

**BEFORE THE  
PENNSYLVANIA GAMING CONTROL BOARD**

<b>IN RE:</b>	:	
<b>PHILADELPHIA ENTERTAINMENT AND</b>	:	<b>PGCB Docket No. 1367</b>
<b>DEVELOPMENT PARTNERS, L.P., d/b/a</b>	:	<b>OHA Docket No. 1408-2010</b>
<b>FOXWOODS CASINO PHILADELPHIA</b>	:	

**ADJUDICATION**

The matter before the Pennsylvania Gaming Control Board (“PGCB” or “Board”) for disposition is the Bureau of Investigations and Enforcement’s (“BIE”) October 5, 2010 Motion for Summary Judgment filed by their Office of Enforcement Counsel (“OEC”). The Motion seeks judgment on behalf of BIE in relation to BIE’s April 29, 2010 Complaint for Revocation of Philadelphia Entertainment and Development Partners, LP, d/b/a Foxwoods Casino Philadelphia’s (“PEDP”) Category 2 Slot Machine License.

As more fully set forth below, following a full consideration of the evidence of the record, the parties’ legal memoranda and oral argument by the parties, the Board has determined that entry of summary judgment in favor of BIE is warranted and PEDP’s Category 2 slot machine license is revoked.

**Background**

The Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101, *et seq.* (“Gaming Act”), enacted by the General Assembly in July 2004, authorizes the Board to award a total of twelve Category 1 and 2 slot machine licenses. Section 1304, 4 Pa.C.S. § 1304, of the Gaming Act directs that of the five allocated Category 2 slot machine licenses, two Category 2 slot machine licensed facilities be located in the City of Philadelphia. The Gaming Act required as “mandatory that the Board shall consider,

approve, condition or deny the approval of all initial applications for each and every category of slot machine licenses collectively and together, in a comprehensive Statewide manner...” 4 Pa.C.S. § 1301.

The Gaming Act directs the Board to consider the factors enumerated in Section 1325(c) of the Gaming Act, 4 Pa.C.S. § 1325(c), including, but not limited to, the location and quality of the proposed facility; the potential for new job creation and economic development resulting from licensing the applicant; an applicant’s plans and efforts to achieve diversity in both ownership and employment; and its record in meeting commitments to local agencies or community-based organizations.

The Gaming Act expresses that the Board is mandated to take into consideration the public interest of the citizens of Pennsylvania in any decision of the Board. 4 Pa.C.S. § 1102(10). In addition, Section 1212(a)(1) also states, “it is the intent and goal of the General Assembly that the Board promote and ensure diversity in all aspects of the gaming activities authorized under this part” including “the ownership of licensed entities.” 4 Pa.C.S. § 1212 (a)(1).

PEDP was one of five applicants for the two available Category 2 slot machine licenses in the City of Philadelphia. PEDP proposed a phased riverfront project beginning with construction of a 390,000 square foot facility to house 3,000 slot machines, a 2,000 seat showroom and varied retail and food and beverage amenities. Later phases of PEDP’s proposed project called for construction of nightclubs, restaurants and hotels and/or condominiums.

In December 2006, the Board awarded PEDP one of the two Category 2 slot machine licenses for the City of Philadelphia. The award of the license to PEDP was

made in a competitive process based upon an extensive evaluation and analysis of the five competing projects, calling on the Board to determine, in its sole discretionary judgment, which two projects best fulfilled the goals of the Gaming Act. Significantly, at the time the Board chose to award PEDP a license, PEDP had presented a comprehensive plan for development and financing for the project, i.e. they had the financial fitness and wherewithal to build a world-class project in Philadelphia.

At the conclusion of the December 20, 2006 public votes to award licenses, including those in Philadelphia, the Board awarded eleven of the twelve available Category 1 and 2 slot machines licenses authorized under the Gaming Act. As of September 2010, all but one of those licensees, PEDP, broke ground, constructed a gaming facility, commenced operations, applied for and was awarded a table game certificate and instituted table gaming at its facility.

Each of those eleven licensees is currently fulfilling the goals of the Gaming Act by contributing to property tax relief, general fund contributions, subsidization of the horse racing industry, community and economic development projects, other community benefits, and, combined have delivered over 13,000 full time, benefit paying jobs for Commonwealth citizens. Meanwhile, PEDP has yet to procure the requisite permits it needs to break ground at the Board approved location for its gaming facility.

Although not required, PEDP requested the issuance of its license in May 2008. PEDP then began, in May 2009, to repeatedly request the Board to permit it more time to finance and develop its project. PEDP's first such request was its May 2009 Petition for Extension of Time. Under Section 1210(a) of the Gaming Act, 4 Pa.C.S. § 1210(a), slot machine licensees are required to begin operations within one year of being issued a

license by the Board. The Board issued PEDP its Category 2 license on May 29, 2008. PEDP argued that it had expended considerable efforts and faced numerous obstacles beyond its control (i.e. litigation; community opposition; and obstacles from Philadelphia City Council) hindering its ability to develop a facility by May 29, 2009. In addition, PEDP contended that the delays were also spent considering alternative locations to move its casino project. The Board held an August 28, 2009 Public Hearing on PEDP's Petition at which time PEDP revealed one of several recurring facets of its repeated requests for more time to develop its project: that the amount and source of the financing which it can arrange will dictate the size and scope of the project which it will be able to construct. Because it lacked sufficient funding for its project, PEDP would need more time to acquire financing to develop its project and it would also likely have to alter its project from that for which it had been licensed.

On September 1, 2009, recognizing that a portion of the delay (the Board found that the time spent looking at other sites was not good cause for an extension) faced by PEDP was not entirely its own fault, the Board granted PEDP's Petition giving it until May 2011 to begin operations at its facility. In doing so, the Board recounted in detail the basis upon which the Board granted PEDP the license in the competitive and comparative setting, and stated "the Board firmly believes that the Foxwoods project. . . should be built as proposed," "solely for the purpose of Foxwoods developing the casino, as described in the Board's February 1, 2007 Adjudication, at the Columbus Boulevard Site." The Board subjected its decision to nine conditions designed to provide assurances and benchmarks to the Board and the public that the PEDP project would remain on track

to be completed by May 29, 2011 and would be constructed in a manner as initially approved by the Board.

Condition 5 of the Board's September 1, 2009 Order provides as follows:

Within 3 months of the date of this Order, [PEDP] shall submit to BIE all architectural renderings, artist renderings, conceptual proposals, engineering opinions, any and all other documents relating to construction of a facility, substantially similar to that approved by the Board on December 20, 2006. The submissions must provide for a minimum of 1,500 slot machines available for play, on or before May 29, 2011, at the Columbus Boulevard site.

Condition 6 of the Board's September 1, 2009 Order provides as follows:

Within 3 months of the date of this Order, [PEDP] shall submit to BIE a timeline for commencement and completion of all phases of development regarding its facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011.

The documents due pursuant to Conditions 5 and 6 of the Board's Order of September 1, 2009 were to be submitted to BIE on or before December 1, 2009. PEDP did not object to the Board's September 1, 2009 Order and the conditions attached thereto nor seek reconsideration thereof.

On November 30, 2009, PEDP filed a Motion for Extension of Time to Comply with Conditions 5 and 6 of the Board's September 1, 2009 Order. In its Motion, PEDP asserted that it could not finalize development plans without first finalizing financing for its project, and requested a three-month extension to comply with the Board's Order. At the January 27, 2010 Public Hearing on PEDP's Motion, counsel for PEDP testified that it was in discussions with a primary investor for its project with international gaming experience; however, PEDP refused to identify the investor. Additionally, counsel for OEC testified that the limited documents PEDP had provided to BIE relative to the possible transaction were lacking. Concluding that PEDP had failed to establish good

cause for the Board to grant an extension of time, the Board denied PEDP's Motion and, on February 1, 2010, issued an Adjudication and Order in which the Board imposed a daily sanction (\$2,000 retroactive to December 1, 2009) until PEDP complied with the Board's September 1, 2009 Order and issued a Rule to Show Cause upon PEDP as to why the Board should not revoke its slot machine license for its failure to comply with the Board's Order.

The Board subsequently held a Public Hearing regarding the Rule to Show Cause on March 3, 2010. At the March 3, 2010 hearing, PEDP presented testimony from Steve Wynn, on behalf of Wynn Resorts Limited ("Wynn"), with which PEDP had been in negotiations with to provide, *inter alia*, financing for its project. During the hearing, representatives for PEDP testified that it intended to file petitions with the Board for change of control/ownership, modifications to its facility and an extension of time to begin operations relative to its contemplated partnership with Wynn.

After the March 3, 2010 Public Hearing, although the Board noted that PEDP had made some progress relative to its submissions related to its negotiations with Wynn, the Board, finding PEDP's progress inadequate, entered an order continuing the aforementioned daily sanction, but imposed a new deadline (April 26, 2010) by which PEDP was to comply with the Board's Order of September 1, 2009. The Board's March 3, 2010 Order also directed PEDP to submit definitive financing documents to OEC no later than March 31, 2010.<sup>1</sup> PEDP did not object to the Board's March 3, 2010 Order nor did it seek reconsideration thereof.

---

<sup>1</sup> At the March 3, 2010 Public Hearing, Steve Wynn testified that the financing could be arranged within thirty days stating, "that's easy for us to do," N.T. 03/03/10 at 105.

On March 31, 2010, PEDP submitted various documents to OEC and the Board describing Wynn's involvement with PEDP's project including a Partnership Interest Purchase Agreement providing for Wynn's financial investment in the PEDP project; a proposed timeline for construction of the facility; and conceptual renderings indicating a facility would be open to the public at the Columbus Boulevard location in July 2012. Even though these submissions may have facially appeared to satisfy the requirements of Conditions 5 and 6 of the Board's Order of September 1, 2009, the Board never had the opportunity to make that decision as, on April 8, 2010, Wynn withdrew from the PEDP project.

By letter dated April 26, 2010, counsel for PEDP officially notified BIE and the Board that Wynn had terminated its involvement in the PEDP project and PEDP once again did not have definitive financing documents, conceptual renderings or construction timelines to submit to the Board to comply with the Board's September 1, 2009 and March 3, 2010 Orders.

