

**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 | 5/19/2014 |
| File # | 2014-03626 |

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

Petitioner,

**Case No. DS 2013-094
DBPR Case No: 2013042510**

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

Intervenors.

FINAL ORDER GRANTING PETITION FOR DECLARATORY STATEMENT

West Flagler Associates, LTD., (“the Petitioner” or “West Flagler”) filed a Petition for Declaratory Statement (“the Petition”) pursuant to section 120.565, Florida Statutes (2013), with the Division of Pari-Mutuel Wagering (“the Division”) on October 8, 2013. The Petition (attached as Exhibit A) is granted and incorporated by reference into the instant Declaratory Statement.¹

¹ The Division initially denied the Petition, and West Flagler appealed to the Third District Court of Appeal. During the pendency of the appeal, the Division reconsidered its position, and the Third District Court of Appeal temporarily relinquished jurisdiction so that the Division could issue a declaratory statement answering the questions posed in the Petition.

FINDINGS OF FACT

1. West Flagler holds a permit to conduct greyhound racing at the Magic City Casino in Miami-Dade County. West Flagler also operates a cardroom and offers slot machine gaming at the Magic City Casino.²

2. The Magic City Casino is currently an “eligible facility” within the meaning of section 551.102(4), Florida Statutes (2013) because it conducted live greyhound racing during calendar years 2002 and 2003 and received approval from a majority of voters in a countywide referendum to have slot machines. See §551.102(4), Fla. Stat. (2013)(providing in pertinent part that an “eligible facility” is “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 . . .”).

3. At the time the Petition was filed, West Flagler also held a summer jai alai permit and was negotiating a lease to conduct summer jai alai games at the Miami Jai Alai fronton.

4. West Flagler’s slot machine license is associated with its greyhound permit, but West Flagler is considering an indefinite discontinuance of greyhound racing at the Magic City Casino if it is able to successfully complete lease negotiations with Miami Jai Alai.

5. West Flagler is uncertain whether Chapter 551 of the Florida Statutes enables it to discontinue greyhound racing at the Magic City Casino while continuing to offer slot machine gaming there.³

² The Division’s analysis of the question posed by the Petition assumes that the facts alleged therein are true. See Fla. Admin. Code R. 28-105.003 (providing that “[t]he agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.”).

6. Calder Race Course, Inc. and Hartman and Tyner Inc. d/b/a Mardi Gras Racetrack and Gaming Center (“the Intervenors”) filed a petition and motion to intervene with the Division on November 4, 2013 and November 13, 2013 respectively. The petition and motion to intervene are hereby incorporated by reference, as Exhibits “B” and “C.”

CONCLUSIONS OF LAW

7. “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 particular set of circumstances.” §120.565, Fla. Stat. (2013).

8. Likewise, Rule 28-1005.001 of the Florida Administrative Code provides that “[a] declaratory statement is a means of 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.”

9. West Flagler describes a hypothetical situation in which it would: (a) discontinue greyhound racing at the Magic City Casino; (b) continue to offer slot machine gaming at the Magic City Casino; and (c) conduct summer jai alai at Miami Jai Alai. Under those circumstances, West Flagler asks whether it could continue to legally offer slot machine gaming at the Magic City Casino.

10. In order to maintain its authority to conduct slot machine gaming, a slot machine licensee must continue to be in compliance with Chapter 551 of the Florida Statutes.

³ This paragraph is a restatement of the question presented in the Petition: “Whether sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, allow West Flagler to operate slot machines at the Eligible Facility pursuant to its summer jai alai permit while leasing Miami Jai Alai to conduct a full schedule of jai alai games.”

§551.104(4)(a), Fla. Stat. (2013). After considering the relevant provisions within Chapter 551 of the Florida Statutes, the Division has concluded West Flagler could not continue to legally offer slot machine gaming under the circumstances set forth in the Petition.

11. For instance, section 551.114(4), Florida Statutes (2013), 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. If a designated slot machine gaming area is to be located in a building that is to be constructed, that new building must be contiguous and connected to the live gaming facility.

12. In addition, section 551.114(2), Florida Statutes (2013), provides that a slot machine licensee “shall display pari-mutuel races or games within the designated slot machine gaming areas and 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.”

13. The discontinuance of greyhound racing at the Magic City Casino makes it impossible for West Flagler’s designated slot machine gaming areas to be “located within the current live gaming facility or in an existing building that must be contiguous and connected to the live gaming facility” as required by section 551.114(4), Florida Statutes (2013).

14. Moreover, the Petition describes a situation in which no pari-mutuel races or games would be conducted at the Magic City Casino. Thus, patrons would have no ability to engage in pari-mutuel wagering on live races as required by section 551.114(2), Florida Statutes (2013).

