

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

FILED	
Department of Business and Professional Regulation AGENCY CLERK	
CLERK	Ronda L. Bryan
Date	7/19/2017
File #	2017-05698

IN RE: PETITION FOR DECLARATORY
STATEMENT, WEST FLAGLER
ASSOCIATES, LTD.,

Petitioner,

Case No: 2016-014603
DS 2016-020

HARTMAN AND TYNER, INC., and H&T
GAMING, INC.,

Intervenors.

FINAL ORDER GRANTING DECLARATORY STATEMENT

COMES NOW, the Division of Pari-Mutuel Wagering (“Division”), and files this Order in response to (1) West Flagler Associates, Ltd.’s (“Petitioner”) Amended Petition for Declaratory Statement (“Petition”) and, (2) Hartman and Tyner, Inc., and H&T Gaming, Inc.’s (“Intervenors”) Motion to Intervene.

1. Petitioner is the holder of two pari-mutuel permits, relevant to this action, located in Miami-Dade County. The first permit, number 155, is a greyhound racing permit that Petitioner has held and conducted live races under since at least 2002. Petitioner is also licensed to offer slot machine gaming, and a cardroom under permit number 155 at the pari-mutuel facility located at 401 N.W. 38th Court, Miami, Florida, 33126.¹ The second permit, number 283, is a summer jai-alai permit that was issued in 2011 and has not operated since 2014.

2. On July 13, 2016, Petitioner filed an Amended Petition for Declaratory Statement with the Division. The Petition, attached as Exhibit “A”, seeks answers to two questions related

¹ This address is the correct address at which Petitioner is licensed to offer slot machine gaming. Petitioner provided a different address in Question 1 of the Petition which the division accepts as an unintended error.

to Petitioner's desire to cease conducting greyhound racing, the activity which initially allowed it to offer slot machine gaming, and instead offer slot machine gaming under its summer jai alai permit.

3. On July 13, 2016, Hartman and Tyner, Inc., and H&T Gaming, Inc., ("the Intervenor"), filed a Motion to Intervene in the action. The Intervenor hold pari-mutuel wagering permits and operate greyhound racing at Mardi Gras Casino and Racetrack in Broward County. The Motion to Intervene is attached as Exhibit "B".

4. On September 9, 2016, the Division filed an Order Declining Petition for Declaratory Statement, declining to answer both questions presented by Petitioner and deeming the Intervenor's Motion to Intervene moot. Petitioner subsequently appealed to the Third District Court of Appeal who, after oral argument, reversed and remanded the Division's order with directions to consider and rule upon the Motion to Intervene and both of the questions presented in the Petition.

MOTION TO INTERVENE

5. Intervenor argue that they would be substantially affected by the Division's answer to the Petition because the questions asked seek the Division's interpretation of the application of key provisions of Florida law and concern activities that would affect Intervenor's business.

6. To intervene in an administrative proceeding, including a request for a declaratory statement, a party must show that it possesses standing. Rule 28-105.0027, Fla. Admin Code. Standing is established if a party is "substantially affected," which is shown by establishing that they will suffer an injury in fact and that the injury is of the nature the proceeding is meant to protect. Fla. Home Builders Ass'n v. Dep't of Labor & Employment Sec., 412 So.2d 351, 352

(Fla. 1982). Agrico Chem. Co. v. Dep't of Env'tl. Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

7. In paragraphs 13 and 14 of the attached Motion to Intervene, Intervenors argue that they are substantially affected by the questions asked in the Petition in general terms. However, the intervenors did not provide specific or immediate injuries and instead argued in broad speculation. As an example of Intervenors' broad argument, they argue that they would be substantially affected by "any declaration by the Division which concerns the requirements relating to slot machine licensure, particularly when the declaration could impact or change the market in which Mardi Gras operates".²

8. This type of broad pleading does not state with any particularity what real and immediate injury or impact the outcome of the declaratory statement would have on Intervenors. In similar cases in which injury is argued in broad generalities the Division has properly denied standing. See, Florida State Racing Com. v. Broward County Kennel Club, Inc., 77 So. 2d 783 (Fla. 1955); International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Com., 561 So. 2d 1224 (Fla. 3d DCA 1990).

9. As explained below, the Division declines to answer Question 1 because it is asking for a broad interpretation of several statutes relating to slot machines and Intervenors have not shown how they would be substantially affected by an answer to Question 2. Intervenors' Motion to Intervene is therefore denied because Intervenors have not established that they have a substantial interest in the proceeding.

DECLARATORY STATEMENT

10. The Division has authority to issue this Declaratory Statement pursuant to section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code.

² See, Exhibit B at paragraph 14.

11. Petitioner presents two questions to the Division for consideration:

Question 1

Whether West Flagler's facility located at 450 NW 37th Avenue, Miami, Florida 33126, must continue to run the same type of racing or games that first qualified the facility to become an "eligible facility" pursuant to section 551.102(4), Florida Statutes.

Question 2

Whether, pursuant to section 551.102(4), Florida Statutes, West Flagler may discontinue the operation of greyhound races and instead operate a full schedule of jai alai performances in order to maintain its "eligible facility" status to continue to conduct slot machine operations.

12. The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance. Novick v. Dep't of Health, Bd. Of Medicine, 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002). However, "an agency may not use a declaratory statement as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretation that apply to an entire class of persons." Regal Kitchens, Inc. v. Florida Dept. of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994).

13. The division declines to answer Question 1. The question asks about a broad policy and seeks a statutory interpretation to a general question that would apply to any pari-mutuel slot facility and therefore a declaratory statement is not appropriate. However, the agency accepts and answers Question 2 in the affirmative because Petitioner's summer jai alai permit may be considered an "eligible facility" for the reasons stated below.

