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"CONFIDENTIAL"

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD



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| COMMONWEALTH OF PENNSYLVANIA GAMING CONTROL BOARD BUREAU OF INVESTIGATIONS AND ENFORCEMENT,<br>Complainant,<br><br>v.<br><br>PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P. D/B/A FOXWOODS CASINO PHILADELPHIA SLOT MACHINE LICENSE 1367,<br>Respondent.<br><br>Filed By: Philadelphia Entertainment and Development Partners, L.P. | : | Docket No. 1367<br><br>Office of Hearings and Appeals Docket Number: 1408-2010<br><br>ADMINISTRATIVE HEARING<br><br>**RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**<br><br>Counsel of Record:<br>Stephen A. Cozen, Esquire<br>(PA ID #03492)<br>F. Warren Jacoby, Esquire<br>(PA ID #10012)<br>John V. Donnelly III, Esquire<br>(PA ID #93846)<br>Jared D. Bayer, Esquire<br>(PA ID #201211)<br>**COZEN O'CONNOR**<br>1900 Market Street<br>Philadelphia, PA 19103<br>(215) 665-2000<br><br>LeRoy S. Zimmerman, Esquire<br>(PA ID #07278)<br>Robert A. Graci, Esquire<br>(PA ID #26722)<br>**ECKERT SEAMANS CHERIN & MELLOTT, LLC**<br>213 Market Street, 8th Floor<br>Harrisburg, PA 17101<br>(717) 237-6000 |

**RESPONDENT'S**
**MOTION FOR SUMMARY JUDGMENT**

Respondent, Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia ("PEDP"), respectfully files this Motion for Summary Judgment on all Counts of the Complaint for Revocation of Slot Machine License ("Complaint") filed in this matter by the Bureau of Investigation and Enforcement ("BIE") of the Pennsylvania Gaming Control Board ("Board"). In support thereof, PEDP avers as follows:

## INTRODUCTION

1. Upon consideration of the limited evidence of record in this matter,[1] PEDP is entitled to judgment as a matter of law on all Counts of BIE's Complaint. The Board should accordingly enter summary judgment in PEDP's favor and against BIE and dismiss BIE's Complaint in its entirety with prejudice. PEDP further relies on and incorporates its supporting Memorandum of Law submitted together with this Motion, and all exhibits thereto, by reference as though fully set forth at length herein.

[1] As this Board is well aware, there are unresolved discovery disputes in this matter which, if resolved in PEDP's favor, would provide PEDP with additional information and documents to be proffered in support of this Motion for Summary Judgment. On September 9, 2010, PEDP filed a Petition for Review with the Commonwealth Court requesting that the Court issue an Order reversing the August 10, 2010 Order of the Board's Director of Hearings and Appeals in which it denied PEDP meaningful discovery. By Notice dated September 16, 2010, the Court advised both parties that issues raised in PEDP's Petition for Review "may be determined upon the record" and directed the Board to forward the record to the Commonwealth Court. Thereafter, on September 27, 2010, BIE filed a Motion to Quash PEDP's Petition for Review. Although PEDP contends that the instant proceedings should be stayed until the Commonwealth Court resolves this matter, the Board has indicated that it will not recognize any such stay. Consequently, PEDP is filing the instant Motion for Summary Judgment in accordance with the time frame set forth in the Board's Scheduling Order of September 9, 2010, without prejudice to its position that a stay is, in fact, warranted, and that it has the right and should be given an opportunity to amend this Motion, as well as its response(s), if any, to any motions filed by BIE or OEC pursuant to the above scheduling order.

## BACKGROUND

2. On December 20, 2006, the Board awarded PEDP one of the two available Category II Slot Machine Licenses ("License") for the City of Philadelphia.

3. PEDP timely paid the $50 million licensing fee on October 17, 2007, and the Board issued PEDP the License on May 29, 2008.

4. On May 22, 2009, PEDP filed a Petition to Extend Time to make slot machines available in which it contended that it had expended considerable efforts and faced numerous obstacles beyond its control regarding developing its facility and that these facts established good cause for the Board to grant additional time to develop its facility.

5. Following a public hearing on the Petition to Extend Time conducted on August 28, 2009 hearing, the Board granted PEDP's Petition in an Order and Adjudication dated September 1, 2009 and entered September 2, 2009. The Board concluded that PEDP had shown good cause sufficient for the Board to grant PEDP's request to extend, for a period of 24 months, the time by which it must make 1,500 slot machines available for play at its facility. The Board accordingly granted PEDP an extension of time until May 29, 2011 to commence operations at the Columbus Boulevard Site.

6. On November 30, 2009 and June 1, 2010, PEDP moved the Board to extend the time for PEDP to submit certain deliverables to the Board or BIE according to reporting deadlines set forth in the Board's Orders of September 1, 2009 and March 3, 2010.

7. The Board denied the November 30 Motion, and consideration of the June 1 Motion has been consolidated with proceedings on BIE's Complaint.

8. From September 2009 through April 2010, PEDP conducted intensive negotiations with prospective investors to secure the alternative financing and funding needed to complete development of its licensed Casino, including, notably, Wynn Resorts, Limited (together with its direct or indirect wholly-owned subsidiaries, collectively "Wynn").

9. After earlier executing a Term Sheet and First Addendum thereto, on April 2, 2010, Wynn and PEDP entered into and executed a Partnership Interest Purchase Agreement ("Purchase Agreement") and other related documents in order to effectuate the transactions contemplated by the Term Sheet, pursuant to which the parties agreed to consummate the Proposed Transactions as set forth therein.

10. Then, on April 8, 2010, without any warning to the Board, BIE, any state or local officials, and PEDP, Wynn unilaterally terminated (through no fault of PEDP) the Purchase Agreement, and the other related documents between Wynn and PEDP.

11. Following the termination of the Wynn transaction, PEDP immediately re-commenced a fast-track process to identify, negotiate, and close on alternative funding and financing necessary to complete development of its licensed Casino.

12. Recognizing the need for PEDP to have a reasonable period of time to submit a revised plan for the development of its Casino following the unexpected termination of the Wynn transaction, on April 28, 2010, BIE and PEDP entered into a Consent Agreement following extensive negotiations. The Consent Agreement would have provided an extension of the timelines for the compliance by PEDP with Conditions 4, 5 and 6 as set forth in the Extension Order, as amended.

13. However, at its meeting of April 29, 2010, without substantive comment, opinion or direction – or even a question of counsel for PEDP – the Board issued an Order, *inter alia*, refusing to approve the Consent Agreement.

14. On that same day, April 29, 2010, within moments after the Board's rejection of the Consent Agreement, BIE filed the instant Complaint. On June 1, 2010, PEDP filed its Response to the Complaint.

15. Thereafter, the Board permitted only starkly limited and constitutionally deficient discovery in response to PEDP's efforts to obtain meaningful discovery of BIE and the Board in order to defend itself against the charges set forth in the Complaint. PEDP has challenged the Board's violation of its due process rights in this regard through a Petition for Review filed with and pending before the Commonwealth Court.

16. As the pleadings have closed, and the Board has refused to grant PEDP any further meaningful discovery notwithstanding PEDP's timely requests for same and the relevance thereof, (*see supra* n.1), PEDP timely files this Motion for Summary Judgment pursuant to § 493a.10 of the Board's Regulations, 58 Pa. Code § 493a.10, and the Director's September 9, 2010 Order.

## REQUEST FOR RELIEF

17. PEDP incorporates all paragraphs of this Motion and supporting Memorandum of Law as though fully set forth herein.

18. BIE's Complaint asserts four Counts that readily break down into two sets of claims.

19. Counts I and III allege that PEDP's License should be revoked because it did not meet certain reporting deadlines established by the Board's Orders of September 1, 2009 and March 3, 2010.

20. Counts II and IV allege that PEDP's License should be revoked on the ground that PEDP has purportedly failed to maintain financial fitness and suitability because it has not yet closed on the funding and financing necessary to complete development of its licensed Casino.

21. Upon consideration of the undisputed facts of record, PEDP is entitled to judgment as a matter of law on both sets of claims – summary judgment should be entered in PEDP's favor and against BIE, and the Complaint dismissed with prejudice .

22. Summary judgment should be entered in PEDP's favor on Counts II and IV. As a matter of law, PEDP's $50 million License cannot be revoked because of an alleged failure to maintain financial fitness and suitability.

23. Among other things, the Pennsylvania Horse Race Development and Gaming Act (the "Gaming Act"), 4 Pa. C.S. § 1101 *et seq.*, and implementing Regulations, 58 Pa. Code § 401a.1 *et seq.*, do nothing more than express this concept in the most conclusory fashion – they provide no concrete, meaningful standard for a licensee to maintain financial fitness and suitability or for the Board to analyze whether a licensee has done so. The financial fitness and suitability provisions thus fail constitutional vagueness review and cannot be the basis for revoking PEDP's $50 million License in this case.

24. Furthermore, consistent with due process and the fundamental public policy of consistency in adjudicative decision-making that underlies the doctrine of *stare decisis*, the

Board must reach the same result here that it reached in the materially similar case of PITG – namely, find that PEDP has maintained financial fitness and suitability, and accord PEDP the time that it needs to close on alternative funding and financing to complete development of its licensed Casino.

25. In the alternative and to the extent that the financial fitness and suitability provisions of the Gaming Act may be deemed to pass constitutional muster, which PEDP denies, the Board must find that PEDP has maintained financial fitness and suitability consistent with the Board's decision in *In re Joint Application of PITG Gaming, LLC and Holdings Acquisition Co., L.P. for Approval of the Reorganization, Change of Control and Recapitalization of PITG Gaming, LLC and Other Relief in Connection Therewith*, OHA Docket # 42028, and the Pennsylvania Supreme Court's opinion in *Station Square Gaming, L.P. v. Pennsylvania Gaming Control Board*, 592 Pa. 664, 927 A.2d 232 (2007).

26. Summary judgment should also be entered in PEDP's favor on Counts I and III. Revocation of PEDP's $50 million License because it could not meet some of the reporting conditions in the Board's September 1 and March 3 Orders, and not because of any willful refusal to comply, is an excessively draconian and unwarranted sanction.

27. The record is clear that PEDP made extensive efforts to comply with those reporting conditions; any non-compliance being solely due to a temporary inability to comply despite its best efforts and for reasons beyond PEDP's control. In fact, it is undisputed that PEDP had achieved substantial compliance with all reporting conditions by early April 2010, and that, following the unexpected termination of the contemplated transaction with Wynn, PEDP immediately re-commenced a robust process to locate an alternative investor.

28. It flies in the face of settled public policy to impose the punitive, draconian sanction of revocation of PEDP's License – in effect, a forfeiture of the $50 million License and the more than $100 million in other funds PEDP has spent to date to develop its Casino – based on its inability to meet certain reporting guidelines as is the situation in the instant case.

29. PEDP further relies on and incorporates by reference thereto its supporting Memorandum of Law submitted herewith, as well as all exhibits attached thereto and all facts referenced therein.

30. Upon the undisputed evidence of record, PEDP is entitled to judgment as a matter of law, and summary judgment should be entered in PEDP's favor and against BIE on all Counts of BIE's Complaint, and such Complaint should be dismissed with prejudice.

## CONCLUSION

WHEREFORE, for the reasons set forth above and elaborated in PEDP's supporting Memorandum of Law, PEDP respectfully requests this Board to enter summary judgment in its favor and against BIE as to Counts I, II, III, and IV of the Complaint, and to dismiss such Complaint with prejudice.

Respectfully submitted,

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*Attorneys for Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia*

Dated: October 5, 2010

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**BEFORE THE**
**PENNSYLVANIA GAMING CONTROL BOARD**

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| COMMONWEALTH OF PENNSYLVANIA GAMING CONTROL BOARD BUREAU OF INVESTIGATIONS AND ENFORCEMENT,<br>Complainant,<br><br>v.<br><br>PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P. D/B/A FOXWOODS CASINO PHILADELPHIA SLOT MACHINE LICENSE 1367,<br>Respondent.<br><br>Filed By: Philadelphia Entertainment and Development Partners, L.P. | : | Docket No. 1367<br><br>Office of Hearings and Appeals Docket Number: 1408-2010<br><br>ADMINISTRATIVE HEARING<br><br>**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**<br><br>Counsel of Record:<br>Stephen A. Cozen, Esquire<br>(PA ID #03492)<br>F. Warren Jacoby, Esquire<br>(PA ID #10012)<br>John V. Donnelly III, Esquire<br>(PA ID #93846)<br>Jared D. Bayer, Esquire<br>(PA ID #201211)<br>**COZEN O'CONNOR**<br>1900 Market Street<br>Philadelphia, PA 19103<br>(215) 665-2000<br><br>LeRoy S. Zimmerman, Esquire<br>(PA ID #07278)<br>Robert A. Graci, Esquire<br>(PA ID #26722)<br>**ECKERT SEAMANS CHERIN & MELLOTT, LLC**<br>213 Market Street, 8th Floor<br>Harrisburg, PA 17101<br>(717) 237-6000 |

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S**
**MOTION FOR SUMMARY JUDGMENT**

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**OTHER AUTHORITIES**

Respondent, Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia ("PEDP"), respectfully submits this Memorandum of Law in support of its Motion for Summary Judgment filed with the Pennsylvania Gaming Control Board ("Board") on October 5, 2010.[1]

## I. INTRODUCTION

This is a case of first impression, where the Board's Bureau of Investigations and Enforcement ("BIE") seeks to revoke the $50 million Category 2 Slot Machine License (the "License") issued to PEDP to develop a casino on Columbus Boulevard, in South Philadelphia. Amazingly, despite the high stakes and important unsettled legal questions presented in this case, the Board has made every effort to deny PEDP critical discovery and stymie PEDP's ability to prepare a meaningful defense to its baseless claims. Indeed, the Board's conduct in denying PEDP such discovery is of such a persistent, arbitrary, and capricious nature PEDP has been forced to file a Petition for Review with the Commonwealth Court to vindicate and obtain redress for its constitutional due process right to obtain meaningful discovery in this case, consistent with the Board's Regulations and the Discovery Order entered in this case by the

[1] As this Board is well aware, there are unresolved discovery disputes in this matter which, if resolved in PEDP's favor, would provide PEDP with additional information and documents to be proffered in support of this Motion for Summary Judgment. On September 9, 2010, PEDP filed a Petition for Review with the Commonwealth Court requesting that the Court issue an Order reversing the August 10, 2010 Order of the Board's Director of Hearings and Appeals in which it denied PEDP meaningful discovery. By Notice dated September 16, 2010, the Court advised both parties that issues raised in PEDP's Petition for Review "may be determined upon the record" and directed the Board to forward the record to the Commonwealth Court. Thereafter, on September 27, 2010, BIE filed a Motion to Quash PEDP's Petition for Review. Although PEDP contends that it is entitled to an automatic stay of the instant proceedings until the Commonwealth Court resolves this matter, the Board has indicated that it will not recognize any automatic stay. Consequently, PEDP is filing the instant Motion for Summary Judgment in accordance with the time frame set forth in the Board's Scheduling Order of September 9, 2010, without prejudice to its position that a stay is, in fact, warranted, and that it has the right and should be given an opportunity to amend this Motion, as well as its response(s), if any, to any motions filed by BIE or OEC pursuant to the above scheduling order.