15. Thus, West Flagler could not continue to legally offer slot machine gaming under the circumstances described in the Petition.

16. The Division recognizes that the Petition calls into question whether the Magic City Casino would still be an “eligible facility” if West Flagler were to discontinue greyhound racing there. See §551.104(3), Fla. Stat. (2013)(providing that “[a] slot machine licensee may be issued only to a licensed pari-mutuel permitholder, and slot machine gaming may be conducted only at the eligible facility at which the permitholder is authorized under its valid pari-mutuel wagering permit to conduct pari-mutuel wagering activities.”).

17. Because the Division’s analysis of section 551.114, Florida Statutes (2013), conclusively establishes that West Flagler could not continue to legally offer slot machine gaming under the circumstances described in the Petition, the Division declines to address whether the Magic City Casino would continue to be an “eligible facility” within the meaning of section 551.102(4), Florida Statutes (2013), if greyhound racing were no longer conducted there.

ORDER

Therefore, it is ORDERED:

1. The Petition and Motion to Intervene filed by the Intervenors are GRANTED.
2. The Final Order rendered on January 3, 2014 is VACATED.
3. The Petition is GRANTED.

DONE and **ORDERED** on this the 16th day of May, 2014.



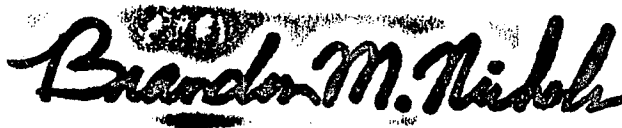
LEON M. BIEGALSKI, DIRECTOR
Division of Pari-Mutuel Wagering
Department of Business & Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1035


NOTICE OF RIGHT TO APPEAL

Any party to this proceeding has the right to seek its judicial review under §120.68, Florida Statutes (2013), 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 an copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notices 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 Granting Petition for Declaratory Statement has been provided electronically at the e-mail addresses below and by U.S. Mail to John M. Lockwood, Esq.; JOHN M. LOCKWOOD, P.A.; 200 West College Avenue, Suite 307; Tallahassee, Florida 32301; Wilbur E. Brewton, Esq., Kelly Brewton Plante, Esq., Tana D. Story, Esq.; BREWTON PLANTE, P.A.; 225 South Adams Street, Suite 250; Tallahassee, Florida 32301-1079; Gary R. Rutledge, Esq., Michael J. Barry, Esq.; RUTLEDGE ECENIA, P.A.; P.O. Box 551; Tallahassee, Florida 32302-0551 on this 19th day of May 2014.



 Agency Clerk

Electronic Copies to:
John Lockwood john@lockwoodlawfirm.com
Gary Rutledge gary@rutledge-ecenia.com
Mike Barry mbarry@rutledge-ecenia.com
Wilbur Brewton wbrewton@bplawfirm.net
Kelly Brewton kbplante@bplawfirm.net
Tana Story tstorey@bplawfirm.net

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 | 10/8/2013 |
| File # | |

In re: Petition for Declaratory Statement

Case No.

WEST FLAGLER ASSOCIATES, LTD.,

DS 2013-094

Petitioner.

PETITION FOR DECLARATORY STATEMENT

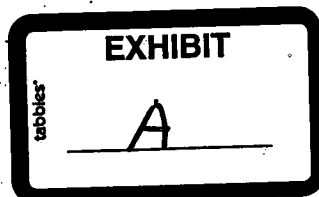
COMES NOW, West Flagler Associates, Ltd. ("West Flagler"), and hereby moves pursuant to section 120.565, Florida Statutes (2013),¹ and rule 28-105, Florida Administrative Code (2013), and requests the issuance of a declaratory statement by the Division of Pari-Mutuel Wagering (the "Division") regarding 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:

Introduction and Party Identification

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. (2013).

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 2013 version of the Florida Statutes.



1

RECEIVED

OCT 08 2013

DBPR Agency Clerk

3. West Flagler's corporate office is located at 450 NW 37th Avenue, Miami, Florida 33126 (the "Eligible Facility"). For purposes of this Petition, West Flagler's address is that of its undersigned counsel.

West Flagler's Particular Circumstances

4. The purpose of a declaratory statement is to allow West Flagler 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). The Division previously denied a petition for declaratory statement filed by West Flagler because the Division considered the request to be generally applicable to all other slot machine eligible facilities governed by chapter 551, Florida Statutes.

