

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WEST FLAGLER ASSOCIATES, LTD.,

Petitioner,

vs.

Case Nos. 15-6773
15-6774

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL
WAGERING,

Respondent.

_____ /

RECOMMENDED ORDER

This case was heard on May 2, 2016, in Tallahassee,
Florida, before E. Gary Early, an Administrative Law Judge
assigned by the Division of Administrative Hearings.

APPEARANCES

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For Respondent: William D. Hall, Esquire
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STATEMENT OF THE ISSUE

Whether the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Respondent or Division), should deny West Flagler Associate, Ltd.'s (Petitioner or West Flagler) June 30, 2015, and July 1, 2015, applications for new summer jai alai permits under section 550.0745, Florida Statutes.

PRELIMINARY STATEMENT

On July 14, 2015, the Division filed a notice denying West Flagler's application for a summer jai-alai permit pursuant to section 550.0745, based on there being no lowest handling pari-mutuel permitholder for consecutive fiscal years 2012/2013 and 2013/2014 (the "June Application"). On August 4, 2015, West Flagler timely filed a Petition for Administrative Hearing challenging the Division's notice of denial. That case was identified as DBPR Case No. 2015-030305.

On July 14, 2015, the Division also filed a notice denying West Flagler's application for a summer jai-alai permit pursuant to section 550.0745, based on there being no lowest handling pari-mutuel permitholder for consecutive fiscal years 2013/2014 and 2014/2015 (the "July Application"). On August 4, 2015, West Flagler timely filed a Petition for Administrative Hearing challenging the Division's notice of denial. That case was identified as DBPR Case No. 2015-030307.

On December 1, 2015, both cases were referred to the Division of Administrative Hearings for formal administrative hearings.

On December 8, 2015, pursuant to West Flagler's unopposed motion, the cases were consolidated. The final hearing was scheduled for January 25, 2016.

On January 7, 2016, the parties jointly moved to continue the final hearing in order to allow the Division to file amended notices of denial, and to allow West Flagler to file amended petitions for administrative hearing. The motion was granted, the amended pleadings were filed, and the hearing was rescheduled for April 12, 2016. After a further meritorious joint request for continuance, the final hearing was set for May 2, 2016.

On April 27, 2016, the parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary. The stipulated facts have been accepted and considered in the preparation of this Recommended Order.

The final hearing was held as scheduled on May 2, 2016.

Joint Exhibits 1 through 6 were received in evidence by stipulation of the parties.

West Flagler called as its witness, Daniel Joseph Licciardi, a jai-alai construction consultant for Southwest

Florida Enterprises, West Flagler's parent company, and the director of pari-mutuel operations for Dania Entertainment, Inc., d/b/a Dania Jai-Alai. Petitioner's Exhibits 1 through 8 were received in evidence. Petitioner's Exhibit 7 is the deposition transcript of Tracy Swain, the designated agency representative pursuant to Florida Rule of Civil Procedure 1.310(b)(6). Petitioner's Exhibits 5 and 6 are, respectively, the deposition transcripts of Joe Dillmore, the Division's Deputy Director; and Jamie Pouncey, the Division's Senior Management Analyst II/Permitholder Administrator. By stipulation of the parties, the deposition transcripts have been accepted in lieu of live testimony, and have been given the evidentiary weight as if the deponents testified at the final hearing.

The Division called as its witness, Tracy Swain, the Division's Revenue Program Administrator. Respondent's Exhibits 1 through 3 were received in evidence.

A one-volume Transcript of the proceedings was filed on May 13, 2016. Both parties thereafter timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order.

Petitioner's application for licensure is governed by the law in effect at the time the final licensure decision is made. See Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53, 54 (Fla.

1st DCA 1993). Therefore, all references to the Florida Statutes shall be to the 2015 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. The Division is the state agency charged with regulating pari-mutuel wagering activities in Florida pursuant to chapter 550.