Director of Hearings and Appeals (the "Director"), and the United States and Pennsylvania Constitutions.

Given its pending Petition for Review and the Board's refusal to correct its persistent due process violations, PEDP submits that the record in this case is far from closed. Furthermore, PEDP submits that the Board should defer proceeding further in this matter until the Commonwealth Court has disposed of PEDP's Petition for Review. However, given the Board's stated refusal to do so, PEDP now files this Motion for Summary Judgment because, even on the starkly limited record which result from the Board's denial to PEDP of the discovery to which it is entitled, PEDP is entitled to summary judgment on all Counts of BIE's Complaint.

BIE's Complaint asserts four Counts that readily break down into two sets of claims. Counts I and III allege that PEDP's License should be revoked because it did not meet certain reporting deadlines established by the Board's Orders of September 1, 2009 and March 3, 2010. Counts II and IV allege that PEDP's License should be revoked on the ground that PEDP has purportedly failed to maintain financial fitness and suitability because it has not yet closed on the funding and financing necessary to complete development of its licensed Casino. Upon consideration of the undisputed facts of record, PEDP is entitled to judgment as a matter of law on both sets of claims, and thus summary judgment should be entered in PEDP's favor and against BIE on BIE's Complaint which should be dismissed with prejudice.

**Summary judgment should be entered in PEDP's favor on Counts II and IV.**

As a matter of law, PEDP's $50 million License cannot be revoked because of an alleged failure to maintain financial fitness and suitability. The Pennsylvania Horse Race Development and Gaming Act (the "Gaming Act"), 4 Pa. C.S. § 1101 *et seq.*, and implementing Regulations, 58 Pa. Code § 401a.1 *et seq.*, do nothing more than express this concept in the most conclusory fashion – they provide no concrete, meaningful standard for a licensee to maintain financial

fitness and suitability or for the Board to analyze whether a licensee has done so. The financial fitness and suitability provisions thus fail constitutional vagueness review and cannot be the basis for revoking PEDP's $50 million License in this case.

Furthermore, consistent with due process and the fundamental public policy of consistency in adjudicative decision-making that underlies the doctrine of *stare decisis*, the Board must reach the same result here that it reached in the materially identical case of PITG – namely, find that PEDP has maintained financial fitness and suitability, and accord PEDP the time it needs to close on alternative funding and financing to complete development of its licensed Casino. In the alternative and to the extent that the financial fitness and suitability provisions of the Gaming Act may be deemed to pass constitutional muster, which PEDP denies, the Board must nonetheless find that PEDP has maintained financial fitness and suitability consistent with the Board's decision in *In re Joint Application of PITG Gaming, LLC and Holdings Acquisition Co., L.P. for Approval of the Reorganization, Change of Control and Recapitalization of PITG Gaming, LLC and Other Relief in Connection Therewith*, OHA Docket # 42028 ["*PITG*"], a true and correct copy of which is attached hereto and made a part hereof as an Exhibit, and the Pennsylvania Supreme Court's opinion in *Station Square Gaming, L.P. v. Pennsylvania Gaming Control Board*, 592 Pa. 664, 927 A.2d 232 (2007) ["*Station Square*"].

**Summary judgment should also be entered in PEDP's favor on Counts I and III.**

Revocation of PEDP's $50 million License because it could not meet some of the reporting conditions in the Board's September 1 and March 3 Orders, and not because of any willful refusal to comply, is an excessively draconian sanction, which is not warranted by the facts – or by the law. The record is clear that PEDP made extensive efforts to comply with those reporting conditions; any non-compliance being solely due to a temporary inability to comply despite its best efforts and for reasons beyond PEDP's control. In fact, it is undisputed that

PEDP had achieved substantial compliance with all reporting conditions by early April 2010, and that, following the unexpected termination of the contemplated transaction with Wynn Resorts, Limited (together with its direct or indirect wholly-owned subsidiaries, collectively "Wynn"), PEDP immediately met with the Board staff to discuss its proposed renewed efforts, and re-commenced a robust process to locate an alternative investor. It flies in the face of settled public policy to impose the punitive, draconian sanction of revocation of PEDP's License – in effect, a forfeiture of the $50 million License and the more than $100 million in other funds PEDP that has spent to date to develop its Casino – based on its inability to meet certain reporting guidelines as is the situation in the instant case.

For all of the reasons explained below, the Board should enter summary judgment in PEDP's favor and against BIE on all Counts of BIE's Complaint, and dismiss such Complaint with prejudice.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 2006, the Board awarded two Category 2 Slot Machine Licenses for the operation of slot machine facilities in the City of Philadelphia (collectively, the "Philadelphia Casinos"), and later memorialized such award in its Order and Adjudication dated February 1, 2007. (*See Adjudication of the Pennsylvania Gaming Control Board in the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia* at 7, a true and correct copy is attached hereto and made a part hereof as an Exhibit.) PEDP was awarded one of the licenses ("License"), and as a result was permitted to construct and operate a casino ("Casino") to be developed on Columbus Boulevard between Reed and Tasker Streets on the banks of the Delaware River in the Pennsport neighborhood of South Philadelphia ("Columbus Boulevard Site"). (*See Id.* at 45, ¶151.) On October 17, 2007, PEDP timely paid the $50 million fee for its License. (*See* October 17, 2007 e-mail from Tom Rogers, a true and

correct copy is attached hereto and made a part hereof as an Exhibit.) The Board subsequently issued PEDP its License on May 29, 2008. (*See* Category 2 Slot Operator License, expiring on May 29, 2009, a true and correct copy is attached hereto and made a part hereof as an Exhibit.[2]) As provided in 4 Pa. C.S. § 1210(a), PEDP had one year from the date of issuance of its License by which to make 1,500 slot machines available for play.[3]

PEDP had initially proposed in its development plan to begin construction of the Casino in February 2007 and to have the Casino operational by November 2008. *See Adjudication of the Pennsylvania Gaming Control Board in the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia* at 39-40, ¶154.) However, from the beginning, Philadelphia's City Council and certain local activist groups, among others, were either opposed to gaming as a matter of principle and/or disagreed with the Board's decision to locate the Casino at the Columbus Boulevard Site. (*See* the Board's September 2, 2009 Adjudication at 2-4, a true and correct copy is attached hereto and made a part hereof as an Exhibit.) Thus, they actively opposed at every turn PEDP's efforts to obtain the necessary zoning approvals, permits and licenses to begin construction at the Columbus Boulevard Site. (*See Id.*) PEDP was therefore required, time and time again, to take action to counter each of these obstacles to its ability to begin construction of and develop the Casino at the Columbus

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[2] There is no date of issuance on the Category 2 Slot Operator License. However, the License does indicate that it expires on May 29, 2009, which, in accordance with the provisions of 4 Pa. C.S. § 1210(a), is one year after the date of issuance.

[3] As of May 29, 2008, the Gaming Act, 4 Pa. C.S. § 1210(a), provided that slot machine licensees "shall be required to operate and make available to play a minimum of 1,500 machines at any one licensed facility within one year of the issuance by the board of a slot machine license unless otherwise extended by the board, upon application and for good cause shown, for an additional period not to exceed 24 months." The Gaming Act was modified on January 7, 2010, to provide that an extension may be granted "upon application and for good cause shown...or an additional period ending on the later of 36 months from the end of the initial one-year period or December 31, 2012."

Boulevard Site on a timely basis as envisioned, including filing and responding to a minimum of ten applications in the Pennsylvania Supreme Court. (*See Id.*)

As the result of these impediments, as well as the dramatic events which were then occurring in the financial market place – which unexpectedly adversely affected the economy, including the gaming industry and the Foxwoods Tribe, as well as planned and other potential sources of funding for the development of the casino project – PEDP was not able to begin construction of the Casino as originally planned. (*See* the Board's September 2, 2009 Adjudication at 14; *see also* Exhibit books introduced by PEDP into evidence at the August 28, 2009 Hearing before the Board; *see also* Agarwal Verified Statement ¶5.) The delay was more than a mere inconvenience, it interrupted the critical path of the whole project which, when coupled with the devastating events taking place in the economy, severely handicapped PEDP's ability to proceed and, for all intents and purposes, ultimately brought the development phase of PEDP's Casino to a crashing halt. (*See generally, Id.*) Consequently, on May 22, 2009, PEDP filed a Petition to Extend the Time to Make Slot Machines Available until May 29, 2011 in accordance with 4 Pa. C.S. § 1210(a). (*See* a true and correct copy of PEDP's May 22, 2009 Motion to Extend Time, attached hereto and made a part hereof as an Exhibit.)

The Board held a public hearing on PEDP's Petition on August 28, 2009. (*See* a true and correct copy of the relevant portions of the Hearing Transcript attached hereto and made a part hereof as an Exhibit.) At that hearing, Cyrus Pitre, on behalf of the Board's Office of Enforcement Counsel ("OEC"), acknowledged that PEDP had proven the existence of good cause as was necessary to extend the time period to make slot machines available.[4] (*See Id.* at 69.) The Board agreed with the OEC's conclusion, finding that good cause existed and stated:

[4] Not only did Mr. Pitre state that there was good cause to extend the deadline, but he noted that he "would probably applaud" PEDP for its efforts up until that point. (N.T. August 28, 2009 Hearing at 69.)

> Undoubtedly, Foxwoods has experienced delays in commencing construction of its slots machine facility. Some of those delays have been caused by the appeal filed by Riverwalk Casino. Other delays have been caused by actions within the Philadelphia city government that have resulted in multiple applications to the Pennsylvania Supreme Court for relief. None of these factors, which have resulted in certain delay to the project, have resulted from any fault of Foxwoods.

(Extension Adjudication at 14, attached hereto and made a part hereof as an Exhibit.)

Ultimately, the Board issued its written Order on September 1, 2009 (the "Extension Order"), granting PEDP's Petition to Extend Time, providing PEDP with a twenty-four month extension of time, until May 29, 2011, to have at least 1,500 slot machines operational and available for play at the Columbus Boulevard Site as provided by § 1210 of the Gaming Act. (*See* a true and correct copy of the Extension Order, attached hereto and made a part hereof as an Exhibit.)

In the Extension Order, the Board imposed nine Conditions on the extension (collectively, the "Conditions"). (*See* Extension Order.) The first seven of those Conditions required PEDP to report at designated times to the Board or BIE, as the case may be, as to the status of various of the specified milestones identified by the Board and BIE as necessary to enable them to confirm PEDP's progress toward having 1,500 slot machines available for play by May 29, 2011. (*Id.*) The remaining two Conditions required PEDP to report additional information to the Board if certain conditions occurred, or as requested by the Board. (*Id.*) The nine Conditions are as follows:

> 1. Within 45 days of the date of this Order, Foxwoods shall provide the Board with a written plan to make a minimum of 1,500 slot machines available for play, on or before May 29, 2011, at the Columbus Boulevard site;
>
> 2. Foxwoods shall provide the Bureau of Investigations and Enforcement ("BIE") written monthly updates, beginning October 1, 2009, regarding its efforts to develop a facility with a minimum of 1,500 slot machines available for play,

on or before May 29, 2011, at the Columbus Boulevard site;

3. Foxwoods shall provide BIE written monthly updates, beginning October 1, 2009, regarding its efforts and progress to obtain financing for developing a facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011;

4. Within 6 months of the date of this Order, Foxwoods shall submit to BIE all financing documents and commitments for financing regarding development of its facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011;

5. Within 3 months of the date of this Order, Foxwoods 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;

6. Within 3 months of the date of this Order, Foxwoods 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;

7. Foxwoods shall provide BIE with monthly updates, beginning October 1, 2009, regarding the status of all outstanding licenses, certifications and permits required by all federal, state, county, local or other agency as prerequisites for construction and development of its facility with a minimum of 1;500 slot machines available for play, on or before May 29, 2011, at the Columbus Boulevard site;

8. Foxwoods shall notify the Board prior to or immediately upon becoming aware of any impeding change of ownership or change in control, material

> change in financial status, including debt position, restructuring, receivership, merger, dissolution, bankruptcy or transfer of assets to any third party; and
>
> 9. Foxwoods will be required to periodically provide updates as to the status of its project, including, but not limited to, financing, zoning, permits and certifications, at public meetings, as scheduled by the Board.

(*See* Extension Order.)

Although PEDP worked diligently and in good faith to fulfill these Conditions, it soon found that, despite its best efforts and for reasons beyond its control (including the continuing deterioration of the economy generally, and the gaming industry specifically), it required additional time to meet certain of the deadlines in the Extension Order, specifically Conditions 5 and 6. (*See generally*, Agarwal Verified Statement ¶¶5, 21.) Consequently, on November 30, 2009, PEDP filed a Motion to Extend Time to Comply with Conditions 5 and 6. (*See* a true and correct copy of PEDP's November 30, 2009 Motion to Extend Time to Comply with Conditions 5 and 6, attached hereto and made a part hereof as an Exhibit.)

After a hearing held on January 27, 2010, the Board denied such Motion. On February 10, 2010, the Board issued its Order (a) confirming its denial of PEDP's Motion, (b) granting the BIE's Motion for Sanctions and assessing PEDP the sum of $2,000 per day beginning on December 1, 2009 and continuing daily until PEDP fully complied with the Board's Extension Order, and (c) issuing a Rule to Show Cause upon PEDP to show, at a hearing of the Board to be held on March 3, 2010, why the Board should not levy further sanctions upon PEDP, including the revocation of PEDP's license, for failure to comply with the Board's Extension Order. (*See* February 10, 2010 Order, attached hereto and made a part hereof as an Exhibit.)