At the Board's April 29, 2010 Public Meeting, PEDP and OEC proposed a joint Consent Agreement to the Board, approval of which would have provided PEDP with yet more time to comply with the Board's Orders. The Board unanimously declined to accept the proposed Consent Agreement and voted to continue the daily sanctions it had earlier imposed upon PEDP. Following the decision that no further extension would be granted, OEC filed the Complaint for Revocation of PEDP's License and subsequent Motion for Summary Judgment thereon now before the Board.

The Board heard oral argument on cross motions for summary judgment as to the complaint on October 27, 2010. While that matter was under consideration by the Board,

on December 10, 2010, in an apparent final attempt to salvage its project, PEDP filed a Joint Petition for Change of Control and Ancillary Relief; a Petition for Approval of Modifications to the Proposed Facility and a Petition for an Extension of Time to Make Slot Machines Available. A review of the documents and testimony at the Board's December 16, 2010 Public Hearing relative to the filings revealed numerous issues therewith, notably, 30% of the equity raise of the new proposed project (\$19 - \$29 million) was unfunded, and no commitments for \$200 million in debt financing had been obtained.

### **Findings of Fact**

After a review of the record of the licensing proceedings, relevant filings, evidentiary submissions, and consideration of the argument provided at the Board's Public Hearings on this matter, as well as all applicable law in this area, the Board finds that there are no disputed genuine issues of material fact and that the Board's revocation of PEDP's License is warranted as a matter of law. In support thereof, the Board makes the following findings of fact and conclusions of law:

1. PEDP was one of five applicants for the two available Category 2 Slot Machine Licenses for the City of Philadelphia.
2. HSP Gaming, LP; Keystone Redevelopment Partners, LLC; Pinnacle Entertainment, Inc. and PNK (PA), LLC; and Riverwalk Casino, LP were the other four applicants that filed for the two available Category 2 Slot Machine Licenses for the City of Philadelphia by the December 31, 2005 deadline.
3. The Board awarded PEDP one of the two Category 2 Slot Machine Licenses for the City of Philadelphia on December 20, 2006. N.T. 12/20/2006.



4. The Board awarded the other available Category 2 Slot Machine Licenses for the City of Philadelphia to HSP Gaming, LP. *Id.*

5. The Board memorialized its decision in an Adjudication and Order dated February 1, 2007.

**PGCB February 1, 2007 Adjudication: Findings of Fact regarding PEDP**

6. PEDP is a Pennsylvania limited partnership formed on January 6, 2005 for the exclusive purpose of acquiring a gaming license in the Commonwealth of Pennsylvania. *PGCB Adjudication* of February 1, 2007 at 31 - 32 (FF<sup>2</sup> 117 - 118).

7. PEDP has a general partner FDC/PEDP GP, LLC and two limited partners, Washington Philadelphia Investors, LP (“WPI”) and FDC Philadelphia, LP (“FDC Philadelphia”) that hold the following ownership interest in PEDP: FDC/PEDP GP, LLC, 00.01%; WPI, 70.00%; and FDC Philadelphia, 29.99%. *Id.*

8. Foxwoods Development Company, a wholly-owned subsidiary of the Mashantucket Pequot Tribal Nation (“Tribal Nation”), is the parent company of FDC/PEDP and FDC Philadelphia. *Id.* (FF 121).

9. Foxwoods Development Company serves as the business arm of the Tribal Nation’s gaming and hospitality interest. *Id.* at 33 (FF 123).

10. The Tribal Nation is the sole owner of Foxwoods Resort Casino in Connecticut. *Id.* (FF 122).

11. Foxwoods Development Company is the parent company of Foxwoods Management, LLC, PEDP’s proposed management company. *Id.* at 32 – 33 and 42 (FF 121, 126 and 164).

---

<sup>2</sup> References are to the specific paragraphs of the Findings of Fact in the cited Adjudication.

12. In consideration for its assisting PEDP in attaining a Category 2 slot machine license, Foxwoods Development Company and its affiliate entities acquired an aggregate 30% partnership interest in PEDP. *Id.* at 33 (FF 126).

13. WPI is comprised of general partner, WPI GP, LLC and several limited partners, including Washington Philadelphia Community Charities, LP (“WPCC”); WPCC holds a 60.52% ownership interest in WPI. *Id.* at 32 (FF 119).

14. The Rubin Family Charitable Foundation, the Silver Family Charitable Foundation (“the Foundations”) and Edward M. Snider all hold limited partnership interest in WPCC. *Id.* at 32 (FF 120).

15. The documents submitted to the Board and sworn testimony on behalf of the Foundations and WPCC in connection with PEDP’s Application committed that the entirety of WPCC’s profits, or 42% PEDP’s profits, would be allocated to charities and non-profit organizations in the Philadelphia area which PEDP estimated would be approximately \$300 million over ten years. *Id.* at 32 (FF 120). PEDP representatives further testified that the donations would be targeted to non-profits in the Philadelphia area serving children. N.T. 12/04/06 at 60 – 62.

16. PEDP proposed locating its facility on a sixteen and one half (16 ½) acre parcel of vacant land on the Delaware Riverfront at the site commonly known as Piers 60, 62 and 63 in Philadelphia. *PGCB Adjudication* of February 1, 2007 at 29 (FF 104).

17. PEDP submitted two site development plans to the Board: one if it was granted riparian rights on the Delaware River and another if it was denied riparian rights. *Id.* at 29 (FF 105).

18. If granted riparian rights, the design plan incorporated an existing pier of approximately 90,000 square feet and planned for restaurants, an entertainment venue, lounges and bars, retail shops, parking and full public access to the waterfront. *Id.* at 29 (FF 106).

19. If not granted riparian rights, the entertainment complex was to be built without the use of riparian rights moving the building back 80 to 100 feet from the other design, but still allowing for the construction of a full entertainment district of more than 120,000 square feet in size on the water's edge. *Id.* at 29 – 30 (FF 107).

20. The Board found based upon the testimony of PEDP representatives that PEDP did not plan to build a temporary casino. *Id.* at 41 (FF 158).

21. PEDP proposed a phased project located at Columbus Boulevard in South Philadelphia beginning with construction of a 390,000 square foot facility, including a 89,000 – 90,000 square foot gaming floor housing 3,000 slot machines; a 2,000 seat showroom; an entertainment lounge; retail shops; a 600-seat buffet; a 250-seat five-outlet food court; a 250-seat sports bar; a 4,200 space parking garage; and 300 surface parking spaces. *Id.* at 39 – 40 (FF 154).

22. PEDP projected that it would begin Phase I of its project in February 2007 with an estimated opening date of November 2008. *Id.*

23. Phase II of PEDP's proposed plan was comprised of an expansion of the casino floor by approximately 66,000 square feet to accommodate the addition of 2,000 slot machines and/or table games. Phase II plans also included the addition of nightclubs, restaurants, boutique retail shopping and an expansion of the parking garage for an additional 1,200 parking spaces. *Id.* at 40 (FF 155).

24. Phase III of PEDP's proposed plan was comprised of construction of two 30-story towers that connect to the existing casino and entertainment complex. The west tower would be a hotel with approximately 500 rooms and the east tower would be designed to be either an additional 500-room hotel or a 200-resident condominium. In addition to the two towers, Phase III plans included additional restaurants, a spa and an outdoor pool. *Id.* (FF 156).

25. PEDP's traffic expert proposed a plan to allow traffic to flow better on South Columbus Boulevard. Working in conjunction with the City of Philadelphia and the Pennsylvania Department of Transportation, and using standards set forth in the Institute of Transportation, and using standards set forth in the Institute of Transportation of Engineers publications, PEDP's traffic experts submitted a series of mitigation measures that it testified would reduce traffic congestion on Columbus Boulevard by 32%. To improve traffic flow, PEDP proposed widening a street as it approaches Columbus Boulevard, constructing double left turn lanes at two intersections, re-striping other intersections, and adding two new traffic signals along Columbus Boulevard. *Id.* at 42 (FF 165).

26. PEDP planned for the Phase I improvements to be complete prior to the opening of the gaming facility. *Id.*

27. PEDP committed to fund 100% of the traffic improvements proposed as part of its Phase I development. *Id.* at 43 (FF 166).

28. PEDP estimated that Phase I would create between 945 and 1,071 construction jobs. PEDP also estimated that its Phase I facility would create 950 permanent

operations positions. These positions were intended to be living wage positions with full medical benefits. *Id.* at 41 (FF 159 – 160).

29. PEDP committed to hire and train local applicants to fill 95% of the new employment positions at Foxwoods Casino Philadelphia. *Id.* at 41 (FF 161).

30. The Board's Financial Suitability Task Force projected a revenue estimate for PEDP of approximately \$310.8 million annually in a stabilized year in 2005 dollars with a win per position of \$284 per day at 3,000 machines. *Id.* at 37 (FF 140 – 141).

31. Based upon a commitment letter from Merrill Lynch, PEDP demonstrated that it had access to sufficient funds to develop the proposed project. Merrill Lynch had committed to arrange and/or underwrite \$460 million in third-party financing for PEDP's project, Foxwoods Casino Philadelphia. In addition, land valued at approximately \$70 million, which is part of the total project cost, had been contributed to the project by WPI and did not need to be financed by the partnership. PEDP would also receive \$55 million from Foxwoods Development Company, \$30 million of which will come in the form of equity to the project with the remaining \$25 million to be repaid by PEDP to the Tribal Nation. *Id.* at 37 – 38 (FF 145).

32. Diverse groups were represented in the ownership of PEDP. Through its subsidiaries, the Tribal Nation holds an aggregate of 30% of the partnership interests of PEDP. In addition, Quincy D. Jones, Jr., an African American, holds a 5.62% limited partnership interest in WPI, a 70% limited partner of PEDP. Billy King and Dawn Staley, both African Americans, each hold a 1.12% limited partnership interest in WPCC, the 60.52% limited partner of WPI. Overall, approximately 51% of PEDP is minority and/or women owned and operated. *Id.* at 38 – 39 (FF 148 – 149).

33. PEDP committed to help set up and fund a special services district to mitigate impacts to the communities nearest to and most directly impacted by the project. There were no specific commitments as to which communities would be included in the special services district, the amount of money that would be contributed to the special services district or exactly how the monies would be used. *Id.* at 43 (FF 168).

