

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA HORSEMEN'S BENEVOLENT  
AND PROTECTIVE ASSOCIATION,  
INC., A FLORIDA NONPROFIT  
CORPORATION,

Petitioner,

vs.

Case No. 17-5872RU

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

Respondent,

and

CALDER RACE COURSE, INC.,

Intervenor.

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FINAL ORDER

Pursuant to notice, Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings, conducted a formal hearing in the above-styled case on May 22, 2018, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Bradford J. Beilly, Esquire  
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For Respondent: Louis Trombetta, Esquire  
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For Intervenor: Wilbur E. Brewton, Esquire  
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STATEMENT OF THE ISSUES

Whether Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division"), relied on an unadopted rule when it renewed a license to operate slot machines to Intervenor Calder Race Course, Inc. ("Calder") for the 2017-2018 fiscal year, and whether Petitioner, Florida Horsemen's Benevolent and Protective Association, Inc. ("Petitioner" or "FHBPA"), has standing to bring the instant action.

PRELIMINARY STATEMENT

On May 9, 2017, Calder submitted its application to renew its Florida license for slot machine operations. On July 6, 2017, the Division issued Calder's renewal license. On October 25, 2017, Petitioner filed at the Division of Administrative Hearings ("DOAH") a Petition Challenging an Agency Statement as a Rule (the "Petition"). The Petition alleges that the Division's issuance of the renewal license

constituted an unadopted rule in violation of section 120.54(1)(a), Florida Statutes. Specifically, Petitioner contends that changes to Calder's physical plant have resulted in its slot machine gaming area no longer being "contiguous and connected" to its live gaming facility as required by section 551.114(4), Florida Statutes. Petitioner also alleges that Calder no longer has a "live gaming facility" within the meaning of section 551.114(4).

On November 2, 2017, Calder filed a Petition to Intervene, which was granted by Order dated November 3, 2017.

The case was scheduled for hearing on November 20, 2017, in Tallahassee. The hearing was continued twice pursuant to joint motions. On January 25, 2018, the parties filed a joint motion to abate, stating that their informal settlement discussions had proved fruitful and requesting time to negotiate further without the pressure of a pending hearing. By Order dated January 25, 2018, the hearing scheduled for January 31, 2018, was canceled and the case placed in abeyance.

On March 15, 2018, the parties filed a status report stating that they had been unable to informally resolve the case and requesting that the final hearing be rescheduled. By Order dated March 16, 2018, the case was scheduled for hearing on May 22, 2018, on which date it was convened and completed.

The parties submitted a Joint Pre-hearing Stipulation. The stipulated facts from that document are included in the Findings of Fact in this Final Order.

At the outset of the hearing, the parties stipulated to entry of their exhibits. Petitioner's Exhibits 1 through 23 and Calder's Exhibits 1 through 20 were admitted into evidence. The Division adopted all of Calder's exhibits as its own.

Petitioner and the Division offered the testimony of Jamie Pouncey, a Senior Management Analyst II for the Division; Casey Smith, the Division's Chief of Slot Operations; Steven Cogan, the Division's Chief of Investigations; and Noel Haynes, a Division investigator. Calder offered the testimony of its President and General Manager, Maureen Adams; and of its Senior Director of Finance, Jason Stroess.

A one-volume Transcript of the hearing was filed at the DOAH on June 18, 2018. On June 22, 2018, the parties filed a Joint Motion for Extension of Time in which they requested until July 23, 2018, to file their proposed final orders. An Order Granting Extension was entered on June 25, 2018. In compliance with the Order Granting Extension, all of the parties filed their Proposed Final Orders on July 23, 2018.

Unless otherwise indicated, all statutory references in this Final Order are to the 2018 version of the Florida Statutes

and all references to Rules are to the current version of the Florida Administrative Code.

#### FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, including the parties' Joint Pre-hearing Stipulation, the following Findings of Fact are made:

1. The FHBPA is a Florida not-for-profit corporation representing licensed horse trainers and horse owners in Florida. The FHBPA's stated purpose is to advance and promote the sport of thoroughbred horse racing and the thoroughbred horse racing industry in the state of Florida, and to assist its members in all matters that affect their interests in the racing industry.

