

TABLED

Cherokee Council House
Cherokee, Qualla Boundary (NC)

Date: SEP 06 2012

ORDINANCE No. 309 (2012)

WHEREAS, The EBCI is in need of economic diversification for the benefit of its enrolled members.

WHEREAS, In order to achieve this economic diversification the EBCI needs to form a new Tribal Enterprise.

NOW THEREFORE BE IT ORDAINED by the Tribal Council of the Eastern Band of Cherokee Indians assembled, at which a quorum is present, that new Chapter 129 is adopted as follows.

Chapter 129 - KITUWAH HOLDINGS ENTERPRISE

- Sec. 129-1. - Authority.
- Sec. 129-2. - Declaration of need.
- Sec. 129-3. - Board of Directors; generally.
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- Sec. 129-19. - Rescission of inconsistent law.

Sec. 129-1. - Authority.

(a) Pursuant to the authority vested in the Eastern Band of Cherokee Indians by its governing document and particularly by section 23 thereof, and its inherent Tribal sovereign authority to oversee, protect and preserve the assets and benefits of the Tribe, together with its capacity and authority to conduct both governmental and business activities by and on behalf of the Tribe, especially when Tribal

members derive direct benefit from such activities, the Tribal Council hereby creates this Tribal enterprise that shall be known as the Kituwah Holdings Enterprise, hereafter referred to as the Kituwah Holdings or KHE.

(b) In any suit, action or proceeding involving the validity or enforcement of any of its contracts, the KHE shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of this chapter. A copy of the chapter duly certified by the Clerk of the Tribal Council shall be admissible in evidence in any suit, action or proceeding.

Sec. 129-2. - Declaration of need.

It is hereby declared:

(a) The Eastern Band of Cherokee Indians would like to form a New Tribal Enterprise to manage the economic diversification of the Tribe. Economic diversification is necessary for the long term well being of the EBCI.

(b) The Board of Directors of the KHE is authorized to undertake such actions as are necessary and appropriate for the execution of the duties and authorities enumerated herein including managing existing non-gaming enterprises.

(c) That the KHE is hereby created and established in the public interest to provide an organizational plan which can most effectively and efficiently manage the economic diversification of the Tribe.

(d) Native American Tribes are eligible to seek business preference certifications which will help with economic diversification.

(e) The Tribe has determined that it would be in the best interest of the Tribe to have authority for the administration and oversight of economic diversification by a separate, single purpose instrumentality of the Tribe having the authority, powers and duties set forth in this chapter under the governance of a Board of Directors, chosen and acting in the manner set forth in this chapter.

(f) The management of KHE will be by the Board of Directors who will have such powers and responsibilities as set forth in this Chapter.

Sec. 129-3. - Board of Directors; generally.

(a) Composition of the Board: The Board of Directors shall be composed of five enrolled members of the Eastern Band of Cherokee Indians who must have clearly demonstrated their business acumen through past business or career successes.

(b) Appointment of the Board: Members of the Board of Directors shall be appointed by the Principal Chief, subject to the approval of the Tribal Council. Nominees to the Board of Directors shall be selected on the basis of their business experience and ability to significantly contribute to the capabilities and functions of the gaming enterprise. At least one member of the Board of Directors shall be an experienced auditor or certified public accountant, or shall have a Bachelors Degree and significant financial and management experience in prior employment.

(c) Members of the Board of Directors may hold other positions of employment with the Tribe and

may engage in business; provided, however, that they shall not engage in any business which will create a conflict with their responsibilities as a KHE Board Member.

(d) Except as provided in subsection (e), each member of the Board of Directors shall serve a term of five years, subject to removal, with cause, by a majority of the Tribal Council. Nothing in this chapter shall be construed to preclude a member of the Board of Directors from serving successive terms. There shall be a six-month probationary period for each new appointee to be reviewed by the Tribal Council.

(e) To ensure continuity in the Board and rotation of appointments, the initial Board members' terms shall be adjusted so that they serve staggered terms. The Principal Chief shall assign term expiration dates for each current Board member, such that one member's term expires each year beginning September 30, 2018. The established rotation shall continue for each Board position for future new, renewal, or replacement appointments.

(f) No member of the Board of Directors shall be finally approved until he or she has successfully completed an official background investigation.

(g) Before assuming office, each member of the Board of Directors shall take the oath of office administered to Tribal officers.

