



STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

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TO: Marc Dunbar

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FROM: Mary Polombo

RE: Dec. Statement, Florida Gaming Centers

DATE: September 13, 2005

TOTAL NUMBER OF PAGES INCLUDING COVER SHEET: 14

COMMENTS/INSTRUCTIONS:

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Governor

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Secretary

Division of Pari-Mutuel
Wagering

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Final Order **BPR-2005-04540** Date: **8-24-05**
FILED
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Sarah Wachman, Agency Clerk

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

Brandon M. Nichols

IN RE: PETITION FOR DECLARATORY STATEMENT

FLORIDA GAMING CENTERS,
D/B/A/ FT. PIERCE JAI ALAI,

DS 2005-016

Petitioner,

DECLARATORY STATEMENT

Petitioner, Florida Gaming Centers, d/b/a/ Ft. Pierce Jai alai, (Petitioner) filed a Petition for Declaratory Statement with the Division of Pari-Mutuel Wagering (Division) regarding the application of Sections 550.01215(4), 550.3551, and 550.615(2), Florida Statutes, regarding whether Petitioner, if unable to conduct a full schedule of jai alai games, will still be qualified to conduct simulcast and intertrack wagering during next year's season.

STATEMENT OF THE FACTS

1. Petitioner is a pari-mutuel wagering permitholder licensed by the Division of Pari-Mutuel Wagering to operate a jai alai fronton in St. Lucie County, Florida.

2. Section 550.002(32), Florida Statutes, defines the term "simulcast" as:

Broadcasting events occurring live at an in-state location to an out-of-state location, or receiving at an in-state location events occurring live at an out-of-state location, by the transmittal, retransmittal, reception, and rebroadcast of television or radio signals by wire, cable, satellite, microwave, or other electronical or electronic means for receiving or rebroadcasting the events.

3. Section 550.002(17), Florida Statutes, defines the term "[i]ntertrack [w]ager" as:

A particular form of pari-mutuel wagering in which wagers are accepted at a permitted, in-state track, fronton, or pari-mutuel facility on a race or game

transmitted from any performed live at, or simulcast signal rebroadcast from, another in-state pari-mutuel facility.

4. Section 550.3551(2), Florida Statutes, states as follows:

Any horse track, dog track, or fronton licensed under this chapter may transmit broadcasts of races or games conducted at the enclosure of the licensee to locations outside this state.

5. Section 550.3551(4), Florida Statutes, states, in pertinent part, as follows:

Any dog track or fronton licensed under this chapter may receive broadcasts of dograces or jai alai games conducted at other tracks or frontons located outside the state at the track enclosure of the licensee during its operational meeting.

6. Section 550.3551(6)(a), Florida Statutes, states as follows:

A maximum of 20 percent of the total number of races on which wagers are accepted by a greyhound permitholder not located as specified in s. 550.615(6) may be received from locations outside this state. A permitholder may not conduct fewer than eight live races or games on any authorized race day except as provided in this subsection. A thoroughbred permitholder may not conduct fewer than eight live races on any race day without the written approval of the Florida Thoroughbred Breeders' Association and the Florida Horsemen's Benevolent and Protective Association, Inc., unless it is determined by the department that another entity represents a majority of the thoroughbred racehorse owners and trainers in the state. A harness permitholder may conduct fewer than eight live races on any authorized race day, except that such permitholder must conduct a full schedule of live racing during its race meet consisting of at least eight live races per authorized race day for at least 100 days. Any harness horse permitholder that during the preceding racing season conducted a full schedule of live racing may, at any time during its current race meet, receive full-card broadcasts of harness horse races conducted at harness racetracks outside this state at the harness track of the permitholder and accept wagers on such harness races. With specific authorization from the division for special racing events, a permitholder may conduct fewer than eight live races or games when the permitholder also broadcasts out-of-state races or games. The division may not grant more than two such exceptions a year for a permitholder in any 12-month period, and those two exceptions may not be consecutive.

