IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 49 CD 2011

Philadelphia Entertainment and Development Partners, LP,
d/b/a Foxwoods Casino Philadelphia,

Petitioner,

v.

Pennsylvania Gaming Control Board,

Respondent.

Appeal from the Final Order of the Pennsylvania Gaming Control Board,
OHA Docket No. 1408-2010, entered December 23, 2010

BRIEF FOR PETITIONER PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, LP

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STATEMENT OF JURISDICTION

Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia ("PEDP") has filed this appeal from the final Order entered on December 23, 2010 by the Pennsylvania Gaming Control Board (the "Board"). (Appendix ["App."] A.) That Order granted summary judgment in favor of the Board's Bureau of Investigations and Enforcement ("BIE") on BIE's Motion for Summary Judgment, and it revoked PEDP's Category 2 slot machine license. PEDP also seeks review of prior non-final Orders entered by the Board in the proceedings below, including its November 19, 2010 Order denying PEDP's Motion for Summary Judgment, (App. C), and numerous earlier Orders concerning discovery, (Apps. D-M).

The Commonwealth Court has appellate jurisdiction over this appeal pursuant to § 763 of the Judicial Code, 42 Pa. C.S.A. § 763, and Rules 341 and 1511 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 341 and 1511. On final Order appeal, the Commonwealth Court also has jurisdiction to review all prior non-final Orders entered by the Board in the proceedings below. *See, e.g.*, *Rohm & Haas Co. v. Lin*, 992 A.2d 132, 149 (Pa. Super. 2010); *Quinn v. Bupp*, 955 A.2d 1014, 1020 (Pa. Super. 2008).

ORDER OR OTHER DETERMINATION IN QUESTION

This appeal is taken by PEDP from the final Order (attached as Appendix "A") entered on December 23, 2010 by the Board in the proceedings below. The text of that Order follows:

AND NOW, this 23rd day of December, 2010, upon consideration of the Office of Enforcement Counsel's ("OEC") Motion for Summary Judgment; Philadelphia Entertainment and Development Partners, L.P.'s ("PEDP") response thereto; and the record before the Board in these proceedings; OEC's Motion is **GRANTED** and it is **ORDERED** that PEDP's Category 2 Slot Machine License is **REVOKED** for the following reasons:

1) PEDP failed to comply with the Board's Order of September 1, 2009 by failing to submit to the Bureau of Investigations and Enforcement ("BIE") by December 1, 2009, architectural renderings, artist renderings, conceptual proposals, engineering opinions and other documents relating to the construction of a facility substantially similar to that approved by the Board on December 20, 2006; as well as a timeline for commencement and completion of all phases of the facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011;
2) PEDP failed to comply with the Board's Order of March 3, 2010 by failing to submit definitive financial documents for its casino project by March 31, 2010;
3) PEDP failed to comply with the Statement of Conditions placed upon the Category 2 Slot Machine License granted to PEDP, including, *inter alia*, Condition 5 of the Statement of Conditions, by failing to maintain financial fitness;
4) PEDP is unable to have 1,500 slot machine available for play by the Board imposed deadline of March 29, 2011; and
5) PEDP has failed to maintain financial suitability to hold a Category 2 Slot Machine License.

An Adjudication setting forth Findings of Fact and Conclusions of Law and the Boards' [sic] rational [sic] for entering this Order shall be forthcoming.

By the Board:

/s/

Gregory C. Fajt, Chairman
Pennsylvania Gaming Control Board[1]

[1] Pennsylvania Gaming Control Board Member Ginty voted to deny OEC's Motion for Summary Judgment.

After this appeal was taken, the Board issued an Adjudication, dated January 26, 2011, in support of its Order, which is attached as Appendix "B."

In addition, this appeal seeks review of prior non-final Orders entered and Adjudications issued by the Board in the proceedings below. Those Orders and Adjudications are attached as appendices as follows:

Appendix C: Order, entered by the Board on November 19, 2010.

Appendix D: Order, entered by the Director on June 18, 2010.

Appendix E: Order, entered by the Director on June 30, 2010.

Appendix F: Order, entered by the Director on July 15, 2010.

Appendix G: Order, entered by the Director on July 15, 2010.

Appendix H: Order, entered by the Director on July 28, 2010.

Appendix I: Order, entered by the Director on August 10, 2010.

Appendix J: Order, entered by the Board on August 11, 2010.

Appendix K: Adjudication, issued by the Board on August 11, 2010.

Appendix L: Order, entered by the Director on August 23, 2010.

Appendix M: Order, entered by the Director on September 8, 2010.

Appendix N: Order, entered by the Board on September 2, 2009.

Appendix O: Adjudication, issued by the Board on September 2, 2009.

Appendix P: Order, entered by the Board on February 10, 2010.

Appendix Q: Adjudication, issued by the Board on February 10, 2010.

Appendix R: Order, issued by the Board on March 3, 2010.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

"'Scope of review' refers to . . . the matters (or 'what') the appellate court is permitted to examine." *Morrison v. Dep't of Pub. Welfare*, 538 Pa. 122, 131, 646 A.2d 565, 570 (1994). This Court's scope of review is plenary as to law, but restricted to the record and to those facts of which judicial notice can be taken. *See Wojdak v. Greater Philadelphia Cablevision, Inc.*, 550 Pa. 474, 488, 707 A.2d 214, 220 (1998) (scope of review on issues of law is plenary); *see also* Pa. R.A.P. 2111(a)(2) and Note (defining scope of review as "what the appellate court is allowed to examine"); Pa. R. Evid. 201 (court may take notice of adjudicative facts).

In the present situation, the Court is being asked to review a final Order of the Board, as a Commonwealth agency, to determine whether the Board committed an error of law, violated constitutional rights, or failed to follow rules of practice and procedure, or that any necessary finding of fact is not supported by substantial evidence of record. 2 Pa. C.S.A. § 704. To determine whether an agency acted "in accordance with law" the Court must also determine whether the agency's conclusions "are adequately supported by competent factual findings, are free from arbitrary or capricious decision making and to the extent relevant, represent a proper exercise of the agency's discretion." *Fraternal Order of Police v. Pennsylvania Labor Relations Board*, 557 Pa. 586,592-593, 735 A.2d 96, 99 (1999). The Court may similarly consider whether an agency acted with "capricious disregard of material, competent evidence." *Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd.*, 571 Pa. 189, 203, 812 A.2d 478, 487 (2002).

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Board committed a reversible error of law, where:

-it applied an incorrect legal test in determining that PEDP had violated conditions of its License because it was not financially fit and suitable for continued licensure, and

-the legal test that the Board applied was contrary to the framework previously used by the Board when it considered financial fitness and suitability?

Suggested Answer: Yes.

2. Whether the Board committed a reversible error of law, where it applied an unconstitutionally vague standard of financial fitness and suitability as the basis to revoke PEDP's License?

Suggested Answer: Yes.

3. Whether the Board created and applied a process that violated due process of law in revoking PEDP's License, where:

-it entered summary judgment against PEDP on BIE's motion for summary judgment, and on PEDP's motion for summary judgment, by resolving genuine disputed issues of material fact against PEDP without conducting an evidentiary hearing and failed to view the record in the light most favorable to PEDP as the respondent to BIE's motion,

-its determinations are unsupported by the record,

-it denied PEDP the necessary discovery in support of its motion for summary judgment and in opposition to BIE's motion for summary judgment, and

-it imposed an excessive sanction?

Suggested Answer: Yes.

STATEMENT OF THE CASE

A. Form of Action and Brief Procedural History.

This appeal is a case of first impression under the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S.A. § 1101, *et seq.* (the "Gaming Act") where the Board, a Commonwealth administrative agency, granted BIE's motion for summary judgment and revoked PEDP's Category 2 slot machine license. (Apps. A & B.) The procedural history of this case is closely intertwined with the factual background and, as such, it will be briefly summarized in this section and discussed more fully below in connection with the statement of necessary facts.

On December 20, 2006, the Board awarded PEDP one of the two available Category 2 Slot Machine Licenses (the "License") to operate a gaming facility (the "Casino") in the City of Philadelphia. The Board issued PEDP's License on May 29, 2008, and PEDP was to open its Casino and commence operations within one year thereafter.

Because of a number of factors beyond its control, PEDP was unable to commence operations by May 29, 2009, and PEDP therefore moved the Board on May 22, 2009 for an extension of time to build and open its Casino. The Board held a hearing on PEDP's motion on August 28, 2009, at which time it determined that PEDP had established good cause to extend the time for its Casino to be operational[1] and granted PEDP until May 29, 2011 to commence operations. (Apps. N & O.) This was the maximum extension allowable under the relevant statute in effect at that time; however, the Board subsequently was given the authority to extend a casino's opening date until December 31, 2012. *See* 4 Pa. C.S.A. § 1210.[2]

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[1] The Board found that PEDP's efforts to develop its Casino had been obstructed and delayed by the actions of Philadelphia's City Council, requiring multiple applications for relief to the Pennsylvania Supreme Court, as well as by the actions of local politicians and citizens' groups. (App. N at 13-14.)

[2] Section 1210 was amended in January 2010, increasing the maximum possible extension of time from 24 months to the later of 36 months or December 31, 2012. (*See* n.3, *infra*.)

In granting PEDP an extension of time to commence operations, the Board also imposed nine conditions that, *inter alia*, set milestone dates by which it expected PEDP to submit certain documentation, including financing documents, architectural and other construction plans, and a development timeline (the "Extension Conditions"). (App. N.) It is the understanding of PEDP that the Board had never before imposed such requirements on other licensees – which could not be confirmed given the Board's denial of the discovery sought by PEDP as discussed in more detail below On November 30, 2009, PEDP moved the Board for an extension of time to submit its architectural plans and development timeline because it was still negotiating to reach an agreement with a new development partner and to obtain financing, which was impacting its ability to prepare and make such submissions. The Board conducted a hearing on the motion on January 27, 2010, and denied PEDP's request for an extension of time. The Board entered an Order and issued an Adjudication on February 10, 2010 to this effect. (Apps. P & Q.) In its February 10 Order, the Board also imposed on PEDP a daily fine of $2,000 until PEDP attained full compliance with the reporting requirements of the September 2 Order (as defined below) and scheduled a further hearing on March 3, 2010 for PEDP to show cause why the Board should not levy further sanctions. (App. P.)

Following the February 10 Order, PEDP entered into a Term Sheet with Wynn Resorts, Limited (together with its direct or indirect wholly-owned subsidiaries, collectively "Wynn"), pursuant to which Wynn would provide or serve as a source of funding and financing sufficient to enable PEDP to proceed with and complete the development of its Casino, and Wynn would also assume management of the Casino project (the "Wynn Transaction"). At the March 3, 2010 hearing, PEDP reported this significant development and informed the Board of the status of its negotiations with Wynn in an effort to reduce the Term Sheet to definitive transactional documents. PEDP also presented the testimony of Steven Wynn, the Chairman of Wynn, who

testified in great and graphic detail as to the planned Casino that would be built under the Wynn Transaction (with expansive descriptions of not just the exterior of the facility, but also the interior and the anticipated concessions to be made available), as well as the ability of his organization to finance the transaction. Mr. Wynn's testimony was the functional equivalent of the development plans and timeline called for in the Extension Conditions in the Board's September 2 Order. (R. 1645a-1651a.) Nonetheless, in an Order entered March 3, 2010 following the hearing, the Board continued to assess the $2,000 daily fine and directed PEDP to submit definitive financing documents relating to the Wynn Transaction by March 31, 2010 and to submit architectural and other construction plans and a development timeline for its Casino by April 26, 2010. (App. R.) The Board's decision was unprecedented, and a sharp departure from its treatment of other licensees in similar circumstances.

PEDP and Wynn executed definitive transactional documents on April 2, 2010, and promptly submitted those documents to BIE and the Board, having provided BIE with draft copies of same on March 31, 2010. Then, on April 8, 2010, Wynn abruptly unilaterally terminated all agreements relating to the Wynn Transaction. As a consequence, and in an effort to mitigate the adverse effects of this unexpected event, PEDP and BIE negotiated a Consent Agreement, which would have accorded PEDP a reasonable period of time in which to conclude an agreement with a new development partner in light of Wynn's unexpected termination of the Wynn Transaction. The Consent Agreement as executed by BIE and PEDP was presented to the Board on April 29, 2009. However, the Board rejected the Consent Agreement and continued the $2,000 daily fine imposed on PEDP. Moments after the Board's rejection of the Consent Agreement, BIE filed its Complaint seeking the revocation of PEDP's License, which commenced the proceedings below.

PEDP answered BIE's Complaint on June 1, 2010, after the Board denied PEDP's unopposed motion for an extension of time to file its Answer. Together with its Answer, PEDP moved the Board for an extension of time to submit the financing documents, architectural and other construction plans, and development timeline required by the Extension Conditions of the Board's September 2 Order. PEDP also filed a motion to toll or otherwise extend the date by which it was required to apply for a table gaming certificate and pay the requisite application fee. The Board deferred and consolidated consideration of these two motions with the proceedings on BIE's Complaint, but never held an evidentiary or other hearing on either application.

On June 18, 2010, the Board's Director of Hearings and Appeals (the "Director"), who was the presiding officer during much of the proceedings below, entered an Order setting a discovery deadline and procedures for conducting discovery. (App. D.) PEDP thereafter attempted to conduct the discovery that it determined was necessary to respond to BIE's Complaint. Nearly all of PEDP's requests were time and again met with objections, which the Director and the Board sustained, as the result of which PEDP received no meaningful discovery and was repeatedly deprived of its constitutional right and ability to effectively defend itself. (Apps. E-M.)

After the Director deemed the matter ripe for disposition, notwithstanding the lack of discovery provided to PEDP, BIE and PEDP filed cross-motions for summary judgment on October 5, 2010, and the Board heard argument on the motions on October 27, 2010. Several days before argument, PEDP concluded the negotiation of a Term Sheet ("Term Sheet") with Caesars Entertainment Corporation f/k/a Harrah's Entertainment, Inc. ("Harrah's") and PEDP's mortgage lender RBS Citizens National Association ("Citizens"), pursuant to which Harrah's would provide financing, investment, and management for the PEDP Casino (the "Harrah's

Transaction"). The Term Sheet was executed on October 22, 2010, and it was submitted to BIE on October 25, 2010.

Following oral argument on October 27, 2010, the Board took the respective summary judgment motions under advisement and placed them on the agenda for consideration at the Board's November 18, 2010 meeting. At that meeting, PEDP and Harrah's reported that they were very close to concluding the definitive documents needed to consummate the complex multi-party Harrah's Transaction. Notwithstanding this report, the Board entered an Order denying PEDP's motion for summary judgment. It further continued consideration of BIE's motion until its December 16, 2010 meeting and directed PEDP to submit definitive transactional documents for the Harrah's Transaction by December 10, 2010.

PEDP submitted the requisite documentation on December 10, 2010 as directed and reported back to the Board at the December 16, 2010 meeting. However, at the December 16, 2010 meeting, without even conducting an evidentiary hearing regarding the parties' respective allegations and defenses with respect to the Complaint for Revocation, the Board proceeded to vote 6-1 to grant summary judgment in favor of BIE and to declare a revocation of PEDP's License,. One week later, it entered its December 23, 2010 Order to that effect from which this appeal arises. On January 7, 2011, PEDP moved for reconsideration of the Board's Order and, in response to questions raised by the Board for the first time on December 16, 2010, also submitted substantial documentation that demonstrated further that the Harrah's Transaction was feasible and viable and would produce a world-class Casino. The Board did not act on the motion for reconsideration, and did not respond or comment to PEDP's substantial documentation regarding the viability of the Harrah's Transaction and Project. PEDP timely petitioned this Court for appellate review on January 14, 2011. The Board issued a written adjudication in support of its Order on January 26, 2011. (App. B.)

B. Prior Determinations in the Same Case.

In addition to the Board's final judgment Order, which entered summary judgment for BIE on its motion for summary judgment and revoked PEDP's License, this appeal also challenges a number of prior non-final determinations made by the Board in the proceedings below. Specifically, PEDP challenges the Order dated November 18, 2010 and entered by the Board on November 19, 2010, which denied PEDP's motion for summary judgment. (App. C.) PEDP also challenges the Board's Orders with respect to discovery in the proceedings below: Order entered by the Director on June 18, 2010 (App. D); Order entered by the Director on June 30, 2010 (App. E); two Orders entered by the Director on July 15, 2010 (Apps. F and G); Order entered by the Director on July 28, 2010 (App. H); Order entered by the Director on August 10, 2010 (App. I); Order entered by the Board on August 11, 2010 (App. J); Adjudication issued by the Board on August 11, 2010 (App. K); Order entered by the Director on August 23, 2010 (App. L); and Order entered by the Director on September 8, 2010 (App. M).

C. Names of the Officials Whose Determinations are to be Reviewed.

The determinations to be reviewed were entered by the Board and the Director. The Board is chaired by the Honorable Gregory C. Fajt, and its members now are the Honorable Raymond S. Angeli, the Honorable James B. Ginty, the Honorable Keith R. McCall, the Honorable Anthony C. Moscato, the Honorable Gary A. Sojka, and the Honorable Kenneth I. Trujillo. The Director is Linda S. Lloyd, Esquire.

D. Chronological Statement of Necessary Facts.

On December 20, 2006, the Board awarded the two available Category 2 Slot Machine Licenses for the operation of slot machine facilities in the City of Philadelphia (collectively, the "Philadelphia Casinos"), and it later memorialized this award in its Order and Adjudication dated February 1, 2007. (R. 469a.) PEDP was awarded one of the two licenses, and as a result was authorized to construct and operate a 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"). (R. 503a, ¶ 151.) On October 17, 2007, PEDP timely paid the $50 million issuance fee for its License on October 17, 2007, and the Board issued PEDP its License on May 29, 2008. (R. 2876a-2878a.)

By statute, PEDP was required to open its Casino with at least 1,500 slot machines available for play within one year of the issuance of its License. 4 Pa. C.S.A. § 1210.[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. (R. 503a-504a, ¶ 154.) However, from the beginning, PEDP encountered obstacles to building its Casino from many sources, including Philadelphia's City Council, other politicians, and certain local activist groups, who 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. (App. O at 2-4, R. 1323a-1325a.) At every turn, these groups actively opposed PEDP's efforts to obtain the necessary zoning approvals, permits and licenses to begin and conduct the construction at the Columbus Boulevard Site. (App. O at 2-4, R. 1323a-1325a.) PEDP was therefore required, time and again, to respond to the obstacles raised by these opposition groups in an ongoing effort to develop its Casino at the Columbus Boulevard Site on a timely basis. Among other things, PEDP filed or responded to at least ten applications in the Pennsylvania Supreme Court. (App. O at 2-4, R. 1323a-1325a.)

Even as PEDP continued to work to overcome these obstacles, the global financial crisis struck, with unexpected and decidedly adverse effect on the economy and the gaming industry.

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[3] As of May 29, 2008, 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." This provision was modified in 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."

The Mashantucket Pequot Tribal Nation, which owns Foxwoods Development Company, the company that owns thirty percent of PEDP and holds its management contract, was particularly hard hit by the global downturn. Other planned and potential sources of funding for development of the Casino project also dried up. As a result of these factors, and despite its continuing efforts, PEDP was unable to begin construction of the Casino as originally planned. (App. O at 14, R. 1335a; R. 737a-1231a; R. 3002a.) On May 22, 2009, therefore, PEDP filed with the Board a Petition to Extend the Time to Make Slot Machines Available until May 29, 2011 in accordance with 4 Pa. C.S.A. § 1210(a). (R. 593a-641a.)

The Board held a public hearing on PEDP's Petition on August 28, 2009. (R. 658a-736a.) 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] (R. 726a.) The Board agreed with OEC's conclusion, finding that good cause existed and stated:

> 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.

(App. O at 14, R. 1335a (emphasis added).) Ultimately, the Board issued its written Order on September 1, 2009, filed on September 2, 2009 (the "September 2 Order"), granting PEDP's Petition to Extend Time and 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 required by § 1210 of the Gaming Act. (App. N, R. 1337a-1339a.)

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[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. (R. 726a.)

In the September 2 Order, the Board also unilaterally imposed the nine Extension Conditions on the extension to commence operations without prior consultation. (App. N, R. 1337a-1339a.)[5] Specifically, the Board required PEDP to submit certain documentation, including financing documents, architectural and other constructions plans, and a development timeline on a schedule imposed by the Board without input from or consultation with PEDP. (App. N, R. 1337a-1339a.) It also required PEDP to submit monthly status reports to BIE, which PEDP timely submitted and continues to timely submit on an ongoing basis. (App. N, R. 1337a-1339a.) Finally, the Board made clear that it would not entertain any application to change the location of the PEDP's Casino. (App. N, R. 1335a-1336a.)

PEDP worked diligently and in good faith to fulfill these Extension Conditions. For example, shortly after the Board entered its September 2 Order, PEDP began working with Blackstone Group, its financial advisor, to solicit interest from potential investors in investing in and providing funding for the development of its Casino. (App. O at 27, R. 1400a; R. 3000a, ¶¶ 3-4.) However, 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 Extension Condition deadlines in the September 2 Order – specifically, Extension Conditions 5 and 6, which required the submission of development plans and a development timeline. (R. 3000a, ¶ 5: R. 3004a, ¶ 21.) Consequently, on November 30, 2009, PEDP filed a Motion to Extend Time to Comply with Extension Conditions 5 and 6. (R. 1340a-1352a.)

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[5] It is respectfully submitted that the Court can and should take judicial notice of the fact that neither the Board nor BIE has ever imposed conditions such as these on other slot machine licensees who had requested an extension of time to comply with the requirements of the Act. Moreover, PEDP submits that the discovery that was denied PEDP would have demonstrated the Board's disparate treatment of PEDP compared to other similarly-situated licensees.

After a hearing on January 27, 2010, the Board denied PEDP's Motion, and on February 10, 2010, it issued an Order and Adjudication confirming its ruling. (Apps. P & Q, R. 1551a-1569a.) The February 10 Order also granted BIE's request to impose sanctions on PEDP for failing to meet the milestone dates in Extension Conditions 5 and 6 of the September 2 Order and imposed on PEDP a $2,000 per day fine beginning on December 1, 2009 and continuing daily until PEDP attained full compliance with the Board's September 2 Order. The Board further issued a Rule to Show Cause upon PEDP to show, at a Board hearing set for March 3, 2010, why the Board should not levy further sanctions upon PEDP, including revocation of its license, for failure to comply with the Board's September 2 Order. (App. P, R. 1551a.)

By mid-February 2010, as a result of its sustained efforts since September 2009 to locate sources of financing and funding for its Casino project, PEDP's situation began to change dramatically. Since at least November 2009, PEDP had been in intensive negotiations with Wynn to serve as a development partner in the project, which eventually bore fruit. On February 18, 2010, PEDP entered into a Term Sheet with Wynn.[6] The Term Sheet contemplated a transaction in which 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 (the "Wynn Transaction"). (R. 3069a-3083a.)

At the March 3, 2010 Board Hearing, PEDP presented testimony by a number of individuals concerning the status of its negotiations with Wynn and the expected timetable for producing definitive transactional documents and for developing the Casino project as contemplated by the Wynn Transaction. Among others, Mr. Wynn, PEDP's counsel, and Daniel Keating, who was to be the builder for the Casino, all testified. Mr. Wynn, for one, testified in great and minute detail concerning the timing and development plans for the Casino to be built

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[6] The Term Sheet was amended on March 16, 2010. (R. 3085a-3088a.)

under the Wynn Transaction, down to the location of the porte cochere and valet parking, the domed ceiling and coppered walkway in the central atrium, the undulating arabesque pattern and finishes on the façade of the building, the orientation of the gaming floor, restaurants, and other amenities, and the surface and garage parking. (R. 1645a-1651a.) He also testified that the total project costs to develop the Casino would be between $500 million and $600 million. (R. 1672a.) In addition, Mr. Wynn assured them that his organization had more than enough funds available to it to construct the facility. (R. 1594a-1595a.) For all intents and purposes. Mr. Wynn addressed and satisfied all of the information and detail contemplated by the Board under Extension Conditions 5 and 6, although PEDP further supplemented this with its submissions to the Board on April 6, 2010.

Notwithstanding this testimony and additional information provided by counsel for PEDP to BIE at its request the previous day, the Board held that PEDP had not met its burden, by clear and convincing evidence,[7] of proving that PEDP had achieved substantial compliance with Extension Conditions 5 and 6. (App. R, R. 1748a-1749a.) The Board did find that PEDP had made progress in advancing its project, as evidenced by the Term Sheet and related documents submitted to BIE. However, the Board refused to lift its February 10 Order, and it instead directed that the $2,000 daily sanction continue to accrue pending further Order of the Board.[8] (App. R, R. 1748a-1749a.)

In its March 3 Order, the Board also directed PEDP to submit definitive financing documents relating to the proposed Wynn transaction to the Board and BIE no later than March

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[7] The Board's application of an elevated "clear and convincing" standard of proof applied was clearly erroneous. Nowhere does the Gaming Act allow the Board to impose an elevated standard of proof on a licensee to prove compliance with a Board Order.

[8] Sanctions in the amount of $186,000 had accrued for the period ended March 3, 2010. PEDP paid this amount to the Board on March 2, 2010. (R. 3181a-3182a.) To date, PEDP has paid a total of $662,000 in accrued daily sanctions while identifying, negotiating with, and executing agreements with new development partners to complete its Casino project. The Board moreover had never entered an Order ceasing the accrual of further sanctions.

31, 2010 and to submit the documents contemplated by Conditions 5 and 6 of the September 1 Order by April 26, 2010. (App. R, R. 1748a-1749a.) It further ordered PEDP to report to the Board at its April 7, 2010 meeting as to the status of the receipt of these documents, and scheduled the matter for a further hearing at the Board's April 29, 2010 public meeting, at which time the Board was to assess the need for further Board action to achieve compliance with the Board's Orders. (App. R, R. 1748a-1749a.) At no time following the March 3rd hearing was there mention of the potential revocation of PEDP's License. (R. 3184a-3186a.)

On April 2, 2010, Wynn and PEDP entered into and executed a Partnership Interest Purchase Agreement ("Purchase Agreement") and other related documents to effectuate the transactions contemplated by the Term Sheet. (R. 3093a-3179a.) Among other things, the Purchase Agreement contemplated that the parties thereto would submit to the Board and BIE petitions and applications seeking Board approval for the proposed change of control and/or ownership, an extension of time to complete the casino and to have it operational (given the recent amendment to the Gaming Act), a change of design, if required, and any other appropriate petitions or applications. (R. 3093a-3179a.) On April 5, 2010, PEDP submitted to BIE fully executed copies of its definitive financial documents in conjunction with the proposed Wynn Transaction, unsigned copies of which had previously been submitted to BIE on March 31, 2010. The following day, April 6, 2010, PEDP submitted to BIE documents in response to Conditions 5 and 6 of the Extension Order in conjunction with the Wynn Transaction. At the Board's April 7, 2010 meeting, Chief Enforcement Counsel confirmed to the Board that PEDP had timely made all submissions required by the March 3 Order and that the submissions were sufficient: (i) to comply with the reporting requirements in the September 1 and March 3 Orders; and (ii) to stop the accrual of further sanctions. (N.T. Board's April 7, 2010 Meeting at 62-64.)[9]

[9] The Court may properly take judicial notice of Mr. Pitre's testimony, which was given during a public meeting of the Board and constitutes a readily-available public record.

Then, on April 8, 2010, without any warning to the Board, BIE, any state or local officials, or PEDP, and their respective counsel, Wynn unilaterally terminated (through no fault of PEDP) the Purchase Agreement, and the other related documents between Wynn and PEDP. PEDP was taken completely by surprise by Wynn's abrupt termination of the transaction because Wynn had (a) executed the Purchase Agreement and related other documents on April 2, 2010, (b) presented detailed testimony through Wynn's 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 Wynn's 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. (R. 3002a, ¶ 11.)

After this shocking series of events, counsel for PEDP immediately scheduled meetings with the Board's Chief Enforcement Counsel and Chief Counsel, and met with them on April 14, 2010 to discuss and give them assurances as to the commitment and ability of PEDP with respect to the future development and operation of its Casino facility. (R. 3185a, ¶ 6.)

BIE recognized 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. Thus, BIE and PEDP negotiated extensively and finally executed a Consent Agreement, pursuant to which PEDP would have a reasonable extension to meet the milestone deadlines set forth in the Extension Conditions in the Board's September 2 Order. (R. 3188a-3201a.) The Consent Agreement was then presented for approval to the Board at its April 29, 2010 meeting. Without substantive comment, opinion or direction – or even a question of counsel for PEDP – the Board refused to approve the Consent Agreement. (R. 1848a.)

That same day, April 29, 2010, moments after the Board's rejection of the Consent Agreement, BIE filed its Complaint seeking the revocation of PEDP's License. (R. 1827a-1846a.) On June 1, 2010, PEDP filed its Answer to the Complaint, after the Board denied its unopposed request for additional time to file this pleading. (R. 1849a-1859a; R. 1866a-1896a.) Together with the Answer, PEDP moved the Board for an extension of time to submit the financing documents, architectural and other construction plans, and development timeline required by the Board's September 2 Order. (R. 1897a-1924a.) PEDP also filed a motion to toll or otherwise extend the date by which it was required to apply for a table gaming certificate and pay the requisite application fee. (R. 2006a.) The Board subsequently consolidated consideration of these two motions with the proceedings on BIE's Complaint, but did not hold a hearing or otherwise act further on either motion, eventually dismissing them as moot after PEDP filed this appeal. (R. 2006a.)