5. In DS 2013-012, the Division acknowledged it is allowed to issue a declaratory statement based upon a properly presented question that other limited participants in a limited industry might have an interest in, such as pari-mutuel wagering. A true and correct copy of DS 2013-012 is attached hereto as Exhibit A. The particular facts and circumstances set forth in this petition are applicable to a limited number of participants in the slot machine industry.

6. West Flagler is a summer jai alai permitholder who owns and operates a licensed pari-mutuel facility in Miami-Dade County. West Flagler is also a greyhound permitholder and currently conducts live greyhound racing at the Eligible Facility, 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.

7. The Florida Constitution authorizes slot machines "within existing, licensed pari-mutuel facilities (thoroughbred and harness racing, greyhound racing, and jai-alai) that have conducted live racing or games in that county during each of the last two calendar years before the effective date of this amendment." Art. X, § 23 (Fla. Const. 1968).

8. 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. (2013) (emphasis supplied).

9. West Flagler conducted a full schedule of live racing at the Eligible Facility during the 2002 and 2003 calendar years. In addition, West Flagler has conducted a full schedule of live racing at the Eligible Facility for each calendar year, and fiscal year, since 2003.

10. West Flagler is currently negotiating a lease with Miami Jai Alai to conduct summer jai alai games at the Miami Jai Alai fronton. West Flagler has previously conducted summer jai alai games at Miami Jai Alai. In addition, West Flagler is a general partner in the Summer Jai Alai partnership that currently holds a lease to conduct summer jai alai games at Miami Jai Alai.

11. West Flagler conducts slot machine operations pursuant to license number SM-155 and such slot machine license is associated with West Flagler's greyhound permit. West Flagler contemplates indefinitely discontinuing live greyhound racing at the Eligible Facility so long as the lease with Miami Jai Alai is in effect and assuming such conduct is permissible under Florida law.

12. West Flagler seeks a declaratory statement as it applies to the particular set of circumstances identified herein. See § 120.565(1), Fla. Stat. (2013). The outcome of this proceeding will be a factor in whether West Flagler continues lease negotiations. West Flagler may only desire to enter into a lease if West Flagler is authorized operate slot machines at the Eligible Facility while conducting a full schedule of live jai alai games at the Miami Jai Alai.

13. The Eligible Facility is authorized to conduct slot machine operations pursuant to article X, section 23 of the Florida Constitution (1968) and section 551.102(4), Florida Statutes. As it relates to this proceeding, the only material conditions of licensure are (1) slot machine operations may only be conducted at the eligible facility and (2) the slot machine licensee conduct no fewer than a full schedule of live racing or games. §§ 551.104(3) and 551.104(c), Fla. Stat. (2013).

14. West Flagler submits it will satisfy these conditions under its proposed scenario. The Eligible Facility will continue to conduct slot machine gaming. In addition, West Flagler will continue to conduct a full schedule of live jai alai games at Miami Jai Alai.

15. Section 551.114(4), Florida Statutes, 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.” West Flagler is unsure whether this provision requires live pari-mutuel wagering performances to be conducted at the Eligible Facility in order to continue slot machine operations.

16. West Flagler is in doubt as to whether sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, require it to conduct live pari-mutuel performances at the same location in which slot machine gaming is conducted, i.e. the Eligible Facility. Specifically, West Flagler questions whether it can lease another permitholder’s premises, conduct a full schedule

of live performances, and retain eligibility to conduct slot machine operations at the Eligible Facility. *if it discontinues greyhound racing at the eligible facility*

17. There are currently seven licensed slot machine facilities in Florida. Of those seven licensed facilities, only three have multiple pari-mutuel permits (Isle of Capri, Gulfstream Park, and Magic City Casino)² that are commonly owned and permitted for the same location as the slot machine facility. Of those three licensed facilities, only two (Gulfstream Park and Magic City Casino) have multiple pari-mutuel permits that are licensed and operational.

18. West Flagler is the only entity owning a greyhound permit and a summer jai alai permit. In addition, West Flagler is also the only summer jai alai permit holder conducting summer jai alai performances via lease and at a facility other than its permitted location.

19. West Flagler seeks a declaratory statement from the Division concerning the question presented in this proceeding.

Question Presented

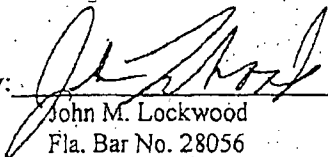
Whether sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, allow West Flagler to operate slot machines at the Eligible Facility pursuant to its summer jai alai permit while leasing Miami Jai Alai to conduct a full schedule of jai alai games.

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

² There are two additional facilities (Calder and Mardi Gras) that have multiple permits operating at the same facility. However, these facilities are not analogous the facts of this petition because they operate via lease and are not permitted for the same location

Respectfully submitted this 8th day of October, 2013.

