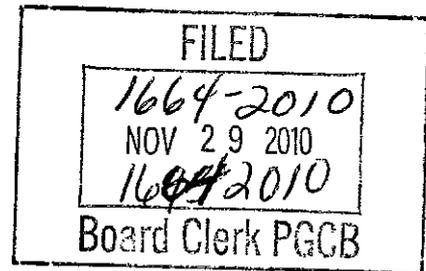


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COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PENNSYLVANIA GAMING CONTROL BOARD

In Re: Application of Woodlands : OHA Docket No. 1664-2010  
Fayette, LLC for a Category 3 :  
License :  
:  
Washington Trotting :  
Association, Inc., Intervenor & :  
Contesting Operator :

**BRIEF IN SUPPORT OF DENIAL OF THE CATEGORY 3  
LICENSE APPLICATION OF WOODLANDS FAYETTE, LLC**

Washington Trotting Association, Inc. d/b/a The Meadows Racetrack & Casino ("WTA"), a Category 1 licensee with a place of business at Racetrack Road, Meadowlands, Pennsylvania, by and through its attorneys, Marie Jiapello Jones, Esquire and Mariel J. Giletto, Esquire of Fox Rothschild LLP, respectfully submits this Brief in Support of Denial of the Application to the Pennsylvania Gaming Control Board (the "Board") of Woodlands Fayette, LLC ("Woodlands").

**I. EXECUTIVE SUMMARY**

The Board should deny Woodlands' Application for a Category 3 License as it fails to demonstrate that it is the most suitable applicant for the license. First and foremost, the Lady Luck Casino is not the best Category 3 License applicant

as it will be placed directly within the over-saturated Southwestern Pennsylvania gaming market<sup>1</sup> and; therefore, will cannibalize revenue from existing Pennsylvania casinos without providing the most incremental revenue or maximizing profits for the Commonwealth.

As William Paulos expressed during Woodlands' License Hearing, cannibalization of the Southwestern Pennsylvania casinos will need to be a key strategy for Woodlands to have any hope of achieving its revenue projections. Mr. Paulos further explained that despite cannibalizing revenue from surrounding projects, Woodlands is not capable of meeting its projected revenue as the key assumptions upon which the revenue projections rely are not justifiable. Woodlands suggests that WTA cannot argue that Woodlands will cannibalize the market, while also arguing that Woodlands will not generate projected revenue. However, WTA submits that the two (2) arguments coincide, as cannibalization of WTA and the Rivers Casino is inevitable despite any revenue projections asserted by Woodlands. Therefore, while WTA asserts that Woodlands is incapable of meeting its revenue projections, if the exaggerated revenue were attainable, it will only be realized at the expense of WTA and the Rivers Casino.

Not only are Woodlands' revenue projections inflated, but Woodlands' presentation to the Board during its license hearing was riddled with contradictions. First, the testimony of Woodlands' expert, Anthony Mumphrey, PhD, contradicts many of the conclusions set forth in his reports. Not to mention

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<sup>1</sup> The Southwestern Pennsylvania gaming market is defined as including the Rivers Casino, the Meadows, Wheeling Island Casino and Racetrack ("Wheeling Island"), and Mountaineer Casino Racetrack and Resort ("Mountaineer").

that his reports also contradict each other. Second, Woodlands suggests that cannibalization of local casinos will be nominal, while utilizing an excessive 200 mile radius to compute revenue projections, which encompasses a plethora of casinos. Moreover, Woodlands calculates cannibalization to be approximately one percent (1%) or \$1.85 million of revenue, but Woodlands fails to take into consideration that one percent (1%) of the Meadows' revenue is greater than \$1.85 million. Third, Chris Plummer, General Manager of Woodlands, stated that Woodlands' guests will not come there to gamble. However, three (3) days later, George Fenich, an expert for Woodlands, testified that Woodlands' revenue would be split between gaming and other amenities. With these contradictions, it is difficult to make an accurate assessment regarding the facts of Woodlands' project and come to an informed decision regarding Woodlands' suitability.

The other reasons that the Board should deny Woodlands' Application for a Category 3 License include the fact that Woodlands is not capable of and, therefore, is not the best applicant for enhancing tourism to the Commonwealth. Moreover, the financial ability of Woodlands to sustain the Lady Luck Casino is questionable. Last, the net effect of granting Woodlands a Category 3 License will prove to be detrimental to the Commonwealth, as Woodlands will decrease the number of high-paying, quality jobs available to the citizens of the Commonwealth; will not provide the maximum tax benefit to the Commonwealth; and will not provide the maximum amount of revenue to the Pennsylvania horsemen.

