



Fox Rothschild LLP
ATTORNEYS AT LAW

Midtown Building, Suite 400
1301 Atlantic Avenue
Atlantic City, NJ 08401-7212
Tel 609.348.4515 Fax 609.348.6834
www.foxrothschild.com

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2008 DEC -9 AM 8:55

INDEPENDENT REGULATORY
REVIEW COMMISSION

**VIA FACSIMILE TRANSMISSION
AND FEDERAL EXPRESS**

December 8, 2008

Richard Sandusky, Director of Regulatory Review
Pennsylvania Gaming Control Board
5th Floor, Verizon Tower, Strawberry Square
303 Walnut Street
Harrisburg, PA 17101
Attention: Public Comment on Regulation No. 125-92

Dear Mr. Sandusky:

We represent Harrah's Chester Downs Management Company, LLC, manager of Chester Downs and Marina, LLC ("Chester Downs"), the holder of a Category 1 Slot Operator license approved and issued pursuant to 4 Pa.C.S. § 1302, License No. F-1368. On behalf of Chester Downs, we are submitting the following comments to Regulation No. 125-92 (proposed regulation 58 Pa. Code §§ 441a and 467a) ("Reg 125-92").

We offer the following comments in response to the Pennsylvania Gaming Control Board's ("Board") Reg 125-92. These comments are submitted on behalf of Harrah's Entertainment, Inc. and its various subsidiary entities (collectively, "HET") with an interest in Chester Downs and Marina, LLC (the "Licensee"), the holder of a Category 1 Slot Operator License issued by the Board.

Specific Section Comments

1. Section 441a.25(d) – Calculation of increase in designated smoking areas

HET respectfully suggests that additional clarity would be brought to the calculation of the allowable increase in designated smoking areas under the Clean Indoor Air Act, 35 Pa.C.S. §637.1, et seq. (the

“Clean Indoor Air Act”) by the inclusion of a formula for such calculation. HET offers the following formula for the Board’s consideration¹:

- (1) On the basis of each report received from the Department of Revenue, a slot machine licensee shall calculate the difference in average gross terminal revenue per slot machine unit in the designated smoking areas (“GTR/Smoking”) and the designated non-smoking areas (“GTR/Non-smoking”) at the licensed facility.
- (2) Subtract GTR/Non-smoking from GTR/Smoking (the “GTR Difference”).
- (3) If the GTR Difference is greater than zero (0), divide the GTR Difference by GTR/Non-smoking and multiply the resulting quotient by 100 (the “Smoking Factor”).
- (4) Add the Smoking Factor to the percentage of the gaming floor permitted to be designated as smoking area under the Clean Indoor Air Act (initially, twenty-five percent (25%)), as such percentage may previously have increased hereunder.

2. Section 441a.25(d) and 441a.25(e) – Prior Board Staff Approval

The Board’s proposed regulations require prior action by Board staff (specifically, the Executive Director) prior to the right of a slot machine licensee to increase the square footage of the designated smoking areas of a licensee’s gaming floor when authorized under the Clean Indoor Air Act. HET respectfully suggests that such prior approval is antithetical to the intent of the provisions of the Clean Indoor Air Act permitting such increase and should not be required.

The Clean Indoor Air Act allows casino licensees to increase the designated smoking areas on the gaming floor above the baseline amount of twenty-five percent (25%) of the total gaming floor when such licensee can demonstrate that the licensee is generating less revenue in the non-smoking areas of its gaming floor than in the smoking areas of its gaming floor. This construct is designed to strike a balance between (1) the Commonwealth’s concern for those who might be exposed to second-hand smoke its deleterious effects and (2) the importance of gaming revenues to the Commonwealth and its citizens. Section 3(b)(11) of the Clean Indoor Air Act makes clear that upon demonstration of the adverse impact of the Commonwealth’s partial smoking ban on gross terminal revenues, an effected licensed facility “may increase the designated smoking area” in accordance with the enunciated formula, not to exceed fifty percent (50%) of the gaming floor. 35 Pa.C.S. §637.3(b)(11). The