2. West Flagler is the owner of pari-mutuel permits and is authorized to conduct pari-mutuel pools on exhibition sports in Miami-Dade County pursuant to chapter 550.

3. There are seven pari-mutuel permits for pari-mutuel pools on exhibition sports in Miami-Dade County. The permitholders are South Florida Racing Association, LLC (Hialeah Park) ("SFRA"); Fronton Holdings, LLC (Miami Jai Alai); Summer Jai Alai Partnership; West Flagler Associates, Ltd. (Flagler Dog Track); Calder Race Course, Inc.; Tropical Park, LLC; and West Flagler Associates, Ltd. (Magic City Jai Alai).

4. Summer Jai Alai Partnership is the holder of a summer jai alai permit.

5. West Flagler currently possesses a summer jai alai permit in Miami-Dade County.

6. On June 30, 2015, West Flagler filed the June Application, pursuant to section 550.0745, for a "new permit" to conduct summer jai alai in Miami-Dade County. West Flagler's

June Application was based on its conclusion that a new summer jai alai permit was available because SFRA had the smallest total pool or handle in Miami-Dade County for two consecutive fiscal years, i.e., state fiscal years 2012/2013 and 2013/2014, and that SFRA declined to convert its pari-mutuel permit to a permit to conduct summer jai alai.

7. On July 1, 2015, West Flagler filed the July Application, pursuant to section 550.0745, for a "new permit" to conduct summer jai alai in Miami-Dade County. West Flagler's July Application was based on its conclusion that a new summer jai alai permit was available because SFRA again had the smallest total pool or handle in Miami-Dade County for two consecutive fiscal years, i.e., state fiscal years 2013/2014 and 2014/2015, and that SFRA again declined to convert its pari-mutuel permit to a permit to conduct summer jai alai.

8. On July 14, 2015, the Division denied the June Application on the grounds that there was not a summer jai alai permit available for fiscal years 2012/2013 and 2013/2014 because SFRA did not have the smallest play or total pool in Miami-Dade County for those two consecutive years. The Division maintains that West Flagler (Magic City Jai Alai) had the smallest total pool in 2012/2013 and Summer Jai Alai Partnership had the smallest total pool in 2013/2014. That basis for the denial remains the position of the Division in this proceeding.

9. On December 7, 2015, the Division issued an amended notice of denial that modified the denial of the July Application from one based on there being no lowest handling pari-mutuel permitholder for consecutive fiscal years 2013/2014 and 2014/2015, to one based on the grounds that 1) "West Flagler is incapable of converting its summer jai alai permit to a summer jai alai permit because there would not be an actual conversion as contemplated by statute"; and 2) "West Flagler has not shown that the issuance of a summer jai alai permit to West Flagler, which already holds a summer jai alai permit, would generate an increase in total state revenue over the revenue West Flagler generates under its current, identical permit."

10. West Flagler's June Application does not seek to convert its existing summer jai alai permit to a summer jai alai permit. Rather, the application is predicated upon the creation of a new summer jai alai permit when SFRA declined to convert its pari-mutuel permit to a permit to conduct a summer jai alai fronton.

11. West Flagler's July Application does not seek to convert its existing summer jai alai permit to a summer jai alai permit. Rather, the application is predicated upon the creation of a new summer jai alai permit when SFRA declined to convert its pari-mutuel permit to a permit to conduct a summer jai alai fronton.

12. The disagreement between the parties regarding the June Application revolves around whether "simulcast export" wagers should be included in calculating a permitholder's "play or total pool within the county" for purposes of section 550.0745(1). The Division argues that a permitholder's total pool includes live wagers, intertrack wagers, and simulcast export wagers. West Flagler argues that a permitholder's total pool includes only live wagers and intertrack wagers.^{1/}

13. A live wager is a wager accepted at a permitted Florida facility on a race or game performed live at that facility. Permitholders derive income, in the form of a commission, on live wagers placed at their facilities. Permitholders pay taxes on live wagers.