For the above-stated reasons, choosing Woodlands as a Category 3 License is in direct contradiction to the intentions of the Pennsylvania Race Horse Development and Gaming Act (the "Act") and is not in the best interest of the Commonwealth.

Based on the intent of the Act, it is clear that the Board should choose the Category 3 License applicant that is the most suitable for licensure, *i.e.* an applicant that is financially viable, will provide the most incremental, new revenue to the Commonwealth, enhance tourism in the Commonwealth, employ the citizens of the Commonwealth with quality, high-paying jobs, and provide revenue and support to Pennsylvania's horsemen. WTA submits that the Board made the right choice to partner with WTA to further the intentions of the legislature and generate sustainable revenue for the Commonwealth. The Board again should make the right choice to deny the application of Woodlands for a Category 3 License and choose an applicant that will be a profitable and beneficial partner for the Commonwealth.

## **II. REVENUE PROJECTIONS INACCURATE**

The Act requires that a Category 3 License applicant demonstrate its suitability for licensure.<sup>2</sup> Such suitability criteria includes the operational viability, *i.e.* the ability of the proposed licensed facility to generate and sustain an acceptable level of growth revenue.<sup>3</sup> James B. Perry, Chairman and Chief Executive Officer of Isle of Capri, stated "[w]e believe in this project and believe it

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<sup>2</sup> 4 Pa C.S. § 1325.

<sup>3</sup> 58 Pa Code § 441a.7(f).

would provide the most incremental income."<sup>4</sup> However, Woodlands' projections paint a different picture than expressed in this comment. Based on the projections presented to the Board, Woodlands is not the applicant that is capable of generating the highest amount of incremental, new revenue for the Commonwealth.

Woodlands' overly inflated revenue projections are nothing more than educated guesses, which oftentimes are wrong. Woodlands also uses a gravity model to support its revenue projections. Gravity models are supported by a series of assumptions rather than actual facts and, oftentimes, are wildly inaccurate. In support of same, Mr. Perry admitted that "revenue projections are difficult."<sup>5</sup> Yet, Woodlands is certain that it will generate \$66.8 million in revenue in 2013, with less than one percent (1%) cannibalization from local casinos. One percent (1%) cannibalization is unrealistic, considering that Woodlands' experts utilize a 200 mile radius to obtain its patrons and the Meadows is less than an hour away. Even if cannibalization was that low, one percent (1%) of the Meadows' gaming revenue is approximately \$2.6 million. Woodlands' projections contradict this number and simply state that only \$1.85 million will be cannibalized from all local casinos, not just the Meadows. This disregard coupled with Woodlands admission that revenue projections are difficult to predict, detracts from Woodlands' certainty that one percent (1%) or \$1.85 million (whichever is correct) in revenue will be derived from cannibalization.

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<sup>4</sup> Woodlands Fayette, LLC November 17, 2010 Board Hearing Transcript ("Woodlands' Hearing Transcript"), pg. 182, ll. 11-12.

<sup>5</sup> Amy Revak, Fayette Proposal Attracts Criticism, Uniontown Herald Standard, November 18, 2010.

A prime example of the difficulty in making accurate projections is the Southwestern Pennsylvania market. The Rivers Casino in Pittsburgh was projected to generate slot revenue of \$362 million in its first year of operations. However, the Rivers Casino only achieved \$223 million - barely sixty percent (60%) of its projections. On the other hand, the Meadows was projected to generate \$237 million in the first year of operation of its permanent casino, but revenue at the Meadows exceeded \$274 million - sixteen percent (16%) higher than estimated.

As expressed by Mr. Paulos, more concerning, however, is that the combined total result for the Rivers Casino and the Meadows only achieved eighty-three percent (83%) of projections.<sup>6</sup> The combined revenues for both properties totaled \$500 million compared to the combined projection of \$600 million – an error of \$100 million. Despite these lower than expected revenues, now Woodlands attempts to persuade the Board with inflated revenue projections that an additional casino in an underperforming and increasingly competitive marketplace is the best option for the Commonwealth.

However, a casino in the Southwestern Pennsylvania market is incapable of generating such revenue, as there already is too much competition. Nearby Ohio recently approved gaming legislation and new casinos are expected to be constructed in the near future. Moreover, the Arundel Mall project is being constructed in Baltimore, Maryland; the Greenbrier Resort in West Virginia recently opened a casino; and the Rocky Gap Lodge Casino project will open

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<sup>6</sup> See generally Woodlands' Hearing Transcript, pg. 163, ll. 53-20.

only fifty-three (53) miles from Woodlands. Even by their own admission, Jeff Nobers, Marketing Director for 84 Lumber and spokesperson for the Woodlands, stated, "We're saturated, but so is Gettysburg."<sup>7</sup> Despite this competition, Woodlands unrealistically projects gaming revenues in 2013 to reach \$66.8 million, with cannibalization from the plethora of local casinos totaling \$1.85 million of revenue.

