

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT M. McCORD, in his :  
official capacity as the Treasurer of the :  
Commonwealth of Pennsylvania, :  
Petitioner :  
v. : No. 446 M.D. 2010  
THE PENNSYLVANIA GAMING :  
CONTROL BOARD, :  
Respondent :

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APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A  
PRELIMINARY INJUNCTION

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Pursuant to Pa.R.App.P. 123 and 1532(a), Pennsylvania Treasurer Robert M. McCord, by and through his undersigned counsel, hereby files this Application for Special Relief in the Nature of a Preliminary Injunction, requesting that this Honorable Court issue an order -- (1) immediately enjoining the Respondent Pennsylvania Gaming Control Board ("Board") from taking any action preventing or otherwise inhibiting the Treasurer or his designee from attending and participating in all sessions and deliberations of the Board (public and private), beginning no later than its public session on Wednesday, January 26, 2011; and, (2) immediately, upon the execution by the Treasurer of an appropriate confidentiality agreement, provide to the Treasurer all confidential or proprietary information relevant to deliberations of the Board. In support thereof, the Treasurer avers the following:

## Statement of Facts

1. On May 11, 2010, Treasurer Robert M. McCord, in his official capacity, initiated the above captioned matter by filing a Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief concerning his legal authority and right pursuant to the Pennsylvania Race Horse Development and Gaming Act (hereinafter, “the Gaming Act”), to fully participate as a non-voting member of the Pennsylvania Gaming Control Board (hereinafter “the Board”) in public and executive sessions and deliberations.

2. In response, the Board, without objection from the Treasurer, filed a request with this Court seeking a twenty-five (25) day extension of the period in which to file responsive pleadings.

3. On June 10, 2010, this Court granted the Board’s request for an extension of time in which to file responsive pleadings – until July 6, 2010.

4. On July 6, 2010, in lieu of filing an Answer to the Petition, the Board filed Preliminary Objections to the Treasurer’s Petition for Review, asserting, among several things, that neither the Treasurer nor his designee was permitted “to participate in executive sessions of the Board.” *See*, Preliminary Objections of the Board at 9, ¶ 48.

5. The Gaming Board’s Preliminary Objections did not raise any new matter or contest any of the underlying facts pled in the Petition for Review. Accordingly, as a matter of law, there are no issues of fact which would otherwise prevent an immediate resolution of the underlying question of law.

6. On September 3, 2010, Treasurer McCord filed a Brief in Opposition to Preliminary Objections.

7. In response, the Board filed a request with this Court to seek permission to submit a Reply Brief. The Board's request was granted by this Court on September 10, 2010.

8. On September 13, 2010, the Board filed a Reply Brief in Support of Preliminary Objections.

9. On September 16, 2010, this Court, sitting *en banc*, conducted Oral Arguments on the Board's Preliminary Objections.

10. On December 10, 2010, this Court, without dissent, issued an Order overruling the Board's Preliminary Objections and directing that an Answer to the Petition for Review be filed within thirty (30) days. *See, McCord v. Pennsylvania Gaming Control Board*, 446 M.D. 2010 slip op. (Pa. Cmwlth. Ct., December 10, 2010); Attachment 1.

11. In support of its Order, President Judge Leadbetter, writing for this Court, addressed the threshold question in the matter and determined, that as a matter of law:

Notwithstanding the Board's concerns, Section 1201(e) of the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa.C.S. § 1201(e), clearly provides that the Treasurer or his designee shall serve on the Board as a non-voting member of the Board. (Emphasis added) *Id* at 3.

12. The Board's primary argument in support of its exclusion of the Treasurer and his designees was rejected by this Court, ruling that the Sunshine Act does not limit executive sessions only to voting members. In fact, the Court stated that, "the legal right to vote as a member of the Board is of no consequence with respect to participation in an executive session." (Emphasis added); *Id* at 4. As this Court explained:

[C]oncerning the appearance of impropriety, the court notes that the Treasurer is a Commonwealth official acting on behalf of the Commonwealth, not on behalf of gaming companies, their principal investors or other interested parties. We do not see how the involvement of the Treasurer pursuant to statute creates an appearance of impropriety. *Id.*

13. Immediately following the release of this Court's Opinion overruling the Board's Preliminary Objections, the Treasurer sought the Board's cooperation to permit his and his designee's immediate attendance and participation in Board executive sessions in a manner consistent with this Court's opinion.

