Florida Department of Business & Professional Regulation

Office of the General Counsel
Joseph M. Helton, Jr., Chief Attorney
Division of Pari-Mutuel Wagering
1940 North Monroe Street, Suite 40
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Charles W. Drago, Secretary

Charlie Crist, Governor

May 15, 2009

D. David Keller, Esq.
Bunnell, Woulfe & Keller, P.A.
One Financial Plaza, Suite 900
100 Southeast 3rd Avenue
Ft. Lauderdale, Florida 33394-0044

RE: South Florida Racing Association, LLC
Quarter Horse Permit for Hialeah Park

Dear Mr. Keller:

Your letter of April 27 to Director Roberts has been forwarded to me for reply. You inquire "if an interested person desired to request an administrative hearing directed to the issuance of the reference permit ..., by what day would the petition need to be filed to be timely?" In answer to your question, enclosed is a copy of a Notice of Issuance of Quarter Horse Permit that was provided to Hialeah with a recommendation that they publish it in a newspaper of general circulation in Dade County. That notice, of course, spells out the requirements for petitioning for an administrative hearing in this matter.

However, I am not aware that Hialeah ever published the notice. We here at the Division of Pari-Mutuel Wagering have certainly received no proof of publication establishing its publication. Thus, so far as we are aware, a substantially affected person would still have the right to petition for an administrative hearing on the issuance of the Hialeah quarter horse permit. *E.g., Bryant v. Dep't of Health & Rehabilitative Services*, 680 So.2d 1144, 1145 (Fla. 3rd DCA 1996); *Henry v. State, Department of Administration, Div. of Retirement*, 431 So.2d 677 (Fla. 1st DCA 1983).

However, in your case and that of your client(s), by this letter you have now received <u>actual</u> notice of issuance of the Hialeah quarter horse permit. Accordingly, since a copy of this letter has been telefaxed to you today (as well as sent by regular mail) your client now has 21 days from today in which to file a petition for administrative hearing in accordance with the terms of the enclosed notice.

Please be advised, though, that the division considers standing a very real hurdle to any third party challenge to the issuance of a quarter horse permit. Enclosed are two final orders the division has already issued in third party challenges to quarter horse permits finding the third party challengers had no standing. *Gadsden Jai Alai, et al. v. State Dep't of Business & Professional Reg., Div. of Pari-Mutuel Wagering and Gretna Racing, LLC*, DBPR Case No. 2008054843 (Nov. 5, 2008), and *Daytona Beach Kennel Club, Inc. v. State Dep't of Business & Professional Reg., Div. of Pari-Mutuel Wagering and Debary Real Estate Holdings, LLC*, DBPR Case No. 2008056708 (Nov. 7, 2008). Both cases are presently on appeal – *Gadsden* in the 1st DCA (App. No. 1D08-5655), and *Daytona* in the 5th DCA (App. No. 5D08-4246).

I hope this is of assistance. Please do not hesitate to contact me if I can be of any further help.

Very truly yours,

Charles T. "Chip" Collette
Assistant General Counsel
Division of Pari-Mutuel Wagering

Enclosures

cc (w/encls):
David J. Roberts, Director
Joseph M. Helton, Jr., Chief Attorney
John J. Brunetti

NOTICE OF ISSUANCE OF QUARTER HORSE PERMIT

Notice is hereby given that on March 16, 2009, the Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering (Division) issued a permit to South Florida Racing Association, L.L.C., pursuant to Section 550.334, Florida Statutes, to conduct quarter horse racing (and conduct pari-mutuel wagering thereupon) in Miami-Dade County, Florida. The application is available for public inspection during normal business hours, 8:00 a.m. to 5:00 p.m., at the Division of Pari-Mutuel Wagering, 1940 North Monroe Street, Suite 50, Tallahassee, Florida 32399-1035.

Any person substantially affected by the Division's permitting decision may petition for an administrative hearing under Sections 120.569 and 120.57, Florida Statutes. The petition must contain the information set forth below and must be filed (received) in the Office of the Agency Clerk, Department of Business & Professional Regulation, 1940 North Monroe Street, Suite 33, Tallahassee, Florida 32399-2202 (Fax # 850/488-5761).