34. Approximately forty-two percent of PEDP's profits would pass through charitable trust owners to charitable causes to primarily assist education and disadvantaged children in the Philadelphia area at a rate of approximately \$300 million over ten years. *Id.* at 43 (FF 169).

35. In its February 1, 2007 Adjudication and Order, the Board explained that

The Gaming Act only permits two licenses to be awarded in Philadelphia and there were five applicants. Thus, there was competition among the applicants for the two available licenses. Because of this competitive factor, the five applicants not only had the responsibility to satisfy the Board that they were eligible and suitable for a Category 2 license, but they also were required to convince the Board that respective project should be among the two chosen by the Board to best serve the Commonwealth's and the public's interest in Philadelphia. Ultimately that was a determination committed to the sound exercise of the Board's discretionary authority to select the two applicants which the Board believes will best serve the Commonwealth's and the public's interest as outlined in the Act.

...

The denials of three applicants is not because the unsuccessful applicants were found unsuitable, but because the Board had the difficult task of choosing among five suitable candidates and proposals, each of which possessed various positive attributes. Simply stated, the successful applicants were the applicants which possessed the projects which the Board evaluated, in its discretion, to be the best projects for licensure under the criteria of the Act.

*PGCB Adjudication* at 5 and 7 (02/01/07).

36. The Board also stated that, in reaching its decision, there were several factors that made PEDP's (and HSP) projects stand out. *Id.* at 80.

37. Both HSP and PEDP are located on the riverfront and have excellent design plans for their facilities. *Id.* at 81.

38. The location of the facilities, in relation to the other and Interstate 95 (i.e. in that the interstate separates the facilities from residential areas) is advantageous. *Id.*

39. PEDP has a strong partner in Foxwoods, in the diversity of its owners and at least forty-two of its profits will flow to charitable trusts to be used for charitable purposes in the Philadelphia area. *Id.*

40. In March 2007, Riverwalk Casino, LP appealed the Board's Category 2 Slot Machine for the City of Philadelphia decision to the Supreme Court. The Board's decision became final when the Pennsylvania Supreme Court upheld the Board's decision issuing its opinion in *Riverwalk Casino v. PGCB*, 926 A.2d 926, on July 17, 2007.

41. By letter dated February 8, 2008, counsel for PEDP formally requested that the Board issue it its Category 2 Slot Machine License ("License"). Neither the Gaming Act nor the Board required PEDP to request the issuance of the license at that time; however, by requesting the issuance of the license, PEDP started the running of the time by which it was required to commence operations.

42. The Board issued PEDP's License on May 30, 2008. Pursuant to Section 1210(a) of the Gaming Act, 4 Pa.C.S. § 1210(a), PEDP had one year from that date by which to make 1,500 slot machines available for play at its facility, unless granted an extension of time, by the Board, upon application and for good cause shown.

43. The expiration date of PEDP's license was May 29, 2009. PEDP had filed an application to renew its license but that application has not been acted upon since PEDP has not been able to commence operations and, therefore, the application has remained in

a pending status. *See*, Section 1209(b) of the Gaming Act, 4 Pa.C.S. §1209(b) (the license remains in effect unless suspended, revoked or not renewed).

44. On October 14, 2008, the Pennsylvania Supreme Court appointed a Special Master to assist PEDP in attaining the necessary permits from the City of Philadelphia for development of its project.

**PEDP's First Extension Request**

45. On May 22, 2009, PEDP filed a Petition to Extend Time to Make Slot Machines Available.

46. The Board conducted a Public Hearing on PEDP's Petition on August 28, 2009.

47. At the hearing, counsel for PEDP testified that good cause existed for the Board to grant the Petition "because of the significant obstacles that PEDP has overcome thus far in attempting to develop and construct the casino and the unprecedented problems that have gripped the financial and credit markets. . ." N.T. 08/28/09 at 15.

48. The "obstacles" counsel referred to during the hearing were attaining the necessary permits to begin construction of its facility from the City of Philadelphia and pressure to relocate its facility from, among others, local and state officials. *Id.* at 16 – 28.

49. During the hearing, counsel for PEDP testified that if the Board granted PEDP's Petition, it "is prepared to move forward with development and construction of a casino that would have at least 1,500 slot machines and have it operational by May 2011." *Id.* at 28, 33, 42, 56 and 62.



50. At the time of the August 28, 2009 Public Meeting, PEDP did not have, nor had it attempted to attain, the fundamental, basic permit it needed in order to break ground at the Columbus Boulevard location. *Id.* at 38 and 41.

51. PEDP had not utilized the services of the Special Master appointed by Pennsylvania Supreme Court to assist PEDP in attaining the necessary permits from the City of Philadelphia at the time of the August 28, 2009 Public Hearing. *Id.*

52. During its presentation, and in response to questions from the Board and OEC, counsel for PEDP repeatedly acknowledged that it lacked financial resources/funding for its project. *Id.* at 29, 35 – 36, 55, 63 – 64 and 67.

53. PEDP also acknowledged that it anticipated altering its Board approved project to reflect ongoing “financial realities,” including submitting to the Board plans for an interim, but not temporary, facility. *Id.* at 29 – 30, 36, 55, and 62 – 64.

54. Counsel for PEDP assured the Board that it would “proceed promptly” to enter into community agreements to lessen the impact of casino development. *Id.* at 47, 51.

55. At the conclusion of the Hearing, the Board, at its August 28, 2009 Public Meeting, announced its decision to conditionally grant PEDP’s Petition for Extension of Time giving PEDP until May 29, 2011 to begin operations at a facility substantially similar to that which was approved by the Board in 2006, with at least 1,500 slot machines. *Id.* at 32 – 34.

56. The Board memorialized this decision in an Adjudication and Order dated September 1, 2009.

57. The Board conditioned its grant of PEDP’s Petition for Extension of Time on nine conditions outlined in the September 1, 2009 Order including benchmark reporting and

documentary submission deadlines that would indicate that the project was on track and moving forward in a manner consistent with the intent of the Gaming Act, as well as the representations of PEDP to the Board during Public Hearings.

58. Condition 5 of the Board's September 1, 2009 Order reads as follows:

Within 3 months of the date of this Order, [PEDP] shall submit to BIE all architectural renderings, artist renderings, conceptual proposals, engineering opinions, any and all other documents relating to construction of a facility, substantially similar to that approved by the Board on December 20, 2006. The submissions must provide for a minimum of 1,500 slot machines available for play, on or before May 29, 2011, at the Columbus Boulevard site.

59. Condition 6 of the Board's September 1, 2009 Order reads as follows:

Within 3 months of the date of this Order, [PEDP] shall submit to BIE a timeline for commencement and completion of all phases of development regarding its facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011.

60. The documents due pursuant to Conditions 5 and 6 of the Board's Order of September 1, 2009 were to be submitted to BIE on or before December 1, 2009 – more than six months after PEDP's extension request.

61. At the August 28, 2009 Public Hearing, counsel for PEDP expressed concern with the "timelines" ultimately delineated in the Board's September 1, 2009 Order; however, PEDP never objected to them or filed a motion for reconsideration or other challenge to the Board's September 1, 2009 Order. N.T. 08/28/09 at 47 – 50.

62. At the August 28, 2009, PEDP was specifically put on notice the Board expected PEDP to "construct the project that you had promised us and that was approved by the Board." *Id.* at 53-54.

**PEDP's Second Extension Request**

63. On November 30, 2009, PEDP filed a Motion for Extension of Time to Comply with Conditions 5 and 6 of the Board's September 1, 2009 Order.

64. Specifically, PEDP sought a three-month extension to comply with Conditions 5 and 6 of the Board's Order.

65. In its Motion, PEDP stated that it had been unable to comply with Conditions 5 and 6 of the Board's September 1, 2009 Order because "it is not possible for it to finalize its development plans and timelines before finalizing how it will fund and finance development of its project. *PEDP Motion for Extension of Time* at 9 (11/30/09).

66. The Board held a Public Hearing on PEDP's Motion on January 27, 2010.

67. At the Hearing, counsel for PEDP testified that between August 28, 2009 (the date of PEDP's last Board hearing) and November 30, 2009 (the date PEDP filed the Motion for Extension of Time), PEDP "had been working with its investment advisor on a nonstop basis . . . in an effort to address financing and funding for the project." N.T. 01/27/10 at 26.

68. At the Hearing, counsel for PEDP testified that PEDP had identified a primary investor for its project; however, PEDP refused to identify that investor. *Id.* at 27 and 41 - 42.

69. Counsel for PEDP testified that the unnamed investor had met with its construction manager a week earlier. *Id.* at 31.

70. Counsel for PEDP testified that the unnamed investor and its construction manager were about to cement a plan for a project consisting of approximately 200,000 square feet of casino space; 75,000 square feet of back-of-the-house space; a free

standing parking garage; at least 2,500 – 2,700 slot machines and 80 – 100 table games; and hotel capacity. *Id.* Counsel for PEDP further testified that it became apparent to PEDP that it “needed to get an investor,” “needed substantial funds” and was “upside down.”

71. During the Hearing, counsel for PEDP acknowledged that it was not seeking funding for the project as approved by the Board nor did intend to operate under the project plan as approved by the Board. “There was a plan that was approved, but that's not the plan under which we intend to operate, number one.” *Id.* at 35 - 36.

72. Counsel for PEDP testified that, if it signed a term sheet with the un-identified investor, it intended to seek Board permission in the future to change the design of its project and seek an extension of time to being operations. *Id.* at 33.

73. At its January 27, 2010 Public Meeting, the Board announced its decision to deny PEDP’s Motion for Extension of Time to Comply with Conditions 5 and 6 of the Board’s September 1, 2009 Order. *Id.* at 6 – 7.