On June 18, 2010, the Director, acting as the presiding hearing officer, entered an Order setting a discovery deadline and procedures for conducting discovery. (App. D, R. 1935a-1936a.) PEDP thereafter attempted to conduct discovery in an effort to defend itself against the allegations in the BIE Complaint. (R. 1935a-2002a; R. 2016a-2033a; R. 2042a-2584a.) Nearly

all of PEDP's requests were met with objections, which the Director and the Board sustained, the result of which was that PEDP received no meaningful discovery. (Apps. D-M.) After the expiration of the truncated discovery process imposed by the Board, the Board, through the Director, deemed the matter ripe for determination. (R. 2584a.) As a consequence, BIE and PEDP filed cross-motions for summary judgment on October 5, 2010, (R. 2645a-3551a; R. 3585a-4838a), and the Director scheduled "oral arguments" on the motions before the full Board for October 27, 2010. (R. 4839a.)

Several days before the scheduled October 27, 2010 oral argument, and after several months of intensive, confidential negotiations, PEDP concluded the negotiation of a Term Sheet setting forth the terms for an agreement with Harrah's and Citizens, who was PEDP's mortgage lender. (R. 5056a.) Pursuant to the Harrah's Transaction as contemplated in the Term Sheet, Harrah's – which was then and is currently a licensee of the Board with respect to the casino located in Chester, Pennsylvania – would serve as a source of financing, investment, and management for the PEDP Casino. The Term Sheet was executed on October 22, 2010, and it was submitted to OEC on October 25, 2010. (R. 5056a.)

On October 27, 2010, the Board heard oral argument on both motions. (R. 4852a-4955a.) Following argument and given PEDP's Term Sheet with Harrah's and Citizens, the Board took both motions for summary judgment under advisement and placed them on the agenda for consideration at the Board's scheduled November 18, 2010 meeting. (R. 4954a-4955a.)

The parties appeared before the Board as directed at its November 18, 2010 meeting. (R. 4963a-5053a.) At that time, PEDP and Harrah's reported that they were very close to concluding definitive documents to consummate the complex multi-party Harrah's Transaction – which also involved PEDP's then-mortgage lender, Citizens Bank – for submission to the Board. (R. 4968a-4972a.) They also advised that they were very close to filing related petitions for

change in control of PEDP, to modify the proposed facility, to extend its opening date, and for approval of a new management agreement – *i.e.*, the submissions required to place PEDP in full compliance with the Board's September 2 and March 3 Orders and provide the Board's Staff with all of the materials necessary for the Board and its Staff to review and approve the Harrah's Transaction. (R. 4968a-4972a; *see also* R. 5055a-5124a.)

Following that presentation by PEDP and Harrah's, the Board then took up the parties' cross-motions for summary judgment. Without further argument, comment, or an evidentiary hearing, the Board voted to deny PEDP's motion for summary judgment, as set forth in the November 19 Order. (R. 4986a-4987a.) However, after moving and seconding a motion to enter summary judgment in favor of BIE, the Board decided to table such motion. (R. 5015a-5027a.) As of that date no evidentiary record existed; no testimony was proffered by BIE; no expert reports or affidavits were offered; no uncontradicted documentary evidence was tendered – which would have been necessary to provide a basis for revocation on any arguable grounds. Instead, the Board directed PEDP to submit by December 10, 2010 definitive documents for the Harrah's Transaction sufficient to show the Board that the transaction was viable and that PEDP was able to finance and build the Casino. (R. 5015a-5016a.) The Board further directed PEDP to report back at the Board's next scheduled meeting on December 16, 2010. (R. 5015a-5016a.) As the Chief Enforcement Counsel explained, it was expected that PEDP would submit by December 10:

> Signed agreements between the parties and definitive financing documents laid out and executed, or at least final draft documents that we could review and ask questions about prior to closing.

(R. 5018a (emphasis added).)

The Chief Enforcement Counsel also emphasized that it was expected that it would take some time for the Board's Staff to consider and approve the documents necessary to consummate the Harrah's Transaction after they were submitted. He noted:

> I'm just saying after all the filings were done, just because everything that's filed, it might not be ripe for Board consideration for some time with regard to these petitions and the anticipated filing.

(R. 5025a-5026a (emphasis added).) Commissioner McCabe then further explained the Board's expectations for the documentation that would need to be submitted by December 10, 2010 in order to enable the Board to withhold any further action on BIE's motion for summary judgment for OEC tabled:

> I think we just want to determine can they build a casino? Can they finance and build a casino? That other stuff I think we realize comes afterwards.

(R. 5025a-5026a.)

As directed, on December 10, 2010 PEDP submitted to BIE and the Board definitive documents for the Harrah's Transaction, and related petitions for change in control, to modify the proposed facility, to extend its opening date, and for approval of a new management agreement. (R. 5055a-5124a.) Thereafter, as also directed, PEDP and Harrah's reported back to the Board at its December 16 meeting as to the status of the Harrah's Transaction. (R. 5125a-5174a.) At that meeting, the Board and BIE posed questions about various aspects of the proposed transaction and the definitive documents submitted on December 10, even though prior to that time neither the Board nor BIE had reviewed with PEDP the terms of the transactions and the provisions and status of the various documents. (R. 5146a-5174a.) Notwithstanding the absence of any factual record upon which to predicate a revocation, and after refusing to hold an evidentiary hearing to resolve genuine disputed issues of material fact, which PEDP had repeatedly requested in response to BIE's Motion for Summary Judgment and at oral argument,

(R. 4753a-4755a; R. 4877a-4878a; R. 4886a-4887a; R. 4899a-4904a; R. 4912a-4913a; R. 4916a; R. 4931a-4932a; R. 4941; R. 4943a-4944a), the Board proceeded to vote 6-1 to grant summary judgment in favor of BIE and to declare a revocation of PEDP's License. One week later it entered its December 23 Order evidencing such decision. (App. A.)

PEDP timely filed a Petition for Reconsideration on January 7, 2011, together with substantial further documentation to respond to the concerns newly articulated to PEDP by the Board and BIE at the December 16 meeting.[10] (R. 5259a-6238a.) However, the Board did not act on the Petition for Reconsideration, and PEDP commenced this appeal on January 14, 2011.

E. Statement of the Order or Determination to be Reviewed.

The Orders to be reviewed are: the Board's December 23, 2010 Order granting summary judgment for BIE (App. A) and Adjudication in support of that Order (App. B); the Board's November 18, 2010 Order denying PEDP's summary judgment motion (App. C); and the Board's Orders with respect to discovery in the proceedings below: Order entered by the Director on June 18, 2010 (App. D); Order entered by the Director on June 30, 2010 (App. E); two Orders entered by the Director on July 15, 2010 (Apps. F and G); Order entered by the Director on July 28, 2010 (App. H); Order entered by the Director on August 10, 2010 (App. I); Order entered by the Board on August 11, 2010 (App. J); Adjudication issued by the Board on August 11, 2010 (App. K); Order entered by the Director on August 23, 2010 (App. L); and Order entered by the Director on September 8, 2010 (App. M).

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[10] Newly executed agreements and commitments provided for 100% of all equity and debt necessary to proceed forthwith with a $450 million Casino project. (R. 5280a-6185a.)

SUMMARY OF ARGUMENT

This is a case of first impression under the Gaming Act in which the Board stripped appellant PEDP of its License based upon BIE's legally flawed summary judgment motion, and without conducting an evidentiary hearing to resolve numerous disputed issues of material fact. PEDP has spent more than four years and $160 million to develop its Casino project – in the face of unrelenting obstructions by City officials, local citizens' groups, state and local politicians, and disappointed gaming license applicants, and the most significant economic downturn in decades which continues to affect the credit markets and gaming industry even today. Indeed, after having spent months of intensive negotiations to deliver the Wynn Transaction, pursuant to which PEDP would have been able to complete the development of its Casino project, PEDP then turned around and negotiated and delivered the Harrah's Transaction, after Wynn unilaterally and without warning terminated the first agreement. Moreover, for nearly the past year, the Board has been fining and PEDP has been paying $2,000 per day for its efforts.

Nonetheless, the Board summarily revoked PEDP's License as an alleged matter of law, finding PEDP "financially unsuitable" based upon a totally flawed legal analysis. In its most simple form, the Board concluded that because PEDP had not opened its Casino for business, it was financially unsuitable in violation of its License. This, of course, was an analytical non-sequitur.

In so doing, not a single witness against PEDP was proffered or cross-examined; not a single expert was called or cross-examined. Instead, because there was no credible evidence to prove that appellant PEDP was financially unsuitable – whatever that statutorily-undefined term means – the Board remarkably and erroneously granted summary judgment on revocation based simply on the alleged fact that because PEDP would be unable to deliver a finished project by May 29, 2011 (without noting that an allowable petition for a 17-month extension was pending)

it *ipso facto* meant that PEDP was financially unsuitable to hold the license which was granted to it in the first instance on the basis of its financial wherewithal – *i.e.*, the ability to deliver a finished project.

The Board moreover applied an unconstitutionally vague standard of financial fitness and suitability that is nowhere defined in the Gaming Act. As such, despite the fact that PEDP identified substantial evidence in the record that demonstrated its financial ability to complete its Casino, the Board proceeded to apply a vague "standard" completely different from what PEDP expected, and of which it had no prior notice in spite of its continued efforts to have the Board identify same. The Board's determination to revoke PEDP's License further ignored critical genuine disputed issues of material fact, such as the fact that the Harrah's Transaction was financially feasible and viable and would have produced a world-class Casino creating numerous jobs and generating substantial revenues for the Commonwealth, and the fact that the reason that PEDP was unable to meet the milestone deadlines in Extension Conditions 4, 5, and 6 was despite its best efforts and due to factors beyond its reasonable control.

PEDP understood, shared, and still shares the Board's apparent frustration that its Casino project could not be completed as quickly as both the Board, and PEDP, had hoped and envisioned. But frustrated expectations do not justify erroneous, arbitrary and capricious decisions – particularly where, as here, PEDP through its diligent efforts and notwithstanding the Board's actions, has been and is ready, willing, and able to deliver a world class Casino through its proposed partnership with Harrah's. Thus, it is respectfully submitted that the Board's flawed and unsubstantiated decision cannot stand and must be reversed.

ARGUMENT FOR APPELLANT

I. The Board Applied an Incorrect Legal Test in Revoking PEDP's License for Financial Unsuitability.

One of this Court's principal functions in the Commonwealth's judicial system is to review the decisions of administrative agencies and correct prejudicial legal error in agency proceedings. Central to this review is that the agency below apply the correct legal standards, as it is required by law to do. Where an agency, such as the Board, utilizes the wrong legal standard to the prejudice of the regulated party, such as PEDP, this Court should reverse the Board's action. Here the Board found as a matter of law that PEDP had violated Condition 5 of the Statement of Conditions of its License (although constitutionally wanting, the only specific requirement arguably imposed upon PEDP relating to its financial fitness and suitability) as the result of the fact that it did not apply the correct legal test.

This is clear error, and in violation of the Board's burden to identify and then establish a legitimate legal basis for its decision, for a number of reasons. First, the Gaming Act does not impose an obligation of financial fitness and suitability on Board licensees. Second, to the extent that Condition 5 of the Statement of Conditions could be read as creating such an obligation, it fails to define any standard to evaluate a licensee's financial fitness and suitability beyond the bare "financial wherewithal" framework set forth in the Suitability Report (but not in Condition 5 itself). Third, even if, *arguendo*, Condition 5 is applicable, financial wherewithal, and hence financial fitness and suitability, is necessarily a factual inquiry that cannot be decided as a matter of law. Moreover, as will be explained more fully in § III.B below, the evidence of record established that PEDP had and continues to have the financial wherewithal to complete its Casino project, or at least created genuine disputed issues of material fact in that regard that required an evidentiary hearing. And fourth, rather than applying the appropriate financial wherewithal framework, the Board instead purported to simply deduce that PEDP was

"financially unsuitable" because it will not complete its Casino project by May 2011, without developing a factual record for its decision and without exploring the reasons why PEDP will not have its Casino operational by May 2011. Therefore, the Board's decision should be reversed.

A. Neither the Gaming Act Nor the Regulations Impose a Duty on a Board Licensee to Maintain Financial Fitness and Suitability.

Nowhere does the Gaming Act impose an obligation of financial fitness and suitability on a licensee such as PEDP. Although PEDP raised and argued the issue in detail in the proceedings below, contrary to its burden to identify and establish a legitimate legal basis for its decision, the Board refused to inquire into, or identify, the source or nature of any requirement that PEDP, as a licensee of the Board, maintain financial fitness and suitability. The Board further specifically refused to allow PEDP any discovery as to the standard that it intended to apply in evaluating PEDP's financial fitness and suitability.[11] Instead, it simply stated – without analysis or explanation – that § 1313 of the Gaming Act and § 441a.7 of the Regulations require PEDP to maintain financial suitability.[12] (App. B at 31, ¶ 8 & 42-44, R. 6284 & R. 6295a-6297a.) A cursory review of these Sections, however, shows that they do not and cannot impose a financial fitness and suitability requirement on PEDP as a licensee of the Board.

Section 1313 of the Gaming Act, which the Board quoted at length in its Adjudication, provides in relevant part as follows:

> **(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 . . .

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[11] The Board's improper denial of all meaningful discovery on this and other matters is addressed in greater detail below.

[12] The Board also oddly refers to § 441a.5 of its Regulations as imposing a financial fitness and suitability requirement on PEDP. (App. B at 31, ¶ 8, R. 6284a.) This Regulation, however, deals with payment bonds and letters of credit; it does not address financial fitness and suitability.

* * *

> **(e) Applicant's operational viability.**--In assessing the financial viability of the proposed licensed facility, the board shall make a finding, after review of the application, that the applicant is likely to maintain a financially successful, viable and efficient business operation and will likely be able to maintain a steady level of growth of revenue to the Commonwealth . . .

4 Pa. C.S.A. § 1313(a) & (e) (quoted in Adjudication, App. B, at 42-43, R. 6295a-6296a).

Section 441a.7(f), which the Board also quoted at length, similarly provides in relevant part:

> (f) For the purposes of this section, an applicant's demonstration of suitability must include a showing of:
>
> * * *
>
> (2) Financial fitness in compliance with section 1313 of the act (relating to slot machine license application financial fitness requirements).
>
> (3) Operational viability, including:
>
> (i) The quality of the proposed licensed facility . . .
>
> (ii) The projected date of the start of operations of the proposed licensed facility and any accessory uses such as hotel, convention, retail and restaurant space proposed in conjunction therewith. . .
>
> (iii) The ability of the applicant's proposed licensed facility to generate and sustain an acceptable level of growth of revenue.

58 Pa. Code § 441a.7(f)(2)-(3) (quoted in Adjudication, App. B, at 44, R. 6297a.)

As is apparent from their plain language, neither § 1313 nor § 441a.7 is applicable to PEDP because PEDP is a "licensee" of the Board, not an "applicant" for a license. The Gaming Act specifically distinguishes between "licensees" and "applicants." Under the Gaming Act, an "applicant" is "[a]ny person who, on his own behalf or on behalf of another, is applying for permission to engage in any act or activity which is regulated under the provisions of this part. . ." 4 Pa. C.S.A. § 1103 (emphasis added). A "licensed gaming entity" or "slot machine

licensee," on the other hand, is "[a] person that holds a slot machine license pursuant to this part." *Id.* (emphasis added).

Because §§ 1313 and 441a.7 by their plain terms apply only to "applicants" and not to "licensees," they cannot as a matter of law be the source of or basis for a financial fitness and suitability requirement applicable to PEDP, as a licensee. *See* 1 Pa. C.S.A. § 1921(b) (clear and unambiguous statutes must be applied according to their plain meaning). Moreover, under the well-settled *inclusio unius est exclusio alterius* and *in pari materia* canons of statutory construction, the financial fitness and suitability requirements in the Gaming Act must be strictly limited to the instances where they are specifically provided.[13] In addition, the Board has not cited any other provisions of the Gaming Act or Regulations that impose a financial fitness and suitability requirement on a "licensee,"[14] nor upon review of the Gaming Act and Regulations has PEDP been able to identify any such requirement.

B. To the Extent that Condition 5 of the Statement of Conditions Could Be Read to Impose an Obligation on PEDP to Maintain Financial Fitness and Suitability, It Fails to Provide or Define any Applicable Standard Other than the Bare Framework of "Financial Wherewithal" from the Suitability Report.

To the extent that Paragraph 5 of PEDP's Statement of Conditions could, *arguendo*, be read as requiring PEDP to maintain financial fitness and suitability as a Board licensee, it

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[13] The doctrine of *inclusio unius est exclusio alterius* holds that "where law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded." *Keim v. Com., Dept. of Transp.*, 887 A.2d 834, 840 (Pa. Cmwlth. 2005); *see* 1 Pa. C.S.A. § 1924. The doctrine of *in pari materia* provides that statutes that "relate to the same persons or things or to the same class of persons or things" should "be construed together, if possible, as one statute." 1 Pa. C.S.A. § 1932.

[14] PEDP also sought through discovery from BIE and the Board to identify the standard of financial fitness and suitability that they intended to apply in the proceedings below and the legal sources of that standard. As explained more fully below, the Director and the Board refused to provide PEDP with such discovery.

nonetheless fails to define any standard to evaluate compliance with such obligation. Condition 5 of the Statement of Conditions obligates PEDP to:

> [E]xercise due diligence to ensure that at all times, Philadelphia Entertainment and Development Partners, LP, its affiliates, intermediaries, subsidiaries, holding companies, management companies, principals, and key employees meet and maintain the suitability requirements of the Act, including but not limited to, those relating to good character, honesty, integrity and financial fitness.

(R. 578a, ¶ 5.)[15] Condition 5 is certainly not a model of clarity, but if it can be read to impose on PEDP an obligation to maintain financial fitness – whatever that term is intended to mean – that still leaves open the question of what standard is to be employed to determine compliance with such an obligation. Condition 5 itself provides no guidance. It states, in the barest terms, that PEDP must "maintain the suitability requirements of the Act" and that, according to Condition 5, these requirements include "those relating to good character, honesty, integrity and financial fitness."[16] Condition 5 does not, however, enumerate or otherwise set forth what those requirements entail or the standard by which compliance is to be measured.

Nor does Condition 5 itself identify specifically what "suitability requirements of the Act" it is referring to or where in the Gaming Act they can be found. Assuming that it refers to the same Sections that the Board incorrectly cited for the proposition that PEDP is obligated to maintain financial fitness and suitability – namely, 4 Pa. C.S.A. § 1313 and 58 Pa. Code § 441a.7(f) – assuming in the first instance that they are applicable, neither Section provides any greater guidance as to the legal test by which a licensee's financial fitness and suitability is to be

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[15] The Board also cites Condition 57 of the Statement of Conditions as imposing a financial fitness obligation. (App. B at 31, ¶ 10, R. 6284a.) This Condition addresses charitable contributions, however, and has nothing to do with PEDP's financial fitness or suitability.

[16] Even this vague statement clearly contemplates that financial fitness and suitability requires a factual inquiry, not a legal determination appropriate for summary judgment.

measured, nor does any other provision of the Gaming Act or Regulations set forth the applicable standard.[17]

Confronted with the silence of the Gaming Act and Regulations, and the Board's refusal to provide any discovery on the issue, one must look still further to determine what legal test should be applied to evaluate a licensee's financial fitness and suitability. In connection with its initial evaluation of license applications in 2006, the Board commissioned its Bureau of Licensing to conduct a background investigation into each applicant and prepare a report considering its suitability for licensure. As to PEDP, the Bureau of Licensing issued a voluminous Category 2 Background Investigation and Suitability Report of Philadelphia Entertainment and Development Partners, LP ("Suitability Report") on November 9, 2006. The Suitability Report at least begins to set forth a framework to evaluate financial fitness and suitability, as the Board acknowledged in its Adjudication. (R. 95a-158a; App. B at 45-46, R. 6298a-6299a.) Moreover, this is the framework that the Board itself adopted and applied in considering the issue of financial fitness.

The Suitability Report, which speaks in terms of "financial suitability" rather than "financial fitness" – in contrast to the Act and the Regulations – states that the framework for evaluating financial suitability is an applicant's financial wherewithal to develop its Casino. Specifically, it provides:

> The Pennsylvania Gaming Control Board is required to assess the financial suitability of an applicant prior to granting it a slot machine license. The financial suitability of the applicant

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[17] Section 1313(a), for example, simply requires an applicant to produce whatever financial information the Board deems necessary to establish the applicant's "financial stability, integrity and responsibility." Section 1313(e) requires the Board, in reviewing a license application, to make a finding "that the applicant is likely to maintain a financially successful, viable and efficient business operation and will likely be able to maintain a steady level of growth of revenue to the Commonwealth." Section 441a.7(f) provides that, to show suitability for licensure, an applicant must show its "financial fitness" in accordance with § 1313 and its "operational viability."

> encompasses an assessment of an applicant's historical financial stability and financial wherewithal to develop the proposed project. In addition, financial suitability assessment includes the proposed project's ability to maintain a steady level and growth of revenue to the Commonwealth.

(R. 106a.) The Suitability Report then goes on to further explain the basis for "financial wherewithal" as follows:

> The financial wherewithal of an applicant is measured by its ability to develop the proposed project and also includes the ability of an applicant to secure debt or obtain financing.

(R. 111a (emphasis added).)

The Suitability Report's statement that financial wherewithal is the touchstone of financial fitness, which is the standard that the Board has applied in considering financial fitness, moreover comports with past precedent of the Board and the Pennsylvania Supreme Court that is instructive, albeit not directly on point. The Supreme Court's opinion in *Station Square Gaming, L.P. v. Pennsylvania Gaming Control Board*, for example, demonstrates that the focus of a financial fitness and suitability determination must be forward-looking, as is the financial wherewithal test. 592 Pa. 664, 676, 927 A.2d 232, 240 (2007) ("In fact, the Act requires the board to consider projections of future revenue."); *see* 4 Pa. C.S.A. § 1313(e). That is, the focus of the evaluation must be whether the entity can and will create and maintain a financially-viable and successful operation on an ongoing basis. Thus, the gist of the analysis is not the entity's financial status at an isolated moment in time, but rather its long-term projected financial capability.

Additionally, as is apparent from *Station Square*, the evaluation of financial fitness and suitability must focus on overall financial viability, or wherewithal. The fact that an entity'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, was found to establish a lack of financial fitness and suitability. *Station Square*, 592 Pa. at 681-82, 927 A.2d at 243.

Further, *Station Square* makes clear that an applicant's ability to attract the necessary funding and financing for development of its project from the financial markets, a central aspect of the financial wherewithal analysis, must be considered in determining financial fitness and suitability. 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.

Accordingly, the Suitability Report at least begins to establish a framework for evaluating financial fitness. As explained in the Suitability Report, by the Board's own acknowledgement, the touchstone of financial fitness is an entity's "financial wherewithal" to develop the project that it proposes, which specifically includes, among other things, its ability to secure debt or obtain financing sufficient to develop the proposed project. Thus, "financial wherewithal" is the minimal framework that the Board should have applied in evaluating PEDP's continued financial fitness and suitability for licensure. It failed to do so, and this alone demands reversal.

C. Evaluation of Financial Wherewithal Necessarily Requires a Factual Inquiry, Which the Board Did Not Conduct, and the Evidence of Record Establishes that PEDP Has the Financial Wherewithal to Develop Its Proposed Casino.

The Board was necessarily required to conduct a factual inquiry to evaluate PEDP's financial wherewithal and to develop a factual record upon which to base its conclusions. The

central question of financial wherewithal is whether or not PEDP has the financial means and/or the demonstrated ability to secure the financial means to develop its proposed Casino project, including specifically, its ability to secure sufficient debt or other financing. The answer to this question does not lie in the statute books or case reporters; rather, it must be found in the factual record that must be developed in the case before it, including fact testimony, competent financial analysis, and expert testimony. Indeed, the Board has admitted that financial wherewithal requires a searching factual inquiry, as is evidenced by the Suitability Report. Yet, contrary to its past practices, the Board specifically declined and refused to conduct a factual inquiry here. This is clear error and must be reversed.

Furthermore, as will be fully explained in § III.B below, the evidence of record at summary judgment established that PEDP had and continues to have the financial wherewithal to complete its Casino project, or at least created genuine disputed issues of material fact in that regard. Most critically, in the face of $662,000 in sanctions, PEDP negotiated and delivered the Harrah's Transaction, which provides full funding and financing to develop a $450 million world-class Casino. (*See* § III.B *infra*.) The Board's legally erroneous decision must be reversed.

D. Instead of Developing a Record to Evaluate PEDP's Financial Wherewithal, the Board Simply Concluded without Basis that Because PEDP's Casino is not Complete, PEDP Must Be Financially Unsuitable.

In this instance, the Board committed legal error by refusing to apply the "financial wherewithal" framework, and the factual inquiry that framework requires, to determine whether PEDP remains financially fit and suitable in conjunction with its consideration of the motions for summary judgment filed by the parties. However, in point of fact, the Board did not apply any standard whatsoever or conduct any factual inquiry to make this determination – it simply chose to deduce that, because PEDP's Casino project is not complete, and cannot be complete by May

29, 2011,[18] it must be financially unsuitable. That syllogistic reasoning, devoid of factual or legal basis, was apparently sufficient in their minds to support revocation of a $50 million License. This was clear error.

In finding that PEDP was financially unsuitable and in breach of some controlling License Condition, the Board improperly equated financial fitness and suitability with PEDP having a Casino open and operating – rather than being financially able to develop, open, and operate a Casino – and it concluded that PEDP was financially unfit because its Casino is not yet open. It reasoned that it had granted PEDP an extension until May 29, 2011 "to build the project as licensed and commence timely operations." (App. B at 48, R. 6301a.) It then reasoned that, notwithstanding the extension, PEDP was not going to be able to build and open a Casino that comported with the plan submitted with PEDP's 2006 application. (App. B at 48, R. 6301a.) Based upon this premise, the Board then recited circularly that the "hallmarks of financial suitability" are "the wherewithal to develop the proposed project and the ability to maintain a steady level and growth of revenue to the Commonwealth and the demonstration by clear and convincing evidence of financial suitability, integrity and responsibility." (App. B at 48-49, R. 6301a-6302a.) (The Board nowhere explained how or where these alleged "hallmarks of financial suitability" could be found in Condition 5 of the Statement of Conditions.)

Clearly, or at the very least, this would require a factual analysis. Yet, without conducting an evidentiary hearing, the Board erroneously held that "[t]hese factors are blatantly non-existent with a licensee which has not put a spade in the ground while ten other licensees have built first-rate casinos and commenced operations in the same or less timeframe; where

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[18] This was the date provided under the extension granted by the Board to PEDP in September 2009. The Board's continued emphasis on this date ignores that the Gaming Act, as amended in January 2010, permits a further extension of time to commence operations until December 31, 2012, which PEDP and Harrah's clearly indicated that they would seek as part of their application for change of control.

hundreds of millions of dollars of tax revenues have now been lost and where over a thousand jobs have remained mired in PEDP's inability, not only to commence operations, but also to unlock the chain-link fencing around its vacant, overgrown piece of riverfront property." (App. B at 49, R. 6302.)

In other words, the Board concluded that, because PEDP cannot open a Casino to be built as set forth in its 2006 proposal by May 2011, PEDP is financially unsuitable. The Board's reasoning wholly disregards its own acknowledged "financial wherewithal" test and the necessary factual inquiry it entails. As acknowledged by the Board in its Adjudication, the financial wherewithal framework evaluates whether PEDP has the financial wherewithal, or financial ability, to develop the project that it proposes, including the ability to secure the necessary financing and funding to complete the project.[19] Whether or not PEDP can complete development of its Casino by a certain date, and whether or not PEDP proposes to build a project identical to its 2006 proposal, is irrelevant to the question of whether PEDP has the financial wherewithal or ability to fund and/or finance the project it proposes. The issues of the timing of the opening and the phasing of the project are not matters of financial wherewithal at all, but rather are separate matters to be dealt with by the Board under the Gaming Act, when and as appropriate. For example, the Gaming Act provides separate processes for extensions of time to commence operations upon good cause shown, 4 Pa. C.S.A. § 1210, and approval of any proposed structural redesign of a licensed facility, 4 Pa. C.S.A. § 1205. In relying on and pre-judging these extraneous considerations, the test applied by the Board was legally incorrect. Moreover, the logic upon which the Board based its decision is flawed at its most basic level. It simply does not follow that PEDP's inability to complete development of a Casino based upon the 2006 proposal by May 2011 means that PEDP is financially unsuitable, nor is that the

[19] Factually, PEDP proved that ability twice within a year. (*See* § III.B, *infra.*)

ultimate analysis under the financial wherewithal framework. There are any number of reasons beyond PEDP's control – all of which require a full factual inquiry – why PEDP has been delayed in completing its Casino that have nothing to do with whether it has the financial wherewithal or ability to fund and/or finance the project it now proposes. The Board has already found that a variety of factors were at least in part responsible for PEDP's inability to complete its Casino as scheduled,[20] yet they do not mean that PEDP lacks the financial wherewithal to secure necessary funding and/or financing to complete development of a Casino.