2. The Division is the state agency responsible for implementing and enforcing Florida's pari-mutuel laws, including the licensing and regulation of all pari-mutuel activities conducted in the state. The Division's regulatory duties include the adoption of "reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state."

§ 550.0251(3), Fla. Stat. The Division is also responsible for

the administration and regulation of slot machine gaming in Florida. § 551.103, Fla. Stat.

3. Calder is the holder of a thoroughbred horse racing pari-mutuel permit and a slot machine license in Miami-Dade County, Florida. Calder is one of eight Florida pari-mutuel facilities authorized to operate slot machines and has continuously held a slot machine license since 2009.

4. Gambling is generally prohibited under Florida law. See chapter 849, Florida Statutes, establishing criminal penalties for many forms of gambling.<sup>1/</sup> However, certain types of pari-mutuel activities, including wagering on horse racing, have been authorized. In recent years, the Legislature has expanded the gambling activities that may occur at the facilities of licensed pari-mutuel permit holders by authorizing the operation of slot machines at pari-mutuel facilities.

5. Article X, section 23 of the Florida Constitution, adopted in 2004, allows the governing bodies of Miami-Dade and Broward Counties to hold a county-wide referendum "on whether to authorize slot machines within existing, licensed parimutuel facilities (thoroughbred and harness racing, greyhound racing, and jai-alai) that have conducted live racing or games in that county during each of the last two calendar years before the effective date of this amendment." Article X, section 23 also requires the Legislature to adopt implementing legislation.

6. Chapter 551, Florida Statutes, originally enacted in 2005, is the implementing legislation for Article X, section 23.

7. Section 551.104(10)(a)1. requires slot machine licensees, who are also thoroughbred racing permit holders to enter into a "binding written agreement" with the FHBPA governing the payment of purses on live thoroughbred races conducted at the licensee's pari-mutuel facility, and to file that agreement with the Division. The statute provides that the agreement may direct the payment of purses "from revenues generated by any wagering or gaming the applicant is authorized to conduct under Florida law."

8. Calder has filed with the Division a binding written agreement with the FHBPA governing the payment of purses on live thoroughbred races conducted at Calder's pari-mutuel facility. The agreement provides for direct payment of purses from revenues generated from Calder's pari-mutuel wagering activities and Calder's slot machine gaming activities.<sup>2/</sup>

9. Calder operated its first live thoroughbred horse racing meet on May 6, 1971, at the current location of the pari-mutuel facility. The facility's legal description is unchanged since Calder's initial racing permit was issued in 1969.

10. A race meet has been conducted at the Calder pari-mutuel facility every year from 1971 through 2017. Since at

least 1992, Calder has been operating live pari-mutuel activities on the racetrack apron, in front of the grandstand.

11. In July 2009, Calder filed for and obtained a slot machine license, pursuant to the provisions of Article X, Section 23, and sections 551.101 and 551.102(4). Section 550.105(1) provides that a slot machine license is effective for one year after issuance and must be renewed annually. Calder has renewed its slot machine license every year since 2009.

12. At the time Calder sought its initial slot machine license, and just prior to constructing its slot machine facility, Calder's pari-mutuel facility included:

- a. a large main dirt race track, and a smaller turf course;
- b. a paddock area, including a patron viewing area of the paddock, and a walking ring in the paddock area;
- c. 1,850 stables and a barn area (the backside);
- d. a detention barn;
- e. state veterinary offices;
- f. a totalizator board;
- g. a winner's circle;
- h. outdoor pari-mutuel wagering areas;
- i. a large grandstand building built in 1971 which housed: a grandstand seating area, which had a capacity in excess of 10,000 seats; several restaurants and lounges; pari-mutuel wagering betting areas;



freestanding pari-mutuel machines; stewards' offices; state offices; a money room; restrooms; and elevators to access the various floors of the building;

j. outdoor concessions (tiki huts), outdoor patron seating, and an outdoor pari-mutuel wagering area to accommodate patrons who sat outside the grandstand building; and

k. parking lots, sidewalks to connect to the various areas, and other physical components associated with the conduct of live thoroughbred racing.

13. All of the above-mentioned areas combined to support the live pari-mutuel wagering activities conducted by Calder and together constituted Calder's pari-mutuel facility as defined in section 550.002(23).