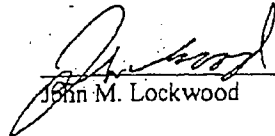
THE LOCKWOOD LAW FIRM
106 East College Avenue
Suite 810
Tallahassee, Florida 32301
Telephone: (850) 727-5009
Facsimile: (850) 270-2610
Email: john@lockwoodlawfirm.com

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

COUNSEL FOR WEST FLAGLER

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 8th day of October 2013.


John M. Lockwood

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

| | |
|---|-----------------|
| FILED | |
| <small>Department of Business and Professional Regulation Deputy Agency Clerk</small> | |
| CLERK | Brandon Nichols |
| Date | 11/4/2013 |
| File # | |

In Re: Petition for Declaratory Statement

CASE NO: DS 2013-094

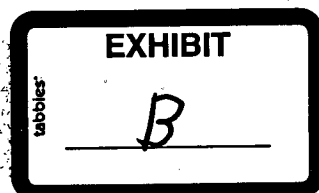
WEST FLAGLER ASSOCIATES, LTD.,

Petitioner.

PETITION TO INTERVENE

Calder Race Course, Inc. ("Calder"), by and through its undersigned counsel, hereby petitions to intervene in the proceeding initiated by the filing of the Petition for Declaratory Statement by West Flagler Associates, Ltd., ("West Flagler") and in support of its Petition to Intervene, Calder states:

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. West Flagler is a summer jai alai permitholder that owns and operates a licensed pari-mutuel facility in Miami-Dade County, Florida. West Flagler is also a greyhound permitholder and currently conducts live greyhound racing at 450 NW 37th Avenue, Miami, Florida 33126. In its Petition for Declaratory Statement, West Flagler refers to this location as the "Eligible Facility" at which it conducts pari-mutuel, cardroom and slot machine operations pursuant to various permits and licenses issued by the Division.



RECEIVED

NOV 04 2013

DBPR Agency Clerk

3. Calder is the holder of a pari-mutuel wagering permit and is currently licensed to conduct thoroughbred racing in Miami-Dade County, Florida. Calder is also authorized to conduct intertrack wagering pursuant to Section 550.615, Florida Statutes; is licensed to operate a cardroom pursuant to Section 849.086, Florida Statutes; and is licensed to operate slot machines pursuant to Section 551.104, Florida Statutes

4. Calder's address is 21001 NW 27th Avenue, Miami, Florida 33056. Calder's representatives in this matter are Wilbur E. Brewton, Esquire, and Kelly B. Plante, Esquire, and Tana D. Storey, Esquire, of Brewton Plante, P.A., located at 225 South Adams Street, Suite 250, Tallahassee, FL 32301.

5. On October 8, 2013, West Flagler filed a Petition for Declaratory Statement (the "Petition"), seeking the Division's position on certain issues that will potentially impact the conduct of pari-mutuel wagering in the state, and in the South Florida area in particular. On October 23, 2013, the Division published a notice in the Florida Administrative Weekly ("FAW") regarding its receipt of the Petition for Declaratory Statement. Calder hereby requests leave to intervene and participate in this proceeding. A copy of the notice is attached hereto.

6. West Flagler and Calder 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." Florida Department of Business Regulation v. Investment Corporation of Palm Beach, 747 So. 2d 374, 385 (Fla. 1999).

7. There are procedural safeguards inherent in the process for issuing declaratory statements that allow other interested or concerned parties to participate. Id. at 384. In Investment Corp., the Court specifically noted that the requirement to publish notice of such a request 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)).

8. The statutes governing pari-mutuel wagering, including Sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, significantly limit and restrict the authorization for conducting pari-mutuel wagering activities. As a permit holder, Calder has a substantial interest in the construction and interpretation of statutes regulating the creation, issuance, conversion, transfer and/or operation of pari-mutuel permits.

9. The question presented in the Petition for Declaratory Statement concerns the interpretation and implementation of statutes that directly govern and control the highly regulated and restricted pari-mutuel industry in which Calder is engaged, and directly address the criteria that must be met to engage in the business of intertrack wagering, the operation of a cardroom and potentially slot machines all of which are activities for which Calder is licensed.

10. The statutory question at issue has not been previously addressed by the Division, nor subject to the rulemaking process set forth in Section 120.54, Florida Statutes. West Flagler is requesting a declaratory statement on:

Whether sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, allow West Flagler to operate slot machines at the Eligible Facility pursuant to its summer jai alai permit while leasing Miami Jai Alai to conduct a full schedule of jai alai games.