(h) Resignation from the Board of Directors: A member of the Board of Directors may resign at any time by providing the Principal Chief and Tribal Council with written notice of his or her intention to resign on a date certain. The resignation shall become effective on the date stated and need not be accepted by Principal Chief or the Tribal Council to be effective.

(i) Filling of vacancies in the Board of Directors: A nomination to fill a vacancy in the Board of Directors shall be made by the Principal Chief within 30 days after the date on which the vacancy becomes effective. The Principal Chief shall then submit the nominee's resume to the Tribal Council for their approval. Action by the Tribal Council shall occur within 30 days after receipt of the nomination from the Principal Chief.

Sec. 129-4. - Eligibility criteria for KHE Board of Directors.

To avoid potential conflicts of interest in oversight and management of the KHE, the Tribe hereby declares that:

(a) While actively serving in any of the following capacities, no Principal Chief or Vice-Chief, member of the Tribal Council, no judge or justice, no employee of KHE may serve on the Board of Directors;

(b) No person convicted of a felony, embezzlement, theft, or any other money-related crime or honesty-related crime (such as fraud) may serve on the Board of Directors;

(c) Board members are prohibited from:

(1) Providing contractual services of any kind to any business owned or managed by KHE;

(2) Providing management services to any business owned or managed by KHE, pursuant to a management contract; and

(3) Engaging in outside employment or activities, including seeking or negotiating for future

employment, which conflict with their official duties and responsibilities as determined by the Tribal Council.

Sec. 129-5. - Powers and duties of Board of Directors.

Subject to the limitations contained in this chapter and other applicable laws, the KHE, by and through its Board of Directors, shall have the following powers and perform the following duties:

- (a) *Management.* The Board may hire managers to operate the businesses under the supervision of the Board.
- (b) *Governance and Management Oversight.* The KHE shall have the power and duty to:
 - (1) With respect to any business approve internal management policies, including:
 - (A) Hiring, discipline and discharge of employees including rights of appeal and policies governing the provision of Indian preference in employment;
 - (B) Selecting Board Members for subsidiaries.
- (c) *Budgetary and Financial Authority.* The KHE shall have the power and duty to:
 - (1) Prepare annual operating, capital, and working capital budgets, which fund short range and long range goals and objectives and the strategies used to accomplish these goals and objectives, which are to be included in the Executive Committee's proposed budget submitted annually to Tribal Council for approval;
 - (2) Establish general bank accounts for each business for the deposit and maintenance of the funds of the operation;
 - (3) Establish, fund, and maintain capital/expansion reserve funds for working capital, continuity of operations, reinvestment in or future acquisitions.
 - (4) Authorize the expenditure of funds as necessary for the operation and maintenance of the business and the timely payment of financial liabilities and obligations;
 - (5) Borrow money and issue temporary or long term evidence of indebtedness and timely repay such debts;
 - (6) Pledge the assets and receipts of the business as security for debts and acquire, sell, lease, exchange, transfer and/or assign the non-realty property interests;
 - (7) No part of the net earnings of the KHE shall inure to the benefit of or be distributed to any Board member or other private person, except that the Board of Directors is authorized and empowered to pay reasonable compensation for services rendered to the KHE as provided in this Chapter and to participate in regular per capita distributions as enrolled members of the Tribe.

- (d) *Property Management.* The KHE shall have the following powers and duties:
- (1) The KHE shall use and operate the real property on which KHE businesses or located;
 - (2) The KHE may lease other property from the Tribe or others for such periods as are lawfully authorized to hold and manage or sublease such properties; and
 - (3) Ownership of all property used or operated by the KHE shall be consistent with Section 16A-16.
- (e) *Contracting and procurement.* The KHE shall have the power and duty to:
- (1) Enter into agreements, contracts, and understandings with any government agency, person, partnership, corporation or Indian tribe; and
 - (2) Retain the services of any business or professional consultants.
 - (3) All contracts and other documents executed in the name of the KHE must be signed by two Board members, one of whom shall be the Chairperson or the Vice-Chairperson, provided that the Board of Directors in its discretion may delegate such signatory authority for specific types of documents to an officer or employee of the KHE or a designated employee of the businesses.
- (f) *Planning.* The KHE shall have the power and duty to:
- (1) Undertake and carry out feasibility and other studies and analyses of the businesses it operates and businesses that it will acquire;
 - (2) Prepare and adopt operation and management plans concerning the businesses it operates;
 - (3) Prepare a plan for acquisitions and the strategy for making such acquisitions;
 - (4) Seek appropriate regulatory approval when necessary; and
 - (5) Cooperate with all other agencies and entities of the Tribe to achieve the goals of the KHE and the Tribe.
- (g) *Internal governance and record keeping.* The KHE shall have the power and duty to:
- (1) Adopt by-laws as necessary for internal operations, *provided* that such by-laws shall be consistent with the provisions of this Chapter and other applicable law;
 - (2) Establish from time to time consultant groups and advisory boards which shall have such duties and the members of which shall hold office for such periods as the Board may determine;
 - (3) Prepare and maintain complete and accurate records of all meetings and actions taken by the Board;
 - (4) Maintain at the KHE's principal office or facility all financial books and records, all minutes of Board meetings, and all other materials, books, records, documents, correspondence, and contracts. All such material shall be made available for inspection and

