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DEMOCRATIC COMMITTEE ON APPROPRIATIONS

March 28, 2007

Via Hand Delivery

The Honorable Thomas A. Decker, Chairman
The Pennsylvania Gaming Control Board
Strawberry Square
5th Floor, Verizon Tower
Harrisburg, Pennsylvania 17101

Re: Implementation of Category 3 Licenses (Resort Licenses)

Dear Chairman Decker:

I have been directed to respond to your letter of March 21, 2007, inviting the submission of comments concerning the legislative history, intent and objective of Section 1305 of the Pennsylvania Race Horse Development and Gaming Act (Act 71). As you have correctly noted, certain qualifying criteria in this section of the Act are ambiguous. This was intentional – a purposeful effort to defer to the experienced judgement of the Board to implement Category 3 licenses in a manner that achieves an effective balance between the legislative objective of maximizing the revenue performance of Category 1 and 2 venues, and at the same time ensuring the financial viability of Category 3 facilities in established tourism venues.

The following is an account of the legislative history of Section 1305 (4 Pa.C.S.A. § 1305), and a response to each of the public policy questions raised in your letter.

Legislative History

The first time that the concept of “resort” gaming licenses was introduced during the development of Act 71 was in the Senate, as part of a comprehensive amendment to House Bill 2330, printer’s number 4272 (pages 50-52) on July 1, 2004. Though the concept was considered in various informal drafts that were circulated among House and Senate legislative staff, the statutory language that was amended into House Bill 2330 originated in the Senate as one of three distinct classes of slot machine licenses.

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The provisions of Section 1305 were based on the West Virginia statute authorizing the placement of slot machines at a “historic resort hotel” – in this case, the Greenbrier Resort in White Sulphur Springs, West Virginia. *See, e.g.*, WV St. § 29-25-1. Significantly, almost everyone of the Category 3 eligibility criteria in Section 1305 mirrors similar criteria in the West Virginia law. In particular:

- the requirement that an applicant possess a minimum number of rooms under “common ownership.” WV St. § 29-25-2(m).
- the requirement that an applicant possess “substantial recreational guest amenities.” *Id.*
- the requirement that an applicant resort hotel be “well-established”. WV St. § 29-25-1(b).
- the requirement that only a “registered overnight guest” may enter the gaming facility. WV St. § 29-25-24(a)(1).

Though Act 71 introduces additional elements of eligibility (such as requiring substantial recreational guest amenities to be available “year-round”) most of the provisions of Section 1305 parallels the statutory criteria in the West Virginia law. This comparison is rather significant because the intended legislative purposes are the same – the enhancement of guest amenities at established resort hotels in order to protect and enhance existing tourism venues.¹

Category 3 licenses were not considered in the state gaming market financial projections that guided the development of the system and statutory placement of licenses throughout the Commonwealth. This fact is particularly relevant to understanding the formation of Section 1305. The 2003 *Pennsylvania Slot Machine Facilities: Statewide Revenue Projections* study prepared for the Senate Democratic Appropriations Committee by the New Orleans based gaming consulting organization, The Innovation Group, conducted a thorough market analysis of the Commonwealth and made revenue projections based upon the strategic placement of 12 larger sized gaming venues. As a result of the 500 slot machine limitation and the restrictions on who may enter the gaming floor, Category 3 venues were not considered to be a significant source of revenue for local property tax relief. Rather, the primary purpose of Category 3 licenses were to provide an additional guest amenity to large year-round resorts in an effort to boost tourism at these established locations in the Commonwealth.

¹ *See*, WV St. § 29-25-1(b) (Legislative findings of the West Virginia law provide that it is in the state’s interest to “protect and enhance the tourism industry . . . by providing a resort hotel amenity which is becoming increasingly important to many actual and potential resort hotel patrons.”) *compare*, 4 Pa.C.S.A. § 1102(6) (Pennsylvania legislature declares that the “authorization of limited gaming is intended to enhance the further development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations in the Commonwealth.”).

