

COMMONWEALTH OF PENNSYLVANIA

GAMING CONTROL BOARD

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IN RE: PETITION TO ALLOW OBJECTIONS TO THE RENEWAL OF
PRESQUE ISLE DOWNS' LICENSE

* * * * *

PUBLIC HEARING

* * * * *

BEFORE: GREGORY C. FAJT, CHAIRMAN
Raymond S. Angeli, James B. Ginty,
Keith R. McCall, Anthony C. Moscato,
Gary A. Sojka, Kenneth I. Trujillo; Members
Christopher Craig, Representing Robert M.
McCord, State Treasurer
Robert Coyne, representing Daniel P.
Meuser, Secretary of Revenue
Matthew Meals, representing George Greig,
Secretary of Agriculture
HEARING: Wednesday, July 20, 2011
9:35 a.m.

Reporter: Rhonda K. Thorpe

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LOCATION: Hearing Room 1
Keystone Building
400 North Street
Harrisburg, PA 17120-0211

WITNESSES: None

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I N D E X

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CHAIRMAN:

Good morning, everyone. I'm Greg Fajt, Chair of the Pennsylvania Gaming Control Board. I'd like to ask everyone, as is our normal practice, to please turn off your cell phones, PDAs, or put them on vibrate. Joining us today is Christopher Craig, representing State Treasurer Rob McCord; Rob Coyne, representing the Secretary of Department of Revenue Dan Meuser; and Matthew Meals, Deputy Secretary of Agriculture representing Secretary George Greig. Thank you all for being here. A quorum of the members is present. I'd like to call today's meeting to order. As the first order of business, please join me in the Pledge of Allegiance.

PLEDGE OF ALLEGIANCE RECITED

CHAIRMAN:

The first matter of business today before the Board is a Petition filed by Gregory Rubino and Passport Realty, LLC, requesting the Board to allow objections to the renewal of Presque Isle Downs' License. The way this is postured today is that both the Office of Enforcement Counsel (OEC) and Presque Isle have filed motions to strike this Petition.

1 Today we will be a hearing argument on these motions
2 to strike, which we'll consolidate given that they
3 basically argue the same thing. So what I'd like to
4 do is first call OEC, to make its argument followed by
5 Presque Isle. After we've heard arguments from those
6 two parties, we will hear from Counsel to the
7 Petitioner, solely on the issue of why one or both of
8 those motions to strike should not be granted.

9 We are not taking evidence on these
10 matters today; we are solely hearing the legal
11 arguments of Counsel. And I see that we have the
12 parties for Presque Isle and Office of Enforcement
13 Counsel at the table. Again, just given the acoustics
14 in this room, which are not great, if I could please
15 ask anybody who is speaking today, before they speak
16 to clearly state your name, speak into the microphone.
17 I can't emphasize enough that when you turn like this
18 (indicating) to look at somebody, that doesn't work.
19 Speak into the microphone, look straight ahead and
20 whoever you're talking to will be able to hear you.
21 But again, for our court reporter, that's paramount.
22 If anybody has --- of the two parties, Presque Isle
23 and OEC --- either of you have folks who are not
24 lawyers who will be testifying in your presentation,
25 if you can please stand to be sworn in? And if there

1 is nobody who are non-lawyers, why don't we get
2 started? And the first argument, that will be OEC.

3 ATTORNEY CREANY:

4 Good morning, Judge Fajt and
5 Commissioners. My name is Barry Creany. I'm with the
6 OEC. And today's first matter, the Petition of
7 Gregory Rubino and Passport Realty involve his
8 Company's filings of a series of requests for the
9 removal of Statement of Condition 58 and that he
10 provide --- be provided with factual basis for the
11 Statement of Condition 58. In the alternative, he's
12 asked the Board to make the decision on the February
13 2008 Petition that he filed to strike or amend
14 Statement of Condition 58.

15 The OEC opposes the 2011 second amended
16 Petition on the basis that Mr. Rubino and Passport
17 Realty are not parties within the meaning of the
18 Pennsylvania Gaming Control Board Rules of Practice
19 and Procedure. And they do not otherwise conform with
20 the Administrative Practice Rules relative to having
21 to articulate a statutory provision or authority to
22 rely for a basis for relief.