14. An intertrack wager is a wager accepted at a permitted Florida facility on a race or game transmitted from and performed live at, or simulcast rebroadcast from, another permitted Florida facility. Permitholders derive income, in the form of a commission, on wagers placed at other Florida facilities on races or games transmitted from the permitholder's facilities. Permitholders pay taxes on intertrack wagers.

15. A simulcast wager is a wager placed at a Florida facility on an out-of-state race transmitted to the Florida facility. Permitholders pay taxes on simulcast wagers.

16. An intertrack simulcast wager is a wager placed at a Florida guest track on an out-of-state race transmitted by the out-of-state track to a Florida host track, and then re-transmitted by the Florida host track to the Florida guest track. Permitholders pay taxes on intertrack simulcast wagers.

17. A simulcast export wager is a wager accepted at an out-of-state facility on a race or game performed live at a permitted Florida facility. Permitholders derive income, in the form of a commission, on simulcast export wagers accepted by out-of-state facilities on races or games transmitted from the permitholder's facilities. The Division does not know the commission structure between the permitholders and out-of-state facilities.

18. Permitholders do not pay taxes on simulcast export wagers, and the state receives no revenue from simulcast export wagers.

19. In sum, live wagers, intertrack wagers, simulcast wagers, and intertrack simulcast wagers are those placed at Florida pari-mutuel facilities, and subject to Florida taxation. Simulcast export wagers are those placed on Florida events at out-of-state facilities, and not subject to Florida taxation.

20. Licensed betting facilities across the country -- and generally across the world -- contract with a licensed totalisator (the "tote")^{2/} by which all wagers are accounted for.

Data on all wagers placed on a hosting permitholder's event (with uncommon exceptions when an out-of-state facility receiving a hosting permitholder's simulcast broadcast forms its own pool) are sent by the tote to the hosting permitholder to be included in its total price pool, and used to determine payouts on winning wagers.

21. The totes also capture simulcast export wagers for use in calculating the commission paid by the guest tracks.

22. A permitholder's pool amounts are reported to the Division by the tote company on a daily basis. The daily tote report includes live, simulcast, intertrack, intertrack simulcast, and simulcast export wagers.

23. The daily tote reports are reviewed by the Division's auditing section to ensure that wagers are accounted for and paid.

24. The Division maintains a central monitoring system by which it captures the daily amounts for all wagers from the daily tote reports, and compiles them up to produce a cumulative report.

25. A permitholder's pool amounts are also reported to the Division directly by the permitholder in monthly pari-mutuel reports, and annual financial statements. The monthly reports and annual financial statements are reviewed by the Division's revenue section.

26. Since simulcast export wagers are not taxed by Florida, the Division's monthly report and annual financial statement forms do not include simulcast export wagers as part of the facility's handle.

27. Due to the combination of low overall handles, and tax credits available for net operating losses, jai alai facilities (as opposed to cardrooms operating therein) do not generate any tax revenues for the state. Thus, the only revenues derived by the state from jai alai facilities are the \$40 per game daily license fees and 15-percent admission tax required by section 550.0951.

28. The parties stipulated that the Third District Court of Appeal considered only live wagers and intertrack wagers in its analysis of whether the "smallest play or total pool within the county" included only wagers physically placed within Miami-Dade County, as reflected in the Court's opinion in South Florida Racing Association v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, ___ So. 3d ___, 2015 Fla. App. LEXIS 11334, 2015 WL 4546935 (Fla. 3d DCA July 29, 2015).^{3/}

29. If simulcast export wagers are excluded from a pari-mutuel facility's play or total pool within Miami-Dade County, SFRA had the smallest total handle in Miami-Dade County for the 2012/2013 state fiscal year.

30. If simulcast export wagers are included in a pari-mutuel facility's play or total pool within Miami-Dade County, West Flagler Associates, Ltd. (Magic City Jai Alai) had the smallest total handle in Miami-Dade County for the 2012/2013 state fiscal year.