14. Calder's designated slot machine gaming area was built in a separate building, hereinafter referred to as the "Casino," located within the boundaries of Calder's facility. The Casino opened for business in 2010.

15. Calder built a covered sidewalk between the grandstand and the Casino to facilitate the movement of patrons between the two parts of the property.

16. While the indoor grandstand was a dedicated location for patrons to watch the races and place bets, patrons were also able to watch the races and place bets outside on the racetrack apron, in front of the grandstand.

17. As noted above, Florida law currently authorizes eight licensed pari-mutuel facilities to operate slot machine gaming facilities. These facilities consist of two thoroughbred permit holders (Calder Race Course and Gulfstream Park); one harness horse track permit holder (Pompano Park); one quarter horse permit holder (Hialeah Race Track); two dog track permit holders (Hollywood and Flagler dog tracks); and two jai alai permit holders (Dania and Miami Jai Alai).

18. Section 551.114(4), Florida Statutes, provides:

Designated slot machine gaming areas may be located within the current live gaming facility or in an existing building that must be contiguous and connected to the live gaming facility. If a designated slot machine gaming area is to be located in a building that is to be constructed, that new building must be contiguous and connected to the live gaming facility.

19. Calder is the only one of the eight slot machine licensees that chose to locate its slot machine facility in a separate, newly constructed building. All seven of the other licensees operate their slot machine facilities within the same buildings as their previously existing pari-mutuel facilities.

20. When it issued Calder's initial slot machine license, the Division determined that Calder's newly built Casino was in compliance with the statute's requirement that it be "contiguous and connected" to the existing pari-mutuel facility. This

determination was not challenged by the FHBPA or any other entity.

21. The Casino has remained in the same location on the Calder property since it opened in 2010.

22. Calder's grandstand was built in 1971 and was approximately 420,000 square feet, seven stories tall, and seated approximately 15,575 people.

23. Calder's live thoroughbred racing attendance and revenues began to decline in 2004 and continued to drop throughout the next decade. By 2013, attendance at Calder for thoroughbred racing had dropped to a total of 118,000 patron visits, or an average of 439 patrons per day. This contrasts with 2004, when total attendance was 841,000, for an average daily attendance of 3,351.

24. Horsemen's purses similarly declined, from \$26,707,755 in 2004 to \$7,751,215 in 2013.

25. In an effort to cut costs, Calder began closing off floors of its grandstand in 2008. By the 2013 and 2014 seasons, only about half the grandstand remained in use.

26. Calder's grandstand building did not have a traditional central air conditioning system; rather, it had cooling towers at either end of the building. The design of the air conditioning system was such that it continued to cool all seven floors even when some had been closed off from use.

Therefore, the only savings Calder could realize from closing off floors was in labor costs. Calder's air conditioning costs for the grandstand were around \$55,000 per month. Calder was also required by law to maintain elevator service to all floors, at a maintenance cost of about \$140,000 per year. These costs were incurred whether or not the track was conducting a race meet.

27. A further blow to Calder's thoroughbred racing fortunes came when Gulfstream Park decided to race year-round, thereby coming into direct competition with Calder's winter race meet. By 2013, Calder was losing more than \$5 million per year on its pari-mutuel activities.

28. In 2014, Calder decided to cut its losses by demolishing the grandstand building.

29. Calder did not request permission from the Division to tear down the grandstand. However, Division personnel visited Calder regularly and were well aware of Calder's plans. No one from the Division advised Calder that tearing down the grandstand would create a slot machine compliance issue.

30. Also in 2014, Calder entered into a contract with Gulfstream Park to outsource the operation of its race meets. Since July 1, 2014, Gulfstream Park and its racing personnel have conducted Calder's full schedule of live racing at the Calder facility.

31. Gulfstream Park's first season of operating the Calder race meet began in October 2014. Gulfstream Park initially intended to operate the race meet from the racetrack apron, thereby foregoing a lease on Calder's still-standing grandstand. However, due to the short time between execution of the lease and commencement of the race meet, Gulfstream Park was forced to lease the first floor of the grandstand to run the meet and part of the seventh floor to house the race officials. The 2014 race meet was the last time that patrons placed bets in the Calder grandstand building.