Similarly, Wynn's unexpected and unilateral termination of the Wynn Transaction after months of intensive negotiations and the execution and submission of definitive transaction documents undoubtedly delayed PEDP in its efforts to develop and complete its Casino. However, the Wynn Transaction termination did not render PEDP financially unsuitable because, through its diligent efforts from and after that time, after the Board, without comment, rejected the Consent Agreement that PEDP and BIE executed, PEDP identified and concluded negotiations with Harrah's as a new development partner. Further to the Harrah's Transaction, as evidenced in the documents submitted by PEDP to the Board and BIE, PEDP had and has the ability to fully fund and/or finance completion of its Casino – that is, PEDP has the financial wherewithal to complete the project it proposes. The issue as to whether the project, and the projected completion date for that project, are acceptable to the Board is a separate issue and requires a separate analysis.

Thus, the Board erred in employing its incorrect circular reasoning instead of the factual investigation required by the financial wherewithal framework. At least had the Board applied an analytically correct legal test (*i.e.*, an evaluation of PEDP's financial wherewithal) – it would have been required to conduct a factual inquiry into the reasons why PEDP is unable to complete

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20 (*See* September 2 Adjudication, App. O at 13-14, R. 1334a-1335a.)

its Casino by May 2011, including for example, financial analysis and/or expert evaluation. It would have been required to determine whether the reason why PEDP has been unable to commence operations yet is that PEDP is financially unfit (whatever that term means), as opposed to the myriad of other obstacles beyond PEDP's control that have caused delay. All of this involves significant issues of material fact. This would have and should have necessitated an evidentiary hearing. At such a hearing, the Board would have been required to consider expert witness testimony, to receive fact testimony, to allow PEDP to cross-examine the witnesses against it, and it would have required the Board to accord PEDP the discovery that it so desperately sought so as to permit it to develop facts and evidence as necessary for its defense. The Board did none of those things here. Instead, it simply chose the result that it apparently wanted to reach – revocation of PEDP's License – and it imposed that result without any basis in the law, without conducting the factual inquiry that the law required, and without a establishing a factual record, thereby denying PEDP the due process of law that is the fundamental prerequisite for the government to strip a private party of its license in the nature of a property right.[21] Because of these legal errors, the Court must reverse the Board's erroneous revocation of PEDP's License by summary judgment.

II. If the Evidence of Record Did Not Establish PEDP's Financial Fitness and Suitability to the Board's Satisfaction, then the Financial Fitness and Suitability Requirements are Unconstitutionally Vague as Applied.

PEDP submits that the evidence of record at summary judgment established its financial wherewithal and, hence, financial fitness and suitability; or at least created genuine disputed

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[21] Even if the License is considered a "revocable privilege" as the Board has contended below, PEDP is still entitled to due process of law because a license, once obtained in compliance with law, becomes a valuable privilege or right in the nature of property, and is safeguarded by due process principles that apply to property lawfully acquired. *See, e.g., Shah v. State Board of Medicine*, 139 Pa. Cmwlth. 94, 103-05, 589 A.2d 783, 788-89 (1991); *see also Balfour Beatty Construction, Inc. v. Dep't of Transportation*, 783 A.2d 901, 908 (Pa. Cmwlth. 2001); *Pennsylvania Institutional Health Services, Inc. v. Dep't of Corrections*, 168 Pa. Cmwlth. 135, 140-41, 649 A.2d 190, 192-93 (1994).

issues of material fact sufficient to require an evidentiary hearing. To the extent that this evidence was not sufficient to meet whatever standard the Board applied, then the applicable standard is unconstitutionally vague as applied and cannot be the basis for revoking PEDP's License. While "financial wherewithal" provides the framework for evaluating financial fitness and suitability, nowhere is there any clear, objective standard to guide the Board's discretion in conducting this evaluation. Without such an objective standard, the financial fitness and suitability requirement, as reflected by the financial wherewithal framework, is subject to any number of different understandings by different reasonable, and even sophisticated, individuals, leaving the Board to make its determination based on the subjective views of its members. As a result, and to the extent that PEDP's reasonable understanding of "financial wherewithal" differed from that of the Board, PEDP's motion for summary judgment dismissing the revocation complaint should have been granted.

It is well-settled that 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. Cmwlth. 2008). Vague laws are unconstitutional and violate due process of law where an ordinary citizen cannot 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. Cmwlth. 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. Cmwlth. 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.

This Court has on several occasions reversed the decisions of administrative and municipal bodies that imposed sanctions based on vague statutes that provided incomplete guidance and which were susceptible to multiple understandings. For example, in *Boron*, it

declared unconstitutionally vague a township ordinance that required adult-oriented businesses to close on "state recognized holidays" because it did not define that term or guide the reader to any method for determining what constituted such a holiday. *Boron*, 960 A.2d at 885, 887-88. Numerous definitions of "state recognized holiday" were available, and in fact, these definitions were in conflict as to whether the day in questions was a "holiday." *Id.* at 887 & n.11, 888 n.13. As a result, the ordinance was susceptible to any number of reasonable understandings, thereby unconstitutionally permitting township officials to determine compliance or not on an *ad hoc* basis, in light of their personal experience. *Id.* at 887-88.

Similarly, in *Watkins v. State Bd. of Dentistry*, a dentist successfully challenged the revocation of his license for failing to maintain "appropriate monitoring equipment" for anesthesia. 740 A.2d 760 (Pa. Cmwlth. 1999). State law required him to maintain "appropriate monitoring equipment," but did not define that term. *Id.* at 762-63. As in *Boron*, the phrase at issue was "subject to many different meanings," and 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.*

Here, the only arguable applicable legal standard is the financial wherewithal framework set forth in the Board's Suitability Report, which the Board erroneously failed to apply, noting it in passing for the first time only in the Adjudication it issued after PEDP had filed its appeal. While that framework goes beyond the conclusory language of the Gaming Act and Regulations, and Condition 5, it still does not state an objective standard for the Board to determine financial fitness and suitability within the framework of financial wherewithal. The Suitability Report explains the ultimate standard that the Board is to consider – namely, the financial wherewithal of the entity to fund and/or finance development of the facility it proposes for application

purposes. It does not, however, provide any objective standards to guide and to constrain the Board's discretion in reaching that determination, and the mere fact that all applicants for the Philadelphia licenses passed the Board's subjective test for licensing back in 2006 does not make the statute any less vague as applied, particularly in the context of license revocation proceedings.

In the absence of an objective standard, reasonable minds could easily differ as to what is necessary to establish the presence or absence of financial wherewithal. PEDP, for example, has understood the financial wherewithal test as requiring a showing that PEDP has the ability to fund and/or finance development of its facility. PEDP further reasonably believed that, in order to make this showing, it would need to present to the Board and BIE funding, financing, and other transactional documents consistent with commercial standards and practices for first the Wynn Transaction, and then the Harrah's Transaction. (R. 3068a-3088a; R. 3092a; R. 5280a-6185a; 6199a-6238a.) In other words, submission of the documentation necessary and commonly used in the market to consummate an agreement to provide funding and/or financing for a project such as this should be sufficient to demonstrate PEDP's financial wherewithal. This is precisely the documentation PEDP submitted to the Board, at its request, first in April with respect to the Wynn transaction, and then on December 10, 2010, and supplemented on January 7, 2011, with respect to the Harrah's Transaction. (R. 3068a-3088a; R. 3092a; R. 5280a-6185a; 6199a-6238a.)

The Board, apparently, was operating under a different understanding, notwithstanding the absence of any basis for that understanding. In its view, transactional documents that included standard commercial contingencies and other provisions did not demonstrate PEDP's financial wherewithal.[22] Rather, the Board appears to believe that financial wherewithal requires

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[22] As discussed further below, the question of whether or not the conditionality of the Harrah's Transaction documents was appropriate and consistent with prevailing commercial

a showing of something other than standard commercial funding and financing documents. The Board did not, however, explain at the hearing on December 16, 2010 or in its Adjudication issued after PEDP had filed its appeal how it reached this understanding, why it concluded that standard commercial funding and financing documents were insufficient to establish the existence of these funding/financing agreements, or what type of evidence the Board would require as evidence of these agreements.

While PEDP denies that the Board's understanding of the financial wherewithal framework is reasonable or legally correct, it is clear that the Board and PEDP approached the issue with very different understandings of financial wherewithal because the Gaming Act and Regulations fail to set any objective standard. This is precisely the risk that constitutional vagueness review is designed to protect against. In considering this issue, it is also important to remember that this is not a case where there is a clear published standard with which PEDP disagrees (other than the minimal "financial wherewithal" framework provided by the Suitability Report) and argues that a different standard should apply. Here, PEDP had no prior notice of the standard that the Board intended to apply or, in fact, applied, particularly insofar as the Board denied PEDP discovery on the issue. Indeed, because the Board declined to explain the standard that it applied or how it reached that standard, PEDP effectively still has no notice of the standard that the Board used in adjudicating PEDP to be financially unsuitable. Under the circumstances, it is outrageous and contrary to the long-settled and deeply-rooted protections of constitutional vagueness review that the Board could revoke PEDP's $50 million License for

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practices at least presented a genuine disputed issue of material fact for the Board. However, the Board – without warning and contrary to its prior practice – did not conduct an evidentiary hearing on this issue, nor did the Board Staff or BIE meet with PEDP to review their submissions, contrary to normal practice as confirmed by Mr. Pitre's testimony on November 18, 2010. (R. 5016a - R. 5017a.)

purported noncompliance with a standard that the Board refused to publish or identify at any time before it revoked the License. The Board's legally erroneous decision must be reversed.

III. The Board Created and Applied a Deeply Flawed Process that Denied PEDP Due Process of Law by Revoking PEDP's License without Conducting an Evidentiary Hearing or Allowing PEDP Necessary Discovery.

A. The Board Was Required, but Failed to Accord, PEDP Due Process of Law.

The Board (including through the Director) in the proceedings below created and applied a process that was deeply flawed and failed to accord PEDP due process of law, compounding the prejudice caused by its application of an incorrect legal test that is unconstitutionally vague.

Due process is fully applicable to adjudicative hearings involving substantial property rights before administrative tribunals. *Conestoga Nat 'l Bank of Lancaster v. Patterson*, 442 Pa. 289, 275 A.2d 6 (1971). The Board was required to accord PEDP due process of law in the proceedings below because those proceedings sought the revocation of PEDP's valuable property right in its License. Even if the License is considered a "revocable privilege" as the Board has contended below, PEDP is still entitled to due process of law because a license, once obtained in compliance with law, becomes a valuable privilege or right in the nature of property, and is safeguarded by due process principles that apply to property lawfully acquired. *See, e.g.*, *Shah v. State Board of Medicine*, 139 Pa. Cmwlth. 94, 103-05, 589 A.2d 783, 788-89 (1991); *see also Balfour Beatty Construction, Inc. v. Dep't of Transportation*, 783 A.2d 901, 908 (Pa. Cmwlth. 2001); *Pennsylvania Institutional Health Services, Inc. v. Dep't of Corrections*, 168 Pa. Cmwlth. 135, 140-41, 649 A.2d 190, 192-93 (1994).

In administrative proceedings, the "essential elements [of due process] are 'notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.'" *Soja v. Pennsylvania State Police*, 500 Pa. 188, 194, 455 A.2d 613, 615 (1982) (plurality decision) (internal citations omitted); *see also*

Conestoga National Bank of Lancaster v. Patterson, 442 Pa. 289, 295, 275 A.2d 6, 9 (1971). The Board's process below accorded neither notice, nor an opportunity to be heard and to defend in an orderly proceeding. From the outset, the Board denied PEDP all meaningful discovery related to the preparation of PEDP's defenses. The Board then elected to erroneously dispose of this case at summary judgment, which it could only accomplish by resolving genuine disputed issues of material fact against PEDP and by refusing to view the evidence in the light most favorable to PEDP, as the respondent to BIE's motion. Moreover, in the end, the Board failed to decide this case consistent with its past decisions in similar factual circumstances, and it imposed an excessive and unreasonable sanction. As a result, the Board denied PEDP any semblance of due process in the proceedings below, and its judgment of revocation should be reversed.

B. The Board Was Required but Failed to View the Record in the Light Most Favorable to PEDP, Which Would Have Required It to Find that PEDP Established Its Financial Wherewithal to Develop Its Casino, or at Least that Genuine Disputed Issues of Material Fact Precluded Summary Judgment.

As a general rule, adjudicatory action cannot be validly taken by an administrative tribunal "except upon a hearing wherein each party has opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence on his own behalf, and to make argument." *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 465, 431 A.2d 946, 948 (1981). In conducting an evidentiary hearing, an administrative agency must determine all issues that are properly before it and properly raised, and its adjudication must include all findings necessary to resolve the issues raised by the evidence that are relevant to a decision. *Page's Department Store v. Velardi*, 464 Pa. 276, 287, 346 A.2d 556, 561 (1975). Where crucial findings of fact have not been made by an administrative agency, the court must remand the case to the agency for further proceedings. *Underkoffler v. Comm. State Employees' Retirement Board*, 432 A.2d 319, 320-21 (Pa. Cmwlth. 1981). In addition, the law requires that an agency may not arbitrarily and capriciously disregard material, competent

evidence "[s]ince an adjudication cannot be in accordance with law if it is not decided on the basis of law and facts properly adduced." *Leon E. Wintermyer, Inc. v. W.C.A.B. (Marlowe)*, 571 Pa. 189, 203, 812 A.2d 478, 487 (2002).

Moreover, it is elementary that summary judgment may only be entered where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Moore*, 437 Pa. Super. 642, 645, 650 A.2d 1090, 1092 (1994) (*quoting* Pa. R. Civ. P. 1035(b)). The tribunal's function at summary judgment is to apply the law to the undisputed factual record, to dispose of cases that present no factual disputes and "where the right is clear and free from doubt." *Anderson*, 437 Pa. Super. at 645, 650 A.2d at 1092. In so doing, "[t]he record and any inferences therefrom must be viewed in the light most favorable to the nonmoving party, and any doubt must be resolved against the moving party." *Anderson*, 437 Pa. Super. at 645, 650 A.2d at 1092. The tribunal is forbidden, however, to enter a decision on summary judgment by resolving genuinely disputed issues of material fact or otherwise weighing or considering the credibility of the evidence – that task is reserved to the finder-of-fact at trial. *Anderson*, 437 Pa. Super. at 645, 650 A.2d at 1092; *Pa. Gas & Water Co. v. Nenna Frain, Inc.*, 320 Pa. Super. 291, 299, 467 A.2d 330, 333 (1983) ("In ruling on a motion for summary judgment it is not the court's function to decide issues of fact but to decide whether there is a genuine issue of fact to be tried.").

Here, BIE did not call a single fact or expert witness and subject them to cross-examination. In sum, the Board committed plain legal error in the proceedings below by refusing to view the record in the light most favorable to PEDP, the respondent on BIE's Motion, by capriciously disregarding such evidence, and by resolving genuine disputed issues of material fact against PEDP rather than conducting the requisite evidentiary hearing.

1. Viewed in the Light Most Favorable to PEDP, the Evidence of Record Established that PEDP Has the Financial Wherewithal to Develop Its Proposed Casino and Therefore is Financially Fit and Suitable.

PEDP identified substantial evidence in the summary judgment record to establish its financial wherewithal to complete its proposed Casino (which was further evident from its submissions to the Board in December, 2010), and the Board was not permitted as a matter of law to disregard that evidence. At a minimum, the evidence of record established numerous genuine disputed issues of material fact sufficient to preclude the entry of summary judgment against PEDP on the issue of its financial fitness and suitability. (R. 501a-502a; R. 665a; R. 688a; R. 1570a-1689a; R. 3001a-3003a; R. 3085a-3088a; R. 3093a-3179a; R. 3258a; R. 3458a; R. 3472a-3473a; ; R. 3475a; R. 3504a; R. 3520a; R. 3526a; R. 3540a-3541a; R. 3564a-3565a; R. 5055a-5124a; R. 5137a; 5139a-5140a; R. 5265a R. 5280a-6185a.)

As explained above, the Suitability Report establishes that the applicable legal framework for determining financial fitness and suitability is an entity's "financial wherewithal to develop the proposed project." (R. 106a.) "The financial wherewithal of an applicant is measured by its ability to develop the proposed project and also includes the ability of an applicant to secure debt or obtain financing." (R. 111a.)

There is ample evidence of record that establishes at least a *prima facie* showing of PEDP's financial wherewithal to develop the Casino project contemplated under the Harrah's Transaction:

- On October 25, 2010, PEDP submitted to BIE a Term Sheet setting forth the terms for an agreement with Harrah's and RBS Citizens National Association ("Citizens"), pursuant to which Harrah's would serve as a source of financing, investment, and management for the Project (the "Harrah's Transaction"). (R. 5056a-5057a.)

- On December 10, 2010, as directed by the Board, PEDP supplemented the record by submitting an executed Partnership Interest Purchase Agreement (the "PIPA") to consummate the Harrah's Transaction. (R. 5280a-6160a.)

- On December 10, 2010, PEDP submitted a Joint Application for Change of Control, an Application for an Extension of Time to commence operations, and an Application to Modify the design of the facility – the other filings necessary to move forward with completing the Casino contemplated under the Harrah's Transaction. (R. 5055a-5124a.)

- On December 10, 2010, PEDP submitted documents showing that it had commitments for $46 million out of the $75 million in new equity needed to complete the first phase of the Casino as contemplated in the Harrah's Transaction. Further, Harrah's committed to provide a bridge loan to temporarily finance the last $10 million in new equity, if necessary, once $65 million in new equity was committed. (R. 5265a; 5139a-5140a.)

- The December 10 submissions included letters presented by two large commercial banks (the "Banks") each of which stated that the bank was highly confident that it would commit to providing $200 million in construction financing for the Project. (R. 5139a-5140a.)

- During the December 16, 2010 hearing before the Board, Harrah's representatives testified that construction of the facility would create approximately 650 construction jobs, and that when opened for business, the facility would create 950 permanent full-time jobs and an additional 250 permanent part-time jobs. The facility contemplated by the Harrah's Transaction was estimated to generate $66 million in gaming tax revenue in the first year of operations, increasing to $75 million in gaming tax revenue by the fifth year of operations. (R. 5137a.)

- On January 7, 2011, PEDP supplemented the record by submitting an Amended and Restated Partnership Interest Purchase Agreement ("Amended and Restated PIPA"), which amended and restated the PIPA submitted on December 10, 2010. (R. 5280a-6160a.)

- The Amended and Restated PIPA reflected the continued definitive agreement of the parties to the Harrah's Transaction and provided, among other things, for a significant reduction in or elimination of the conditions particular to the Harrah's Transaction, including elimination of conditions relating to the conduct of due diligence. The contingencies that remain are only those normally attendant to a transaction of the size and type of the Harrah's Transaction, and largely relate to matters outside of the control of the parties to the Amended and Restated PIPA. (R. 5280a-6160a.)

- The Amended and Restated PIPA also increased Harrah's bridge loan commitment to provide that Harrah's would fund, on a loan basis, any shortfall in the equity raise proposed in connection with the Harrah's Transaction up to $29 million. The increased "backstop," together with equity commitments previously presented to the Board, ensures full funding of the anticipated equity requirements

to develop the first phase of the Casino project contemplated by the Harrah's Transaction. (R. 5280a-6160a.)

- On January 7, 2011, PEDP submitted fully executed Commitment Letters dated January 7, 2011 (the "Commitment Letters") issued to PEDP by the Banks, pursuant to which the Banks committed to provide to PEDP senior secured financing for the development of the Project in the aggregate principal amount of up to $200 million. The Commitment Letter is consistent with the "highly confident letters" submitted to the Board on December 10, 2010, but it also provides a greater level of certainty that financing sufficient for development of the Project will be available to PEDP, and has been approved by the investment committees of both Banks. (R. 6161a-6185a.)

In addition, PEDP has identified substantial evidence of record to make out at least a *prima facie* showing as to its past financial wherewithal to develop its proposed projects:

- At the time of its initial license application, PEDP presented a commitment by Merrill Lynch, pursuant to which Merrill Lynch committed to arrange for or underwrite $450 million in third-party financing, which would have been sufficient to complete the project. (R. 501a-502a; R. 3458a.)

- PEDP presented testimony and documentation that it has already invested substantial financial resources in developing its licensed casino – to date, more than $160 million. (R. 665a; R. 688a.)

- During the timeframe following September 2009, PEDP negotiated and exchanged term sheets with three prospective investors in its Casino project. (R. 3528a; R. 3001a.)

- Following that initial process, PEDP entered into intensive negotiations with Wynn. (R. 3528a; R. 3001a, ¶¶ 6-7.)

- As a result of its intensive negotiations with Wynn, PEDP and Wynn entered into a Term Sheet, followed by definitive transactional documents, pursuant to which Wynn would serve as a source of financing and/or funding, and management, to complete development of PEDP's Casino. Executed copies of these documents were presented to the Board and BIE. But for Wynn's unexpected unilateral termination of the transaction, the Wynn Transaction would have provided the full financing and/or funding necessary to develop the Casino. (R. 1570a-1689a; R. 3069a-3083a; R. 3085a-3088a; R. 3093a-3179a; R. 3002a-3003a, ¶¶ 10, 12.)

- PEDP further presented testimony and documentation that, regardless of whether it has funds sitting in its bank accounts, PEDP has been able to, at every point in time, obtain loans from its partners to pay bills as they have come due, including the $1.5 million loan from WPI in 2009 to cover operating costs going forward. (R. 3540a-3541a; R. 3472a-3473a; R. 3475; R. 3564a-3565a.) To date,

PEDP's partners have advanced it millions of dollars in loans to cover its operating expenses. (R. 3540a-3541a; R. 3472a-3473a; R. 3475; R. 3564a-3565a; R. 3520a; R. 3526a.) For example, among other things, PEDP has timely funded and paid the *per diem* fines imposed by the Board as they have been declared due and payable. (R. 3504a.).

Thus, the record is replete with evidence confirming PEDP's financial wherewithal to develop the project proposed under the Harrah's Transaction. In considering BIE's Motion for Summary Judgment, the Board was required to view this evidence in the light most favorable to PEDP. Doing so can yield only one reasonable conclusion – there is substantial *prima facie* evidence that PEDP has the financial wherewithal to develop the project that it proposes. The Board was not permitted as a matter of law to disregard this substantial evidence at summary judgment; yet it did so nonetheless. At a minimum, the evidence was sufficient to demonstrate the existence of genuine disputed issues of material fact that precluded summary judgment against PEDP on the issue of its financial fitness and suitability, and genuine disputed issues of material fact equally precluded summary judgment against PEDP for alleged noncompliance with the Board's September 2 and March 3 Orders, as set forth below. This also constitutes more than sufficient cause to reverse the Board's erroneous grant of summary judgment against PEDP, and its denial of PEDP's affirmative Motion for Summary Judgment.

2. Genuine Disputed Issues of Material Fact Precluded the Entry of Summary Judgment against PEDP.

In addition to the evidence establishing a *prima facie* showing of PEDP's financial wherewithal and, thus, financial fitness and suitability, the Board also erroneously failed to recognize other genuine disputed issues of material fact that precluded the entry of summary judgment against PEDP. Specifically, among others, the Board disregarded the following evidence of record that established genuine disputed issues of material fact:

- PEDP made good faith efforts to meet the reporting deadlines set forth in the Board's Orders, but was unable to meet some of those reporting deadlines for reasons beyond its control, including PEDP's efforts that led to identifying Wynn as a source of financing and investment, and management, the extensive

negotiations with Wynn, the unexpected termination of the Wynn Transaction, and PEDP's renewed efforts to locate a development partner thereafter. (R. 2999a-3005a.)

- After Wynn's unilateral termination of the Wynn Transaction, through no fault of PEDP, PEDP successfully developed an alternative plan for completing the development of its Casino by negotiating and concluding an agreement with a new development partner in the form of Harrah's. (R. 3528a; R. 3003a, ¶¶ 16-22; R. 2706a; R. 5055a-5080a; R. 5081a-5116a; R. 5117a-5124a; R. 5259a-6238a.)

This evidence, at the very least, created a factual issue as to PEDP's good faith efforts to meet the Board's reporting deadlines and whether its alleged inability to do so was for reasons beyond its control. In particular, the evidence established that, but for Wynn's unilateral and unexpected termination of the Wynn Transaction, PEDP would have achieved compliance with the Board's conditions as of April 6, 2010, when PEDP submitted the Wynn Transaction documents to the Board, and that PEDP again achieved compliance with the Board's conditions with the submission of the Harrah's Transaction documents.

- The terms and conditionalities of the Harrah's Transaction documents are consistent with the norms and standard commercial practices in the market.

The definitive transactional documents PEDP submitted themselves evidence terms and conditions consistent with standard practice in the market. Although PEDP was not given an opportunity to do so, it was prepared to present extrinsic evidence of the norms and standard commercial practices in the market to establish that the terms and conditions of the Harrah's Transaction were commercially reasonable and appropriate. If this was a fact at issue, the Board was required to conduct an evidentiary hearing to resolve it. It failed to do so.

- Any material differences between the Casino to be developed pursuant to the Harrah's Transaction and the originally-proposed project are due to changes in the gaming and financing markets during the intervening years.

PEDP was not given an opportunity to present expert, comparative, or other evidence concerning the comparability of the project proposed under the Harrah's Transaction to the project proposed in 2006, or to other casino projects licensed by the Board where changes were required in the footprint, development and timing of the projects. PEDP was likewise not afforded the opportunity to proceed, through the Board Staff, with the customary review process to identify and respond to any concerns raised by the Board and its Staff with the Harrah's Transaction documents, which is contrary to the Board Staff's standard practice as acknowledged by Mr. Pitre. (R. 5025a-5026a.) If these were facts at issue, the Board was required to conduct an evidentiary hearing to resolve them.

- Charitable contributions pursuant to the Harrah's Transaction would be materially comparable to charitable contributions envisioned in connection with PEDP's original application for its License.

PEDP presented documentation relating to the charitable contributions plan contemplated by the Harrah's Transaction as part of its December 10, 2010 and January 7, 2011 Submissions. It was not, however, afforded an opportunity to present further explanatory evidence or given the opportunity to proceed through the Board Staff review process to identify and respond to any concerns raised by the Board and its Staff regarding same. If this was a fact at issue, the Board was required to conduct an evidentiary hearing to resolve it.

As to all of these factual issues, PEDP either identified *prima facie* evidence in the record to establish the facts or was prepared to place such evidence in the record, but was never informed that the facts were at issue and/or afforded an opportunity to identify or introduce such evidence. In either event, the Board was not permitted as a matter of law to resolve these disputed factual issues against PEDP without conducting an evidentiary hearing.

C. The Board Was Required, but Failed to Accord PEDP, Meaningful Discovery.

PEDP was entitled to, but was denied, meaningful discovery by the Board in the proceedings below. Although discovery may not be automatic as a matter of course in most administrative proceedings, where an agency's Regulations provide for a right of discovery, the agency must accord discovery consistent with its Regulations and due process of law. *See, e.g.*, *Conestoga National Bank of Lancaster v. Patterson*, 442 Pa. 289, 299-300, 275 A.2d 6, 11-12 (1971) (in proceedings before the Banking Department, "procedural due process requires that protesting banks be afforded notice, a hearing, the opportunity to present evidence and access to the application and supporting data when confronted with a proposal for a new branch"); *see also Pennsylvania Bankers Ass'n v. Pennsylvania Dep't of Banking*, 599 Pa. 496, 517-18, 962 A.2d 609 (2008) (confirming the holding of *Conestoga* but finding it inapplicable to the case at bar on the basis of waiver).

When promulgating its practice and procedure Regulations, the Board chose to provide a right to discovery in proceedings before the Board. Specifically, § 493a.11 of the Board's Regulations provides, among other things, that a "[a] party may request discovery by one or more of the following methods: (i) Written interrogatories. (ii) Depositions. (iii) Affidavits. (iv) Production of documents or things. (v) Requests for admissions." 58 Pa. Code § 493a.11(a)(2). In the initial stages of the proceedings below, the Director entered an "Order re: Discovery" that set a discovery deadline, and established procedures for serving and responding to discovery requests, scheduling depositions, and resolving any discovery disputes that could arise. (App. D, R. 1935a-1938a.) As such, the Director's Order confirmed PEDP's right to secure necessary discovery in the proceedings below.

Despite the Board's Regulations and the Director's Order, the Board and Director promptly commenced a process of specifically and purposefully denying PEDP all meaningful

discovery necessary to prepare its defenses. This is despite PEDP's persistent efforts to obtain discovery, and despite the fact that its discovery requests were narrowly tailored to seek information central to the issues presented by BIE's Complaint. For example, PEDP sought centrally-important information concerning the standard that the Board would apply to determine financial fitness and suitability. It also sought information concerning the Board's treatment of similarly-situated licensees, including particularly, Pittsburgh licensee PITG, who faced similar financial difficulties and underwent change-in-control proceedings.[23] Specifically:

- PEDP served interrogatories and requests for production of documents, to which BIE responded with almost entirely of boilerplate objections, but no substantive answers.

- PEDP moved to overrule the objections and compel full and complete responses to PEDP's Requests and Interrogatories. The motion was denied almost immediately.

- PEDP moved to issue a subpoena to the Board for the production of documents including, among other requests, documents evidencing how the Board intended to analyze PEDP's continued financial fitness and suitability and documents showing the Board's past treatment of similarly-situated licensees. The motion was denied almost immediately.

- PEDP moved the Board to review the Directors' Orders denying these motions, which the Director, not the Board, denied without further explanation.

- PEDP sought to depose four witnesses with critical relevant knowledge: 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 was denied the opportunity to depose Mr. Pitre and the PITG investigator.

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[23] Commissioner Ginty and the Chief Enforcement Counsel acknowledged the similarities between PEDP and PITG at the Board's March 3, 2010 hearing. (R. 1687a.) Their colloquy is also quoted in this section below.

