STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FT. MYERS REAL ESTATE HOLDINGS, LLC,	)	
Petitioner,	)	
vs.	)	Case No. 11-1495
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice to all parties, the initial portion of the final hearing in this matter was conducted on June 24 and 25, 2011, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

This case has been bifurcated (as described more fully below). The issues in the present portion of this case are as follows:

1. Whether Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), engaged in undue or unreasonable delay in processing Petitioner, Ft. Myers Real Estate Holdings, LLC's ("Ft. Myers"), application for a quarter horse racing permit.

2. Whether the Division repeatedly denied Ft. Myers' application for a quarter horse racing permit.

3. Whether the Division denied Ft. Myers' petitions for hearing for the purpose of ensuring application of the new law, effective July 1, 2010, that made quarter horse racing permit applications subject to the limitations contained in section 550.554, Florida Statutes (2010).[1/]

PRELIMINARY STATEMENT

Ft. Myers filed an application for issuance of a quarter horse racing permit with the Division, which the Division determined failed to meet the statutory criteria required for

issuance of a permit set forth in section 550.334(1), Florida Statutes (2008). The Division issued a notice of denial of Ft. Myers' application on January 13, 2009. Ft. Myers filed two petitions for hearing on the permit denial. The Division determined that the first petition was non-compliant with Florida Administrative Rule 28-106.210(2), and it was dismissed with leave to amend. The Division dismissed Ft. Myers' amended petition with prejudice for lack of standing. Ft. Myers successfully appealed the Division's denial of the amended petition. The petition was then remanded to the Division of Administrative Hearings to conduct a formal proceeding under section 120.57(1), Florida Statutes.

The parties then sought an initial determination as to whether the current law or the law in effect at the time of Ft. Myers' initial application for a permit would apply to this case. The proceeding was bifurcated to allow for a determination of that issue based, in large part, on application of the exceptions from Lavernia v. Department of Professional Regulation, 616 So. 2d 53 (Fla. 1st DCA 1993), as set forth in Medsport Laboratory, Inc., Department of Agriculture and Consumer Service, 1997 WL 1053370 (Fla. Div. of Admin. Hear.). The issue of bad faith addressed in those cases was not to be included in this initial bifurcated portion of the final hearing.

At phase one of the bifurcated final hearing, Ft. Myers called the following witnesses: David Roberts, former director of the Division; David Romanik, manager of Ft. Myers; Joseph Helton, chief legal counsel for the Division; and Charles Collette, attorney. Petitioner's Exhibits 1 through 45 were admitted into evidence.

The Division called Joseph Barnes, investigative specialist for the Division and rested its case-in-chief. The Division's Exhibits 1 through 11 were admitted into evidence.

A transcript of the final hearing was ordered by the parties. The Transcript was filed at the Division of Administrative Hearings on July 18, 2011; the record remained open for the filing of a transcript from a deposition taken after the final hearing. Upon filing of the deposition Transcript on July 21, 2011, and a Notice of Completion from the parties, the record in this case was deemed complete on July 25, 2011. By rule, the parties were allowed ten days, i.e., up until August 4, 2011, to submit proposed recommended orders. Each party timely submitted a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ft. Myers is a Florida limited liability company established for the purpose of obtaining a permit to own and

operate a quarter horse racing facility in the State of Florida. It is further the intent of Ft. Myers to operate as a pari-mutuel wagering facility in any fashion allowed by law.

2. The Division is the state agency responsible for reviewing and approving applications for pari-mutuel wagering permits, including quarter horse racing facility permits.

3. In January 2009, Ft. Myers filed an application (the "Application") seeking a permit to build and operate a quarter horse racing facility in Lee County, Florida. The Application was properly filed with the Division.

4. On February, 13, 2009, the Division issued a deficiency letter setting forth several perceived problems with the Application.

5. Ft. Myers submitted a response to the deficiency letter on February 18, 2009. In the response, Ft. Myers addressed each of the deficiencies.

6. As far as can be determined, the Application was deemed complete by the Division sometime after February 18, 2009. However, Ft. Myers, thereafter, contacted the Division and asked that further action on the Application be delayed. The basis for that request was that there were some "hostile bills" against quarter horse racing filed with the Legislature, and there were some pending issues concerning a compact with the Seminole Tribe of Florida.

