IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

WEST FLAGLER ASSOCIATES, LTD.,

Appellant,

v.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-2031

Opinion filed May 27, 2014.

An appeal from the Department of Business and Professional Regulation.

John M. Lockwood and Hillary A. Ryan of John M. Lockwood, P.A., Tallahassee, for Appellant.

J. Layne Smith, General Counsel, and Garnett W. Chisenhall, Chief Appellate Counsel, of the Department of Business and Professional Regulation, Tallahassee; Andrew T. Lavin of Navon & Lavin, Fort Lauderdale, for Appellee.

MAKAR, J.

Summer jai alai permits are the focus of this appeal. At issue is whether the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division") erred in denying the application of West Flagler Associates, Ltd. ("West Flagler"), seeking a permit to conduct summer jai alai under section

550.0745(1), Florida Statutes, which allows for the issuance of new permits under defined circumstances. Because the basis for the Division's denial was based on an insupportable reading of the statute, we reverse.

I.

Jai alai is a daring sport of Spanish origin involving rock-hard goat-skin covered rubber balls (pelotas) hurled at speeds well over 100 mph that are bounced off walls forming three-sided spaces known as courts or frontons. Highly-skilled teams compete by using hand basket gloves (cestas) to serve, catch, and throw the pelota with the goal of causing their opponents to commit errors by, for example, failing to catch it on the fly or after its first bounce. Jai alai is popular in Latin American countries and was first introduced in America at the 1904 World's Fair in St. Louis, Missouri. In 1924, it made its first commercial appearance in Florida at a fronton in Miami and has since been operated at various locations around the state as an alternative to other sports on which gambling is permitted, such as horse racing and greyhound racing. See Paul S. George, Passage to the New Eden: Tourism in Miami from Flagler to Everest G. Sewell, 60 Fla. Hist. Q. 440, 455, 459 (April 1981). Florida is by far the state with the greatest interest in, and commercial development of jai alai frontons, though interest has declined in recent years due to consumer interest in other forms of gambling. See generally Jai alai, Wikipedia, http://en.wikipedia.org/wiki/Jai_alai (last visited April 23, 2014).

Not long after its inception in Florida, jai alai became subject to the State's gaming laws that regulate pari-mutuel activities. Those laws have since evolved, one of which is the 1992 enactment at issue entitled "Conversion of pari-mutuel permit to summer jai alai permit" that is codified as section 550.0745, Florida Statutes. Ch. 92-348, § 14. Laws of Florida. Section 550.0745(1) states that the owner or operator of a pari-mutuel permit (one authorized to conduct pari-mutuel pools on exhibition sports in a county having five or more such permits) who has the lowest handle (is the lowest performing economically) for "the 2 consecutive years next prior to filing an application" may apply to convert its permit to a summer jai alai permit. Two of the apparent purposes of this amendment were to help the lowest performing permit holder and to increase state tax revenues.

Hialeah Park, which operates a quarter horse permit in Miami-Dade County, had the lowest handle among the (more than five) qualifying permit holders in that county for the 2010-11 and 2011-12 state fiscal years. Though it was eligible to convert its quarter horse permit to a summer jai alai permit, Hialeah Park declined to do so. This triggered the provisions in section 550.0745(1), which state: "If a permittee who is eligible under this section to convert a permit declines to convert, a new permit is hereby made available in that permittee's county to conduct summer jai alai games as provided by this section, notwithstanding mileage and permit ratification requirements." § 550.0745(1), Fla. Stat. Because Hialeah Park

turned down its statutory right to convert its quarter horse permit to a summer jai alai permit, West Flagler sought the "new permit" made available in Miami-Dade County under this portion of the statute.

The Division denied West Flagler's application. Its reasoning was that because it had issued a summer jai alai permit the previous year (also to West Flagler) based on data from the 2009-10 and 2010-11 state fiscal years (Hialeah Park had the lowest handle for these two fiscal years but declined to convert), it could not use the 2010-11 data again—this time in conjunction with 2011-12 data—to issue a new permit for the most recent two-year period. Under the Division's interpretation, the "statute clearly requires that the lowest mutuel play must come from the same permitholder for 2 consecutive years prior to filing an application under the section." Thus, once a fiscal year's data is used to grant a summer jai alai permit, that same fiscal year data may not be used in granting another summer jai alai permit. In essence, the Division reads the statute as allowing one summer jai alai permit to be made available at most every two years. West Flagler unsuccessfully challenged the Division's interpretation of the statute, and now appeals from the Division's final order denying its application.

II.

We begin by recognizing the "well established proposition that an administrative construction of a statute given by those charged with its

enforcement and interpretation is entitled to great weight, and the courts will not depart from such a construction unless it is clearly erroneous or unreasonable." Summersport Enters., Ltd. v. Pari-Mutuel Comm'n, 493 So. 2d 1085, 1087 (Fla. 1st DCA 1986). On appeal, West Flagler seeks to overcome this proposition, arguing that the "plain and unambiguous language of Section 550.0745(1) requires the Division to issue a new summer jai alai permit each and every year if the lowest handling permitholder declines to convert its permit." It relies upon principles of strict statutory construction, but as a fallback points to some limited legislative history that the statute was intended to be open ended.