The unreality of Woodlands' projections easily can be summed up, in a realistic 100 mile radius of Woodlands, there only are 4.7 million people and approximately 47 slot machines per 10,000 adult population.

Woodlands also is incapable of attaining their experts' projections as they rely on unjustifiable assumptions. First, Woodlands assumes that the Lady Luck Casino will grow revenue for the Southwestern Pennsylvania casinos by \$17 million, which will be derived from customers residing in the Tri-State and Western Maryland areas.<sup>8</sup> Second, Woodlands assumes an aggressive \$24 million or fifty-one percent (51%) of their day visitor revenue (over one-third of total gaming revenues) will be generated from guests traveling an average of seven (7) hours or more roundtrip.<sup>9</sup> Third, Woodlands assumes that the dilution of the Meadows and the Rivers Casino will be approximately one percent (1%) of

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<sup>7</sup> Scot Andrew Pitzer, Nemacolin Likes Casino License Odds, Gettysburg Times, November 14, 2010.

<sup>8</sup> See TMG Consulting, Tri-State and Western Maryland Gaming Market Assessment: An Analysis of the Impact of Nemacolin on Nearby Casinos, pg. 6.

<sup>9</sup> See TMG Consulting, Gaming, Resort, and Tourism Market Assessment: Nemacolin Woodlands Resort Site, Managed by Isle of Capri Casinos, Inc., August 2010 update.

their gross revenues.<sup>10</sup> WTA asserts that facts, as demonstrated by experience and time, depict a more accurate picture than projections and gravity models based on unjustifiable assumptions.

**A. Lack of Growth Potential for Southwestern Pennsylvania**

Woodlands assumes that the Lady Luck Casino will grow revenue for the Southwestern Pennsylvania casinos by \$17 million, which will be derived from customers residing within a 200 mile radius.<sup>11</sup> However, as stated above, Southwestern Pennsylvania already is packed with almost fifty (50) slot machines per 10,000 adults. Further, it can be seen from the experience with the addition of the Rivers Casino, that it is extremely unlikely that Woodlands will increase its market. For example, for the year ended June 30, 2010, the Southwestern Pennsylvania market generated \$758 million in slot revenue compared to the \$620 million in 2009, an increase of only twenty-two percent (22%).

This modest increase came after the opening of the Rivers Casino in August 2009 and the first full year of the Meadows' permanent casino complex. Both projects combined increased slot product in the market by almost 4,500 units or seventy percent (70%). Despite the seventy percent (70%) increase in the number of slot machines, revenue only grew by twenty-two percent (22%). This demonstrates that Southwestern Pennsylvania is a mature market, which is inelastic to increased supply. Moreover, both projects were established by over

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<sup>10</sup> See TMG Consulting, Tri-State and Western Maryland Gaming Market Assessment: An Analysis of the Impact of Nemascolin on Nearby Casinos. Although, it is unclear as to whether Woodlands projects that cannibalization will be one percent (1%) or \$1.85 million of revenue.

<sup>11</sup> See TMG Consulting, Tri-State and Western Maryland Gaming Market Assessment: An Analysis of the Impact of Nemascolin on Nearby Casinos, pg. 6.

\$1 billion of investments. Therefore, as further demonstrated by the actual performance of the marketplace, it is clear that Woodlands' \$50 million total investment at the proposed facility will not generate any measureable incremental revenue in the market – let alone \$17 million.

There are better, alternative applicants for the Category 3 License that will provide significantly more incremental, new revenue for the Commonwealth. Other applicants propose locations that will pull customers from more populated areas without significantly detracting from profitable casinos in the Commonwealth. Further, other applicants for the Category 3 License propose locations with less slot machines per 10,000 people and; therefore, are capable of generating greater incremental, new revenue for the Commonwealth. Within a 100 mile radius of Woodlands, there are 46.8 slot machines per 10,000 adults. This number is 400% higher than the other Category 3 License applicants who proposed to be located in areas that only have twelve (12) to thirteen (13) slot machines per 10,000 adults within a 100 mile radius. Moreover, Woodlands has less people within a 100 mile radius to utilize the higher number of slot machines than the other applicants. Specifically, within the 100 mile radius of Woodlands, there only are 4.7 million people.<sup>12</sup> This is, by far, the lowest number of people within a 100 mile radius of any of the Category 3 License applicants.