23 In support, the Board was provided ---
24 has provided the Petitioner a full hearing on the
25 merits of his 2008 Petition. The Board rejected the

1 Court recommendation, stating that a real estate
2 agent, their license is not professional with any
3 exemption for a gaming service provider in the PGCB
4 regulations. The Petition was held in abeyance
5 pending Mr. Rubino's filing of application as a Gaming
6 Service Provider for certification or registration.
7 The Commonwealth upheld that Decision, and this
8 January the Supreme Court rejected his appeal from the
9 Commonwealth ruling. To date, Mr. Rubino has not
10 filed an application with the Board. Instead, Mr.
11 Rubino has filed a series of Petitions to try to force
12 the Board to rule on his prior request for relief.

13 This Petition should be dismissed as a
14 matter of collateral estoppel. This does not form his
15 alleged constitutional violation to hear his second
16 amended Petition. And the Board has afforded him a
17 full hearing on the merits of the issue of removal of
18 Condition 58. And he's also been given the
19 opportunity to appear and be heard at the public
20 hearing that was held on May 3rd in Erie before the
21 Renewal License of the Presque Isle Downs, as well as
22 Counsel spoke at that proceeding. Nobody's stopping
23 the decision on Statement of Condition 58, except Mr.
24 Rubino by his failing to comply with the request to
25 follow his application. For several of you, in the

1 words of the famous American Yogi Berra, it's déjà vu
2 all over again. OEC recommends a dismissal of the
3 second Petition, the amended Petition, with prejudice.
4 We have nothing further. Thank you.

5 CHAIRMAN:

6 Thank you. Does the Board have any
7 questions for Enforcement Counsel? Okay. Presque
8 Isle, you may make your argument.

9 ATTORNEY RUBEN:

10 Good morning, Mr. Chairman and
11 Commissioners. Robert Ruben, R-U-B-E-N, for the
12 Licensee, Presque Isle Downs. Since at least November
13 of 2008, Presque Isle Downs has consistently been
14 indifferent to whether Statement of Condition 58 stays
15 or goes. That's so because, as a Licensee, Presque
16 Isle Downs will abide by whatever decision this Board
17 makes. Presque Isle Downs was indifferent during the
18 November 25th, 2008 full-blown hearing on the merits
19 before the Office of Hearing and Appeals, which
20 resulted, as Mr. Creany said, from a February 13th,
21 2008 Petition that seeks the very same relief from the
22 very same Petitioner that we have before us today.

23 Presque Isle Downs was indifferent when
24 the Petitioners took exceptions to the recommendation
25 of the Hearing Officer. Presque Isle Downs was

1 indifferent when the Petitioners appealed this Board's
2 September 2, 2009 Order of Adjudication to the
3 Commonwealth Court. It was indifferent during the
4 oral argument before the Commonwealth Court. And it
5 indeed was indifferent when these Petitioners sought
6 allowance for Appeal to the Pennsylvania Supreme Court
7 in January of 2011 and lost.

8 Well, Presque Isle Downs is not
9 indifferent today. And the reason Presque Isle Downs
10 is not indifferent today is because we are not here
11 today on a separate, standalone proceeding for which
12 Mr. Rubino and Passport Realty seek to adjudicate
13 those rights and obtain relief from that SOC 58.
14 We're here today in the context of a License Renewal
15 Proceeding. A proceeding that, by their own
16 admission, the Petitioners have said is designed to
17 delay or derail the renewal of Presque Isle Downs'
18 License unless or until they get what they want. It
19 is, therefore, an unwelcomed and a wrong intrusion
20 into this licensing proceeding. It's wrongful because
21 they do not have standing. It's wrongful because, as
22 Mr. Creany stated, they've already litigated this
23 issue up and down and through the Supreme Court from
24 the time frame standing from 2008 to 2011. And it's
25 wrongful because section 1205 of the Gaming Act

1 provides a constitutionally sufficient means for
2 non-parties, such as these Petitioners to express
3 their grievances or their grievance concerning the
4 license for renewal.

5 For all those reasons and it be for each
6 of them independently, the Petition of this second
7 amended Petition for allowance of objections to renew
8 the license, should be stricken. Let me turn first to
9 the standing because I think that one was the most
10 clear-cut and indeed positive. Section 493a.4(a) of
11 the Board's regulations states that a Petition may be
12 filed by BIE, parties, applicants, licensees,
13 permittees, persons registered or certified by the
14 Board and other persons authorized by the Board.
15 These Petitioners are none of the above. As Mr.
16 Creany pointed out, as we pointed out on papers, this
17 Board has repeatedly invited Petitioners to become
18 persons registered or certified by the Board, if they
19 would only file the appropriate application for
20 certification or registration.