32. In 2015, Calder's race meet was conducted exclusively on the apron. In addition to the outdoor areas Calder has historically maintained on the apron, a tent was erected to house the wagering machines, video screens, and seating for patrons. The grandstand was being prepared for demolition and was not used during the 2015 Calder race meet.

33. Demolition of the grandstand began in 2015 and was completed in 2016.

34. At present, Calder's live viewing locations include areas in front of where the former grandstand building stood, as well as to the east of the former grandstand area. These areas still contain outdoor seating and tiki huts where patrons can get food and drinks, view the race track, and wager on live racing events.

35. The distance a patron must travel from the Casino to the pari-mutuel wagering area is roughly the same as it was when the grandstand building existed. The difference is that prior to closure of the grandstand, patrons could exit the Casino, walk a short distance on the covered walkway, and then enter the air-conditioned grandstand building, through which they could proceed the hundred yards or so to the wagering area. Now, patrons wishing to go from the Casino to the outdoor pari-mutuel wagering area must take a walkway that proceeds around the fenced-off footprint of the old grandstand building. For a portion of the path, the walkway is not covered.

36. The Casino remains where it was in 2010. The wagering area on the racetrack apron has not moved. The only change in the Calder facility is the demolition of the grandstand building. Calder's plan is to convert the former grandstand area into a greenspace.

37. The entire property remains under the control of Calder. Nothing obstructs passage between the Casino and any other portion of the Calder property.

38. Since Calder opened the Casino in 2010, the Division has renewed its slot machine license annually, without objection from any third party, through the renewal for the fiscal year commencing July 1, 2016. Even the instant case is not a direct challenge to Calder's 2017-2018 license renewal.

39. Commencing on October 5, 2016, the FHBPA began writing to various Division personnel complaining that the demolition of the grandstand caused the Calder Casino to no longer be "contiguous and connected to a live gaming facility" as required by section 551.114(4), and requesting the Division to commence enforcement action against Calder.

40. In October 2016, the Division's Office of Investigations conducted an inspection of Calder and did not find any violation related to section 551.114(4). Finding no violations during its inspection, the Office of Investigations saw no need to make a written report and did not initiate a formal investigation.

41. Calder applied for its 2017-2018 slot machine license renewal on May 9, 2017.

42. On June 20, 2017, the FHBPA served the Division with a 30-day notice of its intention to file an unadopted rule challenge against the Division "for its willful failure to enforce the requirements of [section 551.114(4)] by continuing to allow [Calder], as a Division licensee, to maintain its license while it clearly operates its Slots Building in violation of said statute."

43. On July 9, 2017, the Division renewed Calder's slot machine license for the license year commencing July 1, 2017,

without any further analysis as to whether the Casino was in compliance with section 551.114(4).

44. The FHBPA contends that it has standing to challenge the Division's purported unadopted rule because a substantial number of its members would be substantially affected by the Division's regulatory actions. The FHBPA notes that it is specifically named in the statutes at issue in this proceeding and is itself substantially affected by agency decisions regarding Calder's compliance with regulatory statutes because the FHBPA receives a percentage of the total horse racing purse pools awarded at Calder. The Legislature has enacted specific conditions to be met by applicants for slot machine licenses to ensure the promotion of horse racing in Florida. The FHBPA concludes that compliance with the relevant statutes, which is intended to promote horse racing in the state, directly affects it and its members.

45. The Petition states that the necessary effect of compliance with section 551.114(4) is to expose slot machine players to the live thoroughbred racing being conducted elsewhere on the premises. This exposure necessarily increases the chance of patrons wagering on horseracing, thereby increasing the monies being directed to the purse pool for the benefit of FHBPA members. The Petition alleges that the current configuration at Calder's premises fails to expose the slot



machine patrons to the horseracing being conducted and decreases the chances those patrons will wager on horseracing.

46. In contrast, the Division observes that this proceeding relates to a slot machine license and neither the FHBPA nor its members are licensed or regulated under chapter 551, nor do they promote or participate in the slot machine industry. The Division concedes the FHBPA's interest in Calder's thoroughbred horseracing activities under chapter 550, and the slot machine revenues the FHBPA receives to supplement racing purses pursuant to chapter 551. However, the Division points out that if the FHBPA receives the relief it seeks, the prospective effect would be to deprive its members of the revenues they derive from Calder's slot machine operations. The Division suggests that the FHBPA lacks standing because its asserted scope of interest and activity--the maximization of purses to be paid out to its members--is irreconcilably adverse to the relief its requests in this proceeding.