7. Section 550.3551(6)(b), Florida Statutes, states as follows:

Notwithstanding any other provision of this chapter, any harness horse permitholder accepting broadcasts of out-of-state harness horse races when such permitholder is not conducting live races must make the out-of-state signal available to all permitholders eligible to conduct intertrack wagering and shall pay to guest tracks located as specified in ss. 550.615(6) and 550.6305(9)(d) 50 percent of the net proceeds after taxes and fees to the out-of-state host track on harness race wagers which they accept. A harness horse permitholder shall be required to pay into its purse account 50 percent of the net income retained by the permitholder on account of wagering on the out-of-state broadcasts received pursuant to this subsection. Nine-tenths of a percent of all harness wagering proceeds on the broadcasts received pursuant to this subsection shall be paid to the Florida Standardbred Breeders and Owners Association under the provisions of s. 550.2625(4) for the purposes provided therein.

8. Section 550.615(2), Florida Statutes, states as follows:

Any track or fronton licensed under this chapter which in the preceding year conducted a full schedule of live racing is qualified to, at any time, receive broadcasts of any class of pari-mutuel race or game and accept wagers on such races or games conducted by any class of permitholders licensed under this chapter.

9. Section 550.01215(4), Florida Statutes, states as follows:

In the event that a permitholder fails to operate all performances specified on its license at the date and time specified, the division shall hold a hearing to determine whether to fine or suspend the permitholder's license, unless such failure was the direct result of fire, strike, war, or other disaster or event beyond the ability of the permitholder to control. Financial hardship to the permitholder shall not, in and of itself, constitute just cause for failure to operate all performances on the dates and at the times specified.

10. Section 550.002(11), Florida Statutes, states 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 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.

ISSUE PRESENTED

11. Petitioner stated in their request for a declaratory statement that, due to the damage sustained in the 2004 hurricane season, Petitioner was unable to operate the live jai alai season that was scheduled to begin in January 2005. Petitioner further stated that the lack of materials and labor in the Ft. Pierce, Florida area made it impossible to operate any live jai alai during the 2004-2005 fiscal year. Therefore, Petitioner requested a declaratory statement from the Division as to whether the live jai alai requirement for intertrack wagering and simulcast wagering could be waived since Petitioner's failure to operate were, according to Petitioner, beyond the ability of Ft. Pierce Jai alai to control.

CONCLUSIONS OF LAW

12. The Division is authorized to regulate the pari-mutuel industry and administer the provisions of Chapter 550, Florida Statutes, pursuant to Section 550.0251, Florida Statutes.

13. Sections 120.565(1) and (2), Florida Statutes, 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.

14. 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, Florida Statutes, 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. Therefore, it appears that Petitioner is entitled to a declaratory statement regarding Petitioner's ability, if unable to conduct a full schedule of jai alai games this season, to engage in intertrack wagering during the upcoming 2005-2006 racing year, as provided for by Section 550.615(2), Florida Statutes.

15. Authorization for a jai alai fronton to engage in intertrack wagering is contained in Section 550.615, Florida Statutes, which states that:

Any track or fronton licensed under this chapter which in the preceding year conducted a full schedule of live racing is qualified to, at any time,

receive broadcasts of any class of pari-mutuel race or game and accept wagers on such races or games conducted by any class of permitholders licensed under this chapter. (Emphasis added)

16. Section 550.002(11), Florida Statutes, defines a "full schedule of live racing or games," for a jai alai permitholder, as "the conduct of a combination of at least 100 live evening or matinee performances during the preceding year."

17. Section 550.01215(4), Florida Statutes, provides an exception, in the case of "fire, strike, war, or other disaster or event beyond the ability of the permitholder to control," to the requirement that the Division must hold a hearing to determine whether to discipline a permitholder who fails to operate all performances specified. The legislature, by enacting such an exception, made it quite clear that they intended permitholders, who were victims of disasters beyond their control, to be excused from penalty. In this case, there were a series of hurricanes, events definitely beyond the control of Petitioner, which caused Petitioner to be unable to open as scheduled. As a result, and coupled with prior contractual obligations as set forth in their petition, Petitioner does not believe they will be able to complete a full schedule of live racing. Under ordinary circumstances, this would result in Petitioner being precluded from conducting intertrack wagering in the year following Petitioner's failure to conduct a full schedule of live racing. Such a result would be devastating to Petitioner and would significantly impact revenue to the State of Florida. Clearly, this is the exact situation that the legislature, in enacting Section 550.01215(4), Florida Statutes, was attempting to avoid.