14. However, ignoring this Court's clear acknowledgement of the Treasurer's and his designee's legal authority pursuant to the Gaming Act to serve on the Board, the Board has continued its obstruction of the Treasurer's efforts to attend and actively participate in Board matters, including executive session, as an equally informed member.

15. Since December 10, 2010, the Board has conducted two public and executive sessions without the fully informed participation of the Treasurer or his designee and without permitting them access to relevant confidential information.

16. In doing so, the Board has attempted to impose extra-statutory requirements upon the Treasurer as a precondition to his participation in executive sessions or receipt of confidential information, including: (a) prohibiting the Treasurer's designee from attending executive sessions involving any quasi-judicial deliberation; (b) limiting the Treasurer to appoint only one designee – without the right to change or substitute as circumstances warrant; and, (c) requiring the Treasurer to sign a sworn statement swearing he has not received any campaign contributions from lobbying or law

firms that may represent a party before the Board and attest that he has not engaged in any *ex parte* conversations prior to attending any executive deliberation.

17. These preconditions are without legal support and are contrary to this Court's Opinion. Consequently, a preliminary injunction is necessary or the Board will continue to impose unreasonable and unlawful restrictions on the Treasurer's statutory right to sit on the Board. Additionally, the Gaming Act clearly permits the Treasurer to appoint a designee "who shall serve as a member of the Board." 4 Pa.C.S.A. § 1201(e). Neither the Gaming Act nor this Court provides to the Board the legal right to exclude the Treasurer's statutorily authorized designee from an executive session. Furthermore there is no legal support for the Board's attempt to restrict the ability of the Treasurer to appoint an alternate designee when that designee is unable to attend a Board session.<sup>1</sup>

18. The Board also attempts to impose the unprecedented requirement that the Treasurer (who cannot cast a vote) must sign a sworn statement, attesting that he has not received any campaign contributions (at any time) from a lobbying or law firm that may represent a party or that he has not engaged in an *ex parte* conversation. No judge, legislator or administrative officer is required to sign a similar statement prior to participating in a deliberative proceeding.

19. Significantly, the Board seeks to impose these conditions solely upon the non-voting members of the Board. Yet it was the former Chairman of the Board and another voting member who were accused of violating the Board's *ex parte* prohibition when considering a change in ownership of the Pittsburgh slots license. *See*, Toland and

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<sup>1</sup> Voting members of the Board serve in no other public capacity – this is their sole position. The annual salary for their service to the Board is between \$145,000 and \$150,000. By contrast, the Treasurer alone serves on sixteen (16) different boards and commissions. As a result, the General Assembly recognized that scheduling conflicts occur, placing a greater need for reliance on a designee to represent the Treasurer's interest on the Board. 4 Pa.C.S.A. § 1201(e).

Barnes, “Those not in on Barden discussions criticize deal,” *Pittsburgh Post-Gazette* (July 18, 2008); Editorial “The slots saga; What’s to hide?” *Philadelphia Inquirer* (August 4, 2008); *See* Attachment 2.

20. The Board’s continued attempt to construct new hurdles (without cause or need) to prevent the Treasurer and his designee from attending and participating, as an equally informed Board member, in executive deliberations may be reasonably construed as a deliberative ploy to avoid public scrutiny, oversight of its liberal use of executive sessions and prevent outside review and questioning of the Board’s decisions.