31. If simulcast export wagers are excluded from a pari-mutuel facility's play or total pool within Miami-Dade County, SFRA had the smallest total handle in Miami-Dade County for the 2013/2014 state fiscal year.

32. If simulcast export wagers are included in a pari-mutuel facility's play or total pool within Miami-Dade County, Summer Jai Alai Partnership had the smallest total handle in Miami-Dade County for the 2013/2014 state fiscal year.^{4/}

33. If simulcast export wagers are excluded from a pari-mutuel facility's play or total pool within Miami-Dade County, SFRA had the smallest total handle in Miami-Dade County for the 2014/2015 state fiscal year.

34. If simulcast export wagers are included in a pari-mutuel facility's play or total pool within Miami-Dade County, Summer Jai Alai Partnership had the smallest total handle in Miami-Dade County for the 2014/2015 state fiscal year.

35. Regardless of whether out-of-state simulcast export wagers are included in the calculation of facilities' "play or total pool," a single pari-mutuel facility (either SRFA or

Summer Jai Alai Partnership) had the smallest play or total pool within Miami-Dade County for the consecutive 2013/2014 and 2014/2015 state fiscal years.

36. The Division did not notify West Flagler of any apparent errors or omissions in its July Application.

37. The Division did not request that West Flagler provide any additional information with its July Application.

CONCLUSIONS OF LAW

A. Authority

38. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

39. "[I]t is well established that the legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers." Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg. v. Fla. Horse Council, Inc., 464 So. 2d 128, 130 (Fla. 1985). Furthermore, section 550.0251, Florida Statutes, provides that "the Division shall administer [chapter 550] and regulate the pari-mutuel industry under [chapter 550]." As such, the Division has the authority to regulate and issue permits for summer jai alai pursuant to section 550.0745(1).

B. Nature of the Proceeding

40. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env'tl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977). See also § 120.57(1)(k), Fla. Stat. ("All proceedings conducted under this subsection shall be de novo.")

C. Burden of Proof

41. As the party seeking issuance of a license, West Flagler has the burden of proving by a preponderance of evidence that it satisfies the applicable standards and requirements. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); see also § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

D. Standing

42. The parties stipulated that West Flagler has standing under chapter 120, Florida Statutes, to challenge the denial of its June and July Applications for new summer jai alai permits to be located within Miami-Dade County. Furthermore, as the license applicant, West Flagler is a "specifically named

person[] whose substantial interests are being determined in the proceeding," pursuant to section 120.52(13)(a), and thus has standing in this proceeding. Maverick Media Grp. v. Dep't of Transp., 791 So. 2d 491, 492-493 (Fla. 1st DCA 2001).

E. Standards

43. Section 550.0745(1) provides, in pertinent part, that:

The owner or operator of a pari-mutuel permit who is authorized by the division to conduct pari-mutuel pools on exhibition sports in any county having five or more such pari-mutuel permits and whose mutuel play from the operation of such pari-mutuel pools for the 2 consecutive years next prior to filing an application under this section has had the smallest play or total pool within the county may apply to the division to convert its permit to a permit to conduct a summer jai alai fronton in such county during the summer season commencing on May 1 and ending on November 30 of each year on such dates as may be selected by such permittee for the same number of days and performances as are allowed and granted to winter jai alai frontons within such county. If a permittee who is eligible under this section to convert a permit declines to convert, a new permit is hereby made available in that permittee's county to conduct summer jai alai games as provided by this section, notwithstanding mileage and permit ratification requirements

44. Section 550.002(16) defines the term "host track" as "a track or fronton conducting a live or simulcast race or game that is the subject of an intertrack wager."

45. Section 550.002(12) defines the term "guest track" as "a track or fronton receiving or accepting an intertrack wager."

