STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WEST FLAGLER ASSOCIATES, LTD., d/b/a FLAGLER GREYHOUND TRACK, HARTMAN TYNER, INC. d/b/a HOLLYWOOD GREYHOUND TRACK, ST. PETERSBURG KENNEL CLUB d/b/a DERBY LANE and DAYTONA BEACH KENNEL CLUB, INC. d/b/a DAYTONA BEACH KENNEL CLUB,	)	
Petitioners,	)	
vs.	)	CASE NO. 96-3860RP
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Respondent.	)	
PPI, INC., d/b/a POMPANO PARK,	)	
Petitioner,	)	
vs.	)	CASE NO. 96-4093RP
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on September 18, 1996, in Tallahassee, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Don W. Davis.

APPEARANCES

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STATEMENT OF ISSUE

Whether proposed rules 61D-11.001(6), (7), (10), (12), (14) and (17); 61D-11.005(9), (10) and (11); 61D-11.007(1), (2) and (8); 61D-11.008(2), (5), and (7); 61D-11.009(2); 61D-11.012(5); 61D-11.017(4); and BPR Forms 16-002, 16-004, 16-005, and 16-007 constitute invalid delegations of legislative authority.

PRELIMINARY STATEMENT

This matter began when Petitioners challenged, pursuant to Section 120.54, Florida Statutes, the validity of certain proposed rules noticed by the Division of Pari-mutuel Wagering (Respondent) on August 9, 1996 in Volume 22, Number 32, Florida Administrative Weekly. The rules proposed by Respondent resulted from legislative enactment of Chapter 96-364, Laws of Florida, authorizing the operation of commercial cardrooms by pari-mutuel permitholders.

On August 20, 1996, Petitioners West Flagler Associates, Ltd., d/b/a Flagler Greyhound Track; Hartman Tyner, Inc., d/b/a Hollywood Greyhound Track; St. Petersburg Kennel Club, Inc., d/b/a Derby Lane; and Daytona Beach Kennel Club, Inc., d/b/a Daytona Beach Kennel Club filed a Petition For Administrative Determination Of The Invalidity Of Proposed Rules in Division of Administrative Hearings Case No. 96-3860RP.

On August 29, 1996, Petitioner PPI, Inc., d/b/a Pompano Park Racing, filed a Petition For Administrative Determination Of The Invalidity Of Proposed Rules in Division of Administrative Hearings Case No. 96-4093RP.

Both cases were consolidated and scheduled for final hearing on September 18, 1996.

At the final hearing, Petitioners presented the testimony of three witnesses and 21 exhibits of which 19 were admitted into evidence. Respondent presented testimony of one witness and requested official recognition of tapes and transcripts of the Florida House of Representatives; namely, the April 15, 1996 meeting of the Committee on Finance and Taxation, Subcommittee on Sales Tax regarding House Bill 1141, tape and transcript of the full committee meeting of the Committee on Regulated Industries on March 13, 1996, and staff analysis of House Bill 337. Respondent's request for official recognition of these documents is granted.

A transcript of the final hearing was filed with the Division of Administrative Hearings on September 23, 1996. Proposed final orders submitted by the parties have been reviewed and utilized in the preparation of this final order.

FINDINGS OF FACT

1. The 1996 session of the legislature enacted Chapter 96-364, Laws of Florida, 1996, which created, effective January 1, 1997, Section 849.086, Florida Statutes. Section 849.086, Florida Statutes, authorizes pari-mutuel permitholders which meet certain conditions to operate cardrooms on those days when live racing is conducted at their respective pari-mutuel facilities.

2. Section 849.086(1), Florida Statutes, sets forth the legislative intent with regard to cardroom facilities and reads as follows:

> Legislative Intent.--It is the intent of the Legislature to provide additional entertainment choices for the residents of and visitors to the state, promote tourism in the state, and provide additional state revenues through the authorization of the playing of certain games in the state at facilities known as cardrooms which are to be located at licensed pari-mutuel facilities. To ensure the public confidence in the integrity of authorized cardroom operations, this act is designed to strictly regulate the facilities, persons, and procedures related to cardroom operations. Furthermore, the Legislature finds that authorized games as herein defined are considered to be pari-mutuel style games and not casino gaming because the participants play against each other instead of against the house.