21. This is not a hypothetical concern. For example, according to a recent Special Performance Audit conducted by the Pennsylvania Auditor General, the Board has misused executive sessions in order to approve over \$8.7 million of professional service contracts outside of the public eye.<sup>2</sup> Section 708 of the Sunshine Act provides that no official action, such as the adoption of contracts, is to take place outside of the public. *See, e.g., Sovich v. Shaughnessy*, 705 A.2d 942, 946 (Pa. Cmwlth. 1998) (citing *Lawrence County v. Brenner*, 135 Pa. Cmwlth. 619, 582 A.2d 79 (1990)).

22. The Board’s actions continue to frustrate attempts by the Treasurer to effectively participate in public and private deliberations of the Board in considering matters of significant public importance. Based on this Court’s recent decision, the Board’s actions are without legal support or justification.

23. Contemporaneous with this Application for Special Relief, Treasurer McCord has filed an Application for Expedited Consideration – seeking quick resolution

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<sup>2</sup> The Pennsylvania Auditor General found, in part, that “[t]he Gaming Board did not comply with the Sunshine in at least 19 cases by not meeting openly to award contracts worth \$8.7 million for legal and other professional expenses.” *See*, Pennsylvania Department of Auditor General, “The Pennsylvania Gaming Control Board, A Special Performance Audit” at 5 (December 2010).

of this request for injunctive relief in order to permit his attendance at scheduled executive and public sessions of the Board, occurring no later than January 26, 2011.

Standard for Grant of Special Relief in the Nature of Preliminary Injunction

24. The test for granting preliminary injunctive relief under Rule 1532(a) of the Appellate Rules is the same as that for the grant of a preliminary injunction under the Rules of Civil Procedure. *Pappert v. Coy*, 860 A.2d 1201, 1205 (Pa. Cmwlth. 2004). Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See*, Pa.R.App.P. 1532(a).

25. The prerequisites for preliminary injunctive relief are: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by damages; (2) greater injury will result by not granting the relief; (3) preliminary injunction will restore the parties to their status prior to the wrongful conduct; (4) the Petitioner is likely to succeed on the merits; (5) the injunction will abate the offending action; and, (6) the preliminary injunction will not adversely affect the public interest. *Free Speech LLC v. Philadelphia*, 884 A.2d 966, 970 (Pa. Cmwlth 2005); Pa.R.Civ.P. 1531.

26. As applied to this matter, granting of the injunction is necessary to ensure the ability of the Treasurer, who, as has been determined by this Court, “shall serve on the Board,” to attend and participate in scheduled public and executive sessions of the Board. As this Court has recognized, “[i]f this court does not grant the relief sought by the Treasurer, it appears that he will not be permitted to participate in deliberative sessions.” *McCord* at 5. The Board has scheduled a public meeting to be held on

Wednesday, January 26, 2011. Among various public policy matters related to the implementation and oversight of gaming activities, the Board may consider additional gaming licensing matters, including the issuance of a Category 3 resort license; the adoption of temporary administrative regulations, and the licensing of principal and key employees. Any action by the Board to limit, impede, discourage or otherwise prevent the Treasurer and his designee from attending and participating in public and private deliberations, as an equally informed member, concerning these matters pending before the Board would irreparably undermine the ability of the Treasurer, as a public official, to fulfill his fiduciary duty as a member of the Board to consider such matters and act on behalf of the public interest.

27. The Board is unable to claim any injury that would result by permitting the Treasurer or his designee from attending and participating in public and executive sessions of the Board. In fact, granting injunctive relief will likely benefit the Board and the general public by ensuring the ability of the Treasurer to share his perspective as the chief financial officer of the Commonwealth. The Board's primary objection, that the attendance and involvement of Treasurer McCord and his designee in executive sessions of the Board would create an appearance of impropriety, has been rejected by this Court without dissent. As this Court explicitly stated, "we do not see how the involvement of the Treasurer pursuant to statute creates any appearance of impropriety." *McCord* at 4.

28. Treasurer McCord has made several representations to both the Board and to this Court of his willingness to execute appropriate confidentiality agreements consistent with the directives of the Gaming Act prior to his receipt of confidential information and his or his designee's attendance and participation of Board proceedings.