Following the February 10, 2010 Adjudication, the situation changed dramatically. As PEDP had advised the Board, during the period beginning shortly after the Extension Order was

granted on September 1, 2010 up until the date of the January 27, 2010 Board Hearing, PEDP had been soliciting from potential investors, through the efforts of its financial advisor, Blackstone, interest in providing funding for the development of its Casino. (*See* N.T. January 27, 2010 Hearing at 27; *see also* Agarwal Verified Statement ¶¶ 3-4.) It was PEDP's hope that it would soon identify and complete negotiations with an international gaming company that was prepared to provide financing for the project. (N.T. January 27, 2010 Hearing at 27.) As PEDP predicted at that hearing, it entered into a Term Sheet on February 18, 2010,[5] with Wynn, which contemplated that Wynn and PEDP would enter into a purchase agreement which, if approved by the Board, would result in Wynn becoming a controlling owner of PEDP to develop and operate a Casino at the Columbus Boulevard Site. (*See* February 18, 2010 Term Sheet, a true and correct copy is attached hereto and made a part hereof as an Exhibit.)

At the March 3, 2010 Board Hearing, notwithstanding the testimony of the Steven Wynn ("Mr. Wynn"), the Chairman of Wynn, other witnesses on behalf of Wynn, the testimony of counsel for PEDP, and information provided by counsel for PEDP to BIE on the previous day pursuant to the request of BIE, the Board held that PEDP had not met its burden, by clear and convincing evidence,[6] of proving that PEDP had achieved substantial compliance with Conditions 5 and 6 of the Extension Order. (*See* the Board's March 3, 2010 Order, a true and correct copy is attached hereto and made a part hereof as an Exhibit.)

Further, while the Board found that progress had been made by PEDP as evidenced by the Term Sheet and related documents submitted to BIE, the Board refused to lift its Order of

[5] The Term Sheet was amended on March 16, 2010. (*See* First Addendum to Term Sheet dated March 16, 2010, a true and correct copy is attached hereto and made a part hereof as an Exhibit.)
[6] PEDP disputes that such an elevated clear and convincing standard of proof applies.

February 10, 2010. (*Id.*) Therefore, the February 10 Order remained in effect, with the *per diem* sanction previously imposed continuing to accrue pending further Order of the Board.[7] (*Id.*)

The Board also directed in its Order issued on March 3, 2010 (the "Amended Extension Order") the following: (a) PEDP was to submit definitive financing documents relating to the proposed Wynn transaction to the Board and BIE no later than March 31, 2010, (b) PEDP was to submit the documents required by Conditions 5 and 6 of the Extension Order by April 26, 2010, (c) BIE was to report to the Board at its April 7, 2010 meeting as to the status of the receipt of these documents, and (d) the Board was to receive further evidence at the Board's public meeting scheduled for April 29, 2010, at which time the Board was to assess the need for further Board action to achieve compliance with the Board's Orders. (*Id.*) It is noteworthy that, at no time following the March 3rd hearing was there mention of the potential revocation of PEDP's License until BIE filed its Complaint. (*See* F. Warren Jacoby Verified Statement ¶9, attached hereto and made a part hereof as an Exhibit.)

Thereafter, on April 2, 2010, Wynn and PEDP entered into and executed a Partnership Interest Purchase Agreement ("Purchase Agreement") and other related documents in order to effectuate the transactions contemplated by the Term Sheet, pursuant to which the parties agreed to consummate the Proposed Transactions as set forth therein. (*See* Partnership Interest Purchase Agreement, executed on April 2, 2010, a true and correct copy is attached hereto and made a part hereof as an Exhibit.) Then, on April 8, 2010, without any warning to the Board, BIE, any state or local officials, or PEDP, Wynn unilaterally terminated (through no fault of PEDP) the Purchase Agreement, and the other related documents between Wynn and PEDP, notwithstanding that Wynn had (a) executed the Purchase Agreement and related other

[7] The monetary penalty included in the Sanctions, which totaled $186,000 for the period ended March 3, 2010 was paid to the Board on March 2, 2010. (*See* March 2, 2010 Letter from F. Warren Jacoby to Cyrus Pitre, a true and correct copy is attached hereto and made a part hereof as an Exhibit.)

documents on April 2, 2010, (b) presented testimony through its Chairman and Chief Financial Officer at the Board Hearing held on March 3, 2010 as to the plans and vision of Mr. Wynn and his organization for the development of the proposed Casino, Wynn's commitment to the project notwithstanding that the Term Sheet was not "binding", and its ability to fund such development from its own funds, as well as readily available institutional funds, (c) through its counsel and its executive officers, communicated and otherwise met and conferred with BIE and the Bureau of Licensing to discuss and develop a program and schedule for the licensing of Wynn personnel and the approval by the Board of the change of control and ownership of PEDP, including the funding and financing of the activities of PEPD during the period following the execution of the Purchase Agreement, and (d) on April 5, 2010 met with the Mayor of Philadelphia and the head of the Philadelphia Planning Commission to review plans for its proposed casino with them, and had thereafter produced for submission by PEDP to BIE and the Board on April 6, 2010 the documents and timeline required by Conditions 5 and 6 of the Extension Order. (*See* Agarwal Verified Statement ¶ 11.)

After this shocking series of events, counsel for PEDP immediately scheduled meetings, which occurred on April 14, 2010, with Cyrus Pitre, Esquire, and R. Douglas Sherman, Esquire, to discuss the future of the project. (*See* Jacoby Verified Statement ¶6.) Recognizing the need, under the circumstances, for PEDP to have a reasonable period of time to submit a revised plan for the development of its Casino facility – given the unanticipated action of Wynn in unilaterally terminating (through no fault of PEDP) the transaction between Wynn and PEDP commencing shortly after their meeting and until April 28, 2010, BIE and PEDP negotiated extensively and finally entered into a certain Consent Agreement, pursuant to which BIE and PEDP agreed, among other things, to an extension of the timelines for the compliance by PEDP with Conditions 4, 5 and 6 as set forth in the Extension Order, as amended. (*See* Consent

Agreement, a true and correct copy is attached hereto and made a part hereof as an Exhibit.) However, at its meeting of April 29, 2010, without substantive comment, opinion or direction – or even a question of counsel for PEDP – the Board issued an Order, *inter alia*, refusing to approve of such Consent Agreement notwithstanding the many equitable and other reasons why it should have been approved and why PEDP was entitled to the relief provided thereunder. (*See* the Board's April 30, 2010 Order, a true and correct copy is attached hereto and made a part hereof as an Exhibit.)

Thereafter on that same day, April 29, 2010, within moments after the Board's rejection of the Consent Agreement, BIE, through OEC, filed the Complaint which is the subject of the instant action against PEDP seeking the revocation of its slot machine license. On June 1, 2010, PEDP filed its Response to the Complaint along with several other motions, including a motion seeking an extension of time to comply with the conditions set forth in the Extension Order. At the present time, the Board has not heard or otherwise ruled on such motions, other than to consolidate two of the motions with the Revocation Complaint filed by BIE in these proceedings. (*See* the Board's Order to Consolidate, a true and correct copy is attached hereto and made a part hereof as an Exhibit.)

## III. STANDARD OF REVIEW

Section 493a.10 of the Board's Regulations, 58 Pa. Code § 493a.10, provides that "[a]fter the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for summary judgment based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits."

Guided by principles generally determined by Pennsylvania's courts to be applicable to summary judgment motions, "[a] proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains

insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury." *McCarthy v. Dan Lepore & Sons Co.*, 724 A.2d 938, 940 (Pa. Super. 1998), *app. den'd*, 560 Pa. 707, 743 A.2d 921 (1999). While the record must be viewed in the light most favorable to the non-moving party, the non-moving party may not rely solely upon allegations in the pleadings to overcome a motion for summary judgment. See *DeWeese v. Anchor Hocking Consumer & Indus. Prods. Group*, 427 Pa. Super 47, 50-53, 628 A.2d 421, 423-24 (1993); *Ressler v. Jones Motor Co.*, 337 Pa. Super 602, 609, 487 A.2d 424, 428 (1986). "If the non-moving party fails to come forward with sufficient evidence to establish or contest a material issue to the case, the moving party is entitled to judgment as a matter of law." *McCarthy*, 724 A.2d at 940; see *Ertel v. Patriot-News Co.*, 544 Pa. 93, 674 A.2d 1038 (1996), *cert. den'd*, 519 U.S. 1008 (1996).

## IV. ARGUMENT

### A. THE BOARD SHOULD ENTER SUMMARY JUDGMENT IN PEDP'S FAVOR ON COUNTS II AND IV OF THE COMPLAINT (ALLEGING FAILURE TO MAINTAIN FINANCIAL FITNESS AND SUITABILITY)

The Board should enter summary judgment in PEDP's favor and against BIE on Counts II and IV of BIE's Complaint, both of which allege that PEDP has failed to maintain the requisite financial fitness and suitability.

First, PEDP is entitled to summary judgment because the Gaming Act and implementing Regulations setting forth the requirements of financial fitness and suitability are unconstitutionally vague and insufficient to give PEDP reasonable notice of the standard of financial fitness and suitability to which it is supposed to be held.

Second, due process of law and the fundamental public policy of consistency in adjudicative decision-making that underlie the doctrine of *stare decisis* require the Board to reach the same result here that it reached in the materially identical case of PITG. *See In re Joint*

*Application of PITG Gaming, LLC and Holdings Acquisition Co., L.P. for Approval of the Reorganization, Change of Control and Recapitalization of PITG Gaming, LLC and Other Relief in Connection Therewith*, OHA Docket # 42028. Therefore, the Board should find that PEDP has maintained financial fitness and suitability, and accord PEDP the time that it needs to obtain and close on alternative funding and financing to complete development of its licensed casino.

Third, in the alternative and to the extent that the financial fitness and suitability provisions of the Gaming Act may be deemed to pass constitutional muster, which PEDP denies, the Board must nonetheless find that PEDP has maintained financial fitness and suitability consistent with the Board's decision in *PITG* and the Pennsylvania Supreme Court's opinion in *Station Square Gaming, L.P. v. Pennsylvania Gaming Control Board*, 592 Pa. 664, 927 A.2d 232 (2007).[8]

**1. Counts II and IV of the Complaint are Premised on an Overly Simplistic and Legally Incorrect View of the Gaming Act and Implementing Regulations and Fail to Consider the Full Factual Circumstances of Record.**

Counts II and IV of BIE's Complaint are premised on an overly simplistic and legally incorrect view of the Gaming Act and implementing Regulations, and they improperly ignore the full factual circumstances of record in this case. BIE asserts two Counts in which it contends that PEDP is no longer financially fit and suitable for continued licensure. Count IV alleges that PEDP has failed to maintain financial fitness and suitability pursuant to 4 Pa. C.S. § 1313(a), and

[8] The persistent actions of the Board and the Director to improperly and arbitrarily deny PEDP any meaningful discovery in this case, in violation of due process of law, have starkly limited the factual record in this case and stymied PEDP's ability to defend its License and present its arguments in this Motion for summary judgment. PEDP has filed with the Commonwealth Court a Petition for Review of the Director's August 10 Order, confirming the denial of any meaningful discovery, and PEDP incorporates that Petition and those proceedings as though fully set forth. PEDP reserves the right to supplement its summary judgment motion as necessary and appropriate if the Commonwealth Court rules in PEDP's favor and directs the Board and the Director to accord PEDP meaningful discovery in accordance with due process of law.

Count II alleges that PEDP has failed to exercise due diligence to ensure compliance with financial fitness and suitability requirements.

Reading these Counts together, the gist of BIE's argument is that PEDP does not presently have the necessary funding or financing to complete development of its casino by May 29, 2011, and PEDP has no prospects of being able to timely obtain such funding or financing. In other words, Counts II and IV are premised on two propositions: (a) PEDP's purported current lack of financial resources; and (b) the alleged unlikelihood that PEDP will secure such financing or funding in time to complete development of its licensed casino by May 2011. Specifically, the key contentions of Counts II and IV (failure to maintain financial fitness and suitability) are as follows:

A. In its Statement of Conditions, PEDP represented that it would exercise due diligence to ensure compliance with "the suitability requirements of the Act, including but not limited to, those relating to good character, honesty, integrity and financial fitness." (Complaint ¶ 33.)

B. "PEDP has no funds, financing, prospects of obtaining financing, or prospects of entering a partnership with others who could obtain financing" to complete PEDP's casino by May 29, 2011. (Complaint ¶ 34.)

C. As of August 28, 2009, "PEDP has no funds, loans, or other financial means with which to construct its licensed facility." (Complaint ¶ 37.)

D. PEDP entered into the Wynn transaction so as to secure the funding or financing needed to develop the casino. (Complaint ¶¶ 38-39.)

E. With the termination of the contemplated Wynn transaction, "PEDP is in the same or worse position that it was on August 28, 2009, i.e., it has no financing which would enable it to build a licensed facility at the Columbus Boulevard site, and no substantial progress has been made in this regard." (Complaint ¶ 41.)

F. "Since PEDP has no funds, no prospects of funding, and no viable alternative plan to construct and open the facility for which it was licensed by the Board, PEDP is not financially fit to hold a Category 2 slot machine license" and thereby violated its representation in its Statement of Conditions that it would maintain suitability. (Complaint ¶ 42.)

G. As a result, PEDP has failed to meet its representation in its Statement of Conditions that it would exercise due diligence to ensure compliance with the financial

fitness and suitability provisions of the Gaming Act and implementing Regulations. (Complaint at 12, Wherefore clause.)

H. "Pursuant to 4 Pa. C.S. § 1313(a), '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 . . .'" (Complaint ¶ 66.)

I. "PEDP can no longer produce information, documentation and assurances concerning financial background and resources necessary to establish by clear and convincing evidence [] its financial stability, integrity and responsibility." (Complaint ¶ 67.)

J. "PEDP no longer has the financial or operational ability to plan, design, and construct" its casino. (Complaint ¶ 68.)

K. "PEDP is no longer suitable for a slot machine license," or stated otherwise, "no longer suitable and/or financially fit to maintain or possess a Category 2 slot machine license," and the Board can accordingly revoke PEDP's license. (Complaint ¶ 69, Complaint at 17, Wherefore clause.)

Critically, BIE's contention that PEDP's current financial picture is determinative of PEDP's financial fitness and suitability runs contrary to the Gaming Act and to the limited precedent pertaining to financial fitness and suitability. As argued in detail below, the Gaming Act's financial fitness and suitability provisions are unconstitutionally vague. In any event, they fail to provide any reasonable guidance to suggest that a "snapshot" of a licensee's current financial picture is the touchstone for determining a licensee's financial fitness and suitability.

Furthermore, the Board in *PITG* adopted a view of the Gaming Act directly at odds with BIE's simplistic interpretation of financial fitness and suitability. That is, in *PITG*, the Board did not find PITG to be financially unfit and unsuitable for continued licensure, although PITG was then having materially similar financial difficulties – PITG had difficulty obtaining permanent financing to build its Casino and had to stop paying its vendors after it depleted its temporary financing. Rather, the Board allowed PITG sufficient time to secure necessary alternative funding and financing and worked closely with all parties involved to achieve that goal. Under

controlling principles of due process and consistency of adjudicative decision-making, it is respectfully submitted that the Board must reach the same result in this case.