3. Respondent is the agency granted regulatory authority with regard to cardroom operation pursuant to a grant of rulemaking power set forth in Section 849.086(4)(a)-(f), Florida Statutes as created by Section 20 of Chapter 96-364, Laws of Florida, 1996. Section 849.086(4)(a)-(f), Florida Statutes, reads as follows:

> Authority of Division. - The Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation shall administer this section and regulate the operation of cardrooms under this section and the rules adopted pursuant thereto, and is hereby authorized to:
>
> (a) Adopt rules, including, but not limited to: the issuance of cardroom and employee licenses for cardroom operations; the operation of a cardroom; recordkeeping and reporting requirements; and the collection of all fees and taxes imposed by this section.
>
> (b) Conduct investigations and monitor the operation of cardrooms and the playing of authorized games therein.

(c) Review the books, accounts, and records of any current or former cardroom operator.

(d) Suspend or revoke any license or permit, after hearing, for any violation of the provisions of this section or the administrative rules adopted pursuant thereto.

(e) Take testimony, issue summons and subpoenas for any witness, and issue subpoenas duces tecum in connection with any matter within its jurisdiction.

(f) Monitor and ensure the proper collection of taxes and fees imposed by this section. Permitholder internal controls are mandated to ensure no compromise of state funds. To that end, a roaming division auditor will monitor and verify the cash flow and accounting of cardroom revenue for any given operating day.

4. Respondent is also provided additional rulemaking authority with regard to cardrooms through Section 21 of Chapter 96-364, Laws of Florida, 1996, which amended and added subsections (12) and (13) to Section 550.0251, Florida Statutes. Those subsections read as follows:

(12) The division shall have full authority and power to make, adopt, amend, or repeal rules relating to cardroom operations, to enforce and to carry out the provisions of s. 849.086, and to regulate the authorized cardroom activities in the state. The division is authorized to adopt emergency rules prior to January 1, 1997, to implement the provisions of s. 849.086.

* * *

(13) The division shall have the authority to suspend a permitholder's permit or license, if such permitholder is operating a cardroom facility and such permitholder's cardroom license has been suspended or revoked pursuant to s. 849.086.

The Term "Pot"

5. Proposed rule 61D-11.001(l2) provides:

'Pot' means the total amount wagered in a hand or round of cards which shall not exceed $10.00 in chips or tokens.

6. Respondent asserts that statutory authority for this rule is Section 849.085(2)(a) and Section 849.086(8)(b), Florida Statutes, which read respectively as follows:

'Penny-ante game' means a game or series of games of poker, pinochie, bridge, rummy,

> canasta, hearts, dominoes, or mah-jongg in which the winnings of any player in a single round, hand or game do not exceed $10 in value.
>
> * * *
>
> The winnings of any player in a single round hand or game may not exceed $10 in value. The fee charged by the cardroom for participation in the game shall not be included in the calculation of the limitation on the pot size provided in this paragraph.

7. The cardroom act does not set forth a definition of the term "pot", nor does Section 849.085(2)(a), Florida Statutes, contain a pot limit.

8. The statutory language is unambiguous: The "winnings of any player in a single round, hand, or game may not exceed $10 in value." The limitation on winnings is further referenced in the language of Section 849.086(8)(b), Florida Statutes, excluding "the calculation of the limitation on the pot size" from the $10 winnings limitation by any player.

9. Respondent acknowledges that its construction of Section 849.086(8)(b), and Section 849.085(2)(a), Florida Statutes, requires that the term "any player" be construed to mean "all players", contrary to the clear statutory wording. This same agency construction, applied to Section 849.086(8)(b), Florida Statutes, renders meaningless the term "the calculation of" the limitation on pot size which term exists because pot size will vary, i.e. when multiple winner card games are played.

10. The impropriety of Respondent's definition of the term pot to include an improper limit of $10 in terms of amounts wagered is demonstrated by the game of Hi-Lo Seven Card Stud, a form of poker set forth in Hoyle's Modern Encyclopedia Of Cardgames in which there are two separate and distinct winners, the high winner and the low winner. These two separate and distinct winners each may win $10 or less, though the total pot size limit calculated in accordance with the rules of such game may equal but not exceed $20. Respondent's proposed rule 61D-11.002(2), which is unchallenged, authorizes cardgames to be played in a manner set out in Hoyle's Modern Encyclopedia of Cardgames.

11. Cardroom operators are also authorized by the cardroom act to charge a "rake" which is defined as a set fee or percentage of the pot assessed by the cardroom operator for providing the services of the dealer, table, or location for playing the authorized game. Section 849.086(2)(k), Florida Statutes. Where the cardroom operator charges a rake as a percentage of the pot, the amount wagered in a game such as Seven Card Stud may exceed $10, as demonstrated by Petitioners' Exhibit 1 in which such a game was conducted with the cardroom operator charging a rake as a percentage of the pot. The amount wagered inclusive of the rake may exceed $10, but the pot available for the winner at the end of the game after deduction of the rake is $10.