14. As relevant to Petitioner's greyhound facility, Section 551.102(4), Florida Statutes, specifically defines an "eligible facility" as:

[A]ny licensed pari-mutuel facility located in Miami-Dade or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility in the respective county.

15. It is not disputed that Petitioner's greyhound racing facility currently satisfies the elements of an "eligible facility". Petitioner is concerned with whether or not the location would remain eligible to offer slots if it stopped offering greyhound racing and instead offered jai alai at that same location. Answering this question involves determining if a "licensed pari-mutuel facility" as present in section 551.102(4), Florida Statutes, means the actual racetrack or jai alai fronton. If so, Petitioner's summer jai alai permit would not satisfy the elements of an eligible facility because a new fronton would need to be built. Alternatively, if "licensed pari-mutuel facility" instead means the areas of the facility where pari-mutuel activity takes place, Petitioner's summer jai alai permit operating at the same location as where the greyhound permit was located would remain an eligible facility.

16. Section 550.002(23), Florida Statutes, defines a "pari-mutuel facility" as a "racetrack, fronton, or other facility used by a permit holder for the conduct of pari-mutuel wagering". The use of the term "other facility" in this definition suggests that the term should be interpreted broadly to include more than just the race track or fronton.

17. This broad interpretation is consistent with other parts of Chapters 550 and 551, Florida Statutes, which repeatedly use the term "facility" in a broad manner. For example, section 550.0425(3), Florida Statutes, allows for the hiring of minors at pari-mutuel facilities, yet limits minors from serving in positions that directly involve wagering. This section would make little sense if the facility only included the racetrack or fronton itself, as nearly all positions on the site would involve wagering. Additionally, section 551.102(2), Florida Statutes, provides for designated slot machine gaming areas in an "area or areas of a facility". Accordingly, narrowly defining a pari-mutuel facility would require these slot machines to be embedded in the racetrack or fronton itself, rather than in connected buildings; both an impractical and illogical mandate.

18. Additionally, as set forth in Petitioner's Supplemental Memorandum of Law, incorporated herein as Exhibit "C", section 551.102(4), Florida Statutes, contains no direct language or apparent legislative intent conditioning Petitioner's ability to be an eligible facility on it continuing to conduct the same type of live racing or games in the future as it did in 2002 and 2003.


19. Taking all of this into account, it is apparent that the legislature intended for the term "licensed pari-mutuel facility" in section 551.102(4), Florida Statutes, to refer to the physical location or piece of property utilized for pari-mutuel wagering, rather than just the racetrack or jai alai fronton itself. Notwithstanding any other aspect of Florida law regarding the licensing and operation of slot machines, a change from offering greyhound racing to offering jai alai performances at the same facility that qualified as an eligible facility under the first clause of section 550.102(4), Florida Statutes, would not change the status of Petitioner's facility as an "eligible facility".

Therefore it is ORDERED that:

1. The Motion to Intervene filed by the Intervenors is DENIED.
2. Question 1 of the Petition for Declaratory Statement is DENIED.
3. Question 2 of the Petition for Declaratory Statement is ANSWERED as above.

(SIGNATURE PAGE FOLLOWS)

DONE AND ORDERED THIS 19 day of July, 2017.


Anthony J. Glover, Director
Division of Pari-Mutuel Wagering
Department of Business
& Professional Regulation
2601 Blair Stone Road, Mail Stop G1
Tallahassee, FL 32399-1035

NOTICE OF RIGHT TO APPEAL

Unless expressly waived, any party substantially affected by this Final Order may seek review by filing an original Notice of Appeal with the Agency Clerk of the Department of Business and Professional Regulation at 2601 Blair Stone Road, Tallahassee, Florida 32399 (AGC. Filing@myfloridalicense.com), and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty days rendition of this Order, in accordance with Fla. App. P. 9.110 and Section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “Final Order Granting Declaratory Statement,” has been sent by regular United States Mail and/or email on this 19 day of July, 2017 to:

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GAUGE D. CAMPBELL
Administrative Assistant III
Office of the General Counsel
Department of Business and Professional Regulation

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

FILED	
<small>Department of Business and Professional Regulation</small>	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	6/13/2016
File #	

In re: Petition for Declaratory Statement
WEST FLAGLER ASSOCIATES, LTD.,

Case No. DS 2016-020

Petitioner.

AMENDED PETITION FOR DECLARATORY STATEMENT

West Flagler Associates, Ltd. ("West Flagler" or the "Petitioner"), pursuant to section 120.565, Florida Statutes, and rule 28-105, Florida Administrative Code, files this amended request for the issuance of a declaratory statement by the Division of Pari-Mutuel Wagering (the "Division") regarding the application of chapter 551, Florida Statutes, and the administrative rules adopted thereunder, to the Petitioner's particular set of circumstances. In support of this Amended Petition, the Petitioner states the following:

1. The affected agency is the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), located at Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399. The Division is the state agency authorized to administer chapter 551, Florida Statutes, including the conduct of pari-mutuel wagering and slot machine operations.
2. The Division has jurisdiction over this proceeding pursuant to section 120.565, Florida Statutes.
3. West Flagler's corporate office is located at 450 NW 37th Avenue, Miami, Florida 33126. For purposes of this Petition, West Flagler's address is that of its undersigned counsel.



4. West Flagler owns and operates permits and licenses to conduct pari-mutuel (specifically, greyhound races and jai alai performances), cardroom, and slot machine operations at its facility in Miami-Dade County. The facility is commonly referred to as the Magic City Casino.