7. Ft. Myers acknowledges that it requested delays in the review of the Application based upon business reasons.

8. In conjunction with amendments relating to the Indian Gaming Compact, on May 8, 2009, the Legislature enacted Chapter 2009-170, Laws of Florida (also commonly referred to as SB 788), which authorized slot machine gaming for pari-mutuel permit holders located in Miami-Dade County. Chapter 2009-170 was filed with the Secretary of State and approved by the Governor on June 15, 2009, and states in pertinent part:

> Section 14. Section 550.334, Florida Statutes is amended to read:
>
> 550.334 Quarter horse racing; substitutions
>
> (2) All other provisions of this chapter, including s. 550.054, apply to, govern, and control such racing, and the same must be conducted in compliance therewith.
>
> * * *
>
> Section 19. Subsections (4) and (7) of section 551.102, Florida Statutes, are amended to read:
>
> 551.102 Definitions.—As used in this chapter, the term:
>
> (4) "Eligible facility" means any licensed pari-mutuel facility located in Miami-Dade County or Broward County . . .; <u>any licensed pari-mutuel facility located within a county as defined in s. 125.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and</u>

> meets the other requirements of this chapter; . . .
>
> * * *
>
> Section 26. Sections 1 through 3 of this act and this section shall take effect upon becoming law. Sections 4 through 25 shall take effect only if the Governor and an authorized representative of the Seminole Tribe of Florida execute an Indian Gaming Compact pursuant to the Indian Gaming Regulatory Act of 1988 and requirements of this act, only if the compact is ratified by the Legislature, and only if the compact is approved or deemed approved, and not voided pursuant to the terms of this act, by the Department of the Interior, and such sections take effect on the date that the approved compact is published in the Federal Register.

9. Section 14 of the legislation essentially applied a provision to quarter horse racing facilities that already applied to other pari-mutuel facilities, i.e., no new facility could be approved for a location within 100 miles of an existing pari-mutuel facility.

10. The effective date of this legislation, as evidenced in section 26, was conditioned on the execution and approval of a gaming compact between the State of Florida and the Seminole Tribe of Florida.

11. The compacts were subsequently executed by the Governor and the Seminole Tribe of Florida on August 28, 2009, and August 31, 2009, however, they were not ratified by the

Legislature, and, thus, they were specifically rendered void as was the remainder of Chapter 2009-170.[2/]

12. In consideration of SB 788 and certain business negotiations with another permit holder in Lee County, Ft. Myers amended the Application by changing the location of the project to Florida City, Dade County, Florida. In an amended permit application dated July 27, 2009, and filed with the Division on August 12, 2009, Ft. Myers made the following changes to its initial proposal:

- Changes were made to the ownership interest of the project;
- A revised business plan, revised financial projections for year one of operations, and a revised internal organizational chart were included;
- The proposed site plan was amended to reflect the move to Florida City; and
- A new construction time line was submitted.

13. Meanwhile, several other entities submitted applications seeking to construct and operate quarter horse racing facilities in different venues around the state. Quarter horse permits were then issued to ELH Jefferson, LLC ("ELH Jefferson"); Gretna Racing, LLC; Debary Real Estate Holdings, LLC ("Debary"); and South Marion Real Estate Holdings, LLC, between November 2008 and May 2009. Those approvals were given, in part, based on written assurances from land use attorneys

that zoning and other land use approvals (necessary elements for permit approval) could be obtained after permit issuance. After the Division began issuing quarter horse racing permits, however, the Division started to realize that it may not have been requiring a sufficient showing from applicants to meet the statutory criteria for issuance of a permit under section 550.334, Florida Statutes (2008). Notably, although nine quarter horse permits were issued from September 2008 until February 2010, no quarter horse racing permit holder, without an existing facility at the time of permit issuance, had actually utilized a permit to conduct quarter horse racing. Further, both ELH Jefferson and Debary failed to obtain necessary land use approvals after permit issuance, notwithstanding land use attorney opinions that they were obtainable.

14. The Division then began to consider around August 2009, whether it needed more evidence that the land was available for use than opinions from land use attorneys. The Division's re-appraisal began in the course of reviewing the Miami-Dade Airport's application for a quarter horse permit, which asserted that the entire airport property was available for use as a quarter horse facility. The issues associated with the Miami-Dade Airport application, along with the Division's experience that despite assurances, some permit applicants had been unable to obtain land use approvals, caused the Division to

determine that it needed more evidence that the land was, in fact, available for use to ensure the statutory requirements for permit issuance were met.

