

RULES AND REGULATIONS

TITLE 58. RECREATION

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CHS 405, 441 and 443]

Response to Public Comment

CHAPTER 405. BUREAU OF INVESTIGATIONS AND ENFORCEMENT

§ 405.1. General duties and powers.

§ 405.2. Information.

Comment:

Section 405.1(6) - we are troubled by the fact that this section allows the Bureau of Investigations and Enforcement (BIE) the authority to refer possible criminal violations to law enforcement agencies other than the Pennsylvania State Police. Pursuant to the Gaming Act, BIE must refer all possible criminal violation to the Pennsylvania State Police. See 4 Pa.C.S. Section 1517(a)(10). In this regard, I note that 58 Pa. Code Section 405.1(3) requires BIE to monitor, among other things, underage drinking and gaming and reiterate that potential violations must be referred to the Pennsylvania State Police.

Section 405.2(c) - we are also concerned that section 405.2(c) of the draft regulations appears to give BIE the

discretion to refuse to share pertinent information with the Pennsylvania State Police. At least with respect to the Pennsylvania State Police investigations into criminal violations of the Gaming Act, BIE's full cooperation is mandatory.

In addition, 58 Pa. Code Section 405.2(b) indicates that state and local law enforcement, including the Pennsylvania State Police will provide all information, data, and documents requested by the BIE relating to an applicant, licensee, permittee or registrant. Although section 1517(c)(4) of the Gaming Act allows the State Police to provide the Board with information necessary to enforce the Gaming Act or the Board's regulations, the Board does not have the power to compel the production of protected information.

Finally, 58 Pa. Code section 405.1(1) give BIE both the power and the duty to investigate and review all permit applicants even though the Gaming Act requires all permit applicants to consent to a Pennsylvania State Police background investigation.

Response:

In order to implement the provisions of section 1517 of the act, the Board has had ongoing discussions with the Pennsylvania State Police to online their role in

accordance with the statute and in an effort by the Board to maximize expertise while minimizing duplication of efforts towards implementing the provisions of the act.

§ 405.3. Office of Enforcement Counsel.

Comment:

The Board should now adopt clear parameters for the discretion provided in section 405.3(a)(3)-(4). These parameters should include guidelines for initiation of action, dispute settlements, license conditions and revocations, and other disciplinary outcomes. These regulations and guidelines should be strictly delineated and any circumstances that may give rise to exceptions or deviations should also be explicitly stated. Such guidelines or criteria should either be developed now or the Board in these regulations should set a deadline by which such guidelines will be adopted.

Response:

In an effort to promote the integrity of gaming in Pennsylvania, the Board has been given broad discretion to enforce all of the provisions that are clearly articulated in the act and further enumerated in the regulations. The Board will use this discretion to enforce all of the mandates of the act in order to promote the legal

objectives enunciated in section 1102 of the act (relating to legislative intent).

Comment:

We suggest clarification of section 405.3(a)(3). We are concerned that the sole discretion language might be read to prevent the Board, for example, from seeking license conditions, revocations, or other penalties where the Office of Enforcement Counsel does not itself initiate such action.

Response:

The Board declines to accept this recommendation. The language of section 405.3(a)(3) has been drafted in compliance with the requirements of the Supreme Court of Pennsylvania's decision, *Lyness v. Commonwealth of Pennsylvania, State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (Pa. 1992).

§ 405.5. Conduct.

Comment:

This section describes well the establishment and operation of the Bureau within the Board, but fails to cover how this operation will interact with the existing State law enforcement organizations. There is a risk that

this Bureau as subsidiary to the Board could be subject to a conflict of interest with respect to the investigation and enforcement of the State's gaming laws. Such an appearance could negatively impact the public trust in the operation of Pennsylvania's gaming operations, and thus impact revenues.

Proposed Change: Add 405.5(d) The Bureau of Investigations will cooperate fully with the established State and local law enforcement organizations in the enforcement of the laws of the State of Pennsylvania including those covered under the various gaming acts of the State of Pennsylvania.