18. In *Garner v. Ward*, 251 So.2d 252 (Fla. 1971), the court stated that "[i]t is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statutes were not enacted at the same time." *See also*, and *Mann v. Goodyear*

Tire and Rubber Co., 300 So.2d 666 (Fla. 1974); and *City of Coral Gables v. Board of Public Instruction of Dade County*, 313 So.2d 92 (Fla. 3rd DCA 1975).

19. In this case, there are two distinct statutory provisions. Section 550.615(2), Florida Statutes, which requires that a permitholder conduct a full schedule of live racing so as to participate in intertrack wagering in the following year, and Section 550.01215(4), Florida Statutes, which requires that the Division conduct a hearing to determine whether to discipline a permitholder for failing to conduct all of its performances unless such a failure was the result of "fire, strike, war, or other disaster or event beyond the ability of the permitholder to control." Of importance to note is that Section 550.615(2), Florida Statutes, does not provide an explicit exception to this requirement. Thus, under a strict construction approach, because the legislature failed to provide an express exception to the requirement of Section 550.615(2), Florida Statutes, an exception should not be inferred. *See, State v. Nourse*, 340 So.2d 966 (Fla. 3rd DCA 1976) (holding that the right to an exception must be clearly apparent in the language of the statute). However, as stated by the Supreme Court of Florida in *Garner v. Ward*, 251 So.2d 252, when two laws having the same subject matter or purpose exist, they should be read together and in harmony with each other. Here, Sections 550.615(2) and 550.01215(4), Florida Statutes, share the same purpose in that both statutes require a permitholder to conduct a certain number of performances, whether it be all performances, as is the case in Section 550.01215(4), Florida Statutes, or a full schedule of live racing, as is required in Section 550.615(2), Florida Statutes, in order for said permitholder to avoid adverse consequences. Thus, when construing these two statutes, if they were not read together then a permitholder, under Section 550.01215(4), Florida Statutes, could be excused from discipline for failing to run its required performances if such a failure to run was the result of an event beyond their control. However, under Section

550.615(2), Florida Statutes, an entirely different outcome would occur. There, a permitholder would be penalized, in that the permitholder would be precluded from partaking in intertrack wagering, due to their failure to meet the requirement of conducting a full racing schedule. These two results are inconsistent and contrary to the obvious legislative intent for there to be an exception to the requirements of conducting a certain number of performances when such a failure to meet the performance requirements, as set forth in Sections 550.01215(4) and 550.615(2), Florida Statutes, is the "direct result of fire, strike, war, or other disaster or event beyond the ability of the permitholder to control."

20. Pursuant to Section 550.3551(4), Florida Statutes, a dog track or jai alai fronton may only simulcast during their operational meet. The term "meet" or "meeting" is defined in Section 550.002(20), Florida Statutes, as "the conduct of live racing or jai alai for any stake, purse, prize, or premium." Clearly, the requirement that simulcast wagering only be conducted during the conduct of actual live racing or jai alai, is distinctly different from the intertrack wagering requirements of Section 550.615(2), Florida Statutes, whereby a threshold level of performances must have been met during the previous year as a condition precedent to conducting intertrack wagering.

21. Therefore, intertrack wagering is permissible provided that Petitioner has either met the threshold level for performances, as mandated by Section 550.615(2), Florida Statutes, or that Petitioner has been excused pursuant to Section 550.01215(4), Florida Statutes. However, if Petitioner, as stated in their Petition, is unable to operate and conduct live racing or jai alai, then clearly Petitioner, pursuant to Section 550.3551(4), Florida Statutes, is prohibited from conducting simulcast wagering as simulcast wagering is only authorized during Petitioner's conduct of live racing or jai alai.

