[J-42-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RIVERWALK CASINO, LP,	:	No. 27 MM 2007
	:	
Petitioner	:	Petition for Review from an Order of the
	:	Pennsylvania Gaming Board Dated
v.	:	February 1, 2007, Granting the
	:	Applications of HSP Gaming LP and
PENNSYLVANIA GAMING CONTROL BOARD,	:	Philadelphia Entertainment &
	:	Development Partners, LP and Denying
	:	the Application of Riverwalk Casino, LP
Respondent	:	for a Category 2 Slot Machine License in
	:	Philadelphia, Pennsylvania
PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, LP,	:	
	:	
	:	
Intervenor	:	ARGUED: May 15, 2007
	:	
HSP GAMING, LP,	:	
	:	
Intervenor	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: July 17, 2007**

Because I would remand the matter *sub judice* to the Pennsylvania Gaming Control Board ("Board"), I respectfully dissent.

In July of 2004, the General Assembly adopted, and the Governor signed into law, the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101-1906 ("Gaming Act" or "Act"), which authorized an entirely new and controversial industry in Pennsylvania. The Act assigned the task of accommodating the new industry to the newly-created Board, which consisted of seven members: three appointed by the Governor and four appointed by legislative leaders (one each by the President Pro Tempore of the

Senate, the Minority Leader of the Senate, the Speaker of the House, and the Minority Leader of the House). Id. § 1201(a), (b). The legislative appointees were granted what amounts to a veto power on the Board, as the Act dictates that "any action" by the Board involving "the approval, issuance, denial or conditioning of any license" requires "a qualified majority vote consisting of at least one gubernatorial appointee and the four legislative appointees." Id. § 1201(f)(1).

The Board had a daunting task: to set up a staff and infrastructure, to adopt procedures and regulations to govern its business, and to engage in the information-gathering and decision-making duties required of it to carry out the mandate of the Gaming Act in Pennsylvania. In any such administrative start-up, it is natural to experience fits and starts, and to make adjustments and accommodations in order to address issues that only the actual application can reveal. The task was made more difficult by the perceived necessity that gaming become a reality in Pennsylvania as soon as possible, so as to provide for the tax relief that gaming tax revenues were expected to provide. The stakes, as it were, were high.

The Act contemplates a fast-tracked, but very limited, unusual role for the judiciary. As relevant here, the Act allocates direct appeals of final licensing orders, such as the appeal in this case, within the jurisdiction of this Court. Id. § 1204. At the same time, the General Assembly dictated that this Court's review of the substance of any licensing decision would be extremely limited, as the statute mandates affirmance absent finding (1) an error of law, or (2) that the decision under review was both arbitrary and involved a capricious disregard of the evidence. Id. The obvious legislative intent to insulate the Board's licensing decisions from attack as much as possible makes the appellate prospects of a disappointed license applicant dim indeed. The appellant's task is made even more difficult by the fact that the Board has not sat idly by as the successful and unsuccessful applicants proceeded to litigate in this Court, but instead, has participated as a very active

litigant, opposing unsuccessful applicants every step of the way, in the process forwarding some rather extreme positions concerning the posting of bonds, standing, alleged waivers, etc. But the appellate review task is not impossible, if the very limited review contemplated by the statute is to have any meaning at all.

Not surprisingly, given the newness of the Act, the unusual composition of the Board, the voting structure, and the circumstances under which the Board elected to discharge its licensing obligation, the appeal in this case sounds in due process. In my judgment, a number of the procedural complaints advanced by appellant Riverwalk pose closer calls than what is acknowledged by the Majority; and, in the aggregate, those complaints require a remand to the Board for further consideration of the Philadelphia casino licenses. In particular, I will address three of appellant's inter-related complaints: (1) that the Board illegally deliberated in a non-public executive session, in violation of the Sunshine Act, 65 Pa.C.S. § 704; (2) that the Board's finding concerning the feasibility of two casino sites on North Delaware Avenue was arbitrary and capricious, as it was premised upon a controlling "concern" that the Board never identified to appellant Riverwalk at a time when appellant could have addressed the concern; and (3) that the private deliberation process was tainted by the incomplete recusal of Board members. Viewed in hindsight, it is apparent that these related complaints arise, in large part, from the very newness and uniqueness of the processes that the Board adopted.