Obviously, Woodlands is conscious of the significantly low number of people within the 100 mile radius, as their experts were forced to expand the radius to 200 miles in order to demonstrate the number of people who will be

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<sup>12</sup> See TMG Consulting, Gaming, Resort, and Tourism Market Assessment: Nemaquin Woodlands Resort Site, Managed by Isle of Capri Casinos, Inc., August 2010 update.

served by the high number of slot machines. However, a 200 mile radius is excessive and it is unheard of for an expert to use such a wide area to demonstrate population. Woodlands is pushing the boundaries to establish its suitability, when it is apparent that they rely heavily on outer markets to obtain such inflated revenue projections. In fact, Commissioner Ginty summarized the unlikely pull of a day tripper from 200 miles when he tried to figure out how someone could drive from Philadelphia, play a round of golf, go to the casino, and drive home.<sup>13</sup> This simply is not going to happen.

**B. Excessive Reliance on Outer Markets**

As stated above, Woodlands assumes that a majority of their revenues will be derived from day trippers willing to travel 200 miles or in excess of seven (7) hours or more roundtrip. However, based on the contradicting reports and testimony of Woodlands' expert, it is hard to accurately state the amount and percentage of revenue that Woodlands' projects will be derived from day trippers. If Woodlands' experts cannot even provide a stable projection, the Board cannot accurately determine the impact of the Lady Luck Casino.

At Woodlands' license hearing, Dr. Anthony Mumphrey, President of TMG Consulting, stated that over seventy-eight percent (78%) of their revenue will be derived from day-trippers.<sup>14</sup> However, the report produced by Dr. Mumphrey states that over \$24 million or fifty-one percent (51%) of the day visitor revenue,

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<sup>13</sup> Woodlands' Hearing Transcript, p. 187, ll. 22-24.

<sup>14</sup> See Woodlands' Hearing Transcript, pgs. 80-81.

over one-third of total gaming revenues, will be generated from guests traveling an average of seven (7) hours or more roundtrip.<sup>15</sup>

To further confuse the numbers, the comparative analysis prepared by Dr. Mumphrey states that thirty-three percent (33%) of Woodlands' total revenue would be generated from the resort tourism market, including overnight guests and those traveling outside of the 200 mile radius.<sup>16</sup> Dr. Mumphrey also stated that twenty-one percent (21%) of Woodlands' total revenue would be generated from overnight guests.<sup>17</sup> Therefore, according to Woodlands' numbers, approximately twelve percent (12%) of Woodlands' total revenue would be generated those traveling outside of the 200 mile radius.

Despite the dramatic contradictions and no matter which projection actually is proposed to be correct, it is difficult to believe that such a high percentage of revenue would be derived from such a wide radius. To put Woodlands' estimate in perspective, the Meadows only generates \$7.2 million or 2.9% of their gaming revenue from these outer markets with drive times of seven (7) hours or more. The majority of the \$7.2 million in gaming revenue is generated from patrons driving from Ohio; however, this market soon will be diminished as Ohio will host its own casinos. Further, the Rivers Casino reported that only ten percent (10%) of their slot machine revenue comes from visitors

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<sup>15</sup> See TMG Consulting, Gaming, Resort, and Tourism Market Assessments: Woodlands Resort Site, Managed by: Isle of Capri, pg. 105, August 2010 Update.

<sup>16</sup> See TMG Consulting, Comparative Analysis: Nemaocolin Woodlands Resort Site, Managed by: Isle of Capri, pg. 11, September 2010. See also Woodlands' Hearing Transcript, pg. 70, ll. 11-13.

<sup>17</sup> Woodlands' Hearing Transcript, pg. 79, ll. 6-10.

living more than six (6) hours roundtrip and the figure includes overnight visitors as well as day trips.

Moreover, Woodlands projects that approximately \$7.7 million in revenue is expected to come from the Washington D.C./Baltimore area, despite the additional 4,750 slot machines recently approved by Maryland voters for placement at Arundel Mills Mall. Woodlands' projections also rely on \$4.3 million in revenue to be derived from Cleveland, Ohio, which anticipates opening a casino that will house 3,000 slot machines and is located in an area that is or will be well-served by existing or proposed casinos.

Notably, no other Category 3 License applicant places such heavy reliance on outer day trip markets up to 200 miles to achieve their revenue projections. They realize that people will not drive seven (7) hours for a day trip to gamble, especially when there are more convenient casinos nearby or on the way.

### **C. Cannibalization of Local Market**

Woodlands' revenue projections are unrealistic as they project that the Meadows only will experience a one percent (1%) decrease in gross revenue due to cannibalization.<sup>18</sup> Woodlands suggests that cannibalization will be nominal as they are the furthest away from any other licensee, despite the fact that travelers will pass casinos on their 200 mile trek to Lady Luck Casino. These two concepts completely contradict one another. Woodlands cannot pull

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<sup>18</sup> See TMG Consulting, Tri-State and Western Maryland Gaming Market Assessment: An Analysis of the Impact of Nemacolin on Nearby Casinos.

patrons from a 200 mile radius without pulling revenues from other casinos that lie directly within the seven (7) hour drive to the facility.