- After initially agreeing to produce Agents Morace and Dobbins, BIE abruptly objected and refused at the eleventh hour to produce them. PEDP was eventually allowed, upon its motion to compel depositions, to depose the agents, but the questioning was starkly limited.

In the end, PEDP was left with no discovery whatsoever concerning what the Board considered to be the standard for evaluating PEDP's financial fitness and suitability, except for the starkly limited depositions of Agents Morace and Dobbins (who did not know the applicable standards, (R. 3251a; R. 3257a-3260a; R. 3287a; R. 3299a), and no discovery whatsoever concerning the Board's treatment of similarly-situated licensees. Despite being given discovery rights by the Board's Regulations and the Director's June 18 Order, the subsequent Orders of the Director and the Board rendered those rights wholly illusory.

The Board's denial of meaningful discovery moreover caused specific and substantial prejudice to PEDP, effectively vitiating its due process rights to notice and hearing. By denying PEDP discovery concerning the Board's understanding of financial fitness and suitability, the Board prevented PEDP from having any notice of the standard that it intended to apply to PEDP to make that determination. Without this information, PEDP was left with nothing more than its best guess as to how the Board would evaluate this issue and what evidence the Board would consider – a situation confirmed by the Board's Adjudication in support of its revocation Order. As is apparent from the result, PEDP's reasonable best guess did not comport with the *ad hoc* standard that the Board eventually applied.

The Board's denial of discovery concerning similarly situated licensees was equally and specifically prejudicial because it precluded PEDP from developing a record as to how the Board treated similarly-situated licensees in the past. For example, the Board acknowledged at its March 3, 2010 Hearing that this case was substantially similar to that of Pittsburgh licensee PITG:

> 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.

(R. 1688a.) Based on what PEDP was able to glean from the Board's Adjudication concerning PITG, the Board granted PITG significant accommodations in similar circumstances that it was unwilling to extend to PEDP in this case. The Board, however, refused to permit PEDP to explore the Board's treatment of PITG and other similar licensees, and thus, PEDP was denied the ability to present such information in its defense.

Notwithstanding the Board's refusal to allow discovery on this issue and refusal to allow PEDP to develop a record concerning the Board's treatment of other similarly-situated licensees, the Board specifically compared PEDP to these other licensees and relied on its comparisons in deciding to revoke PEDP's License. For example, the Board concluded that PEDP was "blatantly" financially unsuitable where it "has not put a spade in the ground while ten other licensees have built first-rate casinos and commenced operations in the same or less timeframe." (App. B at 49, R. 6302a).[24] As the Board plainly viewed such comparative evidence as central to its conclusions, PEDP should have been given the opportunity to discover how it was similarly-situated to these other licensees, how the Board acted vis-à-vis them, and how the unique

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[24] The Board moreover erred in relying on this comparative evidence when it was not of record. It is elementary that the Board was required to adjudicate this case based on the record before it and is not permitted to rely on facts not of record in making its determination. *See, e.g., Ney v. Ney*, 917 A.2d 863, 866 (Pa. Super. 2007) ("A trial court may not consider evidence outside of the record in making its determination."); *Eck v. Eck*, 327 Pa. Super. 334, 475 A.2d 825, 827 (1984). It is equally settled that a reviewing court cannot affirm the decision of the tribunal below based on off-the-record facts. *See, e.g., Ney*, 917 A.2d at 866; *In re Frank*, 283 Pa. Super. 229, 243-45, 423 A.2d 1229, 1237 (1980).

obstructions and difficulties it has faced justified granting it additional time to complete its Casino.

The Board's refusal to allow PEDP necessary discovery was thus a denial of due process and is independent grounds to reverse its determinations, particularly in light of the substantial and specific prejudice this denial of due process caused PEDP.

D. The Board Imposed an Unreasonably Harsh Sanction when Lesser Sanctions Sufficed.

The final nail in the Board's defective process was the excessive sanction it imposed for PEDP's purported noncompliance with certain reporting conditions and milestone deadlines set forth in the Board's September 1, 2009 and March 3, 2010 Orders. Revocation of PEDP's License was not a legally appropriate, proportional, and available sanction for PEDP's alleged inability to meet certain reporting conditions in the Board's Orders. Indeed, revocation of PEDP's $50 million License because of an inability to meet certain reporting conditions – and not because of any willful refusal to comply – is an excessively draconian sanction, which is not warranted by the facts and is contrary to settled law and public policy.

It is well-settled that punitive sanctions should not be imposed for violation of a coercive civil order where compliance with the order is impossible despite good faith efforts. *See, e.g., Cmwlth. Dep't of Envt'l Resources v. Pa. Power Co.*, 461 Pa. 675, 337 A.2d 823 (1975); *Mueller v. Anderson*, 415 Pa. Super 458, 609 A.2d 842 (1992); *Wetzel v. Suchanek*, 373 Pa. Super. 458, 464, 541 A.2d 761 (1988); *Office of Disciplinary Counsel v. Marcone*, 579 Pa. 1, 855 A.2d 654 (2004).

Furthermore, the law and strong public policy of this Commonwealth abhor an unnecessary forfeiture. *See, e.g., Mazzo v. Bd. of Pensions and Retirement*, 531 Pa. 78, 84-85, 611 A.2d 193, 196-97 (1992) (recognizing the "tenor of our law which disfavors legislative provisions broadly imposing forfeiture"); *In re Fisher's Estate*, 442 Pa. 421, 425, 276 A.2d 516,

518-19 (1971) ("forfeitures are not favored in the law and are to be strictly construed"); *Commonwealth v. $259.00 Cash U.S. Currency*, 860 A.2d 228, 232 (Pa. Cmwlth. 2004) ("Forfeiture is not favored under the law of this Commonwealth"); *Acme Markets, Inc .v. Fed. Armored Exp., Inc.*, 437 Pa. Super. 41, 48, 648 A.2d 1218, 1221 (1994) ("Pennsylvania law 'abhors forfeitures and penalties and enforces them with the greatest reluctance'") (*quoting Fogel Refrigerator Co. v. Oteri*, 391 Pa. 188, 195, 137 A.2d 225, 231 (1958)).

Importantly, this Court has reversed an administrative tribunal's imposition of a sanction that is unnecessarily harsh under the circumstances, even if there was a basis to impose some form of sanction. *See, e.g., Ake v. Bureau of Prof'l & Occupational Affairs, State Bd. of Accountancy*, 974 A.2d 514, 522 (Pa. Cmwlth. 2009) (remanding for the imposition of a lesser sanction); *see also Williams ex rel. Williams v. Sch. Dist. of Philadelphia*, 870 A.2d 414, 417 (Pa. Cmwlth. 2005) (finding error where trial court did not consider lesser sanctions for failure to appear at a hearing). Lesser sanctions will be favored where they achieve the agency's objectives. *Ake*, 974 A.2d at 522.

Ake is a particularly instructive case. In *Ake*, the licensing bureau revoked an individual's certified public accountant certificate and license to practice accounting in the Commonwealth. *Id.* at 515. The accountant has previously been convicted of criminal harassment, and the bureau chose to impose the maximum sanction permitted by the relevant licensing law – namely, licensure revocation. *Id.* Although relevant statutory law allowed for licensure revocation, this Court nonetheless determined that "the Board did not have a basis to impose the maximum penalty" consistent with prior decisions in other cases. *Id.* at 520. Rather, the court held that "the Board abused its discretion by imposing the most drastic available sanction." *Id.* at 522.

Here, as in *Ake*, the Board's prior decisions mandated that it not impose the maximum sanction of licensure revocation on PEDP. Specifically, the Board's decision in *PITG*

established precedent for the Board to work with and accommodate a slot machine licensee that, for reasons beyond its control, is required to secure alternative funding and financing to complete development of its Casino. (R. 2727a-2754a.) Under *Ake*, the Board was not permitted to now make an about-face in this case, when confronted with a materially similar factual predicate, and instead impose the maximum sanction of license revocation.

Additionally, as the record amply established, PEDP made extensive efforts to comply with the reporting conditions in the Board's September 1 and March 3 Orders. Any non-compliance was solely due to a temporary inability to comply despite PEDP's best efforts and for reasons beyond its control. In fact, it is undisputed that PEDP had achieved substantial compliance with all reporting conditions by early April 2010. (N.T. Board's April 7, 2010 Meeting at 62-64 (testimony of the Chief Enforcement Counsel);[25] R. 3002a, ¶ 10; R. 3093a-3179a.) It is equally undisputed that, following the unexpected termination of the contemplated Wynn transaction, PEDP immediately met with the Board staff to discuss its proposed renewed efforts, and re-commenced a robust process to locate an alternative investor. (R. 3185a, ¶ 6; R. 1752a-1765a; R. 3549a; R. 3004a, ¶¶ 16-17.) Finally, it is undisputed that PEDP reached a new agreement with Harrah's, sufficient to complete development of its Casino.

Furthermore, it is clear that in the proceedings below the Board actually imposed a lesser sanction on PEDP, and that lesser sanction was successful in achieving the Board's stated goal. The Board fined PEDP $2,000 per day for failing to timely meet some of the reporting Conditions in its September 1 and March 3 Orders, which ultimately resulted in PEDP paying sanctions in the amount of $662,000. The stated purpose of the daily fines was to compel PEDP to come into compliance with the September 1 and March 3 Orders. (*See, e.g.*, R. 1654a.) For example, Commissioner Coy explained: "The fines, at least as far as I was concerned, were

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[25] The Court may properly take judicial notice of Mr. Pitre's testimony, which was given during a public meeting of the Board and constitutes a readily-available public record.

never meant to be punitive but simply to help move the project along" (R. 1654a.) And, with PEDP's submission of the Wynn Transaction documents, and then again with the Harrah's Transaction documents, that purpose was achieved. Any further sanction – let alone the maximum sanction of license revocation – was thus plainly excessive and punitive.

It flies in the face of settled law and public policy to impose the punitive, draconian sanction of revocation of PEDP's License based on its inability to meet certain reporting guidelines as is the situation in the instant case. Accordingly, the sanction that the Board imposed was not legally appropriate or available under the circumstances presented. To the contrary, settled law and public policy holds otherwise, and the Court should reverse the Board's excessive, punitive sanction.

CONCLUSION

For all of the reasons set forth above, PEDP respectfully requests that this Court enter an Order reversing the Board's December 23 and November 19 Orders, as well as the Board's other prior non-final Orders relating to discovery, and direct the entry of summary judgment in PEDP's favor or, alternatively, remand the matter to the Board with instruction as to the governing law and direction to accord PEDP due process of law in the prosecution of further proceedings.

Respectfully submitted,

COZEN O'CONNOR

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(215) 665-2000

Attorneys for Petitioner

Dated: April 11, 2011

APPENDICES

Appendix A: Order, granted by the Board on December 23, 2010

Appendix B: Adjudication issued by the Board on January 26, 2011

Appendix C: Order issued by the Board on November 19, 2010.

Appendix D: Order issued by the Director on June 18, 2010.

Appendix E: Order issued by the Director on June 30, 2010.

Appendix F: Order issued by the Director on July 15, 2010.

Appendix G: Order issued by the Director on July 15, 2010.

Appendix H: Order issued by the Director on July 28, 2010.

Appendix I: Order issued by the Director on August 10, 2010.

Appendix J: Order issued by the Board on August 11, 2010.

Appendix K: Adjudication issued by the Board on August 11, 2010.

Appendix L: Order issued by the Director on August 23, 2010.

Appendix M: Order issued by the Director on September 8, 2010.

Appendix N: Order issued by the Board on September 2, 2009.

Appendix O: Adjudication issued by the Board on September 2, 2009.

Appendix P: Order issued by the Board on February 10, 2010.

Appendix Q: Adjudication issued by the Board on February 10, 2010.

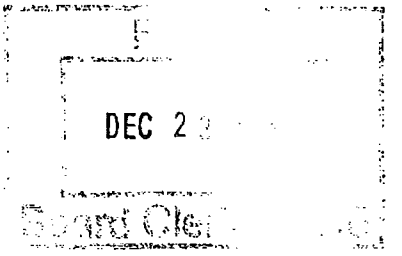
Appendix R: Order issued by the Board on March 3, 2010.

APPENDICES

A

BEFORE THE PENNSYLVANIA GAMING CONTROL BOARD

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA GAMING CONTROL BOARD BUREAU OF INVESTIGATIONS AND ENFORCEMENT	:	**OHA DOCKET NO. 1408-2010**
Complainant	:	
PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P., D/B/A FOXWOODS CASINO PHILADELPHIA SLOTS LICENSE 1367,	:	
Respondent	:	



ORDER

AND NOW, this 23rd day of December, 2010, upon consideration of the Office of Enforcement Counsel's ("OEC") Motion for Summary Judgment; Philadelphia Entertainment and Development Partners, L.P.'s ("PEDP") response thereto; and the record before the Board in these proceedings; OEC's Motion is **GRANTED** and it is **ORDERED** that PEDP's Category 2 Slot Machine License is **REVOKED** for the following reasons:

1) PEDP failed to comply with the Board's Order of September 1, 2009 by failing to submit to the Bureau of Investigations and Enforcement ("BIE"), by December 1, 2009, architectural renderings, artist renderings, conceptual proposals, engineering opinions and other documents relating to construction of a facility substantially similar to that approved by the Board on December 20, 2006; as well as a timeline for commencement and completion of all phases of the facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011;

2) PEDP failed to comply with the Board's Order of March 3, 2010 by failing to submit definitive financial documents for its casino project by March 31, 2010;

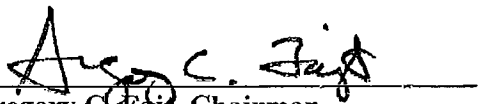
3) PEDP failed to comply with the Statement of Conditions placed upon the Category 2 Slot Machine License granted to PEDP, including, *inter alia*, Condition 5 of the Statement of Conditions, by failing to maintain financial fitness;

4) PEDP is unable to have 1,500 slot machines available for play by the Board imposed deadline of March 29, 2011; and

5) PEDP has failed to maintain financial suitability to hold a Category 2 Slot Machine License.

An Adjudication setting forth Findings of Fact and Conclusions of Law and the Boards' rational for entering this Order shall be forthcoming.

By the Board:



Gregory C. Fajt, Chairman
Pennsylvania Gaming Control Board[1]

[1] Pennsylvania Gaming Control Board Member Ginty voted to deny OEC's Motion for Summary Judgment.

B

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

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

ADJUDICATION

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Findings of Fact

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

1. PEDP was one of five applicants for the two available Category 2 Slot Machine Licenses for the City of Philadelphia.

2. HSP Gaming, LP; Keystone Redevelopment Partners, LLC; Pinnacle Entertainment, Inc. and PNK (PA), LLC; and Riverwalk Casino, LP were the other four applicants that filed for the two available Category 2 Slot Machine Licenses for the City of Philadelphia by the December 31, 2005 deadline.

3. The Board awarded PEDP one of the two Category 2 Slot Machine Licenses for the City of Philadelphia on December 20, 2006. N.T. 12/20/2006.

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

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

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

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

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

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

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

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

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

[2] References are to the specific paragraphs of the Findings of Fact in the cited Adjudication.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The Gaming Act only permits two licenses to be awarded in Philadelphia and there were five applicants. Thus, there was competition among the applicants for the two available licenses. Because of this competitive factor, the five applicants not only had the responsibility to satisfy the Board that they were eligible and suitable for a Category 2 license, but they also were required to convince the Board that respective project should be among the two chosen by the Board to best serve the Commonwealth's and the public's interest in Philadelphia. Ultimately that was a determination committed to the sound exercise of the Board's discretionary authority to select the two applicants which the Board believes will best serve the Commonwealth's and the public's interest as outlined in the Act.
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> . . .
>
> The denials of three applicants is not because the unsuccessful applicants were found unsuitable, but because the Board had the difficult task of choosing among five suitable candidates and proposals, each of which possessed various positive attributes. Simply stated, the successful applicants were the applicants which possessed the projects which the Board evaluated, in its discretion, to be the best projects for licensure under the criteria of the Act.

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

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

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

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

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

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

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

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

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

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

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

PEDP's First Extension Request

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PEDP's Second Extension Request

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

April 29, 2010 Update Meeting

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

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

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

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

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

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

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

OEC's Complaint for Revocation

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

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

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

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

- Failed to maintain financial suitability for licensure pursuant to the Gaming Act.

N.T. 04/29/10; Board Order (04/29/10).

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

99. PEDP filed an Answer to OEC's Complaint on June 1, 2010.[3]

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

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

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

Motion for Summary Judgment Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions of Law

1. The Board, pursuant to Section 1202(a)(1) of the Gaming Act, 4 Pa.C.S. § 1202(a)(1), has jurisdiction over PEDP and the subject matter of the instant proceedings.

2. Under Section 1210(a)(2) of the Gaming Act, 4 Pa.C.S.§ 1210(a)(2), PEDP was required to operate and make available for play a minimum of 1,500 slot machines at its

[6] Commissioner Ginty voted to deny OEC's Motion for Summary Judgment for the reasons indicated in the attached Dissent.

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

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

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

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

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

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

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

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

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

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

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

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

13. Under Section 1518(c)(1)(ii) - (iii) of the Gaming Act, 4 Pa.C.S. § 1518(c)(1)(ii) – (iii), the Board may revoke PEDP's License for PEDP's violation(s) of the Gaming Act, the Board's regulations and/or PEDP's violation of a Board order.

14. PEDP has violated the Gaming Act, the Board's regulations, its Statement of Conditions and/or Board orders.

15. OEC is entitled to summary judgment if there are no genuine issues of material fact relative to its Complaint for Revocation.

16. There are no genuine issues of material fact relative to the facts alleged in OEC's Complaint for Revocation and the basis for each Count in the complaint is established.

17. PEDP has failed to submit definitive documentation that it has the present ability or capacity to build and to finance the development of a gaming facility substantially similar in all respects to the proposed facility and related attributes approved by the Board.

18. The inability of PEDP to timely commence construction, complete the build-out and commence operations of the Category 2 slot machine facility as proposed and licensed warrants the Board's grant of the Complaint for Revocation of PEDP's License.

19. The public's interest in the building of the PEDP project and the promised economic development, employment and charitable giving has been damaged by PEDP's inability to construct and operate the project as licensed.

20. The revocation of the PEDP license furthers the public interest because given the history and inability to construct and commence operations of the facility approved by the Board in 2006, the Board and the public can have no confidence that PEDP can fulfill

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

Discussion

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

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

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

Summary Judgment Standard

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

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury.

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

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

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

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

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

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

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

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

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

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

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

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

PEDP is not entitled to further extensions

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

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

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

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

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

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

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

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

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

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

. . .

ATTORNEY DOWNEY: 2012.

COMMISSIONER COY: So it's not six months?

ATTORNEY DOWNEY:	Correct. Correct.
COMMISSIONER COY:	Okay.
ATTORNEY DOWNEY:	But we'd probably say third quarter is what we're looking at.
COMMISSIONER COY:	Of '12?
ATTORNEY DOWNEY:	Correct.
ATTORNEY JACOBY:	'12, yes.
COMMISSIONER COY:	So you're talking almost two years?
ATTORNEY DOWNEY:	Twenty (20) to 22 I think is exactly what we've got on it.
ATTORNEY JACOBY:	Twenty (20) to 22 months, yes.

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

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

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

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

Revocation of PEDP's License is appropriate

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

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

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

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

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

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

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

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

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

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

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

. . .

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

. . .

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

> (1) The organization, financial structure and nature of all businesses operated by the person, including any affiliate, intermediary, subsidiary or holding companies, the names and personal employment and criminal histories of all officers, directors and key employees of the corporation; the names of all holding, intermediary, affiliate and subsidiary companies of the corporation; and the organization, financial structure and nature of all businesses operated by such holding, intermediary and subsidiary companies as the board may require, including names and personal employment and criminal histories of such officers, directors and principal employees of such corporations and companies as the board may require.
>
> (2) The extent of securities held in the corporation by all officers, directors and underwriters and their remuneration in the form of salary, wages, fees or otherwise.
>
> . . .

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

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

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

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

> (2) Financial fitness in compliance with section 1313 of the act (relating to slot machine license application financial fitness requirements).
>
> (3) Operational viability, including:
>
> > (i) The quality of the proposed licensed facility, and temporary land-based facility, if applicable, including the number of slot machines proposed and the ability of the proposed licensed facility to comply with statutory, regulatory and technical standards applicable to the design of the proposed licensed facility and the conduct of slot machine operations therein.
> >
> > (ii) The projected date of the start of operations of the proposed licensed facility and any accessory uses such as hotel, convention, retail and restaurant space proposed in conjunction therewith. Applicants shall provide the Board with a time line on the deliverability of proposed temporary land-based or phased permanent licensed facilities and the accessory uses proposed in conjunction therewith.
> >
> > (iii) The ability of the applicant's proposed licensed facility to generate and sustain an acceptable level of growth of revenue.

58 Pa. Code § 441a.7(f)(2) – (3).

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

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

The Board's financial suitability standards are not vague

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

> The Pennsylvania Gaming Control Board is required to assess the financial suitability of an applicant prior to granting it a slot machine license. The financial suitability of the applicant encompasses an assessment of an applicant's historical financial stability and financial wherewithal to develop the proposed project. In addition, financial suitability assessment includes **the proposed project's** ability to maintain a steady level and growth of revenue to the Commonwealth.
>
> Section 1313 of Act 71 provides the Pennsylvania Gaming Control Board (the "Board") with the authority to require each applicant for a slot machine license to produce the information, documentation and assurances concerning financial background and resources as the Board deems necessary to establish by clear and convincing evidence the financial stability, integrity, and responsibility of the applicant, its affiliate, intermediary, subsidiary, or holding company.
>
> The Board shall not approve a slot machine license application unless it has made an affirmative determination that the applicant has established that it is likely to maintain a financially successful, viable, and efficient business operation, and will likely be able to maintain a steady level and growth of revenue to the Commonwealth, (58 Pa.Code § 441.5). For that reason, the Board created a Financial Suitability Task Force ("Task Force"), which it charged with

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

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

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

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

PEDP is uniquely situated as to other licensees

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

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

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

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

[10] PEPD also argues that the Board find it financially suitable for the same reasons it found PITG financially suitable. For the reasons discussed previously, the PITG is inapplicable to the current matter and this argument is without merit.

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

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

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

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

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

Conclusion

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

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

Dated: January 26, 2011

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

Dissenting Opinion

Commissioner James B. Ginty

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

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

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

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

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

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

---

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

[3] PEDP testified that these jobs would have become available in the 2nd half of 2011.

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

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

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

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

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

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

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

James B. Ginty, Commissioner

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

C

IN THE PENNSYLVANIA GAMING CONTROL BOARD

COMMONWEALTH OF PENNSYLVANIA GAMING CONTROL BOARD BUREAU OF INVESTIGATIONS AND ENFORCEMENT, COMPLAINANT	:	
v.	:	PGCB DOCKET NO. 1408-2010
PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P. D/B/A FOXWOODS CASINO PHILADELPHIA SLOT MACHINE LICENSE, RESPONDENT	:	

ORDER

AND NOW, this 18th day of November, 2010, it is hereby **ORDERED** that Philadelphia Entertainment and Development Partners, L.P.'s ("Foxwoods") Motion for Summary Judgment is hereby **DENIED**.

By the Board:

Gregory C. Fajt

Gregory C. Fajt, Chairman
Pennsylvania Gaming Control Board

D

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Complaint for Revocation of	:	
Philadelphia Entertainment and	:	
Development Partners, L.P. d/b/a	:	**Docket # 1408-2010**
Foxwoods Casino Philadelphia	:	
Slot Machine License 1367	:	

ORDER RE: DISCOVERY

And now, this 18th day of June, 2010, after holding a pre-hearing conference on June 17, 2010 to discuss discovery issues, the following is ORDERED:

1. All discovery will be completed by close of business Friday July 30, 2010.
2. Any motions filed related to the discovery process will be answered by the opposing party within five (5) business days of the date of service of the motion. This supercedes the Board's regulations governing answers to motions.
3. All discovery requests in the form of interrogatories, production of documents or things, or requests for admissions will be responded to by the receiving party within ten (10) business days of the date of service of the document. If a party determines that additional time is needed to respond, it is suggested that the parties work out a mutually agreeable timetable for response. If a disagreement arises a motion to resolve the issue will be made to the undersigned and filed with the Board's Clerk.
4. The deposition schedule will be mutually worked out between the parties. If a dispute arises between the parties regarding the schedule, a written

motion to address the dispute will be made to the undersigned and will be filed with the Board's Clerk.

5. The regulation requiring permission from the agency head or the presiding officer to take a deposition, found at 1 Pa. Code § 35.145, is waived unless a party objects to a deposition request. If an objection arises, a request to take the deposition will be made to the undersigned in accordance with 1 Pa. Code § 35.145 and will be filed with the Board's Clerk.

6. In all other instances discovery will be governed by 58 Pa. Code § 493a.11 and 1 Pa. Code §§ 35.145-152.

7. The Office of Enforcement Counsel has agreed to and will provide to Philadelphia Entertainment and Development Partners, LP's ("PDEP") attorneys all documents in its possession that it believes are relevant to the Complaint for Revocation on or before Monday June 28, 2010. The production of these documents does not restrict PDEP attorneys from making further requests for relevant documents.

8. If any other dispute arises during the course of discovery a motion will be made to the undersigned and filed with the Board's Clerk in order to resolve the issue.

Linda S. Lloyd

Linda S. Lloyd
Director of Hearings and Appeals

E

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Complaint for Revocation of	:	
Philadelphia Entertainment and	:	
Development Partners, L.P. d/b/a	:	**Docket # 1408-2010**
Foxwoods Casino Philadelphia	:	
Slot Machine License 1367	:	
	:	

ORDER

And now, this 30th day of June, 2010, the following is **ORDERED**: All relief requested in the "Emergency Petition in the Nature of an Appeal" filed by Philadelphia Entertainment and Development Partners, L.P. ("PEDP") filed on June 22, 2010, is **DENIED** based upon the reasons as set forth below.

1. On April 29, 2010, the Board's Office of Enforcement Counsel filed a Complaint seeking revocation of the Slot Machine License of Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia.
2. At the request of PEDP a discovery conference was conducted by the Director of Hearings and Appeals, acting as the Presiding Officer, on June 17, 2010.[1]
3. In accordance with the Board's regulation at 58 Pa. Code § 491a.7(b)(1) and (7), the Presiding Officer has the authority to "regulate the course of hearings, including the scheduling thereof ... (and) ... dispose of procedural matters."

[1] The Board has designated through Regulation, found at 58 Pa. Code § 491a.8, that all matters, except for a hearing under §441a.7, will be assigned to OHA (the Office of Hearings and Appeals). In this particular matter, the Director of Hearings and Appeals has been assigned as the Presiding Officer.

This is also consistent with the general Administrative Law found at 1 Pa. Code § 35.187 and § 35.114.

4. An Order was issued by the Director of Hearings and Appeals on June 18, 2010 setting Friday July 30, 2010 as the deadline for completion of all discovery. Other time frames for responses, among other things, were also included in this Order. This Order addressed the disposition of a procedural pre-hearing matter.

5. On June 22, 2010, a document entitled "EMERGENCY PETITION IN THE NATURE OF AN APPEAL OF THE ORDER DATED JUNE 18, 2010, ISSUED BY THE DIRECTOR OF HEARINGS AND APPEALS DIRECTING THAT DISCOVERY IN THE WITHIN PROCEEDINGS BE COMPLETED BY THE CLOSE OF BUSINESS FRIDAY JULY 30, 2010; FOR AN EXTENSION OF TIME WITHIN WHICH ALL DISCOVERY MUST BE COMPLETED IN THE WITHIN PROCEEDINGS UNTIL OCTOBER 31, 2010; SCHEDULING THE COMMENCMENT OF THE HEARINGS IN THE WITHIN PROCEEDINGS FOR NOVEMBER 2010; AND SEEKING CERTIFICATION OF ORDERS AND A STAY OF PROCEEDINGS" was filed by PEDP.

6. PEDP's appeal of the June 18, 2010 Discovery Order issued by the Director of Hearings and Appeals, acting as the Presiding Officer, appears to be taken in accordance with 1 Pa. Code § 35.20. (*See* Petition at paragraph 30). However, this General Rule is not applicable in this instance. The applicable rule is a Board Regulation found at 58 Pa. Code § 491a.7(f) which states that

"rulings of a presiding officer may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the Board is necessary."

7. A presiding office is authorized to rule on motions prior to the commencement of a hearing when an immediate ruling is essential in order to proceed to the hearing. 1 Pa. Code § 35.180(a). In this instance, PEDP requested a discovery conference, one was conducted by the Presiding Officer and a discovery Order was issued in order to move this matter toward a hearing.

8. In light of the Board's regulations authorizing the Presiding Officer to rule on PEDP's discovery conference request and dispose of procedural matters, and the prohibition against appealing Presiding Officer's Orders except in extraordinary circumstances, the request to appeal and/or overrule the Order dated June 18, 2010 is **DENIED**.

9. Furthermore, discovery is not automatic in most administrative proceedings in the Commonwealth. *See Eastern Pennsylvania Psychiatric Institute, Department of Public Welfare v. Russell*, 465 A.2d 1313 (Pa. Cmwlth. 1983) (employees' contention that they were entitled to a broader form of discovery has not been substantiated by any case law suggesting that such a right exists in administrative hearings. In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process rights occurred.)

10. The Board's regulations do allow for the opportunity to conduct some discover, however, the discretion as to whether or not discovery should be

granted, and to what degree, lies with the Presiding Officer when discovery will "facilitate an efficient and expeditious hearing process, not unduly prejudice and burden the responding party and as may be required in the interests of justice." 58 Pa. Code § 493a.11(a)(1).