copying at any reasonable time during the usual business hours, to:

- (A) The Principal Chief and Tribal Council or duly authorized representatives thereof;
- (B) Any Board member.

(h) *Limited waiver of sovereign immunity.* The KHE, as an unincorporated instrumentality of the Tribe, retains all of the Tribe's rights, privileges, and immunities, including sovereign immunity from suit. The KHE, by and through its Board of Directors, shall have the power to:

(1) Waive the right of the KHE to exercise sovereign immunity in contracts, agreements or undertakings to which the KHE is a party, *provided* that any such waiver of sovereign immunity is strictly limited to enforcement of obligations of the KHE and is enforceable only against the following assets or revenues:

- (A) The assets of the KHE;
- (B) The assets (other than real property held in trust), including the revenues, related to or arising from the operation of the KHE, whether legal title to such assets or revenues is in the name of the KHE or the Tribe;
- (C) Any proceeds obtained by the KHE through the use, ownership or other operation or disposition of such assets or of the business operated by the Tribe in the name of the KHE; and
- (D) Any other assets (other than real property held in trust) produced or acquired by the Tribe and operated as part of the business of the KHE.

(2) If in any case, the Board of Directors exceeds the foregoing limitations on its power and authority to waive sovereign immunity, it shall be deemed to have waived its sovereign immunity only to the extent permitted in this subsection.

(i) *Reporting.* The KHE shall have the power and duty to:

(1) File a quarterly report with the Principal Chief and the Tribal Council, within 60 days after the end of each quarter, which shall include:

- (A) Quarterly financial statements, prepared in accordance with generally accepted accounting principles, which reflect all business conducted by the KHE during the preceding fiscal quarter and year to date, as well as the budgeted amount for the balance of the current fiscal year;
- (B) Material changes and developments since the last report in the business conducted at the gaming operations, including a description of competitive conditions, research and development activities, new lines of business, and projected financial projections over the next 12 months;
- (C) Any material pending legal proceeding to which the KHE is or was a party;
- (D) Total number of employees and turnover rate at each business, including the number of Tribal enrolled members; and

- (E) All other information which the Board deems relevant in order to keep the Principal Chief and Tribal Council informed and current on the operation of the businesses.
- (2) File an annual report with the Principal Chief and the Tribal Council, within 60 days after the end of each fiscal year, which shall include:
- (A) A summary of the year's activities;
 - (B) The financial condition of the KHE;
 - (C) The condition of the KHE businesses;
 - (D) All significant problems and accomplishments; and
 - (E) All other information which the Board deems relevant in order to keep the Principal Chief and Tribal Council informed and current on all KHE business matters.
- (3) In addition to the foregoing reports, the KHE Board Chair shall meet on a regular basis with the Principal Chief. Upon request, the KHE shall promptly and fully advise the Principal Chief and Tribal Council with respect to the business and affairs of the KHE and shall provide copies of requested records, books or documents.
- (j) *Litigation.* The Board of Directors shall immediately notify the Principal Chief upon receipt of any summons or complaint upon the KHE, any Board member, employee or agent of the KHE, or any Business, in which such a party is named in any suit, claim, action or other proceeding in any court, administrative or regulatory forum. A copy of the summons and complaint and related documents shall also be provided to the Tribal Council Chair and the Tribe's Attorney General.
- (k) *Limitations of authority.* The Board of Directors shall possess only those powers specifically granted by this Chapter, but is authorized to take such actions as are necessary and appropriate to carry out the granted authority.