21 Now, the Plaintiffs --- the Petitioners
22 argued that they are parties and this argument is a
23 classic bootstrap. The argument is that they're
24 parties to the 2008 Petition. Well, that doesn't make
25 them parties to this License proceeding by any

1 stretch. If it did, then these Petitioners, by virtue
2 of being a party to that proceeding, could arguably
3 participate in every proceeding before this Board.
4 They'd be every party to every action before this
5 Board, under their construction of the word party,
6 would have standing to appear and participate in every
7 proceeding before the Board. I submit to you that no
8 tribunal could handle that docket and that cannot
9 possibly be the attentive statute in defining the word
10 party. They are not parties to this License
11 proceeding; they are unwelcome intruders. The
12 intrusion's wrongful and for that reason the Petition
13 should be stricken.

14 They've already litigated this matter.
15 As you said, they had a full-blown evidentiary hearing
16 before the Office of Hearings and Appeals in November
17 2008. There were no restrictions placed upon them.
18 They brought extra witnesses --- an extra witness.
19 There was no limitation as to time. They had the
20 hearing that they wanted; they just didn't like the
21 result. We then went through this Court's
22 adjudication, appealed judicial review by the
23 Commonwealth Court, and finally the refusal from the
24 Supreme Court of Pennsylvania to take up the case.
25 The results of that failure of the Supreme Court to

1 take up this case is that this Board's Order and
2 Adjudication holding SOC 58 in abeyance unless until
3 these Petitioners file the application is still in
4 effect. And what that does is that makes this attempt
5 to litigate that same issue in a different proceeding
6 before the same Board an impermissible collateral
7 attack upon that prior Order. And this Board
8 certainly has the right to have all matters waived to
9 SOC 58 per they decided within the confines of that
10 prior pending action.

11 Finally, the credibility. Despite having
12 litigated this issue for three years, these
13 Petitioners are claiming that their constitutional
14 rights have been violated, they haven't had due
15 process. Well, Section 1205 of the Gaming Act
16 provides a constitutionally sufficient process for
17 non-parties and that is in the form of a public input
18 hearing, which they participated in on May 3rd. Not
19 just the Petitioners, but indeed their Counsel
20 declared himself a taxpayer and citizen and stated in
21 no uncertain terms to the Board's Hearing Officer that
22 he objected to the renewal of this license unless and
23 until SOC 58 was removed because it was not in the
24 best interest of being to have it there. They've been
25 heard for three years, they've been heard through the

1 sole context in which the Act permits them to be heard
2 in a licensing proceeding. They've had all the
3 process due a non-party to a licensing proceeding.

4 They do actually, somewhat ironically,
5 have the opportunity for similar process and, as Mr.
6 Creany stated, that process lies in their own hands.
7 All they need to do is file the application and they
8 are entitled for this Court's consideration of that
9 application after a complete background investigation
10 pursuant to the Gaming Act. Other than that, they're
11 entitled nothing except to have this second amended
12 Petition stricken. I have nothing further. Thank
13 you.

14 CHAIRMAN:

15 Does the Board have any questions for
16 Presque Isle's Counsel?

17 MR. TRUJILLO:

18 Yes.

19 CHAIRMAN:

20 Commissioner Trujillo.

21 MR. TRUJILLO:

22 Mr. Ruben, I think I know what
23 indifference means, so thank you for that
24 presentation. Could you just give me the cite at the
25 beginning of your presentation that you cited as part

1 of the Board's regulation? I'm just trying to get
2 on ---.

3 MR. RUBEN:

4 Certainly, Mr. Trujillo. It was
5 493a.4(a). It's on who can file a petition.

6 MR. TRUJILLO:

7 Thank you. That's all I have, Mr. Fajt.

8 CHAIRMAN:

9 Thank you. Any other questions? Okay,
10 thank you. We'll now hear from Counsel for Gregory
11 Rubino and Passport Realty, LLC. Good morning.

12 ATTORNEY MIZNER:

13 May it please the PGCB, my name is John
14 Mizner and I'm Counsel to Gregory K. Rubino and
15 Passport Realty. I understood at the beginning the
16 only issue that was going to be discussed is those
17 standing. Both the Office of OEC and Mr. Ruben went
18 into both standing and the issues of the underlying
19 merits of this case. I feel that I should have the
20 same right and I'm asking the Chair whether I do have
21 that same right or if I'm restricted, as I was
22 originally understood that my comments were to be
23 limited to the issue of the standing, which was the
24 matter that both parties raised in their papers?

