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October 24, 2008

Kim Kaufman
Executive Director
Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

INDEPENDENT REGULATORY
REVIEW COMMISSION

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Re: **IRRC Regulation #2692**

Dear Mr. Kaufman:

As District Attorney of Lebanon County, it has come to my attention that the Pennsylvania Gaming Control Board has issued its Final-Form Rulemaking Adopting Regulation # 125-85 which amends the definition of "licensed facility" in section 1103 of the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act") and section 401a.3 of the Gaming Act regulations.

The Gaming Act defines "licensed facility" broadly as "[t]he physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines." 4 Pa. C.S.A. § 1103. Currently, section 401a.3 of the regulations incorporates this statutory definition. 58 Pa. Code § 401a.3.

The proposed amendment changes the definition of "licensed facility" by adding the following boldfaced language to section 401a.3 of the regulations:

- (i) The physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines **including the gaming floor and all restricted areas servicing slot operations, and food, beverage and retail outlets and other areas serving the gaming floor which are located either on or directly accessible from and adjacent to the gaming floor or the restricted areas servicing slot operations.**
- (ii) The term does not encompass areas or amenities exclusive to pari-mutuel activities, hotel activities including hotel rooms, catering or room service operations serving a hotel, convention, meeting and multipurpose facilities, retail facilities, food and beverage outlets and other amenities and activities not located on or adjacent to the gaming floor or related to slot machine gaming operations.

It is ironic that in its Regulatory Analysis, the Gaming Board boldly claims that the amendment “expands the definition of the term ‘licensed facility’ to provide greater clarity as to what areas are considered to be part of the licensed facility. The Gaming Board amazingly concludes that “[t]here are no public health, safety, environmental or general welfare risks associated with this regulation.”

While responding to a specific request from the IRRC, the Gaming Board concluded that the amended definition of “licensed facility” was consistent with the intention of the General Assembly and therefore the proposed definition did not present a policy issue warranting legislative review.

This letter is to make clear that as one charged with law enforcement and prosecuting criminals I strongly disagree, and would assert that this proposal goes exactly contrary to common sense, good public policy and every stated intent of the General Assembly – public safety in the form of effective law enforcement and regulation.

In Section 1102 of the Gaming Act, the General Assembly identifies the “primary objective” of the Gaming Act to “protect the public through the regulation and policing of all activities involving gaming...” (Emphasis added.). Moreover, section 1102 declares that all other objectives and purposes are “secondary” to the primary purpose of protecting the public.

Adopting the proposed narrow definition of “licensed facility” clearly frustrates the legislative intent expressed in section 1102 by making it less likely that the primary purpose of protecting the public will be served because the regulation and policing of activities involving gaming will be restricted.

The Board’s use of the term “expand” is most interesting. There are two relevant dictionary definitions for “expand.” By “expand,” the Gaming Board could only intend the first meaning — “to express at length or in greater detail.” Merriam-Webster Collegiate Dictionary 439 (11th ed. 2004). The second dictionary definition of “expand” — “to increase the extent or scope”— does not apply to the Final-Form Rulemaking. The amendment does not increase the extent or scope of the definition of “licensed facility.” Rather, even a cursory comparison of the current definition with the proposed definition reveals that the effect of the proposed definition is to markedly decrease the area included within that the term “licensed facility.” Indeed, the vast majority of the text added by the amendment is in subsection (ii), which describes the area that the term does “**not** encompass.” Thus, the insertion of new language has the effect of whittling down the broad “physical land-based” definition of the existing regulation and effectively limiting the “licensed facility” to the gaming floor square footage where slot machines are operated. Although the Gaming Board’s proposed regulation obviously “expands” the number of words in the definition, the result is the redefinition of the term “licensed facility” to decrease the actual physical space encompassed within the definition. As discussed below, if the amendment is adopted, application of this narrowly redefined term to various sections of the Gaming Act will frustrate legislative intent and implement bad public policy.

Section 1102 expresses the legislative intent of the General Assembly when it passed the Gaming Act, provides:

The General Assembly recognizes the following public policy purposes and declares that the following objectives of the Commonwealth are to be served by this part:

(1) The primary objective of this part to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful. 4 Pa. C.S.A. § 1102 (emphasis added).

It is basic that rulemaking that affects the definition of "licensed facility" must be consistent with the primary objective of the Gaming Act to protect the public.

The Final-Form Rulemaking is clearly inconsistent with that objective.

Applying the proposed regulation to Chapter 15 of the Gaming Act shows this inconsistency. As a clear example, Section 1514 requires the exclusion or ejection of certain persons from any "licensed facility." 4 Pa. C.S. § 1514 (a) This provision defines the "standards relating to persons who are career or professional offenders...or whose presence in a licensed facility would...be inimical to the interest of the Commonwealth or of licensed gaming...or both." Using the existing definition, "licensed facility" includes the land-based area, *i.e.*, the entire premises and grounds. Under the proposed definition, the area from which the career or professional offender could be excluded or ejected would be limited to gaming floor area with slot-machines. The authority to regulate "activities involving gaming," would be reduced, not expanded, and the primary objective of the Gaming Act would be frustrated.

Similarly, as another example, section 1515 provides that "a licensed gaming entity may exclude or eject from its licensed facility any person who is known to have been convicted of a misdemeanor or felony committed in or on the premises of any licensed facility." 4 Pa. C.S. § 1515.

A third example, Section 1517 provides for investigations and enforcement and includes the right of the board to "inspect, when appropriate, a licensee's or permittee's person and personal effects present in a licensed facility under this part while that licensee or permittee is present at a licensed facility." 4 Pa. C.S. § 1517(c)(5). The proposed regulation, by restricting the definition of "licensed facility" to apply only to the slot machine area, limits the authority to exclude individuals and to conduct inspections.

These examples dramatically show the proposal clearly violates the primary objective of the Gaming Act, namely to protect the public. We have been told that the narrower definition has been developed in order to make it easier for the Gaming Board to site gaming facilities in certain parts of the state. This is certainly a case of "letting the tail wag the dog," in that it is limiting public safety in order to have two casinos within 15 miles of each other.

On behalf of all levels of law enforcement, we respectfully ask that you disapprove the proposed regulation.

Sincerely,

A handwritten signature in cursive script that reads "David J. Arnold".

David J. Arnold
District Attorney

CC:
Attorney General Tom Corbett
Senator Mike Folmer
Rep. Rosemarie Swanger
Rep. Mauree Gingrich