29. Granting injunctive relief would restore the rights of the parties to a status consistent with the provisions of the Gaming Act. As a statutorily designated non-voting member of the Board pursuant to Section 1201(e) of the Gaming Act, the Treasurer and his designee are entitled, as a matter of state law, to attend and participate (with the sole exception of voting) in all public and private sessions and deliberations of the Board. The Treasurer seeks simply to enjoin the Chairman and members of the Board from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from participating -- thus enabling the Treasurer to exercise all rights and privileges accorded to all other members of the Board – with the exception of voting.

30. The Treasurer's ultimate success on the merits is likely in light of this Court's decision overruling the Board's preliminary objections. Writing for the Court, President Judge Leadbetter, without equivocation, rejected the primary legal arguments offered by the Board in justification of its exclusion of the Treasurer from executive sessions of the Board. In particular, President Judge Leadbetter wrote that: (a) the Gaming Act "clearly provides that the Treasurer or his designee shall serve as a non-voting member *ex officio* member of the Board;" (b) the Sunshine Act "does not limit executive sessions to voting members . . . the legal right to vote as a member of the Board is of no consequence with respect to participation in an executive session;" and (c) "the Treasurer is a Commonwealth official acting on behalf of the Commonwealth, not on behalf of gaming companies, their principal investors or other interested parties." Thus, "[w]e do not see how the involvement of the Treasurer pursuant to statute creates any appearance of impropriety." *McCord*, at 3-4.

31. The granting of injunctive relief would effectively protect and enable the Treasurer's ability to exercise his statutory right to fully participate in all public and executive deliberations of the Board without impediment. As this Court has already observed, if this Court issues an order enjoining the Chairman and members of the board:

. . . from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from participating, the Treasurer will be able to exercise the statutory right by participating as fully as any other member of the Board, with the exception of voting. *Id* at 6.

32. Granting of injunctive relief to enable the Treasurer and his designee to attend and fully participate in public and executive deliberations of the Board is consistent with Section 1201(e) of the Gaming Act and the public interest. *See*, Opinion at 3. Furthermore, an injunction would remove any existing uncertainty and controversy surrounding the authority of the Treasurer to participate in public and private proceedings of the Board. *See, McCord* at 6.

### Conclusion

WHEREAS, for the forgoing reasons, Treasurer McCord respectfully requests that this Honorable Court (1) enter an order enjoining the Chairman and the members of the Pennsylvania Gaming Control Board, its agents, servants, employees, and attorneys, from taking any action prohibiting, impeding, discouraging or otherwise preventing the Treasurer or his designee from fully participating in all public and executive sessions of the Board as a non-voting member, including, without limitation, the ability to: question witnesses; make motions; receive and review confidential information; propose the adoption of rules and regulations; voice objections and opinions; request and receive

records or information from applicants; participate in deliberations and issue public statements; and, attend executive sessions; and, (2) immediately, upon the execution by the Treasurer of an appropriate confidentiality agreement as required by the Gaming Act, provide to the Treasurer all confidential, proprietary or other such information, documents, reports, analyses, studies and such other similar materials relevant to matters pending before the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Christopher Craig', is written over a horizontal line.

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**PROPOSED ORDER**

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AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2011, it is ORDERED that  
Petitioner's Application for a Preliminary Injunction is GRANTED.

\_\_\_\_\_  
J.



On May 11, 2010, the Treasurer filed his petition for review seeking to have this court declare, as a matter of law, that the Treasurer, or his designee, has the statutory right to fully participate in all public and executive sessions of the Board as a non-voting member of the Board. Further, the Treasurer asks this court to enjoin the Board from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from fully participating in public and executive sessions of the Board.

On July 6, 2010, the Board filed preliminary objections to the petition for review in the nature of a demurrer and on the basis of lack of standing and ripeness, and seeks this court's exercise of discretion to decline jurisdiction under the Declaratory Judgments Act.<sup>2</sup> The preliminary objections are currently before the court.<sup>3</sup>

While the Sunshine Act<sup>4</sup> generally states that meetings of Commonwealth agencies are to be open to the public, Section 707 of the Sunshine

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<sup>2</sup> 42 Pa. C.S. §§ 7531-7541.