15. At about the same time the Division was re-appraising its method of reviewing permit applications, Ft. Myers decided to change the location of its proposed quarter horse facility from Lee County to Dade County, Florida. In response to the change, the Division sent Ft. Myers a deficiency letter concerning the Dade County site dated September 11, 2009. That letter set out the following pertinent deficiency items:

- Deficiency #1 That the location(s) where the permit will be used be "available for use." That because previous quarter horse applications have provided opinion letters from land use experts, and those sites have later proven not be to usable for the quarter horse facility, more specific information was required, i.e., The qualifications of the applicant's zoning attorney; A written statement of the attorney's grounds forming his opinion; and A copy of any application for rezoning filed with the City of Florida City, including an update from the City on the status of the application.

- Deficiency #2 That the location(s) where the permit will be used be "available for use." That the Letter of Intent provided by Ft. Myers is insufficient and that documentation reflecting its control over the property is required, i.e., a purchase agreement. The Division also asks for information regarding Ft. Myers' relationship with the registered owner of the site in question.

- Deficiency #4 That reasonable supporting evidence be provided that "substantial construction will be started within 1 year" after issuance of the permit.

16. On November 11, 2009, Ft. Myers responded to the Dade County deficiency letter. In its response, Ft. Myers provided the Division the following information:

- Information about its land use attorney, Jerry B. Proctor, from the law firm Bilzin Sumberg.
- A letter dated September 18, 2009, from Henry Iier, City Planner for the City of Dade City. The letter indicates that the City has zoning jurisdiction over the subject property and that it allows applications for zoning changes. Tier also states that the timetable for rezoning appears reasonable.
- An Agreement for Purchase and Sale between Ft. Myers and an entity called Florida City 70 Acres, LLC. The agreement includes a contingency provision requiring implementation of certain provision of SB 788 passed by the 2009 Legislature. Fulfillment of those provisions was a condition precedent to Ft. Myers' commitment to purchase the property.

17. The Division considered Ft. Myers' response to mean that it had made a decision not to provide information about its zoning request status. Had Ft. Myers submitted that information or requested additional time to gather the information, the Application would not have been denied on that basis.

18. The Division found the contingency in the Purchase and Sale Agreement to be a significant impediment to commencement of construction within one year. In fact, the agreement was also contingent on the approval of provisions of SB 788 that may not ever be approved. As such, the agreement failed to meet the requirements for approval.

19. Sometime during the month of December 2009, personnel from the Division contacted another quarter horse permit applicant, North Florida Racing, concerning its pending application. The Division employee advised North Florida Racing that there had been a change in "policy" at the Division concerning one aspect of the application review. Specifically, North Florida Racing was advised that their selected site would have to be proven to be "land available for use" as a quarter horse facility. They were told that the old standard of having a local zoning lawyer's opinion letter would not suffice. Rather, the applicant must show that an application for rezoning had actually been filed. It is not clear from the evidence whether North Florida Racing contacted the Division or whether the Division initiated that contact. Other than the statements in the deficiency letter, Ft. Myers was not directly contacted by anyone from the Division concerning this change in policy.

20. On January 12, 2010, the Division issued a letter denying Ft. Myers' application for a quarter horse permit in Miami-Dade County, Florida. The denial letter provided two bases for the Division's decision: One, that the Application failed to demonstrate that the land is available for use (under its new policy); and two, that the Application failed to provide reasonable supporting evidence that substantial construction of the facility would be commenced within one year of issuance of

the permit. The denial letter contained a statement concerning the process for requesting an administrative hearing on the matter.

21. It is the position of Ft. Myers that the Division imposed unauthorized requirements on Ft. Myers' application so that it could use the new law in effect, that the Division imposed non-rule policy on Ft. Myers to delay processing of the application, and that the Division unreasonably and improperly delayed Ft. Myers' application to take advantage of the change in the law. The following Findings of Fact (22 through 45) were proffered by Ft. Myers in the furtherance of their position.

22. Hartman and Tyner, d/b/a Mardi Gras Casino ("Hartman and Tyner"), Calder Casino and Race Course ("Calder"), and the Flagler Magic City Casino ("Flagler") are part of a coalition of South Florida pari-mutuel permitholders (collectively referred to as the "South Florida permitholders") that opposed the expansion of quarter horse racing into Miami-Dade County.