Sec. 129-6. - Order of business of Board.

The Board of Directors shall establish regular meetings, not less than monthly.

- (a) Notice of meetings. Notice of each meeting of the Board shall be mailed or emailed to each member, addressed to each Board member's address or usual place of business, not less than five nor more than 20 days from the day on which the meeting is to be held, or notice may be delivered to such member personally not less than two days before the day on which the meeting is to be held. Notice of any meeting of the Board need not be given to any member who shall waive such notice.
- (b) The Board of Directors may call emergency meetings upon 24 hours' notice to Board members with the time and place of such meeting and the business to be transacted at such meeting. Any business conducted in an emergency session shall be approved by not less than a majority of the full Board of Directors.
- (c) The Board of Directors shall endeavor to attend all meetings of the KHE. The KHE shall decide whether absences of a Board member are excused or unexcused. Three consecutive

unexcused absences of a Board member shall be reported by the KHE to the Tribal Council. Three consecutive unexcused absences may be considered cause for removal by the Tribal Council.

Sec. 129-7. - Elections of Board Officers.

The Board of Directors shall, at the first meeting of each fiscal year, elect from among themselves a Chairperson, a Vice-Chairperson and a Secretary. The Board member selected on the basis of his or her experience in auditing or accounting shall be designated Treasurer.

Sec. 129-8. - Annual audit.

The Board of Directors shall be responsible for the preparation and presentation to the Tribal Council of the certified annual audit subject to the following requirements:

- (a) Be conducted by independent accountants, knowledgeable and licensed or certified to practice public accounting in the State of North Carolina;
- (b) Include an opinion, qualified or unqualified, or if appropriate, disclaim an opinion on the financial statements taken as a whole in accordance with standards of the accounting profession established by rules and regulations of the North Carolina State Council of Accountancy and the American Institute of Certified Public Accountants;
- (c) For each audit, the auditors shall provide a draft management letter and shall permit a reasonable time within which to respond to the letter with changes to the operations which address the concerns expressed in the draft management letter. The results of the certified audit shall be provided to the Board, the Principal Chief and Tribal Council and such other governmental agencies as may be required by law.

Sec. 129-9. - Preservation of Board records.

- (a) The Secretary of the Board of Directors shall prepare and maintain complete and accurate records of all meetings and actions taken by the Board.
- (b) The Treasurer shall keep complete and accurate financial records of the Board's expenses and receipts, report at least every fiscal quarter to the Board and shall submit a complete annual report to the Board.

Sec. 129-10. - Quorum at Board meetings.

Three members of the Board shall constitute a quorum.

Sec. 129-11. - Decision making by Board.

The Board shall meet and decide all matters by majority vote of the full Board. The Chairperson shall vote on all issues. A majority vote shall be binding on the Board. The Chairperson, or the Vice-Chairperson in the Chairperson's absence, shall preside at each meeting.

Sec. 129-12. - Minutes of Board meetings.

The Secretary shall cause to be kept a complete and accurate record of all Board meetings, copies of which shall be furnished to the Board and to the Tribal Council upon request.

Sec. 129-13. - Compensation of Board members.

The Board members shall receive compensation and benefits at a level determined by Tribal Council resolution. This compensation shall be included in the Board's annual budget. Board members shall be reimbursed for actual expenses incurred on Board business, including necessary travel expenses.

Sec. 129-14. - Sub-committees of Board.

The Board may from time to time establish consultant groups and advisory Boards which shall have such duties and the members of which shall hold office for such periods as the Board may determine.

Sec. 129-15. - Board Officers.

(a) *Positions and selection.* From among the Board members, the Board shall appoint the following Officers of the KHE Board ("Officers"): a Chairperson, a Vice-Chairperson, Secretary, and Treasurer.

(b) *Terms of office.* The Board shall appoint its Officers at each annual meeting of the Board in the first week of October.

(c) *Powers and duties.* Subject to the supervisory authority of the Board, Officers shall have the following powers and duties, in addition to such other powers and duties as may be set for the office in this article or applicable law, or as may be assigned by the Board:

(1) *Chairperson.* The Chairperson shall preside over all Board meetings; sign on behalf of KHE all documents, contracts, or other instruments approved for such execution by the Board; and be responsible, jointly with the Treasurer, for the authorized and secure receipt, maintenance, execution, endorsement, disbursement, and other disposition of all funds, checks, drafts, other order or demands for money, notes other evidence of indebtedness, securities and other valuable instruments and shall have such other powers and duties as may from time to time be assigned to him by the Board.