47. In the Petition, the FHBPA asserted that its interest in the agency statement is lost revenues. The alleged lack of "contiguity and connectedness" will fail to expose the slot machine patrons to the horseracing being conducted elsewhere on the Calder premises, thereby decreasing the chance that these slot machine players will wager on horseracing. The FHBPA did not directly address the loss of slot machine revenues its

members would suffer if Calder's slot machine license were not renewed.

48. The FHBPA's chief concern is that slot machine wagering was originally approved only as an adjunct to existing, licensed pari-mutuel facilities, with the promise that slot machine revenues would support and enhance Florida's horseracing, greyhound racing, and jai alai industries. Now, at least at Calder, the tail is wagging the dog: casino revenues far outstrip live thoroughbred racing revenues. Calder is actively disinvesting in its thoroughbred racing business, outsourcing its operation to Gulfstream and tearing down its grandstand. Maureen Adams, Calder's president and general manager, candidly testified that Calder would get out of the live horseracing business altogether if the Legislature would "decouple" the slot machine operations from the pari-mutuel operations.

49. It is found that the FHBPA has articulated a sufficient interest to establish standing to bring this unadopted rule challenge as part of its effort to preserve what it contends is the purpose of the constitutional amendment and implementing legislation establishing slot machine operations in Miami-Dade and Broward Counties: the promotion of and economic support for the pari-mutuel gaming industry, including

thoroughbred horseracing. The FHBPA's asserted interest in this proceeding is consistent with the organization's stated purpose.

50. As to whether the Division's action constituted an unadopted rule, the Petition alleged:

The Division's approval and issuance of a renewed slot machine gaming license to Calder reflects and implements a statement of agency policy interpreting the "connected and contiguous" requirement of Fla. Stat. 551.114 so as to allow the issuance of slot machine gaming license to permitholders whose designated slot machine gaming area is contained at a location that is a distance from and physically apart from the area where a live gaming facility is located. This new policy, which has not been promulgated as a rule, is a statement of general applicability because it announces an inclusive interpretation of the term "connected and contiguous" that will serve as the basis for other pari-mutuel wagering permitholders to operate a slot machine gaming facility.

51. The evidence presented at the hearing established that the operation of slot machines is limited to the eight pari-mutuel facilities in Broward and Miami-Dade Counties that were in existence at the time of and had conducted live racing or games in the two calendar years prior to the adoption of Article X, Section 23. Absent a further constitutional amendment, the class of slot machine licensees cannot expand beyond these eight pari-mutuel facilities. Even if it were conceded that the Division's statement is one of general

applicability, its potential application would be limited to these eight entities.

52. Section 550.114(4) provides three options for the location of "designated slot machine gaming areas."<sup>3/</sup> First, the slot machine gaming area may be located "within the current live gaming facility." Second, the slot machine gaming area may be placed "in an existing building that must be contiguous and connected to the live gaming facility." Third, the slot machine gaming area may be located in a newly constructed building, provided that new building is contiguous and connected to the live gaming facility.

53. The evidence presented at the hearing established that seven of the eight eligible pari-mutuel facilities chose option one for their slot machine gaming areas; that is, they located the slot machine gaming area within their current live gaming facilities. No one chose option two. Only Calder chose option three and constructed a new building to house its slot machine gaming area.

54. As matters stood at the time of the hearing, Calder was the only licensee that could possibly be affected by a Division interpretation of the "contiguous and connected" requirement of the statute. Unless another pari-mutuel facility in the future undertakes to construct a new building for its slot machine gaming area or to move its slot machine gaming area

to a different existing building, the alleged unadopted rule is applicable only to Calder.