23. Jim Greer, then chairman of the Republican Party of Florida, was a contract lobbyist for Hartman and Tyner. In May of 2008, Greer entered into a two-year contract with Hartman and Tyner that paid him $7,500 per month as a lobbyist.

24. Charles "Chuck" Drago was the secretary of the Department of Business and Professional Regulation (the "Department"). Drago was a close friend of Greer. Drago had

been the chief of police of Oveido where Mr. Greer had lived and served on the City Commission. Greer and Drago had been fundraisers for Governor Crist.

25. Scott Ross was hired by the Department as a deputy director in April 2009. Ross was hired with assistance from Delmar Johnson, Ross' college friend, who held the position of executive director of the Republican Party of Florida. Johnson worked for Greer. Ross' responsibility included oversight of the Division.

26. David "Dave" Roberts was the director of the Division for approximately eight years. Roberts was division director when a number of quarter horse permit applications were filed with the Division after the 2007 changes in the card room law, which allowed quarter horse racing facilities to have card games. Roberts caused the Division to develop guidelines to govern the review of the quarter horse applications. After Roberts was forced to resign, the Division modified the guidelines to require applicants to show that zoning was in place for racing before the permit was issued.

27. Milton "Milt" Champion was named director of the Division, effective January 4, 2010. He signed the denial of Ft. Myers' quarter horse permits on January 12, 2010, after he had been on the job for eight days.

28. Joseph Helton is an attorney employed by the Division and has served as chief legal counsel to the Division since 2002. Helton has worked as an attorney for the Division for a combined 13 to 14 years. Helton was identified by the Division as its agency representative in this proceeding.

29. Earnest James "Jim" Barnes is employed by the Division as an Investigative Specialist II. Barnes' duties with the Division include the evaluation of applications for quarter horse permits. Barnes was involved in the processing of all quarter horse permit applications.

30. While he was director of the Division, Roberts made all of the decisions on whether to grant or deny a pari-mutuel permit. Neither the secretary, nor the deputy secretary made any decisions on quarter horse applications during Roberts' tenure as director of the Division.

31. Roberts testified that the Division developed guidelines in 2007 to aid in the review of all quarter horse applications after the first of several new applications for quarter horse permits were filed. Roberts explained that the Division had no rules implementing the statutory criteria in 2007, because there had not been any quarter horse applications filed with the Division for a long time.

32. The guidelines for review of quarter horse applications developed under Roberts did not require the

applicant to demonstrate that the property was zoned for a racetrack before the permit was issued. The Division interpreted the statutory "location is available for use" criterion to mean that racetrack zoning was "possible to obtain." Roberts noted that another pari-mutuel statute, section 550.055(2), specifically required the applicant for permit relocation to demonstrate that the location is zoned for racing before the Division issued a permit. In contrast, section 550.334 does not specifically require the applicant to demonstrate that racetrack zoning is in place.

33. During Roberts' directorship, the Division would accept a letter from a land use attorney familiar with zoning in the area where the racetrack would be located describing the process by which proper zoning could be obtained as adequate evidence that zoning was obtainable. Consistent with this guideline, deficiency letters issued by the Division under Roberts requested applicants to provide an opinion from an attorney and from a local government official stating that proper zoning for the proposed location was "obtainable." That standard was specifically altered in the September 11, 2009, deficiency letter for Ft. Myers' Dade County proposal.

34. The guidelines for review of quarter horse applications developed under Roberts did not require the applicant to own the land at the time the permit was issued.

Rather, the applicant was required to give reasonable assurances that the property was under the control of the applicant by written agreement. The applicant typically satisfied this guideline by submitting a contract for purchase or a lease with the application. Some contracts might include a contingency or condition precedent. For example, the real estate contract in the Gretna Racing, LLC, application listed a number of contingencies that must be met.

35. Roberts received numerous complaints from existing pari-mutuel permitholders (including, in particular, representatives of Hartman and Tyner) about the manner in which the Division was granting quarter horse permits. Ross also made it known to Roberts that he was not in favor of granting quarter horse permits. Roberts, however, believed that he was required to do what the letter of the statute dictated.

36. According to Hartman and Tyner's attorney, John Lockwood, the "special interests" wanted Roberts terminated, because they were concerned with the quarter horse application review process. Lockwood testified that he heard complaints that Roberts gave out quarter horse permits "like candy."