Petitions must be filed within twenty-one (21) days of either publication or receipt of this notice, whichever occurs first. At the time of filing, Petitioner shall mail a copy of the petition to South Florida Racing Association, L.L.C., C/O John J. Brunetti, P.O. Box 158, Hialeah, Florida 33011. The failure of any person to file a petition within twenty-one (21) days shall constitute a waiver of that person's right to request an administrative hearing under Sections 120.569 and 120.57, Florida Statutes, or to intervene in and participate as a party in any administrative proceeding involving this permit. Any subsequent intervention (in a proceeding initiated by another person) will be solely at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, Florida Administrative Code (F.A.C.).

All petitions must contain the following information required by Rule 28-106.201, F.A.C.:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's action.

Pursuant to Section 120.573, Florida Statutes, mediation is <u>not</u> available for disputes of the Division's permitting decision in this matter.

Final Order No. BPR-2008-09578 Date:
FILED 11-5-08
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: Brenda M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING

GADSDEN JAI ALAI, INC., and WASHINGTON COUNTY KENNEL CLUB, INC.,

Petitioners,

v. **DBPR CASE NO. 2008054843**

STATE OF FLORIDA, DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING and **GRETNA RACING, LLC,**

Respondents.

FINAL ORDER DISMISSING PETITION FOR ADMINISTRATIVE HEARING

On October 3, 2008, Petitioners GADSDEN JAI ALAI, INC. (Gadsden), and WASHINGTON COUNTY KENNEL CLUB, INC. (Ebro), filed a "Petition for Formal Administrative Hearing" (Petition) challenging the permit the Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering (Division), issued on September 12, 2008, to GRETNA RACING, LLC (Respondent), to conduct quarter horse racing (and conduct pari-mutuel wagering thereupon) in Gadsden County, Florida, pursuant to Section 550.334, Florida Statutes.

Before the Department could complete its initial §120.569(2)(c) review of the Petition,[1] Gretna filed a motion to dismiss that Petition asserting Petitioners lacked standing to challenge the Division's issuance of Gretna's quarter horse pari-mutuel permit. In response to that motion, Petitioners then filed an "Amended Petition for Formal Administrative Hearing" (Amended Petition) on October 28, 2008, re-asserting and buttressing their standing allegations. Gretna then again filed a motion to dismiss directed to the Amended Petition. Thereby, Gretna again asserted that, despite Petitioners' expanded standing allegations, they nevertheless lacked "the requisite standing to initiate a formal administrative proceeding with regard to the pari-mutuel permit" the Division issued Gretna.

Gretna's motion is well taken. Under Florida's oft-cited landmark administrative standing decision, *Agrico Chemical Co. v. Dep't of Environmental Reg.*, 406 So. 2d 478 (Fla 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 & 415 So. 2d 1361 (Fla. 1982) (*Agrico*), and its progeny, Petitioners lack standing to maintain this administrative proceeding. Specifically, under *Agrico* Petitioners, in order to be found entitled to maintain a Chapter 120 administrative proceeding, must demonstrate:

> 1) that [they] will suffer injury in fact which is of sufficient immediacy to entitle [them] to [an administrative] hearing, and 2) that [their] substantial injury is of a type or nature which the proceeding is designed to protect.

406 So. 2d at 482. *Accord, e.g., Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997) ("... the first aspect of the test deals with the degree of injury [and t]he second ... with the nature of the injury"); *Mid-Chattahoochee River Users v. Florida Dep't of Environmental Protection*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006) ("[t]he first element pertains to the degree of injury whereas the second deals with the nature of the injury"). In other words, to be entitled to an administrative hearing under the Florida Administrative Procedure Act, petitioners must show that:

[1] Section 120.569(2)(c), Florida Statutes (2008).

> (1) the proposed action will result in injury-in-fact which is of sufficient immediacy to justify a hearing; and (2) the injury is of the type that the statute pursuant to which the agency has acted is designed to protect.