11. The Presiding Officer has determined that there is adequate time for the parties to conduct discovery before the July 30, 2010 deadline for completion of all discovery.

12. Therefore, the request for an extension of time to complete discovery until October 31, 2010 is **DENIED**.

13. PEDP's request to schedule the hearing on the matter for November 2010 is **DENIED** at this time. A Hearing Notice will be sent to all parties at some time in the future setting the date, time and place for the hearing on this matter.

14. Finally, the Presiding Officer will not refer this matter to the Board for its consideration because the Presiding Officer does not believe that this presents an "extraordinary circumstance" where prompt decision by the Board is necessary. *See* 58 Pa. Code § 491a.7(f). Therefore, PEDP's request seeking certification of Orders and for a stay of the proceedings is **DENIED**

Linda S. Lloyd
Director of Hearings and Appeals

F

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Complaint for Revocation of	:	**Docket # 1408-2010**
Philadelphia Entertainment and	:	**Related Dockets #1170-2009**
Development Partners, L.P. d/b/a	:	**#1464-2010**
Foxwoods Casino Philadelphia	:	
Slot Machine License 1367	:	
	:	

ORDER

And now, this 15th day of July, 2010, the following is **ORDERED**: The relief requested in the "Motion for the Issuance of a Subpoena to Produce Documents or Things for Discovery Directed to the Pennsylvania Gaming Control Board" filed by Philadelphia Entertainment and Development Partners, L.P. ("PEDP") on July 14, 2010[1], is **DENIED** based upon the reasons as set forth below.

1. On April 29, 2010, the Board's Office of Enforcement Counsel filed a Complaint seeking revocation of the Slot Machine License of Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia, listing five (5) Counts as follows: Count I – Failure to Comply with Board Orders of September 1, 2009 and March 3, 2010; Count II – Failure to Comply with Statement of Conditions; Count III – Inability to have a Minimum of 1,500 Slot Machines Available for Play by May 29, 2011; and Count IV – Failure to Maintain Suitability.

[1] PEDP's Motion was served upon OEC Counsel on July 12, 2010 and electronically submitted to the Board's Clerk late in the day on July 13, 2010.

2. On or about June 18, 2010, PEDP served the Office of Enforcement Counsel with a First Set of Interrogatories numbering twenty-nine (29) questions, some with numerous sub-parts, and a First Set of Requests for the Production of Documents numbering twenty-seven (27) requests.

3. On July 2, 2010, Dale Miller, Deputy Chief Enforcement Counsel served PEDP's counsel with responses to both the Interrogatories and the Request for Documents.

4. Discovery is not automatic in most administrative proceedings in the Commonwealth. *See Eastern Pennsylvania Psychiatric Institute, Department of Public Welfare v. Russell*, 465 A.2d 1313 (Pa. Cmwlth. 1983) (employees' contention that they were entitled to a broader form of discovery has not been substantiated by any case law suggesting that such a right exists in administrative hearings. In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process rights occurred.)

5. However, the Board's regulations and the General Rules of Administrative Practice do allow for the opportunity to conduct limited discovery. The discretion as to whether or not discovery should be granted, and to what degree, lies with the Presiding Officer as "the presiding officer may grant any requests for discovery which serve to facilitate an efficient and expeditious hearing process, not unduly prejudice and burden the responding party and as may be required in the interests of justice." 58 Pa. Code § 493a.11(a)(1).

6. The Board's regulations provide that the only information that PEDP is entitled to during discovery are the name and address of any witness who may be called to testify on behalf of the Office of Enforcement Counsel and all documents or other materials in the possession or control of the Office of Enforcement Counsel which it reasonably expects will be introduced into evidence, with a continuing duty to update this information. *See* 58 Pa. Code §493a.11(b).

7. Any confidential information furnished to or obtained by the Board or the Bureau from any source will not be discoverable. *See* 58 Pa. Code §493a.11(d).

8. The rules governing subpoena requests are found at 1 Pa. Code § 35.142. The presiding officer has the authority to determine the relevancy and materiality of the evidence sought in a subpoena request and to issue such subpoenas in accordance with such determination.

9. In this instance the documents sought by PEDP are not relevant or material to the Complaint pending before the Board to revoke PEDP's slot machine license and many of the documents requested are confidential documents protected by the Pennsylvania Race Horse Development and Gaming Act ("Act") related to third parties not involved in this matter.

10. Any documents regarding PITG and the change of control or ownership and any documents related to suitability investigations of other license holders are not relevant to these proceedings because: 1) PEDP has not filed for a change of control and a change of control is not at issue in this matter seeking

revocation of PEDP's slot machine license; 2) these documents are third party documents and are confidential pursuant to the Act; and 3) any suitability investigation of another license holder, if any such documents exist, are not relevant or material to the Complaint for Revocation at issue here and are confidential documents protected by the Act.

11. Any documents the Board may have, if there are any such documents, related to the proposed Wynn deal are not relevant in this matter as the deal was not completed and the specifics of the Wynn transaction are not the subject of the Complaint to revoke PEDP's slot machine license. The only relevancy the proposed Wynn transaction has to this matter is that it was not completed.

12. Any policies, guidelines, etc., if any such documents exist, are not relevant or material to this matter. The Complaint filed by the Office of Enforcement Counsel on April 29, 2010 clearly sets forth the reasons why OEC is seeking revocation of PEDP's slot machine license, and the Act and the Board's regulations clearly set forth the standards by which the Board determines suitability of a license holder.

13. OEC has responded to the request regarding any communications between BIE/OEC and the Board regarding commencement of revocation proceedings by stating in its Answers to Interrogatories and Document Requests served on PEDP on July 2, 2010, that no such documents exist as BIE/OEC does not carry on ex parte communications with the Board regarding the commencement of revocation proceedings in accordance with the law set forth in *Commonwealth v. Lyness*.

14. OEC has responded to the request regarding documents related to the claims and defenses at issue in the Complaint in its Answers to the Interrogatories and Document Requests served on PEDP on July 2, 2001 and by providing to PEDP all documents it reasonably expects to proffer as evidence during the hearing process. OEC is obligated to and has also indicated that it will supplement these documents with any other documents that it may decide will be used during the course of the hearing.

15. Any documents the Board may have, if such documents exist, regarding any entities that may have expressed an interest in PEDP's license are not relevant or material to the allegations set forth in the Complaint nor are they relevant or material to any defense of the allegations that PEDP may set forth during the hearing process. Any interest by another entity in PEDP's license, if such interest exists, is not listed as a reason in the Complaint for revocation of PEDP's slot machine license.

THEREFORE, a subpoena for documents will not be issued as requested by PEDP.

Linda S. Lloyd
Director of Hearings and Appeals

G

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Complaint for Revocation of	:	**Docket # 1408-2010**
Philadelphia Entertainment and	:	**Related Dockets #1170-2009**
Development Partners, L.P. d/b/a	:	**#1464-2010**
Foxwoods Casino Philadelphia	:	
Slot Machine License 1367	:	
	:	

ORDER

And now, this 15th day of July, 2010, the following is **ORDERED**: The relief requested in the "Motion to Overrule Objections and Compel Responses to First Set of Interrogatories and First Set of Requests for Production Directed to Complainant" filed by Philadelphia Entertainment and Development Partners, L.P. ("PEDP") on July 13, 2010[1], is **DENIED** based upon the reasons as set forth below.

1. On April 29, 2010, the Board's Office of Enforcement Counsel filed a Complaint seeking revocation of the Slot Machine License of Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia, listing five (5) Counts as follows: Count I – Failure to Comply with Board Orders of September 1, 2009 and March 3, 2010; Count II – Failure to Comply with Statement of Conditions; Count III – Inability to have a Minimum of 1,500 Slot Machines Available for Play by May 29, 2011; and Count IV – Failure to Maintain Suitability.

[1] PEDP's Motion was served upon OEC Counsel on July 12, 2010 and electronically submitted to the Board's Clerk late in the day on July 12, 2010.

2. On or about June 18, 2010, PEDP served the Office of Enforcement Counsel ("OEC") with a First Set of Interrogatories numbering twenty-nine (29) questions, some with numerous sub-parts, and a First Set of Requests for the Production of Documents numbering twenty-seven (27) requests.

3. On July 2, 2010, Dale Miller, Deputy Chief Enforcement Counsel served PEDP's counsel with responses to both the Interrogatories and the Request for Documents.

4. Discovery is not automatic in most administrative proceedings in the Commonwealth. *See Eastern Pennsylvania Psychiatric Institute, Department of Public Welfare v. Russell*, 465 A.2d 1313 (Pa. Cmwlth. 1983) (employees' contention that they were entitled to a broader form of discovery has not been substantiated by any case law suggesting that such a right exists in administrative hearings. In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process rights occurred.)

5. However, the Board's regulations and the General Rules of Administrative Practice do allow for the opportunity to conduct limited discovery. The discretion as to whether or not discovery should be granted, and to what degree, lies with the Presiding Officer as "the presiding officer may grant any requests for discovery which serve to facilitate an efficient and expeditious hearing process, not unduly prejudice and burden the responding party and as may be required in the interests of justice." 58 Pa. Code § 493a.11(a)(1).

6. Any confidential information furnished to or obtained by the Board or the Bureau from any source will not be discoverable. *See* 58 Pa. Code §493a.11(d).

7. In the discretion of the presiding officer, it has been determined that in this instance the interrogatories posed by PEDP and the document production requests made that have been objected to by OEC are not relevant or material to the Complaint pending before the Board to revoke PEDP's slot machine license, that many of the documents requested are confidential documents protected by the Pennsylvania Race Horse Development and Gaming Act ("Act') as they involve third parties that are not participants in this matter and in some instances the requests are overly broad or vague and the ordering of the production of responses would not serve to facilitate an efficient and expeditions hearing process.

8. Interrogatories or documents regarding PITG and the change of control or ownership and/or related suitability investigations of other license holders are not relevant to these proceedings because: 1) PEDP has not filed for a change of control and a change of control is not at issue in this matter seeking revocation of PEDP's slot machine license; 2) these documents are third party documents and are confidential pursuant to the Act; and 3) any suitability investigation of another license holder, if any has taken place, are not relevant or material to the Complaint for Revocation at issue here and are confidential documents protected by the Act.

9. Any questions about or documents related to the proposed Wynn deal are not relevant in this matter as the deal was not completed and the specifics of the Wynn transaction are not the subject of the Complaint to revoke PEDP's slot machine license. The only relevancy the proposed Wynn transaction has to this matter is that it was not completed.

10. Interrogatories about any policies, guidelines, etc., and the request for such documents, if any such documents exist, are not relevant or material to this matter. The Complaint filed by the OEC on April 29, 2010 clearly sets forth the reasons why OEC is seeking revocation of PEDP's slot machine license, and the Act and the Board's regulations clearly set forth the standards by which the Board determines suitability of a license holder.

11. OEC has responded to the request regarding documents related to the claims and defenses at issue in the Complaint in its Answers to the Interrogatories and Document Requests served on PEDP on July 2, 2001 and by providing to PEDP all documents it reasonably expects to proffer as evidence during the hearing process.

12. Interrogatories or any documents regarding any entities that may have expressed an interest in PEDP's license are not relevant or material to the allegations set forth in the Complaint nor are they relevant or material to any defense of the allegations that PEDP may set forth during the hearing process. Any interest by another entity in PEDP's license, if such interest exists, is not listed as a reason in the Complaint for revocation of PEDP's slot machine license.

13. Interrogatories and document requests related to disappointed applicant Riverwalk are not relevant to the Complaint for revocation and most are confidential in nature and protected by the Act.

14. The Board's regulations provide that the only information that PEDP is entitled to during discovery from OEC are the name and address of any witness who may be called to testify on behalf of the OEC and all documents or other material in the possession or control of the OEC which it reasonably expects will be introduced into evidence, with a continuing duty to update this information. *See* 58 Pa. Code §493a.11(b).

15. OEC's responses to PEDP's Interrogatories and Document Requests do provide a list of potential witnesses and their addresses and OEC has indicated in its responses that the documents it intends to use during the course of the hearing have been provided to PEDP and will be supplemented if other documents will be needed at the hearing.

THEREFORE, PEDP's request to compel OEC to provide answers to the objected to interrogatories and document requests is **DENIED**.

Linda S. Lloyd
Director of Hearings and Appeals

H

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Complaint for Revocation of	:	**Docket # 1408-2010**
Philadelphia Entertainment and	:	**Related Dockets #1170-2009**
Development Partners, L.P. d/b/a	:	**#1464-2010**
Foxwoods Casino Philadelphia	:	
Slot Machine License 1367	:	
	:	
PEDP Motion for Depositions	:	
and Accompanying Subpoenas	:	

DISCOVERY ORDER

And now, this 28th day of July, 2010, the following is **ORDERED**: The relief requested in the "Motion for Depositions and Accompanying Subpoenas" filed by Philadelphia Entertainment and Development Partners, L.P. ("PEDP") on July 22, 2010, is **DENIED** based upon the reasons as set forth below.

1. On April 29, 2010, the Board's Office of Enforcement Counsel filed a Complaint seeking revocation of the Slot Machine License of Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia, listing five (5) Counts as follows: Count I – Failure to Comply with Board Orders of September 1, 2009 and March 3, 2010; Count II – Failure to Comply with Statement of Conditions; Count III – Inability to have a Minimum of 1,500 Slot Machines Available for Play by May 29, 2011; and Count IV – Failure to Maintain Suitability.

2. Discovery is not automatic in most administrative proceedings in the Commonwealth. *See Eastern Pennsylvania Psychiatric Institute, Department*

of Public Welfare v. Russell, 465 A.2d 1313 (Pa. Cmwlth. 1983) (employees' contention that they were entitled to a broader form of discovery has not been substantiated by any case law suggesting that such a right exists in administrative hearings. In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process rights occurred.)

3. The Board's regulations provide that the only information that PEDP is entitled to during discovery are the name and address of any witness who may be called to testify on behalf of the Office of Enforcement Counsel and all documents or other materials in the possession or control of the Office of Enforcement Counsel which it reasonably expects will be introduced into evidence, with a continuing duty to update this information. *See* 58 Pa. Code §493a.11(b).

4. However, the Board's regulations and the General Rules of Administrative Practice do allow for the opportunity to conduct limited discovery. The discretion as to whether or not discovery should be granted, and to what degree, lies with the Presiding Officer as "the presiding officer may grant any requests for discovery which serve to facilitate an efficient and expeditious hearing process, not unduly prejudice and burden the responding party and as may be required in the interests of justice." 58 Pa. Code § 493a.11(a)(1).

5. Any confidential information furnished to or obtained by the Board or the Bureau from any source will not be discoverable. *See* 58 Pa. Code §493a.11(d).

6. In the discretion of the Presiding Officer, it has been determined that the depositions and subpoenas for depositions requested by PEDP in its Motion seek information previously determined by the Presiding Officer, in Orders dated July 19, 2010, to be not relevant or material to this matter or would reveal confidential information related to third parties that is protected by the Pennsylvania Race Horse Development and Gaming Act.

THEREFORE, PEDP's request to compel depositions and the issuance of subpoenas is **DENIED**.

Linda S. Lloyd /AB
Linda S. Lloyd
Director of Hearings and Appeals

I

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Complaint for Revocation of	:	**Docket # 1408-2010**
Philadelphia Entertainment and	:	**Related Dockets #1170-2009**
Development Partners, L.P. d/b/a	:	**#1464-2010**
Foxwoods Casino Philadelphia	:	
Slot Machine License 1367	:	
	:	

ORDER

And now, this 10th day of August, 2010, the following is **ORDERED**:

1. On August 9, 2010, the Presiding Officer Conducted a Discovery Conference with the Parties in the above captioned matter to hear argument concerning the Petitions, Motions and Appeals related to discovery filed by Philadelphia Entertainment and Development Partners, L.P. (PEDP) in this matter.

2. The parties presented arguments addressing filings that have been previously addressed by the Presiding Officer in Orders dated July 15, 2010 and July 28, 2010, and filings that are currently pending before the Presiding Officer.

3. This Order will now address all previous filings and pending filings, reaffirming Orders issued for previous filings and disposing of all current outstanding Petitions, Motions and Appeals filed by PEDP.

4. Due process in an administrative proceeding requires, at a minimum, notice and the opportunity to be heard. *Vaders v. Pennsylvania State Horse Racing Com'n*, 964 A.3d 56 (Pa. Cmwlth. Ct. 2009). In this instance, due process has been or will be satisfied in due course. PEDP has been provided notice in the

form of the Complaint filed by OEC on April 29, 2010 and PEDP will be provided the opportunity to be heard before the Board or appointed presiding officer at a time in the near future.

5. Discovery is not automatic in most administrative proceedings in the Commonwealth. *See Eastern Pennsylvania Psychiatric Institute, Department of Public Welfare v. Russell*, 465 A.2d 1313 (Pa. Cmwlth. 1983) (employees' contention that they were entitled to a broader form of discovery has not been substantiated by any case law suggesting that such a right exists in administrative hearings. In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process rights occurred.)

6. The Board's regulations provide that the only information that PEDP **is entitled to during discovery** are the names and addresses of any witness who may be called to testify on behalf of the OEC and all documents or other material in the possession or control of the OEC which it reasonably expects will be introduced into evidence, with a continuing duty to update this information. *See* 58 Pa. Code §493a.11(b).

7. However, the Board's regulations do allow for the opportunity to conduct other limited discovery. The discretion as to whether or not discovery should be granted, and to what degree, lies with the Presiding Officer as "the presiding officer may grant any requests for discovery which serve to facilitate an efficient and expeditious hearing process, not unduly prejudice

and burden the responding party and as may be required in the interests of justice." 58 Pa. Code § 493a.11(a)(1).

8. Any confidential information furnished to or obtained by the Board or the Bureau from any source will not be discoverable. *See* 58 Pa. Code §493a.11(d).

9. As stated previously, many of the documents PEDP requested in its discovery filings are documents related to third parties which were gathered during the course of investigations by the Board's Bureau of Investigations. This information is specifically protected by the Gaming Act as confidential at Section 1206(f) and cannot be released.

10. PEDP also requested the investigative files, its own and those related to other licensees/applicants. Again, this information is confidential and protected by the Act. Furthermore, case law holds that PEDP has no due process rights to investigative files. *See Starr v. State Board of Medicine*, 720 A.2d 183 (Pa. Cmwlth. Ct. 1998).

11. Finally, as stated in previous Orders the information that PEDP seeks in discovery such as documents related to PITG/Rivers Casino change of control, documents related to Wynn and the "Wynn Transaction" and standards, policies, procedures, guidelines outside of those set forth in the Act and Regulations that OEC/BIE may utilize in order to determine whether or not to bring a Complaint for Revocation are not relevant to the matters raised in the Complaint or responded to by PEDP in its Answer and/or are

confidential. Therefore, in the discretion of the Presiding Officer all requests for documents in PEDP's filings are again **DENIED**.

12. The one outstanding issue in the filings that has not been ruled upon by the Presiding Officer is the request of PEDP to depose Agents Dobbins and Morace.[1]

13. In light of the fact that these two agents appear on the Office of Enforcement Counsel's witness list for hearing, the Presiding Officer determines that OEC will present for deposition Agents Dobbins and Morace.

14. If PEDP chooses to conduct these depositions, Agents Dobbins and Morace will be made available by OEC for deposition before the close of business Wednesday August 18, 2010.

15. If PEDP chooses to conduct these depositions, OEC may raise objections regarding confidential information, as well as any other objection, during the course of the deposition. Such objections shall be considered a motion for protective order and no response will be required of the Deponent. The objections shall be preserved until the conclusion of the deposition and at such time, if the parties so desire, they may contact the Presiding Officer so that an *in camera* review of the questions can be made to determine whether they would lead to the disclosure of information which is or has already been determined to be confidential. Confidential information would include, but may not be limited to, information gathered during the course of investigation concerning third parties; information gathered during the course of

[1] The Presiding Officer had previously denied PEDP's request to depose Chief Enforcement Counsel Cyrus Pitre and an unnamed Western Region Agent. Those denials remain in effect.

investigation pertaining to PEDP if not available to PEDP by other avenues; and standards, processes and procedures utilized in investigations by BIE/OEC that have already been deemed to be confidential and not relevant.

THEREFORE, the Presiding Officer's previously filed Orders of July 15, 2010 and July 28, 2010 remain in effect. PEDP's Second Motion for Depositions and Accompanying Subpoenas filed on July 29, 2010, is **GRANTED in part** with respect to Agents Dobbins and Morace and within the parameters set forth above. PEDP's Petition in the Nature of a Motion filed on August 5, 2010 is **DENIED**.

Linda S. Lloyd
Director of Hearings and Appeals

J

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

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

ORDER

AND NOW, this 11th day of August 2010, for the reasons outlined in the Adjudication issued herewith, the Pennsylvania Gaming Control Board ("Board') hereby **DENIES** Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") July 7, 2010 "Petition Pursuant to 1 Pa. Code § 35.20 in the Nature of Motion for Reconsideration of the Order dated June 30, 2010 Issued by the Director of Hearings and Appeals which, *inter alia*, Denied Respondent's Emergency Petition, dated June 22, 2010, Requesting that all Discovery in the Within Proceedings be Completed by October 31, 2010; and Scheduling the Commencement of Hearings in the Within Proceedings for November 2010."

Notwithstanding this denial, based upon the argument of counsel at the July 29, 2010 hearing in this matter, the Board directs the Director of the Office of Hearings and Appeals, as the Presiding Officer in this matter, to reconsider the discovery deadline imposed upon the parties in this matter as indicated in Paragraph One of her Discovery Order dated June 18, 2010.

Additionally, the Board reminds the parties that it believes Sections 491a.7(b)(1)(7) and (f) of the Board's duly promulgated regulations are directly on point in this matter and that, pursuant thereto, so long as a proceeding is before the Board's

Office of Hearings and Appeals, the Presiding Officer in that Office has the authority to regulate the course of hearings, including the scheduling of proceedings and disposition of procedural matters. Moreover, while the matter is before the Office of Hearings and Appeals, rulings of the Presiding Officer may not be appealed to the Board absent extraordinary circumstances when a prompt decision by the Board is necessary ***and*** the matter is referred to the Board by the Presiding Officer

Dated: 8/11/10

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

K

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

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

ADJUDICATION

The matter before the Pennsylvania Gaming Control Board ("PGCB" or "Board") for disposition is Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") July 7, 2010 petition entitled:

> Petition Pursuant to 1 Pa. Code § 35.20 in the Nature of Motion for Reconsideration of the Order dated June 30, 2010 Issued by the Director of Hearings and Appeals which, *inter alia*, Denied Respondent's Emergency Petition, dated June 22, 2010, Requesting that all Discovery in the Within Proceedings be Completed by October 31, 2010; and Scheduling the Commencement of Hearings in the Within Proceedings for November 2010 ("Motion for Reconsideration").

In the Motion for Reconsideration, Foxwoods primarily contends that, pursuant to 1 Pa. Code § 35.20, the Board should overrule the Director of Hearings and Appeals' June 30, 2010 Order denying its Emergency Petition. In doing so, Foxwoods asks the Board to modify the Director of Hearings and Appeals' June 18, 2010 Discovery Order and set a new discovery deadline of October 31, 2010 and a hearing date sometime in November 2010; or, in the alternative, Foxwoods asks the Board to certify the matter for appeal to the Commonwealth Court.

After a review of the relevant filings and consideration of the argument provided at the Board's July 29, 2010 Public Hearing on this matter, as well as applicable law in this area, the Board makes the following findings:

Findings of Fact

1. Foxwoods was one of five applicants for two Category 2 Slot Machine Licenses in the City of Philadelphia, the others being HSP Gaming, L.P.; Keystone Redevelopment Partners, L.P.; Pinnacle Entertainment, Inc.; and Riverwalk Casino, L.P.

2. The Board awarded Foxwoods one of the two licenses on December 20, 2006. The Board issued its Adjudication and Order memorializing this decision on February 1, 2007.

3. In its February 1, 2007 Adjudication and Order, the Board noted that, during the application process, Foxwoods projected that it would realize $338 million in annual revenue and provide 955 jobs once its facility was fully operational.

4. Because of the delay in Foxwoods commencing operations, it has not contributed to property tax relief, wage tax relief, job creation and other economic benefits as have the nine facilities currently in operation.

5. Although the Board did not require Foxwoods to submit the $50 million licensing fee prior to obtaining the necessary permits it needed to begin construction of its facility, Foxwoods submitted the fee on October 17, 2007.

6. The Board subjects the awarding of all slot machine licenses to the licensees signing a Statement of Conditions that provides, *inter alia*, that licensure is a privilege; requiring the licensee to at all times comply with any and all provisions of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §1101, et. seq. ("Gaming Act") and any rules, regulations, technical standards or Board orders in

effect at the date of signing or later amended or promulgated by the Board; and to maintain the suitability required to hold a license under the Gaming Act.

7. Foxwoods executed its Statement of Conditions on July 11, 2007.

8. The Board issued Foxwoods' slot machine license ("License") on May 29, 2008. Pursuant to Section 1210(a) of the Gaming Act, 4 Pa.C.S. § 1210(a), Foxwoods had one year from that date by which to make 1,500 slot machines available for play at its facility, unless granted an extension of time, by the Board, upon application and for good cause shown.

9. On May 22, 2009, seven days prior to the Section 1210(a) deadline, Foxwoods, which had not (and has not) yet broken ground to commence construction on the project approved by the Board, 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 in developing its facility (i.e. litigation; community opposition; and obstacles from Philadelphia City Council); and that these facts established good cause for the Board to grant it additional time to develop its facility.

10. After an August 28, 2009 Public Hearing, the Board announced its decision to conditionally grant Foxwoods' Petition for Extension of Time, giving it until May 29, 2011 to begin operations with at least 1,500 slot machines. The Board memorialized this decision in an Adjudication and Order dated September 1, 2009.

11. The Board conditioned its grant of Foxwoods' Petition to Extend Time on nine conditions outlined in the September 1, 2009 Order including benchmark reporting and documentary submission deadlines that would indicate that the project was on

track and moving forward in a manner consistent with the intent of the Gaming Act, as well as the representations of Foxwoods to the Board.

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

> 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.

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

> 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.

14. The documents due pursuant to Conditions 5 and 6 of the Board's Order of September 1, 2009 were to be submitted to BIE on or before December 1, 2009.

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

16. After a January 27, 2010 Public Hearing, the Board announced its decision to deny Foxwoods' Motion for Extension of Time to Comply with Conditions 5 and 6 of the Board's September 1, 2009 Order; imposed a daily sanction until Foxwoods complied with the Board's September 1, 2009 Order; and issued a Rule to Show Cause upon Foxwoods as to why the Board should not revoke its slot machine license. The Board memorialized this decision in Adjudication and Order dated February 10, 2010.

17. The Board subsequently held a hearing regarding the Rule to Show Cause on March 3, 2010 after which the Board, dissatisfied with Foxwoods' progress, entered an order continuing the daily sanction and imposing a new deadline (April 26, 2010) by which

Foxwoods was to come into compliance with the Board's Order of September 1, 2009.

18. At the Board's April 29, 2010 Public Meeting, Foxwoods and the Office of Enforcement Counsel ("OEC") presented a Consent Agreement that would have settled the proceedings related to Foxwoods' alleged noncompliance with the Board's September 1, 2010 Order and further extended the deadlines by which Foxwoods had to come into compliance with the Board's Order of September 1, 2009.

19. After a Board vote, the Board announced its decision to reject the proposed Consent Agreement. The Board also continued the daily sanctions earlier imposed upon Foxwoods.

20. After the proposed Consent Agreement was rejected, OEC filed a Complaint for Revocation of Foxwoods' Slot Machine License ("Complaint for Revocation") in which it alleges, generally, that Foxwoods:

    a. Failed to comply with Board Orders;

    b. Failed to comply with its Statement of Conditions;

    c. Is unable to be operational by the Board imposed deadline of May 29, 2011; and

    d. Failed to maintain its suitability for licensure.

21. On May 15, 2010, Foxwoods filed a Motion for Extension of Time to Answer OEC's Complaint for Revocation. The Director of the Office of Hearings and Appeals ("OHA"), acting as the Presiding Officer in this matter, denied this Motion on May 17, 2010. On May 19, 2010, Foxwoods appealed this decision, later withdrawing said appeal on June 2, 1010 after timely filing an Answer to the Complaint for Revocation.

22. In addition to its Answer to the Complaint for Revocation, on June 1, 2010, Foxwoods filed the following documents:

a. A Motion for a Discovery Conference;

b. A Motion for Extension of Time to Comply with the Board's Order of September 1, 2009[1]; and

c. A Petition to Toll or Otherwise Extend Date by which to File a Petition to Conduct Table Games[2].

23. As requested by Foxwoods, on June 11, 2010, the Director of OHA issued an order scheduling a June 17, 2010 Discovery Conference.

24. During the June 17, 2010 Discovery Conference, the Director of OHA indicated to the parties that the discovery deadline in the matter of OEC's Complaint for Revocation would be July 30, 2010.