55. The evidence indicated that the Division did not give much thought to the question whether demolishing the grandstand could affect Calder's slot machine licensure until the FHBPA began complaining about it. The Division then considered the FHBPA's objections and concluded that Calder's slot machine license should be renewed.<sup>4/</sup>

56. The Division's reasoning was essentially that the Casino had not moved, the racetrack had not moved, and no impediment had been placed between them. The demolition of the grandstand had the effect of forcing patrons to take a slightly different path between the Casino and the pari-mutuel facility, and to walk part of the way in the elements rather than briefly under a covered walkway and then through an enclosed air conditioned grandstand.

57. The Casino has never been physically attached to the pari-mutuel facility; it has always been linked by a sidewalk. The demolition of the grandstand did nothing to change the position of the Casino in relation to the pari-mutuel facility. Both facilities are on the Calder property and are still linked by a sidewalk. The loss of the grandstand only made the passage from the Casino to the racetrack less comfortable for those who prefer air conditioning to a walk outdoors. The Division

concluded that the Casino is now as "contiguous and connected" to Calder's pari-mutuel facility as it ever was.

58. The FHBPA contends that the absence of an air conditioned grandstand building is critical. Because section 551.114(4) states that a designated slot machine gaming area may be located within the current live gaming facility, the Legislature "is necessarily stating that a 'live gaming facility' is a structure that is able to house the operation of a slot machine gaming area." If an area cannot house a slot machine gaming area, then it cannot be a "live gaming facility" within the terms of the statute.

59. The FHBPA next points to the testimony of Casey Smith, the Division's Chief of Slot Operations, who stated that a tent on the apron of a racetrack would not be a viable option for a slot machine operation because "slot machines would be sensitive to temperature, humidity, stuff like that, so you know, doing anything long term in a tent like that probably is not something that's going to work." Mr. Smith also noted the necessity of security and a surveillance system.

60. The FHBPA argues that Mr. Smith's testimony, read together with the "live gaming facility" language of section 551.114(4), "make it clear that a 'live gaming facility' must necessarily be an air conditioned structure with enclosed walls, a roof and electricity that is capable of having a surveillance

system installed." In the case of Calder, the "live gaming facility" must be an air conditioned structure with enclosed walls and a roof that allows the public to view and wager on thoroughbred horseraces being conducted "live and in plain view." The FHBPA contends that to interpret "live gaming facility" to mean anything less than an air conditioned structure with enclosed walls and a roof would render the first part of section 551.114(4) "meaningless."

61. The FHBPA's argument would have some force if the first part of section 551.114(4) stood alone, i.e., if a pari-mutuel licensee's only option were to place the slot machine gaming area within the current live gaming facility. As noted above, however, the plain language of the statute gives a licensee two other options: to place the slot machine gaming area in an existing building that is contiguous and connected to the live gaming facility, or to construct a new building that is contiguous and connected to the live gaming facility. The FHBPA's contention is that the statute requires a live gaming facility to be fully capable of housing slot machines, even where the slot machines are in fact housed elsewhere. The language of section 551.114(4) does not support this reading.<sup>5/</sup>

62. It is found that the Division's action in approving the renewal of Calder's slot machine license was based on facts

specific to Calder, applied only to Calder, and constituted an order, not an unadopted rule.

63. "Contiguous and connected" is an undefined term in the statute. Without belaboring the dictionary definitions of these common words, the undersigned finds that the Division was entitled to some exercise of discretion in applying the term "contiguous and connected" to the unique facts on the ground at Calder, without going through the process of adopting a rule that would apply only to Calder. Because the Division's issuance of a slot machine license renewal to Calder was not an unadopted rule, there is no need to further address the correctness of the Division's interpretation of "contiguous and continuous."

#### CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569, and 120.57(1), Florida Statutes.

65. The Division is an "agency" within the meaning of section 120.52(1). The Division's statutory powers include rulemaking pursuant to sections 550.0251(3) and 550.3511(10).

66. Section 120.52(16) defines a "rule" as:

each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the



procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

67. An "unadopted rule" is defined as an agency statement that meets the definition of the term rule, but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

68. Section 120.54(1) provides:

(1)(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

69. The "flush left" language of section 120.52(8), defining "invalid exercise of legislative authority," provides:

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 or interpret the specific 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 or is within the agency's class of powers and duties, 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 and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

70. Section 120.56(4) provides a remedy for persons who are substantially affected by an unadopted rule:

(a) Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.

\* \* \*

(e) If an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action.

