

**[J-44-45-2007]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

STATION SQUARE GAMING LP, Petitioner	:	No. 28 MM 2007
	:	
v.	:	Petition for Review from the Order of the
	:	Pennsylvania Gaming Control Board
	:	Dated February 1, 2007 Granting the
PENNSYLVANIA GAMING CONTROL BOARD,	:	Application of PITG Gaming LLC and
	:	Denying the Application of Station Square
Respondent	:	Gaming LP for a Category 2 Slot Machine
	:	License in Pittsburgh, Pennsylvania,
IOC PITTSBURGH, INC.,	:	Docket Nos. 1361 and 1363
Intervenor	:	
	:	
PITG GAMING, LLC,	:	
Intervenor	:	ARGUED: May 15, 2007

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IOC PITTSBURGH, INC., Petitioner	:	No. 29 MM 2007
	:	
v.	:	Petition for Review from the Order of the
	:	Pennsylvania Gaming Control Board
	:	Dated February 1, 2007 Granting the
PENNSYLVANIA GAMING CONTROL BOARD,	:	Application of PITG Gaming LLC and
	:	Denying the Application of IOC Pittsburgh,
Respondent	:	Inc. for a Category 2 Slot Machine License
	:	in Pittsburgh, Pennsylvania, Docket Nos.
PITG GAMING, LLC,	:	1357 and 1361
Intervenor	:	
	:	
STATION SQUARE GAMING LP,	:	
Intervenor	:	ARGUED: May 15, 2007
	:	

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: July 18, 2007**

Petitioners' arguments are, in my view, somewhat weightier than the majority portrays. For example, Petitioners contend that the Board's alleged failure to act as a "prudent man" in awarding the Pittsburgh license constituted an error of law. See, e.g., Brief for Petitioner (Station Square Gaming, LP) at 57 n.33. The majority rejects this claim by stating that the Gaming Act's requirement that the Board use the prudent man standard has no effect upon the review that this Court must undertake in determining whether the Board erred in the award of a gaming license. See Majority Opinion, slip op. at 13 (asserting that the Gaming Act's directive to apply the prudent man rule "do[es] not channel this Court's appellate review"). It would appear, however, that if it were evident that the Board failed to apply such a standard as required by statute, this would constitute an error of law, thus providing possible grounds for reversal. See 4 Pa.C.S. §1204 (stating that this Court must affirm the Board's order unless it finds, inter alia, that the Board committed an error of law). Under the facts of this case, moreover, Majestic Star's troubled financial history does raise a legitimate question as to whether a "prudent man" would have selected PITG over its competitors for licensure. Still, as the majority points out, the record contains evidence of some positive indicators. For example, the financial suitability task force found that PITG had the resources to build its casino, and the Board determined that the project would be very profitable. Therefore, given this Court's highly deferential review as prescribed by the Legislature, I must ultimately conclude that the Board's actions did not constitute reversible error under the prudent man standard.

Station Square also contends that the Board should have used a baseline of 3,000 slot machines for its revenue-generation comparison of all applicants. The majority dismisses this argument by pointing out that, after six months, "the licensee may request to be permitted to operate up to 5,000 slot machines. Considering that the

Board was calculating future revenues beyond the first six months of the casino's operation, there was no error in the Board utilizing the 5,000 slot machine figure." Majority Opinion, slip op. at 21. This disposition seems non-responsive, as Station Square concedes that it is possible to request expansion after six months, but highlights that there is no way to know whether such a request will be granted.

While I ultimately do not agree with Station Square for reasons discussed below, I find its argument more plausible than the majority. In particular, Station Square points out that the Board has taken the position that market conditions favorable to slots expansion are always a necessary precondition to expanding beyond 3,000 machines, and hence, there is no assurance that the Board will approve such a request. In its decision regarding slot licenses for Philadelphia, the Board stated:

At first glance . . . it appears that Riverwalk will be more profitable than the other casinos. Based upon an examination of evidentiary records, the Board finds there is no significant difference in the revenue estimates. Riverwalk's revenue generation estimates were based upon an assumption that 5,000 machines would be operational by the stabilized year. The number of machines is based upon that number for which financing was in place at the time of the hearing. The other casino applicants' projections were based upon 3,000 machines because that is the number of machines in the committed-to phases of the building projects. Each of those applicants provided credible testimony that they would proceed to their subsequent expansion phase and increase up to 5,000 machines with Board approval if the market supports that expansion. Even Riverwalk could not unilaterally expand from 3,000 to 5,000 machines without Board approval. The Board must approve that expansion . . . . Although they have the financing in place, if Riverwalk did not show usage and economic activity sufficient to support 2,000 additional machines, the Board would not be obligated to permit the expansion. Likewise, if another casino demonstrated that 3,000 machines were utilized to such an extent that expansion was warranted, then market conditions would warrant an expansion for their facility as well. In sum, market conditions will dictate the number of machines over the 3,000 threshold number at any of the properties. This was illustrated by

testimony that more machines do not necessarily translate into more revenues if the market demand is not present for the additional machines.

Adjudication of the Pennsylvania Gaming Control Board in the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia, at 94-95 (emphasis added), quoted in Brief for Petitioner (Station Square Gaming, LP) at 63.

While it may be difficult to reconcile the above reasoning with the Board's comparative approach in the present case, it does not follow that the Board may not make comparisons based upon later stages of the submitted proposals which subsume more than 3,000 slot machines. The applicants each included phased augmentations moving beyond the 3,000 number, with the general expectation that the Board would take into account the circumstances of all phases of the proposals when making its decision as to which proposed casino would best serve the Commonwealth's interests. Thus, regardless of the Board's disposition in the Philadelphia matter, Station Square has little firm ground to maintain that, here, the Board was legally required to make its revenue comparisons using only a 3,000 slot machine basis for each applicant. Moreover, I do not read the adjudication as placing sufficient weight upon the revenue generation factor to support a conclusion that the Board might have reached a different result if it had assumed only 3,000 slot machines relative to all of the proposals.

For these reasons, I am able to join the majority's decision to affirm the Board's order.