(2) *Vice-Chairperson.* The Vice-Chairperson shall exercise the powers and perform the duties of Chairperson when the Chairperson is absent or disabled, sign on behalf of KHE all documents, contracts, or other instruments approved for such execution by the Board, and shall have such

other powers and duties may from time to time be assigned to him or her by the Board.

(3) *Secretary.* The Secretary shall issue notices for all Board meetings; keep minutes of all meetings; and serve as custodian of and maintain all minutes or meetings and associated records and correspondence of the KHE Board. The Secretary shall make such reports and perform such other duties as are incident to the office, or are properly required or assigned to him by the Board.

(4) *Treasurer.* The Treasurer shall be responsible, jointly with the Chairperson, for the authorized and secure receipt, maintenance, execution, endorsement, disbursement, and other disposition of all funds, check, drafts or other order or demands for money, notes, other evidence of indebtedness, securities and other valuable instruments be responsible for the maintenance of comprehensive financial books and records of transactions, prepared in accordance with generally accepted accounting principles. The Treasurer shall have principal oversight responsibilities for all financial functions and affairs of KHE and shall serve as the Board's principal financial liaison with the Tribal Council and other members of KHE management having financial management responsibilities with the KHE. The Treasurer will also communicate with any Contract Manager, subsidiary finance officer, accounting firm and financial Directors. The Treasurer shall perform such other duties incident to the office or that are properly required by the Board.

(5) The Board may temporarily delegate the Board's powers or duties as an officer to another Board member, until the Board member is available or no longer disabled or until the Tribal Council fills the vacancy.

(d) *Duties upon termination of office.* Upon termination from office, each Board member, employee and agent of KHE shall turn over to his or her successor or to the Chairperson, in a timely fashion and in good order, all monies, books, records, minutes, documents contracts or other property of KHE in his or her custody. If such property is not turned over or is damaged or missing, the Board may charge each Board member and any employee or agent a reasonable replacement fee.

Sec. 129-16. - Ownership of property.

All personal property assets and non-trust real property used in the operation of the KHE whether now existing or hereafter acquired may be titled in the name of the Kituwah Holdings Enterprise, as an instrumentality of the Eastern Band of Cherokee Indians, and shall be administered by the KHE for the benefit of the Tribe; provided, however, that nothing herein shall affect the title to the real property held in trust (which includes all land, buildings, improvements or fixtures) used in the operation of or related to the KHE, whether now existing or hereafter acquired, and all such real property shall continue to be held in the name of the Tribe with restrictions upon alienation imposed by the United States, or in the name of the United States in trust for the Tribe, and the title to such real property shall always remain in trust status.

Sec. 129-17. - Severability of provisions.

If any provision of this chapter or the application thereof to any person or circumstances shall be adjudged by any court of competent jurisdiction to violate applicable law or otherwise to be invalid, then that provision shall be severable and considered null and void, but such judgment shall not affect, impair or invalidate the remainder of this chapter or its application to other persons and circumstances,

but shall remain in full force and effect, and such judgment shall be confined in its operation to the provisions of the chapter or the application thereof to the person and circumstances directly involved in the controversy in which such judgment was rendered.

Sec. 129-18. - Duration of KHE and chapter.

By enacting this chapter, the Tribe, through its Tribal Council, agrees and affirmatively pledges that it shall not terminate the lawful existence of or the authority for the KHE until or unless all obligations incurred by the KHE for financing have been satisfied and if for any reason the Tribe were to nevertheless terminate the existence or authority of the KHE before all such obligations are satisfied then all obligations of the KHE shall become the direct obligations of the Tribe; and the Tribe hereby irrevocably grants a waiver of the Tribe's sovereign immunity to permit the obligees of the KHE to enforce such obligations against the Tribe in that circumstance, but with such waiver specifically limited to permit enforcement of such obligations as set forth in the applicable financing documents.

Sec. 129-19. - Rescission of inconsistent law.

All prior ordinances and resolutions in conflict with this chapter are hereby rescinded in their entirety.

BE IT FURTHER ORDAINED that this ordinance shall be effective upon ratification by the Principal Chief, and all prior ordinances and resolutions that are inconsistent with this ordinance are rescinded.

Submitted by the office of Commerce.