37. Lockwood made his client's concerns about Roberts' interpretation of the quarter horse statute known to Ross. Later, Jim Greer, then a contract lobbyist for Hartman and Tyner, called Ross and asked him to fire Mr. Roberts.

38. Ross met with Roberts and gave him the option of termination or resignation on July 16, 2009, within one week after Mr. Greer asked him to terminate Roberts. Roberts was not given a reason for his termination.

39. Joe Dillmore became the interim director of the Division after Roberts was forced to resign. However, according to Dillmore, Ross was, in fact, the person in charge of all quarter horse permit applications after Roberts left. Ross told Dillmore that he wanted to be informed on decisions at every level of the quarter horse application process. Ross made it known to Dillmore that he believed the 100-mile restriction placed on other pari-mutuel permitholders should also be applied to quarter horse permit applications, even though the quarter horse statute did not impose a location restriction at that time. Ross opposed quarter horse racing because of the Governor's opposition to gambling in general.

40. According to Barnes, Ross wanted to be kept apprised of all action on pending quarter horse permits, including deficiency letters, and any recommendation for approval or denial. Previously, Barnes had never been required to report his daily activities to a deputy secretary. Barnes was assigned to process the Application in October 2009, after the location changed from Lee County to Miami-Dade County. Barnes prepared the deficiency letter issued to Ft. Myers on September 11, 2009.

41. On August 11, 2009, approximately three weeks after Roberts was forced to resign, there was a meeting held at the Calder Race Track in Miami between existing pari-mutuel permitholders and key agency personnel. The attendees of this meeting included representatives of Hartman and Tyner, Calder, and Flagler, the three loudest voices in opposition to the expansion of quarter horse gaming into Miami-Dade County. The agency was represented at the Calder meeting by Secretary Drago, Deputy Secretary Ross, and Mr. Helton.

42. One topic of the Calder meeting was the competitive impact of new quarter horse permits on existing permitholders. In particular, the South Florida permitholders made it very clear at this meeting that they opposed the issuance of any quarter horse permits in Miami-Dade County.

43. The existing pari-mutuel permitholders at the Calder meeting told the Division representatives that the Division should require quarter horse applicants to demonstrate that the proposed location for the permit was zoned for a racetrack before the permit was issued. This interpretation had been advanced in legal challenges filed by existing permitholders (including Hartman and Tyner) before the Calder meeting. However, these legal challenges failed to achieve the desired result before the Calder meeting.

44. On August 12, 2009, the day after the Calder meeting, Ft. Myers amended the Application ("Amended Application") for a quarter horse permit to change the location to Miami-Dade County. Lockwood found out about the Amended Application within days and called Barnes to express his client's extreme displeasure with this change in location. Barnes sent an email to Helton on August 19, 2009, relaying the call from Lockwood stating "don't know what that means in the long run."

45. There was a meeting held in Tallahassee within days of this email between attorneys for the South Florida permitholders (including Lockwood) and attorneys for the Division (including Helton), so the permitholders could express their concerns with the quarter horse review process with Division counsel in person.

The Application Review

46. It was the Division's normal practice to provide applicants with deficiency letters so that applicants could be fully aware of any shortcomings and be given an opportunity to correct the deficiencies. It was not uncommon for the Division to issue two or more deficiency letters to an applicant. In the present case, Ft. Myers received a deficiency letter relating to its Lee County site, then received another one when the site was changed to Miami-Dade County. After Ft. Myers responded to the deficiency letter for Miami-Dade County, it reasonably relied

upon the issuance of a further deficiency letter if there were remaining deficiencies. Although no additional letter was required, Ft. Myers believed one would be issued if there were further deficiencies.

47. The Division did not issue a second deficiency letter for the Miami-Dade County site. The Division's rationale was that the first letter was clear and unambiguous, and if Ft. Myers did not respond appropriately, then the deficiencies must not be correctable. No one from the Division contacted Ft. Myers' representatives to discuss the continuing deficiencies.

48. Two other quarter horse permit applications were pending at the same time the Application was under review at the agency: Hamilton Downs II and North Florida Racing. Hamilton Downs received its permit on February 4, 2010; North Florida Racing received its permit on March 26, 2010.

49. Counsel for North Florida Racing remembers being told by Mr. Helton at the Division about changes to the Division's interpretation about the need for zoning approval. Counsel sent an email which says in part: "The powers that be seem to be shifting their interpretation of the statutes and rules to require that zoning for the track must be in place before a QH permit can be issued." Thereafter, North Florida Racing changed locations to a location zoned for quarter horse racing,

and its permit was ultimately issued. It is unclear from the record whether Helton actually made the quoted statement, and, if so, in what context it was made. Helton could not remember the statement, but does not deny that it could have been made.