Fairbanks, Inc. v. Dep't of Transportation, 635 So. 2d 58, 59 (Fla. 1st DCA), *rev. denied*, 639 So. 2d 977 (Fla. 1994) (citing *Agrico supra*; *Town of Palm Beach v. Dep't of Natural Resources*, 577 So. 2d 1383 (Fla 4th DCA 1991); *Intern'l Jai-Alai Players Ass'n v. Florida Pari-Mutuel Comm'n*, 561 So. 2d 1224 (Fla. 3d DCA 1990); *Boca Raton Mausoleum, Inc. v. Dep't of Banking & Finance*, 511 So. 2d 1016 (Fla. 1st DCA 1987)).

In an attempt to establish standing, Petitioners assert they will be economically harmed by Respondent's quarter horse facility, that the facility is too close geographically to their facilities, that the permit will affect Gadsden Jai Alai's ability to freely re-locate its facility under § 550.055(2), Florida Statutes, should it ever wish to do so,[2] and that the facility will impact Washington County Kennel Club's ability to engage in intertrack wagering under § 550.615, Florida Statutes. Petitioners also assert that, despite their not having or ever applying for a § 550.334 quarter horse permit, as pari-mutuel permit holders they nevertheless have a general interest in ensuring the correctness of the quarter horse permitting process which, accordingly, gives them standing to challenge Gretna's permit in this case. Lastly, they also newly raise constitutional claims in their Amended Petition and assert, because of such, they now have the requisite standing to challenge the instant permit.

In assessing assertions of standing in a permit challenge such as this, the required focus is on the permitting statute at issue, § 550.334, not on other statutes. This is especially true in the case at hand because nowhere does § 550.334 indicate that the effect of the location of a new

[2] It is noted, however, that Gadsden Jai Alai's last live performances were conducted in 1989-1990, and no jai alai or pari-mutuel wagering has since been conducted at that facility. In other words, Gadsden Jai Alai has not operated and has, for all intents and purposes, been totally defunct for almost twenty years.

quarter horse facility on other Florida pari-mutuel permit holders must be taken into consideration in deciding whether to issue a quarter horse permit. Indeed, the statute is entirely silent on this point. Furthermore, § 550.334(4) specifically exempts "quarter horse permit holders from the one-hundred mile limit that applies to other horse race permit holders," *Dept' of Bus. & Prof. Reg., Div. of Pari-Mutuel Wagering v. Gulfstream Park Racing Ass'n, Inc.*, 912 So. 2d 616, 622 (Fla. 1st DCA 2005), *aff'd*, 967 So. 2d 802 (Fla. 2007).

In addition, Gretna has not yet applied for racing dates, nor is it anywhere close to doing so, and quite obviously it has therefore given absolutely no indication whatsoever whether at some future time it might possibly wish to conduct intertrack wagering, as such can only be authorized after a permittee has conducted a full schedule of live racing in the previous calendar year.[3] Thus, it is purest speculation, nothing more, as to whether Gretna might ever conduct a full schedule of live racing and thereafter then seek to conduct intertrack wagering, let alone seek to do such in violation of § 550.334(10) and its 50-mile proscription. *See, e.g., Florida Dep't of Offender Rehabilitation v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978).

Speculative potential future economic loss or possible financial hardship without more is insufficient to satisfy either prong of the *Agrico* test. *E.g., Ameristeel*, 691 So. 2d at 477-78; *Intern'l Jai-Alai Players Ass'n*, 561 So. 2d at 1225-26; *Shared Services, Inc. v. State Dept' of Health & Rehabilitative Services*, 426 So. 2d 56 (Fla. 1st DCA 1983). *See also City of Sunrise v. South Florida Water Mgt. Dist.*, 615 So. 2d 746, 747-48 (Fla. 4th DCA 1993) ("[w]hile [the city] may suffer losses and its customers incur expenses due to economic competition and under utilized capacity, this does not satisfy [*Agrico*'s] 'immediacy' requirement [because c]ompetitive economic considerations do not fall within the zone of protection that the [agency] is authorized

[3] *See* §§ 550.615(1) & 550.002(11), Florida Statutes (the latter setting 40 live performances as the full schedule of live racing for quarter horse permit holders).

to consider"); *Florida Society of Ophthalmology v. State Bd. of Optometry*, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) ("loss due to economic competition [fails to satisfy *Agrico*'s] 'immediacy' requirement").