¹ One element of the report to be prepared by the Department of Revenue under Section 3(b)(11) of the Clean Indoor Air Act (35 Pa.C.S. §637.3(b)(11)) that remains unclear is the degree to which this report will simply report a licensee’s 90-day average gross terminal revenue per slot machine or whether it will go so far as to calculate the percentage difference between average gross terminal revenue per slot machine in the designated smoking areas and average gross terminal revenue per slot machine in the designated non-smoking areas. The formula which follows assumes that the licensee will be responsible for calculation of the difference between average gross terminal revenue per slot machine in the designated smoking areas and average gross terminal revenue per slot machine in the designated non-smoking areas.

Clean Indoor Air Act does not require any affirmative prior approval from any instrumentality for an increase in designated smoking area permitted thereby. See id.

Requiring prior approval will cause inevitable delay in the implementation of a revenue-driving solution approved by the Legislature. Regardless of how efficiently the Board's staff is able to receive, review and address each application for designated smoking area increase, delay will be occasioned by virtue of intake of a licensee's application, verification by the Executive Director of the licensee's revenue calculations, review and approval by the Executive Director of the licensee's revised gaming floor plan and issuance of approval by the Executive Director of the licensee's implementation of the proposed revised gaming floor plan. Each day lost in this process represents unrecoverable lost revenues for the Commonwealth.

Further support for the proposition that prior approval by the Board was not intended by the Legislature can be found in the Legislature's specific reference to the Board's limited responsibilities in connection with these matters. Section 5(b)(1)(ii) of the Clean Indoor Air Act provides directive to the Department of Health that, in the case of alleged violations concerning public places "subject to licensure by the Commonwealth, ... the [Department of Health] shall refer the complaint to the appropriate licensing agency for investigation and enforcement of this act." 35 Pa.C.S. §637.5(b)(1)(ii). In furtherance of the Board's enforcement responsibilities, the Legislature specifically reserved to the Board jurisdiction to verify the gross terminal revenues included in the Department of Revenue's report to "ensure compliance with the requirements" under Section 3(b)(11) of the Clean Indoor Air Act. 35 Pa.C.S. §637.3(b)(11). Had the Legislature desired to expand the role of the Board beyond these enforcement responsibilities, they could easily have done so. Basic principles of statutory interpretation require a more narrow reading of the role of the Board in this respect.

HET respectfully suggests that, consistent with the language of the Clean Indoor Air Act, a licensee should be permitted to implement changes to the designated smoking areas of such licensee's gaming floor upon the good faith completion by such licensee of the calculations required by the Clean Indoor Air Act and the subject proposed regulations of the Board. Such calculations will be based upon revenue numbers generated by the Department of Revenue, and verifiable by the Board in connection with its enforcement responsibilities. A licensee that errs in its calculations bears the risk of a Board-initiated enforcement action.

Finally, note that HET does not object to the Board's requiring that licensees submit documentation to the Board supporting the calculation of any permitted increase in designated smoking areas on the gaming floor. Nor does HET object to the submission of revised gaming floor plans reflecting such permitted increase. HET merely suggests that each of these submissions can and should occur after implementation by the licensee of any permitted increase, ensuring (1) the speedy capture of additional revenue for the Commonwealth and (2) the ability of the Board to confirm all relevant aspects of a licensee's compliance with the Clean Indoor Air Act in execution of the Board's enforcement responsibilities.

Richard Sandusky, Director of Regulatory Review
December 8, 2008
Page 4

Please feel free to contact me if you have any questions regarding the above comments or if you would like to discuss any of the comments in greater detail. Additionally, please be aware that if you determine that conversations with HET's regulatory counsel may assist in your consideration of these matters, HET is prepared to make such parties available to you at your convenience. Thank you for your consideration.

Very truly yours,

/s/ William J. Downey

William J. Downey

cc: R. Douglas Sherman, Chief Counsel
Mickey Kane, Acting Board Secretary
N. Lynne Hughes, V.P. Legal Affairs/Eastern Division for Harrah's Operating Co., Inc.