12. As established by testimony of Petitioners' expert at the final hearing and Petitioner's exhibit 1, dealers are trained to specifically control the pot size through such practices as the placement of bets by players in front of their cards. Bets are moved into the pot only by the dealers. The stacking of chips in easily observable and countable $l stacks and in rows of 5 assists

the dealer who stops bets where, if all remaining players bet, the $10 per player winnings limit would be exceeded. This precludes a situation from arising in which chips not accounted for as rake or as winnings within the $10 "winnings of any player" limitation are in the pot at anytime during the game.

13. Section 849.086(8)(a), Florida Statutes, provides that the calculation of the limitation on pot size is dependent on the "winnings of any player in a single round, hand or game" not exceeding $10.

14. Respondent's definition of the term "pot" in proposed rule 61D-11.001(12) as an absolute maximum amount of $l0 based on wagers, rather than a limitation on the winnings of card games with multiple winners, or winnings of any player in a single round, hand, or game, exclusive of the percentage rake that may be charged, is found to be without statutory authority and is arbitrary and capricious.

The Terms "Game", "Hand", and "Round"

15. Proposed rule 61D-11.001(6) provides:

> 'Game' means a card game which results in a winner who achieves a desired result required to win a pot not to exceed $10.00 in chips or tokens.

16. Proposed rule 61D-11.001(7) provides:

> 'Hand' means a single game of cards, one deal of cards to each player based on the rules of the game, resulting in a winner of a pot not to exceed $10.00 in chips or tokens.

17. Proposed rule 61D-11.001(14) provides:

> 'Round' means a cycle of bets made by the players following the deal of the cards and resulting in a player winning the pot which shall not exceed $10 in chips or tokens.

18. Respondent includes the same $10 pot limitation in the challenged definition of the term "game" found in proposed rule 61D-11.001(6);"hand" found in proposed rule 61D-11.001(7); and "round" found in proposed rule 61D-11.001(14). Upon the same findings noted above relative to the definition of "pot", such rules are found to be in excess of Respondent's statutory authority and are arbitrary and capricious.

19. Additionally, Section 849.086(8)(a), Florida Statutes, has defined authorized games to mean those games "authorized by s. 849.085(2)(a)". In turn, Section 849.085(2)(a), Florida Statutes, includes non-card games within the definition of authorized games, i.e. dominoes and mah-jongg. Consequently, Respondent's limitation of the term "game" to only cardgames is found to be in excess of the statutory authorization and is arbitrary and capricious.

20. The term "round" means the cycle of bets in a single game and there may be several cycles of bets in a single game, a fact conceded by Respondent. This was demonstrated by Petitioners' Exhibit 1 in the playing of Seven Card

Stud - one winner. While the winner of such game received $10, the winnings were based on several cycles of bets conducted over the course of the single game. Respondent has artificially restricted the term "round" to a cycle of bets following the deal of the cards with such single cycle resulting in a player winning a pot of $10 or less. Respondent's rule definition in proposed rule 61D-11.001(14) limits statutorily authorized activity, exceeds the Respondent's statutory authority and is arbitrary and capricious.

The Term "Jackpot"

21. Proposed rule 61D-11.001(10)(b) defines the term "jackpot" to mean:

> (a) Any amount wagered in a round, hand, or game in excess of $10 in value paid out to a player or players once a desired result is achieved;
> (b) Any amount wagered in a round, hand, or game in excess of $10 in value which is accumulated and paid out to a player or players once a desired result is achieved; or
> (c) Any prize or cash award in excess of $10 in value paid out to a player or players once a desired result is achieved.

22. A "jackpot" in the context of cardrooms occurs when the house deducts from each hand played a certain amount which is accumulated over many hands and is placed in a separate jackpot fund and paid out when there is a defined occurrence such as a player achieving a royal flush.

23. The definition of jackpot in 61D-11.001(10)(a) is in substance and effect the same definition as the term "pot" found in proposed rule 61D-11.001(12). This definition would preclude the playing of the authorized game Hi-Lo Seven Card Stud in which the winnings of two separate and distinct players are $10 but in excess of $10 in the aggregate.

24. Proposed rule 61D-11.001(10)(a) is found, on the basis of the same findings set forth relative to Respondent's definition of "pot" in proposed rule 61D-11.001(12), to exceed Respondent's statutory authority and to be arbitrary and capricious.