5. In 2004, an amendment to the Florida Constitution outlined specific criteria for certain pari-mutuel facilities in Miami-Dade and Broward Counties to operate slot machines. This amendment to the Florida Constitution required two criteria for Miami-Dade and Broward facilities to qualify for authorization under a referendum to conduct slot machines operation: 1) the facilities must exist and be licensed prior to the referendum; and 2) the facilities must have conducted live racing or games for the past two calendar years.

6. Florida conducted a statewide referendum on November 2, 2004, to authorize the above amendment. On January 29, 2008 and pursuant to section 23, article X of the Florida Constitution, the voters of Miami-Dade approved a referendum authorizing slot machine operations in Miami-Dade.

7. The Florida Constitution amendment also authorized the Legislature to adopt legislation implementing this section of the Florida Constitution and to include provisions for the licensure and regulation of slot machines. § 23(b), art. X, Fla. Const. As such, the Legislature provided that an “eligible facility” for slot machine licensing is defined as follows:

“Eligible facility” means any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility in the respective county. . .

§ 551.102(4), Fla. Stat. (emphasis added).

8. As a facility in Miami-Dade County, West Flagler applied for a slot machines

license under the provisions of section 551.102(4), Florida Statutes, because the facility existed and was licensed prior to the referendum. Additionally, the facility had run greyhound races for the past two years. West Flagler was granted a slot machine license and has annually renewed its license each year.

9. Therefore, in 2009 and under the provisions of section 551.102(4), Florida Statutes, West Flagler obtained a slot machine operations license from the Division. Since that time, West Flagler continues to conduct a minimum number of live greyhound performances in order to renew its annual slot machine license.

10. West Flagler's facility located at 450 NW 37th Avenue, Miami, Florida 33126 is an "eligible facility" because the facility conducted (as the statute states, "has conducted") live racing during 2002 and 2003 and the Miami-Dade voters approved a referendum to have slot machines at the facility.

11. The Petitioner intends to seek a pari-mutuel license to conduct at least 150 live jai alai performances at its facility pursuant to pari-mutuel permit number 283. The Petitioner questions whether, upon receipt of a jai alai license for at least 150 live performances, the facility can discontinue its current operation of greyhound racing and instead operate a full schedule of jai alai games in order to maintain its current annual slot machine license.

12. The Petitioner further questions whether West Flagler will maintain its "eligible facility" status as it continues to satisfy the requirements in section 551.102(4), Florida Statutes, because the facility had conducted greyhound races for the two years prior to the 2004 statewide referendum.

13. The Petitioner seeks a declaratory statement from the Division concerning how the operative provisions of chapter 551, Florida Statutes, or any other provision of Florida law,

including any applicable administrative rules, would impact the question presented below regarding the Petitioner's conduct of slot machine gaming operations.

Questions Presented

Question 1: Whether West Flagler's facility located at 450 NW 37th Avenue, Miami, Florida 33126, must continue to run the same type of racing or games that first qualified the facility to become an "eligible facility" pursuant to section 551.102(4), Florida Statutes.

Question 2: Whether, pursuant section 551.102(4), Florida Statutes, West Flagler may discontinue the operation of greyhound races and instead operate a full schedule of jai alai performances in order to maintain its "eligible facility" status to continue to conduct slot machine operations.

WHEREFORE, the Petitioner requests that the Division issue a Declaratory Statement responding to the above-stated questions.

Respectfully submitted this 13th day of June 2016.

By: /s/ Kala Shankle

John M. Lockwood, Esq.

Fla. Bar No. 28056

Thomas J. Morton, Esq.

Fla. Bar No. 13771

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by hand delivery to the Agency Clerk, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32301, on June 13th, 2016.

/s/ Kala Shankle _____
Attorney

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

FILED	
Department of Business and Professional Regulation AGENCY CLERK	
CLERK	Ronda L. Bryan
Date	7/13/2016
File #	

In Re: Amended Petition for Declaratory Statement

Case No. DS 2016-020

WEST FLAGLER ASSOCIATES, LTD.,

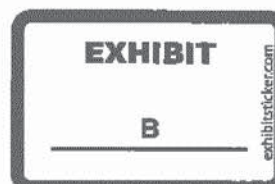
Petitioner.

MOTION FOR LEAVE TO INTERVENE IN AMENDED PETITION FOR
DECLARATORY STATEMENT

Pursuant to Rule 28-105.0027, Florida Administrative Code ("F.A.C."), Hartman and Tyner, Inc. ("Hartman and Tyner"), and H&T Gaming, Inc. ("H&T") (collectively referred to as "Mardi Gras"), by and through their undersigned counsel, in response to the Amended Petition for Declaratory Statement ("Petition") filed by West Flagler Associates, Ltd. ("West Flagler") on June 13, 2016, file this Motion to Intervene in the above captioned proceeding, and further request the Division's consideration and inclusion in the record of the accompanying Memorandum of Law in Opposition to Declaratory Statement. In support, Mardi Gras states as follows:

Parties

1. The affected agency is the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division"), located at 1940 North Monroe Street, Tallahassee, Florida 32399.
2. Hartman and Tyner is a pari-mutuel wagering permitholder authorized to conduct greyhound racing at the Mardi Gras Casino and Racetrack, located at 831 North Federal Highway, Hallandale Beach, in Broward County, Florida. Additionally, Hartman and Tyner is authorized to conduct intertrack wagering pursuant to Section 550.615(2), Florida Statutes, is



licensed to operate a cardroom pursuant to section 849.086, F.S., and is licensed to operate slot machines pursuant to Chapter 551, F.S. H&T is also the holder of a pari-mutuel permit situated in Miami-Dade County, Florida, which is currently licensed and operating pari-mutuel greyhound racing at the Mardi Gras Casino and Racetrack, pursuant to a lease authorized by section 550.475, F.S. For purposes of this proceeding, the contact information for H&T is that of its undersigned counsel.