11. The Division's determinations and interpretations as how to implement these statutes potentially impact multiple parties, including Calder. Thus, Calder is entitled to participate, whether the Division chooses to respond to the Petition for Declaratory Statement, chooses to address the issues raised through rulemaking or chooses some other form of agency action.

12. Calder is substantially affected by any interpretations and implementations of Sections 551.102(4), 551.104(4)(c) and 551.114, Florida Statutes, and any other section of Chapters 550, 849 or 551, Florida Statutes.

13. Calder is entitled to participate and be heard regarding the proper interpretation of the statutes because: (i) the statutes at issue directly govern and affect every permitholder in Broward and Miami-Dade Counties, including Calder; and (ii) such interpretations would directly and significantly impact slot machine operations currently conducted by Calder.

14. Calder submits that the Division should dismiss the requested Petition for Declaratory Statement. Although seemingly addressing the West Flagler's limited circumstances, the question presented is, in actuality, a question of whether Chapter 551, Florida Statutes, would allow a permitholder to operate slot machines at a facility which is neither the facility where the permitholder conducts its live pari-mutuel operations, nor a building contiguous and connected to the facility where the permitholder conducts its

live pari-mutuel operations. The answer to that question potentially affects all pari-mutuel permitholders in Miami-Dade and Broward Counties. Pursuant to Investment Corp., the Division is not necessarily authorized to issue a declaratory statement which is generally applicable to all of the slot machine eligible pari-mutuel facilities governed by Chapter 551, Florida Statutes.

15. In fact, this question is really no different than the question presented in West Flagler's Amended Petition for Declaratory Statement DS 2013-012 ("Prior Petition") which was denied by the Division. In that Prior Petition, West Flagler asked:

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.

The Division denied the Prior Petition as it determined that the answer to that question:

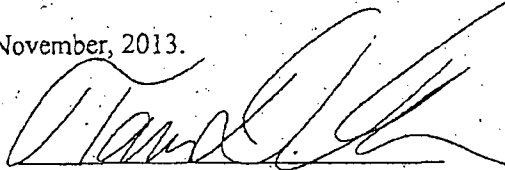
... would ultimately be applicable to all pari-mutuel facilities in Miami-Dade and Broward Counties because all of those facilities are required by §551.104(4)(c), Fla. Stat., to conduct a full schedule of races or games in order to maintain a slot machine license and each of those permitholders is authorized to lease another pari-mutuel facility of the same class within 35 miles to conduct races or games under §550.475, Fla. Stat.

16. In addition, if the Division is inclined to address the question presented, Calder respectfully submits that the plain language of Chapter 551, Florida Statutes, mandates that the answer to the question presented is NO. Calder requests the opportunity to provide a memorandum of law at a later date further arguing this issue.

17. Calder contacted counsel for Petitioner and is authorized to represent that West Flagler objects to Calder's intervening in its Petition for Declaratory Statement.

WHEREFORE, it is respectfully prayed that Calder be permitted to intervene in this matter.

Respectfully submitted this 4th day of November, 2013.



WILBUR E. BREWTON
Florida Bar Number 110408
KELLY BREWTON PLANTE
Florida Bar Number 866441
TANA D. STOREY
Florida Bar Number 0514772
BREWTON PLANTE, P.A.
225 South Adams Street; Suite 250
Tallahassee, Florida 32301
(850) 222-7718/(850) 222-8222 (Fax)
wbrewton@bplawfirm.net
kbplante@bplawfirm.net
tstorey@bplawfirm.net

ATTORNEYS FOR CALDER

CERTIFICATE OF SERVICE

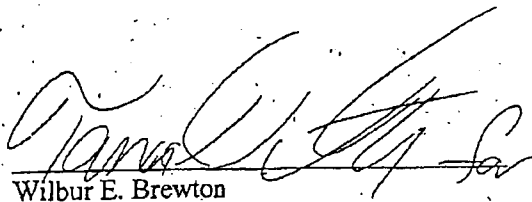
I HEREBY CERTIFY that a true copy of the foregoing has been served on the following parties this 4th day of November, 2013, to:

Via Hand Delivery to:

Agency Clerk
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1035

Via electronic mail to:

John M. Lockwood, Esquire
The Lockwood Law Firm
106 East College Avenue
Suite 810
Tallahassee, Florida 32301
john@lockwoodlawfirm.com



Wilbur E. Brewton

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 | 11/13/2013 |
| File # | |

IN RE: Petition for Declaratory Statement

Case No. DS 2013-094

WEST FLAGLER ASSOCIATES, LTD.,

Petitioner.