Response:

In response to the mandates of section 1517 of the act, the Board has entered into detailed discussions with the State Police to outline the division of duties that are needed to enforce the statute. This has been an ongoing process and will result in a Memorandum of Understanding in the near future. As way of further response, the Board refers to section 1517 of the act (relating to enforcement) which discusses how the Board will refer all investigation for criminal violations under the Gaming Act, specifically section 1517(f) which provides direction as to the information sharing and enforcement referrals.

§ 441.13. Notification of anticipated or actual changes in key employee qualifiers or key employees.

Comment:

Tying this requirement to the licensee or applicant's intent seems overbroad. Arguably, to comply with this provision, an applicant or licensee may have to inform the Board of its intent to enter into an agreement with new financial backers prior to informing the backers of the same. Such a requirement could also impinge on the confidentiality of negotiations over the potential financing arrangements. Moreover, basing the timing of the reporting obligation on the licensee or applicant's intent undermines the regulation's enforceability and creates confusion for those attempting to comply with the requirement. As an alternative, the Board could require reporting of such agreements within a specific number of days after their consummation.

Response:

The Board declines to accept this recommendation as this regulation includes the language "as soon as practicable," which provides a sufficient amount of time for the applicant to comply with this provision. Further, this regulation is consistent with the notification process used by other gaming jurisdictions.

General Comments on Category 2 and Category 3 licenses

Comment:

(1) The local impact statement requirements under 441.4(a)(21) do not adequately address the impact of casino development on existing parking supply and demand, or the impact on casinos of yet-to-be-completed nearby developments as well as the impact of casinos on those developments.

While a traffic circulation plan may not have been necessary for racinos developed on the large plots of land available right off an interstate at probable Class 1 sites, managing traffic around urban casinos is a critical challenge that will be faced at almost every potential site identified in Philadelphia. We believe that it would be most constructive to consider applications only if they include a full and complete traffic circulation plan, both on and off site, including all proposed roadway improvements with input from local streets (and where applicable state and federal highway) officials.

We urge the Board to require from each applicant a transportation demand plan ("TDP"). The TDPs should include, among other items the needs of patrons, employees, and service delivery traffic with regard to:

i) Transportation inventory. For Philadelphia casinos, for example, this should include expressways, surface streets, and mass transit, including elevated train lines, commuter rail, Amtrak, and SEPTA, and New Jersey Transit buses;

ii) Transit capacity, including peak hour ridership and capacity on transit lines serving each site and capacity of such lines to expand to handle additional ridership;

iii) Roadway capacity, including analysis of excess and already over-utilized capacity of each road. This analysis should be augmented by an analysis of the additional traffic police officers needed to facilitate area traffic movements and identified funding for those officers;

iv) Parking, including the impacts on both existing capacity and existing demand;

v) Charter buses, including projections of volume and time of day for arrival and departure. This analysis should also include arrival and departure routes, where the buses will be stored, and transportation impacts at the storage site and along the travel routes;

vi) Porte-cochere operations on site, including taxi and valet storage operations;

vii) Proposed mitigation measures, including any street modifications, traffic signal improvements, reduction in on-site parking demand through off-site employee parking, transit improvements, and off-site parking locations for charter buses. Funding commitments for these improvements should be specified in the application.

We recommend that the Board pursue aggressive independent review of TDPs and all traffic and transportation information submitted by license applicants. If this review cannot be provided in a timely and thorough manner by the PENNDOT, we urge the Board to quickly commence a public procurement process for traffic engineer/transportation consultants capable of providing the necessary independent review of submitted transportation analyses and plans.

(2) Given the fact that the Philadelphia Class 2 facilities will be placed in an already built urban environment and may be constructed in phases, we believe that the expansion of section 441.4(a)(18) or a new subsection 443.4 should require applicants to indicate early in their submission the impact of the design on neighboring communities and development. Among the factors that should be considered are:

i) How the design concept is responsive to the urban setting in which it is located;

ii) Building materials that will be used;

iii) Any phasing in of development;

iv) How the facility will maximize a positive street-frontage to ensure a positive urban design impact, even as it accommodates a high volume of vehicles;

i) If the proposed facility is adjacent to amenities such as rivers and parks, how the development will facilitate access to such public amenities.