25. The Director of OHA memorialized her decision regarding the discovery deadline in an Order dated June 18, 2010.

26. On June 22, 2010, Foxwoods attempted to appeal, to the Board, the Director of OHA's Discovery Order of June 18, 2010 pursuant to a filing Foxwoods entitled:

> Emergency Petition in the Nature of an Appeal of the Order Dated June 18, 2010 Issued By the Director of Hearings and Appeals Directing that All Discovery in the Within Proceedings Be Completed by the Close of Business on Friday, July 30, 2010; for an Extension of the Time Within Which All Discovery Must Be Completed in the Within Proceedings to October 31, 2010; Scheduling the Commencement of Hearings in the Within Proceedings for November, 2010; and Seeking Certification of Orders and a Stay of Proceedings. ("Appeal")

27. In the Appeal, Foxwoods argued that the Board should review the Director of OHA's June 18, 2010 Discovery Order pursuant to 1 Pa. Code § 35.20 because it was

[1] This Motion was consolidated with OEC's Complaint for Revocation, docketed at 1408-2010, by an Order issued by the Director of Hearings and Appeals dated July 1, 2010.
[2] See Footnote 1, *supra*.

improper, arbitrary and capricious and violated its due process rights. Specifically, Foxwoods contended that the Director of OHA had no justification to establish a deadline so near in time to the date of the conference and that because the underlying matter was one of first impression for the Board (i.e. revocation of a slot machine license) and involved an expensive item (i.e. Foxwoods' License), the parties needed more time to conduct discovery.

28. On June 30, 2010, the Director, still acting as Presiding Officer in this matter, issued an Order denying the Appeal, finding that 1 Pa. Code § 35.20 was superseded by Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), and that that Section prohibited appeals of rulings by a presiding officer during the course of a hearing or conference unless the question was certified to the Board by the presiding officer.

29. On July 7, 2010, Foxwoods filed the current Motion for Reconsideration of the Director of OHA's aforementioned Orders of June 18, 2010 and June 30, 2010.

30. The Board listed this matter for consideration at a July 29, 2010 Public Hearing and Public Meeting.

31. On July 29, 2010, immediately prior to its Public Meeting, at a Public Hearing, the Board heard argument on the matter from both Foxwoods and OEC.

32. At the time of its July 29, 2010 Public Meeting, the Board announced its decision to deny Foxwoods' Motion for Reconsideration but directed that the Director of OHA, as Presiding Officer, review the discovery deadline set in her June 18, 2010 Order in light of the arguments and statements made by counsel during the Public Hearing.

Conclusions of Law

1. The Board, pursuant to Section 1202(a)(1) of the Gaming Act, 4 Pa.C.S. § 1202(a)(1), has jurisdiction over Foxwoods and the subject matter of the instant proceeding.

2. Unless the Board hears a matter directly, all matters . . . will be assigned to the Office of Hearings and Appeals to be heard by a presiding officer. 58 Pa. Code § 491a.8(a).

3. A presiding officer can be a member of the Board or another person designated by the Board. 58 Pa. Code §491a.2.

4. The presiding officer has the authority to regulate the course of hearings . . . and dispose of procedural matters. 58 Pa. Code § 491a.7(b)(1).[3]

5. Setting discovery deadlines is a procedural matter within the discretion of the presiding officer. 58 Pa. Code §493.11(a)(1).[4]

6. Discovery in administrative proceedings is not automatic. *St. Joe's Minerals v. PHRC*, 465 A.2d 1313 (Pa. Cmwlth. Ct. 1983).

7. Under the Board's regulations, the only discovery a party is absolutely entitled to are the names of any witnesses who may be called to testify and all documents or other material which the responding party reasonably expects to put into evidence. 58 Pa. Code § 493a.11(b).

8. Rulings of a presiding officer may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the

[3] This is consistent with general administrative law practice in the Commonwealth. *See, for example*, 1 Pa. Code § 35.187 and § 35.114.

[4] *See, also*, 1 Pa. Code §§ 35.113 and 35.117 (under the Administrative Code, a presiding officer can even limit the number of witnesses).

Board is necessary and the presiding officer refers the matter to the Board. 58 Pa. Code § 491a.7(f). [5]

9. An appeal of an order memorializing a ruling of a presiding officer made during the course of a discovery conference is subject to 58 Pa. Code § 491a.7(f).

10. An order setting a discovery deadline is not an extraordinary circumstance necessitating a prompt decision by the Board which a presiding officer should refer to the Board.

11. Regulations are to be construed in accordance with the Pennsylvania Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.* 1 Pa. Code § 1.7.

12. A final order, appealable to an appellate court as a matter of right, must (a) dispose of all claims and of all parties; (b) be expressly defined as a final order by statute; or (c) have the trial court or government unit make an express determination that an immediate appeal would facilitate resolution of the entire case. Pa.R.A.P. No. 341.

13. Neither an order setting a discovery deadline, nor an order by a presiding officer denying an immediate appeal of an order setting a discovery deadline, are final orders under the test established by Pa.R.A.P. No. 341 and are, therefore, interlocutory orders.

14. An interlocutory order is only appealable to an appellate court if it involves a controlling question of law as to which there is substantial ground for difference of opinion and for which an immediate appeal may materially advance the ultimate termination of the matter. Pa.R.A.P. No. 1312.

15. Neither an order setting a discovery deadline, nor an order by a presiding officer denying an immediate appeal of an order setting a discovery deadline are orders

[5] This is consistent with general administrative law in the Commonwealth. *See* 1 Pa. Code §§ 35.190 and 35.180(a).

involving controlling questions of law as to which there is substantial ground for difference of opinion, the resolution of which would materially advance the ultimate termination of the underlying matter.

Discussion

In the Motion for Reconsideration presently before the Board, Foxwoods essentially asks for relief on two levels:

First, Foxwoods requests that the Board consider the matter pursuant to 1 Pa. Code §35.20, a provision of the Pennsylvania Administrative Code which provides that a decision of a subordinate officer of a state agency can be appealed to an agency head. As a result of that provision, Foxwoods argues that the June 30, 2010 Order of the Director of OHA, denying its Appeal (to the Board seeking an extension of the discovery deadline established by the Director of OHA's June 18, 2010 Discovery Order) was improperly decided by the Presiding Officer and should have been decided by the Board.[6] In short, Foxwoods feels that it is entitled to immediately appeal to the Board, an order of a Presiding Officer setting a discovery deadline and, related thereto, it seeks a determination that it was inappropriate for the Presiding Officer to deny such an appeal of the Presiding Officer's decision on a procedural matter (i.e. discovery deadlines).

Second, Foxwoods requests that the Board rescind the Presiding Officer's June 18, 2010 Discovery Order and enter an order extending the discovery deadline.[7]

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[6] In the alternative, Foxwoods requested that the Board issue an order certifying the Director of OHA's June 30, 2010 Order denying Foxwoods' June 22, 2010 Appeal and the Director of OHA's June 18, 2010 Discovery Order as ripe for appeal as they both involve "controlling questions of law for which an immediate appeal would materially advance the ultimate termination of the matter," Pa.R.A.P. No. 1312.

[7] Here too, in the alternative, Foxwoods requests that the Board issue an Order certifying "(1) the Director's (of OHA) denial of [Foxwoods] Emergency Petition dated June 30, 2010 and (2) the [Director of OHA's] June 18, 2010 [Discvoery] Order as Orders involving controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these Orders will materially advance the ultimate

For the reasons outlined below, The Board denies all of Foxwoods' requests.[8]

The Presiding Officer has the Authority to Regulate Hearings; Dispose of Procedural Matters, including Discovery Matters; and Dispose of Improper Appeals

The Director of OHA, acting as the Presiding Office in this matter, properly denied Foxwoods' June 22, 2010 Appeal of her June 18, 2010 Discovery Order as an improper appeal. Specifically, the Presiding Officer correctly concluded that Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), not 1 Pa. Code § 35.20, controlled her consideration of Foxwoods' Appeal; that her June 18, 2010 Discovery Order was made during the course of a hearing or conference; and that the matter was not extraordinary so as to warrant Board consideration thereof.

Foxwoods' Appeal of the Presiding Officer's June 18, 2010 Discovery Order was appropriately before the Presiding Officer and the Presiding Officer properly denied said Appeal. Here, Foxwoods does not challenge the Presiding Officer's authority to rule on discovery matters[9]. Instead, Foxwoods argues that 1 Pa. Code § 35.20, not 58 Pa. Code § 491a.7(f), controls consideration of its challenge of the Director of OHA's June 18, 2010 Discovery Order and that, under that provision, the Board, not the Presiding Officer herself, should have ruled on the Appeal.[10]

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termination of the matter." Foxwoods also requests that the Board enter a stay of all proceedings pending such an appeal.

[8] Notwithstanding this denial, the Board will direct the Presiding Officer to review the arguments of counsel made at the July 29, 2010 hearing on this matter and determine whether an extension of the discovery deadline established in the June 18, 2010 Order is warranted.

[9] Unless the Board hears a matter directly, Section 491a.8 of the Board's regulations, 58 Pa. Code § 491a.8, directs that the matter will be assigned to OHA to be heard by a presiding officer.

[10] During the July 29, 2010 Public Hearing on the instant matter, counsel for Foxwoods stated, "the hearing today which would decide whether she [Director of OHA] really had the authority to decide whether we should have had more time in the first place." In other words, counsel argued that the purpose of the hearing was for the Board to rule on whether the Director of OHA has the authority to rule on Foxwoods' June 22, 2010 Appeal in which they request an extension of the July 30, 2010 discovery deadline set by the Director of OHA in her June 18, 2010 Order.

Section 491a.7(b) of the Board's regulations, 58 Pa. Code § 491a.7(b), directs that a presiding officer has the authority to "regulate the course of hearings . . . and dispose of procedural matters" including discovery matters. Rulings made by the presiding officer pursuant to this authority "may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the Board is necessary," 58 Pa. Code § 491a.7(f). If the presiding officer finds that "extraordinary circumstances whe[re] a prompt decision by the Board is necessary" exists, he/she must then refer the matter to the Board for its consideration. 58 Pa. Code § 491a.7(f).

Comparatively, 1 Pa. Code § 35.20 provides, more generally, that "[a]ctions taken by a subordinate officer (of any state agency) under authority delegated by the agency head may be appealed to the agency head," 58 Pa. Code § 35.20.

Directly on point is authority found in Foxwoods' Motion for Reconsideration. Specifically, Foxwoods correctly states that regulations are to be construed in accordance with the Pennsylvania Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.*;1 Pa. Code § 1.7. Indeed, Section 1933 of the Statutory Construction Act provides:

> Whenever a general provision in a [regulation] shall be in conflict with a special provision in the same or another [regulation], the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision . . .

1 Pa.C.S. § 1933.

1 Pa. Code § 35.20 is clearly more general than Section 491a.7(f) of the Board's regulations. Specifically, Section 491a.7(f) provides "[r]ulings of presiding officers may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the Board is necessary [and the presiding officer] immediately refers

the matter to the Board for determination," 58 Pa. Code § 491a.7(f), whereas 1 Pa. Code § 35.20 seemingly permits appeals of agency staff actions irrespective of timing, substance or position within the agency. Because, in the context of this matter, the general 1 Pa. Code § 35.20 conflicts with the more specific 58 Pa. Code § 491a.7(f), pursuant to Section 1933 of the Statutory Construction Act, 1 Pa.C.S. § 1933, the more specific provision must prevail. Accordingly, the instant matter is controlled by Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), and not 1 Pa. Code § 35.20.

Here, the Presiding Officer, during a June 17, 2010 Discovery Conference, decided the deadline for discovery in the matter of OEC's Complaint for Revocation of Foxwoods' License. The Presiding Officer memorialized this decision in her Discovery Order of the very next day, June 18, 2010. Unhappy with the deadline, Foxwoods, citing 1 Pa. Code § 35.20, appealed this Discovery Order. Finding that the more specific 58 Pa. Code § 491a.7(f) applied over the general 1 Pa. Code § 35.20, the Presiding Officer concluded that Foxwoods' Appeal was an improper appeal and denied same. Because she did not refer Foxwoods' Appeal to the Board for consideration, the Presiding Officer impliedly also concluded that the matter did not involve "extraordinary circumstances whe[re] a prompt decision by the Board was necessary," 58 Pa. Code § 491a.7(f).

Because Section 491a.7(b) of the Board's regulations, 58 Pa. Code § 491a.7(b), permits a presiding officer to regulate the course of hearings and, because Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), prohibits appeals of such a ruling made by a presiding officer, the Director of OHA's June 30, 2010 denial of Foxwoods' Appeal was appropriate.

Foxwoods' Interpretation of 58 Pa. Code § 491a.7(f) is Flawed

The Presiding Officer properly denied Foxwoods' June 22, 2010 Appeal based on the prohibition of appeals under Section 491a.7(f) of the Board's regulations', 58 Pa. Code § 491a.7(f). Here, Foxwoods argues that the Presiding Officer misapplied Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f). Specifically, Foxwoods contends that the Presiding Officer's June 18, 2010 Discovery Order was not issued "**during** the course of a hearing or conference" but instead, **after** the conclusion of a hearing or conference and, therefore, Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), providing that rulings by presiding officers **during** hearings or conferences are not appealable, is inapplicable to these proceedings (emphasis added).

First, Foxwoods' contention that application of the phrase "during the course of a hearing or conference" does not apply to a discovery conferences is without merit. To exclude discovery conferences, absent the language in the Board's regulations, would make application of the provision arbitrary (i.e. uncertain as to what type of conferences to which the provision applies). Section 1922(2) of the Statutory Construction Act, 1 Pa.C.S. § 1922(2)[11], directs that "in ascertaining the intent of the [Board] in the enactment of the [regulations] it is presumed that the [Board] intends the entire [compliment of regulations] to be effective and certain." In other words, "a statute (or regulation) should, when possible, be construed to give effect to all of its provisions, and a particular section of a piece of [regulation] should (absent [agency] direction to the contrary) be construed as an integral part of the whole, and not as a separate portion with an independent meaning." *Crary Home v. Defrees*, 329 A.2d 874, 876 - 7 (Pa.Cmwlth. Ct. 1974) (internal citations omitted).

[11] As explained earlier, the Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.* applies to the construction of regulations. 1 Pa. Code § 1.7.

Section 491a.7 of the Board's regulations, 58 Pa. Code § 491a.7, in its entirety, provides:

> (a) When evidence is to be taken in a hearing, the Board or a presiding officer may conduct the hearing.
>
> (b) The Board and presiding officers shall have the power and authority to:
>
> > (1) Regulate the course of hearings, **including the scheduling thereof,** and the recessing, reconvening and the adjournment thereof, unless otherwise provided by the Board, as provided in § 494a.1 (a) (relating to generally).
> >
> > (2) Administer oaths and affirmations.
> >
> > **(3) Issue subpoenas.**
> >
> > (4) Rule upon offers of proof and receive evidence.
> >
> > **(5) Preside over or cause depositions to be taken.**
> >
> > **(6) Hold conferences before or during hearings.**
> >
> > **(7) Dispose of procedural matters,** but not before a proposed report, if any, to dispose of motions made during hearings to dismiss proceedings or other motions which involve final determination of proceedings has been submitted to the Board.
> >
> > (8) Certify any question to the Board for consideration and disposition, within the presiding officer's discretion, or upon direction of the Board.
> >
> > (9) Submit proposed reports or reports and recommendations in accordance with this subpart.
> >
> > (10) Take other action appropriate to the discharge of their duties as may be designated by the Board and authorized by the act.
>
> (c) Except as authorized by law and by this subpart, a presiding officer may not, in a proceeding, consult with a party on a fact in issue or issue of law unless notice and opportunity for parties to participate has been given.
>
> (d) Presiding officers will conduct fair and impartial hearings and maintain order. Disregard by parties or counsel of rulings of the presiding officer on matters of order and procedure will be noted on the record, and if the presiding officer deems necessary, it will be made the subject of a special written report to the Board.
>
> (e) If parties or counsel engage in disrespectful, disorderly or contumacious language or conduct in connection with any hearing, the presiding officer may immediately submit to the Board a report thereon, together with recommendations, and, in the presiding officer's discretion, suspend the hearing.
>
> (f) Rulings of presiding officers may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the Board is necessary. In this instance, the matter will be immediately referred by the presiding officer to the Board for determination.

> (1) An offer of proof made in connection with an objection to a ruling of the presiding officer rejecting or excluding oral testimony must be a statement of the substance of the evidence which counsel contends would be adduced by the testimony. If the rejected or excluded evidence is in documentary or written form, a copy of the evidence shall be marked for identification and shall constitute the offer of proof.
>
> (2) Unless the Board acts upon a question referred by a presiding officer for determination within 30 days, the referral will be deemed to have been denied.
>
> (g) This section supersedes 1 Pa. Code §§ 35.185--35.190 (relating to presiding officers).

58 Pa. Code § 491a.7 (emphasis added). Reading this regulatory provision, in its entirety, it is clear that the Board, in enacting this provision, intended the provisions therein to apply to pre-hearing matters and specifically, pre-hearing discovery matters (*see*, emphasized provisions *supra.*). Because Section 491a.7 of the Board's regulations, 58 Pa. Code § 491a.7, applies to pre-hearing discovery conferences, subsection (f) of that provision, 58 Pa. Code § 491a.7(f), must also apply to pre-hearing discovery conferences "absent [Board] direction to the contrary," *Crary Home v. Defrees, Id.*

Second, Foxwoods contends that 58 Pa. Code § 491a.7(f) is inapplicable in these proceedings because it seeks to appeal the Presiding Officer's Discovery Order issued the day after the Discovery Conference (although simply memorializing statements made at that conference) as it was not issued during the conference. This argument is absurd.

Section 1922(1) of the Statutory Construction Act, 1 Pa.C.S. § 1922(1) [12], directs that when reviewing regulatory language, "the [Board] does not intend a result that is absurd, impossible of execution or unreasonable." Moreover, as noted earlier, Section 1922(2) of the Statutory Construction Act, 1 Pa.C.S. § 1922(2), provides that "in ascertaining the intent of the

[12] As explained earlier, the Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.* applies to the construction of regulations. 1 Pa. Code § 1.7.

[Board] in the enactment of the [regulations] it is presumed that the [Board] intends the entire [compliment of regulations] to be effective and certain." In other words, "the [Board] cannot . . . be deemed to intend that language used in a [regulation] shall be superfluous and without import." *Com. v. Mack Bros. Motor Car Co.*, 59 A.2d 923, 925 (Pa. 1948).

Here, Foxwoods' suggestion that the prohibition against appeals of a presiding officer's rulings made during a conference or hearing (*see,* 58 Pa. Code § 491a.7(f)) does not apply so long as the appeal is taken after the conclusion of said conference or hearing is an absurd interpretation as it renders the provision meaningless. If, as Foxwoods argues, a party can appeal, without limitation, a ruling of a presiding officer so long as that appeal is filed after the conference or hearing at which said ruling was made, Section 491.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), can be bypassed without limitation. This result is not only absurd but would render the entire subsection impermissibly "superfluous and without import," 1 Pa.C.S. § 1922 and *Com. v. Mack Bros. Motor Car Co., Id.*

The Presiding Officer's Orders of June 18, 2010 and June 30, 2010 are Not Appropriate for Appeal to an Appellate Court

The Presiding Officer's June 18, 2010 and June 30, 2010 Orders, in turn, setting a discovery deadline and denying Foxwoods' appeal thereof, are neither final, appealable orders pursuant to Pa.R.A.P. No. 341; nor are they orders involving controlling questions of law to which there is substantial ground for difference of opinion, the immediate appeal of which would advance the ultimate termination of the matter. Pa.R.A.P. No. 1312.[13]

Pursuant to Pa.R.A.P. No. 341, absent certification of an order for appeal by the issuing authority, only "final orders" are subject to appeals. A "final order" is defined as an order that (a) disposes of all claims and of all parties; (b) is expressly defined as a final order by statute; or

[13] For virtually identical reasons, the Order of the Board being issued herewith is similarly unappealable.

(c) is an order about which the trial court or government unit has made an express determination that an immediate appeal of which would facilitate resolution of the entire case. Pa.R.A.P. No. 341.

The Presiding Officer's Orders of June 18, 2010 and June 30, 2010 are not Final Orders

Here, the first two tests under RPa.R.A.P. No. 341 clearly do not apply to Foxwoods' challenge of either the Director of OHA's June 18, 2010 Discovery Order nor her June 30, 2010 Order denying Foxwoods' appeal of that Discovery Order.

It is well established that discovery orders are generally interlocutory and not appealable until there is a disposition of the final judgment. *Smith v. Philadelphia Gas Works*, 740 A.2d 1200, 1203 (Pa. Cmwlth. Ct. 1999).[14] Clearly, only under the most unique set of circumstance – which do not exist here – could appellate review of a discovery order setting a deadline (like the June 18, 2010 Discovery Order in this matter) "facilitate resolution of the entire case," Pa.R.A.P. No. 341. Accordingly, Foxwoods' challenge of the Director of OHA's June 18, 2010 Discovery Order must be denied as it fails to meet the requirements for an appealable final order under Pa.R.A.P. No. 341.

Additionally, Foxwoods not only contends that its right to discovery was somehow infringed by the Director of OHA's June 18, 2010 Order setting a discovery deadline, it also contends that the June 30, 2010 Order denying its appeal of that earlier Order is final and appealable. As noted above, the first two "finality" tests under Pa.R.A.P. No. 341 clearly do not apply to this situation. The question then becomes whether the Presiding Officer's denial of Foxwoods' Appeal of her June 18, 2010 Discovery Order is a matter, under Pa.R.A.P. No.

[14] Although Pa.R.A.P. No. 313 permits appeals of discovery orders involving privilege, *Cmwlth. V. Makara*, 980 A.2d 138 (Pa. Super. 2009), that is not the situation currently before the Board. Here, Foxwoods is challenging the Presiding Officer's denial of its appeal of her establishment of a discovery deadline. These Orders are entirely procedural in nature are not subject to a permissible interlocutory appeal of a collateral discovery order.

341(3), the immediate appeal of which would facilitate resolution of the entire case. Again, clearly the answer is in the negative. Challenges to a presiding officer's rulings on procedural discovery matters (like the Director of OHA's June 18, 2010 Discovery Order) only serve to delay the relevant proceedings as opposed to "facilitating resolution of the entire case," Pa.R.A.P. No. 341.

The Presiding Officer's Orders of June 18, 2010 and June 30, 2010 are not appealable interlocutory orders

In the alternative, Foxwoods seeks certification, under Pa.R.A.P. 1312, of the Director of OHA's June 18, 2010 and June 30, 2010 Orders as appealable interlocutory orders. Such orders must involve a controlling question of law for which there is substantial ground for difference of opinion and the immediate appeal of which would advance the ultimate termination of the matter. Pa.R.A.P. No. 1312. It cannot legitimately be found that the June 18, 2010 Discovery Order and the June 30, 2010 Order denying Foxwoods' appeal thereof, warrant certification for appeal.

First, it cannot be understated that discovery in administrative proceedings is not automatic, *St. Joe's Minerals v. PHRC*, 465 A.2d 1313 (Pa. Cmwlth. Ct. 1983). Indeed, Board regulations provide that it is within the presiding officer's discretion whether or not to allow discovery; further outlining that discovery may be allowed upon a finding by the presiding officer that it will "facilitate an efficient and expeditious hearing process (which does) not unduly prejudice the responding party and. . . may be required in the interest of justice," 58 Pa. Code § 493a.11(a)(1).

Indeed, notwithstanding the authority granted to a Board presiding officer regarding the extent of available discovery, the Board's regulations also provide that the only discovery to which a party is ***absolutely entitled*** is the name and address of any witness who may be called to

testify and all documents or other material which the responding party reasonably expects to put into evidence, 58 Pa. Code § 493a.11(b). As a result, the appropriateness of a discovery deadline, where full discovery is not even a matter of right, cannot be said to be a "controlling question of law which there is substantial ground for difference of opinion the immediate appeal of which would advance the ultimate termination of the matter," Pa.R.A.P. No. 1312.

With respect to the Director of OHA's June 30, 2010 Order denying Foxwoods' improvident appeal of an order imposing a discovery deadline, again, there is clearly not a "question of law to which there is substantial ground for difference of opinion," Pa.R.A.P. No. 1312. Indeed, under Pennsylvania law, such an order, regarding procedural matters, is clearly within the presiding officer's discretion to decide. *See, in part,* 1 Pa. Code §§ 35.114, 35.117, 35.180, 35.187 and 35.190. To find otherwise would subject every decision of a presiding officer to an immediate appeal.

Finally, Foxwoods offers no support, and the Board can conceive of none, for Foxwoods' contention that appellate review of either of the aforementioned orders would "advance the ultimate termination" of the matter (a requisite finding for certification of an interlocutory order for appeal). On the contrary, such appeals would do nothing more than unnecessarily delay resolution of the underlying matter.

Conclusion

For the forgoing reasons, Foxwoods' Motion for Reconsideration is denied.

Dated: 8/11/10

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

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BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Complaint for Revocation of	:	**Docket # 1408-2010**
Philadelphia Entertainment and	:	**Related Dockets #1170-2009**
Development Partners, L.P. d/b/a	:	**#1464-2010**
Foxwoods Casino Philadelphia	:	
Slot Machine License 1367	:	
	:	

ORDER RE: RULINGS ON OBJECTIONS DURING DEPOSITIONS OF AGENTS MORACE AND DOBBINS

And now, this 20th day of August, 2010, the following is **ORDERED**:

This Order memorializes rulings made during a conference call with all parties held on Friday August 20, 2010 beginning at 1:00 pm and rules on objections that were deferred during that conference.

AS TO THE DEPOSITION OF AGENT MORACE:

1. Question and Objection beginning on page 22, line 12 "How did you decide what questions you had to ask as part of that process?" **Objection overruled.**
2. Question and Objection beginning on page 29, line 19 "Do you recall how you identified which people you wanted to speak with? **Objection overruled.**
3. Question and Objection beginning on page 30, line 21 and continues through page 30, line 19 "How about documents, do you recall what documents you looked at as part of the investigation that commenced in the summer of 2006 with respect to the suitability of the Applicant, Foxwoods, for a Category 2 License?" **Objection overruled. May answer question as to types of documents.**

4. Question and Objection beginning on page 39, line 2, "How about other than the introduction of new individuals, what else are you investigating on an ongoing basis regarding the suitability of Foxwoods?" **Objection sustained.**

5. Question and Objection beginning on page 41, line 5, "So my question again, and if I'm not clear, I apologize, is during the period from December 2006 to late 2008, were you conducting an investigation as to the ongoing suitability of Foxwoods the entity, not principal licenses, not individual licenses?" **Objection overruled.**

6. Question and Objection beginning on page 44, line 15, "Can you describe to us what activities you engaged in conducting that investigation?" **Objection sustained.**

7. Question and Objection beginning on page 47, line 5, "And what activities are you engaging in currently regarding that investigation?" **Objection sustained.**

8. Question and Objection beginning on page 51, line 7, "Could you describe your involvement with OEC's part of that investigation?" **Objection sustained.**

9. Question and Objection beginning on page 54, line 7 through page 55 line 3, "I'm talking about any investigation that's been conducted after April 29th with respect to PEDP as the entity level. I think that was the question I posed." **Objection overruled.**

10. Question and Objection beginning on page 55, line 14, "Do you know whether any investigative efforts that you've undertaken at the entity level have been

utilized by OEC in conjunction with the revocation proceedings?" **Objection overruled. Deponent may answer yes or no.**

11. Question and Objection beginning on page 58, line 4, "What type of files have you worked on?" **Objection overruled. Deponent may answer with list of types of files worked on.**

12. Question and Objection beginning on page 52, line24, "No, you testified that you wanted --- when I have asked you the question why there was a need to have it done so quickly, you said because we wanted to. Were you part of the decision in deciding that it had to be done quickly?" **Objection overruled. Deponent may answer yes or no.**

13. Question and Objection beginning on page 67, line 10, "So your organization doesn't keep any original records of interview with anyone?" **Objection sustained.**

14. Question and Objection beginning on page 68, line 4, "And who did you give those reports to?" **Objection sustained.**

15. Question and Objection beginning on page 69, line 18, "And who was the person at OEC that asked you to do that?" **Objection sustained.**

16. Question and Objection beginning on page 74, line 25 "During the period from late 2008 to May 2009, do you recall whether you conducted any investigations with respect to the suitability of the Foxwoods' entity during that period? Whether there was a renewal investigation or otherwise during that discrete time period. Did he conduct any investigation as to the suitability of Foxwoods?" **Objection overruled. Deponent may answer yes or no.**

17. Question and Objection beginning on page 76, line 5, "If a report was issued, would it be issued would you be the person to issue that report during that time period? **Objection sustained.**

18. Question and Objection beginning on page 77, line 3, "During the period September 1st, 2009 to date, have you ever conducted an investigation as to whether or not PEDP has complied with any of the conditions attached to that order?" **Objection overruled. Deponent may answer yes or no.**

19. A series of Questions and Objections beginning on page 80, line 23 and going through page 81, line 19 regarding the first hand knowledge of Mr. Morace as to whether PEDP failed to comply with Board Orders dated September 1st, 2009 or March 3rd, 2010. **Objection sustained.**

20. A series of Questions and Objections beginning on page 82, line 19 and going through page 83, line 17, "Mr. Morace, as you sit here today, do you have any reason to believe that Foxwoods, PEDP, is unable to have a minimum of 1,500 slot machines available for play by May 29, 2011?", and "Mr. Morace, as you sit here today, given that you testified that you've been conducting suitability investigations of PEDP since before December 2006 to the present, do you have any reason to believe that PEDP has failed to maintain suitability?" **Objection sustained.**

21. Question and Objection beginning on page 86, line 7, "Are you aware of the fact that on April 2nd, 2010, PEDP entered into definitive document with an affiliate of Steven Wynn?" **Objection sustained.**

22. Question and Objection beginning on page 91, line 9, "As a result of the termination of the transaction between PEDP and Wynn, where you directed by anyone to conduct an investigation as t o the suitability of PEDP?" **Objection overruled. Deponent to answer yes or no.**

23. Question and Objection beginning on page 93, line 25, "Is financial fitness --- is the meaning of financial fitness different than that of the meaning for financial suitability in your mind?" **Objection overruled. Deponent shall define terms as they are defined in his mind.**

24. A series of Questions and Objections beginning on page 95, line 4, beginning with "Does BIE or OEC have any written standards for determining financial fitness?" and ending at page 95, line 25 regarding standards. **Objections sustained.**

25. Question and Objection beginning on page 97, line 13, "Do you have any reason to believe that PEDP no longer has any financial arrangements or partnerships relating to financing to build the facility at the casino site? "and at page 98, line 24, "Do you believe that the PEDP has to have funds or prospect of funds to construct its casino?" **Objection sustained.**

26. Question and Objection beginning on page 98, line 16, "When is the last time you looked at the books and records of PEDP?" **Objection overruled.**

27. Question and Objection beginning on page 100, line 2, "Have you ever sat down with members of your Financial Investigation Unit and discussed with them the financial fitness of PEDP?" **Objection overruled. Deponent will answer yes or no.**

AS TO THE DEPOSITION OF AGENT DOBBINS:

28. Question and Objection beginning on page 13, line 13, "What does suitability mean to you in that regard?" **Objection overruled**.