3. West Flagler is a pari-mutuel wagering permitholder authorized to conduct greyhound racing and jai alai in Miami-Dade County. Under its greyhound permit, West Flagler is authorized to conduct intertrack wagering pursuant to Section 550.615, F.S., is licensed to operate a cardroom pursuant to Section 849.086, F.S., and is licensed to operate slot machines pursuant to Chapter 551, F.S.

Background

4. On March 3, 2016, West Flagler filed a Petition for Declaratory Statement. Mardi Gras filed its Motion for Leave to Intervene responding to the Petition filed on June 9, 2016.

5. Subsequently, on June 13, 2016, West Flagler filed an Amended Petition for Declaratory Statement seeking the Division's opinion as to the applicability of Chapter 551, Florida Statutes, as it applies to the Petitioner. Petitioner seeks a determination as to whether its facility located at 450 NW 37th Avenue, Miami, Florida 33126, must continue to run the same type of racing or games that first qualified the facility in becoming an "eligible facility" pursuant to Section 551.102(4), Florida Statutes.

6. In its Amended Petition, West Flagler asks the Division to answer the following questions:

Question 1: Whether West Flagler's facility located at 450 NW 37th Avenue, Miami, Florida 33126, must continue to run the same type of racing or games that first qualified the facility to become an "eligible facility" pursuant to section 551.102(4), Florida Statutes.

Question 2: Whether, pursuant to section 551.102(4), Florida Statutes, West Flagler may discontinue the operation of greyhound races and instead operate a full schedule of jai alai performances in order to maintain its "eligible facility" status to continue to conduct slot machine operations.

7. On June 22, 2016, the Division published a Notice of its receipt of the Amended Petition for Declaratory Statement in the Florida Administrative Register ("FAR"). Rule 28-105.0027, F.A.C., states that "persons other than the original parties to a pending [declaratory statement] proceeding whose substantial interests will be affected by the disposition of the declaratory statement and who desire to become parties may move the presiding officer for leave to intervene" within 21 days after publication. Mardi Gras hereby requests leave to intervene and participate in this proceeding. This Motion is timely filed pursuant to Rule 28-105.0027, F.A.C.

Intervention in Declaratory Statement Proceedings

8. There are procedural safeguards inherent in the process for considering and issuing a declaratory statement that are intended to protect the rights of other concerned parties. Florida Department of Business Regulation v. Investment Corporation of Palm Beach, 747 So. 2d 374, 384 (Fla. 1999). In Investment Corporation, the Court specifically noted that the requirement to publish notice of a request for a declaratory statement is an acknowledgement "that the answer to a petition for a declaratory statement may very well have an impact on others who are regulated by the agency" and that any "substantially affected party can intervene in a declaratory statement proceeding before the agency." Id. at 377 (quoting Chiles v. Department of State, Division of Elections, 788 So. 2d 151, 154 (Fla. 1st DCA 1998)).

9. These safeguards in favor of participation in declaratory statement proceedings are particularly important in matters involving the pari-mutuel industry. The Petitioner and Mardi Gras are both members of “a unique industry having very limited participants engaged in almost identical operations” such that “declaratory statements as to one would almost invariably be of interest to others in the very limited group.” Investment Corporation, 747 So. 2d at 385. In fact, the Petitioner and Mardi Gras are both engaged in the same type of pari-mutuel activity (greyhound racing) in the same market area (i.e., within 25 miles of each other). See §550.022(19), Fla. Stat. As a holder of permits in both Broward and Miami-Dade counties and licenses for cardrooms and slot machine gaming, Mardi Gras has a substantial interest in West Flagler’s request for an interpretation and application of Florida Statutes regulating the licensure and operation of pari-mutuel activities and slot machine facilities in this highly regulated and competitive industry in South Florida.

10. The Amended Petition sets forth circumstances and poses questions on the application and interpretation of the Florida Constitution and statutes that have broad implications for permitholders in Miami-Dade and Broward Counties. The questions raised require interpretation of provisions of the Florida Constitution as well as key provisions in Chapter 551, Florida Statutes, which directly relate to and impact Mardi Gras’ licensed business. More specifically, the question implicates the criteria that must be met in order to qualify for future licensure to conduct slot machine gaming, which is an activity that Mardi Gras conducts and will continue to conduct at its facilities pursuant to slot machine licenses issued by the Division.

11. The Petition presents significant legal issues with broad policy ramifications, including the potential first-time determination of the eligibility for slot machine gaming by a

pari-mutuel permitholder at a facility that does not continue to conduct the type of live pari-mutuel event on which its initial approval for a slot machine license as required by Section 23, Article X of the Florida Constitution.

12. The real issue presented is whether West Flagler can terminate the greyhound license racing which is the basis for its continuing eligibility to conduct slot machine gaming, and in place of such racing substitute jai alai games that cannot be the predicate for eligibility and authorization to conduct slot machine gaming for West Flagler.

13. In sum, Mardi Gras is substantially affected in this matter in several ways, including, but not limited to:

- A. The Amended Petition for Declaratory Statement relates to the qualifications and requirements for a pari-mutuel wagering facility to offer slot machine gaming, which is one of the major business activities in which Mardi Gras is engaged.
- B. The Amended Petition for Declaratory Statement seeks an interpretation as to the requirements to conduct live pari-mutuel wagering activities in order to qualify for eligibility and licensure to conduct slot machine gaming, both of which are businesses in which Mardi Gras is engaged.
- C. The Amended Petition for Declaratory Statement requests an interpretation as to the application of key provisions of Chapter 551, Florida Statutes, as well as implicitly Section 23, Article X of the Florida Constitution, regarding eligibility and licensure for slot machine gaming in Miami-Dade County, which provisions also govern Mardi Gras's business activities and which location is within the market area of Mardi Gras.