25 CHAIRMAN:

1 I'm willing to give you a little
2 latitude, Mr. Mizner, but stray and I will reign you
3 in. So go ahead and proceed.

4 ATTORNEY MIZNER:

5 Thank you, Mr. Chairman. First with
6 respect to the Office of --- OEC's comment, they
7 raised the issue of collateral estoppel, but it's
8 nowhere in their papers. That was not properly before
9 this Court, but I believe that those comments should
10 be stricken. I would also like to point out as a
11 factual matter of both the Office of OEC and Mr.
12 Ruben, we're very clear about the opportunity that Mr.
13 Rubino and I had to appear at the May 3rd public
14 comment meeting. Those of you that were present know
15 that our remarks were limited and we were specifically
16 instructed to not discuss anything which is a civil
17 rights lawsuit, which covers actually from the
18 beginning of this decade until the present. And so I
19 want the record to be clear, while we were given an
20 opportunity to stand up and to begin comments, we were
21 specifically directed that we were not allowed to
22 discuss those issues.

23 SOC 58, as we all know, is a condition in
24 particular to any sort of commercial relationship
25 between Mr. Rubino and any of these other companies.

1 And our objection for renewal of the license is solely
2 because it would contain a similar restriction in the
3 future. Now as to the issue of standing, the
4 regulation said that Petitions may be filed --- the
5 word is may. It says may be filed by the BIE,
6 parties, applicants, licensees, permittees, persons
7 registered or certified by the Board and other persons
8 authorized by the Board. I would point out as a
9 matter of statutory regulatory instruction that when
10 they use words like may, and provide this Board to
11 authorize other persons, that is not a list that is
12 limited solely to the identified people. But it says
13 it identifies those as people that may be allowed to
14 do it.

15 I think it's very difficult to argue that
16 Mr. Rubino and Passport do not have a standing with
17 respect to SOC 58, in that it's specific delineated
18 prohibition against them, both Mr. Rubino and his
19 affiliates. And while everybody has been quick to say
20 that this Board has laid out the direction that Mr.
21 Rubino and his affiliates should take in order to deal
22 with this, they left out crucial two words of this
23 Board's Order. And that is that, I quote, until such
24 time as Petitioner submits certified vendor
25 applications through PIDI --- through PIDI. Now, if

1 this Board were to say that Mr. Rubino's companies
2 could file certified vendor applications on their own,
3 they would proceed to do so. But I don't think
4 there's anyone in this room that's familiar with the
5 long, torturous history of the relationship between
6 the Board, Mr. Rubino, Passport and Presque Isle Downs
7 and their parent company MTR that there's a single
8 person that can reasonably believe that PIDI is going
9 to allow us to file a Petition through them. And
10 therein is the whole problem. We are forced to go
11 through a party who is obviously adverse to us in our
12 lawsuit against them. And we are told that we must go
13 through their gate in order to get to the Board. And
14 I don't believe that that's appropriate.

15 I believe that Mr. Rubino's company
16 should be allowed to stand alone. I do not see
17 anything in either the statute or the regulations that
18 require today a certified vendor or a vendor seeking
19 certification to go through a particular licensee.
20 And I can't stress enough that while Presque Isle
21 Downs may not want to do business with Mr. Rubino or
22 one of his companies, SOC 58 and its construction
23 prohibits Mr. Rubino from representing buyers of
24 property that Presque Isle Downs has. It, in fact,
25 would surplus properties and I think the record will

1 reflect that one time MTR wanted to try to sell those
2 surplus properties to bring in revenue for the
3 company. Well, as is presently constituted, Mr.
4 Rubino is not allowed to bring any deal to the table.
5 And I'm not going to relitigate this for the fact two
6 were brought in, the fact that SOC was in place
7 prohibited those.

8 But I think the reason why it's important
9 for the Board is that the purpose of the Gaming Act in
10 part is to make sure that there's revenue and economic
11 activity. It's been denied ---.

12 ATTORNEY RUBEN:

13 Mr. Chairman, I'd like to object and I'm
14 sorry to interrupt, but I think we've gone very far
15 astray of the issues presented in the ---.

