the result of the next play at the selected play level
- On a game display, for any given play point level (25, 100, etc.), the resulting points for the next play are displayed. Each play level can be reviewed to determine PRIOR TO PLAY what the result is going to be.
- Accordingly, there is no chance. The player knows exactly what the point outcome of the play is going to be, if played.

Machines Are NOT Illegal ~

Mandatory Preview and Timing

- Chance does not predominate over skill
- Prior to choosing to insert money
 - Player can scroll through every play level to learn what the exact point outcome is going to be for the next play at that point level
 - No need to insert money
 - Single play allowed
- After inserting money, prior to any game play
 - Player can scroll through every play level to learn what the exact point outcome is going to be for the next play at that point level
 - Full refund available if no play is desired
- After at least one game play, can elect to proceed to Skill Wheel at any time.

Machines Are NOT Illegal ~

Skill Wheel

- Chance does not predominate over skill
- After at least one game play, the Skill Wheel requires a player to employ pattern recognition, memory of the pattern/timing of display, and/or hand-eye coordination to proceed to an ultimate printing of a ticket reflective of points earned during play.
- Mandatory feature to collect points
- The player must start the wheel spinning by touching the wheel. The wheel does not randomly (or pseudo-randomly) stop. Instead, the player must stop the wheel to display a certain amount of points to be awarded to the player, the goal being to stop the wheel at a maximum value.

Conclusion - Big Daddy Games Skill Plus Machines Are NOT Illegal in Wisconsin

- The wholly deficient legal and factual bases provided for the APD recommendation of license denial, and Inspections Department wholesale adoption of same, without independent review, would render any denial recommendation from this committee to the common council, and any action by the common council, a virtual nullity
- Furthermore, the features of the Big Daddy Games Skill Plus machines require that skill predominate over chance, thereby precluding such machines being categorized as a gambling machine under Wisconsin law.

gkg@keaneip.com

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d/b/a Mad Elephant

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BEFORE THE APPLETON SAFETY AND LICENSING COMMITTEE

In re: Mad Elephant Amusement
Device License Application

Action Item: 25-1091

DECLARATION OF HOWARD SMOYER

I, Howard Smoyer, being of age of majority, declares as follows:

1. I am general manager-marketing at Big Daddy Games, LLC (“BDG”) located in Menasha, Wisconsin.
2. BDG makes an amusement device called BIG DADDY GAMES SKILL PLUS (or SKILL+) (hereinafter, the “Device”).
3. In my position at BDG, I have personal knowledge of the operation of the Device.
4. The Device is a video amusement skill game, featuring a touch screen for operation and visual display.
5. The Device is played using credits/points that are deposited by a player or accumulated through game play.
6. The Device features various play levels requiring a different number of points to play. The play of the Device results in a display of artistic images in various positions on the screen, the order of which dictates point assignment.
7. The Device includes a mandatory reveal (or preview) feature. No matter the timing of play, the mandatory reveal feature displays the next result of the next play at the currently displayed point level. The player is not required to do anything for the display to occur, as it is

always on the screen. That is, on a game display, AT ALL TIMES, for any given play point level (25, 100, etc.), the resulting points for the next play are displayed. Each play level can be reviewed to determine PRIOR TO PLAY what the result is going to be. The mandatory reveal feature is displayed prior to any insertion of money to establish credits, after insertion of money to establish credits and before play, and between plays. Prior to insertion of money to establish credits, a player can review all play levels and outcomes without inserting any money into the machine. The player does NOT have any option to dismiss the display of the results of the next play at the current level.

After insertion of money to establish credits, and prior to any game play, a player can review all play levels and next outcomes without inserting any additional money into the machine to establish credits. The player does NOT have any option to dismiss the display of the results of the next play at the current level. The player has the complete option for a full refund of inserted money prior to beginning play.