25. The definition of jackpot set forth in proposed rule 61D-11.001(10)(b) would preclude the playing of the authorized game of Hi-Lo Seven Card Stud where the amount wagered is accumulated over several betting cycles prior to the winners being declared with the amount awarded to each winning player being $10 or less but with the aggregate amount awarded to all players exceeding $10 in value.

26. Upon the same findings set forth relative to the Division's definition of the term "pot", proposed rule 61D-11.001(10)(b) is found to exceed Respondent's statutory authority and is arbitrary and capricious.

27. Likewise, the definition of jackpot set forth in proposed rule 61D-11.001(10)(c) is reasonably susceptible to an interpretation that would preclude the playing of the authorized game of Hi-Lo Seven Card Stud in which there are two separate and distinct winners of $10 or less but with winnings of more than $10 in the aggregate. Again, upon the same findings set forth relative to

Respondent's definition of the term "pot", proposed rule 61D-11.001(10)(c) is in excess of statutory authority and is arbitrary and capricious.

The Term "Tournament"

28. Proposed rule 61D-11.001(l7) provides:

> 'Tournament' means any competition involving more than one round, hand, or game where the winner of the competition or the runners-up receive any prize or cash award in excess of $10 in value.

29. The cardroom statute, Section 849.086(2)(a), Florida Statutes, defines "authorized games" as those games authorized by Section 849.085(2)(a), Florida Statutes. In turn, Section 849.085(2)(a), Florida Statutes, provides:

> 'Penny-ante game' means a game or series of games of poker in which the winnings of any player in a single round, hand or game do not exceed $10 in value.

30. Section 849.085(2)(a), Florida Statutes, does not require that the winnings of the player be paid at the conclusion of each single round, hand, or game nor does it require that the player have "won" such single round, hand or game. Further, Section 849.085(2)(a), Florida Statutes, imposes no limit on pot size. The statute does, however, only authorize those winnings which do not exceed $10 in value.

31. Petitioners' expert testified at final hearing to the circumstance of a group of players that pay an entry fee, receive tournament chips, play a specific number of hands of cards and at the end of the designated number of hands the winner or winners who hold the most chips will receive funds which total an amount in excess of $10 but do not exceed $10 per hand played throughout the tournament.

32. The proposed rule and Section 849.085(2)(a), Florida Statutes, clearly permit only $10 payments to game winners. Under the scenario to which Petitioner's expert testified, payments are made at the conclusion of the tournament, in amounts which exceed that authorized by the cardroom statute. Consequently, it is found that such results provide no basis to determine that Respondent's proposed rule 61D-11.001(17), defining the term tournament, is invalid.

Prohibitions

33. Proposed rule 61D-11.005(9) provides:

> Tournaments and jackpots are prohibited.

34. Proposed rule 61D-11.005(9) is found to be in excess of Respondent's statutory authority and arbitrary and capricious only in regard to the prohibition of jackpots. This finding is made on the basis of those findings noted above relating to invalidity of the definition of "Jackpot" in proposed rule 61D-11.001(10).

35. Proposed rule 61D-11.005(10) provides:

An accumulation of $10 values based upon the actual number or an average number of rounds, hands, or games played during a competition where the winner of the competition and the runners up receive the accumulated amount, a portion thereof, or the prize representing the accumulated amount or a portion thereof is prohibited.

36. On the basis of findings noted above relative to proposed rule 61D-11.001(17), which defines the term "tournament", proposed rule 61D-11.005(10), is not in excess of Respondent's statutory authority and is not arbitrary and capricious.

37. Proposed rule 61D-11.005(11) provides:

> No amount wagered by a player, ante, or participation fee collected by the house shall be accumulated into a pool for purposes of paying out the accumulated amount once a desired result is achieved by a patron or patrons.

38. On the basis of findings previously set forth relating to proposed rule 61D-11.001(10), the definition of "jackpot" and in particular subsection (10)(b), the prohibition of proposed rule 61D-11.005(11) that no amount wagered may be accumulated even within a single hand or game, is in excess of Respondent's statutory authority and is arbitrary and capricious.

Ordinance Requirement

39. Proposed rule 61D-11.007 provides in pertinent part:

> (1) A licensed pari-mutuel permitholder desiring to operate a cardroom must submit to the Division proof that the county commission of the county which the permit-holder intends to operate the cardroom has passed an ordinance approving cardroom operations. The proof of the passage of a county ordinance shall consist of a copy of the certified ordinance as filed with the Secretary of State. The effective date of the ordinance shall be upon filing with the Secretary of State or later if so prescribed.
> (2) If a cardroom ordinance is repealed or amended, the effective date of the repeal or amendment shall be upon filing with the Secretary of State or later if so prescribed. If the cardroom ordinance is repealed, cardroom operation shall be ceased upon the effective date of repeal.
> * * *
> (8) An applicant for an annual cardroom license shall complete a cardroom license application, BPR Form 16-002 . . .