MOTION FOR LEAVE TO INTERVENE

In accordance with the Uniform Rules of Procedure, including Rule 28-105.0027, Florida Administrative Code, Hartman and Tyner, Inc. ("Hartman and Tyner"), and H&T Gaming, Inc. ("H&T") (together "Mardi Gras"), by and through its undersigned counsel, in response to the Petition for Declaratory Statement ("Petition") filed by West Flagler Associates ("West Flagler") on October 8, 2013, hereby file this motion to intervene in the above captioned proceeding, and further requests 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



RECEIVED

NOV 13 2013

DBPR Agency Clerk

authorized to conduct intertrack wagering pursuant to section 550.615(2), 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. 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. 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 October 8, 2013, West Flagler filed a Petition seeking the Division's position on certain issues that will potentially impact the conduct of pari-mutuel wagering in the state, and in the South Florida area in particular.

5. In its Petition, West Flagler asks the Division to answer the following question:

Whether sections 551.102(4) and 551.114, Florida Statutes, allow West Flagler to operate slot machines at the Eligible Facility pursuant to its summer jai alai permit while leasing Miami Jai Alai to conduct a full schedule of jai alai games.

6. On October 23, 2013, the Division published a notice of its receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly ("FAW"). 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. Through this Motion, Mardi Gras 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

7. 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)).

8. 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), F.S. As a holder of permits in both Broward and Miami-Dade counties and a license for slot machine gaming, Mardi Gras has a substantial interest in West Flagler's request for an interpretation and application of statutes regulating the licensure and operation of pari-

mutuel activities and slot machine facilities in this highly regulated and competitive industry in South Florida.

9. The Petition sets circumstances and a question on the application of statutes that have broad implications for permitholders in Miami-Dade and Broward counties. The question raised seeks an interpretation of key provisions in chapter 551, F.S., 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 facility pursuant to slot machine licenses issued by the Division.

10. 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 conduct live pari-mutuel events.

11. In an apparent attempt to avoid or restrict the intervention of interested parties, the Petition tries to understate and diminish the policy impacts of the request by differentiating among pari-mutuel permitholders based on the types and location of permits and where those permits are operated. This is a red herring. The real issue is whether West Flagler can terminate the greyhound 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.

12. A basic premise underlying the Petition is that pari-mutuel permits and pari-mutuel operations are interchangeable for purposes of chapter 551. This concept has significant policy implications, which, if accepted, would apply to all types of pari-mutuel activity and all pari-mutuel permitholders in Miami-Dade and Broward counties that are otherwise eligible for a

slot-machine license. Thus, the particular types of pari-mutuel events at issue here – greyhound racing and jai alai games – are implicated in this proceeding, which justifies both Mardi Gras's intervention and the Division's rejection of the Petition, as explained below. West Flagler is wrong to suggest that only permit holders with both a greyhound permit and a jai alai permit are affected by this proceeding. As explained below, West Flagler's arguments are founded on the erroneous view that its summer jai alai permit is the legal equivalent of its greyhound permit for purposes of qualifying West Flagler for continuing eligibility and licensure for slot machine gaming under chapter 551.

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

- A. The 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 Petition for Declaratory Statement seeks an interpretation as to the requirements to conduct pari-mutuel wagering activities, including location of those 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 Petition for Declaratory Statement requests an interpretation as to the application of key provisions of chapter 551, Florida Statutes, regarding eligibility and licensure for slot machine gaming in Miami-Dade County,

which provisions govern Mardi Gras's business activities and which location is within the market area of Mardi Gras.

D. The Petition for Declaratory Statement concerns whether the operation of certain permits, newly issued (which, under current interpretation, may occur every single year), may serve as a basis for authorizing slot machine gaming at a location in Miami-Dade County, which is within the market area of Mardi Gras as defined by section 550.002(19), Florida Statutes.

E. The Petition for Declaratory Statement concerns whether a summer 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.

F. The Petition for Declaratory Statement may require a determination of whether a greyhound permitholder is required to continue to conduct live greyhound racing onsite or via lease under section 550.475, Florida Statutes, 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, 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, who objects to the filing of this Motion.

MEMORANDUM IN OPPOSITION TO DECLARATORY STATEMENT

Summary

Mardi Gras concurs with and adopts the position set forth in the Petition to Intervene submitted by Calder Race Course, Inc., on November 4, 2013, which asserts that the Division should simply decline to issue the requested declaratory statement. However, if the Division is inclined to issue a declaratory statement in response to the Petition, it should be limited in scope and application to the following: (1) confirming the Petitioner's authorization to operate slot machines at its existing facility is based upon West Flagler's conduct of live greyhound racing at its current facility; (2) the Petitioner's authorization to conduct slot machine gaming at its facility derives from the greyhound permit held by West Flagler and operated during calendar years 2002 and 2003; (3) a summer jai alai permit that was not in operation in calendar years 2002 and 2003 does not and cannot serve as a basis for authorization to conduct slot machine gaming at West Flagler's facility under chapter 551, Florida Statutes; and (4) West Flagler's authorization to conduct slot machine gaming is contingent upon the Petitioner's continued operation of its greyhound permit, either onsite or by lease pursuant to section 550.475, Florida Statutes.