(3) We believe that section 441.4(a)(31) or a new section of 443.4 should require expansion of the applicant's adverse effect analysis to include projected impacts on crime, emergency medical services, and other aspects of public safety. A response to this requirement could potentially include a neighborhood safety and security plan.

(4) Proposed Change on section 443.4(a)(2) - Add after "The statement shall include the appropriate business and tourism studies, economic impact studies, projected revenue, and business plans." The economic impact studies shall include: a) an assessment of the economic impact of the proposed licensed facility on existing tourism, including heritage tourism, and businesses servicing

tourists; b) an assessment of the impact of the proposed licensed facility on current unemployment and community growth, which includes an estimate of how many employees will be employed by the proposed licensed facility and what geographic areas the employees will be drawn from; c) a detailed analysis of the anticipated customer base of the proposed licensed facility, which includes an assessment of what geographic areas the customers will be drawn from; d) an assessment of the economic impact that the proposed licensed facility will have on Category 2 slot machine licensees and the other Category 2 slot machine licensees; and e) an assessment of the impact of anticipated and potential competitive responses of existing and proposed gaming operations in Ohio, West Virginia, Maryland, Delaware, New Jersey, and New York on the operation of the licensed facility.

Response:

The Board believes that the regulations adequately address the issues raised in these comments, specifically in section 441.4, as they apply to all categories of license. The Board agrees that the issues raised in this comment are significant and the Board will scrutinize these elements in its evaluation of the application.

Comment:

We are concerned about the possibility of individuals presenting themselves or their opinions to the community or to the Board regarding other applications without disclosing that they represent interested parties. Recent local experience has convinced us of the wisdom of requiring disclosure of paid lobbyists, communication consultants, and other experts in connection with these proposals, even if the representation is limited to grassroots communication efforts in nearby neighborhoods.

Response:

With regard to individuals appearing before the Board, Chapter 499 of the regulations, entitled Representation before the Board, provides specific procedural requirements for persons or their attorneys who appear before the Board. The regulations include disclosure of the party and their representatives. Further, the Board's public comment process requires interested parties to identify themselves or whom they represent.

Comment:

The draft regulations for Category 1 facilities grant the political subdivision, within which a licensed gaming facility would be located, a 60-day comment period prior to the Board taking final action on an application. It is not clear to me that these same opportunities will be provided

to Category 2 and Category 3 gaming facilities. Please make certain that the political subdivisions, and the public, are given the same opportunity for input in all three categories of gaming licenses.

Response:

Pursuant to the Supreme Court opinion in the case of *Pennsylvanians Against Gambling Expansion Fund, Inc., et al. v. Commonwealth of Pennsylvania, et al.*, No. 229 MM 2004, 2005 Pa. LEXIS 1318 (Pa. Jun. 22, 2005), which held section 1506 of the act (relating to local land use preemption) unconstitutional, the Board has eliminated any reference to a 60-day public comment period in the regulations. Nonetheless, in section 441.12, entitled "Public input," the Board has provided a mechanism for public input hearings, which applies not only to Category 1 licenses but also to Category 2 and 3 licenses, as well. The Board will publish a schedule of public input hearings at a later date.

§ 443.4. Category 2 slot machine licensees

Comment:

Section 443.4(a)(1) that would require applicants for Category 2 licenses to swear or affirm "that neither the applicant, nor any of its affiliates, intermediaries,