40. BPR Form 16-002 is entitled Permitholder Application for Annual License to Operate a Cardroom. Question 10 of this form provides, "If this is your initial cardroom operator license application, enclose a copy of the certified ordinance as filed with the Secretary of State."

41. Respondent contends that its authority to promulgate this rule is derived from the provisions of Section 849.086(16), Florida Statutes, which provides:

> County Commission Approval -- The Division of Pari-Mutuel Wagering shall not issue any license under this section except upon proof in such form as the Division may prescribe that a majority of the county commissioners in the county where the applicant for such license desires to conduct cardroom gaming has voted to approve such activity within the county.

42. Respondent acknowledges that Section 849.086(16), Florida Statutes, does not expressly require the adoption of an ordinance by a county commission.

43. Respondent's position is that the phrase "except upon proof in such form as the Division may prescribe" provides the unlimited power or authority to require the local government approval to be in a form Respondent may desire, here the adoption of an ordinance. This is as opposed to the statutory language which requires the applicant to report the means of local approval in a manner (form) acceptable to Respondent.

44. In the analogous statutes governing municipalities, the factual distinction between a resolution and an ordinance is set forth in Section 166.041(1)(a) and (b), Florida Statutes:

> (a) 'Ordinance' means an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law.
>
> * * *
>
> (b) 'Resolution' means an expression of a governing body concerning matters of administration, an expression of a temporary character, or a provision for the disposition of a particular item of the administrative business of the governing body.

45. Section 849.086(16), Florida Statutes, requires only that a majority of the county commissioners in the county where the applicant proposes to conduct cardroom activity vote to approve that activity within the county. Neither Section 849.086(16), Florida Statutes, nor any other provision of the cardroom act authorize a county commission to exercise any regulatory jurisdiction or control enforceable as a local law over the operation of cardrooms. This authority instead is vested in Respondent. Consequently, as a matter of law, Respondent's authority to designate the form which approval may take is not a grant of authority to dictate the means of passage of substantive legislation by a county commission and the proposed rule's attempt to do so through the requirement of ordinance passage exceeds Respondent's authority.

46. Section 125.01(1)(t), Florida Statutes, provides:

> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:
>
> * * *
>
> (t) Adopt ordinances and resolutions necessary for the exercise of its powers and prescribe fines and penalties for the violation of ordinances in accordance with law.

47. The adoption of a resolution approving cardrooms by a county commission is not, as a matter of law, inconsistent with the provisions of Section 849.086(16), Florida Statutes.

48. Dade County adopted a resolution, by unanimous vote of all the county commissioners, approving the conduct of cardrooms and all activities authorized by Section 849.086, Florida Statutes, within the County. A certified copy of this resolution was received in evidence at the final hearing. Respondent's representative acknowledged that there is no better proof of the adoption of such a resolution then a certified copy of the resolution. There is, as a matter of law, no element of proof of the approval required by Section 849.086(16), Florida Statutes, that is not reflected in the Dade County resolution approving cardrooms.

49. Proposed rule 61D-11.007(1), (2) and that portion of (8) and of BPR Form 16-002 which seek to impose the ordinance requirement are in excess of Respondent's statutory authority and are arbitrary and capricious.

Cardroom Business Occupational License

50. Proposed rule 61D-11.008(2) provides:

> (2) A corporation, general or limited partnership, sole proprietorship, business trust, joint venture, or unincorporated association, or other business entity may not be issued or hold a cardroom business occupational license in this state if any one of the persons or entities specified in paragraph (a) has been determined by the Division not to be of good moral character, to have filed a false report to any government agency, pari-mutuel wagering or gaming commission or authority, or has been convicted of any offense specified in paragraph (b).
>
> (a) 1. The cardroom business occupational license;
>
> 2. An employee of the licensee;
>
> 3. The sole proprietor operating under the license;

4. A corporate officer or director of the licensee;
5. A general partner of the licensee;
6. A trustee of the licensee;
7. A member of an unincorporated association of the licensee;
8. A joint venturer of the licensee;
9. The owner of more than 5 percent of any equity interest in the licensee, whether as a common shareholder, general or limited partner, voting trustee, or trust beneficiary; or
10. An owner of any interest in the licensee, including any immediate family member of the owner, or holder of any debt, mortgage, contract, or concession from the licensee, who by virtue thereof is able to control the business of the licensee.
(b) 1. A felony or misdemeanor involving forgery, larceny, extortion, or conspiracy to defraud, in this state or any other state or under the laws of the United States.
2. A felony or misdemeanor set forth in s. 550.105, Florida Statutes.