Petitioners cannot establish how the Division's actions in this case are within the "zone of interests to be protected or regulated by the statute" here at issue, *City of Panama City v. Bd. of Trustees of the Internal Improvement Trust Fund*, 418 So.2d 1132, 1134 (Fla. 1st DCA 1982) – cannot show "that [their] substantial injury is of a type or nature which the proceeding is designed to protect," *Agrico*, 406 So.2d at 482. *Accord, e.g., Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, Inc.*, 418 So.2d 1046 (Fla. 1st DCA 1982), *rev. denied*, 430 So.2d 451 (Fla. 1983). Here, of course, the operative statute is § 550.334, and as in *Mid-Chattahoochee River Users*, 948 So. 2d at 799, the potential economic injury to be suffered by Petitioners from the permitting of the instant quarter horse facility in question is not an injury "of the type that [the statute's] permitting process was designed to protect." *Accord, Intern'l Jai-Alai Players Ass'n*, 561 So. 2d at 1226. *Cf. Fla. State Racing Comm'n v. Broward County Kennel Club*, 77 So. 2d 783, 784-85 (Fla. 1955) (pari-mutuel facility with Winter racing dates, as well as taxpayer with general interest, both held to lack standing to challenge grant of Summer racing dates to competing pari-mutuel facility in same county).

The fact that Petitioners hold Chapter 550 pari-mutuel permits, be they active or inactive, in no way confers standing upon them to oversee Chapter 550's quarter horse permitting process under § 550.334, especially since Petitioners themselves have never applied for nor posses any quarter horse permits. In short, "petitioners' continuing general interest [as pari-mutuel permit holders] in the quality [or correctness of the Division's interpretation and application of the quarter horse permitting statute] is not predicated upon a legally recognized right of sufficient imme-

diacy and reality [that is necessary] to support their standing to challenge the validity of the" of the permit here at issue, *State Bd. of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878, 881 (Fla. 1st DCA 1988) (citations omitted). Quite simply, Petitioners "are not subject to regulation or control under [the statute], ... and [therefore] cannot predicate standing on the notion that the application of the [the statute] will prevent or obstruct their" pari-mutuel endeavors, *Id.*

Finally, the fact that Petitioners now raise constitutional claims in their Amended Petition neither enhances their standing nor confers it upon them. "It is well established in Florida's jurisprudence that only persons who can demonstrate that they will be affected by a legislative act have the proper standing to raise the question of the constitutionality of such legislation," *Miami Beach Kennel Club, Inc. v. Bd. of Business Reg., Dep't of Business Reg.*, 265 So.2d 373, 374 (Fla. 3rd DCA 1972) (citations omitted). *Accord, e.g.*, *Florida Nat'l Organization for Women, Inc. v. State*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002):

> Appellants allege that their right to free speech has been violated by the mere existence of the Choose Life plate. As the trial court explained ..., "the facts alleged do not show that any of the plaintiffs have attempted any expression and been denied access to the alleged forum for speech, or that the statutes at issue have hindered or curtailed any plaintiff's speech in any way." Because Appellants have not applied for, and been denied, a pro-choice plate, and have stated their intention not to do so, they cannot amend the count to state a viable claim as they lack standing to do so. (Emphasis added.)

See also, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-67 (1996) (same true in federal arena). In addition, the constitutionality of a statute or rule cannot be decided in an administrative proceeding. *E.g.*, *Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157-58 (Fla. 1982); *Metro Dade County v. Dep't of Commerce*, 365 So. 2d 432, 434-35 (Fla. 3rd DCA 1978) ("the Administrative Procedure Act cannot relegate matters of constitutional proportions to administrative agency

resolution, nor can it impair judicial jurisdiction to determine constitutional disputes"); *Dep't of Transportation v. Morehouse*, 350 So.2d 529, 533 (Fla. 3rd DCA 1977), *rev. denied*, 350 So. 2d 529 (Fla. 1978) (same).