subsidiaries or holding companies is eligible to seek a Category 1 slot machine license" (proposed Reg. 443.4(a)(1)) is an unduly narrow interpretation of section 1304 of the Gaming Act. Section 1307 of the Gaming Act permits the Board at its discretion to reissue "any Category 1 license...as a Category 2 license if an application for issuance of such license has not been made to the Board." If eligibility for Category 1 license were a categorical bar to holding a Category 2 license, the Board could not exercise its discretion to reissue a Category 1 license as a Category 2 license pursuant to section 1307. Similarly, such an interpretation would reduce to surplusage the portion of section 1304(a) which states that "[i]t shall not be a condition of eligibility to apply for a Category 2 license to obtain a license from either the State Horse Racing Commission or the State Harness Racing Commission to conduct thoroughbred or harness race meetings respectively with pari-mutuel wagering," as such licenses are relevant only to Category 1 licenses in all events. Harrah's respectfully submits that in effectively nullifying section 1307 and making part of section 1304(a) surplusage, Proposed Regulation 443.4(a)(1) is not in keeping with the rules of statutory interpretation. See 1 Pa. C.S. § 1921; Keystone Aerial

Surveys, Inc. v. Pennsylvania Prop. & Cas. Ins. Guaranty Ass'n, 777 A.2d 84, 90 (Pa.Super. 2001).

Response:

The Board declines to accept this recommendation. It is the Board's interpretation of the act that sections 1302, 1304 and 1305 of the act, which refer to the eligibility requirements for the Category 1, 2 and 3 licenses, were specifically drafted to require that a person eligible to apply for a specific category of license not be eligible to apply for a license in any of the other categories. The language is clear to the Board that for the purposes of eligibility, a Category 1 applicant cannot apply for a Category 2 or Category 3 license, a Category 2 applicant cannot apply for a Category 1 or Category 3 license, and a Category 3 applicant cannot apply for a Category 1 or Category 2 license.

The Board declines to accept the commenting party's interpretation of section 1307 and believes that the language of 1307 is clear in that a person who is eligible to apply for a Category 1 license but chooses not to do so within the five year limitation of section 1307, is prohibited from seeking a Category 2 license because of the eligibility requirements enunciated in section 1304.

Finally, the Board is offering for public comment, a regulation entitled "Change in ownership or control of slot machine licensees and multiple slot machine license prohibition." This regulation addresses the limitations in multiple slot machine license ownership provided in section 1330 and applies these limitations, pursuant to section 1328, to changes in ownership after the initial operator's license has been issued.

Comment:

(1) Proposed Change on 443.4(a)(2) - Add a new subsection (c) to read "Notwithstanding the foregoing, the Board may not issue a Category 2 slot machine license within a city of the First or Second Class, for a facility to be located within two miles of the boundary of a National Battlefield, National Historic Site, National Military Park, as administered by the National Park Service, and for any other location within fifteen miles of the boundary of a National Battlefield, National Historic Site, or National Military Park, as administered by the National Park Service."

(2) Proposed Change for section 443.4(a)(3): after the words "revenue or tourism-enhanced location," add "not adjacent to a National Battlefield, National Historic Park,

or National Military Park, as administered by the National Park Service.”

Response:

The Board declines to accept this recommendation. In the awarding of slot machine licenses, the Board is bound by the geographical provisions present in Act 71. As way of further response, the Board notes that it will consider all factors required by the act, including impact on existing tourism, including historical and cultural resources, required by section 441.4(21) of the regulations, in evaluating applications for slot machine licenses.

Comment:

In section 443.4(a)(3), define “tourism studies or economic impact studies.” We suggest that applicants could be required to address certain issues and answer certain questions:

i) What are the specific plans to integrate the project into the tourism economy?

ii) What non-gaming attractions, if any, are planned and how will they be marketed?

iii) Are such attractions designed to compete with or complement existing attractions in the region?

iv) What are the local training needs to ensure the local workforce is ready to fill openings?

We suggest the Board consider adopting and publishing a list of pre-screened subject matter experts to provide these economic impact analyses reports to potential licensees.

Response:

The Board declines to accept this recommendation. The Board believes that it is the applicant's decision to select an expert to develop these studies as it deems appropriate for the application process.

§ 443.5. Category 3 slot machine license.

Comment:

Rather than a blanket incorporation by reference of "all requirements in Chapter 441" of the Board's regulations (see § 443.5(a)), a careful review of each general requirement should be conducted and, where a particular requirement is determined to be overbroad or otherwise not applicable to a Category 3 licensee, an exception should be built into the Category 3-specific regulations in Chapter 443. Alternatively, if an exception is not desirable, a phased-in implementation of the requirement may be appropriate whereby the obligation is

imposed after the licenses are awarded, as opposed to during the application phase.