<sup>3</sup> Preliminary objections to an original jurisdiction petition for review are permissible under Pa. R.A.P. 1516(b). Our review of matters before this court on preliminary objections is limited to the pleadings. *Pennsylvania State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res.*, 909 A.2d 413 (Pa. Cmwlth. 2006), *aff'd*, 592 Pa. 304, 924 A.2d 1203 (2007).

[This court is] required to accept as true the well-pled averments set forth in the [petition for review], and all inferences reasonably deducible therefrom. Moreover, the court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.

*Id.* at 415-16 (citations omitted).

<sup>4</sup> 65 Pa. C.S. §§ 701-716.

Act, 65 Pa. C.S. § 707, provides that, as an exception to the general rule, agencies may hold executive sessions which are not open to the public. Executive sessions give agency board members opportunity to privately discuss confidential matters such as personnel actions, business and legal strategy or negotiations, and consultations with legal advisors, and the like. *See* 65 Pa. C.S. §§ 703, 707(a), 708(a). The Board argues that the Treasurer is not a member of the Board who may participate in an executive session, and that the Treasurer is not authorized to act on the purposes for which an executive session may be held under Section 708 of the Sunshine Act. 65 Pa. C.S. § 708. The Board further contends that the participation of the Treasurer or his designee in executive sessions would taint the Board with the appearance of corruption, erode public confidence in the oversight of gaming, disrupt the intended structure of the Board, threaten the quasi-judicial function of the Board, and may result in the divulgence of confidential information, as well as the waiver of the Board's attorney-client privilege.

Notwithstanding the Board's concerns, Section 1201(e) of the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa. C.S. § 1201(e), clearly provides that the Treasurer or his designee shall serve on the Board as a non-voting *ex officio* member of the Board. The Board notes, however, that Section 1103 of the Gaming Act, 4 Pa. C.S. § 1103, defines a "member" of the Board as being only the voting members designated under Section 1201(b) of the Gaming Act.<sup>5</sup> With that, the Board argues that neither the Treasurer, nor his

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<sup>5</sup> The voting membership of the Board consists of: (1) Three members appointed by the Governor, (2) One member appointed by each of the following: (i) The President pro tempore of the Senate, (ii) The Minority Leader of the Senate, (iii) The Speaker of the House of Representatives, and (iv) The Minority Leader of the House of Representatives. 4 Pa. C.S. § 1201(b).

designee, is entitled to fully participate in executive sessions because they are not voting members of the Board. The Sunshine Act, however, does not limit executive sessions to “voting members.” Further, Section 708 of the Sunshine Act limits the function of an executive session such that no official action takes place behind closed doors. Thus, the legal right to vote as a member of the Board is of no consequence with respect to participation in an executive session.

Moreover, concerning the appearance of impropriety, the court notes that the Treasurer is a Commonwealth official acting on behalf of the Commonwealth, not on the behalf of gaming companies, their principal investors or other interested parties. We do not see how the involvement of the Treasurer pursuant to statute creates any appearance of impropriety.

“For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party by refusing to sustain the objections.” *Smith v. Pa. Emps. Benefit Trust Fund*, 894 A.2d 874, 881 (Pa. Cmwlth. 2006). Here, despite the Board’s concerns or reservations, the General Assembly has spoken with respect to the Treasurer’s serving as an *ex officio* member of the Board. It cannot be said with any certainty that under the statutory scheme at issue, the Treasurer is not a member of the Board who may participate in an executive session. In fact, it appears that the opposite may be true. Accordingly, preliminary objections based on the Board’s statutory interpretation cannot be sustained.<sup>6</sup>

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<sup>6</sup> The Board also objects to the portion of the Treasurer’s petition which requests that this court ensure his ability to fully participate in the Board’s public meetings. The Treasurer has pled that, among other things, his designees have been discouraged from fully participating in public meetings, and that a member of the Board asserted that the Treasurer or his designees are limited in their participation to the scope of their official agency duties.

