[J-81-2009][M.O. - McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

GREENWOOD GAMING AND ENTERTAINMENT, INC.,	:	No. 106 MM 2009
Petitioner	:	Appeal from the Order of the Pennsylvania Gaming Control Board, No. 19421, dated May 8, 2009
v.	:	
	:	ARGUED: October 21, 2009
PENNSYLVANIA GAMING CONTROL BOARD,	:	
Respondent	:	
VALLEY FORGE CONVENTION CENTER PARTNERS, L.P.,	:	
Intervenor	:	

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: March 8, 2011**

I respectfully differ with the majority's reasoning and holding on the threshold legal question of what the Legislature meant when it employed the term "well-established resort hotel" as the litmus for Category 3 license eligibility. 4 Pa.C.S. §1305(a)(1).

In the first instance, the majority recognizes that this term is undefined in the statute. See Majority Opinion, slip op. at 6. Nevertheless, in spite of the apparent ambiguity, the majority offers little or no analysis of the term, other than to accept the

Board's interpretation that the Valley Forge Convention Center qualifies. See id. at 6-7. For my part, I believe a more probing inquiry on this pivotal question of statutory construction is necessary to an appropriate resolution of this licensing appeal. See Nationwide Ins. Co. v. Schneider, 599 Pa. 131, 145 n.8, 960 A.2d 442, 450 n.8 (2008) (explaining that "this Court ultimately maintains the final responsibility to interpret or construe statutes").

The Board's regulations define a well-established resort hotel, somewhat tautologically, as "[a] resort hotel . . . having substantial year-round recreational guest amenities." 58 Pa. Code §441a.1. This, however, is plainly insufficient to capture the legislative intent, since it affords no meaning to the qualifier that the resort hotel must be "well-established" to support a Category 3 license. 4 Pa.C.S. §1305(a)(1). Indeed, contrary to the presumption that the General Assembly does not intend to include superfluous language, see 1 Pa.C.S. §1922(2), neither the Board's definition, nor its adjudication, gives any attention to this qualifying term.

Furthermore, the Board appears to read the statutory proviso that the established resort hotel offer "substantial year-round recreational guest amenities," 4 Pa.C.S. §1305(a)(1), as if this criterion defines a well-established resort. In the statute, however, the year-round proviso is positioned remotely from the "well-established" qualifier and an independent purpose is readily discernable. In this regard, core amenities offered at many resorts (such as skiing and golfing) are seasonal in nature. Thus, for example, a hotel might enjoy the status of a well-established resort but not meet the independent requirement to provide substantial year round amenities.[1]

[1] Considering the purposes of the Gaming Act (including the clear intent to restrict Category 3 licenses and the gaming activities authorized thereunder), the year-round-amenities requirement may have been added to assure that gaming activities would not (continued . . .)

Moreover, a newly-constructed hotel may offer year-round amenities but cannot fairly be characterized as well established. For these reasons, status as a well-established resort must entail more than the provision of year-round amenities.

In considering the purpose of the "well-established" qualifier, I recognize that it is possible that the Legislature intended it to relate only to status as a hotel (which appears to be the majority's understanding, see Majority Opinion, slip op. at 7), as opposed to encompassing the resort term as well. The legislative history related by one of Applicant's attorneys, however -- namely, that the definition was crafted with two of Pennsylvania's long-standing, landmark resort hotels as the models -- strongly favors the latter understanding. Specifically, the attorney explained:

> Now, I think what's more important here . . ., Section 1305 of the Act was substantially amended in November of '06, very -- almost the whole thing was rewritten. . . . The Act was written originally with two resorts in mind. There's no doubt about that. Both of those resorts originally applied to you, and they both withdrew. You then held your own hearing to try to figure out how to get other applicants to be interested. And the legislature knew when it amended the Act in November of '06, Nemacolin [Woodlands Resort] had already withdrawn and Seven Springs [Mountain Resort], those of us in the industry knew they were going to withdraw.