71. The FHBPA has standing for purposes of challenging an unadopted rule pursuant to section 120.56(4), in that a substantial number of its members would be substantially affected by the Division's regulatory actions. NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294 (Fla. 2003); Rozenzweig v. Dep't of Transp., 979 So. 2d 1050, 1053-54 (Fla. 1st DCA 2008). The FHBPA is named specifically in chapter 551 as an entity with which a thoroughbred racing licensee must contract in order to obtain and renew a slot machine license. § 551.104(10)(a)1., Fla. Stat. The FHBPA would itself be substantially affected by the Division's decisions regarding slot machine licensure and by

the Division's specific decision to approve Calder's license under the circumstances described in the above Findings of Fact.

72. An administrative agency is required to promulgate rules as to "those statements which are intended by their own effect to create rights or to require compliance, or otherwise to have the direct and consistent effect of law." Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200, 203 (Fla. 1st DCA 2010), quoting Ag. for Health Care Admin. v. Custom Mobility, 995 So. 2d 984, 986 (Fla. 1st DCA 2008).

73. An agency statement need not be reduced to writing in order to meet the definition of a rule, and an agency cannot avoid the rulemaking requirement by refraining from memorializing the agency statement in written terms. Dep't of High. Saf. & Motor Veh. v. Schluter 705 So. 2d 81, 84 (Fla. 1st DCA 1997).

74. The focus in determining whether an agency statement is a rule within the meaning of section 120.52(16) is on the effect of the statement rather than the agency's characterization of it. Dep't of Rev. v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996); Balsam v. Dep't of HRS, 452 So. 2d 976, 977 (Fla. 1st DCA 1984); Amos v. Dep't of HRS, 444 So. 2d 43, 46-47 (Fla. 1st DCA 1983); State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

75. An agency's interpretation of a statute is a rule if it gives the statute a meaning not readily apparent from a literal reading, or if it purports to create rights, require compliance, or otherwise has the direct and consistent effect of law. Beverly Enterprises-Florida, Inc. v. Dep't of HRS, 573 So. 2d 19, 22-23 (Fla. 1st DCA 1990), quoting St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

76. Florida administrative law does not allow an agency to establish new policy by stealth, through the issuance of licenses. A policy having the force and effect of law must be formally adopted through the rulemaking process. Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof. Reg., 133 So. 3d 1118, 1119-20 (Fla 1st DCA 2014).

77. To reiterate, section 551.114(4) provides:

Designated slot machine gaming areas may be located within the current live gaming facility or in an existing building that must be contiguous and connected to the live gaming facility. If a designated slot machine gaming area is to be located in a building that is to be constructed, that new building must be contiguous and connected to the live gaming facility.

78. The FHBPA contends that the quoted statutory language necessarily implies that a "live gaming facility" must be capable of housing a slot machine gaming area. The FHBPA states that the evidence established that a slot machine gaming area requires an enclosed, air conditioned space and that the outdoor

area currently provided by Calder for pari-mutuel wagering is incapable of housing slot machines. Therefore, Calder does not currently operate a "live gaming facility."

79. The FHBPA misreads the statute. First, the statute's language is permissive: a slot machine gaming area may be located within the current live gaming facility. Second, the statute goes on to provide the pari-mutuel license holder with two other options for setting up its slot machine operation, neither of which logically requires the current live gaming facility to be capable of housing slot machines.

80. As noted in the Findings of Fact above, the FHBPA's reading might be compelling if the only option open to a pari-mutuel facility were to place the slot machine gaming area in its current live gaming facility. However, it would make no sense to require that a current live gaming facility be capable of housing a slot machine operation when the slot machine operation is in fact going to be placed in a different building.

81. The FHBPA also argues that the Division's approval of Calder's license renewal is in derogation of the statute's requirement that the separate building housing the slot machine gaming operation be "contiguous and connected" to the current live gaming facility. Put another way, the Division has acted in accordance with an unadopted rule by interpreting the "contiguous and connected" requirement in such a way that the

allegedly unconnected, non-contiguous Casino has been approved for license renewal.