The bottom line is that, "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable," *Wiccan Religious Cooperative of Florida, Inc. v. Zingale*, 898 So. 2d 134, 135 (Fla. 1st DCA 2005), *cert. dismissed*, 944 So. 2d 233 (Fla. 2006) (quoting *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968)). *See also Id.*, 898 So. 2d at 136 (collecting cases):

> [*See also*] *State v. Benitez*, 395 So. 2d 514, 517 (Fla. 1981) (stating that a party cannot challenge a statutory enactment that does not adversely affect that party's personal or property rights); *Chamberlin v. Dade County Bd. of Pub. Instruction*, 171 So. 2d 535, 537 (Fla. 1965) (holding that parents who brought suit challenging certain religiously-related practices in public schools were without standing to challenge religious practices at baccalaureate programs because their children, who were enrolled in elementary schools, were not adversely affected by the challenged practice); *Alachua County v. Scharps*, 855 So. 2d 195, 201 (Fla. 1st DCA 2003) (stating that a party who is not adversely affected by the statute he or she seeks to challenge does not have standing).

As Petitioners have already filed an Amended Petition in this matter and as it conclusively appears no further amended petition can cure Petitioners' lack of standing, *see* § 120.569(2)(c), Florida Statutes,

IT IS THEREFORE ORDERED:

A. The "Petition to Intervene" filed by Gretna Racing, LLC (Gretna), is hereby GRANTED *nunc pro tunc* to October 10, 2008, the date Gretna filed its intervention petition, and Gretna shall be and is hereby made a party Respondent to this action.

B. The Petition shall be and is hereby DISMISSED, with prejudice, for lack of standing. *Agrico Chemical Co. v. Dep't of Environmental Reg.*, 406 So. 2d 478 (Fla 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982).

C. Petitioners' "Motion to Consolidate or in the Alternative Hold in Abeyance" filed November 4, 2008, shall be and is hereby DENIED as moot.

DONE AND ORDERED this 5th day of November, 2008, in Tallahassee, Florida.

DAVID J. ROBERTS
Director
Division of Pari-Mutuel Wagering
Department of Business & Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

NOTICE OF RIGHT TO APPEAL

Any party to this proceeding has the right to seek its judicial review under Section 120.68, Florida Statutes, by the filing of a notice of appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk, 1940 North Monroe Street, Tallahassee, Florida 32399-2202, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed (received) in the Office of the Agency Clerk within thirty days after the date this Order is filed with the Clerk.

CERTIFICATE OF SERVICE

I hereby certify this 15th day of November, 2008, that true copies of the foregoing "Order" have been served by U.S. mail and telefax upon:

HAROLD F. X. PURNELL, ESQ.
JOHN M. LOCKWOOD, ESQ.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
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for SARAH WACHMAN, AGENCY CLERK
Department of Business & Professional Regulation

Copies Furnished to:

Office of Operations/Licensing Section
Office of Investigations
Office of Auditing

Joseph M. Helton, Jr., Chief Attorney
Charles T. "Chip" Collette, Assistant General Counsel

Final Order No. EPR-2008-49678 Date: 11-7-08
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By:

STATE OF FLORIDA
DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING

DAYTONA BEACH KENNEL CLUB, INC.,

Petitioner,

v. DBPR CASE NO. 2008056708

STATE OF FLORIDA, DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING and DEBARY REAL ESTATE HOLDINGS, LLC,

Respondents.
_____/

FINAL ORDER DISMISSING AMENDED PETITION FOR ADMINISTRATIVE HEARING

On October 10, 2008, Petitioner DAYTONA BEACH KENNEL CLUB, INC. (Daytona), filed a "Petition for Formal Administrative Hearing" (Petition) challenging the permit the Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering (Division), issued on September 22, 2008, to DEBARY REAL ESTATE HOLDINGS, LLC (Respondent), to conduct quarter horse racing (and conduct pari-mutuel wagering thereupon) in Volusia County, Florida, pursuant to Section 550.334, Florida Statutes.

On October 30, 2008, following its §120.569(2)(c) review of the Petition,[1] the Division entered an "Order Dismissing Petition With Leave to Amend." That order noted:

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1 Section 120.569(2)(c), Florida Statutes.