46. Section 550.002(17) defines the term "intertrack
wager" as:

a particular form of pari-mutuel wagering in
which wagers are accepted at a permitted,
in-state track, fronton, or pari-mutuel
facility on a race or game transmitted from
and performed live at, or simulcast signal
rebroadcast from, another in-state pari-
mutuel facility.

47. Section 550.002(32) defines the term "simulcasting"
as:

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

48. Section 550.002(13) defines the term "handle" as "the
aggregate contributions to pari-mutuel pools."

49. Section 550.3551(2) (b) describes "simulcast export"
wagering as follows:

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

* * *

(b) Wagers accepted by any out-of-state
pari-mutuel permitholder or licensed betting
system on a race broadcasted under this
subsection may be, but are not required to

be, included in the pari-mutuel pools of the horse track in this state that broadcasts the race upon which wagers are accepted. The handle, as referred to in s. 550.0951(3), does not include any wagers accepted by an out-of-state pari-mutuel permitholder or licensed betting system, irrespective of whether such wagers are included in the pari-mutuel pools of the Florida permitholder as authorized by this subsection.

50. Section 550.0951(3) provides, in pertinent part, that:

TAX ON HANDLE. — Each permitholder shall pay a tax on contributions to pari-mutuel pools, the aggregate of which is hereinafter referred to as "handle," on races or games conducted by the permitholder. The tax is imposed daily and is based on the total contributions to all pari-mutuel pools conducted during the daily performance. If a permitholder conducts more than one performance daily, the tax is imposed on each performance separately.

51. The second sentence of section 550.3351(2)(b), read in conjunction with section 550.0951(3), means that any wager made at an out-of-state facility on a Florida event, i.e., a "simulcast export" wager, is not subject to taxation in Florida. Nonetheless, simulcast export wagers are part of the total pari-mutuel pool for the Florida pari-mutuel facility at which the event is held.^{5/}

F. South Florida Racing Association vs. DBPR

52. Much of the argument advanced by both parties involves the application of the opinion of the Third District Court of Appeal in South Florida Racing Association v. Department of

Business and Professional Regulation, Division of Pari-Mutuel Wagering, ___ So. 3d ___, 2015 Fla. App. LEXIS 11334, 2015 WL 4546935 (Fla. 3d DCA July 29, 2015). In that case, the court was asked to construe section 550.0745, and the factors to be considered in a determination of which facilities had "the smallest play or total pool within the county" for purposes of converting to or creating a new summer jai alai permit. Prior to the court's opinion, the Division limited its consideration to live wagers and to intertrack wagers placed at guest tracks in the same county as the host track. Thus, the court summarized the issue before it as follows:

[I]f the "total pool within the county" includes both live on-track wagers and intertrack wagers then SFRA had the smallest total pool for two consecutive years, and another summer jai alai permit should be issued. However, if the "total pool within the county" includes only those wagers that were physically placed in Miami-Dade County (either live on-track wagers only or live on-track wagers plus intertrack wagers placed at guest tracks within the county), then West Flagler had the lowest total pool, and no permit is available.

53. The issue of whether simulcast export wagers, i.e., wagers accepted at out-of-state facilities, are to be considered in determining "the smallest play or total pool within the county" was not raised or considered in South Florida Racing Association, and thus remains one of first impression. However, the opinion remains instructive.

54. The court analyzed the plain meaning of section 550.0745(1) in determining that the factors to be considered in establishing which facility has the smallest play or total pool within the county were necessarily greater than just live wagers and in-county intertrack wagers, and concluded that:

After pruning out the dependent clauses and the language that is irrelevant to this case, we are left with: "The owner or operator of a pari-mutuel permit . . . whose mutuel play . . . has had the smallest play or total pool within the county may apply to the division to convert its [pari-mutuel] permit to a permit to conduct a summer jai alai fronton in such county" *Id.* The plain and natural meaning of this simplified sentence is clear: The owner or operator of a pari-mutuel permit whose mutuel play has the smallest play or total pool as compared to the other pari-mutuel permittees within that same county may apply to convert its permit. The phrase "within the county" simply defines the universe of pari-mutuel permittees with which to compare the applicant's total pool; it does not limit the calculation of that applicant's "total pool" to those bets physically within the county. It takes a very strained reading to contort the statutory language into the Division's adopted interpretation. Moreover, the term "total pool" seems to refer to all monies wagered. Although "total pool" is not statutorily defined, the term "pari-mutuel wagering pool" is defined to mean "the total amount wagered on a race or game for a single possible result." § 550.002(24). Nothing in Chapter 550 of the Florida Statutes limits the total pool to solely physical in-county wagers. Thus, we conclude that the Division's

interpretation conflicts with the plain meaning of section 550.0745(1). (emphasis added).

Id. at 10-11.

55. Thereafter, the court embarked on an exploration of the legislative history of section 550.0745(1) as further support for its conclusion. However, reliance on tenets of statutory construction, including legislative history, is necessary only if the language of a statute is unclear or ambiguous. Blinn v. Dep't of Transp., 781 So. 2d 1103, 1107 (Fla. 1st DCA 2000) ("[W]here the language of a statute is clear, the language must be given effect, rather than the purpose or intent indicated by legislative history.").

56. As established by the Third District Court of Appeal:

the phrases "total pool" and "pari-mutuel wagering pool" are used throughout Chapter 550, the pari-mutuel wagering chapter of the Florida Statutes, to discuss the full amount wagered on a particular type of event. Not once in chapter 550 is a distinction made between wagers physically placed within the county and wagers placed remotely as an intertrack wager for purposes of calculating the "total pool." It is therefore unreasonable to construe this subsection of the statute as placing a limitation on the calculation of the total pool.

Id. at 11-12.

57. In keeping with the court's analysis, not once in chapter 550 is a distinction made between wagers placed in Florida and wagers placed at out-of-state facilities for

purposes of calculating the "total pool." The evidence unequivocally demonstrated that those out-of-state wagers reported by the tote are included in the calculation of the Florida pari-mutuel facility's total pool.

58. Though out-of-state wagers are not reported to the Division's revenue section because they are not subject to Florida taxation, they are reported to the Division's auditing section on a daily basis.

59. The undersigned concludes that the plain meaning of section 550.0745(1) mandates that simulcast export wagers, as constituting a portion of "the total amount wagered on a race or game for a single possible result," are to be included in the determination of the pari-mutuel facility "whose mutuel play . . . has had the smallest play or total pool within the county" for the relevant consecutive two-year period.

G. The June Application

60. Based on the foregoing, there was not a summer jai alai permit available in Miami-Dade County for fiscal years 2012/2013 and 2013/2014. Including simulcast export wagers as part of the pari-mutuel pool, West Flagler (Magic City Jai Alai) had the smallest total pool for the 2012/2013 state fiscal year. Summer Jai Alai Partnership had the smallest total pool for the 2013/2014 state fiscal year. For the fiscal years 2012/2013 and 2013/2014 time period, the criteria established in section

550.0745(1) for the conversion of a pari-mutuel permit to a permit to conduct a summer jai alai fronton, or for the creation of a new permit to conduct summer jai alai games, have not been met. Thus, the June Application should be denied.

H. The July Application

61. Based on the foregoing, Summer Jai Alai Partnership had the smallest total pool for the 2013/2014 and 2014/2015 state fiscal years.

62. Summer Jai Alai Partnership is the holder of a summer jai alai permit.

Conversion of the Summer Jai Alai Partnership Permit

63. Summer Jai Alai Partnership had the smallest play or total pool in Miami-Dade County for two consecutive years, triggering section 550.0745(1) and allowing it to "apply to the division to convert its permit to a permit to conduct a summer jai alai fronton." If Summer Jai Alai Partnership was "eligible" to convert but chose not to convert, a new permit to conduct summer jai alai games would have been created.^{6/}

64. The simple definition of the word "convert" is:

- : to change (something) into a different form or so that it can be used in a different way
- : to change to a different system, method, etc.
- : to change from one form or use to another

Merriam-Webster Dictionary, at <http://www.merriam-webster.com/dictionary/convert>.