D. The Amended Petition for Declaratory Statement concerns whether West Flagler's jai alai permit that was not in operation in 2002 and 2003 can serve as the legal basis to conduct slot machine gaming under Chapter 551, Florida Statutes, which substantially affects Mardi Gras's business activities.

E. The Amended Petition for Declaratory Statement requires a determination of whether a greyhound permitholder is required to continue to conduct live greyhound racing in order for that permitholder to be entitled to continued authorization to conduct slot machine gaming at an eligible facility as defined by Section 551.102(4), Florida Statutes, and implicitly Section 23, Article X of the Florida Constitution, which directly and substantially affects the licensed businesses in which Mardi Gras is engaged.

14. Because of the significant statutory requirements and restrictions applicable to slot machine operations, Mardi Gras is substantially affected by any declaration by the Division which concerns the requirements relating to slot machine licensure, particularly when the declaration could impact or change the market area in which Mardi Gras operates. Consequently, Mardi Gras is entitled to participate and be heard regarding the proper interpretation of the statutes that the Petitioner is asking the Division to interpret and apply in this proceeding.

15. The undersigned has conferred with counsel for the Petitioner, and is authorized to represent that the Petitioner objects to this Motion.

MEMORANDUM IN OPPOSITION TO DECLARATORY STATEMENT

Mardi Gras asserts that the Division should simply decline to issue the requested declaratory statement as the resolution of the questions presented would require the Division to

interpret and apply Section 23, Article X, of the Florida Constitution. Initially, the Petitioner included questions specifically directed to the interpretation and application of Section 23, Article X. In the Amended Petition, the Petitioner deletes reference to Section 23, Article X. Even so, the Petitioner's questions are still rooted in the proper interpretation and application of Section 23, Article X as West Flagler received its initial authorization to operate slot machines pursuant to that constitutional amendment. Further, West Flagler cites to Section 551.102(4), Florida Statutes, as the applicable statute. Section 551.102(4) defines "Eligibility Facility" in part based on the language of Section 23, Article X.

Section 120.565, Florida Statutes, provides in pertinent part, that:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances. [Emphasis added.]

Rule 28-105.001, F.A.C., titled "Purpose and Use of Declaratory Statement" provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person. [Emphasis added.]

By the terms of the applicable statutes and rules, a declaratory statement may resolve questions or doubts concerning the applicability of statutes, not questions or doubts originating from the applicability of provisions of the Florida Constitution. Arguably, the Division lacks the authority to issue the instant Declaratory Statement. In addition, such determination would potentially

apply to an entire class of persons, including potentially any permitholder in Miami-Dade or Broward County. The Division is without authority to adopt broad policy or otherwise provide the interpretations requested by West Flagler. See Investment Corp., at 376. The Division should decline to consider the instant Petition. If, however, the Division is inclined to address West Flagler's Petition, the Mardi Gras respectfully requests leave to file an additional response to the merits of the questions at that time.

Through its Petition, West Flagler is attempting to defy this important distinction established by the Legislature in Chapter 551 by inviting the Division to establish – inappropriately through an individual declaratory statement proceeding – a new and completely unfounded policy that improperly expands the types of permits eligible for slot machine gaming beyond what the plain terms of both the Constitution and Chapter 551 allow.

WHEREFORE, Mardi Gras respectfully requests the Division to enter an order granting this Motion for Leave to Intervene in this proceeding as a full party and denying the Petition. Alternatively, Mardi Gras requests the Division to enter an order granting this Motion for Leave to Intervene in this proceeding and, if the Division is inclined to address the merits of the questions presented, that the Division enter an order granting Mardi Gras leave to file a subsequent memorandum of law addressing the merits.

Respectfully submitted this 13th day of July, 2016.

/s/ Gary R. Rutledge

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**Attorneys for Hartman and
Tyner, Inc., and H & T Gaming, Inc.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served this 13th day of July, 2016, as follows:

By Electronic Mail:

Agency Clerk
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1035
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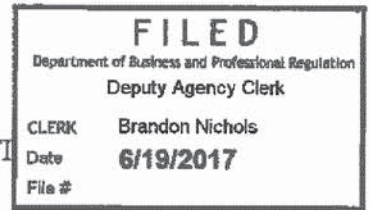
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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING



In re: Petition for Declaratory Statement

Case No. 2016-020

WEST FLAGLER ASSOCIATES, LTD.,

Petitioner.

SUPPLEMENTAL MEMORANDUM OF LAW

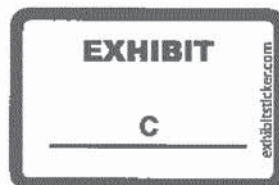
West Flagler Associates, Ltd. (“West Flagler” or the “Petitioner”), pursuant to section 120.565, Florida Statutes, and rule 28-105, Florida Administrative Code, files this Supplemental Memorandum of Law regarding the application of chapter 551, Florida Statutes, and the administrative rules adopted thereunder, to the Petitioner’s particular set of circumstances. In support of this Amended Petition, the Petitioner states the following:

Introduction

1. The affected agency is the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the “Division”), located at Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399. The Division is the state agency authorized to administer chapter 551, Florida Statutes, including the conduct of pari-mutuel wagering and slot machine operations.

2. The Division has jurisdiction over this proceeding pursuant to section 120.565, Florida Statutes.

3. In its petition, West Flagler asks the Division two questions of statutory interpretation. These boil down to whether West Flagler can switch from greyhound racing to jai



alai games and remain an “eligible facility” under section 551.102(4) to conduct slot machine operations.