**(Footnote continued on next page...)**

Next, the Board argues that the Treasurer does not have standing to bring the petition for review. We disagree.

The core concept of standing is that ‘a party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus, has no right to obtain judicial resolution of his challenge.’ A litigant is aggrieved when he can show a substantial, direct, and immediate interest in the outcome of the litigation. A litigant possesses a substantial interest if there is a discernible adverse effect to an interest other than that of the general citizenry. It is direct if there is harm to that interest. It is immediate if it is not a remote consequence of a judgment.

*In re Milton Hershey Sch.*, 590 Pa. 35, 42, 911 A.2d 1258, 1261-62 (2006) (citations omitted).

Simply on the basis that the Board seeks to preclude the Treasurer from participating in deliberative sessions, the Treasurer has a substantial, direct and immediate interest in the outcome of the litigation. If this court does not grant the relief sought by the Treasurer, it appears that he will not be permitted to participate in deliberative sessions. Accordingly, we hold that the Treasurer does have standing to bring the petition for review in this matter.

The Board further argues that the Treasurer is barred by the doctrine of ripeness from bringing the petition for review. We disagree.

If differences between the parties concerned, as to their legal rights, have reached the state of antagonistic claims, which are being actively pressed on one side and opposed

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**(continued...)**

In the extensive briefing of this case, as well as at oral argument, this aspect of the case has received very little attention, and there is a need for more factual development before this court can make a judgment on this claim. In light of the disposition of the rest of the case, and because it is not certain that the law will permit no recovery on this aspect of the claim, we overrule the objections to this aspect of the petition.

on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.

*Mid-Centre Cnty. Auth. v. Boggs Twp.*, 384 A.2d 1008, 1011 (Pa. Cmwlth. 1978) [quoting *Lakeland Joint Sch. Dist. Auth. v. Scott Twp. Sch. Dist.*, 414 Pa. 451, 456-57, 200 A.2d 748, 751 (1964)]. Here, there is clearly a present controversy over whether the Treasurer or his designee may attend and participate in executive sessions. Accordingly, this controversy is ripe for review.

Next, the Board argues that this court should exercise its discretion under the Declaratory Judgments Act to decline jurisdiction over the petition for review. We disagree.

Under the Declaratory Judgments Act: “The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding . . . .” 42 Pa. C.S. § 7537. As the Treasurer has standing to bring the petition for review, and the matter is ripe, this court concludes that a decree rendered by this court would terminate the uncertainty and controversy giving rise to this proceeding. Accordingly, we will not decline jurisdiction.

Finally, the Board argues that this court should refuse to enter a declaratory judgment where the relief in question would not resolve how the Treasurer may “fully participate” in such meetings. We disagree. If this court confirms that the Treasurer has a statutory right to fully participate in all public and executive sessions of the Board as a non-voting member, and enjoins the chairman and members of the Board from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from participating, the Treasurer

will be able to exercise the statutory right by participating as fully as any other member of the Board, with the exception of voting. Clearly then, granting the relief requested would, in fact, resolve the present controversy.

For all of the above reasons, the Board's preliminary objections are overruled.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

Judge Butler did not participate in the decision in this case.

## Those not in on Barden discussions criticize deal

Friday, July 18, 2008

By Bill Toland and Tom Barnes, Pittsburgh Post-Gazette

Republicans and Democrats alike are criticizing a flurry of last-minute phone calls among casino investors, state gaming board members and Democratic politicians, all in advance of a deal moving Pittsburgh's casino project out of Don Barden's hands.

State Rep. Dwight Evans, chairman of the House Appropriations Committee, said yesterday that he, Gov. Ed Rendell, Rendell Chief of Staff Greg Fajt, Don Barden, and Mr. Barden's new business partner, Chicago billionaire Neil Bluhm, discussed the impending deal twice by conference call on Monday. The deal, which gives Mr. Bluhm's outfit 75 percent control of the Pittsburgh casino in exchange for \$120 million in cash, was signed Wednesday.

