

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

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	9/23/2013
File #	2013-05652

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

DS 2013-012

Petitioner,

DBPR Case No. 2013008605

CALDER RACE COURSE, INC., and
HARTMAN AND TYNER, INC. d/b/a MARDI
GRAS RACETRACK AND GAMING CENTER

Intervenors.

FINAL ORDER DENYING DECLARATORY STATEMENT

Petitioner, West Flagler Associates, Ltd., (“Petitioner”) filed a Petition for Declaratory Statement (“Petition”) pursuant to Section 120.565, Florida Statutes, with the Division of Pari-Mutuel Wagering (“the Division”) on February 25, 2013. Petitioner filed an Amended Petition for Declaratory Statement (“Amended Petition”) on June 21, 2013. The Amended Petition is hereby incorporated by reference.

1. The Petitioner is the holder of pari-mutuel wagering permits for greyhound racing and summer jai alai and is licensed to conduct slot machine and cardroom gaming and pari-mutuel wagering performances in Miami-Dade County.

2. The Amended Petition asks the following question:

Question 1: Whether any provision of Chapter 551, Florida Statutes, or any other provision of Florida law, requires a permitholder to conduct a full schedule of live pari-mutuel performances at the same location in which slot machine gaming will be conducted in order to receive and maintain a slot machine license.

3. On March 20, 2013, the Calder Race Course, Inc., and Hartman and Tyner, Inc., d/b/a Mardi Gras Racetrack and Gaming Center filed petitions to intervene. The petitions to intervene are incorporated by reference.

4. The Division's issuance of a declaratory statement is governed by the provisions of §120.565, Fla. Stat., which provides in relevant part:

(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.

5. Rule 28-105.001, Florida Administrative Code (2007), which governs an agency's issuance of a 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.

6. The Supreme Court of Florida in *Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), recognized that, due to the unique nature of this industry with limited participants other similarly situated entities would almost invariably have an interest in a declaratory statement. The Court further found that changes to that section made by the 1996 amendments to the Administrative Procedure Act authorize the issuance of declaratory statements even though the interest of persons who are not a party

may be affected. *Id.* 747 So. 2d at 378-385. Thus, the Petitions to Intervene should be granted.

7. 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, as noted by the Intervenors in their response to the original Petition, the Amended Petition fails to plead what, if any, particular set of circumstances would apply to the Petitioner. The Amended Petition specifically asks whether a pari-mutuel permitholder can conduct its pari-mutuel operations by lease at another pari-mutuel facility and still maintain its ability to conduct slot machine operations at the site of the pari-mutuel permit. However, the Amended Petition contains no statement that the Petitioner intends to operate by lease at another pari-mutuel permitholder's facility, lease its facility to another pari-mutuel permitholder, or even that a competitor is operating by a lease.¹

8. The question presented itself is not about the Petitioner's set of circumstances, but asks for a statement by the division which would be generally applicable to all pari-mutuel facilities governed by Chapter 551, Fla. Stat., Specifically, the question asks whether Chapter 551, or any other provision of Florida law "requires a permitholder to conduct a full schedule of live pari-mutuel performances at the same location in which slot machine gaming will be conducted in order to receive and maintain a slot machine license." Thus, the answer to the question presented would ultimately be applicable to all of the pari-mutuel facilities in Miami-Dade and Broward Counties because all of those facilities are required by §551.104(4)(c), Fla. Stat., to conduct a full

¹ To the extent that the allegations of the Amended Petition could be read to request comment on the actions of other parties, such a request would not be a proper subject of a declaratory statement under Rule 28-105.001, FAC. See also, *Manasota-88 v. Gardiner, Inc.*, 481 So. 2d 948 (Fla. 1st DCA 1986)

schedule of races or games in order to maintain a slot machine license and each of those permitholders is authorized to lease another pari-mutuel facility of the same class within 35 miles to conduct races or games under §550.475, Fla. Stat. *Investment Corp. of Palm Beach* would allow the Division to issue a declaratory statement based on a properly presented question that other limited participants in a limited industry might have an interest in, such as pari-mutuel wagering. However, the case cannot be read so broadly as to authorize the Division to issue a declaratory statement which would be generally applicable to all of the slot machine eligible pari-mutuel facilities governed by Chapter 551, Fla. Stat., based on allegations that are not in some way specific to a particular petitioner. An agency cannot issue a declaratory statement instead of rule making, *Lennar Homes, Inc. v. Dep't of Bus. & Prof'l Reg.*, 888 So. 2d 50 (Fla. 1st DCA 2004)

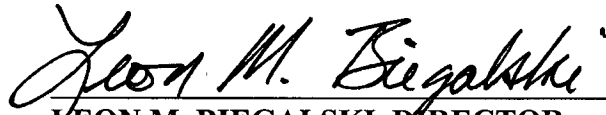
9. Finally, although the Amended Petition does provide a reference to §§ 551.104(4)(c) and 551.114(4), it ultimately asks a question regarding the applicability of “Chapter 551, Florida Statutes, or any other provision of Florida law.” Thus, the ultimate question presented is not about the applicability of a specific statutory provision, or of any particular rule or order of the agency as required by §120.565, Fla. Stat. Rather, the question asked is so broadly worded that it relates to an entire Chapter of the Florida Statutes that is under the Division’s jurisdiction and other provisions of Florida law, over which over which the agency potentially has no authority.