We need not consider legislative history because, try as we might, we cannot read the language of the statute as the Division has implemented it in this case. The statute plainly provides that the permitholder with the lowest handle for "the 2 consecutive years next prior to filing an application" may apply for a summer jai alai permit, and, if it declines to do so, a "new permit" is made available. § 550.0754(1), Fla. Stat. This statutory language envisions a rolling two-year period rather than the at-most-every-other-year approach the Division urges. The word "consecutive" typically means "following continuously" or "following one's or its predecessor in uninterrupted sequence." The New Shorter Oxford English Dictionary, 484 (1993). The Division's interpretation would create a discontinuity or interruption in the otherwise "consecutive years" approach that the statute

establishes. We would have to interpret "consecutive" other than by its ordinary and plain meaning to reach this result, effectively rewriting it.

Likewise, the phrase "next prior"—though clumsy and seemingly contradictory—has been consistently used to mean the "immediately prior" instances. See Bryan A. Garner, A Dictionary of Modern Legal Usage, 588 (2d ed. 1995) (noting that phrase "next preceding" is "an awkward phrase, arguably illogical, that commonly appears in DRAFTING.").[1] Though not commonly used today (for good reason), the phrase appears in other Florida Statutes, and generally older caselaw with this same meaning. See, e.g., § 475.17 (1)(b), Fla. Stat. (2014) ("An application may be disapproved if the applicant has acted or attempted to act, or has held herself or himself out as entitled to act, during the period of 1 year next prior to the filing of the application . . . ."); § 731.19, Fla. Stat. (Supp. 1941), repealed by ch. 74-106, § 3, Laws of Fla. ("[B]y his will duly executed immediately next prior to such last will and more than six months before his death . . . ."); Curley v. Curley, 198 So. 584, 586 (Fla. 1940) (wife had burden "to show that she had resided in Florida for a period of ninety days next prior to the date of filing the suit for divorce . . ."); Ringling v. Ringling, 158 So. 125, 126 (Fla. 1934) ("[F]or more than sixty days next prior to the date of the filing of such affidavit . . .

[1] Professor Garner provides this example: "Anything *in the next preceding paragraph of this contract* [read *in the paragraph immediately preceding this one*] notwithstanding . . . ." Id.

."). The use of this phrase dovetails with the term "consecutive" to make evident that a continuous, rather than discontinuous, approach was intended.

The Division expressed a concern at oral argument that allowing a new summer jai alai permit to be issued each year based on a rolling two-consecutive-years approach would lead to a proliferation of summer jai alai permits. If the legislature intended to allow a new permit, at most, every other year it could have written the statute to say so. And if it deems it a good policy to have this limitation, it can implement it legislatively; but we cannot interpret the language of the existing statute to achieve this result.

III.

Because the Division's interpretation of section 550.0745(1) is not supportable, we reverse its final order with directions to reinstate West Flagler's application for the new summer jai alai permit at issue.

REVERSED.

THOMAS, J., CONCURS. MARSTILLER, J., CONCURS IN PART, DISSENTS IN PART, WITH OPINION.

MARSTILLER, J., CONCURS, in part, and DISSENTS, in part.

While I concur in the decision to reverse the order denying West Flagler's application for a new summer jai alai permit, and I agree with much of the majority's reasoning, respectfully, I do not agree that "the at-most-every-other-year approach the Division urges"[2] is wholly incompatible with the language of section 550.0745(1).

The provision reads, in pertinent part:

> The owner or operator of a pari-mutuel permit who is authorized by the division to conduct pari-mutuel pools on exhibition sports in any county having five or more such pari-mutuel permits and whose mutuel play from the operation of such pari-mutuel pools *for the 2 consecutive years next prior to the filing of an application* under this section has had the smallest play or total pool within the county may apply to the division to convert its permit to a permit to conduct a summer jai alai fronton in such county during the summer session commencing on May 1 and ending on November 30 of each year on such dates as may be selected by the permittee . . .. If a permittee who is eligible under this section to convert a permit declines to convert, a new permit is hereby made available in that permittee's county to conduct summer jai alai games as provided by this section, notwithstanding mileage and permit ratification requirements.

§ 550.0745(1), Fla. Stat. (2012) (emphasis added). As I read the statute, the word "consecutive" refers to the eligibility period for converting a pari-mutuel permit to a summer jai alai permit, and does not, as the majority opinion seems to conclude,

[2] Maj. op. at 5.

mandate annual availability and issuance of a summer jai alai permit. To the extent the Division interprets and applies the statutory language highlighted above to require a pari-mutuel permit holder who has obtained a conversion summer jai alai permit to wait two years before again applying, I believe the language accommodates such an interpretation. The two-year qualification period must have some significance relative to the frequency with which a conversion permit holder is eligible to apply for a subsequent conversion permit; else, the Legislature could have specified that, *annually*, the permit holder with the smallest play for the two consecutive prior years may apply for conversion.

However, I do agree with the majority that the statutory language does not support the Division's position that in no event can it consider an application for a conversion summer jai alai permit until two years after a prior conversion permit was issued. Here, Hialeah Park, which, all parties agree, had the lowest handle in Miami-Dade County for fiscal years 2010-11 and 2011-12, qualified for a conversion permit. Nothing in section 550.0745(1) prohibited the Division from considering the 2010-11 total pool data *as to Hialeah Park* simply because the same data had been relevant to granting *West Flagler* a conversion permit previously. And if, as the record suggests (but does not establish), Hialeah has opted not to convert its permit to a summer jai alai permit, a *new* permit has

become available as provided by section 550.0745, and West Flagler should be able to apply for it.