CONCLUSION

The exception provided for in Section 550.01215(4), Florida Statutes, applies to the requirement of Section 550.615(2), Florida Statutes. Therefore, based upon the foregoing, the Division holds that if the Petitioner's failure to meet the requirements of Section 550.615(2), Florida Statutes, is the "direct result of fire, strike, war, or other disaster or event beyond the ability of the permitholder to control," then the Petitioner will be permitted to conduct intertrack wagering during the following racing season. However, Petitioner may only simulcast during their operational meeting. Therefore, if Petitioner is unable to conduct live jai alai, then they are prohibited from simulcasting.

DONE AND ORDERED this 23rd day of AUGUST 2005.



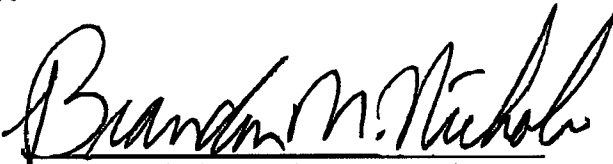
David J. Roberts, Director
Division of Pari-Mutuel Wagering
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1035

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 that a true and correct copy of the foregoing Declaratory Statement, has been provided by U.S. Mail to Mr. Daniel J. Licciardi, Vice President and General Manager, Ft. Pierce Jai alai, 3500 N.W. 37th Avenue, Miami, Florida, 33142, this 24th day of August, 2005.


for: Sarah Wachman, Agency Clerk

Copy to:

S. Thomas Peavey Hoffer, Assistant General Counsel
Suzanne Printy, Joint Administrative Procedures Committee

RECEIVED

MAY 31 2005

OFFICE OF GENERAL COUNSEL

DS 2005-016FLORIDA
GAMING
CORPORATION

May 27, 2005

Mr. David J. Roberts, Director
Division of Pari-Mutuel Wagering
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1033**FILED**
Department of Business and Professional Regulation
DEPUTY CLERKCLERK *Brandon M. Nichols*
DATE 5-31-2005

Dear Mr. Roberts:

Please be advised that Ft. Pierce Jai-Alai was struck by Hurricanes Frances and Jeanne in September of 2004. Due to the structural and water damage to the fronton, Ft. Pierce was unable to operate the live jai-alai season that was scheduled to begin in January 2005. Ft. Pierce Jai-Alai has just finished rebuilding the auditorium area and is beginning to rebuild the jai-alai playing court. The lack of labor and materials in the Ft. Pierce area has made it impossible to operate any live jai-alai during the 2004 - 2005 fiscal year.

As stated in the Florida Statutes Section 550.01215(4), Ft. Pierce Jai-Alai has been unable to operate its "performances specified on its license at the date and time specified...unless such failure was the direct result of...disaster or event beyond the ability of the permit holder to control." Ft. Pierce Jai-Alai hereby requests a Declaratory Statement from the Division of Pari-Mutuel Wagering as to waiving the live jai-alai requirement for ITW and Simulcast wagering, as these disasters were clearly beyond the ability of Ft. Pierce Jai-Alai to control. I appreciate your assistance in this matter and if there is any additional information that can be provided, please call.

Thank you.

Sincerely,

Daniel J. Licciardi
Vice President and General Manager

FLORIDA
GAMING
CENTERS



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APR 15 2005

OFFICE OF GENERAL COUNSEL

DS 2005-016

April 8, 2005

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

FILED
Department of Business and Professional Regulation
DEPUTY CLERK

CLERK *Brandon M. Nichols*
DATE 4-15-2005

Dear Mr. Roberts:

Pursuant to our conversation of last week referencing Ft. Pierce Jai-Alai, post hurricane reconstruction is still continuing. Ft. Pierce Jai-Alai has just finished rebuilding the auditorium area and is beginning to rebuild the jai-alai playing court. The lack of labor and materials in the Ft. Pierce area has made it impossible to operate live jai-alai during the 2004 - 2005 fiscal year.

Based on these "Acts of God", Ft. Pierce Jai-Alai hereby requests a declaratory statement from the Division of Pari-Mutuel Wagering as to waiving the live jai-alai requirement for ITW and Simulcast wagering. I appreciate your assistance in this matter and if there is any additional information that can be provided, please call.

Thank you.

Sincerely,

Daniel J. Licciardi
Vice President and General Manager