51. Proposed rule 61D-11.008(2) is, as Respondent's Director has acknowledged, an almost verbatim copy of Section 550.1815(1), Florida Statutes, which authorizes Respondent to determine whether applicants for a pari-mutuel wagering permit are of good moral character. Pursuant to Section 849.0866(5), Florida Statutes, only the holder of such a pari-mutuel wagering permit may be licensed to operate a cardroom.

52. It is found, as a mixed question of law and fact, that Respondent is authorized to seek good moral character information as part of the application process. Specifically, Section 849.086(6)(f), Florida Statutes, incorporates the provisions of Section 550.105(9), Florida Statutes, as follows:

> (f) The division shall promulgate rules regarding cardroom occupational licenses. The provisions specified in s. 550.105(3),(4),(5),(6),(7) and (9) relating to licensure shall beapplicable to cardroom occupational licenses.

Section 550.105(9), Florida Statutes, provides that Respondent may seek ". . . any information [Respondent] determines is necessary to establish the identity of the applicant or to establish that the applicant is of good moral character."

53. Proposed rule 61D-11.008(2) is not in excess of Respondent's statutory authority, does not vest unbridled discretion in Respondent and is not arbitrary and capricious.

54. Similarly, it is found as a matter of law and fact that proposed rule 61D-11.008(5) which requires an FDLE fingerprint processing and criminal records check fee "for each person or entity as specified in paragraph (2)(a)" of the rule is supported by Section 849.086(6)(f), Florida Statutes, which incorporates the provisions of Section 550.105(9), Florida Statutes, and is not in excess of

the Division's statutory authority, does not vest unbridled discretion in Respondent and is not arbitrary and capricious.

55. Proposed rule 61D-11.008(7) requires that:

> An applicant for an annual cardroom business occupational license shall complete a cardroom business occupational license application, BPR Form 16-004, and submit the $250.00 fee for an annual cardroom business occupational license.

56. Proposed rule 61D-11.008(7) is supported by provisions of Section 849.086(4), and (6), Florida Statutes, which incorporates the provisions of Section 550.105(9), Florida Statutes, and is not in excess of the Division's statutory authority, does not vest unbridled discretion in Respondent and is not arbitrary and capricious.

Cardroom Employee Occupational License

57. Proposed rule 61D-11.009(2) provides:

> All applicants for a . . . cardroom employee occupational license, shall complete a cardroom employee occupational application BPR Form 16-005. . .

58. BPR Form 16-005 consists of two forms, the Cardroom Employee Occupational License Application and the Request for Release of Information and Authorization to Release information forms.

59. BPR Form 16-005, the Cardroom Employee Occupational License Application in question 14 requires that the applicant provide a complete listing of all addresses where the applicant has resided during the last five years under penalty that the application may be denied or the license revoked based upon any misstatements or omissions in the application.

60. As previously noted, Section 550.105(9), Florida Statutes, adopted by Section 849.086(6)(f), Florida Statutes, authorizes Respondent to require an applicant to provide Respondent with any information deemed necessary by Respondent "to establish the identity of the applicant or to establish that the applicant is of good moral character."

61. Despite Petitioners' concerns that cardroom employee occupational license applicants are expected to be highly transient and that such individuals should not be required to execute the proposed rule's release of information form, proposed rule 61D-11.009(2) and the subject BPR Form 16-005 is supported by Respondent's authority in Section 550.105(9), Florida Statutes, as adopted by Section 849.086(6)(f), Florida Statutes, and is not in excess of statutory authority or arbitrary and capricious.

Electronic Surveillance

62. Proposed rule 61D-11.012(5) provides:

> (5) Cardroom operators shall install electronic surveillance equipment to record

> all gaming activity. The surveillance equipment must provide a cover ratio of one camera per four tables and to record all activity in the cardroom bank and cage and count area. Surveillance cameras and monitors shall be able to record and observe in color or black and white.
>
> (a) Cameras must have the capability to zoom in on specific card table(s) and record card table activity.
>
> (b) Tapes shall be labeled in chrono-logical order by date and time.
>
> (c) Tapes of surveillance records shall be maintained for a period of no less than 14 days. Tapes shall be kept for a longer period of time if requested by the Division or any law enforcement agency.