- Section 441.4(a) (21) requires that all slot machine applicants supply the PGCB with an extensive local impact report.

- Section 441.4(a) (31) requires a slot machine license application to explain: "The degree to which potential adverse effects related to the proposed facility, including costs of meeting the increased demand for public health care, child care, public transportation, affordable housing and social services, will be mitigated."

- Section 441.5(c) (2) dictates that applicants for a slot machine license provide the organizational structure, financial structure and nature of all businesses owned or operated by the applicant and its affiliates, intermediaries, subsidiaries and holding companies, including the name, employment and criminal histories of each key employee qualifier and key employee of such businesses.

- Section 441.5(c) (14) requires the applicant for a slot machine license to identify the "defined gaming market and projected visitation" for the proposed site.

- Section 441.6(c) (2) requires the applicant to provide a "history of insurance claims for the past seven years or that exceed \$50,000 relating to the business activities of the applicant or its affiliate, intermediary, subsidiary or holding company."

We respectfully submit that a provision waiving or limiting these requirements should be added to section 443.5 of the proposed regulations. Alternatively, the proposed regulations could clarify that requirement could be fulfilled through the submission of a statement by an officer of a Category 3 applicant generally addressing the subject matter.

Response:

The Board declines to accept this recommendation and believes that due to the competitive nature of the application process for Category 3 licenses, the requirements set forth in the regulations should not be altered.

Comment:

Section 443.5(a) (2) requires a "statement detailing the proposed plans and locations of the licensed facility," but gives no specifics as to what is to be included. The regulation lacks detailed information regarding whether a simple description will be sufficient or whether

architects' drawings or blueprints will be necessary to satisfy this requirement.

Response:

The regulations contained in Chapter 441 require the applicant to provide detailed information regarding the plans for the proposed facility. The Board's intent in this regulation is to request the applicant to submit a statement that would further illuminate the detailed plans provided pursuant to Chapter 441, specifically in section 441.4.

Comment:

(1) In section 443.5(a)(2), there are no additional definitions to provide guidance regarding what the Board will consider a "well-established resort hotel" or "substantial year-round recreational guest amenities." There is no indication as to whether the Board will consider qualities such as the number of years that the resort has been in business within the Commonwealth of Pennsylvania, the number of individuals currently employed by the resort, the revenue generated by the resort or the number of patrons at the resort each year.

(2) Clearly, the type of establishment envisioned by this statutory language is not any old hotel with a pool, a ballroom and a bar or lounge. Instead, the act's language

connotes a large facility, that has all the hallmarks of a full scale, high quality resort that is a destination for both tourism and business/conference travelers, and has a significant history of serving guests in Pennsylvania along with a well-established record as a corporate citizen, compliant with regulatory requirements and industry norms.

(3) We respectfully suggest that the PGCB not attempt to recreate the wheel on this point, but rather look to respected and established travel and tourism rating service for guidance as to the substantive meaning of the well-established eligibility requirement. Two examples of such existing services are AAA and the Mobile Travel Guide. Certainly, based on the requirements of the act, a three diamond (AAA) or three star (Mobile Travel Guide) rating would be an appropriate minimum eligibility requirement for Category 3 applicants in order to qualify as a "well-established" resort hotel and a "revenue or tourism enhanced location."

(4) Section 1305(a) plainly calls for Category 3 licensees and applicants to not simply have a few amenities, but rather to have "substantial" year-round amenities. Accordingly, the Category 3 specific regulations should embody the level of quality demanded of Category 3 licensees and applicants in the act, and should

establish more rigorous eligibility and amenity requirements.

(5) Section 443.5(b)'s requirement that an applicant have three or more of the cited amenities should be bolstered to more accurately capture the intent of section 1305(a)'s eligibility requirements. The regulation must account for the requirement in section 1305(a) that such amenities be "substantial" and year-round. This could be accomplished by increasing the minimum requirement for both the quality and quantity of amenities. Additional criteria, a tiering approach, or more rigorous standards as to the amenities provided by an applicant may be appropriate.