82. The Division responds that its renewal of Calder's license is not an unadopted rule because it lacks general applicability. In support of its contention, the Division quotes Florida Quarter Horse Track Association v. Florida Department of Business & Professional Regulation, Case No. 11-5796RU at ¶ 59 (DOAH May 6, 2013), aff'd, Florida Quarter Horse Track Association v. State, 133 So. 3d 1118 (Fla. 1st DCA 2014), as follows:

A statement which, by its terms, is limited to a particular person or singular factual situation is not generally applicable, nor is one whose applicability depends on the circumstances. Such ad hoc directives are orders, not rules. By contrast, "general applicability" requires that the scope of the statement—its field of operation—be sufficiently encompassing as to constitute a principle; there must be, in other words, a comprehensiveness to the statement, which distinguishes the statement from the more narrowly focused, individualized orders that agencies routinely issue in determining the substantial interests of individual persons. A generally applicable statement purports to affect, not just a single person or singular situations, but a category or class of persons or activities.

83. The actual "statement" in this case was the Division's renewal of Calder's slot machine gaming license, which the FHBPA characterized as expressing the Division's judgment that "a designated slot machine gaming area in a building that is both

physically disconnected from and located in a different geographic area than a live gaming facility is actually 'contiguous and connected' to the live gaming facility."

84. Despite the FHBPA's effort to broaden the Division's statement into one of general applicability, it was in fact specific to Calder and the configuration of Calder's gaming facilities. Calder was the only slot machine licensee that chose to build a new and separate building to house its Casino and to connect the Casino to the pari-mutuel facility via sidewalks. All seven of the other eligible pari-mutuel licensees elected to house their slot machine gaming areas within their current live gaming facilities.

85. The Division is specifically authorized by section 550.104(1) to issue a license to conduct slot machine gaming upon a finding that the application is complete and the applicant is qualified. Given the uniqueness of Calder's facility, the Division was not required to initiate the rulemaking process in order to renew Calder's license. The Division's interpretation of the "contiguous and connected" criterion is inapplicable to any other slot machine licensee. Calder's license renewal was an order, not an unadopted rule.

86. All three parties presented argument as to whether the Division's interpretation of the "contiguous and connected" was a correct reading of section 551.114(4). Because the

undersigned concludes that the Division's issuance of a license renewal to Calder was not an unadopted rule, there is no need to reach the issue of whether the agency's interpretation of the statute was erroneous.

ORDER

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

ORDERED that the Florida Horsemen's Benevolent and Protective Association, Inc.'s Petition Challenging an Agency Statement as a Rule is DISMISSED.

DONE AND ORDERED this 4th day of September, 2018, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of September, 2018.

ENDNOTES

<sup>1/</sup> Paragraphs 6 through 17 of Florida Quarter Horse Racing Association v. Department of Business & Professional Regulation, DOAH Case No. 11-5796RU (Final Order May 6, 2013), aff'd 133 So.



2d 1118 (Fla. 1st DCA 2014), provide an excellent primer on Florida pari-mutuel wagering in general and quarter horse racing in particular.

<sup>2/</sup> There was testimony regarding the existence of a second and confidential agreement between Calder, the FHBPA, and Gulfstream Park, the entity that has operated the race meet at Calder since 2014. It was not necessary to delve into the terms of either agreement because there was no dispute that Calder was in compliance with the statutory requirement that an agreement be on file with the Division.

<sup>3/</sup> "Designated slot machine gaming areas" are defined as "the area or areas of a facility of a slot machine licensee in which slot machine gaming may be conducted in accordance with the provisions of this chapter." § 551.102(2), Fla. Stat.

<sup>4/</sup> The parties' extensive argument over whether the Division conducted a formal "investigation" into the "contiguous and connected" question, or why it failed to do so, is irrelevant to the decision in this case. The Division had personnel on the ground at Calder throughout the period of the Casino's construction and the grandstand's demolition. The Division was well aware of the configuration of Calder's facility. The Division did not need to undertake a formal investigation of Calder's premises to conclude that the FHBPA's objections were unfounded.

<sup>5/</sup> Of less significance but some interest, Mr. Smith qualified his testimony regarding the practicality of tents by pointing out that the Seminole Tribe of Florida's Big Cypress gaming facility was in an air conditioned tent for several years. The slot machines were in the tent and the computer, monitoring and surveillance equipment were kept in storage containers capable of withstanding a hurricane.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.