63. As established by testimony of Terry Fortino, Petitioners' expert in poker cardroom management and operations, many cardrooms, similar to the low stakes games operations contemplated by the cardroom act, do not have cameras on the tables for the reasons that the poker players, dealers and floor managers police the game and the house's money is not at risk.

64. Respondent has made no cost benefit analysis regarding electronic surveillance requirements of the proposed rule. Respondent's representative at the final hearing has never viewed or had demonstrated a surveillance tape that complies with the one camera per four table ratio. Under such an arrangement, people's backs will always be to the camera and at best there will only be limited coverage lacking in detail.

65. While the cameras must have the capabilities to zoom in on a specific card table, the proposed rule is silent as to how such zoom capability would be activated. The pan and tilt feature that enables the camera to zoom in on a table is manually operated. Unless somebody is physically present to monitor a video screen and to operate the pan and tilt controls, the zoom feature is effectively meaningless.

66. The proposed rule's requirement of surveillance by one camera for every four tables is stated to be for the the purpose of obtaining evidence should Respondent desire to take licensing action against a dealer or cardroom operator. Notably, no electronic surveillance has ever been required in the pari-mutuel industry yet Respondent has routinely taken licensing action absent video tapes.

67. Pursuant to Section 849.086(4)(e), Florida Statutes, Respondent is empowered to take testimony, issue subpoenas and subpoenas duces tecum in connection with any matter within its jurisdiction. Section 849.086(4)(f), Florida Statutes, specifically authorizes Respondent to:

> Monitor and ensure the proper collection of taxes and fees imposed by this section. Permitholder internal controls are mandated to ensure no compromise of state funds. To that end, a roaming division auditor will

> monitor and verify the cash flow and accounting of cardroom revenue for any given operating day.

68. Section 849.086, Florida Statutes, contains no requirement that electronic surveillance, or any other form of ongoing monitoring of the activities of cardroom players, be provided by a cardroom operator.

69. Daniel Riley, Petitioners' expert in electronic surveillance equipment in the gaming industry, while noting that less expensive fixed camera electronic surveillance of the bank, count area and cages in cardrooms could prove beneficial, projected the cost of providing only the electronic surveillance equipment required by Respondent's proposed rule at $15,320 for four tables and $27,820 for 20 tables.

70. Steven Hlas, Petitioner's expert in pari-mutuel facility management and operation, testified that the cost of providing the proposed rule's required surveillance equipment together with the necessary construction costs, electrical and cable installations and personnel approximated $3,200 per cardroom table seating eight players and that Petitioner Derby Lane's expected cost with 25 cardroom tables was approximately $80,000.

71. The provisions of proposed rule 61D-11.012(5) exceed Respondent's statutory authority, are arbitrary and capricious and impose regulatory costs on the regulated entities which can be reduced or eliminated by the adoption of less costly alternatives that substantially accomplish the statutory objectives, i.e. Respondent's implementation of its statutorily prescribed auditing function by "a roaming division auditor" to "monitor and verify the cash flow" of cardroom revenue.

Admissions and Player Count

72. Proposed rule 61D-11.017(4) reads as follows:

> Each cardroom operator shall file with the Division admission information on BPR form 16-007. Any cardroom operator that wishes to charge admission fees shall notify the Division in writing at least 2 working days prior to the effective date of such change via facsimile.

73. Proposed rule 61D-11.018(2) reads as follows:

> Every licensed cardroom operator shall file BPR Forms . . . 16-009. . . with the Division by the fifth day of each calendar month for the preceding calendar month's cardroom activity.

74. Taxes are collected with regard to cardroom wagering in two ways. Ten percent of the cardroom operation's monthly gross income, and fifteen percent (or 10 cents, whichever is greater) of the admission charge for entrance to the cardroom, if any. Section 849.086(13)(a) and (b), Florida Statutes. Respondent is required to monitor and ensure the proper collection of taxes and fees. Section 849.086(4)(f), Florida Statutes.

75. Respondent is also called upon by the legislature to generate tax revenue projections for the Revenue Estimating Conference and to supply information to public officials, the industry and the general public regarding the pari-mutuel industry. Further, Respondent will be developing a statistical model to permit it to determine if the correct amount of taxes are being paid to the State, as well as developing essential tax revenue projections.

76. Under the proposed rules, Respondent requires cardroom operators to report statistics regarding the number of persons admitted to the cardroom at each facility, and the number of persons participating in the cardroom games at each facility.