Even if the financial fitness and suitability provisions, as applied in this case, are deemed to pass constitutional muster, the limited precedent of *PITG* and *Station Square* establish that PEDP has not failed to maintain financial fitness and suitability based simply on alleged current financial difficulties. Extrapolating from *PITG* and *Station Square*, it is clear that the emphasis of the financial fitness and suitability requirement is not whether PEDP at this instant is financially able – on its own – to complete development of its Casino. Rather, the inquiry focuses on PEDP's wherewithal to continue operations and sustain its efforts to close on an agreement with a development partner, thereby securing the funding and financing to complete development of the Casino.

In addition, BIE's continued insistence on judging PEDP's financial fitness and suitability against the May 29, 2011 date is improper and ignores the current state of the Gaming Act. As argued in detail above, the January 2010 amendments to the Gaming Act permit the Board to extend until December 2012 "upon application and for good cause shown" the date by which a current licensee must open its casino with at least 1500 slot machines operational and available for play. See 4 Pa. C.S. § 1210(a)(2). PEDP's financial fitness and suitability must be considered in light of the fact that PEDP can apply for and the Board grant such an extension of time to commence operations. Any other view is arbitrary and capricious and contrary to law.

Finally, with respect to Count II, the evidence of record amply establishes that PEDP has exercised utmost diligence in maintaining financial fitness and suitability. As argued at length

below, PEDP has undertaken extensive efforts to secure the additional funding and financing necessary to complete development of its licensed Casino. It is not for lack of its best efforts that PEDP has been unable to secure further funding and financing, but rather for reasons beyond PEDP's control. Therefore, summary judgment should be entered in PEDP's favor and against BIE on Counts II and IV of the Complaint.

### 2. The Financial Fitness and Suitability Provisions of the Gaming Act and Implementing Regulations are Unconstitutionally Vague.

The provisions of the Gaming Act and implementing Regulations that require a slot machine licensee to maintain financial fitness and suitability as a condition of continued licensure are unconstitutionally vague. They fail to set forth any meaningful standard of financial fitness and suitability sufficient to permit a licensee to ensure compliance with such requirement. As a result, they unconstitutionally permit the Board to make this determination on an ad hoc basis.

#### (a) Vague Laws that Fail to Provide Meaningful Guidance are Unconstitutional.

Ours is a society based on the rule of law, but, for that rule to be effective, the laws must be sufficiently definite to give meaningful notice of what they proscribe. To that end, the courts of this Commonwealth and the United States have long provided for constitutional vagueness review. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Boron v. Pulaski Township Bd. of Supervisors*, 960 A.2d 880, 886 (Pa. Commw. 2008).

Vague laws are unconstitutional and violate due process of law where an "ordinary citizen" can not understand what the laws require in all of their applications. *Eagle Envt'l II, L.P. v. Commonwealth*, 584 Pa. 494, 517, 884 A.2d 867, 881 (2005); *see Commonwealth v. Ludwig*, 583 Pa. 6, 16, 874 A.2d 623, 628 (2005) (constitutional and due process right to notice of "reasonable standards" sufficient to enable regulated parties to conform their future conduct to

comply with the law); *Grayned*, 408 U.S. at 108-09. A statute or regulation is unconstitutionally vague if it:

> (1) traps the innocent by failing to give a person of ordinary intelligence reasonable opportunity to know what it provides so that he may act accordingly; or
>
> (2) results in arbitrary or discriminatory enforcement in the absence of explicit guidelines for its application."

*Whymeyer v. Comm., Dep't of State, Bureau of Prof'l & Occupational Affairs, State Registration Bd. for Prof'l Engineers, Land Surveyors & Geologists*, 997 A.2d 1254, 1259 (Pa. Commw. 2010); *see also Grayned*, 408 U.S. at 108-09 (outlining vagueness standards).

As the United States Supreme Court has explained, constitutional vagueness review protects a number of deeply-rooted public policies:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

*Grayned*, 408 U.S. at 108-09. Vagueness review protects a regulated party from decisions by the regulating agency or board based upon a "purely subjective criterion" deriving from "the personal or professional views of individual members." *Blanco v. State Bd. of Private Licensed Schools*, 158 Pa. Commw. 411, 418-19, 631 A.2d 1076, 1081 (1993) (*quoting Pa. State Bd. of Pharmacy v. Cohen*, 448 Pa. 189, 200, 292 A.2d 277, 282 (1972)). Thus, where a statute or regulation provides only "incomplete guidance" to the decision maker and thereby risks arbitrary determinations, it is unconstitutionally vague. *Id.* at 419, 631 A.2d at 1081.

### (b) Binding Commonwealth Court Precedent Explains Constitutional Vagueness Review in Practice.

The recent Commonwealth Court decisions in *Whymeyer* and *Boron* demonstrate vagueness review in practice. In *Whymeyer*, a college graduate who was denied professional licensure as an engineer challenged statutory language requiring graduation from a university with an "approved engineering curriculum" as a precondition to professional engineering licensure. *Whymeyer*, 997 A.2d at 1255. The licensing board concluded that an engineering curriculum could only be deemed "approved" if it was accredited by ABET, the only national organization known to the board to accredit engineering programs. *Id.* at 1259.

As the court noted, however, the Regulation did not set out this criterion, nor did it provide any further definition of the meaning of the statutory term "approved." *Id.* at 1256. Moreover, although the board was also empowered to conduct an independent investigation to approve an engineering curriculum, it declined to do so in that case. *Id.* at 1260. The Commonwealth Court concluded that an ordinary college applicant could not be expected to understand that an "approved engineering curriculum" only included a program accredited by ABET. *Id.* at 1259-60. It thus held that the statute was unconstitutionally vague as applied to the plaintiff because the licensing board relied on this single determinative interpretation that was not meaningfully explained in the regulation. *Id.* at 1260.

Similarly in *Boron*, the Commonwealth Court declared unconstitutionally vague a township ordinance that mandated that adult-oriented businesses close on "state recognized holidays." *Boron*, 960 A.2d at 887-88. In that case, the township suspended an adult bookshop owner's business license for operating on Flag Day. *Id.* at 881. The owner had even sought counsel's advice as to what holidays were "state recognized holidays" and remained closed on those days, but Flag Day was not included on the listing provided by counsel. *Id.* at 882.

The court concluded that the ordinance did not pass constitutional muster because it did not define "state recognized holiday" or guide the reader to any method for determining what constituted such a holiday. *Id.* at 885. It explained that numerous definitions of "state recognized holiday" were available. *Id.* at 887. "State recognized holidays" could include days when state offices were closed, days recognized by the public despite state offices remaining open, days identified as holidays on calendars, days declared a holiday by the General Assembly, or days declared a holiday by the Governor. *Id.* In fact, Pennsylvania law was in conflict as to Flag Day – Pennsylvania's courts and liquor stores remained open on Flag Day; banks, however, have the option of closing on Flag Day. *Id.* at 887 n.11, 888 n.13. As a result, the ordinance failed to provide sufficiently meaningful guidance of its proscriptions and unconstitutionally permitted township officials to determine compliance or not on an ad hoc basis, in light of their personal experience. *Id.* at 887-88.

In *Boron*, the court also analyzed prior precedent where it had found statutes unconstitutionally vague. For example, in *Blanco*, the Commonwealth Court invalidated a state statute that exempted schools that taught "other service occupations" from private school licensing requirements. 158 Pa. Cmwlth. at 414-15, 631 A.2d at 1078-79. The plaintiff in *Blanco* operated a bartender training course and did not obtain a private school license prior to opening. *Id.* at 412, 631 A.2d at 1077-78. When the relevant board issued a cease and desist order, he asserted that he was exempt from the licensure requirement because he conducted training in "other service occupations." *Id.* at 414, 631 A.2d at 1078.

The board argued that the term – undefined in the statute – was not unconstitutionally vague because the board had "developed a reasonable procedure" for decision making. *Id.* at 415, 631 A.2d at 1079. It had consistently relied on publications from the federal departments of Labor and Education, but had never itself defined the term or published guidance as to how it

made that determination. *Id.* at 417, 631 A.2d at 1080. The Commonwealth Court rejected the board's argument, holding that the statute provided only incomplete guidance. *Id.* at 419, 631 A.2d at 1081. It concluded that the language was unconstitutionally vague and resulted in the Board rendering an "*ad hoc*" determination based on "the Board's own expertise" and criteria not identified in the statute. *Id.*

Similarly, in *Watkins v. State Bd. of Dentistry*, a dentist challenged the revocation of his license for failing to maintain "appropriate monitoring equipment" for anesthesia. 740 A.2d 760 (Pa. Commw. 1999). State law required that Dr. Watkins maintain "appropriate monitoring equipment," but did not define that term. *Id.* at 762-63. The board explained that the term was purposefully left vague to permit advances in technology, but the Commonwealth Court rejected this argument. *Id.* at 765. Instead, it held the term unconstitutionally vague because "it [did] not provide a reasonable standard" for action. *Id.* at 765. As in *Boron*, the phrase at issue was "subject to many different meanings." *Id.* This vague language thus gave rise to the precise concern identified by the Pennsylvania Supreme Court in *Cohen* – that the ultimate determination was left to an ad hoc determination based on the "personal or professional views" of Board members, rather than the relevant legislative body. *Id.*

As explained more fully below, the governing provisions of the Gaming Act and implementing Regulations are equally vague and constitutionally deficient as applied. Therefore, PEDP cannot be held to a standard that has never been meaningfully defined.

**(c) Section 1313(a) of the Gaming Act is Unconstitutionally Vague and Violates Due Process of Law as Applied in This Case.**

The Gaming Act and implementing Regulations fail to define the requirement that a licensee maintain financial fitness and suitability with sufficient specificity to survive constitutional vagueness review and thereby violate constitutional guarantees of due process of law. They offer no meaningful, concrete standards for evaluating financial fitness and suitability

or guiding PEDP's efforts to maintain same, and they set no standards to guide or constrain the Board's discretion in assessing a licensee's continued financial fitness and suitability. The requirement that a licensee maintain financial fitness and suitability is thus unconstitutionally vague and violates due process of law, at least as applied in this case. *See, e.g.*, *Whymeyer*, *supra*, 997 A.2d 1254; *Boron*, *supra*, 960 A.2d 880; *see also Grayned*, *supra*, 408 U.S. at 104.

**(i) BIE's Financial Fitness and Suitability Argument is Premised on Section 1313(a) of the Gaming Act.**

According to BIE's Complaint, its allegations that PEDP has failed to maintain the requisite financial fitness and suitability are based primarily on section 1313(a) of the Gaming Act, 4 Pa. C.S. § 1313(a) ("Slot machine license application financial fitness requirements").

Section 1313(a) provides (emphasis added):

> **(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.

4 Pa. C.S. § 1313(a).

According to its responses to PEDP's Interrogatories, BIE also relies on four additional provisions of the Gaming Act and implementing Regulations that purportedly establish and explain the financial fitness and suitability requirements. Those sections are: 4 Pa. C.S. § 1202(b)(23); 4 Pa. C.S. § 1310; 58 Pa. Code § 421a.1(b); and 58 Pa. Code § 421a.2. (BIE's Answers to Interrogatories, a true and correct copy is attached hereto and made a part hereof as an Exhibit, at 5, No. 5.)

In the first instance, section 1202(b)(23) of the Gaming Act does not mention financial fitness or suitability. It provides in relevant part (emphasis added):

> (23) The board shall not approve an application for or issue or renew a license, certificate, registration or permit unless it is satisfied that the applicant has demonstrated by clear and convincing evidence that the applicant is a person of good character, honesty and integrity . . . .

Section 1310 of the Gaming Act provides in relevant part (emphasis added):

> (1) Every application for a slot machine license shall include such information, documentation and assurances as may be required to establish by clear and convincing evidence the applicant's suitability, including good character, honesty and integrity. . . .

Section 421a.1(b) of the Regulations provides in relevant part (emphasis added):

> (b) By filing an application with the Board, an applicant consents to an investigation of the applicant's general suitability, financial suitability, character, integrity and ability to engage in, or be associated with, gaming activity in this Commonwealth to the extent deemed appropriate by the Board. . . .

Section 421a.2 of the Regulations provides in relevant part (emphasis added):

> (a) An application for issuance or renewal of a license, permit, certification or registration may be denied, or a license, permit, certification or registration may be suspended or revoked if:
>
> (1) The applicant has failed to prove to the satisfaction of the Board that the applicant or any of the persons required to be qualified, are in fact qualified in accordance with the act and with this part. . . .

**(ii) Section 1313(a) is Unconstitutionally Vague and Violates Due Process of Law as Applied, and the Board Has Persistently Refused to Issue Meaningful Standards for Evaluating Financial Fitness and Suitability.**

It is readily apparent that § 1313(a) – and the other provisions relied on by BIE – fail constitutional vagueness review and violate constitutional guarantees of due process as well. First, the governing provisions do not themselves set out a meaningful standard sufficient to

guide PEDP as to how it is to maintain the requisite financial fitness and suitability. *See Whymeyer*, 997 A.2d at 1256, 1259-60; *Boron*, 960 A.2d at 885, 887-88. They do nothing more than note in conclusory fashion that an applicant or licensee must be financially fit and suitable. Indeed, as is apparent from the provisions cited by BIE, the Gaming Act and the Regulations fail to even use consistent terminology throughout. The text of the governing provisions is thus unconstitutionally vague and applying those vague provisions in this case violates PEDP's due process rights to meaningful notice and an opportunity to be heard. *See, e.g., Eagle Envt'l II, L.P., supra*, 584 Pa. at 517, 884 A.2d at 881; *Ludwig, supra*, 583 Pa. at 16, 874 A.2d at 628; *Grayned, supra*, 408 U.S. at 108-09.

Second, the governing provisions do not reference or incorporate other statutes, regulations, or published guidance defining financial fitness and suitability and the standards to be applied in making that determination. *See Whymeyer*, 997 A.2d at 1256, 1259 (no reference in governing regulation to requirement of ABET accreditation); *Boron*, 960 A.2d at 885 (no reference in ordinance to definitive listing of "state recognized holidays); *Blanco*, 158 Pa. Commw. at 417-19, 631 A.2d at 1080-81 (no reference in governing regulation to federal publications relied on by the licensing board). As such, the governing provisions' unconstitutional vagueness is not remedied by incorporation of any standards published elsewhere.