4. Question 1 asked whether West Flagler must continue to run the same type of racing or games that first qualified the facility to become an “eligible facility” under the slot machine statute (551.102(4)). West Flagler respectfully submits the answer is no, the statute does not require it to continue running greyhound races in order to remain eligible to conduct slot machine operations.

5. Question 2 asked whether, under the slot machine statute (551.102(4)), West Flagler may discontinue greyhound racing, and instead operate a full schedule of jai alai performances in order to maintain its “eligible facility” status to continue to conduct slot machine operations. West Flagler respectfully submits that the answer is yes, West Flagler may make that change and continue to conduct slot machine operations.

Background

6. In 2004, the Florida Constitution was amended to allow slot machine gaming at qualified pari-mutuel facilities in Miami-Dade and Broward Counties, so long as approved by local referendum in each county. Art. X, § 23, Fla. Const. (the “Amendment”). Miami-Dade voters approved the Amendment via local referendum.

7. The Amendment directed the Legislature to “adopt legislation implementing this section[.]” Art. X, § 23(b), Fla. Const. Thus, the Legislature was charged with interpreting and implementing the Constitutional provision and did so by enacting chapter 551, Florida Statutes.

8. To qualify for a license to operate slot machines, a pari-mutuel facility had to have (1) already been in existence at the time of the approval of the Amendment (2004), and (2) conducted “live racing or games” in 2002 and 2003. § 551.102(4), Fla. Stat. (emphasis added).

West Flagler qualified for a slot machine license because its facility was already in existence and it had conducted greyhound racing in the requisite years 2002 and 2003 (and subsequently through today).

9. West Flagler later acquired from the State another permit to conduct pari-mutuel sporting – a jai alai permit – which it currently is not using, but would like to do so at its facility.¹ West Flagler seeks to discontinue the live greyhound races and substitute the requisite number of jai alai games needed to remain qualified as an “eligible facility” to conduct slot machine operations. To that end, it filed this declaratory statement proceeding asking the two questions outlined above. West Flagler requires an answer before it invests millions of dollars erecting a fronton and in other improvements, marketing and advertising, entering new contracts, and hiring and training new personnel, to support jai alai operations. The Third District Court of Appeal agreed that this is the very type of question properly set forth and answered in a declaratory statement proceeding. *West Flagler Assoc., Ltd., v. Fla. Dep’t of Bus. & Prof. Reg., Div. of Pari-Mutuel Wagering*, ___ So. 3d ___, 2017 WL 2348562 (Fla. 3d DCA May 31, 2017).

10. Originally, the Division issued a final order refusing to answer the questions posed, maintaining that answering West Flagler’s questions would require it to construe the Constitutional Amendment, which it could not do. On appeal, the Third District Court of Appeal reversed, directing the Division to answer the questions posed under the statutes. The Court stated: “The fact that the constitutional amendment also contains terms (such as “eligible facility”) that are found within the implementing legislation or agency rules is not a legal basis for the [Division] to shirk its statutory duty.” *Id.* Further, at oral argument, the panel noted that constitutional questions, if any, would be left to the appellate court.

¹ See Division’s list of pari-mutuel permits, available at <http://www.myfloridalicense.com/dbpr/pmw/documents/CurrentPermitholdersList.pdf>.

Legal Argument

11. Chapter 551 permits West Flagler to change from greyhound racing to jai alai and still remain qualified for a slot machine license.

12. First, an “Eligible facility” is defined in the statute and does not contain any language which would prohibit the pari-mutuel facility from changing its existing live racing or games to another form of live racing or games. Clause 1 of the statute states, in part:

“Eligible facility” means any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted lives racing or games during calendar years 2002 and 2003 and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility

§ 551.102(4), Fla Stat. (emphasis added).

13. This language only requires that the pari-mutuel have conducted live racing or games during 2002 and 2003, and that the pari-mutuel be in existence at the time the Amendment was adopted in 2004. The statute contains no prohibition on changing sports, e.g., from greyhound racing to jai alai, and no requirement that a pari-mutuel continue to conduct the exact same racing or games after 2003. Nor is there any other provision in chapter 551 which prohibits such a change.

14. In addition, section 551.104(4)(c) states that, to remain licensed as a slot machine operator, a facility must “[c]onduct no fewer than a full schedule of live racing or games as defined in § 550.104(11).” (Emphasis added.) It does not say a facility must continue to conduct the same type of live racing or games that originally qualified it for a slot machine license. If the Legislature meant for the pari-mutuel facility to have to conduct the same racing or games in perpetuity, it would have said so.

15. **Second**, section 550.0745 in chapter 550, which contains the predicate pari-mutuel wagering statutes, is instructive here. Section 550.0745 explicitly permits pari-mutuel permitholders to convert their racing permits to summer jai alai pari-mutuel permits. *See* § 550.0745, Fla. Stat. Because this section pre-dates chapter 551, it is clear that if the Legislature meant for the same sport to be played in order to maintain the slot license, it would have mandated that explicitly.

16. **Third**, this interpretation is consistent with, and supportive of, public policy. As noted above, the effect of the Amendment was to authorize an additional form of gaming – slot machine gaming – on existing premises where other forms of wagering were already taking place. Allowing West Flagler to change from greyhound racing to jai alai is consistent with that intent. Indeed, pari-mutuel facilities currently operating jai alai are licensed to operate slots.² Therefore, in either case, whether there is greyhound racing or jai alai games, the pari-mutuel activity occurs on the exact same premises and does not represent unauthorized expansion of gaming to a new location.