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Accordingly, all policy considerations related to Category 3 licenses should be made with an understanding that the primary source of revenue for the various funding priorities outlined by the General Assembly in the Act are Category 1 and 2 facilities. Therefore, it is an important consideration of both the Act and the Board to ensure that Category 3 venues do not compete for the same customer base as the larger Category 1 and 2 facilities – hence the statutory milage restrictions on the location of the venue, eligibility to apply for a license, and the limitations on those persons who may enter the gaming floor.

“Well Established”

The inclusion of the phrase “well established” in Section 1305 was a purposeful attempt by the legislature to limit the pool of potential applicants for a Category 3 license to those resort hotels that pre-existed at the time of application. In other words, “well established” necessarily excludes those hotels that are purposefully built (or pledged to be built) in order to apply for a slots license. The term “well established” and “established” to repeatedly describe the type of resort hotel that can apply for a license was also borrowed from the West Virginia statute. WV St. § 29-25-1.

The phrase was included to ensure that only those resort hotels, that are economically viable without a slots facility, could apply to include this extra amenity for its patrons and overnight guests. “Well established” is not mere surplusage, but a purposeful attempt to ensure that the limited number of Category 3 venues would be allocated to only those resort hotels that are currently existing, and that the addition of a limited slots venue would enhance the established tourism market. These licenses are designed to boost existing tourism locations. The potential addition of a gaming floor at a resort hotel is intended as an enhancement for guests and area tourism – not the primary economic revenue generator for a non-established or financially struggling venue. A resort must be “well-established,” with a business history and track record in order to be eligible to seek a Category 3 license.

“Guest Rooms Under Common Ownership”

Section 1305 explicitly states that a Category 3 applicant must be a “well established resort hotel having no fewer than 275 guest rooms under common ownership.” (Emphasis added). Coupled with the condition that the resort hotel must be “well established” at the time of application, an applicant must have at least 275 guest rooms in order to be eligible to apply for a Category 3 license. Either the applicant has no fewer than 275 guest rooms at the time of application – or it does not. The plain language of the Act does not permit the construction of additional rooms at or following the time of application in order to qualify. The 275 room requirement is not a future target, it is a present measurement of qualification.

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Though the number of required guest rooms is clear, it is acknowledged that there exists an element of ambiguity as to the definition of a “guest room.” The Pennsylvania Rules of Statutory Construction dictate that unless clearly indicated otherwise, words and phrases are to be given their plain and ordinary meaning. 1 Pa.C.S.A. § 1903. Within the context of hotels or inns, a guest room is typically considered to be a partitioned part of a building made available for overnight accommodations to a person to whom hospitality is extended.² However, the term “guest room” should be construed within the context of Section 1305's mandate that all guest rooms of the resort hotel are to be under “common ownership.”

The element of “common ownership” has spawned the question as to whether or not timeshare apartments or facilities fall within the meaning of “guest rooms.” As a matter of state law, timeshare facilities are not customarily considered to be part of a hotel or inn. The Pennsylvania Innkeeper’s Rights Act is applicable to all resort hotels that provide overnight lodging for consideration to persons seeking temporary accommodations. 37 P.S. § 101, *et seq.* The Innkeeper Act sets forth certain rights for owners and operators of lodging establishments in the Commonwealth, in particular, it permits the conditional refusal of accommodations, a guest register requirement and the right to eject persons from the premises. *Id.* Significantly, in its definition of the type of “lodging establishments” that are extended innkeeper rights, time-share arrangements are explicitly excluded, as part of a hotel or inn. *See*, 37 P.S. § 102.

Additionally, the statutory requirement that all guest rooms are to be under “common ownership” precludes the consideration of facilities that are made available pursuant to timeshare agreements that may convey a property interest to persons other than the owners and operators of the resort hotel. In considering this matter, the Board would be well served to determine if, at the time of application, any timeshare room possesses transferable property interests, if they are insured or otherwise indemnified by persons who do not own and operate the applicant resort facility, or if a person who possess an interest in a timeshare property would also possess an interest in the proposed slots facility. The “common interest” provision is a clear statutory requirement by the General Assembly to restrict the type of resort facilities that can qualify for a Category 3 license.³

² *See, Webster's Ninth New Collegiate Dictionary* at 541 (1991) (definition of guest); at 1023 (definition of room).