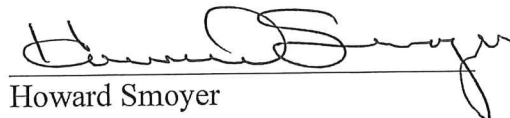
Not only are the results of next play displayed prior to a player inserting money and prior to playing, the same is true between plays. A player can review all play levels and next outcomes without inserting any additional money into the machine to establish credits. The player does NOT have any option to dismiss the display of the results of the next play at the current level. The player has the option to elect to play (if sufficient credits are available) or to proceed to the Skill Wheel feature.

8. The Device includes a mandatory skill wheel feature. After at least one game play, the Skill Wheel requires a player to employ memory of the pattern/timing of display, and/or hand-eye coordination to proceed to an ultimate printing of a ticket reflective of points accumulated during play or credits purchased. This is a mandatory feature to collect points for display on a

printed ticket and cannot be circumvented. The player must start the wheel spinning by touching the wheel. The wheel does not randomly (or pseudo-randomly) stop. Instead, the player must utilized pattern recognition, memory of the pattern/timing of display, and/or hand-eye coordination to stop the wheel to display a certain amount of points to be awarded to the player, the goal being to stop the wheel at a point or percentage value of the player's choosing.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/24/2025


Howard Smoyer

Timeline – Provided 9/24/2025

Matter 25-1091

Appleton Safety and Licensing Committee

Taste of Thai Appleton, LLC submitted, on July 25, 2025, an amusement device license application that listed two amusement devices by the same name: BIG DADDY GAMES – SKILL PLUS. While the copy of the application attached to the agenda was not signed by anyone in the FOR OFFICE USE ONLY box on the bottom of the page, the application was sent for approval on July 29, 2025 and was approved by the fire department through D. Henson on July 30, 2025.

This copy of the application was obtained by Taste of Thai on August 26, 2025.

The application was submitted pursuant to Appleton city ordinance §§ 9-126 through 129, and there appears to be no defects in the application itself, and none have been identified as forming the basis for the denial, e.g., under Appleton Ordinance 9-22(b).

Rather, the entire basis for the denial appears to be an August 2, 2025 memo authored by Lieutenant Ben Goodin of the Appleton Police Department, and addressed to this committee. However, there is no evidence yet provided that anyone on this committee has seen this memo. Without any additional explanation, the entirety of Lt. Goodin's analysis was, "Based on my knowledge and research

into gambling machines, both listed machines are illegal in Wisconsin pursuant to Wis. Stat. § 945.03, Wis Stat. § 945.035 and Wis. Stat. § 945.04, and City of Appleton ordinance § 9-52(3).”

The denial was communicated to Taste of Thai in a letter dated August 4, 2025, from the office of the city clerk and signed by clerk Molitor. The letter offers the reason for denial as the “listed machines are illegal gambling machines in Wisconsin pursuant to Wis. Stat. § 945.03, Wis Stat. § 945.035 and Wis. Stat. § 945.04, and City of Appleton ordinance § 9-52(3),” citing verbatim the conclusion from Lt. Goodin, with no supporting rationale.

On September 2, 2025, I sent a letter via FedEx to Clerk Molitor, advising her that Taste of Thai was appealing the denial. On that same date, I also submitted public records requests to both the Department of Inspections and the Appleton Police Department, seeking:

Any and all records reviewed, relied upon, or otherwise related to the [respective] Department’s recommendation of denial of an application for a Mechanical Amusement Device License for Mad Elephant, located at 1222 South Oneida Street, Appleton, WI 54915, regarding Big Daddy Games Skill Plus. This includes any documents considered in making the denial recommendation, as well as a list of any attorneys, experts, officials, or other peoples consulted in making such recommendation and any and all records they consulted or were given to

consult. To the extent there are additional records (e.g., third-party reports or complaints) that mention or reasonably identify my client, please produce the additional records.