N.T., Oct. 22, 2008, at 80. While the attorney also indicated that the General Assembly had subsequently modified the Gaming Act in 2006 and expanded the range of qualifying hotels, see id., in point of fact, the language of Section 1305(a)(1) was unaltered by the 2006 amendments. Compare Act of July 5, 2004, P.L. 572, No. 71, §1305(a), with Act of Nov. 1, 2006, P.L. 1243, No. 135, §1305(a)(1). Moreover, the

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(. . . continued)
be the only substantial attraction during off-season periods, thus converting a resort offering gaming amenities into, effectively, a "casino."

stronger variant of the "well-established" qualifier -- i.e., that attaching to both "resort" and "hotel" -- is consistent with the apparent legislative intent to closely limit the availability and scope of Category 3 licenses.[2]

Taking into account that a degree of deference is due the Board's construction of Section 1305, see Schneider, 599 Pa. at 145 n.8, 960 A.2d at 450 n.8, I am simply unable to accept it, because the Board's regulation and adjudication afford no role to the "well-established" qualifier. Thus, I find that the Board committed an error of law, and its adjudication cannot be sustained for that reason. See 4 Pa.C.S. §1204. Moreover, as Appellant develops at length, there is little or no record evidence that Applicant so much as markets itself as a resort hotel -- certainly, there is no dispute that the convention center is the predominate marketing focus.[3] I find substantial force in Appellant's argument that Valley Forge Convention Center cannot be well established in the public eye as a resort, where it does not appear even to perceive itself as such.

I have no doubt that industry definitions may overlap or of the desire among hotel establishments to serve as many things to many people. However, I am unable to accept that a convention center complex which does not broadly portray itself to the public as a resort qualifies as a "well-established resort hotel," along the lines of the Nemacolin or Seven Springs resort properties. Accord Brief for Appellant at 30 ("Lacking from [the] litany of the ordinary [amenities associated with the property] are

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[2] See 4 Pa.C.S. §1305. Indeed, if anything, the Legislature subsequently has strengthened the qualifiers by modifying the statute, in 2010, to repeat the "well-established" criterion four additional times. See Act of Jan. 7, 2010, P.L. 1, No. 1, §1305(a)(1).

[3] As Appellant highlights, all of the facility's signage, letterheads, and marketing and guest materials reflect that it is a convention center and are devoid of a single reference to resort status. See R.R. at 262a-263a, 806a-826a.

those 'special' or 'substantial' amenities that are the hallmarks of a true well-established resort hotel and that were plainly envisioned by Section 1305 of the Gaming Act. The Valley Forge Convention Center fails to offer its guests such on-site amenities as golf courses, lakes, boating, winter sports activities, tennis, hiking, biking, horseback riding, art galleries, museums and more.").[4]

Finally, I am sympathetic to the Board's efforts to advance the aims underlying the Gaming Act through the prompt issuance of the finite number of licenses subject to its charge.[5] I also recognize the benefits to the local area associated with a Category 3 approval for Applicant's facility, as amply developed in its evidence, as well as the wide-scale support Applicant enjoys from its community. Indeed, in light of the experience of attrition among Category 3 applicants, it may very well be that the Legislature may wish to revisit the prevailing restrictions.[6] With all due deference, however, I believe the Board committed legal error by failing to implement, appropriately, the existing statutory prerequisites to the approval of a Category 3 license.

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[4] Appellant also argues that the Board ignored or misconstrued key factors, such as the percentage of leisure guests and their average length of stay, in making its decision. In this regard, I also question the inclusion of convention-center guests within the leisure segment for purposes of determining resort-hotel status.

[5] Some insight into what appears to be an evolving understanding of what constitutes a well-established resort hotel on the part of the Board are encapsulated in a commissioner's comments at the licensing hearing, as follows: "Well, they're not exactly standing in line to come in for a Category Three license. And we do have another obligation is [sic] to get gaming up and running in Pennsylvania." N.T., Oct. 22, 2008, at 97.

[6] Of course, concerns with saturation of the Greater Philadelphia market maintained by Appellant also would be relevant to any such legislative inquiry. See N.T., Oct. 22, 2008, at 86-89, 93 (expressing Appellant's concerns over "cannibalizing" existing gaming revenues via oversaturation).