> ... [T]he Petition fails to comply with Rule 28-106.201(2), F.A.C.,. in that it does not contain: (A) "an explanation of how the Petitioner's substantial interests are affected by the agency determination" in this case, i.e., the issuance of a permit to conduct quarter horse racing to Respondent Debary Real Estate Holdings, LLC, *see* Rule 28-106.201(2)(b), F.A.C.; *see also* § 120.54(5)(b)4.c, Fla. Stat.; (B) "a statement of when and how the Petitioner received notice of the agency decision" in this case, Rule 28-106.201(2)(c); § 120.54(5)(b)4.b; and (C) "an explanation of how the alleged facts [asserted by Petitioner] relate to the specific rules or statutes" herein at issue, Rule 28-106.201(2)(f); § 120.54(5)(b)4.f. Without this information, the Petition must be dismissed as required by § 120.569(2)(c), Florida Statutes

Accordingly, the order granted Petitioner fifteen days in which to file an amended petition curing these defects, pointing out that "substantial interests" requires that a petitioner plead and ultimately prove it has administrative standing under the two-prong test enunciated in Florida's landmark administrative standing decision, *Agrico Chemical Co. v. Dep't of Environmental Reg.*, 406 So. 2d 478 (Fla 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 & 415 So. 2d 1361 (Fla. 1982).

On November 6, 2008, Daytona filed an "Amended Petition for Formal Administrative Hearing" (Amended Petition) in response to the Division's order. Therein, Daytona asserted its substantial interests would be impacted because it holds a Chapter 550 pari-mutuel permit to conduct greyhound racing in Volusia County, Florida, it holds a § 849.086 poker cardroom license[2] issued by the Division pursuant to, and Debary may sometime in the future also obtain a poker cardroom, that the Debary quarter horse facility and its possible future cardroom "will cause the deterioration of [Daytona's] revenue," and that the quarter horse permitting statute is facially unconstitutional as violative of "due process and equal protection of the law under the Florida and Federal Constitutions," and that Daytona itself "has been denied due process and equal protection of the law" by the Division's "intended action to issue a quarter horse permit to" Debary.

This is, however, insufficient to establish Daytona's legal right to maintain this action. Under Florida's oft-cited landmark administrative standing decision, *Agrico Chemical Co. v.*

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[2] Section 849.086, Florida Statutes.

Dep't of Environmental Reg., 406 So. 2d 478 (Fla 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 & 415 So. 2d 1361 (Fla. 1982) (*Agrico*), and its progeny, Daytona lacks standing to maintain this administrative proceeding. Specifically, under *Agrico* a petitioner such as Daytona, in order to be found entitled to maintain a Chapter 120 administrative proceeding, must demonstrate:

> 1) that [it] will suffer injury in fact which is of sufficient immediacy to entitle [it] to [an administrative] hearing, and 2) that [its] substantial injury is of a type or nature which the proceeding is designed to protect.

406 So. 2d at 482. *Accord, e.g., Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997) ("... the first aspect of the test deals with the degree of injury [and t]he second ... with the nature of the injury"); *Mid-Chattahoochee River Users v. Florida Dep't of Environmental Protection*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006) ("[t]he first element pertains to the degree of injury whereas the second deals with the nature of the injury"). In other words, to be entitled to an administrative hearing under the Florida Administrative Procedure Act, a petitioner must show that:

> (1) the proposed action will result in injury-in-fact which is of sufficient immediacy to justify a hearing; and (2) the injury is of the type that the statute pursuant to which the agency has acted is designed to protect.

Fairbanks, Inc. v. Dep't of Transportation, 635 So. 2d 58, 59 (Fla. 1st DCA), *rev. denied*, 639 So. 2d 977 (Fla. 1994) (citing *Agrico supra*; *Town of Palm Beach v. Dep't of Natural Resources*, 577 So. 2d 1383 (Fla 4th DCA 1991); *Intern'l Jai-Alai Players Ass'n v. Florida Pari-Mutuel Comm'n*, 561 So. 2d 1224 (Fla. 3d DCA 1990); *Boca Raton Mausoleum, Inc. v. Dep't of Banking & Finance*, 511 So. 2d 1016 (Fla. 1st DCA 1987)).