74. The Board also imposed a \$2,000 daily sanction, retroactive to December 1, 2009 (the date the documents were due), upon PEDP, due March 3, 2010, or until it came into compliance with Conditions 5 and 6 of the Board’s Order of September 1, 2009. *Id.*

75. The Board also issued a Rule to Show Cause Upon PEDP to appear before the Board on March 3, 2010 to show cause why the Board should not impose further sanctions, up to and including revocation of its License, for failure to comply with the Board’s September 1, 2009 Order. *Id.*

76. The Board memorialized this decision in an Adjudication and Order dated February 10, 2010.

**Rule to Show Cause Hearing (Presentation of Proposed Wynn Transaction)**

77. The Board held a Public Hearing on the Rule to Show Cause on March 3, 2010.

78. At that Hearing, counsel for PEDP began its presentation by arguing that the Board should lift the sanctions it imposed on it in its Order of February 10, 2010 and not impose further sanction against PEDP because the purpose of the sanction(s) were no longer necessary in light of the term sheet it entered into as of February 18, 2010 with an affiliate of Wynn Resorts, Limited and because the January 2010 amendments to the Gaming Act 1) permits table games at slot facilities and 2) permits the Board to grant a further extension of time to begin operations, upon good cause shown, up to December 31, 2012. N.T. 03/03/10 at 9.

79. In response to questions from OEC, counsel for PEDP acknowledged that final/definitive documents in relation to the term sheet had not yet been signed. *Id.* at 40 – 41.

80. PEDP then presented testimony from Steve Wynn, Chairman and CEO of Wynn Resorts Limited *Id.* at 12, 16 – 17, 20 – 27 and 35 – 38.

81. Steve Wynn admitted that the parties agreement was not binding. *Id.* at 42.

82. Mr. Wynn testified that Wynn Resorts Limited was brought into the PEDP project to, among other things, provide financing for and management services to the project. *Id.* at 16, 20, and 25.

83. During the Hearing, counsel for PEDP and Mr. Wynn noted that PEDP intended to file petitions with the Board for change of control/ownership; for approval to modify its plans for its facility; and for an extension of time to begin operations. *Id.* at 32, 35, 42 and 47.

84. Under the contemplated transaction, Wynn Resorts Limited would own 51% of PEDP; it would manage PEDP; and it would be responsible for the design, development and operation of the facility. *Id.* at 29 – 30.

85. In response to questioning from OEC, counsel for PEDP admitted that without involvement of Wynn Resorts Limited, PEDP had no capability or alternate plans to develop a facility by the May 29, 2011 deadline. *Id.* at 53.

86. In response to questioning from the Board, counsel for PEDP admitted that it had not complied with Conditions 5 and 6 of the Board's Order of September 1, 2009. *Id.* at 55.

87. At the time of its March 3, 2010 Public Meeting, the Board announced its finding that PEDP had not substantially complied with Conditions 5 and 6 of the Board's Order of September 1, 2009. *Id.* at 21.

88. The Board ordered that PEDP had until April 26, 2010 to comply with Conditions 5 and 6 of the Board's Order of September 1, 2009. *Id.*

89. The Board also announced that it would be continuing the daily sanction it levied against PEDP in its February 10, 2010 Order. *Id.*

90. The Board further ordered PEDP to submit to the Board definitive financing documents no later than March 31, 2010. *Id.*

91. The Board directed PEDP to appear at the Board's April 29, 2010 Public Meeting to update the Board as to the status of matter. *Id.*

#### **April 29, 2010 Update Meeting**

92. On March 31, 2010, PEDP submitted various documents to OEC and the Board regarding Wynn Resorts Limited's involvement with PEDP's project, including a

Partnership Interest Purchase Agreement providing for Wynn Resorts Limited's financial investment in the PEDP project; a proposed timeline for construction of the facility; and conceptual renderings indicating a facility would be open to the public at the Columbus Boulevard location in July 2012. N.T. 04/29/10.

93. On April 8, 2010, Wynn Resorts Limited withdrew from the PEDP project. *Id.*

94. By letter dated April 26, 2010, counsel for PEDP notified BIE and the Board that, although it was aggressively seeking alternative investors, because Wynn Resorts Limited had terminated its involvement in the PEDP project, PEDP did not have definitive financing documents, conceptual renderings or construction timelines to submit to the Board in compliance with the Board's September 1, 2009 and March 3, 2010 Orders. *Id.*

95. At the time of the Board's April 29, 2010 Public Meeting, PEDP and OEC proposed a joint Consent Agreement for the Board's consideration which would have further extended the deadline by which PEDP had to come into compliance with the Board's Orders of September 1, 2009 and March 3, 2010. *Id.*

96. The Board voted unanimously to reject the Consent Agreement. *Id.* at 11 – 12.

97. The Board also voted unanimously to continue the \$2,000 daily sanction the Board imposed upon PEDP in its March 3, 2010 Order. *Id.* at 12 – 13.

#### **OEC's Complaint for Revocation**

98. After the Board rejected OEC and PEDP's proposed Consent Agreement, on April 29, 2010, OEC filed a Complaint for Revocation of PEDP's Slot Machine License in which it alleged, generally, that PEDP:

- Violated the Board’s Order of September 1, 2009 and the Board’s Order of March 3, 2010 by failing to: (i) Submit architectural renderings, artist renderings, conceptual proposals, engineering opinions, any and all other documents relating to construction of a facility, substantially similar to that approved by the Board on December 20, 2006 to BIE by December 1, 2009; (ii) Submit a timeline for commencement and completion of all phases of development regarding its facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011 to BIE by December 1, 2009; and (iii) Submit definitive financial document to BIE by March 31, 2010.

- Violated its Statement of Conditions by failing to “exercise due diligence to ensure that at all times it meets and maintains the suitability requirements of the Gaming Act, including but not limited to, those relating to good character, honesty, integrity and **financial fitness**.

- Failed to be able to be operational by the Board imposed statutory deadline of May 29, 2011; and

- Failed to maintain financial suitability for licensure pursuant to the Gaming Act. N.T. 04/29/10; Board Order (04/29/10).

*OEC Complaint for Revocation (04/29/10).*

99. PEDP filed an Answer to OEC’s Complaint on June 1, 2010.<sup>3</sup>

100. In its Answer, PEDP argued that it had fully or substantially complied with all requirements of the Gaming Act and/or Board orders and, therefore, the Board should not revoke its License. *PEDP Answer* (June 1, 2010).

---

<sup>3</sup> PEDP’s appeal of the Director of the Office of Hearings and Appeals denial of its unopposed request for an extension of time to answer OEC’s Complaint delayed PEDP ultimately filing its June 1, 2010 Answer.



101. Even if it had not fully or substantially complied with all requirements of the Gaming Act and/or Board orders, PEDP argued that its failure to comply with the Board's requirements was through no fault of its own/because of factors beyond its control for which it should not be held responsible. *Id.*

**Motion for Summary Judgment Proceedings**

102. Following the conclusion of discovery, on October 5, 2010, OEC and PEDP each filed Motions for Summary Judgment relating to the April 29, 2010 Complaint for Revocation of PEDP's License and, on October 15, 2010, both parties filed their respective Answers/Reponses thereto. *OEC Motion for Summary Judgment (10/05/10); PEDP Motion for Summary Judgment (10/05/10); OEC Answer to PEDP's Motion for Summary Judgment (10/15/10); PEDP's Answer to OEC's Motion for Summary Judgment (10/15/10).*

103. On October 27, 2010, the Board conducted a Public Hearing on OEC's and PEDP's Motions for Summary Judgment. N.T. 10/27/10.

104. Counsel for both OEC and PEDP presented evidence and legal argument regarding the Motions to the Board. *Id.*

105. At the conclusion of the Hearing, the Chairman noted the Board would consider both Motions for Summary Judgment at its next Public Meeting. *Id.* at 103 – 104.

106. At the Board's November 18, 2010 Public Meeting, counsel for PEDP testified regarding its efforts to reach a deal with potential investor Harrah's/Caesar. N.T. 11/18/10 at 6 – 7.

107. Counsel for PEDP testified that PEDP intended to file applications for change of control, an application for an extension of time and an application for a change in design. *Id.* at 7.

108. Regulatory counsel for Harrah's testified that the parties had yet to finalize three important documents: a Partnership Purchase Agreement, a Limited Partnership Agreement and a Management Agreement. *Id.* at 10.

109. At the conclusion of testimony, the Board voted to deny PEDP's Motion for Summary Judgment. *Id.* at 25.

110. The Board considered OEC's Motion for Summary Judgment, but the Board tabled consideration of OEC's Motion for Summary judgment until its December 16, 2010 Public Meeting. *Id.* at 26 – 60.

111. The Board voted to allow PEDP until December 10, 2010 to submit to the Board documents regarding restructuring, refinancing and/or change of ownership sufficient to establish PEDP's ability to construct and operate a gaming facility at the Board approved location. *Id.* at 54 – 65.

112. On December 10, 2010, PEDP filed a joint Petition with Horseshoe PL GP, LLC; Horseshoe PL LP, LLC; Horseshoe PL Acquisition Co., LLC; and Bally's Midwest Casino, Inc. ("Harrah's/Caesars") for Change of Control and Ancillary Relief ("Petition for Change of Control"); a Petition for Approval of Modifications to the Proposed Facility ("Petition for Modification"); and a Petition for an Extension of Time to Make Slot Machines Available ("Petition for Extension of Time").

113. PEDP-Harrah's/Caesars' Petition for Change of Control proposed the following ownership structure (and respective capital contributions) for PEDP:

Class A Shares	63.3%	
Silver Trust	16.6%	(\$10.5 million)
Edward Snider	16.6%	(\$10.5 million)
<b>To be determined</b>	<b>30.1%</b>	<b>(\$19 - \$29 million)<sup>4</sup></b>
Class B. Shares	30.7%	
Harrah's/Caesars		(\$25 million)
Class C Shares	6%	
Philadelphia Investors	1.6%	<sup>5</sup>
Tribal Nation	1.6%	
Harrah's/Caesars	2.6%	

114. PEDP-Harrah's/Caesars' Petition for Change of Control also included provisions for restructuring of PEDP's current \$127.4 million debt.

115. PEDP-Harrah's/Caesars' Petition for Modification proposed a phased project located at Columbus Boulevard with construction scheduled to commence immediately upon Board approval, receipt of debt financing and City approvals. The Petition anticipated that Phase 1A of the project would be complete in the second half of 2012.

116. Phase 1A of PEDP-Harrah's/Caesars' Petition for Modification contemplated a 151,000 square foot facility, including a 64,000 square foot gaming floor housing 1,500 slot machines; 70-80 multi-position table games; 1,372 surface parking spaces; 4 restaurants; 1 VIP lounge; and 1 center bar located on the gaming floor. Later phases of PEDP-Harrah's/Caesars' proposed modified project called for, *inter alia*, additional 32,000 square feet of building space; 23,000 square feet of gaming space; 700 additional slot machines; 20-30 additional table games; a World Series of Poker poker room; a

---

<sup>4</sup> The agreement between the parties was conditioned on at least \$19 million in equity from new investors which, if raised, Harrah's/Caesars would contribute an additional \$10 million in equity shortfall.