65. It is well established that:

Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However,

when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglas, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)); see also Verizon Bus. Purchasing, LLC v. Dep't of Rev., 164 So. 3d 806, 809 (Fla. 1st DCA 2015) ("To discern legislative intent, a court must look first to the plain and obvious meaning of the statute's text, which may be discerned from a dictionary. If the language of the statute is clear and unambiguous and conveys a clear and definite meaning, a court must apply the unequivocal meaning and not resort to the rules of statutory construction.") (citations omitted); Fla. Hosp. (Adventist Health) v. Ag. for Health Care Admin., 823 So. 2d 844, 848 (Fla. 1st DCA 2002) ("If the language of the statute is clear and unambiguous and conveys a clear and definite meaning, the statute should be given its plain meaning. When necessary, the

plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary.”)(citations omitted).

66. Changing a summer jai alai permit to a summer jai alai permit does not meet the simple and plain definition of the term “convert.” Thus, Summer Jai Alai Partnership could not convert its permit from a permit to conduct a summer jai alai fronton to a permit to conduct a summer jai alai fronton.

Profitability

67. Florida Administrative Code Rule 61D-4.002(1) provides that:

(1) In evaluating a permit application, the division shall deny any application where the applicant fails to establish the following criteria:

(a) Financial profitability of the prospective permitholder as derived from the assets and liabilities of the applicant; the existence of any judgment or current litigation, whether civil, criminal, or administrative; the type of pari-mutuel activity to be conducted and desired period of operation; and net income projected over the first three years of operation with the permit. If the applicant is able to show any profitability as outlined in this paragraph, the Division will review the following criteria in paragraph (b).

(b) That the issuance of the permit will preserve and protect the pari-mutuel revenues of the state by generating an increase of total state revenue.

68. If the profitability of an applicant were to be based solely on the pari-mutuel jai alai events conducted under the

permit, then the proposed summer jai alai permit would not meet the test of profitability established by the rule.

Mr. Licciardi agreed that "the jai alai portion of that permit will be a drain and that hopefully you'd make up with it on cards or slots, something like that." However, the rule includes no express limitation of the term "pari-mutuel activity."

69. Section 849.086(1), Florida Statutes, provides, in pertinent part, that "the Legislature finds that authorized [cardroom] games as herein defined are considered to be pari-mutuel style games."

70. The Division advanced no express argument that profitability is to be measured only against the revenues and expenses from the races or games conducted under the pari-mutuel license, and not include the revenues and expenses from the cardroom authorized by and operating in concert with the licensed pari-mutuel facility. See § 849.086(5), Fla. Stat. No such limitation is hereby inferred.

71. If "pari-mutuel activities" includes cardroom revenues and expenses as part of the "net income projected over the first three years of operation with the permit," the preponderance of the evidence indicates that a new summer jai alai permit as requested under the July Application would meet the test of profitability established in rule 61D-4.002(1).

72. Likewise, if "pari-mutuel activities" includes cardroom revenues and expenses, the preponderance of the evidence indicates that a new summer jai alai permit as requested under the July Application would result in an increase of total state revenue resulting from the taxes and fees realized by the operation of the cardroom.

I. Conclusion

73. It is concluded that simulcast export wagers form a part of the "play or total pool within the county" as that term is used in section 550.0745(1). Based thereon, there was no single facility with the smallest play or total pool within Miami-Dade County for the consecutive 2012/2013 and 2013/2014 state fiscal years. Therefore, the June Application should be denied.