Mr. Evans, D-Philadelphia, also said he discussed the deal by phone with Pennsylvania Gaming Control Board member Jeff Coy and board Chairwoman Mary DiGiacomo Colins, and fielded calls from Mr. Barden himself on Sunday.

Yesterday, both the conference calls and the one-on-one communiques between Mr. Evans and the gaming board members drew admonitions from critics who said the conversations violate the gaming board's code of conduct provisions against private discussions on issues that will come before the board for a vote.

"I'm flabbergasted," said state Sen. Jim Ferlo, D-Highland Park, who called for a new round of bids for the casino license even before he knew about the private discussions.

Asked if any of those communications could be viewed as inappropriate, Mr. Evans said:

"I would agree with you, if the gaming board had not made the decision to pick Don Barden already. ... It's not that we told the gaming board what to do, how to do it. [We] wanted to add our stamp to this, that we were 1,000 percent supportive."

Mr. Evans said it was important that select state officials referee the conference calls partly because it was important to Mr. Evans, who also is black, to preserve Mr. Barden's role as a minority owner. The state had pledged to have minority ownership among the state's 14 casinos.

He also said state officials wanted assurances that the new ownership group would keep the financial promises Mr. Barden had made to the city of Pittsburgh and its neighborhoods -- payments toward a new hockey arena, in particular.

Mr. Coy was contacted, Mr. Evans said, because he was the House Democrats' appointee to the gaming board. Each caucus -- House Democrats, House Republicans and their Senate counterparts -- gets one representative, while the governor names three people to the seven-person board.

Mr. Coy said he didn't regard the call as an effort to pressure him to approve the transfer, and that he hadn't decided how he will vote on it.

He also said there was nothing "ex parte," or private or improper, about his phone call with Mr. Evans, because Mr. Evans has said publicly that he supports Mr. Barden's ownership of the casino.

"He simply reiterated what he has said in public, in the past," Mr. Coy said.

Steve Miskin, spokesman for House Republican Leader Sam Smith, wasn't buying it.

"If you already know [his] position, what was the point of the conversation to begin with? The law was written exactly to prevent these types of conversations," he said.

Mr. Smith, R-Punxsutawney, sent a letter to the gaming board yesterday, which said, in part: "I must admit that I am hard-pressed to reconcile the language of the law [and] the reports of ongoing discussions between a Pennsylvania Gaming Control Board member and various public officials about the pending Barden petition."

He referenced the 2004 gaming law's code of conduct (section 1202.1): "A member of the board shall not engage in any ex parte communication with any person [and shall] avoid impropriety and the appearance of impropriety at all times and observe standards and conduct that promote public confidence in the oversight of gaming."

The passage suggests that if any gaming board member discussed the situation with "any person" -- Mr. Evans, or anyone else -- he engaged in ex parte communications.

Ironically, a July 16 letter from the gaming board acting director, Frank Donaghue, regarding the upcoming review of the new casino arrangement, explicitly said that "it would be inappropriate for the board to engage in ex parte discussions about the details of a pending matter upon which it will exercise its quasi-judicial responsibilities."

The law defines "ex parte communication" as "an off-the-record communication by a member or employee of the board, regarding the merits of or any fact in issue relating to a pending matter before the board, or which may reasonably be expected to come before the board in a contested on-the-record proceeding." The transfer of the license from Mr. Barden to the new Pittsburgh Gaming Holdings LLC is expected to come before the board next week.

The law also says that a board member should remove himself from voting on a matter if his neutrality is questioned.

Communications between elected officials and casino investors don't appear to be prohibited by the state gaming law, but when the gaming board was considering the applications back in 2006, elected officials made a point of stressing that they'd exert no influence over the selection process.