It is difficult to believe that cannibalization will be only one percent (1%), as the Meadows actual revenue and historical data dictate otherwise. For year-ended September 30, 2010, the Meadows gaming revenues totaled \$257 million. Therefore, by Woodlands' projections, only \$2.6 million of its gaming revenue will be generated from Meadows' customers. However, the historical performance of the marketplace leads to the conclusion that actual cannibalization of the Meadows revenue will be significantly higher. In the past year, the Meadows generated more than \$58 million in gaming revenues from customers who live in zip codes wholly or partially within a sixty (60) minute drive from the Meadows – of which \$22 million came from Fayette County zip codes alone. Therefore, it is absolutely absurd that dilution of the Meadows' revenue only would be \$2.6 million.

Moreover, when the Rivers Casino opened in August 2009, the Meadows experienced a dilution of slot revenues in excess of twenty percent (20%). Dilution of the entire Southwestern Pennsylvania market was experienced with the opening of the Meadows' permanent facility and the opening of the Rivers Casino. Wheeling's slot revenue has decreased by thirty-six percent (36%) and Mountaineer's slot revenue has decreased by thirty percent (30%) since the year ended June 30, 2007. History dictates that similar decreases to slot revenue will occur when the Lady Luck Casino opens and pulls patrons away from the Meadows.

Woodlands argues that the Meadows should have expected competition because prior applicants for the Category 3 Licenses have proposed facilities in proximity to the Meadows. The Meadows' fully expects competition. However, as Mr. Paulos stated during Woodlands' license hearing, "I believe in competition ... [h]owever, I do not believe in competition at the expense of local government, local economy and local citizens."<sup>19</sup> That is just what Woodlands will do – it will take away revenue at the expense of the government, local economy, and local citizens as it fails to provide the most incremental, new revenue. Frankly, Southwestern Pennsylvania is not the market it was expected to be.

### **III. WOODLANDS FAILS TO ENHANCE TOURISM**

Woodlands fails to demonstrate how obtaining a Category 3 License will increase tourism to the Commonwealth, an expressed intention of the Act and one of the criteria that a Category 3 License applicant is required to demonstrate in order to be found suitable for licensure.<sup>20</sup> The Act specifically states that the authorization of gaming was "intended to enhance the further development of the tourism market throughout [the] Commonwealth, including, but not limited to year-round recreational and tourism locations in [the] Commonwealth."<sup>21</sup> Moreover, a Category 3 License applicant is required to demonstrate "[t]he potential for enhancing tourism which is expected to result from granting a license to the applicant."<sup>22</sup>

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<sup>19</sup> Woodlands Hearing Transcript, pg. 171, ll. 2-7.

<sup>20</sup> See 4 Pa C.S. § 1102 & 1325.

<sup>21</sup> 4 Pa C.S. § 1102.

<sup>22</sup> 58 Pa Code § 441a.7(g)(6).

On November 29, 2006, the Pittsburgh Tribune Review quoted Doug Harbach, a spokesman for the Board, as saying, "[t]he [B]oard is very clear on what the intention of the Legislature was, that was to provide a recreational facility that was an additional amenity at a resort, not a free standing facility." However, as described by the Pittsburgh Post Gazette on February 20, 2006, the former Route 40 outdoors store is "[a]n Adirondack style building past the entrance to Woodlands and away from the heart of the resort" – a completely free-standing facility. Despite its location away from the heart of the resort, Mr. Harbach also was quoted in the Pittsburgh Post Gazette on November 12, 2006 as saying, "[t]he casino would be an additional recreational amenity to patrons of Woodlands, it can't be just someone off the street."

Moreover, while quoting Greenwood Gaming and Entertainment, Inc.'s argument to the Pennsylvania Supreme Court, Ray Quaglia, attorney for Woodlands admitted during Woodlands' license hearing that "it cannot be denied that Category 3 Slot Machine Licenses were designed to increase the flow of tourism at well-established resort hotels in the Commonwealth, and in turn boost said businesses and related ancillary services."<sup>23</sup>

Apparently, Woodlands disregards the intent to enhance tourism through a separate Category of licensure, as Woodlands' proposed Lady Luck Casino is more akin to a Category 2 facility, rather than additional amenity for patron's of Woodlands' resort to enjoy. At the license hearing, Woodlands admitted that only twenty-one percent (21%) of overnight guests would gamble and that most

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<sup>23</sup> Woodlands' Hearing Transcript, pg. 183, ll. 3-7.

of their gaming revenue would be derived from day-trippers, including persons from other resorts. However, the closest overnight lodge to Lady Luck Casino is the upscale Falling Rock, which, as admitted by Woodlands during the license hearing, is closed for six (6) months out of the year.<sup>24</sup> Therefore, clearly, the day-trippers will have to come from areas that do or will have casinos.