Background

In its Petition, West Flagler blurs and confuses the authorizations for slot machine gaming set forth in chapter 551, Florida Statutes, and the Florida Constitution. Slot machine

gambling is generally illegal in Florida. In 2004, Florida voters passed an amendment to the Florida Constitution authorizing the governing bodies in Miami-Dade and Broward Counties to conduct referenda to authorize slot machines at "existing, licensed parimutuel facilities (thoroughbred and harness racing, greyhound racing, and jai-alai)." Ultimately codified as Section 23 of Article X of the Florida Constitution, the constitutional amendment directed the Legislature to adopt implementing legislation.

In 2005, the Legislature enacted chapter 2005-262, Laws of Florida, which was codified as chapter 551, Florida Statutes, to regulate slot machine gaming in Florida. Among the various provisions, the Legislature enacted section 551.102(4) defining slots-eligible facilities to comport with the constitutional amendment set forth in section 23 of Article X. In addition, the Legislature enacted section 551.104(4) establishing the requirements for slot machine licensing, which includes a requirement to conduct "no fewer than a full schedule of live racing or games." § 551.104(4)(c), Fla. Stat. The phrase "live racing or games" in subsection 551.104(4)(c) refers to pari-mutuel facilities in existence and in operation during the calendar years 2002 and 2003. When read *in para materia* with the corresponding provision under subsection 551.102(4), this licensing prerequisite dictates that, in order to be eligible for a slot machine license, a pari-mutuel permit holder must operate the live racing or games which gave rise to its eligibility to conduct slot machine gaming in the first place. Thus, for example, West Flagler conducted live greyhound racing in 2002 and 2003, and therefore West Flagler is required to conduct a full schedule of live greyhound racing to receive its annual slot machine license under subsection 551.104(4)(c). Similarly, Calder Race Course, Inc., conducted live thoroughbred horse racing in 2002 and 2003, and therefore Calder is required to conduct a full schedule of live thoroughbred horse racing to receive its annual slot machine license under subsection 551.104(4)(c). Likewise,

the operators at Miami Jai Alai and Dania Jai Alai – the only jai alai frontons in existence and in operation in 2002 and 2003 – must conduct full schedules of live jai alai games in order to qualify for a slot machine license under subsection 551.104(4)(c).

Under the original legislation, Hialeah Park, a quarter-horse race track, was excluded from the authorization to operate slot machines. In 2009, the Legislature amended various provisions of chapter 551, including the definitions in subsection 551.102(4) regarding the requirements for slots-eligible facilities. The amendment to subsection 551.102(4) broadened the list of eligible facilities to include new pari-mutuel venues, both within Miami-Dade County and, with further legislation, potentially elsewhere in the state. Ch. 2009-170, Laws of Florida. In contrast to the original legislation, the Legislature confined the amended slot machine authorization to pari-mutuel facilities conducting “live racing” for the two consecutive calendar years preceding the application for a slot machine license. As the 2009 legislation had the effect of authorizing Hialeah Park to apply for a slot machine license, it has been widely referred to as the “Hialeah amendment.” In other words, the 2009 legislation did not extend to “games.” Thus, after 2009, the eligibility of a jai alai permit holder to obtain a slot machine license remained predicated on having conducted operations in 2002 and 2003.

The Petition Should be Answered in the Negative as Contravening the Pertinent Statutes

The interpretation and application of a statutory provision is a pure question of law. *See, e.g., State v. Sigler*, 967 So. 2d 835, 841 (Fla. 2007). The basic rule of statutory construction is that legislative intent is the most important factor. *See Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 5 (Fla. 2004) (“It is well settled that legislative intent is the polestar that guides a court’s statutory construction analysis.”). Legislative intent is determined primarily from the actual text of the statute. *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007);

Borden v. E-European Ins Co., 921 So. 2d 587, 595 (Fla. 2006). If the text of the statute is clear and unambiguous, there is no need to resort to any other authorities. See *Foley v. State*, 50 So. 2d 179, 184 (Fla. 1951). However, if the language employed by the Legislature is ambiguous, the legislative history may be consulted to discern and give effect to the legislative intent. See, e.g., *Florida Elections Commission v. Blair*, 52 So. 3d 9, 12 (Fla. 1st DCA 2010).