"This is making a mockery of this issue. ... I'm completely perplexed as to why public officials are somehow negotiating -- involved in any way -- in this matter. I'm somewhat incredulous that there are these secret conversations taking place between unknown parties on these [license] transfers. ... Talk about back-room deal-making," said Mr. Ferlo, who joined Republican Sen. Jane Orie earlier this week in calling for a new round of casino bids.

Combined, the two conference calls lasted more than an hour.

Mr. Ferlo said the proper mode of communication with the gaming board is a letter; Mr. Evans said there's little difference between lobbying via letter or with a phone call, and pointed out that he did, in fact, send a letter to the gaming board in support of Mr. Barden, on May 1.

Mr. Ferlo and Ms. Orie sent a letter to the gaming board yesterday, questioning the talks between board members and Mr. Evans:

"The involvement of the House Majority Appropriations Committee chairman, who has direct oversight over the board budget, in discussions with a member of the board on behalf of applicants for a gaming license, raises troubling ethical questions concerning the board's adjudicatory process, the conduct of its members and the inherent fairness of any resulting determination," the letter said.

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**August 4, 2008 Monday**  
CITY-D Edition

**SECTION:** EDITORIAL; Inq Opinion & Editorial; Pg. A10**LENGTH:** 538 words**HEADLINE:** Editorial: The **Slots Saga**;  
What's to hide?**BODY:**

The leading lights in Harrisburg who four years ago rammed through the slots gaming law in the dark of night continue to try to wallpaper over any problems that may arise.

Consider the latest troubles unfolding in Pittsburgh. That's where Don Barden, the owner of a half-built \$780 million slots parlor, ran into financial trouble before he could get his one-armed bandits plugged in.

What to do, what to do?

In classic Harrisburg fashion, key lawmakers and casino operators huddled in private to cobble together a rescue plan. One lawmaker even placed calls to state gaming board officials, raising eyebrows.

Gov. Rendell met with State Rep. Dwight Evans and Barden. Also on his speed dial was Neil Bluhm, a billionaire real estate developer from Chicago who is an investor in the proposed SugarHouse slots parlor in Philadelphia. Evans, in turn, called state Gaming Control Board Chairwoman Mary DiGiacomo Colins and board member Jeff Coy.

Next thing you know, Bluhm's been dealt a blackjack. His private-equity fund emerged as the majority owner of the Pittsburgh slots parlor after agreeing to kick in \$120 million to complete the project.

To paraphrase Woody Allen: 80 percent of success is showing up - especially with a cashier's check.

Bluhm clearly has the deep pockets and expertise needed to salvage the Pittsburgh deal. Once the slots joint is open, Bluhm and his well-heeled investors will likely reap outsized returns.

But shouldn't there be more transparency in these deals, given the river of money sloshing through the state-sanctioned gambling franchises?

Granted, the state Gaming Board has yet to approve the new ownership structure. The board is holding hearings, reviewing public comment, and examining the details of the plan.

That's the right thing to do. But there can be little doubt that the Gaming Board will rubber-stamp the deal, given how deeply Rendell is banking on gambling revenue and how Evans has expressed his support to board members.

Evans' phone calls raise questions, given that the Gaming Board's code of conduct prohibits any ex-parte calls from interested parties before key votes. Such prohibitions are in place to "avoid impropriety and the appearance of impropriety" in order to promote "public confidence in the oversight of gaming."

Given the state's sloppy oversight of the entire gaming process in the last four years, how much public confidence is left? Exhibit A: The indictment this year of Poconos slots parlor owner Louis DeNaples for allegedly lying to the Gaming Board about his alleged mob ties. The gaming law shouldn't have been

written to allow convicted felons like DeNaples to get a license.

At least one lawmaker, State Sen. Jim Ferlo, a Democrat from Allegheny County, is outraged by the private discussions on the Pittsburgh deal. He has called for the state to reopen the bidding for the license.

Evans defended his calls, arguing it was important for lawmakers and gaming officials to ensure that Barden, who is African American, remained involved in the slots parlor since he was the only minority to get a gambling license from the state.

OK. But what was so important that it needed to be said in private, rather than in public before the Gaming Board?

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