Viewing the issue in isolation, the Majority may be correct in rejecting appellant's Sunshine Act claim, by treating the Board's deliberations as technically quasi-judicial matters which the Board was not obliged to conduct in public. On the other hand, there was nothing to **prevent** the Board from opening up its processes and deliberations more, and such a policy of openness may well have avoided the procedural complaints now at issue in this matter -- complaints exposed only after the Board announced its licensing decisions and, still later, articulated for the first time the reasons for its decision in its

loquacious 113-page adjudication. Nor did the Board adopt the equivalent of a post-verdict procedure so that a party, once finally provided with the Board's reasoning and explanation for the licensing decisions it reached in private deliberations, might bring procedural and substantive complaints to the Board's attention. The Board's decision to deliberate as if it were a self-styled judicial body, but without providing an opportunity for an airing of objections once the reasons for its licensing decisions were finally disclosed, created the anomalous circumstance where grievances are now being heard for the first time in this Court.

Appellant's complaint concerning the traffic issue illustrates the problem created by holding private deliberations, while providing for no post-decision challenges. Appellant notes that the Board found that each of the proposed casinos in the North Delaware Avenue area had produced evidence that the traffic impact of its casino could be mitigated. But, appellant alleges, the Board then arbitrarily determined that siting both casinos in the North Delaware Avenue corridor would create an insurmountable traffic problem. Appellant notes that the Board's adjudication revealed that it deemed this factor -- the traffic impact of two casinos on North Delaware Avenue -- to be a disqualifying one for the proposal of two casinos in that locality. See Riverwalk's Brief at 25 ("According to the Board, 'if the Board approved one of the North Delaware Avenue locations for a license, then the Board is constrained to eliminate the two other locations in the same general vicinity for reasons of traffic management as discussed below [in the Adjudication].'") (quoting Adjudication at 83). Appellant complains that the Board reached this dispositive conclusion, which reduced appellant's prospect for obtaining a license by half, without any affirmative evidence that additional traffic problems would occur if two licenses were awarded in the northern corridor. Instead, the Board "relied entirely on the lack of any evidence disproving the Board's unsupported assumption." Riverwalk's Brief at 26 (citing Adjudication at 83, 87,

where Board thrice refers to not receiving evidence that the North Delaware Avenue corridor could "absorb" or "manage" traffic from two casinos).

In addition to complaining that there was no evidence to support the Board's controlling concern that only one license could be awarded in the North Delaware Avenue corridor because of traffic congestion, appellant forcefully argues that it was denied any opportunity to produce evidence to address the Board's concern because the Board did not put Riverwalk on notice to do so.

> The Board indicated for the first time in its Adjudication that it "is very concerned about the prospect of setting two casinos in the North Delaware Avenue region because of detrimental effects of traffic as well as the impact that locating two casinos in close proximity would have on one neighborhood." Ex. B (Adjudication) at 87. Riverwalk was never informed by the Board of this "concern" nor did the Board ever ask Riverwalk -- or the City of Philadelphia -- to submit any studies addressing the possible effects of having both casinos located in the North Delaware Avenue area. During Riverwalk's suitability hearings, the Board never questioned Riverwalk -- or the Board's own engineering expert -- about the possible effects of two North Delaware Avenue area casinos. [Record citation omitted.] Accordingly, neither Riverwalk nor the City was able to present evidence to the Board that having two casinos in the North Delaware Avenue area would not create additional traffic issues or demonstrate that these undisclosed concerns could be alleviated through traffic mitigation plans.
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> Disqualifying Riverwalk on the basis of hidden dispositive factors violated Riverwalk's due process rights under the constitutions of Pennsylvania and the United States and was arbitrary and capricious, Riverwalk and the City were effectively denied their right to present evidence because the Board never informed Riverwalk that having two North Delaware Avenue casinos was an issue on which either Riverwalk or the City <u>should</u> present evidence. The Board did not provide either Riverwalk or the City with due notice of all of the dispositive factors that would affect the Board's determination. The Board then made arbitrary and capricious factual findings about the assumed effect of two casinos even though the Board found that each casino could mitigate its own traffic. Even more egregiously, the Board relied entirely on the failure of the applicants to present evidence on a dispositive issue never raised by the Board as support for the Board's assumption about the effect two casinos would have on traffic.