On September 11, 2025, Department of Inspections responded with an email from Kurt Craanen, which was forwarded from Daniel Meissner. Mr. Meissner stated “Based upon APD’s letter, Inspections denies as well. If more or different proof of legal use is presented, we will respond accordingly.” The September 11 response did NOT include a copy of the APD letter, so within 3 minutes or so of receiving Mr. Craanen’s email, I advised him of the deficiency and requested the attachment supposedly sent by Lt. Goodin.

On September 12, 2025, Mr. Craanen supplemented his response, with apologies, to provide the APD letter and a version of the application.

On September 18, 2025, APD responded with a cover letter and the following documents:

- Email from Cathy Allcox to Cathy Allcox, likely blind copying others;
- Copy of Lt. Goodin’s August 2, 2025 memo to Safety and Licensing Committee
- Nine screenshots/snapshots seemingly taken from an unidentified website.

On September 19, 2025, the matter was added to the agenda for this evening's meeting, but we were not informed of same until Monday, September 22, two days prior to the meeting.

Application for Mechanical Amusement Device License



License period is
July 1st – June 30th.

*NOTE: please allow approximately 2 weeks
for application processing*

~~FEES ARE NON-REFUNDABLE~~

~~CASH OR CHECK ONLY~~

☒ Amusement Device - \$25.00 per machine
(15 Machines and over = \$350.00)

Total Number of Machines: 2

☒ Police Investigation Fee - \$7.00

Date Received:

7/25/25

Total Fee: 50

Receipt #: 8947-2

DEFINITION – A mechanical amusement device is a machine which upon the insertion of a coin or slug operates a game, contest, or amusement, EXCEPT MUSIC. A billiard table or pool table is a mechanical device when operated commercially, whether it is coin operated or not.

SECTION 1 – BUSINESS INFORMATION

Legal Business Name

TASTE OF THAI APPLETON, LLC

Business Trade Name or DBA

MAD ELEPHANT

Street Address (where devices will be operated):

1222 S. ONEIDA ST.

City

APPLETON

State

WI

Zip

54915

Business Phone

920-830-2036

Business Email

tasteofthai789@gmail.com

Agent/Person in Charge Name

CHISA JITMAIWONG

Agent Phone (Required)

920-810-6264

Agent Date of Birth

12/02/1986

Agent Drivers License/State ID Number

J355-1008-6942-07

DL/ID State of Issuance

WI

Mailing Address (if different from street address):

City

State

Zip

SECTION 2 – AMUSEMENT DEVICES

Brand/Name & Type of Device(s) (Required)

Total Number of Devices: 2

BIG DADDY GAMES

SKILL PLUS.

BIG DADDY GAMES

SKILL PLUS.

SECTION 3 – PENALTY NOTICE

The undersigned requests that a license be granted in accordance with Sections 9-126 to 9-129 of the Municipal Code of the City of Appleton.

Signature of Applicant:

CHISA J.

Date: 07/20/2025

FOR OFFICE USE ONLY

DEPARTMENT	APPROVE	DENY	DATE	STAFF MEMBER/REASON
Police				
Fire	☒		<u>7/30/25</u>	<u>D. Henson</u>
Inspections				
Community Development				

Date Sent for Approval: 7/29/25 Date Approved: Date Issued: License Number:

Return completed form to: Office of the City Clerk, 100 N Appleton St, Appleton, WI 54911

Cathy Allcox

From: Cathy Allcox
Sent: Thursday, September 18, 2025 7:04 AM
To: Cathy Allcox
Subject: FW: 250902 PRR to Appleton PD.pdf
Attachments: Mad Elephant Amusement device denial.pdf

From: Benjamin M. Goodin <Benjamin.Goodin@AppletonWI.gov>
Sent: Wednesday, September 17, 2025 1:39 AM
To: Cathy Allcox <Cathy.Allcox@AppletonWI.gov>; Zak N. Buruin <Zak.Buruin@AppletonWI.gov>; Mary Schmeichel <Mary.Schmeichel@AppletonWI.gov>; Patricia Bentaalla <Patricia.Bentaalla@AppletonWI.gov>
Cc: Jamie Griesbach <Jamie.Griesbach@AppletonWI.gov>; Amy E. Molitor <Amy.Molitor@AppletonWI.gov>
Subject: Re: 250902 PRR to Appleton PD.pdf

Here's a copy of the memo I originally submitted on 8/2/25.