Third, although it had ample opportunity and authority to do so, the Board has failed or refused to promulgate any regulations to establish meaningful standards for evaluating financial fitness and suitability. *See Blanco*, 158 Pa. Commw. at 419, 631 A.2d at 1081 ("[W]e conclude that Section 6502 of the Act as applied in this instance is void for vagueness because without proper regulations defining the term 'other service occupations,' Blanco did not have the reasonable opportunity to know that his bartending classes needed a license.") The Gaming Act

specifically empowers the Board "[t]o promulgate rules and regulations necessary for the administration and enforcement of this part," 4 Pa. C.S. § 1202(b)(30), and the Board has had several years in which to promulgate such regulations concerning financial fitness and suitability. Yet, it has not done so. Moreover, as is clear from *Watkins*, the Board cannot purposefully leave this requirement undefined. *See* 740 A.2d at 765 (rejecting licensing board's argument that a statutory term be left undefined so as to accommodate future changes in technology that may fall within the provision). Thus, the Board's failure to promulgate Regulations that meaningfully define the Gaming Act's financial fitness and suitability requirement leaves those provisions unconstitutionally vague and violative of due process of law as applied here – perhaps intentionally so.

Fourth, the Board and the Director specifically refused to provide PEDP with further guidance as to the standards that the Board intends to apply in this case to determine whether PEDP has maintained financial fitness and suitability, despite PEDP's persistent efforts to obtain discovery of such information. PEDP initially sought to obtain this critical guidance through its First Set of Requests for Production and its First Set of Interrogatories, served on BIE on June 18, 2010, the very first day of discovery. On July 2, 2010, BIE served its responses to PEDP's Interrogatories and Requests, which consisted almost entirely of boilerplate objections, but no substantive answers, particularly regarding the standards utilized and applied by the BIE in its determination to commence this action.

Faced with the boilerplate objections by BIE and the absence of any substantive responses, on July 12, 2010, PEDP filed a Motion to overrule the objections and compel full and complete responses to PEDP's Requests and Interrogatories. The following day, July 13, 2010, PEDP also filed a Motion for the issuance of a subpoena to the Board for the production of

documents including, among other requests, documents evidencing how the Board intends to analyze PEDP's continued financial fitness and suitability.

On July 15, 2010, the Director entered two Orders denying both pending discovery Motions. Although BIE had five days to file responses to the discovery Motions, the Director entered the July 15 Orders without awaiting any response from BIE.[9] Four days later, on July 19, 2010, PEDP filed a Petition for review of the July 15 Orders by the full Board, which the Director's August 10 Order denied without further explanation.

On July 19, 2010, PEDP also provided written notice to BIE that PEDP intended to depose four individuals:

> -Cyrus R. Pitre, Esq., Chief Enforcement Counsel for OEC;
>
> -Joseph Morace, a BIE agent;
>
> -William Dobbins, a BIE agent; and
>
> -the BIE investigator(s) assigned to the Western Region of Pennsylvania possessing the most information related to the investigation of PITG Gaming, LLC, in connection with *In re: Joint Application of PITG Gaming, LLC and Holdings Acquisition Co., L.P. for Approval of the Reorganization, Change of Control and Recapitalization of PITG Gaming, LLC and Other Relief in Connection Therewith*, OHA Docket # 42028 (the "PITG investigator").

PEDP intended to question these individuals concerning the applicable standards of financial fitness and suitability, among other topics. Specifically, as Chief Enforcement Counsel, Mr. Pitre should be knowledgeable of the standards, practices, guidelines, policies, and procedures used by BIE and the Board in determining whether a slot machine licensee has maintained financial fitness and suitability. Moreover, by virtue of his position, Mr. Pitre also directed BIE's analysis of PEDP's financial fitness and suitability in this case, and he presumably directed such analysis of PITG. Similarly as BIE Agents, Agents Morace and

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[9] BIE never stated its substantive position on or opposition to PEDP's Motion for the issuance of a subpoena to the Board.

Dobbins would be expected to have knowledge of the standards used and factors considered in investigating and analyzing whether a licensee has maintained financial fitness and suitability, as well as the application of those standards in their investigation of PEDP. Finally, the PITG Investigator(s) would also be expected to have knowledge of these standards, as well as how the standards were applied in the materially similar case of PITG.

BIE responded that it did not oppose the depositions of Agents Morace and Dobbins, but that it objected to the depositions of Mr. Pitre and the PITG investigator. On July 22, 2010, PEDP accordingly filed a Motion for the depositions of Mr. Pitre and the PITG investigator, but proceeded to schedule the depositions of Agents Morace and Dobbins by agreement. BIE filed an objection to the Motion for Depositions on July 27, 2010, and on July 28, 2010, the Director issued an Order denying the Motion.

On August 4, 2010, PEDP filed a Petition in the nature of a Motion for reconsideration of the July 28 Order. BIE filed a reply and objection to the Petition on August 10, 2010. The Director denied PEDP's Petition that same day in her August 10 Order without further explanation.

In the meantime, on July 27, 2010, the day before the depositions of Messrs. Morace and Dobbins, as scheduled by agreement with BIE, BIE abruptly notified PEDP that it had changed its position and would no longer agree to produce those witnesses for deposition. On July 28, 2010, PEDP was therefore forced to file a second Motion for depositions, seeking the depositions of Agents Morace and Dobbins. BIE filed a reply and objection to that Motion on August 5, 2010. The Director's August 10 Order granted PEDP's Motion in part, directing the depositions to go forward, while strictly limiting the scope of questioning of Agents Morace and Dobbins and specifically precluding PEDP from questioning them concerning, among other things, the Board's and BIE's standards of financial fitness and suitability.

PEDP was thus left with no discovery whatsoever concerning the standards that the Board applied and intends to apply in evaluating its financial fitness and suitability for continued licensure, except for the starkly limited depositions of Agents Morace and Dobbins. These individuals were only permitted to testify to their personal understandings of what financial fitness and suitability meant. However, this limited testimony simply confirmed all the more that the governing provisions are unconstitutionally vague.

For example, Agent Dobbins testified that he does not know if there is a distinction between financial suitability and financial fitness in the Gaming Act. (Dobbins Deposition, Day 1, at 74.) He stated that he believes the two concepts are interchangeable. (*Id.*, Day 2, at 24.) As Agent Dobbins explained, he would define suitability (circularly) as "the ability of an individual or an entity to be licensed by the Board, to be found suitable by the Board," including character, reputation, honesty, criminal history and finances. (*Id.*, Day 2, at 10.) Equally conclusory, Agent Dobbins testified that financial fitness and suitability in his mind means: "If it was a business or an entity, to me, it would be, again, their ability to manage their credit, to pay their creditors, to execute their business plan and to keep, retain and pay employees." (*Id.*, Day 2, at 24.)

Agent Morace similarly testified in circular fashion that financial suitability is a condition that an entity must have in order to be suitable and that financial fitness is synonymous with financial suitability. (Morace Deposition, Day 1, at 93; *id.*, Day 2, at 34.) He also testified that determinations of financial fitness and suitability are based on taxes, audited financials, and whether a company has outstanding debts. (*Id.*, Day 2, at 34-35.) None of this testimony provides any greater guidance than the conclusory wording of the statutes and regulations themselves.

Thus, the Board's refusal to explain the standards that it applied and intends to apply in evaluating and calling into question PEDP's financial fitness and suitability in this case further compounds the governing provisions' fatal constitutional vagueness. Indeed, if anything, the limited discovery that PEDP was allowed, in the form of the testimony of Agents Dobbins and Morace, makes crystal clear that there are no meaningful standards to evaluate a licensee's financial fitness and suitability, and thus by which PEDP is to be judged, nor could PEDP have had prior notice of the substance of same. In the end, therefore, PEDP is left with nothing more than the conclusory statement that it must maintain financial fitness and suitability. In other words, the Board will make that determination on an *ad hoc* basis, according to the "personal or professional views" of its members, and in the vacuum created by the utter lack of standards to guide its decision-making.

This is precisely the risk that constitutional vagueness review and constitutional guarantees of due process of law are designed to protect against, and it is clear that the relevant provisions of the Gaming Act and implementing Regulations cannot be applied fairly in this case, but rather are unconstitutionally vague. Therefore, summary judgment should be entered on Counts II and IV in PEDP's favor and against BIE.

### 3. Due Process Binds the Board to Decide this Case Consistent with *PITG* and Therefore the Board Should Conclude that PEDP Has Maintained Financial Fitness and Suitability.

The Board is bound by due process of law and the fundamental public policy of consistency in adjudicative decision-making that underlies the doctrine of *stare decisis* to reach consistent results when adjudicating matters presenting materially similar facts and circumstances. The material facts presented when PITG applied for a change in control to resolve the financial difficulties that had stymied development of its casino are substantially

similar to those presented here.[10] Like PITG, PEDP had an initial commitment for financing which was withdrawn due to the deteriorating economic climate, PEDP has invested substantial resources in developing its casino, and

(*Adjudication of the Pennsylvania Gaming Control Board in the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia* at 37-38, ¶ 145; Moles Interview at 39, 45; N.T. August 29, 2010 Hearing at 8, 31.) However, in *PITG* the Board did not find that PITG had failed to maintain financial fitness and suitability, but rather accorded PITG sufficient time to close on alternative funding and financing. Consistent with due process and decisional consistency, the Board is bound to reach the same result here.

**(a) Due Process and Decisional Consistency Require the Board to Issue Consistent Decisions When Confronted with Similar Material Facts.**

It is a fundamental principle of American jurisprudence that the courts and administrative tribunals must render consistent results in factually similar cases. *See, e.g., Stilp v. Cmwlth.*, 588 Pa. 539, 600 n.31, 905 A.2d 918, 957 n.31 (2006) (by requiring consistency in decision-making, *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, [and] fosters reliance on judicial decisions"); *see also Randall v. Sorrell*, 548 U.S. 230, 243 (2006). Although the Board, as an administrative agency, is not strictly bound by *stare decisis* per se, it must nonetheless abide by the same underlying public policies and issue consistent opinions that "follow, distinguish, or overrule its own precedent." *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 56, 791 A.2d 1155, 1166 (2002); *see also OHB Homes, Inc. v. Zoning Hearing Bd. of Newtown Twp.*, No. 2009-8280, 2010 Pa. Dist. & Cnty. Dec.

[10] Of course, PEDP has been denied any discovery concerning the standards of financial fitness and suitability, if any, that were applied to PITG, thereby limiting PEDP's ability to fully present this argument.

LEXIS 203, *11 (Pa. C.P. 2010) (recognizing that administrative tribunals must abide by the same fundamental principles that underlie *stare decisis*). As the federal courts have explained, consistency in administrative adjudication is necessary to provide guidance and notice of applicable rules of law to those under the agency's authority and to serve as a check against arbitrary decision-making. *See, e.g., California Trout v. FERC*, 572 F.3d 1003, 1022-23 (9th Cir. 2009) (agencies may not irrationally depart from their prior decisions); *McCrary v. OPM*, 459 F.3d 1344, 1350 (Fed. Cir. 2006) (change from established practice without adequate explanation is arbitrary and capricious); *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1986) (Breyer, J.) (reversing labor board's determination where it departed from clear line of decisions without appropriate justification).

A sudden departure by the Board from its established precedent violates due process of law by denying adequate and consistent notice of the rule of law to be applied in future proceedings. *Cf. Krupinski v. Vocational Technical Sch., E. Northampton County*, 544 Pa. 58, 61, 674 A.2d 683, 685 (1996) (due process requires "adequate notice, opportunity to be heard, and . . . a fair and impartial tribunal"); *Conestoga Nat. Bank of Lancaster v. Patterson*, 442 Pa. 289, 295, 275 A.2d 6, 9 (1971); *Melloy v. Shalala*, Civ. A. No. 94-1375, 1994 U.S. Dist. LEXIS 17534, at *16 (E.D. Pa. 1994) (allegation that "inconsistent notices left [plaintiff] unable to understand or act upon" available remedies states a colorable claim for violation of due process). Thus, the Board must render consistent decisions in cases presenting similar material facts. *See, e.g., Gibson v. Unemployment Compensation Bd. of Review*, 682 A.2d 422 (Pa. Commw. 1996); *Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 677 A.2d 861 (Pa. Commw. 1996); *Pittsburgh Stadium Concessions v. Pa. Liquor Control Bd.*, 674 A.2d 334 (Pa. Commw. 1996).

Where an agency's decision deviates too significantly from prior decisions presenting materially the same facts, it will be reversed. *See Gibson, supra*; *Nat'l Fuel Gas Distrib. Corp.*,

*supra*. For example, in *Gibson*, the Commonwealth Court reversed an order denying certain unemployment benefits to a claimant based on the board's unexplained change of position from its determinations in two other identical cases. 682 A.2d at 424 n.7. The claimant was denied eligibility for benefits determined by an applicant's pay schedule while employed, while two similarly situated co-workers were granted benefits. *Id.* at 423 n.6 & 424 n.7. The claimant and other former employees were all paid on the same schedule, but the board inconsistently interpreted the dates on which the claimant was "generally paid" differently from its decisions as to her former co-workers. *Id.* The Commonwealth Court recognized the board's authority to change its position, but refused to allow it to do so without proper justification. *Id.* at 424 n.7. Thus, it ruled that the board had erred as a matter of law by adopting two different and conflicting interpretations in identical circumstances. *Id.*

Similarly, in *National Fuel Gas Distribution Corp.*, a gas company challenged the Utility Commission's decision to reject the company's proposed rate increase based on the Commission's disagreement with the company's method of calculating inflation. 677 A.2d at 862 & 865. The Commonwealth Court reversed and remanded because the Commission had "consistent[ly] accept[ed]" the proposed method of calculating inflation in prior cases without ever questioning its accuracy. *Id.* Similarly, the Commission had "specifically refused" studies designed to substantiate expenses in prior cases. *Id.* As a result, it could not suddenly require substantiation from the gas company without "provid[ing] explicit standards . . . and explain[ing] its divergence from earlier decisional law." *Id.*

Thus, due process of law and the fundamental public policies underlying *stare decisis* require the Board to reach similar results in adjudicating factually similar cases. As set forth below, applying those principles to this case, the Board is bound to reach the same result here that it reached in the materially similar case of PITG.

### (b) PITG Faced Long-Running Financial Difficulties that Stymied Its Ability to Complete Development of Its Licensed Casino.

The instant case presents materially similar facts and circumstances to those that were present when PITG faced financial difficulties that impacted its ability to complete development of its licensed casino.[11] Therefore, the Board is obligated to apply the same analysis to PEDP as it applied to PITG in evaluating whether PEDP has maintained financial fitness and suitability. Consistent with *PITG*, the Board should find that PEDP has not failed to maintain financial fitness and suitability, and instead, permit PEDP the time it needs to close on the additional funding and financing needed to complete development of its licensed casino.