Daytona neither holds a § 550.334 quarter horse pari-mutuel permit, nor has it ever applied for one, and the Amended Petitions "substantial interests" allegations are totally insufficient to establish Daytona's standing to maintain this action. In a permit challenge such as this, the required focus is on the permitting statute at issue, § 550.334, not on other statutes – not on § 550.054, the general pari-mutuel permitting statute, and not on § 849.086, the cardroom licens-

ing statute. Indeed, with respect to § 550.334, this is especially true because nowhere does the statute indicate that the effect of the location of a new quarter horse facility on other Florida pari-mutuel permit holders must be taken into consideration in deciding whether to issue a quarter horse permit, i.e., the statute is entirely silent on this point. Furthermore, and as Daytona correctly notes, § 550.334(4) specifically exempts "quarter horse permit holders from the one-hundred mile limit that applies to other horse race permit holders," *Dept' of Bus. & Prof. Reg., Div. of Pari-Mutuel Wagering v. Gulfstream Park Racing Ass'n, Inc.*, 912 So. 2d 616, 622 (Fla. 1st DCA 2005), *aff'd*, 967 So. 2d 802 (Fla. 2007).

In addition, Debary has not yet applied for a cardroom license, nor is it anywhere close to doing so. Quite obviously, therefore, it is purest speculation as to whether Debary might sometime in the future seek and obtain a § 849.086 poker cardroom license, and then thereafter actually operate a poker cardroom. *See, e.g., Florida Dep't of Offender Rehabilitation v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978).

Speculative potential future economic loss or possible financial hardship, i.e., "deterioration of [possible future] revenue," is insufficient to satisfy either prong of the *Agrico* test. *E.g., Ameristeel*, 691 So. 2d at 477-78; *Intern'l Jai-Alai Players Ass'n*, 561 So. 2d at 1225-26; *Shared Services, Inc. v. State Dept' of Health & Rehabilitative Services*, 426 So. 2d 56 (Fla. 1st DCA 1983). *See also City of Sunrise v. South Florida Water Mgt. Dist.*, 615 So. 2d 746, 747-48 (Fla. 4th DCA 1993) ("[w]hile [the city] may suffer losses and its customers incur expenses due to economic competition and under utilized capacity, this does not satisfy [*Agrico*'s] 'immediacy' requirement [because c]ompetitive economic considerations do not fall within the zone of protection that the [agency] is authorized to consider"); *Florida Society of Ophthalmology v. State Bd.*

of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) ("loss due to economic competition [fails to satisfy *Agrico*'s] 'immediacy' requirement").

Daytona cannot establish that its "interest in the [quarter horse permit] is ... within the zone of interests to be protected or regulated by the statute" here at issue, *City of Panama City v. Bd. of Trustees of the Internal Improvement Trust Fund*, 418 So.2d 1132, 1134 (Fla. 1st DCA 1982) (quoting *Ass'n of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 153 (1970)) – cannot show "that [its] substantial injury is of a type or nature which the proceeding is designed to protect," *Agrico*, 406 So.2d at 482. *Accord, e.g., Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, Inc.*, 418 So.2d 1046 (Fla. 1st DCA 1982), *rev. denied*, 430 So.2d 451 (Fla. 1983). Here, of course, the operative statute is § 550.334, and just as in *Mid-Chattahoochee River Users*, 948 So. 2d at 799, the potential economic injury to be suffered by Daytona from the permitting of the Debary quarter horse facility in question is not an injury "of the type that [the statute's] permitting process was designed to protect." *Accord, Intern'l Jai-Alai Players Ass'n*, 561 So. 2d at 1226. *Cf. Fla. State Racing Comm'n v. Broward County Kennel Club*, 77 So. 2d 783, 784-85 (Fla. 1955) (pari-mutuel facility with Winter racing dates, as well as taxpayer with general interest, both held to lack standing to challenge grant of Summer racing dates to competing pari-mutuel facility in same county).

The fact that Daytona holds a Chapter 550 pari-mutuel greyhound permit, as well as a § 849.086 cardroom license, in no way confers it standing to oversee Chapter 550's § 550.334 quarter horse permitting process, especially since Daytona itself has never applied for nor possesses a quarter horse permit. In short, "petitioner['s] continuing general interest [as a pari-mutuel permit holder] in the quality [or correctness of the Division's interpretation and application of the quarter horse permitting statute] is not predicated upon a legally recognized right of

sufficient immediacy and reality [necessary] to support [its] standing to challenge the validity of the" of the permit here at issue, *State Bd. of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878, 881 (Fla. 1st DCA 1988) (citations omitted). Quite simply, Daytona is "not subject to regulation or control under [the statute], ... and [therefore] cannot predicate standing on the notion that the application of the [the statute] will prevent or obstruct" its pari-mutuel endeavors, *Id.*