74. Summer Jai Alai Partnership had the smallest play or total pool within Miami-Dade County for the 2013/2014 and 2014/2015 state fiscal years. However, since Summer Jai Alai Partnership operates pursuant to a summer jai alai permit, it could not "convert its permit to a permit to conduct a summer jai alai fronton." (emphasis added). § 550.0745(1), Fla. Stat. Since Summer Jai Alai Partnership was not "eligible under [section 550.0745] section to convert a permit," a new summer jai alai permit was not created. Therefore, the July Application should be denied.

75. If it is determined that Summer Jai Alai Partnership was eligible to convert its summer jai alai permit to a summer jai alai permit, but declined to do so, thus creating a new summer jai alai permit, West Flagler met the requirements of section 550.0745(1) and rule 61D-4.002 for approval of the July Application.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that West Flagler Associate, Ltd.'s, June 30, 2015, and July 1, 2015, applications for new summer jai alai permits be DENIED.

DONE AND ENTERED this 20th day of June, 2016, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 2016.

ENDNOTES

^{1/} The evidence and argument in this case indicates that the dispute between the parties centers on whether wagers that are not subject to taxation in Florida, i.e., simulcast export wagers, should be included as part of the "play or total pool within the county." Thus, the term "intertrack wager," as referenced by the parties, is construed encompassing all wagers taxable in Florida, including simulcast and intertrack simulcast wagers. See § 550.002(17), Fla. Stat.

^{2/} There are three totalisator companies licensed by the state of Florida. The number of totalisators operating worldwide was not disclosed. However, there was no suggestion that any totalisator reporting wagers to Florida facilities is less than reliable or accurate.

^{3/} In reviewing the South Florida Racing Association opinion, it is apparent that the Court included simulcast and intertrack simulcast wagers in its analysis of whether "intertrack" wagers should be included in the facility's "play or total pool within the county." Id. at *19 n.2. ("The term 'intertrack wager' is statutorily defined and 'means a particular form of pari-mutuel wagering in which wagers are accepted at a permitted, in-state track, fronton, or pari-mutuel facility on a race or game transmitted from and performed live at, or simulcast signal rebroadcast from, another in-state pari-mutuel facility.' § 550.002(17), Fla. Stat. (2013). When such broadcasts are made to or from facilities in a different state, it is called 'simulcasting.' § 550.002(32), Fla. Stat. (2013).").

^{4/} West Flagler Associates, Ltd. (Magic City Jai Alai) had the smallest total handle (\$0.00) in Miami-Dade County for the 2013/2014 state fiscal year, but since it did not operate, despite being licensed, its total was not considered.

^{5/} The provision of section 550.3351(2)(b) that wagers placed at an out-of-state facility on a race or game simulcast from a Florida pari-mutuel facility "may be, but are not required to be" included in the hosting facility's pari-mutuel pool is a recognition that there are instances when an out-of-state facility may choose to create its own local pool for a Florida race or game, in which case bets placed on the Florida simulcast event are not reported as and do not count towards the Florida pari-mutuel facility's aggregate pari-mutuel pool. Although local pools are allowable, no witness could offer any reason as

to why a local pool would be created, as it typically would result in smaller pay-outs on winning wagers.

All wagers placed at out-of-state facilities for which information is transmitted by the totalisator to the Florida pari-mutuel facility are included in the Florida pari-mutuel facility's total pool.

^{6/} The record is silent as to whether Summer Jai Alai Partnership ever affirmatively "decline[d] to convert." That issue was not addressed by either party. The December 2, 2015, notice of proposed agency action regarding the July Application is predicated on the assumption that West Flagler was seeking to convert its own permit to a permit to conduct a summer jai alai fronton. Though the parties seemed to acknowledge that, if simulcast export wagers were included in the play or total pool, Summer Jai Alai Partnership would have the smallest play or total pool for state fiscal years 2013/2014 and 2014/2015, there was no evidence to suggest that Summer Jai Alai Partnership was advised of that determination, or that it ever took any action thereon. Thus, this Recommended Order should not be construed as determining whether any necessary condition precedent to the creation of a summer jai alai permit on the part of Summer Jai Alai Partnership was performed.

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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.