The case of PITG came before the Board on PITG's application for approval of a change of control and recapitalization of the licensee. *See In re Joint Application of PITG Gaming, LLC and Holdings Acquisition Co., L.P. for Approval of the Reorganization, Change of Control and Recapitalization of PITG Gaming, LLC and Other Relief in Connection Therewith*, OHA Docket #42028 ("*PITG*"). At that time, PITG had long faced financial difficulties that had stymied its ability to complete development of its licensed facility. As the Board found in its adjudication, PITG had secured the necessary funding and financing to develop its casino at the time it applied for licensure, but subsequent events forced it to secure alternative funding and financing to complete the project. The Board allowed PITG the time it needed to secure that alternative funding and financing and did not find that PITG had failed to maintain its financial fitness and suitability.

During the pre-licensure PITG suitability hearing in November-December 2006, PITG presented testimony that it had a commitment from Jeffries & Co., a publicly-traded company listed on the New York Stock Exchange with then-market capitalization in excess of $3.7 billion,

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[11] The facts of record establishing these material similarities are, of course, also limited by the Board's and Director's denial of meaningful discovery to PEDP. PEDP believes, however, that further discovery would further emphasize that the facts pertaining to financial fitness and suitability in both cases are materially similar.

to provide approximately $450 million in debt financing to PITG. (*PITG* at 5, ¶ 10.) Subsequently, PITG and Jeffries & Co. failed to reach a definitive agreement regarding financing for the project, forcing PITG to secure alternative financing. (*PITG* at 7, n.1.) Thereafter, on November 19, 2007, PITG secured limited alternative financing in the form of a $200 million bridge financing loan arranged by Credit Suisse, Cayman Islands Branch which was syndicated among various financial institutions. (*PITG* at 7, ¶ 19.)

The credit markets in the United States deteriorated significantly from 2006 through 2008. (*PITG* at 8, ¶ 21.) Through the spring of 2008, PITG pursued permanent financing to complete development of the project, but was unsuccessful in securing such financing. (*PITG* at 8, ¶ 22.) PITG's bridge financing matured on May 19, 2008. (*PITG* at 8, ¶ 22.) PITG, however, was unable to renegotiate the bridge financing with its lenders. (*See PITG* at 8, ¶¶ 21-23.)

On July 2, 2008, Credit Suisse as the agent of the syndicated lenders, served written notice on PITG that on July 24, 2008 it would sell certain collateral, including specifically, all membership interests in PITG. (*PITG* at 8, ¶ 23.) The sale of all membership interests in PITG would have had a material, detrimental impact on the development and completion of PITG's casino. (*PITG* at 8, ¶ 22.) By July 1, 2008, all construction on PITG's casino ceased due to non-payment of PITG's contractors. (*PITG* at 9, ¶ 27.)

On April 17, 2008, PITG applied for Board permission to modify its casino development plan. PITG thereafter filed an amended application on April 23, 2008 that, among other things, sought approval of permanent financing through Key Bank and Credit Suisse. (*PITG* at 8, ¶ 24.) On May 13, 2008, PITG moved the Board to postpone consideration of the proposed permanent financing because the financing negotiations were continuing. (*PITG* at 9, ¶ 26.) The Board held public hearings concerning the status of the anticipated financing on May 14, 2008 and June 11, 2008. (*PITG* at 9, ¶ 26.) PITG's new financing and funding proposal to complete

development of the casino included both an infusion of new equity funding and new loans. Specifically, new investors agreed to contribute $205 million in equity, Credit Suisse agreed to arrange $415 million in loans, and Key Bank agreed to provide $150 million in loans. (*PITG* at 14, ¶¶ 46-47.)

The Board ultimately approved PITG's application for a change of control and its new funding and financing plan to complete development of its licensed casino. (*PITG* at 27.) However, at no time in PITG's process of identifying and closing on alternative funding and financing to complete development of its casino did the Board find that PITG had failed to maintain the requisite financial fitness and suitability.

**(c) PEDP is Similarly Situated to PITG, and the Board is Bound to Reach the Same Result in this Case — Find PEDP Financially Fit and Suitable for Continued Licensure and Allow PEDP Sufficient Time to Close on Alternative Funding and Financing.**

PEDP is presently confronted with materially similar financial issues and resultant interference with its ability to complete development of its licensed facility that confronted PITG. Consistent with due process of law and the fundamental public policies underlying *stare decisis*, the Board must reach a consistent decision in this case – finding that PEDP has not failed to maintain financial fitness and suitability and permitting PEDP sufficient time to close on new funding and financing to complete development of its licensed casino.

Importantly and ironically – given their resistance to any meaningful discovery, the Board and BIE have already admitted that PEDP and PITG faced materially the same financial difficulties, as was confirmed at the March 3, 2010 Hearing before the Board in this matter. At that hearing, Commissioner Ginty and Chief Enforcement Counsel Pitre testified as follows:

> MR. GINTY: In the River [PITG] situation, at least on the financial side and change of control side, you know, we had something similar. Would you agree with that?

> ATTORNEY PITRE: It's totally similar to the Rivers, except that we weren't under the time constraints we were under because we had the steel erected and employees --- construction employees on site who had stopped being paid. But from the financing end, I think this is probably going to be a simple one. However, from the background investigation end, we're looking at more detail.

(N.T. March 3, 2010 Hearing at 119.)

The evidence of record in this case bears out the conclusions of Commissioner Ginty and Chief Enforcement Counsel Pitre. Like PITG, PEDP had a commitment for financing sufficient to complete development of its licensed facility at the time it was awarded its license. Merrill Lynch had issued a commitment to arrange for or underwrite $450 million in third-party financing, which would have been sufficient to complete the project. (*Adjudication of the Pennsylvania Gaming Control Board in the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia* at 37-38, ¶ 145; Moles Interview at 39.) Also like PITG, PEDP has already invested substantial financial resources in developing its licensed casino – to date, more than $160 million. (N.T. August 29, 2010 Hearing at 8, 31.)

As was the case in PITG, PEDP was unable to conclude a prior definitive financing agreement with Merrill Lynch, who provided the initial financing commitment, because of the general downturn in the economy and gaming in particular. (Moles Interview at 46; Agarwal Verified Statement ¶ 5.) PEDP's ability to close on the necessary financing was also significantly impeded by its inability to obtain necessary City zoning and building permits due to interference and obstruction by City Council and local community opposition groups. (Moles Interview at 46; Agarwal Verified Statement ¶ 5.) As the result of these impediments, as well as the dramatic events which were then commencing to take place in the financial market place – which unexpectedly adversely affected the economy, including the gaming industry and the Foxwoods Tribe, as well as planned and other potential sources of funding for the development of the casino project -- PEDP was not able to begin construction of the Casino as originally

planned. The delay was more than a mere inconvenience, it interrupted the critical path of the whole project which, when coupled with the devastating events taking place in the economy, severely handicapped PEDP's ability to proceed and, for all intents and purposes, ultimately brought the development phase of PEDP's efforts to a crashing halt. The economic conditions and significant deterioration in the credit markets in the United States from 2006 through 2008 that affected PEDP's ability to proceed continued through the remainder of 2009, and in fact substantially remain in place today.

As the Board emphasized in its Extension Order, PEDP "faced many of the same obstacles as did HSP which have resulted in the delay in developing its project," including:

> • litigation from community groups, unsuccessful applicants and legislators challenging the Board's decision to award it a License;
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> • refusal of City Council to zone the Columbus Boulevard Site as a Commercial Entertainment District . . . ;
>
> • entering into an agreement with the city for payment of taxes relative to the Columbus Boulevard Site in January 2008 and payment, pursuant to that agreement, of $875,000 in January 2008 and $1.2 million in February 2008 for real estate taxes;
>
> • requests with the Pennsylvania Supreme Court for emergency relief the last of which was granted on April 2, 2008... ;
>
> • refusal by the City to act on the zoning and use permit applications [PEDP] filed in May 2008;
>
> • another request for relief and appointment of a Master from the Pennsylvania Supreme Court in July 2008[ which] the Court granted [] in October 2008.

(Extension Adjudication at 13-14.) The Board thus held: "Undoubtedly, Foxwoods has experienced delays in commencing construction of its slots machine facility. [ ] Accordingly, the Board finds that Foxwoods has, pursuant to Section 1210(a) of the Gaming Act, 4 Pa. C.S. § 1210(a), shown good cause, as described above, to extend the time by which it must make slot

machines available to May 29, 2011." (Extension Adjudication at 14.) Indeed, as the Board acknowledged, PEDP thus faced greater obstacles to closing on its initial financing than did PITG.

Like PITG, PEDP has also faced the same significant deterioration in the credit markets in the United States from 2006 through the present. (*See PITG* at 8, ¶ 21; Agarwal Verified Statement ¶¶ 3, 5.) In addition, as Mr. Wynn testified, the national economy and the ability of a casino developer to secure necessary funding and financing "has not improved since a year ago, generally speaking." (N.T. March 3, 2010 Hearing at 89.)

Also similar to PITG, PEDP too was forced to seek new equity funding and debt financing to complete development of its licensed casino, which was compounded by the weak credit markets. (*See, e.g.*, N.T. March 3, 2010 Hearing at 89; Agarwal Verified Statement ¶¶ 3, 5.) As in PITG, PEDP negotiated and reached an agreement with a new source of equity financing—namely, Wynn. (*See, e.g.*, N.T. March 3, 2010 Hearing at 16, 64-66; Term Sheet; First Addendum; Purchase Agreement.) PEDP similarly undertook to present its new funding and financing proposal to the Board. (*See, e.g.*, N.T. March 3, 2010 Hearing; Term Sheet; First Addendum; Purchase Agreement.)[12] Importantly, as in *PITG*, PEDP faced difficulties in its negotiations to secure new funding and financing for its project, which required PEDP to continue to negotiate the proposed transaction with Wynn over time, and ultimately, to negotiate with other potential investors following the termination of the Wynn transaction through no fault of PEDP. (N.T. March 3, 2010 Hearing at 42; April 8 Letter.) PEDP kept BIE and the Board apprised of these negotiations through regular meetings and conference calls and through PEDP's regular monthly update letters submitted to BIE on a confidential basis, and indeed,

[12] PEDP kept BIE apprised of these developments through its regular submission of monthly status updates to BIE on a confidential basis.

Chief Enforcement Counsel Pitre separately communicated, and met and consulted with, representatives of Wynn during this time.

PEDP is similarly situated to PITG with respect to the financial difficulties both slot machine licensees confronted. In *PITG*, the Board gave PITG every accommodation to allow it to secure the financial or funding resources it needed in order to revive and complete its project. The Board did not commence revocation proceedings or seek the revocation of PITG's license based on any alleged failure to maintain financial fitness and suitability.

Although facing materially identical factual predicates, the Board is taking materially different and wholly inconsistent actions with respect to PEDP than it did with respect to PITG. Instead of accommodating PEDP's significant efforts to overcome the obstacles that have confronted it, the Board has been unnecessarily oppositional, including, for example, the Board's unexplained denial of the Consent Agreement negotiated and agreed to by PEDP and BIE after extensive negotiations over a two-week period, which predictably created greater problems for PEDP in identifying and negotiating with new investors. (Agarwal Verified Statement ¶ 14.) Similarly, in contrast to its accommodation of PITG, the Board and BIE are here inconsistently contending that PEDP has failed to maintain financial fitness and suitability and seeking to revoke PEDP's License, which has been having a deleterious effect on PEDP's efforts to obtain funding and financing. (Agarwal Verified Statement ¶ 14-15.) The Board cannot act inconsistent with its *PITG* adjudication, but rather must act in accordance with that earlier ruling, and accord PEDP the time it needs to close on alternative funding and financing to complete development of its licensed casino.

An inconsistent adjudication in this case, which presents a materially similar factual predicate to *PITG*, would violate due process of law and the fundamental public policies underlying the foundational American jurisprudential policy of *stare decisis*. The Board must

treat PEDP the same as it treated PITG. Therefore, summary judgment on Counts II and IV should be entered in PEDP's favor and against BIE.

### 4. In the Alternative, PEDP Has Maintained Financial Fitness and Suitability Consistent with the Board's Adjudication in *PITG* and the Supreme Court's Opinion in *Station Square*.

In the alternative, to the extent that the financial fitness and suitability provisions of the Gaming Act and implementing Regulations are deemed to pass constitutional muster, which PEDP denies, PEDP has maintained financial fitness and suitability consistent with the governing rules as set forth in *PITG* and *Station Square*.

#### (a) *PITG* and *Station Square* Suggest the Outer Contours of Facts and Circumstances that Do Not Rise to the Level of a Failure to Maintain Financial Fitness and Suitability.

As set forth above, the Gaming Act and implementing Regulations do not provide meaningful standards to elucidate what is required to establish that a slot machine licensee has maintained the requisite financial fitness and suitability for continued licensure. Nonetheless, the Board's adjudication in *PITG* and the Pennsylvania Supreme Court's opinion in *Station Square*, can be extrapolated to suggest the outer contours of circumstances and conditions that do not rise to the level of a failure to maintain financial fitness and suitability.

First, *PITG* makes clear that the Board must apply a different and more flexible and forgiving standard when evaluating a licensee's continued financial fitness and suitability, as opposed to an applicant's financial fitness and suitability. For example, in *PITG* the Board did not find PITG financially unfit or unsuitable for continued licensure when its initial financing commitment fell through, where its temporary financial circumstances forced it to cease construction, where its lenders served notice of their intent to sell all membership interests in PITG, and where PITG did not immediately secure new funding or financing. *See PITG*. While these financial difficulties may have precluded an applicant from being found financially fit and

suitable for a license, they were insufficient to establish a licensee's failure to maintain financial fitness and suitability sufficient for continued licensure.

Second, § 1313 of the Gaming Act and *Station Square* make clear that the emphasis of the financial fitness and suitability determination must be forward-looking. That is, the focus of the evaluation must be whether the licensee will create and maintain a financially-viable and successful operation on an ongoing basis. *See* 4 Pa. C.S. § 1313(e); *Station Square Gaming, L.P. v. Pennsylvania Gaming Control Board*, 592 Pa. 664, 676, 927 A.2d 232, 240 (2007) ("In fact, the Act requires the board to consider projections of future revenue."). Thus, the gist of the analysis is not the licensee's financial status at an isolated moment in time, but rather the licensee's long-term projected financial capability. This is a critical distinction from the instant position of BIE.