³ It is worth restating that, like most of the licensing elements under Section 1305, the “common ownership” requirement was also borrowed from the West Virginia gaming statute. In that case, the Greenbrier resort exemplified the typical well-established resort hotel that possesses a large number of guest rooms under common ownership.

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“Substantial Year-Round Recreational Guest Amenities”

An additional licensing criteria for Category 3 applications is the requirement that the resort hotel possesses “substantial year-round recreational guest amenities.” 4 Pa.C.S.A. § 1305(a)(1). Although the Act does not define this term, the Board’s existing regulations provide guidance consistent with the legislative intention of the Act. 58 Pa.Code § 443.5. It is noted that the required amenities are not to be merely incidental to the resort hotel – rather they are required to be “substantial.” Consistent with the Act’s stated legislative objective of enhancing “year-round recreational and tourism locations in this Commonwealth,” (4 Pa.C.S.A. § 1102(6)) the requirement for applicant resort hotels to possess substantial year-round recreational guest amenities is a means of identifying established state tourism destinations for the placement of Category 3 licenses. It is worth repeating – the primary purpose of Category 3 Licenses was the enhancement of established tourism locations, not the financial justification for the creation of new resorts.

“Patron of the Amenities”

The language related to “patron of the amenities” and the definition thereof was an issue introduced by legislative House staff members. Its importance relates to the potential customer market of a Category 3 licensee – not its licensing criteria. Pursuant to Section 1305, only two types of individuals may use the gaming facilities at a resort hotel; registered overnight guests of the resort hotel and patrons of one or more of the amenities provided by the resort hotel. 4 Pa.C.S.A. § 1305(a)(1). The general public is not permitted to enter the gaming facility of the resort hotel.

Accordingly, there is a financial cost to a person who wants to enter the slot facility. That cost is either in the form of a night’s stay at the hotel, or the cost of using the amenities of the resort. This statutory restriction was included in order to ensure that the potential customer base of Category 3 Resort Hotels would be distinctly different from the customer base of Category 1 and 2 facilities. The revenue projections conducted by the legislature in its development of Act 71 did not take into account the revenue potential of Category 3 facilities as a result of their limited nature (500 slot positions). Instead, the Commonwealth relies upon the operational viability of Category 1 and 2 facilities to fund its revenue priorities. As a consequence, it is necessary to ensure that the operation of Category 3 licenses does not occur in a manner that cannibalizes the local gaming market.⁴

⁴ The statutory disfavor of unnecessary market competition is further evidenced by the detailed milage exclusion zones that surround each licensed gaming entity. *See, e.g.*, 4 Pa.C.S.A. §1305(b) (no Category 3 license shall be located within 15 linear miles of any other licensed facility).

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There have been various proposals that would permit a person to purchase a "resort membership" for a set fee, enabling the use of resort amenities (such as the ski slopes, swimming pool, health club, dining facilities, or hiking trails) and access to the gaming floor. Although this approach is neither contrary to the Act nor its legislative purpose, its impact on neighboring Category 1 and 2 facilities must be carefully considered. The Act specifically defines the use of "amenities" as being "non-de minimus." 4 Pa.C.S.A. § 1305(e). Accordingly, the longer the membership term, the less consideration is proportionally paid for each visit to the gaming floor during that term. For example, a yearly membership for a \$20 fee, would clearly be de minimus consideration if the patron were permitted entry onto the gaming floor for the entire year. By contrast, a person who paid a \$20 membership fee for a 48 hour access to the resort's amenities, including the gaming floor, would not be de minimus. It is appropriately within the Board's authority to determine how to define such membership programs within these parameters.

Conclusion

It is acknowledged that the provisions of Section 1305 related to the licensing and operation of Category 3 Resort Licenses contain an element of ambiguity. This was intentional. The consequence of this is to permit the Board the necessary regulatory flexibility to the implement the provisions of this section in a manner that enhances established tourist and recreational areas of the Commonwealth, and avoid cannibalization of the local gaming markets at the expense of Category 1 and 2 facilities.

It is sincerely hoped that this letter is responsive and useful to the Board's deliberations. Please do not hesitate to contact me if I may provide any additional information.

Sincerely,



Christopher B. Craig
Counsel

cc: All members of the Board
Anne Neeb, Executive Director
Frank Donaghue, Chief Counsel