77. Reporting of the number of persons admitted to the cardroom facility is required, regardless of whether a cardroom operator is charging separate admissions fees for the cardroom portion of the pari-mutuel facility, in order to verify and corroborate the cardroom operator's figures regarding the number of people actually gambling. Unlike pari-mutuel racing wagering which operates with a "Totalizator" tracking every individual wager, there is no method of recording individual wagers in the cardroom.

78. Proposed rule 61D-11.017(4) and its requirement of a filing of BPR Form 16-007 is not in excess of Respondent's statutory authority, is not arbitrary and capricious and does not appear to impose excessive regulatory costs on the regulated entity.

79. Proposed rule 61D-11.018(2) requires a cardroom operator to file BPR Form 16-009. This form in turn requires the cardroom operator to report not just the collection of fees or rakes but also the actual number of players to have played at each table during the period of time in which the fees or rakes were collected.

80. Requirements of proposed rule 61D-11.018(2) and BPR Form 16-009 are not in excess of Respondent's statutory authority, are not arbitrary and capricious and do not appear to impose regulatory costs on the regulated entity which could be eliminated by less costly alternatives that substantially accomplish the statutory objective.

Stipulated Facts

81. Petitioners have standing to challenge the proposed rules at issue in this proceeding.

CONCLUSIONS OF LAW

82. The Division of Administrative Hearings has jurisdiction over this subject matter and the parties to this action pursuant to Section 120.57(1), Florida Statutes.

83. Section 120.536(3), Florida Statutes, enacted by Section 9 of Chapter 96-159, Laws of Florida, provides all proposed rules filed with the Department of State on or after October 1, 1996 must be based on rulemaking authority no broader than permitted by such statute. This statute, in subsection (1), limits the rulemaking authority of an agency as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be

> implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

84. Section 120.536, Florida Statutes, is applicable to the instant matter since the proposed agency rules will be filed with the Secretary of State after October 1, 1996. Section 120.54(3)(e), Florida Statutes.

85. The definition of an invalid exercise of delegated legislative authority is set forth in Section 120.52(8) which provides:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious;
>
> (f) The rule is not supported by competent substantial evidence; or
>
> (g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

86. Relative to proposed rule 61D-11.001(12), defining the term "pot" on the basis of wagers rather than winnings, the proposed rule is found to be without statutory authority and is arbitrary and capricious.

87. The same ten dollar wager limitation on the pot in the challenged definition of "game" in proposed rule 61D-11.001(6); in the definition of "hand" found in proposed rule 61D-11.001(7); and in the definition of "round" in proposed rule 61D-11.001(14) is also found to be without statutory authority and is arbitrary and capricious, resulting in invalidity of these proposed rules.

88. Proposed rule 61D-11.001(10)(a),(b), and (c), which seeks to restrict the term "Jackpot" on the basic premise that a pot may not exceed ten dollars and that wagers are restricted to that amount, is also found to be without statutory authority and is arbitrary and capricious, resulting in invalidity of these proposed rules.

89. Proposed rule 61D-11.005(9) is found to be partially in excess of Respondent's authority, arbitrary and capricious, and invalid only with regard to prohibition of jackpots.

90. Proposed rule 61D-11.005(11) that no amount wagered may be accumulated within a hand or game is found to be in excess of Respondent's authority, and arbitrary and capricious.

91. Proposed rule 61D-11.007(1), (2), that portion of (8), and BPR Form 16-002 which seeks to require an ordinance from a local government approving authorized cardroom activity, as opposed to merely addressing the form of approval, exceed Respondent's statutory authority and are considered arbitrary and capricious.

92. Provisions of proposed rule 61D-11.012(5), requiring electronic surveillance, are invalid since the provisions are arbitrary, capricious and impose concomitant regulatory costs which can be reduced or eliminated by less costly alternatives.

93. The proof presented at final hearing fails to establish invalidity of the remainder of the challenged rules.

ORDER

Based upon the foregoing findings of fact and conclusions of law, proposed rules 61D-11.001(6), 61D-11.001(7), 61D-11.001(10), 61D-11.001(12), and 61D-11.001(14); 61D-11.005(9) only as to jackpots, and 61D-11.005(11); 61D-11.007(1), 61D-11.007(2), the portion of 61D-11.007(8) and Question 10 of BPR Form 16-002 which impose an ordinance requirement upon county government; and 61D-11.012(5) are hereby found to be invalid exercises of delegated legislative authority.

DONE AND ORDERED this 24th day of October, 1996, in Tallahassee, Florida.

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Administrative Law Judge
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NOTICE OF RIGHT TO APPEAL

A Party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of the notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.