Third, as is apparent from *Station Square*, the evaluation of financial fitness and suitability must focus on the overall financial viability of the licensee. The fact that a licensee's financial picture reveals some negative aspects is not sufficient to establish a lack of financial fitness and suitability. For example, in *Station Square*, PITG's financial reports identified a high debt-to-equity leverage ratio and a decline in PITG's financial health from the time when PITG submitted its application through the time when the Board initially conducted its suitability determination. Neither of these factors, however, were found to establish a lack of financial fitness and suitability. *Station Square*, 592 Pa. at 681-82, 927 A.2d at 243.

Fourth, *PITG* also establishes that a temporary decline in a licensee's financial picture does not establish that a licensee has failed to maintain financial fitness and suitability. Even a precipitous decline, such as that suffered by PITG, including the imminent threat that all membership interests in the licensee would be sold to satisfy the licensee's matured and unpaid

loans, is not sufficient to constitute a failure to maintain financial fitness and suitability, so long as the temporary decline is remedied.

Fifth, a licensee's ability to attract the necessary funding and financing for development of its project from the financial markets should also be considered in determining whether the licensee is financially fit and suitable for continued licensure. As the Court noted in *Station Square*:

> Of critical note to the Board was that the capital markets have clearly evidenced that they are comfortable with the financial positions of Majestic Star and PITG. . . . By focusing on whether the capital markets – neutral entities motivated wholly by their own financial self-interest – found Majestic Star and PITG to be worthy entities to which to loan substantial sums of money, the Board in no fashion acted in an arbitrary or capricious fashion. Thus, we conclude that the Board did not act arbitrarily or in capricious disregard of the evidence when it found PITG financially suitable for licensure.

*Station Square*, 592 Pa. at 243-44, 927 A.2d at 683.

Applying these five decisional rules to the instant case, it is clear that PEDP has not failed to maintain financial fitness and suitability within the contours established by *PITG* and *Station Square*.

**(b) PEDP Has Not Failed to Maintain Financial Fitness and Suitability under *Station Square* and *PITG*.**

PEDP has not failed to maintain financial fitness and suitability in a manner which is not consistent with the general notions set forth in *PITG* and *Station Square*. As a licensee rather than an applicant, PEDP is entitled to be judged by the more flexible, deferential standard of financial fitness and suitability. The emphasis must be on PEDP's long-term projected financial circumstances and overall financial viability. Moreover, the temporary decline in PEDP's financial picture, including its extensive negotiations to secure alternative financing and funding, and the unexpected termination of the Wynn transaction, is insufficient to establish that PEDP has failed to maintain financial fitness and suitability.

First, PEDP is entitled to be judged by the more deferential standard applicable to evaluating a licensee's continued financial fitness and suitability, rather than the standard applicable to an applicant seeking initial licensure. *See PITG*, *supra*. As in *PITG*, PEDP had obtained a commitment sufficient to finance its project at the time of initial licensure. But similarly, as detailed above, unexpected intervening events beyond PEDP's control have since forced it to secure alternative funding and financing to complete development of its licensed casino. Under *PITG*, that fact does not make PEDP financial unfit or unsuitable. Rather, in actuality, the Board must accord PEDP greater leeway to close on alternative funding or financing and analyze PEDP's financial fitness and suitability under the more deferential standard of *PITG*.

Second, the evidence of record and current state of the law under the Gaming Act do not establish that PEDP will be unable to open and operate a casino that will be financially viable on an ongoing basis. *See* 4 Pa. C.S. § 1313(e); *Station Square Gaming, L.P.*, *supra*, 592 Pa. at 676, 927 A.2d at 240. Two factors should be given critical weight in this regard.

Initially, with the January 2010 amendments to the Gaming Act, the potentially applicable time horizons have changed. PEDP can petition the Board, for good cause shown, to extend the opening date for its casino until December 31, 2012, as contemplated under 4 Pa. C.S. § 1210(a)(2). Were the Board to grant such an extension, PEDP would have more than sufficient time to build and operate a financially viable casino as contemplated. Because the financial fitness and suitability analysis is forward-looking, the Board must account for the potentially revised time horizon in evaluating PEDP's continued financial fitness and suitability.

Additionally, the evidence of record establishes that PEDP remains committed to developing a casino which would be financially viable, as contemplated by the Board in awarding PEDP its License. (*See Adjudication of the Pennsylvania Gaming Control Board in*

*the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia* at 37, ¶ 144; *see also id.* ¶¶ 140-143.)

As is clear from the record, PEDP has undertaken exhaustive efforts to secure new funding and financing to complete development of what the Board has determined to be a financially viable operation, and it has kept the Board and BIE apprised of its progress throughout the process.[13]

Thereafter, PEDP reached an agreement with Wynn to secure the necessary additional equity financing, which, but for Wynn's unexpected unilateral termination of the transaction, would have provided the funding and financing necessary to complete the project. (*See, e.g.*, N.T. March 3, 2010 Hearing; Term Sheet; First Addendum; Purchase Agreement; Agarwal Verified Statement ¶¶ 10, 12.)

Wynn was capable of funding the entire project through money it had on hand. As Mr. Wynn testified: "I repeat that we don't need outside financing to do this. We have the ability today with our current funds to write a check for this place and two others if we wanted to."

[13] PEDP has delivered and continues to deliver Monthly Update Reports to BIE, apprising it of PEDP's progress, on a Confidential basis.

(N.T. March 3, 2010 Hearing at 64; *see also* Agarwal Verified Statement ¶ 8.) Wynn was also capable of securing the necessary financing to complete development of the project by virtue of its strong financial position and strong relationships with interested lenders. Mr. Wynn further testified that, following the contemplated transaction, PEDP with Wynn's investment would "be able to get financing from our banks" for whatever portion of the costs of completing development of the project was appropriate. (N.T. March 3, 2010 Hearing at 65-66; *see also* Agarwal Verified Statement ¶ 9.)

When PEDP concludes these negotiations, the resulting transaction will provide PEDP with the funding and financing needed to complete the casino. (Agarwal Verified Statement ¶ 18.) The bottom line is that PEDP has the capability to secure new funding and financing, (Ford Deposition at 48; Agarwal Verified Statement ¶¶ 19, 22), and has been exercising its utmost efforts to do so. (Agarwal Verified Statement ¶ 22.) Once such funding or financing is secured, PEDP will be able to complete development of its licensed casino and operate a financially viable casino on an ongoing basis. (*Id.*) Applying the necessary forward-looking analysis, PEDP has thus maintained financial fitness and suitability.

The forward-looking emphasis of the financial fitness and suitability requirement, as suggested by *Station Square* (*citing* § 1313(e)) also illustrates the fatal disconnect between BIE's factual averments and limited document production (which for all intents and purposes consisted

of PEDP's own documents) and the state of the applicable law. In alleging that PEDP is not financially fit and suitable for continued licensure, BIE relies exclusively on an alleged current "snapshot" of PEDP's financial picture. BIE alleges that PEDP does not presently – on its own – have in place funding or financing to complete future development of the Casino. As is clear from § 1313(e) and *Station Square*, however, that is not what the law requires. Rather, the emphasis of the financial fitness and suitability requirement is forward-looking, focusing on whether the licensee will create and maintain a financially-viable and successful operation on an ongoing basis. Thus, even assuming *arguendo* that the facts are as BIE alleges, the Complaint fails as a matter of law to state a claim for failure to maintain financial fitness and suitability because BIE has not identified or pleaded the necessary predicate facts. In other words, the facts upon which BIE relies are not determinative of the issues raised concerning PEDP's financial fitness and suitability. To the contrary, as the undisputed evidence of record amply demonstrates, PEDP has been able to secure loans from its partners as needed to fund payment of critical operating expenses, and PEDP has the wherewithal to secure the funding and financing necessary to complete development of its Casino and has been exercising utmost diligence to do so.

Third, considering PEDP's overall picture, and not simply the fact that is has not yet closed on final funding and financing for the project, PEDP has not failed to maintain financial fitness and suitability. *See Station Square*, 592 Pa. at 681-82, 927 A.2d at 243.

) PEDP's overall financial picture thus demonstrates that it has maintained [illegible] maintain financial fitness and suitability within the rule of *Station Square*.

Fourth, as the evidence of record discussed above equally demonstrates, the financial difficulties PEDP presently faces are only a temporary condition, and a temporary decline in a licensee's financial picture does not rise to the level of a failure to maintain financial fitness and suitability. *See PITG*. PEDP had a commitment to finance the full cost to develop its casino at the time it was awarded its license. (*Adjudication of the Pennsylvania Gaming Control Board in the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia* at 37-38, ¶ 145; Moles Interview at 39.) After it was unable to close on financing according to the terms of this commitment, PEDP was able to successfully negotiate

alternative funding to complete the project in the form of the Wynn transaction. (N.T. March 3, 2010 Hearing; Term Sheet; First Addendum; Purchase Agreement.) After Wynn unexpectedly terminated the transaction, PEDP has again undertaken to locate alternative funding and financing to complete development of its casino, and it has nearly reached a term sheet with a new prospective investor. (Armentrout Deposition at 63

Fifth, the capital and financial markets have consistently evidenced their trust and belief that PEDP will deliver a financially-viable Casino by virtue of their interest in providing financing or funding for the project at various times. PEDP initially secured a financing commitment letter from Merrill Lynch at the time it was awarded its License. (Moles Interview at 39.) Then, when Blackstone was retained and circulated an investment memorandum describing the project, it received serious responses from five different entities interested in pursuing investment in the project. Those discussions led to the Wynn transaction, which had Wynn not unilaterally terminated the transaction, would have provided sufficient funding to complete development of the project. (Armentrout Deposition at 62; Agarwal Verified Statement ¶¶ 3-4, 7-10, 12.) Following the termination of the Wynn transaction, PEDP returned to the capital and financial markets and has nearly completed negotiations with a new potential investor. (Agarwal Verified Statement ¶¶ 13, 16-17.) Thus, the capital and financial markets have consistently evidenced their trust in PEDP and its potential future financial viability.

The instant case thus falls well within the contours of the Board's *PITG* Adjudication and the Supreme Court's Opinion in *Station Square*. Extrapolating from and applying that precedent, it is clear that PEDP has not failed to maintain the requisite financial fitness and suitability.

## B. THE BOARD SHOULD ENTER SUMMARY JUDGMENT IN PEDP'S FAVOR ON COUNTS I AND III OF THE COMPLAINT (ALLEGING NON-COMPLIANCE WITH BOARD ORDERS).

The Board should enter summary judgment in PEDP's favor on Counts I and III of BIE's Complaint, both of which allege that PEDP has failed to comply with the Board's September 1, 2009 and/or March 3, 2010 Orders, for two reasons. First, PEDP is entitled to summary judgment because any non-compliance with Conditions 4, 5 and 6 of the Board's Extension Order is excused because PEDP was incapable of compliance. Second, PEDP is entitled to summary judgment because it has established that good cause has existed and currently exists to extend the time periods set forth in Conditions 4, 5 and 6 of the Board's Extension Order, as amended.

### 1. PEDP's Non-Compliance With Conditions 4, 5 and 6 is Excused.

Among other things, PEDP's inability to fulfill Conditions 4, 5 and 6 of the Board's Extension Order is due to factors outside of its control. Consequently, as explained in detail below, PEDP is and should be excused from compliance. While there is no case law directly on point, administrative determinations may draw defenses from other areas of law. *See, e.g., Smith v. Pa. State Horse Racing Com.*, 517 Pa. 233, 238, 535 A.2d 596, 598 (Pa. 1988) (explaining that criminal law entrapment defense was available in license revocation proceedings). As a result, administrative hearings should entitle parties to the same defenses available for the violation of other civil orders.

Disobedience of a civil court order is contempt unless the alleged contemnor is unable to comply. *Office of Disciplinary Counsel v. Marcone*, 579 Pa. 1, 7 n.4, 855 A.2d 654, 658 n.4 (Pa. 2004). Willful noncompliance must be proven by the enforcing party by a preponderance of the evidence. *Id.* Good faith attempts at compliance will demonstrate that the alleged contemnor is truly unable to comply. *See, e.g., Cmwlth Dep't of Envt'l Resources v. Pa. Power Co.*, 461 Pa. 675, 687, 337 A.2d 823, 829 (Pa. 1975) (noting that good faith is the opposite of willfully

disobeying the court); *Mueller v. Anderson*, 415 Pa. Super 458, 459-461, 609 A.2d 842, 842 (1992) (holding property owners in contempt for failing to attempt alternative options offered in court order). Courts are concerned with converting coercive civil orders, designed to bring parties into compliance, into sanctions designed to punish, particularly where compliance is impossible despite good faith efforts. *Wetzel v. Suchanek*, 373 Pa. Super. 458, 464, 541 A.2d 761 (1988).

The Supreme Court in *Pennsylvania Power Co.* found that the alleged contemnor had attempted to comply with a Department of Environmental resources order on pollution by conducting numerous investigations into options such as alternative materials and plant conversion. 461 Pa. at 688, 337 A.2d at 830. By choosing the "best available" option, rather than an unproven and risky way to attempting to comply with the order, the alleged contemnor demonstrated a good faith attempt at compliance. *Id.* at 688-90, 337 A.2d at 830-31. Because materials and plant conditions to fully meet the order were unavailable for reasons beyond the control of the power company, the Supreme Court recognized that compliance was impossible. *Id.*, 337 A.2d at 830-31. As a result, it affirmed the dismissal of the contempt order. *Id.* at 696, 337 A.2d at 834.

A lack of good faith is demonstrated by overt actions that disrespect the order. In *Marcone*, a suspended attorney failed to comply with this standard by opening a law practice limited to federal cases in the Eastern District. 579 Pa. at 10-11, 855 A.2d at 660-61. Because such an action clearly demonstrated a violation of a court order not to practice law, he was rightfully held in contempt. *Id.* at 10-14, 855 A.2d at 660-62. In *Mueller*, the property owners were unable to claim a defense of impossibility because they failed to show even an attempt at meeting both alternatives offered by the court order. 609 A.2d at 842.