Further, Woodlands stated to the Board at its license hearing that they project a win per visit of \$98 for non-overnight guests.<sup>25</sup> If only twenty-one percent (21%) of the projected \$66.8 million in revenue is derived from overnight guests, then approximately \$53 million must be derived from non-overnight guests. Following the numbers presented to the Board by Woodlands, approximately 540,000 total day-trippers must visit the facility to meet their revenue projections. Woodlands expects to have 100,000 additional, overnight guests if they are awarded a gaming license.<sup>26</sup> Therefore, Woodlands will have to attract nearly 240,000 additional day-trippers to the facility. Currently, however, Woodlands only welcomes about 300,000 guests to the facility, inclusive of overnight guests.

Despite the fact that their revenue projections rely heavily on day-trippers, Mr. Plummer stated "[w]e don't envision our guests, if we get a license, coming here to gamble."<sup>27</sup> It is interesting that Mr. Plummer suggested that their guests will not go there to gamble considering that three (3) days later, George Fenich,

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<sup>24</sup> Woodlands' Hearing Transcript, pgs. 100-101, ll. 25 & 1-3.

<sup>25</sup> See Woodlands' Hearing Transcript, Testimony of Dr. Anthony Mumphrey, pg. 106.

<sup>26</sup> Woodlands' Hearing Transcript, pg. 31, ll. 16-18.

<sup>27</sup> Scot Andrew Pitzer, Nemacolin Likes Casino License Odds, Gettysburg Times, November 14, 2010.

one of Woodlands' experts, stated during Woodlands' license hearing that patrons will come for the resort, but will split revenue between gaming and other amenities.<sup>28</sup> Once again, we see Woodlands contradicting itself.

Also at the license hearing, Woodlands suggested to the Board that their facility was similar to the Greenbrier in West Virginia, an existing resort that introduced an \$80 million casino July 2010. However, after three (3) months of operation, table game and slot revenue at the Greenbrier was sixteen percent (16%) below projections.<sup>29</sup> In its fourth month of operation, Greenbrier continued to experience below projections revenue.<sup>30</sup> The Commonwealth does not need a similar, underperforming casino.

Woodlands insists that it will increase tourism; however, they state that, if granted a Category 3 License, occupancy at the resort only will increase by twenty percent (20%). Such a low increase to the number of rooms at Woodlands only adds sixty (60) more rooms a night. This is significantly less than the increase in the rooms available that other applicants present.

Woodlands fails to demonstrate to the Board that it will enhance tourism for the Commonwealth, let alone that they are the best Category 3 License applicant to do so. This is directly in contrast to the intention of the Act and demonstrates that Woodlands is not suitable for licensure.

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<sup>28</sup> Woodlands' Hearing Transcript, pg. 58, ll. 17-18.

<sup>29</sup> Phil Kabler, The Charleston Gazette, Charles Town Table Games Offset Lottery Problems Elsewhere, September 29, 2010.

<sup>30</sup> Phil Kabler, The Charleston Gazette, Charles Town Table Gambling Still Raking in the Dough, September 29, 2010.

#### IV. FINANCIAL VIABILITY

The Act requires that a Category 3 License applicant demonstrate its suitability by showing financial fitness.<sup>31</sup> However, there are blatant, publicly-known issues regarding the financial fitness of Woodlands. Commissioner Kenneth Trujillo questioned Woodlands' operation and financial viability during the license hearing, stating, "I understand that it's a great resort, but it hasn't been able to generate money over the last five (5) years. I have concerns about how viable this model is. Your total revenues are on a downward spiral."<sup>32</sup>

Not only is the resort losing money, but the 2001 Trust, the mutual owner of 84 Lumber and Woodlands, has a \$23 million line of credit in place with the First Commonwealth Bank, to which Woodlands is a party.<sup>33</sup> 84 Lumber often draws upon this loan facility in difficult economic times, precisely the state our country currently is facing. 84 Lumber also recently applied to local counties for loans in excess of \$20 million, which has been a point of public controversy. At the license hearing, Adrian King, attorney for Woodlands, explained that if 84 Lumber was unable to repay the line of credit, then Woodlands and Isle of Capri will be responsible to repay the loan.<sup>34</sup> Obviously, with the state of the economy, it is questionable as to whether 84 Lumber will survive the economic downturn and be able to repay its debts. It also is questionable as to whether Woodlands will rebound from its continued revenue loss.