29. Question and Objection beginning on page 17, line 18, "What type of financial documents related to PEDP and the investigation you were conducting ..." **Objection overruled. Deponent may list types of documents.**

30. Question and Objection beginning on page 24, line 8, "Can you describe for me the standard process that is followed in conducting an investigation of the sort in which you were involved?" **Objection sustained**.

31. Question and Objection beginning on page 29, line 14, "Are you aware of any revocation proceedings having been initiated against any other Category 1, 2 or 3 slot machine licensee?" **Objection sustained.**

32. Question and Objection beginning on page 31, line 1, "Do you know who was?" **Objection overruled. Deponent may answer yes or no.**

33. Question and Objection beginning on page 34, line 9, "Did those reports contain recommendations as to whether or not a license should or should not be reviewed – renewed?: **Objection sustained.**

34. Question and Objection beginning on page 39, line 16, "Do you know if Agent Morace prepared a report of the interview of Agent (sic) Moles?" **Objection overruled. May answer yes or no, if he has knowledge.**

35. Question and Objection beginning on page 42, line 5, "And what would be the nature of OEC's involvement with respect to PEDP?" **Objection sustained.**

36. Question and Objection beginning on page 44, line 9, "I assume based on that answer that you also don't know what standards were used to determine whether or not to seek a revocation of PEDP's license?" **Objection overruled. May answer yes or no.**

37. Question and Objection beginning on page 45, line 2 and continuing to page 45 line 14 regarding whether a list of individuals had ever provided documents that were not specifically solicited by deponent. **Objection overruled. Deponent may answer yes or no and state who on that list may have provided documents.**

38. Question and Objection beginning on page 53, line 16, "Between the time of those meeting, that being April 26th with Mr. Ford, and April 28th with Mr. Moles and Ms. Marchese, did you communicate any of the information that you had obtained or that you --- I'm sorry, that you and Agent Morace obtained to anyone else in either BIE or OEC?" **Objection overruled. Deponent may answer yes or no.**

39. Question and Objection beginning on page 54, line 2, "Do you know if any of that information was communicated to OEC for the preparation of the Complaint for Revocation?" **Objection overruled. Deponent may answer yes or no.**

40. Question and Objection beginning on page 55, line 4 "Have you been involved in any investigative activities in relation to the revocation complaint of PEDP since that time?" **Objection overruled. Deponent may answer yes or no.**

41. Question and Objection beginning on page 62, line 13, "Was an attempt being made by BIE in that time frame, end of April 2010, to try to determine the financial suitability of Foxwoods?" **Objection overruled. Deponent may answer yes or no.**

42. Question and Objection beginning on page 64, line 14, "Have you been involved in any other proceedings – I'm sorry, in any other investigations where revocation proceedings have been commenced against a Category 1, 2 or 3 Slot Machine Licensee?" **Objection sustained.**

43. Question and Objection beginning on page 67, line 7, "Were you involved in the preparation of any such reports during that time?" **Objection overruled. Deponent may answer yes or no.**

44. A series of Questions and Objections beginning on page 67, line 24 through line 12 regarding reports. **Objection overruled.**

45. A series of Questions and Objections beginning on page 68, line 13 through page 70, line 1 regarding compliance with Board Orders and PEDP compliance with those orders. **Objection sustained.**

46. A series of Questions and Objections beginning on page 73, line 4 regarding the Wynn Transaction. **Objection sustained.**

47. Question and Objection beginning on page 74, line 7, "Is there a difference between the two in the way that BEI views the two?" **Objection sustained.**

48. A Question and Objection beginning on page 75, line 5 regarding financial fitness and financial suitability. **Objection overruled. Deponent may define**

the difference in his mind between financial fitness and financial suitability.

49. Question and Objection beginning on page 77, line 9, "Are you aware of nay written standards for BIE that draw a distinction between financial fitness and financial suitability?" **Objection sustained.**

50. Question and Objection beginning on page 79, line 19, "Have you been involved in any investigations of financial suitability of any other slot machine license holders since their licenses have been issued – awarded?" **Objection overruled. Deponent may answer yes or no.**

51. Questions and Objections beginning on page 80, line 1, related to types of documents. **Objection overruled. Deponent may list types of documents.**

52. Question and Objection beginning on page 81, line 2, "Do you have any knowledge as an agent of BIE with respect to funds that might be available to PEDP?' **Objection sustained.**

53. A series of Questions and Objections beginning on page 81, line 16 through page 82, line 16, whether or not questions have been asked of third parties concerning PEDP's license? **Objection sustained.**

WITH REGARD TO DEADLINE FOR PEDP TO SUBMIT DOCUMENTS TO OEC:

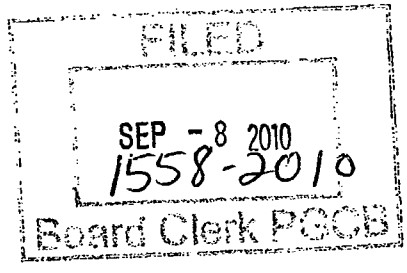
54. PEDP will serve, by close of business Friday August 27, 2010, its list of witness it reasonably intends to provide at the hearing and copies of all documents it reasonably intends to use during the course of the hearing.

Linda S. Lloyd
Director of Hearings and Appeals

M

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

In Re:	:	
	:	
Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia Petition in the Nature of an Appeal to Orders of the Director of Hearings and Appeals Dated July 15, 2010	:	**Docket # 1558-2010**



ORDER

And now, this 8th day of September, 2010, the above captioned Petition in the Nature of an Appeal is **DENIED** in light of the Board's Order and Adjudication filed on August 11, 2010 at docket number 1408-2010 holding that while matters are before the Board's Office of Hearings and Appeals, the Presiding Officer in that Office has the authority to regulate the course of hearings, including the scheduling of proceedings and the disposition of procedural matters. While the matter is before the Office of Hearings and Appeals, rulings of the Presiding Officer may not be appealed to the Board absent extraordinary circumstances when a prompt decision by the Board is necessary **and** the matter is referred to the Board by the P residing Officer.

Linda S. Lloyd
Director of Hearings and Appeals

N

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

IN RE:	:	
PHILADELPHIA ENTERTAINMENT AND	:	
DEVELOPMENT PARTNERS, L.P., d/b/a	:	**PGCB Docket No. 1367**
FOXWOODS CASINO PHILADELPHIA	:	
	:	

ORDER

AND NOW, this 1st day of September 2009, the Board hereby **GRANTS** Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") May 22, 2009 Petition to Extend Time to Make Slot Machines Available for a period of twenty-four months to run from May 29, 2009, or until May 29, 2011. The authorization granted herein is limited to operating slot machines at the location contained at the Columbus Boulevard site, and to develop a facility substantially similar to that which was presented in Foxwoods' application materials and as approved by the Board in its February 1, 2007 Adjudication and Order.

In addition, the Board fully expects Foxwoods, as a good corporate citizen, to act in a manner which will seek to minimize any adverse effects to the neighboring community.

The Board further ORDERS and DIRECTS that its decision is subject to the following conditions:

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.

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

If you disagree with the Board's Adjudication and Order, you have the right to file an appeal with the Commonwealth Court of Pennsylvania within thirty (30) days of the date of this Order. See, Pennsylvania Rule of Appellate Procedure 1512.

O

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

IN RE:	:	
PHILADELPHIA ENTERTAINMENT AND	:	
DEVELOPMENT PARTNERS, L.P.	:	**PGCB Docket No.1367**
	:	

ADJUDICATION

This matter is before the Pennsylvania Gaming Control Board ("PGCB" or "Board") for disposition of Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") May 22, 2009 Petition to Extend Time to Make Slot Machines Available ("Petition to Extend Time"). Foxwoods contends that, pursuant to Section 1210(a) of the Pennsylvania Race Horse Development Act ("Gaming Act"), it has good cause to seek and for the Board to grant it "an additional period not to exceed 24 months" by which to "operate and make available to play a minimum of 1,500 machines" at its facility, 4 Pa.C.S. § 1210(a).

After a review of the relevant filings and consideration of the evidence and the testimony provided at the Board's August 28, 2009 public hearing on this matter, the Board makes the following findings.

Findings of Fact

1. Foxwoods applied for one of the two available Category 2 Slot Machine Licenses for the City of Philadelphia ("License") in December 2005.

2. Foxwoods' application included, *inter alia*, a proposal to build a slot machine casino facility at Columbus Boulevard, between Reed and Tasker Streets, on the South Philadelphia waterfront ("Columbus Boulevard Site") with plans to begin construction in March 2007.

3. Foxwoods was one of five applicants for two Category 2 Slot Machine Licenses in the City of Philadelphia, the others being HSP Gaming, L.P. ("HSP"), Keystone Redevelopment Partners, L.P. ("Keystone"), Pinnacle Entertainment and Riverwalk Casino.

4. The Board awarded Foxwoods one of the two Licenses on December 20, 2006. The Board's Order and Adjudication memorializing this decision was issued on February 1, 2007.

5. The Board awarded the second Category 2 License for the City of Philadelphia to HSP for a site on North Delaware Avenue along the Delaware River.

6. Foxwoods submitted the requisite zoning and use registration permit applications to the City of Philadelphia in January 2007.

7. In March 2007, Riverwalk Casino appealed the Board's decision regarding the Philadelphia Licenses; the Pennsylvania Supreme Court upheld the Board's decision issuing its opinion in *Riverwalk Casino v. PGCB,* 926 A.2d 926 on July 17, 2007.

8. After numerous and varied delays and obstructions by local and municipal entities, Foxwoods filed several Emergency Petitions for Review with the Pennsylvania Supreme Court between June 1, 2007 and December 28, 2007.

9. On April 2, 2008, the Pennsylvania Supreme Court granted Foxwoods' Emergency Petition directing Philadelphia to, *inter alia*, approve the necessary zoning for the Columbus Boulevard Site.

10. Foxwoods submitted a zoning and use permit application to the City of Philadelphia on May 5, 2008 (this permit is a necessary pre-requisite to obtaining all other city permits; e.g. construction permits); the City failed to act on the application.

11. The Board issued Foxwoods' License on May 29, 2008. Pursuant to Section 1210(a) of the Gaming Act, Foxwoods had one year from this date by which to make 1,500 slot machines available for play at its facility.

12. On July 16, 2008, Foxwoods filed a Petition with the Pennsylvania Supreme Court seeking appointment of a special master and enforcement of the Court's April 2, 2008 order regarding its permit application with the City of Philadelphia.

13. In August 2008, Foxwoods began to meet with state and local government officials regarding the possibility of moving its facility from the Columbus Boulevard Site.

14. On October 14, 2008, the Supreme Court granted Foxwoods request for enforcement of its previous April 2, 2008 order and appointed a special master to assist Foxwoods in attaining the necessary permits for development of its project from the City of Philadelphia.

15. In September 2008, Foxwoods met with state and local government officials to discuss a possible relocation of its facility to the Gallery Complex in Philadelphia.

16. In early 2009, Foxwoods, upon urging from the Pennsylvania Real Estate Investment Trust, began considering a potential move to an alternative site at the Strawbridge Building at 801 Market Street in Philadelphia.

17. On April 8, 2009, Foxwoods appeared at a public meeting of the Board to provide an update on the status of its project. At that time, Foxwoods confirmed that it was exploring relocation options for its project and that it anticipated filing a petition requesting permission from the Board to relocate its facility at some undetermined point in the future.

18. On May 22, 2009, Foxwoods filed a Petition to Extend Time to Make Slot Machines Available in which it contends that it has expended considerable efforts and faced numerous obstacles beyond its control regarding developing its facility and, that these facts establish good cause for the Board to grant it additional time to develop its facility.

19. On June 11, 2009, the Board's Office of Enforcement Counsel ("OEC") filed an Answer and New Matter to Foxwoods' Petition for Extension of Time in which it objects to the relief sought in Foxwoods' Petition pending receipt of more detailed information regarding its efforts to begin construction of its project and details regarding relocation possibilities.

20. On June 11, 2009, June 17, 2009 and July 7, 2009 Senators Farnese and Stack and Representatives O'Brien, McGeehan, Taylor and Josephs ("Legislators"); Keystone Redevelopment Partners, LLC ("Keystone"); and Eastern Pennsylvania Citizens Against Gambling ("Eastern") and James D. Schneller ("Schneller") respectively filed Petitions to Intervene in Foxwoods' Petition for Extension of Time.

21. The Board addressed the aforementioned Petitions to Intervene at its August 28, 2009 public meeting.

22. The Board addressed Foxwoods' Petition for Extension of Time at a public hearing held immediately prior to its public meeting on August 28, 2009 at which time, Foxwoods presented sworn testimony and documentary exhibits.

23. During the August 28, 2009 public hearing on Foxwoods' Petition for Extension of Time, Foxwoods representatives testified that Foxwoods was committed to developing the Columbus Boulevard site and were no longer contemplating a move to the Market Street location.

24. At its August 28, 2009 meeting, the Board announced its decision to deny the aforementioned Petitions to Intervene. The Board also announced its decision to grant the Legislators' Petition for *Amicus Curiae* status and, consequently, that it would consider the Legislators' filings on the matter.

Conclusions of Law

1. The Board has jurisdiction over Foxwoods and the subject matter of the instant proceeding.

2. The Board, pursuant to Section 1210(a) of the Gaming Act, has the authority to extend, upon application and for good cause shown, for a period not to exceed 24 months, the time by which a licensee must make 1,500 slot machines available to play at its facility.

3. Foxwoods has shown good cause sufficient for the Board to grant its request to extend, for a period of 24 months, the time by which it must make 1,500 slot machines available to play at its facility.

4. Foxwoods' Category 2 Slot Machine License is only valid for the specific location within the municipality and county for which it was granted, absent further relief from the Board.

5. The Board's grant of an extension of time for Foxwoods to make slots available is limited to development of a facility substantially similar to that which was presented in its initial proposal as approved by the Board, at the Columbus Boulevard site.

6. The 24 month extension granted herein specifically expires at the close of business on May 29, 2011.

Discussion

Foxwoods' Petition for Extension of Time has been pending before the Board for three months. Meanwhile, the time for Foxwoods commence operations continues to run. The public's interest in the fulfillment of the Gaming Act's provisions for two casinos in the City of Philadelphia, along with the promised full time casino jobs, construction jobs, tax revenues and other benefits therefrom, demands the Board consider this Petition without further delay.

Disposition of Foxwoods' Petition for Extension of Time necessitates a review of the Board's 2006 decision to award it the Category 2 License to operate a gaming facility it now seeks more time to develop.

The Board's February 1, 2007 Adjudication relative to Foxwoods

The primary objective of the Gaming Act is to "protect the public through the regulation and policing of all activities involving gaming . . .," 4 Pa.C.S. § 1102(1). Secondarily, the legislation was enacted to enhance the horse racing industry in the Commonwealth, provide a significant source of income to the Commonwealth for tax relief, provide broad economic

opportunities to Pennsylvania's citizens and develop tourism throughout the Commonwealth. 4 Pa.C.S. §1102. To this end, Section 1202(b)(14) of the Act provides, "[t]he [B]oard shall have the specific power and duty to . . . [a]t it's discretion, . . . issue, approve, renew, revoke, suspend, condition or deny issuance or renewal of slot machine licenses," 4 Pa.C.S.§ 1202(b)(12).

In addition to the eligibility requirements set out in Sections 1304 and 1310-1313 of the Gaming Act, 4 Pa.C.S. §§ 1304 and 1310-1313, the Board must take into consideration the facts enumerated in Section 1325(c) of the Gaming Act, 4 Pa.C.S. § 1325(c), in making its determination regarding awarding slot machine licenses. Among the factors enumerated in Section 1325(c) of the Gaming Act for Board consideration are "the location and quality of the proposed facility" and "the potential for new job creation and economic development which will result from granting a license to an applicant," 4 Pa.C.S. § 1325(c)(1)-(2). When, as was the case in the Philadelphia Category 2 Licenses, there was more than one eligible and suitable candidate for licensure, the Section 1325(c) factors provide a basis for comparison between otherwise equally appropriate applicants. "The Board fully considered those factors, as applicable, to arrive at a decision on licensure based upon all of the evidence in the record before it. The Board considered all of the evidence which made up the evidentiary record in the case, received briefs and heard oral argument supporting the applications, where presented, and has the opportunity to question applicants about their proposals." *PGCB Adjudication,* p.6.

In its February 1, 2007 Adjudication and Order regarding the two Philadelphia Category 2 Licenses, the Board explained that, "the Gaming Act only permits two licenses to be awarded in Philadelphia and there were five applicants. Thus, there was competition among the applicants for the two available licenses. Because of this competitive factor, the five applicants not only had the responsibility to satisfy the Board that they were eligible and suitable for a

Category 2 license, but they also were required to convince the Board that respective project should be among the two chosen by the Board to best serve the Commonwealth's and the public's interests in Philadelphia. Ultimately that was a determination committed to the sound exercise of the Board's discretionary authority to select the two applicants which the Board believes will best serve the Commonwealth's and the public's interests as outlined in the Act." *PGCB Adjudication,* p.5. The Board went on to emphasize "that the denials of three applicants [was] not because the unsuccessful applicants were found unsuitable, but because the Board had the difficult task of choosing among five suitable candidates and proposals, each of which possessed various positive attributes. Simply stated, the successful applicants were the applicants which possessed the projects which the Board evaluated, in its discretion, to be the best projects for licensure under the criteria of the Act." *PGCB Adjudication,* p.7.

In reference to Foxwoods, the Board found relevant to determining that its proposal was one of the two "best projects for licensure" the following "Findings of Fact":

- The facility would be located on a sixteen and one half (16 ½) acre parcel of vacant land on the Delaware Riverfront at the site commonly known as Piers 60, 62 and 63 in Philadelphia. *PGCB Adjudication,* FF 104, p.29.
- Foxwoods submitted two site development plans to the Board: one if it is granted riparian rights on the Delaware River and one if it is denied riparian rights. *PGCB Adjudication,* FF 105, p.29.
- If granted riparian rights, the design plan that incorporated an existing pier of approximately 90,000 square feet and plans for restaurants, an entertainment venue, lounges and bars, retail shops, parking and full public access to the waterfront. *PGCB Adjudication,* FF 106, p.29.

- If not granted riparian rights, the entertainment complex would be built without the use of riparian rights by moving the building back 80 to 100 feet from the other design, but still allowing for the construction of a full entertainment district of more than 120,000 square feet in size on the water's edge. *PGCB Adjudication,* FF 107, p.29.
- Foxwoods presented a three-phase construction plan:
    - Phase I: 3,000 slot machines, a 2,000 seat showroom, entertainment lounge, retail shops, 600 seat buffet, 250 seat five-outlet food court and 250 seat sports bar, 4,200 space parking garage with an additional 300 surface parking spaces. *PGCB Adjudication,* FF 154, p.39.
    - Phase II: expansion of the casino floor by approximately 66,000 square feet to accommodate the addition of 2,000 slot machines and/or table games. Phase II plans also include the addition of nightclubs, restaurants, boutique retail shopping and an expansion of the parking garage for an additional 1,200 parking spaces. *PGCB Adjudication,* FF 155, p.39-40.
    - Phase III: construction of two (2) 30-story towers that are connected to the existing casino and entertainment complex. The west tower will be a hotel with approximately 500 rooms and the east tower is designed to be either an additional 500-room hotel or a 200-resident condominium. In addition to the two (2) towers, Phase III plans include additional restaurants, a spa and an outdoor pool. *PGCB Adjudication,* FF 156, p.40.
- Foxwoods estimated that the Phase I facility will create 950 permanent operations positions. These positions are intended to be living wage positions with full medical benefits, while more permanent employment positions would be created as Foxwoods

Casino Philadelphia is expanded. *PGCB Adjudication,* FF 159, p.41. Foxwoods also estimated that between 945 and 1,071 construction jobs will be created during the Phase I construction of Foxwoods Casino Philadelphia. *PGCB Adjudication,* FF 160, p.40-1.

- Foxwoods' traffic expert proposed a plan to allow traffic to flow better on South Columbus Boulevard. Working in conjunction with the City of Philadelphia and the Pennsylvania Department of Transportation, and using standards set forth in the Institute of Transportation Engineers publications, Foxwoods' traffic experts submitted a series of mitigation measures that it believes will reduce traffic congestion on Columbus Boulevard by 32%. To improve traffic flow, Foxwoods proposed widening a street as it approaches Columbus Boulevard, constructing double left turn lanes at two intersections, re-striping other intersections, and adding two new traffic signals along Columbus Boulevard. These Phase I improvements would be completed prior to the opening of the gaming facility. *PGCB Adjudication,* FF 165-6, p.42.

In its Adjudication, the Board noted that "the decision as to which two of the five eligible and suitable proposals would receive the award of the two Category 2 slot machine operator licenses in Philadelphia was a very difficult one calling for the Board to weigh five competitive, yet unique and different proposals to determine which two the Board, in its sole discretion, believed to be the best fit for the Commonwealth and the public in light of the various factors which may be taken into consideration under the Act." *PGCB Adjudication*, p. 78. The Act embodies multiple objectives to be considered by the Board, including the protection of the public through regulating and policing all activities involving gaming; enhancing entertainment and employment in the Commonwealth; providing a significant source of income to the Commonwealth for tax relief; providing broad economic opportunities to Pennsylvania's

citizens; developing tourism; strictly monitoring licensing of specified locations, persons, associations, practices, activities, licenses and permittees; considering the public interest of the citizens of the Commonwealth and the social effects of gaming when rendering decisions; and maintaining the integrity of the regulatory control of facilities. 4 Pa.C.S. § 1102.

After considering all the evidence before it and giving the appropriate weight to the factors that it, solely in the exercise of its discretion, found to be in furtherance of the objective of the Gaming Act, the Board determined that HSP and Philadelphia Entertainment represented the best fit for Category 2 licensure in the City of Philadelphia.

In its Adjudication, the Board explained,

> In reaching this conclusion [to award HSP and Foxwoods the two Category 2 Licenses], the Board has examined and weighed the various factors cited above. However, there were several factors that, in the Board's opinion, made HSP and Philadelphia Entertainment's projects stand out above the remaining applicants.
>
> First, both HSP and Philadelphia Entertainment are located on the riverfront and have excellent design plans for their facilities. Neither have riparian rights issues because if they are not successful in securing riparian rights, they both have alternate plans to build quality facilities without the need for these rights. The synergy provided by the riverfront locations and the proximity to Center City and the downtown Philadelphia area were positive factors.
>
> Second, the location of each facility, as it relates to the other, creates the most advantageous locations. Both locations are largely separated from primary residential areas by Interstate 95 and it is anticipated that a significant amount of the patrons coming to the casinos will use Interstate 95 to access the sites. In addition, siting one location on the North Delaware Avenue corridor and the other location farther south and below the Ben Franklin Bridge, will spread out the patron traffic and avoid the traffic congestion that having two sites located close together would invariable bring to Philadelphia.

PGCB Adjudication, p. 81.

After finding HSP to be one of the best projects, the Board continued,

> The Board believes, based upon its review of the evidence, that the Philadelphia Entertainment/Foxwoods proposal will also serve the objectives of the Act and should be granted a Category 2 license. The location of South Philadelphia, near the sports complexes and sufficiently separated from the North Delaware Avenue

> area, provides a location conducive to economic development and gaming without overburdening local services. Moreover, the Board finds that the history and successful management of Foxwoods Connecticut, which will be imported to the South Philadelphia project, will provide a tremendous boost to this project for the betterment of the Commonwealth.
>
> Based upon the findings of fact, conclusions of law and discussions set forth above, which are supported by the evidentiary record, the PGCB finds that **HSP/Sugarhouse** and **Philadelphia Entertainment and Development Partners/Foxwoods** have satisfied the requirements of 4 Pa.C.S. § Category 2 license, are eligible and suitable to receive a license and that it is in the best interest of the public and the Commonwealth that these two entities be granted the two available Category 2 slot machine licenses allocated by the General Assembly to Philadelphia, Pennsylvania, a city of the First Class, subject to the terms and conditions placed on the license by the PGCB.

PGCB Adjudication, p. 112.

As reflected by the foregoing discussion, the river-front location of Foxwoods along with the physical structure of the building proposal and the proposed amenities provided a uniqueness to the Foxwoods' project which, among many other factors, set it apart from the other proposals which were not chosen for a Category 2 license in Philadelphia. Given the competitive application process, the Board selected that project as superior to three others. The Board continues to believe that Foxwoods' project, as presented in its application, the details of which led to the Board awarding it License, remains well suited for Philadelphia and should be fulfilled accordingly.

Good Cause exist to extend the time by which Foxwoods must make slots available

Section 1210(a) of the Gaming Act provides, in relevant part,

> . . . all 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.

4 Pa.C.S. § 1210(a). Although the Gaming Act does not contain a definition for "good cause," the phrase has come to be understood in the law as "substantial reason amounting to a legal excuse for failing to perform an act required by law as determined on a case-by-case basis," BLACKS LAW DICTIONARY, 6th Edition (1990) (citations omitted).

Previously, in the matter of *HSP Gaming, L.P.'s Application for Additional Time to Make Slot Machines Available to Play*, the Board found "good cause" to grant HSP Gaming, L.P.'s ("HSP") request for an extension of time to make slots available. In that case, HSP alleged that litigation, community opposition and obstacles from Philadelphia City Council were responsible for the delay in progressing with its project.

In its Petition for Extension of Time and in the evidence presented to the Board on August 28, 2008, Foxwoods established that it has faced many of the same obstacles as did HSP which have resulted in the delay in developing its project. Specifically, Foxwoods references the following obstacles it has encountered, and the efforts it has made, since the Board awarded it a Category 2 License in December 2006:

- litigation from community groups, unsuccessful applicants and legislators challenging the Board's decision to award it a License;
- refusal of City Council to zone the Columbus Boulevard Site as Commercial Entertainment District ("CED") (prior to the Board awarding the Philadelphia licenses, the city created a new zoning district, CED, which was a prerequisite to constructing a gaming facility in Philadelphia);
- 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 (in which the Court granted Foxwoods CED zoning for the Columbus Boulevard Site);
- refusal by the City to act on the zoning and use permit applications Foxwoods filed in May 2008;
- another request for relief and appointment of a Master from the Pennsylvania Supreme Court in July 2008; the Court granted this request in October 2008[1]

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. 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. However, the Board firmly believes that the Foxwoods project, which was granted a Category 2 slot machine license, should be built as proposed.[2] Accordingly, the Board is expressly limiting its grant of an extension of

[1] Finally, in its Petition for Extension of Time, Foxwoods details its efforts regarding the possible relocation of its facility. As described in detail above, the Board awarded Foxwoods a Category 2 License for a specific location, the Columbus Boulevard Site. The location of Foxwoods proposed facility was one of the determining factors in the Board choosing it out of five eligible and suitable license applicants; accordingly, the Board does not consider Foxwoods efforts regarding exploring relocation possibilities as good cause for an extension of time to make slots available under Section 1329 of the Gaming Act and said efforts are not be a factor in the Board's ultimate disposition of Foxwoods request for an extension of time.

[2] As noted above, Foxwoods has seemingly abandoned the idea of moving to a site on Market Street in the City of Philadelphia. If it had not done so, it would have had to file a petition to relocate under Section 1329 of the Gaming Act. As was clear by the Board's statements at the August 28, 2009 hearing on this matter, the Board would not be inclined to approve a material change in location or site for the casino project where the initial license was granted in the competitive process and the project was picked as one of the two best among those presented.

time to commence operations **solely** for the purpose of Foxwoods developing the casino, as described in the Board's February 1, 2007 Adjudication, at the Columbus Boulevard Site.

Dated: September 1, 2009 By: _____

Gregory C. Fajt, Chairman
Pennsylvania Gaming Control Board

If you disagree with the Board's Adjudication and Order, you have the right to file an appeal with the Commonwealth Court of Pennsylvania within thirty (30) days of the date of this Order. See, Pennsylvania Rule of Appellate Procedure 1512.