Here, PEDP should be excused from complying with Conditions 4, 5 and 6 of the Board's Extension Order 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 PEDP's control it has not yet been able to do so. As a result of the dramatic adverse turn in the economy, which materially affected the development plans of PEDP, including the role of the Foxwoods Tribe in the future development, funding and operation of PEDP's planned Casino facility following the issuance of the Extension Order, PEDP has been working with its investment advisors and consultants on a non-stop basis in an effort to address financing and funding for its casino project. (*See* Agarwal Verified Statement ¶ 21.) In an effort to find a solution to this problem, which continues today and which has confronted many other gaming businesses in recent years, including those in the Commonwealth of Pennsylvania, PEDP initiated and has tirelessly implemented a plan to identify potential investors and sources of financing to provide funds and to invest in PEDP and its proposed development, and to provide management and expertise regarding the development and operation of its casino. (*Id.*

As part of the above process, PEDP identified Wynn as a source of financing and investment, and management, as it so advised the Board and BIE. PEDP entered into a Term Sheet with Wynn which contemplated that, upon the execution of definitive transaction documents, Wynn would, subject to Board approval, obtain an ownership interest in PEDP and be responsible for the development and management of the Casino. (*See* Agarwal Verified Statement ¶ 7; *see also* February 18, 2010 Term Sheet; *see also* First Addendum to Term Sheet dated March 16, 2010.) The Board was clearly informed that the completion of the casino as contemplated by the Wynn transaction was premised on obtaining a further extension of time to

December 2012, the maximum extension available under the Gaming Act as amended in January 2010. (3/3/10 Hearing Transcript, Page 34, Lines 17-20; Agarwal Verified Statement ¶ 7.) It was then forecasted that it would take approximately 20 months to complete construction of the casino, including 14 months of construction, as well as six months to obtain necessary permits. (3/3/10 Hearing Transcript, Page 63, Lines 15-20; Agarwal Verified Statement ¶ 7.)

On April 2, 2010, Wynn and PEDP entered into and executed a Purchase Agreement and other related documents in order to effectuate the transactions contemplated by the Term Sheet, pursuant to which the parties agreed to consummate the Proposed Transactions as the result of which PEDP would have the funding and financing necessary for the development of its casino. (*See* Partnership Interest Purchase Agreement, executed April 2, 2010.) As was acknowledged by BIE at the Board's Meeting held on April 7, 2010, PEDP had made its submissions and was in substantial compliance with Conditions 4, 5 and 6 as of this date. (Agarwal Verified Statement ¶ 10.)[14]

On April 8, 2010, without any warning to the Board, BIE or any state or local officials, or PEDP, Wynn unilaterally terminated (through no fault of PEDP) the Purchase Agreement, and the other related documents between Wynn and PEDP, notwithstanding that Wynn had (a) executed the Purchase Agreement and related other documents on April 2, 2010, (b) presented testimony through its Chairman and Chief Financial Officer at the Board Hearing held on March 3, 2010 as to the plans and vision of Mr. Wynn and his organization for the development of the proposed Casino, Wynn's commitment to the project notwithstanding that the Term Sheet was not "binding", and its ability to fund such development from its own funds, as well as readily

[14] PEDP made a confidential submission in response to Condition 4 on March 31, 2010, and again on April 5, 2010, and confidential submissions in response to Conditions 5 and 6 on April 6, 2010. At that time, there was no mention of an issue regarding PEDP's suitability or fitness, notwithstanding that both the Term Sheet and the definitive documents provided for numerous conditions as a basis for Wynn to not close on the transaction.

available institutional funds, (c) through its counsel and its executive officers, communicated and otherwise met and conferred with BIE and the Bureau of Licensing to discuss and develop a program and schedule for the licensing of Wynn personnel and the approval by the Board of a change of control and ownership, including the funding and financing of the activities of PEPD during the period following the execution of the Purchase Agreement, and (d) on April 5, 2010 met with the Mayor of Philadelphia and the head of the Philadelphia Planning Commission to review plans for its proposed casino with them, and had thereafter produced for submission by PEDP to BIE and the Board on April 6, 2010 the documents and timeline required by Conditions 5 and 6 of the Extension Order. (Agarwal Verified Statement ¶ 11.)

During the period commencing with its active negotiations with Wynn in November, 2009, through the negotiation and execution of the Term Sheet and the Purchase Agreement and other related documents, and the other actions taken by Wynn in furtherance of the parties' agreement, PEDP rightfully and justifiably had the reasonable expectation that, as presented by Wynn to the Board on March 3, 2010 and to BIE in its meetings and other communications with BIE, Wynn would thereafter provide the design and financing required to continue to comply with the Amended Order, thereby satisfying Conditions 4, 5 and 6 of the Extension Order, and justifying the termination of the penalties and fines imposed pursuant to the Amended Order. Moreover, PEDP's reliance was justified given that the Board indicated in its Amended Extension Order that PEDP had achieved substantial compliance with Conditions 5 and 6 of the Extension Order. (*See* Amended Extension Order.) Although the Board refused to lift its Order of February 10, 2010, thereby leaving the *per diem* sanction in effect, the Board noted that it would reassess the need for further Board action to achieve compliance with the Board's Orders at public meeting scheduled for April 29, 2010. (*Id.*) Again, it is also noteworthy that, following the March 3rd hearing, there was no mention of issues of suitability or

fitness, or the potential revocation of PEDP's License, until April 29th when BIE filed its Complaint. (*See* Jacoby Verified Statement ¶ 9.)

After this shocking series of events, counsel for PEDP immediately scheduled a meeting, which occurred on April 14, 2010, with Cyrus Pitre and R. Douglas Sherman of the OEC to discuss the future of the project. (*See* Jacoby Verified Statement ¶ 6.) Recognizing the need for PEDP to have a reasonable period of time to submit a revised plan for the development of its Casino facility – given the unanticipated action of Wynn in unilaterally terminating (through no fault of PEDP) the transaction between Wynn and PEDP – on April 28, 2010, BIE and the PEDP entered into a certain Consent Agreement, pursuant to which BIE and PEDP agreed, among other things, to an extension of the timelines for the compliance by PEDP with Conditions 4, 5 and 6 as set forth in the Extension Order, as amended. (*See* Consent Agreement.) However, at its meeting of April 29, 2010, without substantive comment, opinion or direction, the Board issued an Order, *inter alia*, refusing to approve of such Consent Agreement notwithstanding the many equitable and other reasons why it should have been approved. (*See* the Board's April 30, 2010 Order.)

Immediately following the unilateral termination of Wynn, PEDP re-engaged with its financial advisors and consultants to identify and negotiate on a "fast track" basis with potential investors and sources of financing for the development of its casino project. (Ford Deposition at 59; Agarwal Verified Statement ¶ 16.) PEDP received term sheets from five prospective investors in and managers of its project and has narrowed this group down to one principal investor. At the present time, PEDP is actively engaged in term sheet negotiations with this principal investor and expects to submit a mutually agreed upon term sheet to BIE and the Board in the near future. (Agarwal Verified Statement ¶ 17.)

Wynn's unilateral termination, followed by the filing of the Complaint for Revocation just weeks later, has made it impossible for PEDP to comply with Conditions 4, 5 and 6 of the Extension Order and, as forecasted, has made it difficult for PEDP to attract and negotiate with potential investors and sources of funding – a consequence which would have been addressed through the proposed Consent Agreement. (Agarwal Verified Statement ¶ 15.) As detailed above, PEDP has not sat idly by; rather, as in *Pennsylvania Power Co.*, it has made good faith efforts to comply with the letter and spirit of the Extension Order. 461 Pa. 675, 687, 337 A.2d at 829. Consequently, PEDP should be excused from such non-compliance which is outside its control.

**2. Good Cause Exists to Extend the Time Limitations Set Forth in Conditions 4, 5 and 6 of the Board's Extension Order, as Amended.**

PEDP has faithfully and honestly endeavored to comply with the Board's Extension and Amended Extension Orders. Although PEDP has not satisfied all of the Conditions in the original Extension Order, it has satisfied many of them and continues to work diligently and in good faith towards full compliance as set forth in more detail below. Therefore, good cause exists to further extend the timelines set forth in Conditions 4, 5 and 6 of the Extension Order, as amended – which were by the admission of Mr. Pitre substantially complied with in April, 2010, and only now affected by the unexpected termination by Wynn of its agreements with PEDP.

Pursuant to § 497a.5 of the Board's regulations, 58 Pa. Code § 497a.5, the Board may, upon timely motion and for good cause shown, extend any period of time set forth in any order of the Board. Section 497a.5(a)(1) provides:

> Whenever under this part or by order of the Board, or notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may be extended by the Board, for good cause, upon a motion made before expiration of the period originally prescribed or as previously extended. Upon a motion made after the expiration of the specified period, the time period within which the act may be

> permitted to be done may be extended when reasonable grounds are shown for the failure to act.

While the Gaming Act and the Board's Regulations do not specifically define the term "good cause," in prior adjudications involving the License, the Board has construed the term "good cause" to mean "a substantial reason amounting to legal excuse for failing to perform any act required by law as determined on a case-by-case basis." (*See* the Board's September 2, 2009 Adjudication at 13.)

PEDP has satisfied many of the Conditions in the Extension Order. PEDP timely satisfied Condition 1 by submitting to the Board on October 16, 2009 a confidential written plan to make a minimum of 1,500 slot machines available for play by May 29, 2011 at the Columbus Boulevard Site. PEDP timely satisfied Conditions 2, 3, and 7 of the Extension Order, as of the date of this Motion, by submitting confidential written monthly updates to BIE for October, 2009, November, 2009, December, 2009, January, 2010, February, 2010, March, 2010, April, 2010, May, 2010, June, 2010, July, 2010 and August, 2010 regarding its efforts to develop a facility with a minimum of 1,500 slot machines available for play by May 29, 2011 at the Columbus Boulevard Site, its efforts to and progress in obtaining financing for developing the facility, and the current status of all outstanding licenses, certifications and permits required by all federal, state, county, local or other agency as prerequisites for construction and development of the facility.

The only three Conditions that PEDP has not currently fulfilled are Conditions 4, 5 and 6. PEDP submits that there were two primary objectives underlying Conditions 4, 5 and 6: (1) building a high-quality slot machine facility and having it operational in the limited time then available under the Gaming Act; and (2) in light of the severe economic downturn that gripped the country, ensuring that PEDP had the means – both financially and otherwise – to build the slot machine facility on time. Given the unilateral termination by Wynn, as described in detail

*infra*, PEDP believes that, under the circumstances, it is entitled to an extension of time to comply with these Conditions – having complied with them once,[15] and having that compliance abrogated by conditions that were very obviously beyond PEPD's expectation or control – as well as the expectation of both State and local officials, including the Board, among others.

## V. CONCLUSION

In sum, upon consideration of the undisputed facts of record, PEDP is entitled to judgment as a matter of law on all Counts of BIE's Complaint. Summary judgment should be entered in PEDP's favor on Counts II and IV because, as a matter of law, PEDP's $50 million License cannot be revoked because of an alleged failure to maintain financial fitness and suitability. The Gaming Act and implementing Regulations do nothing more than express this concept in the most conclusory fashion – they provide no concrete, meaningful standard for a licensee to maintain financial fitness and suitability or for the Board to analyze whether a licensee has done so. The financial fitness and suitability provisions thus fail constitutional vagueness review and cannot be the basis for revoking PEDP's $50 million License in this case.

Furthermore, consistent with due process and the fundamental public policy of consistency in adjudicative decision-making that underlies the doctrine of *stare decisis*, the Board must reach the same result here that it reached in the substantially similar case of PITG. It must find that PEDP has maintained financial fitness and suitability and accord PEDP the time it needs to close on alternative funding and financing to complete development of its licensed Casino. In the alternative and to the extent that the financial fitness and suitability provisions of

[15] There is little doubt that Conditions 4, 5 and 6 were satisfied with the consummation of the Wynn deal in April 2010. However, these Conditions were actually fulfilled in early March 2010. Pursuant to the direction of Mr. Pitre, PEDP submitted a confidential letter to OEC's Cyrus Pitre on March 2, 2010, the day before the March 3, 2010 Rule to Show Cause Hearing, in which PEDP explained in depth how the primary objectives underlying Conditions 4, 5 and 6 would be fulfilled with the Board's approval of the Wynn transaction. PEDP contends that the explanations in this letter fulfill its requirements under Conditions 4, 5 and 6.

the Gaming Act may be deemed to pass constitutional muster, which PEDP denies, the Board must nonetheless find that PEDP has maintained financial fitness and suitability consistent with the Board's holdings in *PITG* and the Pennsylvania Supreme Court's opinion in *Station Square*.

Summary judgment must also be entered in PEDP's favor on Counts I and III. Revocation of PEDP's $50 million License because it could not meet some of the reporting conditions in the Board's September 1 and March 3 Orders – and not because of any willful refusal to comply – is an excessively draconian and unwarranted sanction. The record is clear that PEDP made extensive efforts to comply with those reporting conditions; any non-compliance is solely due to a temporary inability to comply despite best efforts and for reasons beyond PEDP's control. In fact, it is undisputed that PEDP had achieved substantial compliance with all reporting conditions by early April 2010, and that, following the unexpected termination of the contemplated transaction with Wynn, PEDP immediately re-commenced a robust process to locate an alternative investor. It flies in the face of settled public policy to impose the punitive, draconian sanction of revocation of PEDP's License – in effect, a forfeiture of the $50 million License and the more than $100 million in other funds that PEDP has spent to date to develop its Casino – based on its inability to meet these conditions.

For the reasons set forth in PEDP's Motion for Summary Judgment and elaborated above, PEDP respectfully requests this Board to enter summary judgment in its favor and against BIE as to Counts I, II, III, and IV of the Complaint, and to dismiss such Complaint with prejudice.

Respectfully submitted,

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Dated: October 5, 2010

**VERIFICATION**

I, F. Warren Jacoby, Esquire, hereby state that I am authorized to make this Verification, and state that the facts above set forth in the foregoing Motion for Summary Judgment and in the supporting Memorandum of Law are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C. S. § 4904 (relating to unsworn falsification to authorities).

Date: October 5, 2010

F. Warren Jacoby, Esquire

**BEFORE THE**
**PENNSYLVANIA GAMING CONTROL BOARD**

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| IN RE | : | |
| PHILADELPHIA ENTERTAINMENT AND | : | Docket No. 1367 |
| DEVELOPMENT PARTNERS, L.P., d/b/a | : | |
| FOXWOODS CASINO PHILADELPHIA | : | Office of Hearings and Appeals Docket |
| | : | Number: 1408-2010 |

**ORDER**

AND NOW, on this ___ day of _____, 2010, upon consideration of Respondent, Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's Motion for Summary Judgment and any response thereto, it is hereby ORDERED that said Motion is GRANTED and the Complaint of the Board's Bureau of Investigations and Enforcement is dismissed with prejudice.

_____

**CERTIFICATE OF SERVICE**

I certify that I am this day serving a complete copy of the foregoing Respondent's Motion for Summary Judgment on October 5, 2010 by E-Mail upon the following:

Cyrus R. Pitre, Esquire
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By: _____
F. Warren Jacoby, Esquire

Dated: October 5, 2010