Comments of the Independent Regulatory Review Commission

Pennsylvania Gaming Control Board #125-85 (IRRC #2692)

Licensed Facility

July 2, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the May 3, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Gaming Control Board (Board) to respond to all comments received from us or any other source.

1. Section 401a.3.- Definitions- Statutory Authority; Legislative Intent; Whether the Regulation is in the Public Interest; Fiscal Impact; Possible Conflict with Statute; Need; Whether the Regulation represents a Policy Decision of Such Substantial Nature that It Requires Legislative Review; Reasonableness; Clarity.

This proposed regulation changes the definition of "licensed facility" by restricting the location of the facility to "[t]he gaming floor and all restricted areas servicing slot operations together with all adjacent and proximate amenities...."

According to the Preamble, the Board has changed the definition because "a number of questions have arisen as to how the term should be interpreted," in particular with respect to linear distance between gaming facilities.

The Board has received several comments in opposition to this regulation from members of the legislature and the public who reside in Lebanon County, in particular, East Hanover Township. The Gaming Act (Act) provides that licensees must pay a "local share assessment" into the Gaming Fund. *See* 4 Pa. C.S. § 1403. These commentators are concerned that the new definition will deny Lebanon County residents their portion of the local share assessment paid by Hollywood Casino, a Category 1 licensee, because the commentators assert that facility operations span across both Dauphin and Lebanon counties, and the new definition would extend the facility only as far as Dauphin County. However, as a result of their close proximity to the casino,

Lebanon County providers offer various "associated" services to the casino, including sewage and emergency services.

We raise five issues.

A. *Statutory Authority, Possible Conflict with Statute and Clarity.*

First, we join several commentators in questioning whether the Board has the statutory authority to change the definition of "licensed facility" found in the Act. The Act defines a licensed facility as "the physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines." 4 Pa. C.S. § 1103. The new definition adds language stating that the facility includes:

> "[t]he gaming floor and all restricted areas servicing slot operations together with all adjacent and proximate amenities, including, but not limited to, food, beverage and retail outlets and other areas directly accessible from the gaming floor or the restricted areas servicing slot operations....The term does not encompass areas or amenities exclusive to pari-mutuel activities, hotel activities and other amenities and activities not related to slot machine gaming operations."

If the Board can demonstrate its authority for changing the statutory definition, the Board should then clarify whether "physical land-based location" refers to an entire property owned by a licensee, or whether it refers to an identified structure(s) on that property. Furthermore, how does the proposal's specific language relate to the Act's reference to a "physical land-based location"? The Board should explain both how the proposed language is consistent with the Act, and the source of its statutory authority for changing the statutory definition.

Second, a commentator also questioned whether the Board has the authority to change this definition, because to do so would interfere with rights exclusively granted by statute to the Department of Revenue (Department). *See* 4 Pa.C.S. § 1403 and 61 Pa. Code Ch. 1001. Has the Board consulted with the Department to determine what impact, if any, this regulation will have on the Department's operations?

B. *Legislative Intent and Whether the Regulation Represents a Policy Decision of Such a Substantial Nature That It Requires Legislative Review.*

Third, several legislators have expressed concern that the proposed regulation does not reflect the legislative intent of the Act. Overall, opposition stems from the claim that to change the definition creates a policy whereby East Hanover Township will no longer stand to receive the approximately $350,000 in local share fees they believe they are entitled to under the Act.

Senator Mike Folmer (48th Senatorial District) indicated that because this definition would preclude East Hanover Township from receiving its portion of the local share assessment, the regulation is "profoundly unfair considering that the original intent of the Gaming Law was to compensate municipalities for costs incurred as a result of the gaming facilities being located within their jurisdiction." Representatives Gingrich (101st Legislative District), Swanger (102nd Legislative District) and Marsico (105th Legislative District) collectively commented that the original intent of the Act was to define "licensed facility" as "the land-based location of the facility, as defined, whether they are part of the racetrack, part of a hotel, or even the parking lot." Additionally, Senator Tomlinson (6th Senatorial District) provided to the Board transcripts from the Senate floor debate on amendments to the Act.

The Board should explain how the final-form regulation is consistent with the intent of the General Assembly. Moreover, the Board should consider whether the underlying issues represent a policy decision of such a substantial nature that they require legislative review.

C. *Whether the Regulation is in the Public Interest; Need; Fiscal Impact; Reasonableness.*

Fourth, a Category 2 license applicant suggested changes to the second sentence of the definition, and indicated the definition should not include "[d]istinctly hotel related operations such as stand-along [*sic*] food and beverage outlets, catering facilities including room service facilities serving the hotel, convention, meeting and multi-purpose facilities and stand-alone retail facilities." The commentator stated that, without their suggested changes, an "unintended consequence" could be that "[e]mployees of...restaurants and retail shops that are leased to the tenants and not owned by the casino licensee...would have to be licensed by the Board as Non-Gaming employees." The commentator states that this could result in various regulatory and financial burdens. Has the Board considered the proposed changes recommended by this commentator? Without these changes, how will the Board avoid possible unnecessary costs for licensees?

Finally, the Preamble indicates that the rationale behind changing the definition is statutory provisions such as "[t]he Act requires that no Category 3 license shall be located within 15 linear miles of another licensed facility." As a result, "[q]uestions have been raised as to whether the 15 linear miles should be measured from the property line of the licensed facility or the building that houses the gaming floor." Given this concern, how does the proposed language address the confusion raised? If the purpose of the changes to the definition is solely to measure distance, has the Board considered including language restricting the new definition "for purposes of measuring linear distance between facilities only?"