P

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

IN RE:	:	
PHILADELPHIA ENTERTAINMENT AND	:	
DEVELOPMENT PARTNERS, L.P., d/b/a	:	**PGCB Docket No. 1367**
FOXWOODS CASINO PHILADELPHIA	:	**Hearing and Appeals No. 1170-2009**
	:	

ORDER

AND NOW, this 10th day of February 2010, the Board hereby **DENIES** Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") November 30, 2009 Motion to Extend Time to Comply with Conditions 5 and 6 of the Board's Order of September 1, 2009

In addition, the Board hereby **GRANTS** the Office of Enforcement Counsel's December 15, 2009 Motion for Sanctions. Foxwoods is hereby assessed a *per diem* sanction of two thousand dollars ($2,000) beginning December 1, 2009 and continuing daily until Foxwoods fully complies with the Board's Order of September 1, 2009, including the filing of all documents responsive to conditions 5 and 6 of the Board's Order of September 1, 2009. This *per diem* sanction is payable to the Commonwealth of Pennsylvania at the time of the March 3, 2010 hearing before the Board.

Finally, the Board hereby imposes a **Rule to Show Cause** upon Foxwoods to show, at a hearing on **March 3, 2010**, why the Board should not levy further sanctions, including revocation of its license, for failure to comply with the Board's September 1, 2009 Order.

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

If you disagree with the Board's Adjudication and Order, you have the right to file an appeal with the Commonwealth Court of Pennsylvania within thirty (30) days of the date of this Order. See, Pennsylvania Rule of Appellate Procedure 1512.

Q

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD

IN RE:
PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P.

PGCB Docket No. 1367
Hearings and Appeals No. 1170-2009

ADJUDICATION

This matter is before the Pennsylvania Gaming Control Board ("PGCB" or "Board") for disposition of Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") November 30, 2009 Motion to Extend Time to Comply with Conditions 5 and 6 of the Board's September 1, 2009 Order ("Motion for Extension of Time"). Foxwoods contends that, pursuant to Section 497a.5 of the Board's regulations, it has good cause to seek, and for the Board to extend, the time by which it must comply with Conditions 5 and 6 of the Board's Order of September 1, 2009, 58 Pa. Code § 497a.5(a)(1).

After a review of the relevant filings and consideration of the evidence and the testimony provided at the Board's January 27, 2010 Public Hearing on this matter, the Board makes the following findings.

Findings of Fact

1. Foxwoods was one of five applicants for two Category 2 Slot Machine Licenses in the City of Philadelphia, the others being HSP Gaming, L.P. ("HSP"), Keystone Redevelopment Partners, L.P. ("Keystone"), Pinnacle Entertainment and Riverwalk Casino.

2. The Board awarded Foxwoods one of the two Licenses on December 20, 2006. The Board's Order and Adjudication memorializing this decision was issued on February 1, 2007.

3. The Board subjects the awarding of all slot machine licenses to the licensees signing of a Statement of Conditions that provides, *inter alia*, that licensure is a privilege; that the licensee must immediately notify the Board of any criminal or regulatory investigations commenced into it: that the licensee must develop a Diversity Plan and a Compulsive and Problem Gambling Plan; and to comply with the system of internal controls approved by the Board.

4. Foxwoods executed its Statement of Conditions on July 11, 2007, Condition 1 of which requires it "to at all times, comply with any and all provisions of the Gaming Act and any rules, regulations, technical standards or [Board] orders in effect [at the date of signing] or later amended or promulgated by the Board."

5. The Board issued Foxwoods' License on May 29, 2008. Pursuant to Section 1210(a) of the Gaming Act, 4 Pa.C.S. § 1210(a), Foxwoods had one year from that date by which to make 1,500 slot machines available for play at its facility, unless granted an extension of time, by the Board, upon application and for good cause shown.

6. On May 22, 2009, Foxwoods 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 in developing its facility (litigation; community opposition; and obstacles from Philadelphia City Council); and that these facts established good cause for the Board to grant it additional time to develop its facility.

7. The Board addressed Foxwoods' Petition for Extension of Time at a Public Hearing held immediately prior to its Public Meeting on August 28, 2009, at which time Foxwoods presented sworn testimony and documentary exhibits.

8. Specifically, Foxwoods provided evidence of the following which it believed demonstrated "good cause" for the Board to grant its request for an extension of time to begin operations:

   a. litigation from community groups, unsuccessful applicants and legislators challenging the Board's decision to award it a License;

   b. refusal of City Council to zone the Columbus Boulevard site as Commercial Entertainment District ("CED") (prior to the Board awarding the Philadelphia licenses, the city created a new zoning district, CED, which was a prerequisite to constructing a gaming facility in Philadelphia);

   c. 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;

   d. requests with the Pennsylvania Supreme Court for emergency relief, the last of which was granted on April 2, 2008 (in which the Court granted Foxwoods CED zoning for the Columbus Boulevard Site);

   e. refusal by the City to act on the zoning and use permit applications Foxwoods filed in May 2008;

f. a July 2008 request for relief from the Pennsylvania Supreme Court and subsequent appointment of a Master by the Court in October 2008.[1]

9. Recognizing the litigation, community opposition and obstacles from Philadelphia City Counsel that Foxwoods had endured, the Board, at its August 28, 2009 meeting, announced its decision to conditionally grant Foxwoods' Petition, giving it until May 29, 2011 to begin operations with at least 1,500 slot machines.

10. The Board indicated that the grant of the extension was subject to nine conditions including benchmark reporting and documentary submissions which would indicate that the project was moving forward.

11. On September 1, 2009, the Board reduced this decision to writing, issuing an Adjudication and Order. Foxwoods did not appeal this Adjudication and Order.

12. The conditions placed upon Foxwoods, pursuant to the Board's September 1, 2009 Order, requires it to provide the Bureau of Investigations and Enforcement ("BIE") or the Board with certain information and updates relative to the financing and construction of its gaming facility.

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

> 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.

[1] Finally, in its Petition for Extension of Time, Foxwoods details its efforts regarding the possible relocation of its facility. The Board awarded Foxwoods a Category 2 License for a specific location, the Columbus Boulevard Site. The location of Foxwoods proposed facility was one of the determining factors in the Board choosing it out of five eligible and suitable license applicants; accordingly, the Board does not consider Foxwoods efforts regarding exploring relocation possibilities as good cause for an extension of time to make slots available under Section 1329 of the Gaming Act and said efforts are not be a factor in the Board's ultimate disposition of Foxwoods request for an extension of time.

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

> 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.

15. The documents due pursuant to Conditions 5 and 6 of the Board's Order of September 1, 2009 were to be submitted to BIE on or before December 1, 2009.

16. On November 30, 2009, Foxwoods filed a Motion for Extension of Time to Comply with Conditions 5 and 6 of the Board's September 1, 2009 Order in which it contends:

a. Since the Board issued its Order of September 1, 2009, Foxwoods has "moved diligently forward in its efforts to develop a licensed gaming facility";

b. "The realities of the national credit and financial markets" have hampered its ability to secure financing for its project and that attaining financing is the "first and most critical hurdle" to progressing with its project;

c. The source funding for Foxwoods' project "will dictate the timing and direction of development issues;" therefore, without such funding, it cannot "satisfy Conditions 5 and 6 of the Board's Order of September 1, 2009 to an appropriate level of specificity";

d. Since September 1, 2009, Foxwoods has "worked with its investment advisor;" "provided marketing material to 15 potential investors;" entered into confidentiality agreements with potential investors;" and negotiated proposed Term Sheets with potential investors."; and

e. Potential investors have been reluctant about committing to a funding agreement with Foxwoods while the table games legislation was still pending.[2]

17. On December 9, 2009, Senators Farnese and Stack and Representatives O'Brien, McGeehan, Taylor and Josephs ("Legislators") filed a Memorandum of Law in opposition to Foxwoods' Motion. This Memorandum was filed pursuant to their *amicus curiae* status in these proceedings.[3]

18. In their filing, which the Board has considered, the Legislators essentially argue that Foxwoods has not met the requisite "good cause" standard for the Board to grant the current Motion for Extension of Time because, unlike the Board's previous grant of extension of time to Foxwoods, where there were outside forces acting in opposition to the progress of Foxwoods project (i.e. litigation; community opposition; and obstacles from Philadelphia City Council), the outside forces Foxwoods cites in its current Motion (i.e. primarily, the downturn in the international credit and financial markets) are not acting in opposition to Foxwoods and have been a constant since the time of the Board's September 1, 2009 Order.

19. On December 15, 2009, the Board's Office of Enforcement Counsel ("OEC") filed an Answer, Objection and Motion for Sanctions regarding Foxwoods' current Motion for Extension of Time.

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[2] Foxwoods indicated that the expansion of gaming in Pennsylvania to include table games would enhance the attractiveness of this project to both equity participants and lenders. Subsequent to filing the present Motion for Extension of Time, Senate Bill 711, which expands gaming in Pennsylvania to include table games, was enacted on January 7, 2010.

[3] On September 1, 2009, the Board granted this group of legislators *amicus curiae* status in the underlying matter; Foxwoods' Petition to Extend Time to Make Slots Available.

20. OEC argues that Foxwoods has not met the requisite "good cause" standard for the Board to grant its current Motion for Extension of Time because it has not provided any concrete facts in support of its request.

21. OEC also argues that Foxwoods has improperly intimated that an investor would dictate the design of its facility where the Board, in its Order of September 1, 2009, directed Foxwoods to develop a facility substantially similar to that which the Board approved in 2006.

22. OEC further recommends that the Board impose monetary sanctions upon Foxwoods for failure to comply with the Board's September 1, 2009 Order.

23. On December 21, 2009, Keystone Redevelopment Partners, LLC ("Keystone") filed a Petition to Intervene in the current matter; this Petition was denied on the basis that Keystone did not possess the requisite direct, substantial and immediate interest in the matter under consideration.[4]

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[4] Both OEC and Foxwoods filed objections to Keystone's Petition and, after oral argument on January 27, 2010, the Board denied Keystone's Petition to Intervene. During oral argument, Keystone's counsel argued that it had standing to intervene and, relative to the underlying matter, that the Board was without jurisdiction to consider Foxwoods' Motion because Keystone had appealed the Board's Order of September 1, 2009 to Commonwealth Court. As that same Order was the Order from which Foxwoods' currently seeks relief, Keystone took the position that the Board was without jurisdiction to modify the Order as Foxwoods was requesting.

As to the issue of standing to intervene, Keystone lacks the requisite direct, substantial and immediate interest required. 58 Pa. Code § 493a.12(c). Keystone contends that, as an eligible and suitable applicant for Foxwoods' License, it has the requisite interest in these proceedings because, if the Board were to revoke Foxwoods' license, it is the only remaining eligible and suitable candidate. Keystone ignores the fact, however, that the Board denied its license application on December 20, 2006 when it approved two other applicants for licensure. Moreover, Keystone assumes what the Board would do if it were to revoke Foxwoods' license. Finally, it is far from certain that Keystone would now, more than three years later, be found eligible and suitable if the license were otherwise available.

On the issue of Keystone "appealing" the Board's September 1, 2009 Order granting Foxwoods' Petition for an Extension of Time to Make Slots Available, Keystone lacks the requisite status to effectuate such an appeal. As a result, the appeal itself is a nullity and cannot bar the Board from modifying the Order under "appeal." Generally, in order to properly effectuate an appeal, a person must be either a party to the proceeding (which Keystone was not, having been denied intervention), see Pa.R.A.P. No. 501, or a person with a "direct interest" in the matter.

24. The Board addressed Foxwoods' Motion for Extension of Time at a Public Hearing held immediately prior to its January 27, 2010 Public Meeting, at which time Foxwoods presented sworn testimony and documentary exhibits.

25. At the January 27, 2010 Public Hearing, OEC introduced into evidence, under seal, the monthly reports Foxwoods submitted to BIE, pursuant to the Board's Order of September 1, 2009. These reports detail Foxwoods' progress in developing a slots facility.

26. The reports were vague and provided little details regarding Foxwoods' progression with its project.

27. At the January 27, 2010 Public Hearing, Foxwoods offered the testimony of one its attorneys regarding its efforts to comply with the Board's September 1, 2009 Order.

28. Counsel testified that the Board should consider the progress Foxwoods has made towards commencing operations including, "working with its investment advisor;" "providing marketing material to 15 potential investors;" "entering into

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While arguing that it was improperly denied intervention, Keystone also argues that it is a person with a "direct interest" in the proceedings at issue and, as a result, properly effectuated the appeal of Foxwoods' September 1, 2009 Order to the Commonwealth Court. Pursuant to 42 Pa.C.S. § 761 and 2 Pa.C.S. § 702, a non-party has a "direct interest" in the subject matter at issue if they have "material interests that are discrete to some person or limited class of persons from more diffuse ones that are common among citizenry." *Citizens Against Gambling Subsidies. PGCB*, 916 A.2d 624, 628 (Pa. 2007). Keystone, as an ***unsuccessful bidder*** for a Category 2 License ***more than three years ago*** cannot assert an interest in an ***unavailable*** license is any different than the interest of any other prospective applicant should the license ever become available. Accordingly, it does not have a "direct interest" in the Foxwoods proceedings thereby allowing it to effectuate an appeal of an order in Foxwoods' proceedings.

Additionally, Keystone failed to seek a stay of the Order at issue pursuant to Pa.R.A.P. No. 1781, and the filing of a petition for review does not automatically supersede the Board's Order of September 1, 2010, *id.* In sum, even if Keystone's appeal of that Order were proper, it has failed to follow the procedural steps required to stop the Board from enforcing the provisions thereof.

Finally, and again, in the event Keystone's appeal is proper, the Rules of Appellate Procedure allow the Board to enforce its own order, even if under appeal. Specifically, "after an appeal is taken or review of a quasijudicial order is sought, the trial court or other governmental unit may . . . enforce any order entered in the matter, unless the effect of the order has been superseded." Pa.R.A.P. No. 1701(b)(2). This is precisely what the Board is doing in this matter.

confidentiality agreements with potential investors;" and negotiating proposed Term Sheets with potential investors."

29. Counsel testified that Foxwoods is in the final stages of reaching an agreement with an unnamed investor (the same investor they had been in discussions with months ago) who has international gaming experience.

30. Testimony revealed that Foxwoods had also hired a construction company (The Keating Group).

31. Finally, counsel testified that, notwithstanding Foxwoods' inability to come into compliance with Conditions 5 and 6 of the Board's Order of September 1, 2009 in the 58 days since the reports were due that, if the Board granted its Motion for Extension of Time, meeting a March 1, 2010 deadline for compliance with Conditions 5 and 6 was "doable."[5]

32. The global economy has been in an economic downturn since, at least, 2008.

33. Since 2006, the citizens of the state of Pennsylvania have benefited, by way of property tax relief and job creation, from Pennsylvania casinos.

34. Because of the delay in Foxwoods commencing operations, it has not contributed to property tax relief, wage tax relief, job creation and other economic benefits as have the nine facilities currently in operation.

[5] The relief sought in the Motion under consideration only seeks an extension until March 1, 2010 to file the reports and recommendations referenced in condition 5 and 6 of the Board's Order of September 1, 2009. Additionally, the financing documents for the project, pursuant condition 4 of the Board's Order of September 1, 2009, are also due March 1, 2010.

Conclusions of Law

1. The Board, pursuant to Section 1202(a)(1) of the Gaming Act, 4 Pa.C.S. § 1202(a)(1), has jurisdiction over Foxwoods and the subject matter of the instant proceeding.

2. Section 1102 of the Gaming Act, 4 Pa.C.S. § 1102, provides that the authorization of limited gaming is intended to, *inter alia*, provide for property tax reduction and economic development opportunities; provide broad economic opportunities to the citizens of the Commonwealth; enhance tourism; and assist the Commonwealth's horse racing industry.

3. The Gaming Act mandates that all Pennsylvania casinos contribute 55% of their "gross terminal revenue" to the State Gaming Fund (34%), the Pennsylvania Race Horse Development Fund (12%), the Pennsylvania Gaming Economic Development and Tourism Fund (5%) and local and county government shares (4%). 4 Pa.C.S. §§ 1403 - 1407.

4. The Board, pursuant to Section 497a.5(a)(1) of the Board's regulations, 58 Pa. Code § 497a.5(a)(1), has the authority to extend, upon application and for good cause shown, any deadline imposed by the Board upon a licensee.

5. "Good cause" is defined as substantial reason amounting to a legal excuse for failing to perform an act required by law as determined on a case-by-case basis.

6. A party seeking an extension of time of a Board imposed deadline bears the burden of establishing and proving the existence of "good cause."

7. Foxwoods has not demonstrated "good cause" sufficient for the Board to grant its request to extend the time by which it must comply with Conditions 5 and 6 of the Board's Order of September 1, 2009.

8. The Board, pursuant to Section 1202(b)(16) and 1518(c)(1)(vi) of the Gaming Act, 4 Pa.C.S. §§ 1202(b)(16) and 1518(c)(1)(vi), has the authority to levy fines and/or other sanctions upon a licensee for violation of the Gaming Act, the Board's regulations, and the Board's Orders issued to implement and regulate legalized gaming under the Gaming Act.

9. Section 1202(b)(12) of the Gaming Act, 4 Pa.C.S. § 1202(b)(12), permits the Board to condition a slot machine license and Section 423a.6(b)(5), 58 Pa. Code § 423a.6(b)(5), of the Board's regulations provides that failure to fully comply with a Statement of Conditions constitutes a violation thereof and may result in Board imposed sanctions, up to and including revocation.

10. Foxwoods' delay, without good cause, in complying with a Board Order is in violation of Foxwoods' Statement of Conditions; the Gaming Act; and the Board's regulations.

11. The Board, pursuant to its authority and duty to regulate gaming and enforce the legislative mandates of the Gaming Act under Section 1202(a)(1) of the Gaming Act, 4 Pa.C.S. § 1202(a)(1), may issue a Rule to Show Cause against a licensee to show why the Board should not levy further sanctions for failure to comply with a Board order.

12. Foxwoods' failure to comply with a Board order, coupled with its inability to provide evidence of significant progress with its project warrants the Board issuing a Rule to Show Cause to Foxwoods as to why the Board should not impose further sanctions against it.

Discussion

At the time of the Board's hearing on January 27, 2010, Foxwoods' deadline for complying with Conditions 5 and 6 was fifty-eight days past and, based upon the evidence presented, there appears to be little tangible movement in the development of Foxwoods' project. Meanwhile, the public's interest in the fulfillment of the Gaming Act's provisions for two casinos in the City of Philadelphia and, with it, the promised full time casino jobs, construction jobs, tax revenues and other benefits therefrom, demands the Board consider Foxwoods' Motion, and the status of the project generally, without further delay.

Foxwoods has failed to establish good cause to extend the time by which it must comply with Conditions 5 and 6 of the Board's Order of September 1, 2009

Section 497a.5(a)(1) of the Board's regulations 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

58 Pa. Code § 497a.5(a)(1) (emphasis added).

Although neither the Gaming Act nor the Board's regulations contains a definition of "good cause," the phrase has come to be understood in the law as "substantial reason amounting to a legal excuse for failing to perform an act required by law as determined on a case-by-case basis," BLACKS LAW DICTIONARY, 6th Edition (1990) (citations omitted).

Previously, in the matters of *HSP Gaming, L.P. 's Application for Additional Time to Make Slot Machines Available to Play* and *Foxwoods' Petition for Extension of Time to Make Slots Available*, the Board found "good cause" to grant HSP Gaming, L.P.'s and Foxwoods' Petitions, respectively. In those cases, HSP and Foxwoods showed that litigation, community

opposition and obstacles from Philadelphia City Council were responsible for the delay in progressing with their projects. Finding that these factors were beyond the licensees' control and warranted a finding of "good cause" for delay, the Board granted both Petitions.

In its current Motion for Extension of Time, Foxwoods contends that the "current realities of the national credit and financial markets necessary to fund the development of the facility, which is the first and most critical hurdle to ensuring it begins operations on or before May 29, 2011," has delayed Foxwoods' satisfaction of Conditions 5 and 6 of the Board's Order of September 1, 2009. Foxwoods claims that, "because the source, manner, timing and amounts of financing and funding for development of the facility will dictate many of the details that go into architectural renderings, it cannot provide the Board with these renderings to an appropriate level of specificity and detail" without first securing said financing.

In their December 9, 2009 filing in opposition to Foxwoods' Motion for Extension of Time, the Legislators recommend that the Board deny Foxwoods' Motion for failure to establish "good cause." The Legislators contend that the Board previously granted Foxwoods an extension of time where forces, in opposition and outside their control, interfered with the development of its project; however, the forces Foxwoods argues are currently impeding development of its project (i.e. the downturn in the international credit and financial markets) are (1) not "in opposition" to Foxwoods and (2) have been in place since before the Board entered its September 1, 2009 Order. The Board agrees that an economic downturn has plagued this country, and the world, for many months. The Board further recognizes, however, that this situation has existed since well before September 1, 2009 and, in fact, by many accounts, the global capital and credit markets have improved, somewhat, since that date.

In its December 15, 2009 Answer, Objection and Request for Sanctions, OEC argues that Foxwoods has failed to establish "good cause" for the Board to grant its Motion for Extension of Time. Specifically, OEC contends that Foxwoods has "offered no facts upon which an extension could or should be granted, but only vague references to changing money markets and un-named possible investors who may or may not have some interest in a gaming project which is undefined." Additionally, OEC objects to Foxwoods' statements that possible investors will dictate the type of facility Foxwoods will develop because, "the Board and citizens of the Commonwealth are entitled to a concrete plan for a facility substantially similar to that approved by the Board [on December 20, 2006]." The Board agrees with OEC's position.

The factors Foxwoods contends are causing delays in its compliance with Conditions 5 and 6 of the Board's September 1, 2009 Order have remained relatively constant since Foxwoods accepted those conditions at the Board's August 28, 2009 meeting. Foxwoods has been aware since at least 2008 of the issues that it alleges are contributing to a delay in the progression of its project. Notwithstanding that fact, Foxwoods did not, at that time, assert impossibility of compliance with the Board's deadlines, or ask the Board for reconsideration, as was its right pursuant to Section 494a.8 of the Board's regulations ("a party to a proceeding may file for reconsideration of a Board order within 15 days of issuance of that order"), 58 Pa. Code § 494a.8. Additionally, Foxwoods did not file the current request for an extension of time until the day before compliance with Conditions 5 and 6 of the Board's September 1, 2009 Order was called for although it should have known long prior to that date that it could not meet the conditions. Finally, it has been almost two months since Foxwoods filed the current Motion and it appears it has not made substantive progress in satisfying the aforementioned conditions.

At the Public Hearing on January 27, 2010, counsel for Foxwoods explained that it has settled on a construction company, The Keating Group, and that it has been in discussion with a possible investor for its project. Counsel for Foxwoods stated that he expected an agreement on a term sheet with this investor, complete for Board review, by the end of January. Counsel for Foxwoods went on to state that, provided Board staff does not object to the term sheet, he believes Foxwoods will be able to comply with Conditions 5 and 6 of the Board's Order of September 1, 2009 by March 1, 2010; the date by which certain financing documents are also due. However, counsel for Foxwoods could not provide the Board with any significant further information regarding development of its project since September 1, 2009, nor with any specific information regarding its negotiations, including the identity of the potential investor.

It is noteworthy that, in accordance with other provisions of the Board's September 1, 2009 Order, Foxwoods submitted monthly updates on development of its project to BIE. These updates were entered into the record, under seal, on January 27, 2010. As a result, information contained therein is now available to the Board. After reviewing these reports, the Board finds these monthly updates are generally vague and do not mention any specific details of progress other than stating Foxwoods was "optimistic" that it would reach an agreement with one of several funding sources in order to construct a facility to meet its May 29, 2011 deadline. Foxwoods' most recent update, dated January 4, 2010, noted that it has a "substantial agreement with one international investor with gaming experience;" a fact counsel for Foxwoods confirmed during his testimony at the January 27, 2010 Public Hearing without any further detail.

While the Board is not unsympathetic to the difficulties Foxwoods has experienced to obtain the required financing during the current economic turmoil, the Board is duty-bound to fulfill the legislative intent of the Gaming Act. Section 1102 of the Gaming Act, 4 Pa.C.S. §

1102, provides that the authorization of limited gaming is intended to, *inter alia*, provide for property tax reduction and economic development opportunities; provide broad economic opportunities to the citizens of the Commonwealth; enhance tourism; and assist the Commonwealth's horse racing industry. To this end, the Gaming Act authorizes two Category 2 casinos in the City of Philadelphia which will contribute 55% of their "gross terminal revenue" to the Commonwealth. Since the first casino in Pennsylvania opened in October 2006, all citizens of the State have benefited from the revenue and jobs provided by gaming entities. The Board issued Foxwoods its License in May 2008. Undoubtedly, Foxwoods faced opposition and resistance from forces outside its control since being awarded a Category 2 License which, the Board recognized in its September 2009 decision to grant Foxwoods an extension through May 29, 2011 to develop its facility; however, in order to ensure that the citizens of Pennsylvania experience the aforementioned benefits of gaming, in a timely fashion, the Board conditioned that decision and required Foxwoods to provide updates and various status documents to the Board or BIE during progression of its project. Aside from vague references in its monthly "progress letter," in the past 5 months Foxwoods has provided the Board with very little information to provide the Board with the necessary confidence that this project is moving forward to deliver the economic benefits mandated by the Gaming Act. Optimism alone will not build the structure, employ hundreds of Philadelphia-area residents or contribute to the economic welfare of Pennsylvanians. Only substantive and definitive agreements, contracts and documents will demonstrate progress.

The Board finds that Foxwoods is clearly in violation of the Board's Order of September 1, 2009. In order to impart upon Foxwoods the importance that Foxwoods progress with its project so that the citizens of Pennsylvania can realize the benefits it will bring, the Board has

determined that a monetary sanction, on a *per diem* basis, retroactive to the date by which Foxwoods was to comply with Conditions 5 and 6 of the Board's September 1, 2009 Order is appropriate and will convey the seriousness of this matter and offer any serious investor to the project incentive to bring some closure to the negotiations. To be clear, imposition of this sanction will cease when Foxwoods has complied with Conditions 5 and 6 of its Order of September 1, 2009. Because such compliance is not certain to occur, however; or, if it does, when it will occur, the Board will further issue a Rule to Show Cause upon Foxwoods to show why the Board should not levy further sanctions, including possible revocation of its license, for failure to comply with the Board's September 1, 2009 Order.[6]

Conclusion

The inability of Foxwoods to provide timely definitive documents relative to the project or to provide sufficient details to enable the Board to determine that the project is viable and can be completed in a timely manner is of significant concern to the Board. The Commonwealth's interest in economic development, job creation and fulfillment of the legislative intent of the Gaming Act is significant. Allowing the Foxwoods project to linger without readily apparent forward momentum is contrary to the Board's duty to timely implement gaming.

Foxwoods has failed to establish good cause for its delay in complying with Conditions 5 and 6 of the Board's Order of September 1, 2009. Accordingly, the Board denies Foxwoods' request for an extension of time and will impose a two-thousand dollar *per diem* sanction, beginning with the established deadline for satisfaction of these sections (i.e. December 1, 2009), and continuing until compliance with Conditions 5 and 6 of the Board's September 1, 2009

[6] Because the Board cannot reverse itself on a substantive issue previously decided (i.e. licensure of Foxwoods) in the absence of providing the affected party an opportunity to be heard, a hearing is necessary. *See, for example, Keller v. New Cumberland Zoning Hearing Board*, 19 Pa. D&C.3d 473, 476 (Pa.Com.Pl, 1981) (citations omitted).

Order is met. Furthermore, the Board issues a Rule to Show Cause upon Foxwoods to show, at a hearing to be held on March 3, 2010, why the Board should not levy further sanctions, including possible revocation of its license, for failure to comply with the Board's September 1, 2009 Order.

Dated: 2/10/10

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

If you disagree with the Board's Adjudication and Order, you have the right to file an appeal with the Commonwealth Court of Pennsylvania within thirty (30) days of the date of this Order. See, Pennsylvania Rule of Appellate Procedure 1512.

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IN THE PENNSYLVANIA GAMING CONTROL BOARD

IN RE:	:	
PHILADELPHIA ENTERTAINMENT AND	:	
DEVELOPMENT PARTNERS, L.P., d/b/a	:	**OHA DOCKET NO. 1170-2009**
FOXWOODS CASINO PHILADELPHIA	:	
	:	

ORDER

AND NOW, this 3rd day of March 2010, the Pennsylvania Gaming Control Board ("Board") finds that Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia ("Foxwoods") has not met its burden, by clear and convincing evidence, that it has achieved substantial compliance with Conditions 5 and 6 of the Board's September 1, 2009 Order or, otherwise provided sufficient excuse for failing to do so.

The Board does however find that progress has been made by submission to the Office of Enforcement Counsel ("OEC") of a term sheet and related documents.

The Board has not, at this point, received sufficient evidence that warrants lifting the Order of February 10, 2010 and, therefore, said Order remains in effect. The *per diem* sanction continues to accrue pending further order of the Board.

The Board further ORDERS and DIRECTS that Foxwoods shall submit definitive financing documents to the Board and OEC no later than March 31, 2010. OEC shall report to the Board during the Board's meeting of April 7, 2010 as to the status of the receipt of those documents.

Foxwoods shall submit documents required by Conditions 5 and 6 of the Board's September 1, 2009 Order by April 26, 2010. The Board shall receive further evidence of this

matter at the Board's Public Meeting scheduled for April 29, 2010, at which time the Board shall assess the need for further Board action to achieve compliance with the Board's Orders.

By the Board:

Gregory C. Fajt, Chairman
Pennsylvania Gaming Control Board

If you disagree with the Board's Decision and Order, you have the right to file an appeal with the Commonwealth Court of Pennsylvania within thirty (30) days of the date of this Order. See, Pennsylvania Rule of Appellate Procedure 1512.