The website link I provided is the only thing I reviewed/consulted when making the decision of denial for this particular amusement device application in addition to my prior knowledge/conversation with Zak as noted earlier in this email thread. I can't recall which specific links I clicked on within the website.

Ben

Kurt Craanen

From: Daniel J. Meissner
Sent: Wednesday, September 10, 2025 9:18 AM
To: Kurt Craanen
Subject: FW: Mech. Amusement Device App, Mad Elephant-1222 S Oneida St

As requested



Daniel Meissner, AIA, NCARB
Commercial Building Inspector/Plans Examiner
City of Appleton, Community Development Department
100 N. Appleton Street, Appleton, WI 54911
O: 920-832-6418 | daniel.meissner@appletonwi.gov
Appleton.org

From: Daniel J. Meissner
Sent: Monday, August 4, 2025 8:15 AM
To: Benjamin M. Goodin <Benjamin.Goodin@AppletonWI.gov>; Lindsay J. Reuer <Lindsay.Reuer@appletonwi.gov>;
Derek J. Henson <Derek.Henson@AppletonWI.gov>; Don Harp <Don.Harp@AppletonWI.gov>
Cc: Zak N. Buruin <Zak.Buruin@AppletonWI.gov>; Kurt Craanen <Kurt.Craanen@AppletonWI.gov>
Subject: RE: Mech. Amusement Device App, Mad Elephant-1222 S Oneida St

Based upon APD's letter, Inspections denies as well. If more or different proof of legal use is presented, we will respond accordingly



Daniel Meissner, AIA, NCARB
Commercial Building Inspector/Plans Examiner
City of Appleton, Community Development Department
100 N. Appleton Street, Appleton, WI 54911
O: 920-832-6418 | daniel.meissner@appletonwi.gov
Appleton.org

From: Benjamin M. Goodin <Benjamin.Goodin@AppletonWI.gov>
Sent: Saturday, August 2, 2025 12:31 AM
To: Lindsay J. Reuer <Lindsay.Reuer@AppletonWI.gov>; Derek J. Henson <Derek.Henson@AppletonWI.gov>; Don Harp <Don.Harp@AppletonWI.gov>; Daniel J. Meissner <Daniel.Meissner@AppletonWI.gov>
Cc: Zak N. Buruin <Zak.Buruin@AppletonWI.gov>
Subject: Re: Mech. Amusement Device App, Mad Elephant-1222 S Oneida St

APD recommends denial. Please see the attached letter.

Thank you,
Ben Goodin

From: Lindsay J. Reuer <Lindsay.Reuer@AppletonWI.gov>

Sent: Tuesday, July 29, 2025 2:02 PM

To: Benjamin M. Goodin <Benjamin.Goodin@AppletonWI.gov>; Derek J. Henson <Derek.Henson@AppletonWI.gov>;
Don Harp <Don.Harp@AppletonWI.gov>; Daniel J. Meissner <Daniel.Meissner@AppletonWI.gov>

Subject: Mech. Amusement Device App, Mad Elephant-1222 S Oneida St

Hello-Please see the attached mechanical amusement device license application for Taste of Thai Appleton LLC dba Mad Elephant, located at 1222 S Oneida St. **Please respond with your recommendations by August 12.**

Thank you,

Lindsay Reuer

Administrative Support Specialist

City of Appleton, Department of Legal and Administrative Services

100 N. Appleton Street, Appleton, WI 54911

O: 920-832-6443 | lindsay.reuer@appletonwi.gov

Facebook | [AppletonWI.gov](https://www.facebook.com/AppletonWI)

Pronouns: she/her



DEPARTMENT OF

**LEGAL AND
ADMINISTRATIVE
SERVICES**

August