When the Legislature uses a word, it means what it says, and when the Legislature uses the same word in different places in the statutes it is presumed to have intended the same meaning. See, e.g., *State v. Roberison*, 614 So. 2d 1155, 1156 (Fla. 1st DCA 1993). Likewise, the use of different terms in different statutes is strong evidence that different meanings were intended. *Id.* It is presumed that the Legislature expresses its intent in the precise words employed and with the knowledge of other existing statutes. *Id.* Related statutory provisions must be read together to achieve a consistent whole, and courts endeavor to give full effect to all statutory provisions in harmony with one another. *Woodham v Blue Cross & Blue Shield, Inc.*, 829 So. 2d 891, 898 (Fla. 2002) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

Moreover, it is a general principle of statutory construction that the mention of one thing implies the exclusion of another: expression unius est exclusion alterius. *Thayer v State*, 335 So. 2d 815, 817 (Fla. 1976). Where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." *Id.*; see also *Young v. Progressive Se. Ins. Co.*, 753 So.2d 80, 85 (Fla.2000) ("Under the principle of statutory construction, expression unius est exclusio alterius, the mention of one thing implies the exclusion of another.").

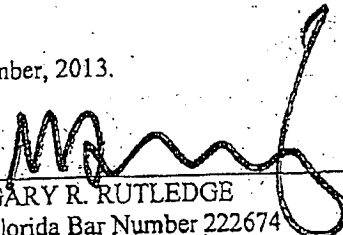
There is no guesswork required here, because the contrasting provisions are situated right next to each other in same subsection. In enacting the original section 551.102(4) in 2005, the Legislature clearly chose to authorize slot machine gaming at all pari-mutuel facilities then in operation, including jai alai frontons, by the use of the words "live racing or games." In amending the statute in 2009, the Legislature chose in equally clear terms to extend authorization for slot machine gaming only to certain other pari-mutuel facilities, excluding jai alai frontons, by the use of the words "live racing" and the omission of the words "and games." The use of different words within the same subsection is strong evidence of a different meaning. *See, e.g., Robertson*, 614 So. 2d at 1156.

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 chapter 551 allow. Equally troubling, the Petition fails to delineate or address the broad legal and policy implications of West Flagler's request. The requested statement would not only contravene the plain language of the statute, it would have massive policy ramifications for the entire state – from new and expanded gaming activities without legislation or rulemaking to potentially endangering the State's substantial revenue-sharing payments under the Seminole Compact. The Division should reject West Flagler's attempt to circumvent the strict limitations governing slot machine gaming without a full public airing of the policy implications and appropriate rulemaking. After all, this kind of haphazard approach to new gaming authorizations through ad hoc decisions and so-called loopholes was recently and expressly repudiated by an ALJ in *Florida Quarter Horse Racing Ass'n, Inc., Fla*

*Quarter Horse Breeders & Owners Ass'n, Inc., & Keesling v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering & Fla. Quarter Horse Track Ass'n, Inc., 2013 WL 1942349, * 3 (DOAH 2013)* – particularly where the attempt at securing new gaming entitlements has no foundation or basis in the plain language of the governing statute.

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 issue a declaratory statement consistent with the positions set forth above.

Respectfully submitted this 13th day of November, 2013.



GARY R. RUTLEDGE
Florida Bar Number 222674
gary@rutledge-ecenia.com
MICHAEL J. BARRY
Florida Bar Number 646911
mbarry@rutledge-ecenia.com
RUTLEDGE ECENIA, P. A.
119 South Monroe Street, Suite 202
Post Office Box 551 (32302-0551)
Tallahassee, Florida 32301
(850) 681-6788
(850) 681-6515 Facsimile

**ATTORNEYS FOR HARTMAN AND
TYNER, INC., AND H & T GAMING,
INC.**

CERTIFICATE OF SERVICE

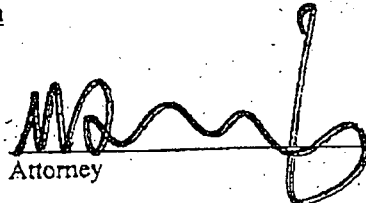
I HEREBY CERTIFY that a true copy of the foregoing has been served this 13th day of
November, 2013, as follows:

By Hand Delivery:

Agency Clerk
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1035

By Electronic Mail:

John M. Lockwood
John M. Lockwood, P.A.,
106 East College Avenue, Suite 810
Tallahassee, Florida 32301
john@lockwoodlawfirm.com


Attorney