ORDER

Therefore it is ORDERED:

1. All Petitions to Intervene are GRANTED.
2. The Amended Petition for Declaratory Statement is DENIED.

DONE AND ORDERED this 20th day of September, 2013, in Tallahassee,
Florida.




LEON M. BIEGALSKI, DIRECTOR
Division of Pari-Mutuel Wagering
Department of Business & Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1035

NOTICE OF RIGHT TO APPEAL

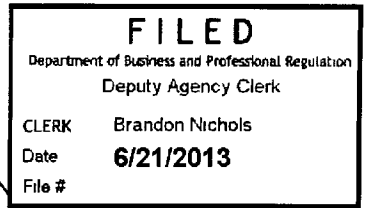
Any party to this proceeding has the right to seek its judicial review under § 120.68, Florida Statutes, by the filing of a notice of appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk, 1940 North Monroe Street, Tallahassee, Florida 32399-2202, and by 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 that a true copy of the foregoing Final Order Denying Declaratory Statement has been provided electronically at the e-mail addresses below and by U.S. Mail to John M. Lockwood, Esq., at 200 West College Avenue, Suite 307, Tallahassee, Florida 32301; Wilbur Brewton, Esq. and Kelly Brewton Plante, Esq., at 225 South Adams Street, Suite 250, Tallahassee, Florida 32301; and, Michael J. Barry, Esq., at 119 South Monroe Street, Suite 202, Tallahassee, Florida 32301 this 23rd day of September, 2013.

for: 
Agency Clerk

Electronic Copies to:
John Lockwood <john@lockwoodlawfirm.com>
Wilbur Brewton <wbrewton@bplawfirm.net>
Kelly Brewton Plante <kbplante@bplawfirm.net>
Michael J. Barry <mbarry@rutledge-ecenia.com>



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

In re: Petition for Declaratory Statement

Case No. DS2013-12

WEST FLAGLER ASSOCIATES, LTD.,

Petitioner.

AMENDED PETITION FOR DECLARATORY STATEMENT

COMES NOW, West Flagler Associates, Ltd. (“West Flagler”) (collectively the “Petitioners”), and hereby moves pursuant to Section 120.565, Florida Statutes (2012),¹ and Rule 28-105, Florida Administrative Code (2012), and requests 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 particular set of circumstances. In support of the Petition, the Petitioner state the following:

1. The affected agency is the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 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 and slot machine gaming operations. *See* 551.103, Fla. Stat. (2012).

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

¹ All references herein to “Chapter” or “Section” are to the applicable chapter or section of the official 2012 version of the 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 is a greyhound racing permitholder who owns and operates a licensed pari-mutuel facility in Miami-Dade County. The facility is commonly referred to as the Magic City Casino. At such facility, West Flagler conducts pari-mutuel, cardroom and slot machine operations pursuant to various permits and licenses issued by the Division.

5. West Flagler conducted live racing during the 2002 and 2003 calendar years at the Magic City Casino and such facility is eligible to conduct slot machine gaming pursuant to Article X, Section 23 of the Florida Constitution (1968).

6. Florida law defines "eligible facility" for slot machine licensing 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; any licensed pari-mutuel facility located within a county as defined in s. 125.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter; or any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter.

§ 551.102(4), Fla. Stat. (2012)

7. West Flagler currently conducts a minimum number of live greyhound performances in order to renew its annual slot machine license. *See* § 551.104(4)(c), Fla. Stat. (2012).

8. Section 551.114(4), Florida Statutes, further provides that “[d]esignated slot machine gaming areas may be located within the current live gaming facility or in an existing building that must be contiguous and connected to the live gaming facility.”

9. The Petitioner is in doubt as to whether Sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, or any other provision of Florida law, require a slot machine operator to conduct live pari-mutuel performances at the same location in which slot machine gaming is conducted. Specifically, the Petitioner questions whether a permitholder can lease another permitholder’s premises, conduct a full schedule of live performances, and still retain eligibility to conduct slot machine operations.

10. The Petitioner seek a declaratory statement from the Division concerning how the operative provisions of Chapter 551, 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.

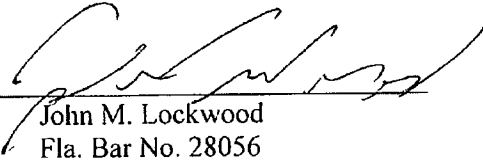
Question Presented

Question 1: Whether any provision of Chapter 551, Florida Statutes, or any other provision of Florida law, requires a permitholder to conduct a full schedule of live pari-mutuel performances at the same location in which slot machine gaming will be conducted in order to receive and maintain a slot machine license.