<sup>5</sup> The "Philadelphia Investors" and their respective ownership interest in the Class C Shares as proposed in PEDP-Harrah's/Caesars' Petition for Change of Control are the Rubin Family Foundation (.4%); the Silver Trust (.37%); Edward Snider (.18%); Peter DePaul (.15%); Manny Stamatakis (.072%); Frederick Teece (.1%); Quincy Jones (.09%); Anuj Agarwal (.08%); Robert Levy (.05%); Billy King (.02%); Dawn Staley (.02%); Garry Maddox (.02%); Joan Steinberg (.014%); and the Sylvia DiBona/DiBona Family Trust (.02%).

2,250 space parking garage; additional 250 surface parking spaces; additional structured parking; and an additional showroom, meeting and conference facilities, restaurants, casino floor expansions, a hotel tower and/or retail space.

117. PEDP-Harrah's/Caesars' December 10, 2010 filings indicated a reduction in the charitable contributions that PEDP had initially committed to relative to its Board approved project. Specifically, in 2006 PEDP committed to contribute 42% of its profits to Philadelphia charities which PEDP estimated would amount to \$300 million over ten years. The PEDP-Harrah's/Caesars' December 10, 2010 filings explain that, if the Board approved their filings, their charitable contributions would be allocated as follows:

- If actual total development costs are less than amount budgeted, contribution of difference, up to \$5 million at the opening of the casino.
- If less than \$5 million, up to \$400,000 per month from excess cash flow (prior to non-required payment under Caesars or third party debt and permitted distributions to equity holders) as to needed to reach until reaching \$5 million
- Annual contributions of up to 2% of net revenue (gross revenue less promotional and comps), subject to reduction (floor of 1%) in the event of shortfall in Class A subscriptions procured by parties other than Caesars.
- \$6,000,000 of the charitable contributions would be to the Pequot Indian museum in Connecticut.

118. Documentation submitted by PEDP-Harrah's/Caesars was in part unsigned, had blanks and contemplated additional negotiation and the occurrence of various conditions. The PEDP-Harrah's/Caesars' agreements were conditional on events such as the Board's reduction of the table game certificate fee despite the statute making the fee mandatory and not providing the Board discretion to reduce it. The agreements also contemplated a debt and equity raise of \$229,000,000, which had not been obtained.

119. The PEDP-Harrah's/Caesar's proposal would significantly reduce the diversity of minority ownership of the project from that in 2006. PEDP had no additional committed equity participation from any minority investor. N.T. 12/16/2010 at 32.

120. The PEDP-Harrah's/Caesars' proposal changed the committed-to cost of the project from \$560,000,000 (2006) to \$275,000,000 (2010).

121. On December 16, 2010, the Board conducted a Public Hearing on these Petitions and to address OEC's outstanding Motion for Summary Judgment. N.T. 11/16/10.

122. At the time of the December 16, 2010 Hearing, Chief Counsel for OEC expressed reservations as to the PEDP-Harrah's/Caesars' December 10, 2010 filings. N.T. 11/16/10 at 18-22.

123. Counsel for OEC stated that he did not believe that the Purchase Agreement between the parties was a "truly definitive document" and that there was "uncertainty regarding the details of additional equity infusion." *Id.* at 20.

124. At the Board's December 16, 2010 Public Meeting, the Board voted 6-1 to grant OEC's Motion for Summary Judgment thereby revoking PEDP's License.<sup>6</sup> N.T. 11/16/10 at 24-29.

### **Conclusions of Law**

1. The Board, pursuant to Section 1202(a)(1) of the Gaming Act, 4 Pa.C.S. § 1202(a)(1), has jurisdiction over PEDP and the subject matter of the instant proceedings.
2. Under Section 1210(a)(2) of the Gaming Act, 4 Pa.C.S. § 1210(a)(2), PEDP was required to operate and make available for play a minimum of 1,500 slot machines at its

---

<sup>6</sup> Commissioner Ginty voted to deny OEC's Motion for Summary Judgment for the reasons indicated in the attached Dissent.

licensed facility within one year of the issuance by the Board of its License, i.e. by May 29, 2009.

3. Under Section 1210(a)(2) of the Gaming Act, 4 Pa.C.S. § 1210(a)(2) (which was applicable when PEDP sought an extension of time to make slot machines available for play), upon application and for good cause shown, the Board extended the time by which PEDP was required to operate and make available for play a minimum of 1,500 slot machines at its licensed facility by the statutorily maximum period of twenty-four months to May 29, 2011.

4. PEDP is in violation of Section 1210(a) of the Gaming Act, 4 Pa.C.S. § 1210(a), and the Board's Order because it is unable to operate and make available for play a minimum of 1,500 slot machines at its licensed facility by May 29, 2011.

5. The Board required PEDP to provide BIE with the "architectural renderings, artist renderings, conceptual proposals, engineering opinions, any and all other documents relating to construction of a facility, substantially similar to that approved by the Board on December 20, 2006" as a condition of the Board's September 1, 2009 Order. PEDP's failure to provide BIE with the "architectural renderings, artist renderings, conceptual proposals, engineering opinions, any and all other documents relating to construction of a facility, substantially similar to that approved by the Board on December 20, 2006" is a violation of Condition 5 of the Board's September 1, 2009 Order.

6. The Board required PEDP to provide BIE a "timeline for commencement and completion of all phases of development regarding its facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011" as a condition of the Board's September 1, 2009 Order. PEDP's failure to provide BIE with a "timeline for

commencement and completion of all phases of development regarding its facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011” is a violation of Condition 6 of the Board’s September 1, 2009 Order.

7. The Board required PEDP to provide BIE with “definitive financial documents” as a condition of the Board’s March 3, 2010 Order. PEDP’s failure to provide BIE with “definitive financial documents” is a violation of the Board’s March 3, 2010 Order.

8. PEDP is required to maintain its financial suitability pursuant to the Gaming Act and the Board’s Regulations. 4 Pa.C.S. § 1313 and 58 Pa. Code § 441a.5(f).

9. Section 1202(b)(12) of the Gaming Act, 4 Pa.C.S. § 1202(b)(12), permits the Board to condition PEDP’s License.

10. PEDP is required to maintain its financial suitability pursuant to its Statement of Conditions. 4 Pa.C.S. § 1202(b)(12), 58 Pa. Code § 423a.6(b) and PEDP’s Statement of Conditions, SOC 57 (July 11, 2007).

11. PEDP’s inability to timely finance the development of its Board approved gaming facility and its failure to attain financial and operational viability render it financial unsuitable in violation of its Statement of Conditions, the Gaming Act and the Board’s regulations. *Id.*

12. Section 423a.6(b)(5), 58 Pa. Code § 423a.6(b)(5), of the Board’s regulations provides that failure to fully comply with a Statement of Conditions constitutes a violation thereof and may result in Board imposed sanctions, up to and including revocation.

13. Under Section 1518(c)(1)(ii) - (iii) of the Gaming Act, 4 Pa.C.S. § 1518(c)(1)(ii) – (iii), the Board may revoke PEDP’s License for PEDP’s violation(s) of the Gaming Act, the Board’s regulations and/or PEDP’s violation of a Board order.
14. PEDP has violated the Gaming Act, the Board’s regulations, its Statement of Conditions and/or Board orders.
15. OEC is entitled to summary judgment if there are no genuine issues of material fact relative to its Complaint for Revocation.
16. There are no genuine issues of material fact relative to the facts alleged in OEC’s Complaint for Revocation and the basis for each Count in the complaint is established.
17. PEDP has failed to submit definitive documentation that it has the present ability or capacity to build and to finance the development of a gaming facility substantially similar in all respects to the proposed facility and related attributes approved by the Board.
18. The inability of PEDP to timely commence construction, complete the build-out and commence operations of the Category 2 slot machine facility as proposed and licensed warrants the Board’s grant of the Complaint for Revocation of PEDP’s License.
19. The public’s interest in the building of the PEDP project and the promised economic development, employment and charitable giving has been damaged by PEDP’s inability to construct and operate the project as licensed.
20. The revocation of the PEDP license furthers the public interest because given the history and inability to construct and commence operations of the facility approved by the Board in 2006, the Board and the public can have no confidence that PEDP can fulfill



the various applicable mandates of the Gaming Act, build and operate a facility as awarded or otherwise comply with the Board's orders.

### **Discussion**

The issue before the Board, whether to revoke a slot machine facility license, is not one undertaken lightly by the Board. In 2006, when the Board determined that PEDP should be awarded a license, the decision was made in a competitive statewide process as contemplated by the legislature. This process called on the Board to consider voluminous documentary submissions; to receive extensive presentations from the applicants and the public alike, to take testimonial and documentary evidentiary submissions during public hearings, to hear oral argument and accept legal briefs to deliberate and to vote in a public setting as to which two of five applicants presented the best proposals for casinos in Philadelphia vis-à-vis those in the rest of the state. As reflected in the Board's 113 page Adjudication, the task of weighing and evaluating the proposals and determining which two projects, in the Board's discretion were the best for the Commonwealth and Philadelphia, was not an easy one, yet it was a decision to which the Board was firmly committed. As the Board has stated, the combination of all of the various attributes of the proposal presented by PEDP made it one of the two best.

The Board is now presented with a licensee beset by a host of delays and repeated violations the requirements of the Gaming Act, the Board's regulations, the conditions of its license and the Board's Orders. As a result, the failures of PEDP to live up to its obligations, has left in its wake an immeasurable void of unfulfilled promises and commitments of economic revitalization, employment opportunities, revenues for the benefit of the Commonwealth and Philadelphia alike, as well as for the underprivileged in

the Philadelphia area. Thus, while the Board fully appreciates the consequences of a revocation to the PEDP investors, in its fiduciary duty to the Commonwealth, it nonetheless has an obligation to ensure that the purpose and intent of the Gaming Act is accomplished. As set forth below, PEDP's continued possession of a license by PEDP in the circumstances presented is contrary to the provisions of the Gaming Act, mandating the Board's action of revocation.