Response:

The Board believes that the regulations adequately address the statutory requirements. As way of further response, the Board has amended the language of this section to further clarify "substantial year-round recreational guest amenities."

Comment:

Section 443.5(a)(3) requires "Documentation satisfactory to the Board" and suggests several items for corporations, partnerships and limited liability companies, but gives no indication as to what documents would be insufficient. Additionally, there is a suggestion by the

inclusion of the language "Documentation may include but not be limited to copies of the following documents" that other items may be required by the Board, but again there is no indication of what other types of information or combination of information may be necessary to satisfy the Board's requirements.

Response:

The Board declines to accept this recommendation. Pursuant to section 1202 of the act (relating to general and specific powers), the Board has broad discretion to enforce the provisions of the act and therefore the discretionary language contained in this section is necessary to further the intent of the act.

Comment:

Section 443.5(a)(4) requires a "plan detailing how the applicant, as part of its operational plan, will monitor the gaming area..." but does not specify whether the plan for purposes of obtaining the license will amount to no more than a statement describing general plans or whether the proposed licensee must retain a consultant to design a specific plan, nor do the regulations specify what constitutes a suitable plan in order to satisfy the requirement.

Response:

Because of the competitive nature of the application process, the Board anticipates that applicants will provide as much detail as possible. The Board leaves it to the discretion of the applicant to determine the extent to which it will hire experts. As way of further response, the Board anticipates adopting internal control regulations which may provide further guidance to the applicant.

Comment:

Section 443.5(a)(4) requires Category 3 applicants to submit a plan detailing how the applicant will monitor its gaming area to ensure that only registered guests or patrons of its amenities "over the age of 21" are permitted to "enter the gaming area." The provision is technically not consistent with the act in its age reference. While section 1207(8) of the act prohibits licensees from allowing persons under age 21 from playing a slot machine, section 1518(a)(13) only restricts entry into the gaming area to persons under age 18. This discrepancy is not insignificant to Category 3 applicants, given the greater likelihood of guests and/or patrons at Category 3 facilities to include families with young adults between ages 18-20. We respectfully request that proposed section 443.5(a)(4) be modified to state the proper age restriction for entry into the gaming area.

Response:

The Board declines to accept this recommendation. Under the authority contained in 1207(8) of the act (relating to regulatory authority of the Board), the Board has the authority to ensure persons under the age of 21 are prohibited from operating slot machines. In furtherance of the legislative intent of the act, which is to promote the public interest and the integrity of gaming, the Board believes that this regulation is an appropriate use of its regulatory authority. As way of further response, this regulation does not pertain to employees of the licensed facility. The Board will also be reviewing the internal controls of the applicants as a way of monitoring compliance with the age restrictions.

Comment:

Section 443.5(a) (5) indicates that the applicant must provide "any and all information deemed necessary by the Board to determine the operational viability, financial fitness or character of the applicant," but does not specify what type of information or combination will satisfy the requirement or what type of information will be deemed insufficient.

Response:

This section is intended to enunciate the Board's discretionary power to supplement the applicant's initial submissions pursuant to Chapter 441.

Comment:

Section 443.5(b) should be modified to clarify that ownership requirement by replacing the work "have" with the word "own."

Response:

The Board has amended this regulation to provide that the applicant must "offer on its premises three or more of the following amenities."

Comment:

Section 1305(e) of Act 71 states, in the definition of "Amenities" that the Board will define what is meant by "non-de minimis consideration," however, there is no definition included in the draft regulations. We would suggest for purposes of determining whether a member of the transient public has paid a "non-de minimis consideration," that when a member of the transient public has paid 20 dollars toward use of the resort amenities, h/she is a patron of the amenities and paid a "non-de minimis consideration."

Response:

The Board agrees in part and has provided the following definition of "non-de minimis consideration": a payment of \$25 or more per patron paid to a slot machine licensee.