50. As to the Hamilton Downs II location, neither of the two deficiency letters issued in that filing stated that the property had to be zoned for quarter horse racing. On November 4, 2009, Hamilton Downs provided the Division with a letter from the Town Council of Jennings stating it would support a zoning change at the proposed site to allow for quarter horse racing and that the zoning could be accomplished within six months. Thereafter, on December 14, 2009, Hamilton Downs submitted a letter from Hamilton County, Florida, stating the proposed site is, in fact, presently zoned for quarter horse racing. There is no credible evidence as to what precipitated Hamilton Downs' sending the Division that letter.

The Administrative Hearing Petitions

51. After receiving the denial letter from the Division, Ft. Myers prepared a Petition for Formal Administrative Hearing which it filed on January 29, 2010. On February 16, 2010, the Division rejected the Petition on the basis that it failed to identify disputed issues of material fact. Ft. Myers was given leave to amend its Petition within 21 days, i.e., on or before March 8, 2010.

52. Ft. Myers filed its Amended Petition for Formal Administrative Hearing on March 8, 2010. The amended Petition was also rejected by the Division, this time on the basis that Ft. Myers did not have standing. The rational for that decision was that inasmuch as the SB 788 provisions could not come into effect and those provisions were a condition precedent to Ft. Myers' purchase agreement for property, Ft. Myers could not move forward on their Application and, thus, did not have standing in an administrative challenge.

53. The rejection of Ft. Myers' Amended Petition was appealed to the First District Court of Appeal. In an opinion dated February 7, 2011, that court summarily reversed the Division's rejection of the Amended Petition. The Court remanded the case to the Division with directions to refer the case to the Division of Administrative Hearings.

54. During the pendency of the appeal to the First District Court of Appeal, Chapter 2010-29 was passed and became law, effective July 1, 2010. The new law contained the 100-mile restriction mentioned above. There is not any location in Florida that would qualify for a new pari-mutuel facility under that limitation.

55. If the original Petition filed on January 29, 2010, had been accepted by the Division, it is possible a final order could have been entered sometime between June 17 and July 26,

2010, had the case proceeded at a normal pace. Thus, it is possible the final order could have been entered prior to the new 100-mile limitation taking effect on July 1, 2010.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

57. Ft. Myers, as the party asserting the affirmative of the issue in this proceeding, has the burden of proof. See Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), citing Dep't of Agric. & Consumer Servs. v. Strickland, 262 So. 2d 893 (Fla. 1st DCA 1972).

58. At the time Ft. Myers' application for a quarter horse racing permit was filed, the pertinent portion of section 550.334, Florida Statutes (2008), stated as follows:

> (4) Section 550.054 is inapplicable to quarter horse racing as permitted under this section. All other provisions of this chapter apply to, govern, and control such racing, and the same must be conducted in compliance therewith.

59. While the Application was pending at the Division, section 550.334, Florida Statutes (2009), was amended to read:

> (2) All other provisions of this chapter, including s. 550.054, apply to, govern, and control such racing, and the same must be conducted in compliance therewith.

60. The reference to section 550.054, Florida Statutes (2009), specifically relates to subsection (2) of that statute which states, "[a]n application may not be considered, nor may a permit be issued by the division or be voted upon in any county, to conduct horseraces, harness horse races, or dograces at a location within 100 miles of an existing pari-mutuel facility . . . ." Under the amended version of section 550.334, Florida Statutes (2009), the Application could not be approved, because there is not any location within the state that would satisfy the 100-mile limitation.

61. Courts generally state that, absent explicit guidance from the Legislature, remedial changes to licensing laws are applied retroactively, but substantive changes are not. Florida follows the general rule that a change in the licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted. Lavernia, 616 So. 2d at 52-54, citing Bruner v. Bd. of Real Estate, Dep't of Prof'l Reg., 399 So. 2d 4 (Fla. 5th DCA 1981).