Summary Judgment Standard

After the close of the relevant pleadings, but within such time as to not unreasonably delay a hearing, any party may move for summary judgment in whole or in part, as a matter of law, based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits:

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury.

Pa.RC.P. No. 1035.2 and 58 Pa. Code § 493a.10(b).

Summary judgment is appropriate when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Guy M. Cooper, Inc. v. East Penn School District*, 903 A.2d 608 (Pa.Cmwlth.2006). *Soppick v. Borough of West Conshohocken*, 2010 WL 3929063, 3 (Pa. Cmwlth. Ct. 2010). Finally, the [Board] may grant summary judgment only where the right to such judgment is clear and free from

doubt. *Thornton v. Philadelphia Housing Authority*, 2010 WL 3705347, 11 (Pa. Cmwlth Ct. 2010) citing *Fine v. Checcio*, 870 A.2d 850, 857 (Pa. 2005).

The Board's primary obligation under the Act is to "protect the public through the regulation and policing of all activities involving gaming . . .," 4 Pa.C.S. § 1102(1). To this end, the Gaming Act authorizes the Board to, at its discretion and without limitation, revoke the slot machine license of any licensee it determines (1) has violated a provision of the Gaming Act or the Board's regulations which would otherwise disqualify the licensee from holding a slot machine license; (2) has willfully and knowingly violated or attempted to violate an order of the Board directed to that licensee; and/or (3) has failed to fully comply with a Statement of Conditions. 4 Pa.C.S. §§ 1202(b)(12), 4 Pa.C.S. 1518(c)(1)(ii)-(iii) and 58 Pa. Code § 423a.6(b)(5).

Here, in its Complaint for Revocation, and subsequent Motion for Summary Judgment, OEC argues there exist four bases upon which call for the Board to revoke PEDP's License: (1) PEDP violated the Board's Orders of September 1, 2009 and March 3, 2010 by failing to submit the requisite documents to the Board; (2) PEDP is in violation of its Statement of Conditions for failing to remain financially suitable for licensure; (3) PEDP is in violation of the Board's Order of September 1, 2009 for failing to be operational by May 29, 2011; and (4) PEDP is in violation of the Gaming Act for failure to remain financially suitable for licensure.<sup>7</sup>

For the following reasons, the Board finds that, after examining the record in a light most favorable to PEDP, it is abundantly clear that there are no genuine issues of material fact; PEDP has committed the violations as alleged by OEC; and that OEC is

---

<sup>7</sup> Although not directly implicated by the OEC Summary Judgment Motion, the proposed transaction posited by PEDP demonstrates that it had no intention or ability to deliver the project for which it was licensed.

entitled to judgment as a matter of law. Furthermore, it is equally clear to the Board that PEDP's actions and inactions complained of in these proceedings have been ongoing. The Board has given PEDP numerous opportunities and time to develop the Board approved gaming facility that Commonwealth citizens expect and the Gaming Act demands, all to no avail. The cumulative effect of PEDP's pervasive noncompliance in this matter leaves the Board with little option other than to exercise its discretion pursuant to the Gaming Act to revoke PEDP's License.

**Count I and III:**  
**PEDP is in violation of the Board's Orders of September 1, 2009 and March 3, 2010**

The Gaming Act is clear, "the Board may, without limitation, revoke the license of any [licensee] for willfully and knowingly violating an order of the Board." 4 Pa.C. S. 1518(c)(1)(iii). PEDP is not in compliance, substantial or otherwise, nor does it claim to be, with Conditions 5 and 6 of the Board's September 1, 2009 Order; the deadline to begin operations set forth in the Board's September 1, 2009 Order; or the Board's March 3, 2010 Order ("Board's Orders"). Indeed, it is clearly beyond dispute that PEDP does not have committed financing to build the project as licensed and cannot, even with committed full financing, build, complete and commence operations of its gaming facility within the timeframe mandated by the Gaming Act and the Board's Orders.

PEDP argues that the Board should excuse its noncompliance with its Orders "because, despite the fact that it has made repeated and continuous good faith attempts to comply with those Conditions, due to factors and events beyond [its] control it has not yet been able to do so." *PEDP's Memorandum of Law* at 53 (10/05/10). Moreover, PEDP contends that revocation of its License is an inappropriately harsh sanction where it has

substantially complied with other requirements of Board's Orders and continues to expend good faith efforts to comply with the remaining conditions.

*PEDP is not entitled to further extensions*

First, PEDP implies that the Board is unreasonably rejecting its attempts to comply with Board orders. Specifically, PEDP claims that "it has made and continues to make extensive efforts to comply with the reporting conditions" in the Board's Orders; citing, in particular, the submissions it made in March 2010 relative to its now defunct relationship with Wynn. *PEDP's Brief in Opposition to Complainant's Motion for Summary Judgment* at 12 (10/15/10). At best, the submissions PEDP made relative to its former relationship with Wynn may have momentarily satisfied portions of the Board's Orders if the Board had reviewed them. However, those submissions were (1) of no real legal significance as the submissions related to Wynn's presumed assumed control of the project for which PEDP never actually sought or received Board approval and (2) became illusory within a week when Wynn terminated its relationship with PEDP. Then, only after OEC filed a Complaint for Revocation and Motion for Summary Judgment, did PEDP submit the December 10, 2010 PEDP-Harrah's/Caesars' filings. Those filings do nothing to bring PEDP into compliance and propose a vastly different project than the Board approved in 2006. Accordingly, although PEDP may have made efforts to comply with Board's Orders, those efforts are nowhere close to actual compliance and nor an excuse for noncompliance.

Second, PEDP's plea ignores the fourteen months of extensions the Board granted PEDP to comply with the Board's Orders. Specifically, the Board issued its September 1, 2009 Order excusing PEDP's failure to begin operations by the one-year deadline

imposed by the Gaming Act. Additionally, the Board entered an order in January 2010 extending the time by which PEDP must comply with the September 1, 2009 Order and assessed a monetary sanction against PEDP. Then, on March 3, 2010, the Board again extended the time by which PEDP could comply with the September 1, 2009 Order to March 31, 2010. Thereafter, on April 29, 2010, even after the Board rejected a consent agreement between PEDP and OEC to extend deadlines, the Board in effect again extended the time by which PEDP comply with the September 1, 2009 Order and, in addition, the March 3, 2010 Order. Over six months later, on November 18, 2010, the Board granted PEDP a final extension for PEDP to come into compliance with the September 1, 2009 and March 3, 2010 Orders. Clearly, the Board provided PEDP with ample opportunities to comply with its directives. PEDP's failure to do so in these circumstances evidences its willfulness and knowledge. PEDP had knowledge of the requirements of the Board yet repeatedly failed to comply with the Board's Orders. Specific intent to violate the Gaming Act is not required for revocation. Rather, the knowing failure to comply with the Board's Orders without justifiable excuse is sufficient and requires Board action to protect the public interest.

Third, despite the Board's extensions, PEDP has failed to show that it has the ability to comply with its obligations. At the Board's March 3, 2010 Public Hearing on its Rule to Show Cause it issued upon PEDP, counsel for PEDP testified as follows (in response to questions from Chief Enforcement Counsel) regarding its ability to meet the aforementioned March 31, 2010 deadline:

ATTORNEY PITRE: I have one question for Mr. Jacoby. As of today, the Licensees, as they exist today within PEDP, what, if anything, would be developed? I mean, excluding --- let's say,

what's your plan B? Let's say things don't work out with Mr. Wynn or if this Board just wants to deal with the Licensees that they licensed, what is the plan for developing a facility by May 29, 2011 as imposed in the Board's Order from the previous timeline, when you requested an extension?

ATTORNEY JACOBY: I believe that under the circumstances, there's no capability at this time and no plans in place to be able to do that. . .

N.T. 03/03/10 at 52 -54.

BIE's query proved prescient as PEDP found itself in need of a "Plan B" when, approximately one month later, the Wynn Transaction evaporated and PEDP seemed to find such a "plan" in the Amendments to the Gaming Act. Specifically, Section 1210(a)(2), 4 Pa.C.S. § 1210(a)(2), which, when amended in January 2010, would permit the Board to grant, upon application and for good cause shown, an extension for an additional period ending on the later of 36 months from the end of the initial one-year period or December 31, 2012:

COMMISSIONER COY: . . . under the best set of circumstances, if there was an approval from this Board to have Harrah's proceed with this project, and maybe Mr. Downey needs to help answer it or you can both answer it, how soon --- what is the absolute quickest time that you think you could get all the approvals, build a casino, even if it's a temporary situation, and have revenues flowing to reduce taxes in Pennsylvania? What would that date be? How long are we talking?

...

ATTORNEY DOWNEY: 2012.

COMMISSIONER COY: So it's not six months?

ATTORNEY DOWNEY: Correct. Correct.

COMMISSIONER COY: Okay.

ATTORNEY DOWNEY: But we'd probably say third quarter is what we're looking at.

COMMISSIONER COY: Of '12?

ATTORNEY DOWNEY: Correct.

ATTORNEY JACOBY: '12, yes.

COMMISSIONER COY: So you're talking almost two years?

ATTORNEY DOWNEY: Twenty (20) to 22 I think is exactly what we've got on it.

ATTORNEY JACOBY: Twenty (20) to 22 months, yes.

N.T. 11/18/10 at 36 -38. It is clear from this testimony that PEDP is progressing as if the aforementioned amendment automatically applies to it; however, not only is that assumption ill-founded, it is inapplicable. Even if the Board found that good cause existed to grant PEDP until December 2012 to construct and begin operations at a gaming facility, PEDP never filed a petition bringing such a matter properly before the Board until well after the argument in these proceedings.

In total, the Board has permitted PEDP fifteen months (September 1, 2009 through December 16, 2010) by which it must comply with the requirements of the Board's Order of September 1, 2009 and over nine months to come into compliance with the requirements of the Board's Order of March 3, 2010. Moreover, testimony from PEDP representatives demonstrates that, not only has the licensee failed to plan for contingencies when seeking alternative financing when its own compliance with Board



directives is on the line, but PEDP assumes un-petitioned for/and ungranted statutory relief as some illusory form of compliance.