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<sup>31</sup> 4 Pa C.S. § 1313.

<sup>32</sup> Woodlands' Hearing Transcript, pgs. 112 & 113, ll. 12-16 & 18-19.

<sup>33</sup> See Woodlands' Hearing Transcript, pgs. 118-122.

<sup>34</sup> Id.

If there is one thing that the economic downturn has taught us, it is that the future is not stable and definitely not predictable. Moreover, Mr. Perry emphasized that "all the projections people are dealing [with] in a time here of [are] very difficult because nobody really knows the impact."<sup>35</sup> However, Mr. Plummer seems to think otherwise, replying to the comments by Commissioner Trujillo stating that while revenues have gone down, "last year was the bottom." It is impossible to know when the bottom occurred without looking at history. At this point we cannot look at history, because we currently are living in the moment of a terrible economy. Commissioner Trujillo correctly pointed out "... you look at what happened to the markets yesterday and what's going on with the [E]uro and what's going on in Ireland, and other parts of the world, the possibility of a credit freeze, and liquidity issues exist."<sup>36</sup> Obviously a doomsday scenario is a possibility.

WTA submits that the Board should let time run its course and see if Woodlands rebounds and begins producing revenue. Woodlands withdrew its license application in 2006 and, over the past four (4) years, had the advantage of watching the market and gaming in Pennsylvania develop. As an explanation of why Woodlands withdrew its license application in 2006, Mr. Nobers stated that "[n]o one wanted this license until everyone understood the rules."<sup>37</sup> The Board should be given the benefit of the next couple years to see how Woodlands and the Southwestern Pennsylvania gaming market can perform.

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<sup>35</sup> Woodlands' Hearing Transcripts, pg. 181, ll. 19-22.

<sup>36</sup> Woodlands' Hearing Transcripts, pgs. 116-117, ll. 25 & 1-4.

<sup>37</sup> Scot Andrew Pitzer, Nemacolin Likes Casino License Odds, Gettysburg Times, November 14, 2010.

Then, with the knowledge gained, the Board can revisit the issue of whether Woodlands deserves a Category 3 License, as Woodlands will be eligible for a Category 3 License in 2017.<sup>38</sup>

Mr. Nobers also added, “[w]e think the Gaming Board is eager to finally get (a Category Three casino) open.”<sup>39</sup> WTA agrees. However, Woodlands presents financial issues and uncertainty as to whether these issues can be rectified in this economy.

**V. DETRIMENTAL NET EFFECT OF DECREASED REVENUE FROM GRANTING WOODLANDS A LICENSE**

Woodlands also presents a number of issues that will be detrimental to the Commonwealth; issues that are not so prominent with other Category 3 License applicants. If the Board grants Woodlands a Category 3 License, casinos in Southwestern Pennsylvania will be forced to share revenue with Woodlands. This decrease in business caused by the forced revenue sharing will have a detrimental impact on the horsemen and ultimately will lead to job losses at the Meadows as well as reduced gaming taxes for the Commonwealth, all of which are directly in contrast to the intentions of the Act.

The Act was intended to generate a “significant source of new revenue,” provide “tax relief,” create broad economic opportunities, “enhance live horse racing,” and “positively assist the Commonwealth’s horse racing industry.”<sup>40</sup>

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<sup>38</sup> While suggesting that the Board revisit Nemaocolin’s application in the future, WTA reserves the right to review the market conditions as they develop and then determine if it will continue to have a concern with an additional facility in Southwestern Pennsylvania.

<sup>39</sup> Scot Andrew Pitzer, Woodlands likes Casino License Odds, Gettysburg Times, November 14, 2010.

<sup>40</sup> See 4 Pa C.S. § 1102.

Moreover, an applicant is required to demonstrate its suitability for licensure by explaining its plan to provide quality, living-wage jobs for the residents of the Commonwealth.<sup>41</sup>

**A. Detrimental Impact on Horsemen**

Loss of revenue at the Meadows caused by permitting Woodlands to place the Lady Luck Casino in the over-saturated market of Southwestern Pennsylvania also directly will impact the contribution made to the horsemen, intended beneficiaries of the Act. The General Assembly clearly articulated that the Act was intended to "positively assist the Commonwealth's horse racing industry, support programs intended to foster and promote horse breeding, and improve the living and working conditions of personnel who work and reside in and around the stable and backside areas of the racetracks."<sup>42</sup> In an effort to further these intentions, the Act requires that all casinos share in the taxes designated for the horsemen.<sup>43</sup> To date, as Mr. Paulos put it, Category 1 Licensees have been carrying the water when it comes to the portion of the tax designated for the horsemen.<sup>44</sup>

Further, keeping the Meadows profitable and increasing its revenue is crucial from the Meadows Standardbred Owners Association ("MSOA"). While, the horse racing industry receives funds from all licensees, the amount allocated to the MSOA from those funds is dependant upon the performance of the

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<sup>41</sup> See 58 Pa Code § 441a.7(8).