17. **Fourth**, the Florida Supreme Court has said one important purpose (primarily, *the* purpose) behind the State’s regulated gaming operations is to generate revenue to the State. *See, e.g., Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass’n*, 245 So. 2d 625, 629 (Fla. 1971) (“Unquestionably, state revenue is one of the prime factors for permission of pari-mutuel wagering in this state”). For example, the tax on slot machine revenue is 35%. § 551.106(2)(a), Fla. Stat. And presenting jai alai games instead of greyhound races would require West Flagler to hire additional personnel at an increased median rate of pay. Thus, to require West Flagler to operate its greyhound permit to maintain its slot license when it has a

² *See* Division’s map of pari-mutuel permits with licenses, which sets forth slot licenses as well, accessible at <http://www.myfloridalicense.com/dbpr/pmw/documents/MAP-Permitholders--WITH--2016-2017-OperatingLicenses.pdf>.

more cost effective, job creating jai alai permit it seeks to utilize instead would undermine the very reason for allowing such regulated gaming in the first place.

18. **Finally**, the type of game played does not change the nature of the facility itself. The statutes recognize the distinction between the facility and the pari-mutuel activity that occurs within the facility. As a matter of common sense, the West Flagler business premises will occupy the same physical location, and continue to be an existing licensed pari-mutuel facility, regardless of whether it continues to conduct greyhound racing or changes to jai alai gaming on that property.

19. The statutes confirm this by recognizing that different activities take place in different parts of the facility. Indeed, the statutes provide for designated slot areas within the facility. *See* § 551.102(2), Fla. Stat. (“**Designated slot machine gaming area**’ means the area or areas of a facility of a slot machine licensee in which slot machine gaming may be conducted in accordance with the provisions of this chapter.”) (emphasis added). The statutes define a “slot machine licensee” as “a pari-mutuel permitholder who holds a license issued by the division pursuant to this chapter that authorizes such person to possess a slot machine within facilities specified in s. 23, Art. X of the State Constitution and allows slot machine gaming.” § 551.102(11), Fla. Stat. (emphasis added). To define “facilities” as simply the greyhound track or jai alai fronton would necessarily mean that slot machines are to be installed in the dirt of the racetracks or within the walls of the fronton courts. Clearly, that cannot be (and is not) the case.

20. Chapter 550, which governs pari-mutuel gaming, also uses the term “facility” in reference to the business premises as a whole and does not limit it to the racetrack or fronton found thereon. For example, section 550.0425 governs the hiring of minors at pari-mutuel facilities and prohibits their work in certain functional areas. § 550.0425(3), Fla. Stat. (“minors

may be employed at a pari-mutuel facility except in positions directly involving wagering or alcoholic beverages or except as otherwise prohibited by law.”). Indeed, the term “facility” is used routinely throughout the statutes in reference to the place in its entirety, not simply the track or fronton. *See, e.g.*, § 551.103(4)(a), Fla. Stat. (law enforcement agencies shall have unrestricted access to slot machine licensee’s facility at all times). A facility is not simply the track or fronton where the performances occur; it also includes the location where the wagering occurs, where the simulcasts are displayed, and where patrons enter. *See, e.g.*, § 551.114(2), Fla. Stat. (licensee must offer patrons within the designated slot machine gaming areas the ability to engage in pari-mutuel wagering on live, intertrack, and simulcast races conducted or offered to patrons of the licensed **facility**) (emphasis added).

21. Another example further illustrates the point. In Florida, a thoroughbred racetrack can also be used for quarter horse racing, each sport requiring its own distinct pari-mutuel permit and license from the State. *See* §§ 550.334, 550.01215, 550.002(15), (31), Fla. Stat. If the term “facility” refers to the exact pari-mutuel sport being conducted, then the same track would be treated as two different facilities, even though it is the same track. That is illogical and unsupported by the statutory language.

22. To interpret the track or fronton itself as the “existing facility” as opposed to the entire pari-mutuel premises is not only illogical and narrow, it also contradicts the Division’s own use of the term. Indeed, the Division maintains a website on which it references the authorization of slot machine gaming at “pari-mutuel facilities” in Broward and Dade. *See* Division homepage, accessible at <http://www.myfloridalicense.com/Dbpr/pmw/index.html> (“In Florida, pari-mutuel wagering is authorized for horse racing, harness horse racing, greyhound

racing, jai alai games, and cardroom poker games. Additionally, slot machine gaming at pari-mutuel facilities is authorized in Broward and Miami-Dade Counties.”).

23. In fact, the Division historically has referred to the entire premises as the “facility” and not so narrowly constrained the term solely to the footprint of the track or fronton. Review of the annual reports filed by the Division (*available at* <http://www.myfloridalicense.com/dbpr/pmw/PMW-Publications.html>) makes it clear that the only query to answer here is whether any pari-mutuel operation existed in the relevant time period at the relevant address. The type of racing or game is immaterial. Tellingly, in its 2004-2005 annual report, the Division clearly distinguished the racetrack as a *component* of the overall facility, explaining: “Gulfstream Park, a thoroughbred racing **facility** in Hallandale, underwent an extensive renovation project during the fiscal year. The old grandstand and clubhouse buildings were torn down in July 2004, and the racetrack itself was lengthened from a mile in distance to a mile and an eighth.” (Emphasis added.)

24. Other examples (of many) of the Division's use of the term facility as the entirety of the premises include the Division's 2000-2001 annual report, wherein it refers to the “facility” as the place where both live and intertrack wagering occurs; the very nature of intertrack wagering makes it impossible for the activity to be limited to the track or fronton itself:

For purposes of this report, on-track schedules include wagering and attendance statistics as compiled on-track for the **facility** at which a live race or game is being conducted, or a race or game broadcast from out-of-state that is imported. For a host pari-mutuel **facility**, the on-track statistics exclude intertrack wagering data for wagers and attendance at guest tracks or frontons, and also excludes wagers which are taken at the **facility** if it is functioning as a guest permitholder receiving intertrack broadcasts. Some permitholders do not broadcast races or games to other Florida permitholders.

