

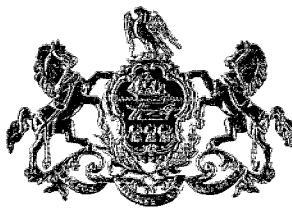
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Senate of Pennsylvania
48TH SENATORIAL DISTRICT

October 29, 2008

#2692

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

RE: IRRC Regulation #2692

Dear Mr. Kaufman:

We want to reemphasize our strong opposition to the Gaming Control Board's Regulation #125-85, which we believe would allow that Board to rewrite law or otherwise reinterpret what the General Assembly expressly intended and enacted into law. We continue to believe that IRRC's July 2nd comments on these regulations were on point in capturing our concerns with the Gaming Board's proposal.

We urge the Commission to disapprove Regulation #125-85 (#2692) because it fails to meet several of the criteria set forth in the Regulatory Review Act at 71 P.S. § 745.5b. Most importantly, the regulation has not met the primary Regulatory Review Act criteria of whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based. The Regulation fails to effectuate the intent of the General Assembly and does not conform to the statutory meaning.

Notably, Lebanon County and East Hanover Township, Lebanon County, have been ousted from receiving funding intended to be paid to these communities under the statutory definition enacted by the General Assembly. In addition, the Gaming Board has impermissibly changed the facility boundaries for law enforcement purposes as is discussed in the Lebanon County District Attorney's opinion that is part of this record. The strained justification offered by the Gaming Board fails to justify its contorted version of the statutory definition.

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REVIEW COMMISSION

We also continue to believe that the Gaming Board does not have authority to promulgate a regulation that would change the disbursement of the Local Share Assessment under §1403(c) of the Gaming Act. The Gaming Board has failed to justify its intrusion into the authority and duty of the Department of Revenue to distribute funds to the counties based on the percentage of acreage of the “land-based” licensed facility.

The Department of Revenue¹ holds the exclusive authority to distribute funds under the Act, as is noted in your staff Comments. The Gaming Board’s strained and incorrect interpretation has effectively blocked Revenue from proper distribution to date. The regulation should be disapproved because it is therefore not in the public interest. Further, we believe that the changes made by the Gaming Board are of such a substantial nature that this policy decision requires legislative review.

We also agree with Lebanon District Attorney Arnold’s legal assessment of the Gaming Board’s proposed rule:

- 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**

¹ Section 1403(c) of the Gaming Act states that

The Department [of Revenue] shall: (. . .)

(2) From the local share assessment established in subsection (b), make quarterly distributions among the counties hosting a licensed facility in accordance with the following schedule: (. . .)

(vi) If the licensed facility is located in more than one county, the amount available shall be distributed on a pro rata basis determined by the percentage of acreage located in each county (. . .). 4 Pa. C.S. §1403(c)

adjacent to the gaming floor or related to slot machine gaming operations.

In its Regulatory Analysis, the Gaming Board asserts 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.” Regulatory Analysis Form, p. 1, ¶ 8. The Gaming Board also concludes that “[t]here are no public health, safety, environmental or general welfare risks associated with this regulation.” Regulatory Analysis Form, p. 2, ¶ 12.

Before issuing the Final-Form Rulemaking, the Gaming Board reviewed comments from several legislators, entities affected by the proposed amendment, and the Independent Regulatory Review Commission (“IRRC”). The Gaming Board stated in its Regulatory Analysis that under the provisions of the Gaming Act relating to local share distributions, the amendment could have a fiscal impact on a political subdivision’s ability to receive local share funds because the distribution of funds is based upon the location of the licensed facility. Regulatory Analysis Form, p. 4, ¶ 18. Responding to the public comments on the amendment, the Gaming Board concurred with those commentators who asserted that the amendment would have an economic impact on East Hanover Township, Lebanon County because East Hanover Township would not be entitled to any distribution of local share funds under the Gaming Act if the amendment were adopted.

Finally, 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.

- The final-form rulemaking of the Gaming Board amending the definition of “licensed facility” in the Gaming Act regulations is inconsistent with the legislative intent of the General Assembly

Contrary to the assertions of the Gaming Board, the amendment does not expand but rather severely narrows that definition. 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....” 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” 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 Final-Form Rulemaking Narrows the Definition of “Licensed Facility”

The Gaming Board asserts that the Final-Form Rulemaking “expands” the definition of “licensed facility.” In fact, the Final-Form Rulemaking has the opposite effect. There are two relevant dictionary definitions for “expand.” By “expand,” the Gaming Board clearly intends 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 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 the 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 the implement bad public policy.

