

Department of Business and Professional Regulation  
AGENCY CLERK

Sarah Wachman, Agency Clerk

By

Brandon M. Nichols

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

IN RE: PETITION FOR DECLARATORY STATEMENT

GULFSTREAM PARK  
RACING ASSOCIATION, INC.

CASE No. 2008-071  
DBPR No. 2008053671

Petitioner,  
\_\_\_\_\_ /

**DS 2008-071**

DECLARATORY STATEMENT

Petitioner, Gulfstream Park Racing Association, Inc., (Petitioner) filed a Petition for Declaratory Statement with the Division of Pari-Mutuel Wagering (Division) regarding how many races must be applied for by the Petitioner under Section 849.086(5)(b), Florida Statutes, in order to obtain a cardroom license for each of its two pari-mutuel permits.

FINDINGS OF FACT

1. Petitioner, Gulfstream, is a pari-mutuel facility licensed pursuant to Chapter 550, Florida Statutes. Its address is 901 S. Federal Highway, Hallandale Beach, FL 33009.
2. The Petitioner is a thoroughbred racing permitholder licensed pursuant to Chapter 550, Florida Statutes, to conduct more than 80 days of racing. The Petitioner is also a quarter horse racing permitholder; however, it has never applied for racing dates for this permit.

3. The Petitioner, under its thoroughbred pari-mutuel permit, is licensed as a cardroom operator at its pari-mutuel facility.

4. Section 849.086(5)(b), F.S., states that in order for a cardroom license to be renewed, the applicant must have requested, as part of its pari-mutuel license application, to conduct at least 90 percent of the total number of live performances conducted by such permitholder during either the state fiscal year in which the license was issued or the state fiscal year immediately prior thereto. It also requires that if one or more permitholder is operating at a facility, each permitholder must have applied for a license to conduct a full schedule of live racing.

5. The definition of a "full schedule of live racing," found in Section 550.002(11), F.S., states that it shall include at least 40 live regular wagering performances for a thoroughbred racing permitholder and at least 40 live regular wagering performances for a quarter horse racing permitholder.

6. Currently, since it is only licensed under its thoroughbred permit, it is Petitioner's interpretation of the law that in order for it to secure a cardroom license, it is required to seek licensure for a minimum of at least 90 percent of the total number of live performances it conducted during either the state fiscal year in which its initial cardroom license was issued or the state fiscal year immediately prior thereto.

7. Petitioner is seeking a declaratory statement from the Division to determine whether the Division is in agreement with its interpretation of Section 849.086(5)(b), Florida Statutes, or whether it is required to apply for some other number of races in order to be eligible to receive a cardroom license under both its thoroughbred and quarter horse permits.

## CONCLUSIONS OF LAW

8. The Division is authorized to regulate the pari-mutuel industry and administer the provisions of Chapter 550, F.S., pursuant to Section 550.0251, F.S.

9. Sections 120.565(1) and (2), F.S., provide as follows:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

\* \* \*

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

10. The Petitioner has standing to initiate this proceeding by virtue of its status as a quarter horse racing permitholder and thoroughbred racing permitholder under Chapter 550, Florida Statutes and its licensure as a cardroom operator under Chapter 849, Florida Statutes.

11. The purpose of a Declaratory Statement is to allow a petitioner to select a proper course of action in advance. *Novick v. Department of Health, Board of Medicine*, 816 So. 2d 1237 (Fla. 5th DCA 2002). The Supreme Court of Florida, in *Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), recognized that by enacting Section 120.565, F.S., the Legislature gave citizens a right to get a clear, binding answer from the agency on how the agency's statute and rules apply. In *Investment Corp of Palm Beach*, the Court also recognized the unique nature of this industry with limited participants who would almost invariably have an interest in a Declaratory Statement. The Court further found that changes to the Administrative Procedure Act allow for the

issuance of Declaratory Statements even though the interest of persons who are not a party may be affected. *Id.* 747 So. 2d 374, at 378 and 385.

12. Additionally in *Lennar Homes, Inc. vs. Department of Business and Professional Regulation*, 888 So.2d 50, 53 - 54 (Fla. 1<sup>st</sup> DCA) the court held that the authority to issue a Declaratory Statement is limited by Section 120.565, F.S. to a determination "as to the applicability of a statutory provision . . . to the petitioner's particular set of circumstances." However, in that same opinion the court also cited *Investment Corp.*, 747 So.2d 374, 385 for the proposition that an agency can issue a Declaratory Statement dealing with a petitioner's "particular set of circumstances," while at the same time announcing its intention to initiate rulemaking on the same subject. In that case, the court reasoned:

It must be observed that under circumstances such as those presented in this case, involving such a unique industry having very limited participants engaged in almost identical operations, declaratory statements as to one would almost invariably be of interest to others in the very limited group. We are not aware of any rule of law that precludes an agency from simultaneously pursuing both courses of action. Further, such an approach to these issues does not appear to harm the rights of "[a]ny substantially affected person[s]". *Id.*

13. Therefore, the Petitioner is entitled to a Declaratory Statement regarding the number of races it must apply for in order to receive a cardroom license from the Division pursuant to Section 849.086(5)(b), Florida Statutes.