...

There is no admission tax on patrons attending a **facility** to wager on intertrack races or games when the **facility** is not simultaneously conducting live performances. (Emphasis added.)

25. In the 2015-2016 report, the Division stated that “[a]ll intertrack and intertrack simulcast handle is detailed by the host permitholder in this report. These schedules reflect combined wagering statistics for all guest **facilities** that received broadcasts and conducted wagering and included in the wagering pools of the host.” (Emphasis added.) Broadcasts are viewed and wagered on in the businesses' premises. Interpreting the facility to mean only the track or fronton is nonsensical and unsupported by prior use of the term and by current general use.

26. Moreover, section 550.0745, Florida Statutes, which pre-dates Chapter 551 and the Constitutional Amendment, authorizes ailing pari-mutuel permits (that satisfy certain criteria) to convert to summer jai alai permits. It would be illogical, and in contravention of the Division's mission and purpose, to deny a pari-mutuel facility that currently operates slots a continued license to do so if it converts its underlying permit, and thus deny the State the millions of dollars upon which it had come to rely to support education and other programs. The term “existing facility” was never meant to be construed so narrowly as to encompass the track or fronton alone.

27. Similarly, the Division's refusing to issue a slot license to West Flagler upon discontinuing greyhound racing to use its jai alai permit instead – which would result in *(i)* a decrease of pari-mutuel operating costs and *(ii)* an increase in local employment and rate of pay for such jobs – is an unintended interpretation and as a result, an abuse of its position, and a dereliction of its duties, which are to carry out the purposes of Chapters 550 and 551, and to

specifically ensure that revenues to the State are preserved and protected. *See, e.g.*, §§ 550.0251; 550.125; 551.103; 551.123, Fla. Stat.

28. And, to be clear, though the Division need not interpret the Florida Constitution to answer the questions posed, construction of article X, section 23 confirms West Flagler may switch from greyhound racing to jai alai and still remain qualified for its slot machine license. Indeed, a finding to the contrary would actually violate the Constitution.

29. A statute must be construed “in a manner that resolves all doubt in favor of its constitutionality.” *Imhotep-Nguzo Saba Charter School v. Dep’t of Ed.*, 947 So. 2d 1279, 1284 (Fla. 4th DCA 2007) (citing *State v. Fuchs*, 769 So. 2d 1006, 1008 (Fla. 2000)). Such an interpretation must be construed so as not to conflict with the Florida Constitution. *See State v. Cronin*, 774 So. 2d 871, 874 (Fla. 1st DCA 2000) (citing *Firestone v. News-Press Publishing Co., Inc.*, 538 So. 2d 457, 459 (Fla. 1989)).

30. For the following reasons, interpreting the term “eligible facility” in section 551.102(4), Florida Statutes, as meaning that West Flagler cannot retain its slot machine authorization unless it continues to conduct greyhound racing would result in an unconstitutional construction of and conflict with article X, section 23.

31. **First**, the constitutional provision expressly states that any one of three distinct pari-mutuel activities can be used to qualify a facility for a slot machine license: (1) thoroughbred and harness racing, (2) greyhound racing, or (3) jai alai. *Id.* In adopting the Amendment, the voters did not express a preference for one activity over another – they approved all three. Moreover, neither the Constitution nor chapter 551 says anything about a facility having to conduct the exact same pari-mutuel sport going forward to continue to be qualified for a slot machine license. Thus, a finding that West Flagler cannot switch from

greyhound racing to jai alai and still remain qualified for its slot machine license would place an additional requirement on West Flagler that is not present in the constitution.

32. **Second**, from its plain language, the obvious intent at the time of the Amendment was to authorize slot machines only at existing pari-mutuel facilities where wagering was already being conducted. Clearly the concept was to allow an additional form of gaming – but only at existing locations where pari-mutuel gaming was already taking place. Changing from one type of authorized game to another does not create any additional pari-mutuel facilities; it simply changes the type of authorized sport played at a facility already in existence.

33. **Third**, interpreting article X, section 23 as prohibiting a change in the type of sport presented reads that constitutional amendment too narrowly and defeats its underlying objective of allowing additional revenue to be raised for the State. Courts have “an obligation to provide ‘a broader and more liberal construction’ of constitutional provisions, as well as being certain not to construe the provisions ‘so as to defeat their underlying objectives.’” *Coastal Fla. Police Benev. Ass’n, Inc. v Fla. Optometric Ass’n*, 489 So. 2d 1118 (Fla 1986))

34. **Finally**, interpreting article X, section 23 as allowing West Flagler to change from greyhound racing to jai alai (a) is consistent with, and supportive of, public policy; and (b) does not change the nature of the facility itself.

35. For all of these reasons, West Flagler asks the Division to opine that there is no statutory provision that prevents West Flagler from discontinuing greyhound racing and substituting instead a full schedule of live jai alai performances in order to continue to be an eligible facility to conduct slot machine operations pursuant to chapter 551, Florida Statutes. To find otherwise would result in an unintended, incorrect, and unconstitutional interpretation of the law.

WHEREFORE, the Petitioner requests that the Division issue a Declaratory Statement responding to the above-stated questions.

Respectfully submitted this 19th day of June 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by electronic mail to the Agency Clerk (agc.filing@myfloridalicense.com), Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32301, on June 19th, 2017, and a copy to the following:

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