- The Proposed Narrower Definition of “Licensed Facility” Is Inconsistent with the General Assembly’s Legislative Intent Expressed in the Gaming Act

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

§ 1102. Legislative intent.

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 (West 2008) (emphasis added). 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 inconsistent with that objective.

Applying the proposed regulation to chapter 15 of the Gaming Act shows this inconsistency. Section 1514, for example, requires the exclusion or ejection of certain persons from any “licensed facility.” 4 Pa. C.S. § 1514 (a) (West 2008). 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.” Id. 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, 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 (West 2008). Section 517 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. This clearly violates the primary objective of the Gaming Act to protect the public.

Floor debate on an amendment to the Gaming Act passed in 2006 supports the conclusion that the proposed narrow definition of “licensed facility” contravenes legislative intent because it limits Gaming Board authority. Mirroring the statute, current Gaming Act regulations define “licensed facility” 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. § 1103 (West 2008). Before an amendment in 2006, however, the Gaming Act defined “licensed facility” as “[t]he physical land-based location and associated areas at which a license gaming entity is authorized to place and operate slot machines.” Thus, in 2006, the General Assembly amended the definition by deleting the phrase “and associated areas.”

In the Senate, which concurred in the amendment, the following excerpt from Senator Fumo’s floor remarks are telling:

The acceptance of any interpretation of the provisions of Senate Bill. No. 862 that would weaken or limit the regulatory authority of the board to protect the public is contrary to the explicit provisions of the act and the intent of this body...It is well within the authority of the board to develop rules or regulations that continue to ensure the proper operation, management, and

licensing of customary accessory uses that are typically connected or inherently linked with the conduct of gaming at a casino.

Pa. Leg. J., Senate, at 2207, October 27, 2006.

Senator Fumo further clarified the intent to maintain a broad definition of “licensed facility” in order to maintain broad authority to police gaming operations:

However, for the benefit of the Members, they should understand that **there could be an interpretation now that the Gaming Board's authority has now been limited to strictly the floor of the facility**, where at one time it regulated the entire facility.... I am raising a valid issue concerning corruption and the possibility of it. We made the Gaming Board, we think, very powerful and very pure. **We invested a lot of authority in them to regulate this, to keep organized crime and other people out of it. We gave them broad authority.** We have now added the Attorney General to that. What the House did was [arguably] take away that authority and say that they will now only regulate the gaming floor, none of the ancillary areas such as restaurants, or anything else attached to that, which we think is a huge mistake. **It does not exist anywhere else in America. Everywhere else in America, the Gaming Board regulates the whole facility, as it should, because the facility is really one entity.** By the House doing this, they have now made this subject a legal battle. We were much better off with the other language. I hope the courts agree with Senator Brightbill and myself, but we have now opened a new door through some hastiness on their part. They talked about us doing things late at night, they did things I do not think they even read or understood, at the behest of some lobbyist somewhere that has now gummed up this bill.

Pa. Leg. J., Senate, at 2206, October 27, 2006. The proposed narrow definition of the term “licensed facility” as the area or floor where slot machines are located diminishes Gaming Board authority to police gaming operations and therefore frustrates the “primary objective” of protecting the public.

We continue to believe that had the Gaming Board heeded IRRC's comments, it would have rectified a situation affecting Lebanon County and East Hanover Township, Lebanon County, a host municipality for the Hollywood Casino at Penn National Racetrack.

Kim Kaufman
October 29, 2008
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Thank you again for your consideration of this important matter.

Sincerely,



Mike Folmer
48th Senatorial District



RoseMarie Swanger
102nd House District



Michael A. Ginty
101st House District

cc: Honorable Tom Corbett, Attorney General
Mary DiGiacomo Colins, Chair, Pennsylvania Gaming Control Board
Jeffrey W. Coy, Commissioner, Pennsylvania Gaming Control Board
James B. Ginty, Commissioner, Pennsylvania Gaming Control Board
Kenneth T. McCabe, Commissioner, Pennsylvania Gaming Control Board
Sanford Rivers, Commissioner, Pennsylvania Gaming Control Board
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Frank T. Donaghue, Acting Executive Director, Pennsylvania Gaming Control Board
Honorable Robin Wiessmann, State Treasurer
Honorable Thomas W. Wolf, Secretary of Revenue
Honorable Dennis Wolff, Secretary of Agriculture
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