14. Section 849.086(5)(b), Florida Statutes, was last amended by Sect. 3 of Chapter 2003-295, Laws of Florida. The amendments to Section 849.086(5)(b), Florida Statutes, contained in Chapter 2003-295, Laws of Florida, Section 3, were as follows:

After the initial cardroom license is granted, the application for the annual license renewal shall be made in conjunction with the applicant's annual application for its pari-mutuel license. If a permitholder has operated a

cardroom during any of the 3 previous fiscal years and fails to include a renewal request for the operation of the cardroom in its annual application for license renewal, the permitholder may amend its annual application to include operation of the cardroom. In order for a cardroom license to be renewed the applicant must have requested, as part of its pari-mutuel annual license application, to conduct at least 90 percent of the total number of live performances conducted by such permitholder during either the state fiscal year in which its initial cardroom license was issued or the state fiscal year immediately prior thereto. If the application is for a harness permitholder cardroom, the applicant must have requested authorization to conduct a minimum of 140 live performances during the state fiscal year immediately prior thereto. If more than one permitholder is operating at a facility, each permitholder must have applied for a license to conduct a full schedule of live racing.

15. Thus, prior to the adoption of Chapter 2003-295, Laws of Florida, all permitholders who applied for a cardroom license were subject to the requirements of the 90 percent rule for its application for pari-mutuel races or games imposed by the renewal provisions of the cardroom statute. However, since adoption of the 2003 amendments, two new, more specific provisions now apply to harness permitholders and locations where more than one permitholder is operating at a facility. Harness permitholders must have conducted at least 140 live performances in the state fiscal year immediately prior thereto in order to renew their cardroom licenses. If more than one permitholder is operating at a facility, each permitholder must have applied for a license to conduct a full schedule of live racing in its concurrent racing application filed pursuant to Sections 550.01215(1) or 550.5251(2), Florida Statutes.

16. A full schedule of live racing is defined by Section 550.002(11), Florida Statutes, as follows:

"Full schedule of live racing or games" means, for a greyhound or jai alai permitholder, the conduct of a combination of at least 100 live evening or matinee performances during the preceding year; for a permitholder who has a converted permit or filed an application on or before June 1, 1990, for a converted permit, the conduct of a combination of at least 100 live

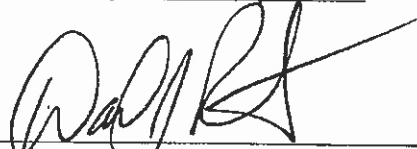
evening and matinee wagering performances during either of the 2 preceding years; for a jai alai permitholder who does not operate slot machines in its pari-mutuel facility, who has conducted at least 100 live performances per year for at least 10 years after December 31, 1992, and whose handle on live jai alai games conducted at its pari-mutuel facility has been less than \$4 million per state fiscal year for at least 2 consecutive years after June 30, 1992, the conduct of a combination of at least 40 live evening or matinee performances during the preceding year; for a jai alai permitholder who operates slot machines in its pari-mutuel facility, the conduct of a combination of at least 150 performances during the preceding year; for a harness permitholder, the conduct of at least 100 live regular wagering performances during the preceding year; for a quarter horse permitholder, the conduct of at least 40 live regular wagering performances during the preceding year; and for a thoroughbred permitholder, the conduct of at least 40 live regular wagering performances during the preceding year. For a permitholder which is restricted by statute to certain operating periods within the year when other members of its same class of permit are authorized to operate throughout the year, the specified number of live performances which constitute a full schedule of live racing or games shall be adjusted pro rata in accordance with the relationship between its authorized operating period and the full calendar year and the resulting specified number of live performances shall constitute the full schedule of live games for such permitholder and all other permitholders of the same class within 100 air miles of such permitholder. A live performance must consist of no fewer than eight races or games conducted live for each of a minimum of three performances each week at the permitholder's licensed facility under a single admission charge.

17. While the definition of "full schedule of live racing or games" above references the preceding year and Section 550.002(38), Florida Statutes provides that a "year" for a full schedule of live racing means a calendar year, the specific provisions of Section 849.086(5)(b), Florida Statutes, clearly apply to the application for the upcoming racing year. The thoroughbred racing season begins on June 1 and runs through May 30 of the next year pursuant to Section 550.5251(1), Florida Statutes. All other racing years follow the state fiscal year pursuant to Section 550.01215(1), Florida Statutes. When there are two pari-mutuel permitholders operating at the same facility, the Division interprets the provisions of Section 849.086(5)(b), Florida Statutes, to require that in

order to operate a cardroom under each separate pari-mutuel permit, the permitholder must apply for a license to conduct at least the minimum number of races or games specified in Section 550.002(11), Florida Statutes, for the specific class of pari-mutuel permit under which each cardroom is intended to operate.

18. Petitioner is a permitholder who holds both a thoroughbred racing permit and a quarter horse racing permit. Therefore, the provisions for renewal contained in the last sentence of Section 849.086(5)(b), Florida Statutes, would require the Petitioner to apply for a racing license to conduct 40 thoroughbred races and a racing license to conduct 40 quarter horse races in order to receive a cardroom license under each of its permits.

DONE AND ORDERED this 16<sup>TH</sup> day of JANUARY 2009.

  
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David J. Roberts, Director  
Division of Pari-Mutuel Wagering  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-1035

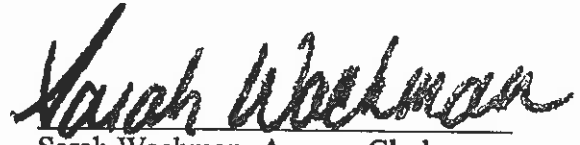
**NOTICE OF RIGHT TO APPEAL UNLESS WAIVED**

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate

District Court of Appeal within thirty (30) days rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and Section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I hereby certify this 20<sup>th</sup> day of January 2009, that a true copy of the foregoing has been provided by U.S. Certified Mail to MARC W. DUNBAR, ESQ. Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Post Office Box 10095, Tallahassee, Florida 32302-2095.

  
Sarah Wachman, Agency Clerk

Copy to:

Joseph M. Helton, Jr., Chief Attorney for Pari-mutuel Wagering  
Marjorie Holliday, Joint Administrative Procedures Committee