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

Respectfully submitted this 21st day of June, 2013.

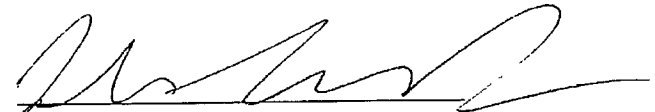
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By: 
John M. Lockwood
Fla. Bar No. 28056

Counsel for West Flagler

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by electronic mail to Daniel R. Russell, Esq. (drussell@joneswalker.com) and Michael J. Barry, Esq. (mbarry@reuphlaw.com).


Attorney

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

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	2/25/2013
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Case No:

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

DS 2013-012

PETITION FOR DECLARATORY STATEMENT

COMES NOW, West Flagler Associates, Ltd. ("West Flagler"), and hereby moves pursuant to Section 120.565, Florida Statutes (2012),¹ and Rule 28-105, Florida Administrative Code (2010), and requests 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 West Flagler's particular set of circumstances. In support of the Petition, West Flagler states the following:

1. The affected agency is the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 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 and slot machine gaming operations. *See* 551.103, Fla. Stat. (2012).

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

¹ All references herein to "Chapter" or "Section" are to the applicable chapter or section of the official 2012 version of the Florida Statutes.

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FEB 25 2013

DBPR Agency Clerk

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 the undersigned counsel.

4. West Flagler owns and operates the Magic City Casino in Miami, Florida, and is licensed by the Division to conduct pari-mutuel, cardroom and slot machine operations. West Flagler holds two pari-mutuel wagering permits at this location, one for greyhound operations and one for jai alai operations.

5. West Flagler conducted live racing during the 2002 and 2003 calendar years at the Magic City Casino and such facility is eligible to conduct slot machine gaming pursuant to Article X, Section 23 of the Florida Constitution (1968).

6. Florida law defines "eligible facility" for slot machine licensing 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; any licensed pari-mutuel facility located within a county as defined in s. 125.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter; or any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter.

§ 551.102(4), Fla. Stat. (2012).

7. West Flagler currently conducts a minimum number of live greyhound performances in order to renew its annual slot machine license. *See* § 551.104(4)(c), Fla. Stat. (2012). Section 551.114(4), Florida Statutes, also provides that "[d]esignated slot machine

gaming areas may be located within the current live gaming facility or in an existing building that must be contiguous and connected to the live gaming facility.”

8. West Flagler is in doubt as to whether Sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, or any other provision of Florida law, require a slot machine operator to conduct live pari-mutuel performances at the same location in which slot machine gaming is conducted. Specifically, West Flagler questions whether a permitholder can lease another permitholder’s premises, conduct a full schedule of live performances, and still retain eligibility to conduct slot machine operations.

9. West Flagler seeks a declaratory statement from the Division concerning how the operative provisions of Chapter 551, or any other provision of Florida law, including any applicable administrative rules, would impact the question presented below regarding West Flagler’s conduct of slot machine operations at the Magic City Casino.

Questions Presented

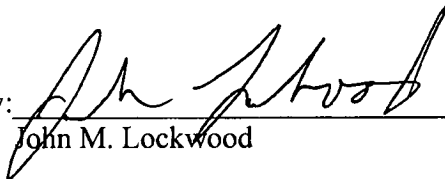
Question 1: Whether any provision of Chapter 551, Florida Statutes, or any other provision of Florida law, requires a permitholder to conduct a full schedule of live pari-mutuel performances at the same location in which slot machine gaming will be conducted in order to receive an initial slot machine license.

Question 2: Whether any provision of Chapter 551, Florida Statutes, or any other provision of Florida law, requires a permitholder to conduct a full schedule of live pari-mutuel performances at the same location in which slot machine gaming is conducted in order to renew its annual slot machine license.

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

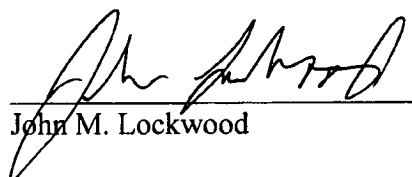
Respectfully submitted this 25th day of February, 2013.

JOHN M. LOCKWOOD, P.A.
Counsel for Petitioner
200 West College Avenue, Suite 307
Tallahassee, Florida 32301
Telephone: (850) 727-5009
Facsimile: (850) 270-2610
Email: john@lockwoodlawfirm.com

By: 
John M. Lockwood

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing document was filed via hand delivery with the Agency Clerk of the Department of Business and Professional Regulation at 1940 North Monroe Street, Tallahassee, Florida 32399-1035 on this 25th day of February 2013.


John M. Lockwood