62. However, there are exceptions to the general rule. In Lavernia, the Court sets forth several exceptions based upon existing case law. Those exceptions are as follows:

- When the reviewing agency repeatedly denies an application and the law changes while the application is pending. Goldstein v. Sweeny, 42 So. 2d 367 (Fla. 1949).
- When the reviewing agency unreasonably delays acting upon an application until the amended statute becomes effective. Attwood v. State, 53 So. 2d 101 (Fla. 1951).
- When the reviewing agency seeks to apply the amended statute during appeal when it had applied the prior statute when making its initial decision. Dep't of HRS v. Petty-Eifert, 443 So. 2d 266 (Fla. 1st DCA 1983).
- Two other exemption cases addressed in Lavernia did not actually relate to the application of amended statutes and are not applicable to the instant action.

63. Upon a review of the facts, there were not "repeated denials" of the Application by the Division. The Application, as originally submitted, was not denied by the Division. It was amended by Ft. Myers, requiring review of new and additional information. Upon review, the Division denied the Application, but only once, on January 12, 2010. The denial was based upon

the Division's determination that it did not meet the requirements for approval.

64. There is no persuasive evidence that the delay in ruling on the Application was caused by the Division. Ft. Myers' actually asked for the Application to remain pending for a period of time so that it could determine what changes the Legislature might make to relevant statutes. The change in location from Ft. Myers to Miami-Dade County necessitated additional and further review, but that was a decision made by Ft. Myers, not by the Division.

65. The Division did not attempt to apply the prior statute during its initial review and then apply the amended statute during the appeal, so the third exception does not apply.

66. The Division's rejection of the initial Petition for Formal Administrative Hearing was based on the inadequacy of the Petition pursuant to Florida Administrative Code Rule 28-106.201(2), as discussed in Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration, 870 So. 2d 834 (Fla. 3rd DCA 2003). The Division acted within its authority to impose the strict standards of that rule to the initial Petition.

67. The Division's actions, vis-à-vis the Amended Petition for Formal Administrative Hearings filed by Ft. Myers, were

undeniably in error. The District Court of Appeal made it clear that the rejection of that Petition was contrary to "the fundamental principles of administrative law." Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg., 53 So. 3d 1158, 1162 n.4 (Fla. 1st DCA 2011).

68. There is, however, insufficient evidence to conclude that the original Petition, if it had not been rejected, would have been ruled upon and a final order entered prior to July 1, 2010, the effective date of the changes to section 550.334. Thus, there can be no finding that the rejection of the Ft. Myers' petitions for hearing was done for the purpose of delaying their conclusion beyond the effective date of the new statute.

69. The conspiracy theory espoused by Ft. Myers (as set forth in Findings of Fact 22 through 45, above), while establishing that the Division made changes to the way it reviewed quarter horse racing permit applications, did not prove the existence of intentional actions by the Division against Ft. Myers for the purpose of delaying the review of the Application. It is not possible, from the evidence presented, to understand fully why the Division took some of the actions it did regarding how the Ft. Myers Application was reviewed. However, there is not sufficient evidence that the Division's

actions were improper or directed toward the end of ultimately denying the Ft. Myers' Application.

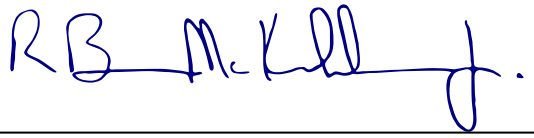
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, declaring that the 2010 version of section 550.334, applies to the Application filed by Petitioner, Ft. Myers Real Estate Holdings, LLC, for a quarter horse racing permit.

IT IS THE UNDERSTANDING OF THE UNDERSIGNED AND ALL PARTIES THAT THIS RECOMMENDED ORDER WILL UNDERGO EXPEDITED AGENCY REVIEW SO THAT A FINAL ORDER AS TO THIS PORTION OF THE BIFURCATED PROCEEDING WILL BE RESOLVED AS QUICKLY AS PRACTICABLE.

DONE AND ENTERED this 22nd day of August, 2011, in Tallahassee, Leon County, Florida.



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Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2011.

ENDNOTES

[1/] Unless specifically stated otherwise herein, general references to Florida Statutes shall be to the 2010 version.

[2/] It was not until Chapter 2010-29 was enacted and became law, effective July 1, 2010, that the third compact entered into by the Governor and the Seminole Tribe of Florida on April 7, 2010, went into effect. Thus, the statutory amendment allowing slot machines at quarter horse and other pari-mutuel facilities went into effect at the same time as the provision subjecting quarter horse racing permits to the 100-mile distance requirement between pari-mutuel facilities set forth in section 550.334.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.