In summary, PEDP's repeated violations of orders of the Board and its admitted inability to commence operations in a timely manner are inexcusable and not indicative of an entity deserving of the continued privilege to conduct gaming in the Commonwealth. Extensions are not automatic and the Board's patience with PEDP's inability to comply with its obligations is not without end. We have come to that end.

*Revocation of PEDP's License is appropriate*

PEDP's contentions that revocation of its License is an unnecessarily harsh sanction for its noncompliance with certain aspects of Board orders<sup>8</sup> is misguided. Not only does the Gaming Act give the Board the unlimited authority to take such action (*see*, 4 Pa.C.S. § 1518(c)(1)), but the Gaming Act directs that the Board, as a fiduciary of the Commonwealth (*see*, 4 Pa.C.S. § 1201(h.1)), protect the citizens of the State and the integrity of gaming (*see*, 4 Pa.C.S. § 1202) from PEDP's continued wasting of a Commonwealth asset; i.e. its gaming license.

Any argument that revocation is too severe is disingenuous where PEDP is admittedly unable to commence operations by May 2011. Furthermore, the ability to possess a slot machine license in Pennsylvania, as acknowledged in the Gaming Act and the licensees' statements of conditions, is a privilege and not a right. The abuse of that privilege, through non-compliance with the Gaming Act and Board orders is, by itself, reason to revoke the privilege. Licensees are not entitled to infinite grace periods,

---

<sup>8</sup> PEDP does not argue that revocation of its License is an unnecessarily harsh sanction for its noncompliance with the operation deadline portion of the Board's September 1, 2009 Order.

extensions infinitum or permitted simply to rely on best efforts, no matter how far short of the mark they fall. The Board has not been impatient or ignored PEDP's efforts; far from it. Rather, PEDP has failed to avail itself of the Board's repeated opportunities for it to come into compliance. PEDP has been provided more than sufficient time and opportunity. The public interest is not served by more extensions, the continuation of delay or a response less than revocation in light of PEDP's long term and repeated failed efforts.

This argument is particularly unpersuasive since even as the Board's fines mounted, PEDP's counsel was invited to suggest less severe alternative to revocation. October 27, 2010 TR at 92. He decline to do so. Id at 93-94.

**Count II and IV:**  
**PEDP is in violation of its Statement of Conditions and the Gaming Act for failing to remain financially suitable**

PEDP is not financially suitable to continue to possess a license under the criteria of the Gaming Act, the Board's regulations or PEDP's Statement of Conditions as evidenced by PEDP's failure to finance the construction, develop and/or operation of and/or obtain the committed financing to construct, develop and/or operate a gaming facility as approved by the Board in 2006.

The Gaming Act is clear. Section 1313 of the Gaming Act, 4 Pa.C.S. § 1313, provides, in relevant part:

(a) Applicant financial information.--The board shall require each applicant for a slot machine license to produce the information, documentation and assurances concerning financial background and resources **as the board deems necessary to establish by clear and convincing evidence the financial stability, integrity and responsibility of the applicant**, its affiliate, intermediary, subsidiary or holding company, including, but not limited to, bank references, business and personal income and disbursement schedules, tax returns and other reports filed with governmental agencies, and business and personal accounting and check records and ledgers. In addition, each applicant shall in writing authorize the

examination of all bank accounts and records as may be deemed necessary by the board.

(b) Financial backer information.--The board shall require each applicant for a slot machine license to produce the information, documentation and assurances as may be necessary to establish by clear and convincing evidence the integrity of all financial backers, investors, mortgagees, bondholders and holders of indentures, notes or other evidences of indebtedness, either in effect or proposed. Any such banking or lending institution and institutional investors may be waived from the qualification requirements. A banking or lending institution or institutional investor shall, however, produce for the board upon request any document or information which bears any relation to the proposal submitted by the applicant or applicants. The integrity of the financial sources shall be judged upon the same standards as the applicant. Any such person or entity shall produce for the board upon request any document or information which bears any relation to the application. In addition, the applicant shall produce whatever information, documentation or assurances the board requires to establish by clear and convincing evidence the adequacy of financial resources.

...

**(e) Applicant's operational viability.--In assessing the financial viability of the proposed licensed facility, the board shall make a finding, after review of the application, that the applicant is likely to maintain a financially successful, viable and efficient business operation and will likely be able to maintain a steady level of growth of revenue to the Commonwealth pursuant to section 1403 (relating to establishment of State Gaming Fund and net slot machine revenue distribution).**

...

(f) Additional information.--In addition to other information required by this part, a person applying for a slot machine license shall provide the following information:

(1) The organization, financial structure and nature of all businesses operated by the person, including any affiliate, intermediary, subsidiary or holding companies, the names and personal employment and criminal histories of all officers, directors and key employees of the corporation; the names of all holding, intermediary, affiliate and subsidiary companies of the corporation; and the organization, financial structure and nature of all businesses operated by such holding, intermediary and subsidiary companies as the board may require, including names and personal employment and criminal histories of such officers, directors and principal employees of such corporations and companies as the board may require.

(2) The extent of securities held in the corporation by all officers, directors and underwriters and their remuneration in the form of salary, wages, fees or otherwise.

...

4 Pa.C.S. § 1313. The license issued by the Board to PEDP was specifically conditioned upon PEDP agreeing to maintain, as a condition of licensure, its financial suitability under the Gaming Act. Condition 5 of those SOCs provides:

To exercise due diligence to ensure that at all times PEDP. . . meet and maintains the suitability requirements of the Gaming Act, including but not limited to, those relating to good character, honesty, integrity and financial fitness.

PEDP Statement of Conditions (executed July 11, 2007).

The Board's regulations are equally clear. Section 441a.7(f) of the Board's regulations provide, in relevant part that suitability for licensure includes demonstration of:

(2) Financial fitness in compliance with section 1313 of the act (relating to slot machine license application financial fitness requirements).

(3) Operational viability, including:

(i) The quality of the proposed licensed facility, and temporary land-based facility, if applicable, including the number of slot machines proposed and the ability of the proposed licensed facility to comply with statutory, regulatory and technical standards applicable to the design of the proposed licensed facility and the conduct of slot machine operations therein.

(ii) The projected date of the start of operations of the proposed licensed facility and any accessory uses such as hotel, convention, retail and restaurant space proposed in conjunction therewith. Applicants shall provide the Board with a time line on the deliverability of proposed temporary land-based or phased permanent licensed facilities and the accessory uses proposed in conjunction therewith.

(iii) The ability of the applicant's proposed licensed facility to generate and sustain an acceptable level of growth of revenue.

58 Pa. Code § 441a.7(f)(2) – (3).

PEDP argues that the aforementioned provisions are vague. Then alternatively, it argues that if the standards are not vague, that the Board must permit it more time to secure alternative financing for its project similar to the way the Board did relative to

another licensee. Finally, PEDP argues that the Board should find that it is financially suitable because, although currently lacking the ability, it has the future capability to acquire sufficient financing to construct and operate a gaming facility, although clearly not the one for which it received its license.

*The Board's financial suitability standards are not vague*

PEDP's protestations that the Board's financial suitability standards are vague are unfounded and plainly contradicted by its own conduct. Financial suitability is a concept routinely used and applied throughout the regulatory gaming industry. Moreover, not only have these standards, as delineated in the Gaming Act and Board's regulations as cited above, been known to PEDP since the time it applied for licensure, the Board explained these standards, in detail, in its November 9, 2006 Background Investigation and Suitability Report (to which PEDP was provided an opportunity to review and commented) as follows:

The Pennsylvania Gaming Control Board is required to assess the financial suitability of an applicant prior to granting it a slot machine license. The financial suitability of the applicant encompasses an assessment of an applicant's historical financial stability and financial wherewithal to develop the proposed project. In addition, financial suitability assessment includes **the proposed project's** ability to maintain a steady level and growth of revenue to the Commonwealth.

Section 1313 of Act 71 provides the Pennsylvania Gaming Control Board (the "Board") with the authority to require each applicant for a slot machine license to produce the information, documentation and assurances concerning financial background and resources as the Board deems necessary to establish by clear and convincing evidence the financial stability, integrity, and responsibility of the applicant, its affiliate, intermediary, subsidiary, or holding company.

The Board shall not approve a slot machine license application unless it has made an affirmative determination that the applicant has established that it is likely to maintain a financially successful, viable, and efficient business operation, and will likely be able to maintain a steady level and growth of revenue to the Commonwealth, (58 Pa.Code § 441.5). For that reason, the Board created a Financial Suitability Task Force ("Task Force"), which it charged with

determining the financial suitability of each prospective licensee's slot license application.

*PGCB Category 2 Background Investigation and Suitability Report of PEDP* at 9-10 (11/09/06). (emphasis added) Furthermore, PEDP addressed these standards, in its December 11, 2006 Brief to the Board where PEDP not only cited the above-cited regulatory provision, it highlighted its "Unparalleled Financial and Operational Strength Among Philadelphia Applicants" citing, *inter alia*, (a) the PGCB's Task Force's conclusions that the Tribal Nation's strong financial performance, increasing revenues year to year and cash flow margins were significantly higher or comparable to the gaming industry median; (b) the PGCB's Task Force's confirmation that [PEDP] was a stable, low-risk operator with positive interest coverage, leverage and liquidity ratios; (c) that FDC [PEDP] was one of only three gaming companies in the nation whose bonds were rated "investment grade" by Standard and Poor's and Moody's Investor Service; and (d) that Merrill Lynch had committed to underwrite \$460 million dollars in Phase I financing in addition to \$100 million in equity provided by the FDC. *Foxwoods Philadelphia's Brief* at 2 (12/11/06).

Four years later, during its negotiations with Wynn, and later with its negotiations with Harrah's/Caesars, PEDP never questioned what information it needed to produce to show to the Board it was financially suitable because it has been aware what that information was since as early as 2005 when it applied for licensure. PEDP's newfound position that it does not understand the definition of financial suitability is belied by its prior actions and submissions. Moreover, throughout the proceedings giving rise to the current matter, the Board has clearly required PEDP to, at all times, demonstrate that it has definitive financing to complete its Board-approved project. Based upon the plain

language of the Board's adjudications and orders; relevant documentary filings; and testimony and statements made during Board hearings and meetings, any position by PEDP that it is unaware of the meaning of the phrase "financially suitable" is dubious and not entitled to any weight.