Riverwalk's Brief at 27-28.[1]

In my view, appellant makes a very strong case for denial of due process. In rejecting appellant's claim that the Board's failure to disclose its concern with the traffic impact of two casinos on North Delaware Avenue denied it due process, the Majority states that the Board's Adjudication reveals that appellant's failure to address the issue "was not a dispositive factor in selecting the applicants for licensure." Majority Slip Op. at 30-31. Respectfully, the Adjudication says otherwise. The Board flatly declared that, if it "approved one of the North Delaware Avenue locations for a license, then the Board is constrained to eliminate the two other locations in the same general vicinity for reasons of traffic management." Adjudication at 83. That clearly constitutes a dispositive conclusion. The Board repeatedly referred to its not receiving evidence to address its concern in this regard, a concern which significantly reduced the chances of each of the North Delaware Avenue applicants, as they were effectively competing for one license, not two. Since the Board's actual deliberations were not held before the public, we have only its Adjudication by which to assess the role this factor played in its final licensing decision. Taking the Board at its word, I believe that due process requires a remand to allow appellant to address the Board's late-disclosed, dispositive concern, which I view as an error of law.

The Board's decision to deliberate in private is also significant to a proper assessment of appellant's recusal claim. Viewing the issue in isolation, and given the structure in which the statute is drafted, and the fact that the licensing votes were unanimous, I would tend to agree that the failure of conflicted Board members to recuse from the entirety of the deliberation was harmless. In addition, Chairman Decker and Commissioner Marshall made clear that their recusals were in an abundance of caution, to avoid even the appearance of any impropriety. But the broader question is what concerns

[1] Riverwalk emphasizes the City because the City supported its application.

me: what is the proper scope of a recusal when a comparative, rather than a distinct and absolute, decision is being deliberated? I respectfully disagree with the notion that a selective recusal is sufficient in such a situation.

For purposes of addressing that legal question, we should take the fact of recusal at face value: *i.e.*, the member recused because, as to that applicant, his or her objectivity could reasonably be questioned. Selective recusal does not eliminate the possibility of taint. A vote, or an argument or position, made in confidential deliberations **against** an applicant obviously operates to the good of the other applicants, and vice versa. Take, for example, a situation where an actual conflict exists, and say that the board member had a financial stake in one of the proposed casinos. Even if the member selectively recused from the deliberations and voting as to that applicant, he could in theory advance that applicant's chances, and his own financial interests, by opposing other applicants. Being privy to all other deliberations, the conflicted member could assess the relative prospects of other candidates, and then cast his lot in such a way as to maximize the prospects for the entity in which he had an interest. Private deliberations, such as were engaged in by the Board here, facilitate the potential for taint even further. Thus, in my view, when recusal is required in a situation involving a comparative assessment of multiple candidates, recusal should be required as to all deliberations affecting the prospects of that candidate. I would so hold, and because I would remand the matter for further consideration of appellant's traffic impact/due process claim, I would direct that any recusal should be total as to the award of the Philadelphia casino licenses.[2]

[2] I emphasize that my concern is with the point of law; I have no doubt whatsoever that Chairman Decker and Commissioner Marshall acted cautiously and more than honorably in all respects in this case. The points of law we decide, however, must attempt to account for other days and less honorable circumstances.

(continued…)

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Moreover, if the Court were to adopt my view respecting the proper scope of recusal, I would not hold members to prior recusals where such were entered in an abundance of caution, and without realization that recusal should be total.