Finally, the fact that Daytona raises constitutional claims in its Petition neither enhances its standing nor otherwise confers it. "It is well established in Florida's jurisprudence that only persons who can demonstrate that they will be affected by a legislative act have the proper standing to raise the question of the constitutionality of such legislation," *Miami Beach Kennel Club, Inc. v. Bd. of Business Reg., Dep't of Business Reg.*, 265 So.2d 373, 374 (Fla. 3rd DCA 1972) (citations omitted). *Accord, e.g., Florida Nat'l Organization for Women, Inc. v. State*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002):

> Appellants allege that their right to free speech has been violated by the mere existence of the Choose Life plate. As the trial court explained..., "the facts alleged do not show that any of the plaintiffs have attempted any expression and been denied access to the alleged forum for speech, or that the statutes at issue have hindered or curtailed any plaintiff's speech in any way." Because Appellants have not applied for, and been denied, a pro-choice plate, and have stated their intention not to do so, they cannot amend the count to state a viable claim as they lack standing to do so. (Emphasis added.)

See also, e.g., Arizonans for Official English v. Arizona, 520 U.S. 43, 64-67 (1996) (same true in federal arena). In addition, the constitutionality of a statute or rule cannot be decided in an administrative proceeding. *E.g., Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157-58 (Fla. 1982); *Metro Dade County v. Dep't of Commerce*, 365 So. 2d 432, 434-35 (Fla. 3rd DCA 1978) ("the Administrative Procedure Act cannot relegate matters of constitutional proportions to administrative agency resolution, nor can it impair judicial jurisdiction to determine constitutional disputes"); *Dep't of Transportation*

v. Morehouse, 350 So.2d 529, 533 (Fla. 3rd DCA 1977), *rev. denied*, 350 So. 2d 529 (Fla. 1978) (same).

The bottom line is that, "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable," *Wiccan Religious Cooperative of Florida, Inc. v. Zingale*, 898 So. 2d 134, 135 (Fla. 1st DCA 2005), *cert. dismissed*, 944 So. 2d 233 (Fla. 2006) (quoting *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968)). *See also Id.*, 898 So. 2d at 136 (collecting cases):

> [*See also*] *State v. Benitez*, 395 So. 2d 514, 517 (Fla. 1981) (stating that a party cannot challenge a statutory enactment that does not adversely affect that party's personal or property rights); *Chamberlin v. Dade County Bd. of Pub. Instruction*, 171 So. 2d 535, 537 (Fla. 1965) (holding that parents who brought suit challenging certain religiously-related practices in public schools were without standing to challenge religious practices at baccalaureate programs because their children, who were enrolled in elementary schools, were not adversely affected by the challenged practice); *Alachua County v. Scharps*, 855 So. 2d 195, 201 (Fla. 1st DCA 2003) (stating that a party who is not adversely affected by the statute he or she seeks to challenge does not have standing).

ACCORDINGLY, IT IS THEREFORE ORDERED:

A. The Petition shall be and is hereby DISMISSED, with prejudice, for lack of standing. *Agrico Chemical Co. v. Dep't of Environmental Reg.*, 406 So. 2d 478 (Fla 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982).

B. Daytona's "Motion to Consolidate or in the Alternative Hold in Abeyance" filed November 6, 2008, shall be and is hereby DENIED as moot.

DONE AND ORDERED this 7th day of November, 2008, in Tallahassee, Florida.

DAVID J. ROBERTS
Director
Division of Pari-Mutuel Wagering
Department of Business & Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

NOTICE OF RIGHT TO APPEAL

Any party to this proceeding has the right to seek its judicial review under Section 120.68, Florida Statutes, by the filing of a notice of appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk, 1940 North Monroe Street, Tallahassee, Florida 32399-2202, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed (received) in the Office of the Agency Clerk within thirty days after the date this Order is filed with the Clerk.

CERTIFICATE OF SERVICE

I hereby certify this 7th day of November, 2008, that true copies of the foregoing "Order" have been served by U.S. Mail and telefax [or email] upon:

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Office of Investigations
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