<sup>42</sup> 4 Pa C.S. § 1102(4).

<sup>43</sup> 4 Pa C.S. § 1405.

<sup>44</sup> Woodlands' Hearing Transcript, pg. 168, ll. 14-16.

Meadows.<sup>45</sup> Consequently, a reduction in Meadows' slot revenue directly reduces amounts paid to the MSOA, which will be financially detrimental to the horsemen and will significantly harm the harness racing industry – a stark contrast to the intention of the Act.

**B. Loss of Quality, Living-Wage Jobs for Citizens of the Commonwealth**

The Meadows currently is one of the largest employers in Washington County. More specifically, the Meadows employs over 1,500 people, approximately ninety percent (90%) of whom are Pennsylvania residents. The Meadows also is well known for paying attractive wages and benefits, as it does not pay below the \$7.25 per hour minimum wage for any position, including food servers who receive \$7.58 per hour plus tips. On the other hand, current starting pay for a food server at Woodlands is \$2.83 per hour net plus tips. In fact, Mr. Perry stated during Woodlands' License Hearing that Woodlands cannot disrupt the pay scale that already is in place for Woodlands' employees and that the wages for Isle of Capri's food and beverage employees probably will be consistent with the current wage rates for Woodlands' employees.<sup>46</sup> Therefore, the net effect of granting a license to Woodlands will be the loss of high-paying, quality jobs at the Meadows versus a minimum gain of lower-paying jobs at Woodlands.

As stated above, the Meadows provides jobs for Pennsylvania residents. In contrast, as testified to by Woodlands Director of Human Resources and as

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<sup>45</sup> See 4 Pa C.S. § 1406.

<sup>46</sup> See Woodlands' Hearing Transcript, pg. 127, ll. 19-24.

reported in the newspaper, Woodlands relies upon non-US residents for their workforce.<sup>47</sup> Woodlands applied for the most worker certifications out of any employer in Allegheny, Westmoreland, and Fayette Counties.<sup>48</sup> The unemployment rate in Fayette county is close to 10% and yet Woodlands continues to hire foreigners.

## **VI. CONCLUSION**

The Board should deny Woodlands' Application for a Category 3 License as it fails to demonstrate that it is the most suitable applicant for the license. As Mr. Paulos stated, WTA "paid \$66 and-a-half million to be your partner, sir, and invested over a half a billion dollars to be your partner. So, I'm going to trust that you're going to make the right decision ...".<sup>49</sup> The Lady Luck Casino is not the Board's best Category 3 partner as it will be placed directly within the over-saturated Southwestern Pennsylvania gaming market. The Lady Luck Casino is not capable of furthering the intentions of the Act and failed to demonstrate that it is the most suitable applicant for the Category 3 License. Woodlands will be eligible to apply for the Category 3 License in 2017. Therefore, the Board should be given the benefit to analyze the performance of the market as well as Woodlands' financial performance over the next couple of years and then revisit whether Woodlands should receive a Category 3 License, if they choose to reapply.

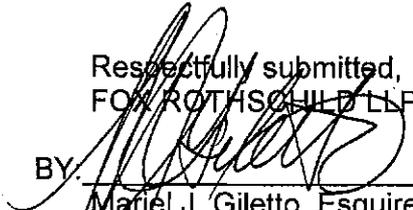
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<sup>47</sup> Woodlands' Hearing Transcript, pg. 94.

<sup>48</sup> See Amy Crawford, Nemacolin Relies on Foreign Guest Workers, Tribune Review, Oct. 3, 2010, at <http://m.tribeline.com>.

<sup>49</sup> Woodlands' Hearing Transcript, pg. 179, ll. 17-21.

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BY: 

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Dated: November 29, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of November 2010, a true and accurate copy of the foregoing brief in Support of Denial of the Category 3 License Application of Woodlands Fayette, LLC was served via Email and Federal Express delivery to the following addresses:

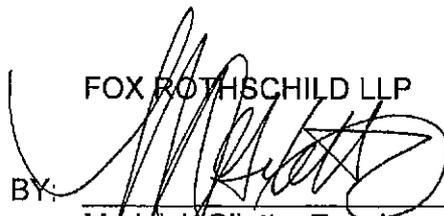
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