16 CHAIRMAN:

17 I'm going to overrule the objection, Mr.
18 Ruben. Mr. Mizner, let's wrap it up.

19 ATTORNEY MIZNER:

20 The fact of the matter is when you took
21 the whole purpose of the Gaming Act --- and I think
22 this, I believe, violates Mr. Rubino and Passport's
23 constitutional rights to have a specific prohibition
24 against them and to have it continue at the renewal of
25 the new license. Now, we can let our differences lie,

1 but the only relief that we seek is that when Presque
2 Isle Downs' License is renewed that there is not a
3 Statement of Operating Condition or a Statement of
4 Condition that applies to Mr. Rubino or to his
5 companies. We believe that he is standing, bring that
6 before this Board and I would ask the Board to
7 consider the requirement that our vendor application
8 has to go through Presque Isle Downs because that
9 denies every potential buyer that may want to come to
10 Erie, the opportunity to use Mr. Rubino's services.
11 And I don't see how the use of any buyer of Mr. Rubino
12 or his companies will eventually affect the integrity
13 of Gaming Order. Thank you for your time.

14 CHAIRMAN:

15 Thank you very much. Are there any
16 questions from the Board for Counsel for Mr. Rubino
17 and Passport Realty? Commissioner Ginty.

18 MR. GINTY:

19 I understood our rights have been changed
20 so that you do not have to get sponsorship for Presque
21 Isle Downs.

22 ATTORNEY MIZNER:

23 That is my understanding as well and what
24 everybody talks about is the Order that we've been
25 directed by the Board to submit the certified vendor

1 applications through PIDI. Now, Commissioner, if I'm
2 misunderstanding the Board's previous conduct, I'm
3 happy to advise Mr. Rubino and his company that he no
4 longer has to go through PIDI. And I am aware of that
5 change to regulations. What I focused on is that the
6 Board has issued a ruling and to my knowledge has not
7 made any change to that, the Court --- or excuse me,
8 the Board's ruling. And that's what we were abiding
9 by.

10 MR. GINTY:

11 Well, have you sought to file under the
12 new regulation --- I'm sorry, have you sought to file
13 an application under the new ruling?

14 ATTORNEY MIZNER:

15 No, because of our understanding of the
16 Board's ---.

17 MR. GINTY:

18 Well, will that clear it up if you file
19 the application?

20 ATTORNEY MIZNER:

21 Well, I don't know if it will clear it up
22 or not.

23 MR. GINTY:

24 Well, at least you'd get an understanding
25 as to whether the prior Order is in effect or whether

1 the --- you know, the regulation is in effect.

2 ATTORNEY MIZNER:

3 Can I get that today? I mean, will
4 somebody tell me, does the Board know that? You're
5 asking Mr. Rubino and Passport to ---.

6 MR. GINTY:

7 No, I'm suggesting you file an
8 application. That's it, simple as that.

9 ATTORNEY MIZNER:

10 Through PIDI or ---?

11 MR. GINTY:

12 File the application with the Board under
13 the new regulation.

14 CHAIRMAN:

15 Any other questions from members?
16 Commissioner Trujillo?

17 MR. TRUJILLO:

18 I just want to get one thing clear, which
19 is we do not object to granting the renewal to Presque
20 Isle; am I correct there?

21 ATTORNEY MIZNER:

22 As long as it doesn't have the same
23 condition with respect to Mr. Rubino or his
24 affiliates.

25 MR. TRUJILLO:

1 But you object to anything like a
2 condition being imposed as part of the ---?

3 ATTORNEY MIZNER:

4 That is correct.

5 MR. TRUJILLO:

6 So put that aside over here. Without
7 respect to Condition 58-like restriction, you have no
8 objection to the granting of the renewal to Presque
9 Isle Downs?

10 ATTORNEY MIZNER:

11 That is correct, sir.

12 MR. TRUJILLO:

13 So your sole objection is anything that
14 relates that sounds like a condition?

15 ATTORNEY MIZNER:

16 That is correct, Commissioner.

17 MR. TRUJILLO:

18 That's all I have.

19 CHAIRMAN:

20 Any other questions? Thank you very
21 much. We'll consider this matter in our upcoming
22 executive session later this morning.

23 * * * * *

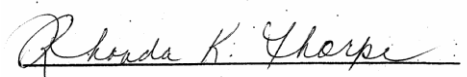
24 HEARING CONCLUDED AT 9:58 A.M.

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CERTIFICATE

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I hereby certify that the foregoing proceedings, hearing held before Chairman Fajt, was reported by me on 07/20/2011 and that I Rhonda K. Thorpe read this transcript and that I attest that this transcript is a true and accurate record of the proceeding.


Court Reporter