*PEDP is uniquely situated as to other licensees*

PEDP next argues that if the Board's financial suitability standards are not vague, that it is similarly situated to another licensee and that the Board is required to treat it as it treated the other licensee and permit PEDP more time to secure alternate financing for its project. The other licensee PEDP is referring to is PITG Gaming, LLC/Holdings Acquisition Co., LP ("PITG"). Not only is the procedural posture of these two matters inapposite<sup>9</sup>, but the factual background is entirely dissimilar; for PEDP to argue otherwise is illogical.

*PEDP is required to maintain financial suitability as a condition of licensure*

Finally, as a last resort, PEDP argues that if the Board's financial suitability standards are not vague and that it is not similarly situated to the PITG matter,<sup>10</sup> it is financially suitable because it has the *wherewithal* to "continue operations and sustain efforts to close on an agreement with a development partner, thereby securing the funding and financing to complete development" of its project. *PEDP's Brief in Opposition to Complainant's Motion for Summary Judgment* at 8 (10/15/10). Furthermore, PEDP contends that, as a licensee, it should be judged by a more flexible, deferential standard

---

<sup>9</sup> OEC never commenced and the Board was not asked to consider revocation proceedings regarding PITG. Additionally, PITG was already partially constructed when it lost its financing. A new equity investment was sought and approved by the Board permitting the timely completion of the facility as previously approved.

<sup>10</sup> PEDP also argues that the Board find it financially suitable for the same reasons it found PITG financially suitable. For the reasons discussed previously, the PITG is inapplicable to the current matter and this argument is without merit.

than an applicant regarding financial suitability. In other words, PEDP wants the Board to determine whether its financially suitable based on its ability to attain financing in the future and develop a facility, even if it is not substantially similar to that which it initially proposed, as opposed to its ability to maintain financing and operations. In short, it claims that as long as it keeps making chugging noises and saying “I know I can,” the Board should allow it to do so.

For support, PEDP cites to the Supreme Court’s opinion in *Station Square Gaming, LP v. PGCB*, 927 A.2d 232 (2007). PEDP, however, misreads the decision arguing that it stands for the proposition that an applicant and/or licensee’s ability to acquire future funding/financing is demonstrative in and of itself of that applicant and/or licensee’s financial suitability. Although PEDP correctly interprets *Station Square* to require the Board to consider an applicant’s future financial viability when weighing that applicant’s financial suitability, the analysis cannot end there. When assessing an applicant or licensee’s financial suitability, the Board must weigh that applicant or licensee’s future **and current** financial posture. In *Station Square*, as here, it is especially important that the Board consider the applicant’s (here, the licensee’s) current financial posture as the project has yet to be constructed/developed.

So while PEDP correctly demands the Board consider its future financial viability, such considerations cannot be exclusive and must be balanced with its current financial viability.

The undisputed facts are that PEDP does not have the wherewithal, despite numerous delays and the Board granting it repeated extensions, to build the project as licensed and commence timely operations. These are hallmarks of financial suitability:



the wherewithal to develop the proposed project and the ability to maintain a steady level and growth of revenue to the Commonwealth and the demonstration by clear and convincing evidence of financial suitability, integrity and responsibility. These factors are blatantly non-existent with a licensee which has not put a spade in the ground while ten other licensees have built first-rate casinos and commenced operations in the same or less timeframe; where hundreds of millions of dollars of tax revenues have now been lost and where over a thousand jobs have remained mired in PEDP's inability, not only to commence operations, but also to unlock the chain-link fencing around its vacant, overgrown piece of riverfront property.

### **Conclusion**

In the four years since the Board awarded PEDP a Category 2 slot machine license, ten other Category 1 and 2 gaming facilities, including Philadelphia's other Category 2 facility, SugarHouse/HSP, have begun operations. To date, these facilities have generated \$3.8 billion in tax revenues including nearly \$2.4 billion to statewide property tax relief (derived from slot machine revenue) along with \$165 million to the General Fund (derived from table game revenue). Furthermore, these facilities have created over 13,000 living wage jobs. PEDP, however, has failed to break ground; violated Board orders; and failed to maintain financial suitability. Indeed, almost four years to the day after the Board awarded PEDP a license, its best efforts culminated in a proposal vastly different than was originally approved; was lacking in full equity participation with no committed debt financing; and was contingent on outcomes not authorized by law. PEDP and its counsel point to countless villains to avoid revocation yet repeatedly avoid the place where fault will most surely be found, the mirror.

Based upon the foregoing, the Board hereby revokes the privilege of holding a Category 2 slot machine license from PEPD.

Dated: January 26, 2011

By:   
Gregory C. Fajt, Chairman  
Pennsylvania Gaming Control Board

## Dissenting Opinion

Commissioner James B. Ginty

While I share the frustration of my colleagues on the length of time it is taking for a second casino in Philadelphia to come to fruition and their concern with the inability of PEDP to comply with the reasonable requirements of the Board, of greater concern to me is the potential for job and revenue loss for the Philadelphia region that stems from the Board granting the Office of Enforcement Counsel's request for Summary Judgment, thereby revoking PEDP's Category 2 license. Ultimately, I believe that the licensee has demonstrated sufficient progress to support their contentions that the project will be accomplished and, because of that, I respectfully dissent.<sup>1</sup>

I believe it is imperative to keep in mind the essential objectives served by the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act"). 4 Pa.C.S. §§ 1101, *et seq.* In bringing gaming to Pennsylvania, the Gaming Act "intended to provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives". 4 Pa.C.S. §§ 1102(3). The Gaming Act also was "intended to enhance the further development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations . . .". 4 Pa.C.S. § 1102(6). Through the introduction of table games, the General Assembly sought to "increase revenues to the Commonwealth and provid[e] new employment opportunities by creating

---

<sup>1</sup> I also question the Board making this decision in the context of a Motion for Summary Judgment on a Petition for Revocation. If PEDP is, indeed, no longer financially suitable, the matter could have been addressed when PEDP's Category 2 slot machine license renewal application came before the Board as each *applicant* (which PEDP would be in that procedural posture) has the burden to establish by clear and convincing evidence the requisite financial suitability. *See*, for example, 4 Pa.C.S. § 1313(a).

skilled jobs for individuals related to the conduct of table games at licensed facilities in this Commonwealth". 4 Pa.C.S. §§ 1102(2.1).

Loss of this license will cost the Philadelphia region approximately 1850 family sustaining jobs with full medical benefits,<sup>2</sup> including 650 construction jobs during the building of the casino<sup>3</sup> and 1200 casino jobs at opening. The latest information on the unemployment rates in Pennsylvania indicates that as of November 2010, the Commonwealth of Pennsylvania had an 8.6% unemployment rate. Philadelphia County, specifically, had an estimated 9.5% unemployment rate.

There will also be a substantial tax revenue loss to the City and School District of Philadelphia<sup>4</sup>. PEDP testified that projected tax revenue could amount to \$66 million in the first year of operation and up to \$75 million by year five. While not broken down into tax revenue specific to Philadelphia, it undoubtedly equates to substantial amounts of money lost to both the state and the region. Additionally, that estimate does not include calculations of revenue to the City received from added wage, sales and other taxes. Granting this motion, at best, will delay realization of these jobs and this revenue to the City of Philadelphia for years. The license at issue is one of two Category 2 licenses set aside by the Legislature for Philadelphia. 4 Pa.C.S. §§ 1304(b)(1) & 1307. As I mentioned at the December 16th public meeting, of greater concern to me is that if the legislature opens this license up to the rest of the state, these jobs and revenue may be lost to the City permanently.

---

<sup>2</sup> To put 1850 jobs in Philadelphia in perspective, the casino would rank with some of Philadelphia's iconic employers, e.g., Tasty Baking (900 jobs), Saint Joseph's University (1274 jobs), and others.

<sup>3</sup> PEDP testified that these jobs would have become available in the 2<sup>nd</sup> half of 2011.

<sup>4</sup> The Gaming Act requires that the first \$5 million of the 4% gross terminal revenue due Philadelphia County from slot machine operations be given to the School District of Philadelphia (4 Pa.C.S. § 1403(c)(2)(iii)(A)).

While PEDP clearly had more work to do on the financing for this project, by today's standards the remaining needed equity of (\$19-\$29 million) is not a substantial amount. The addition of a world-class operator in Harrah's Entertainment/Caesar's as a partner to the project provides credibility that the financing could be obtained. In short, I believe that PEDP has made enough progress in obtaining financial backing for the project to allow them the opportunity to proceed.

With respect to the facility itself, the Board has allowed other licensees to modify previously approved facility plans and time-lines, and I believe PEDP should have been accorded the same privilege.

I also believe it appropriate to briefly address the commitment that PEDP made in its original application (now a condition of the license), to set aside proceeds from its operations to benefit disadvantaged children in the Philadelphia area<sup>5</sup>. I find it extremely troubling that PEDP now seeks to ignore this commitment in significant part by redirecting a sizable portion of those proceeds to a non-profit organization in Connecticut. Nevertheless, this charitable contribution condition could have been addressed, and fixed, in ongoing proceedings.

The progress that has been made by PEDP in the last few months strongly suggests that this project could get done and that the goals proclaimed by the legislature could be met in the relatively near term. Given the current state of the economy and the need for family sustaining jobs and new revenues for the Commonwealth and for Philadelphia, I would exercise the Board's broad discretionary authority in regulating and

---

<sup>5</sup> Originally, PEDP's profits were to pass through charitable trust owners to charitable causes to primarily assist education and disadvantaged children in Philadelphia at a rate of approximately \$300 million over ten years. While I do not take issue with PEDP's proposed amendment that dedicates 2% of gross terminal revenues to this charitable commitment, at least 6 million is now diverted to the Pequot Museum in Connecticut.

administering the gaming industry<sup>6</sup> in favor of giving the licensee more time. Revoking PEDP's license runs counter to the intentions of the Act in creating prompt job and economic activity; will have a detrimental effect on revenue in the Philadelphia area for a time uncertain; and may lead to the permanent loss of the license to the City.



---

**James B. Ginty, Commissioner**

---

<sup>6</sup> See *Rubino v. PGCB*, 1 A.3d 976, 981 (Pa. Cmwlth. 2010); *Pocono Manor Investors, LP v. PGCB*, 927 A.2d 209, 225 (Pa. 2007).