STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE FLORIDA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC.,

Petitioner,

and

FLORIDA THOROUGHBRED BREEDERS' ASSOCIATION, INC., D/B/A FLORIDA THOROUGHBRED BREEDERS' AND OWNERS' ASSOCIATION; AND OCALA BREEDERS' SALES COMPANY, INC.,

Intervenors,

vs. Case No. 19-1617

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING; AND CALDER RACE COURSE, INC.,

Respondents.
_____/

RECOMMENDED ORDER

This matter came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing on October 21 through 24, 2019, by video teleconference with sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: The Florida Horsemen's Benevolent and Protective Association, Inc. ("FHBPA"):
Bradford J. Beilly, Esquire
Beilly and Strohsahl, P.A.
1144 Southeast Third Avenue
Fort Lauderdale, Florida 33316

For Intervenor — Florida Thoroughbred Breeders' and Owners' Association, Inc. ("FTBOA"):
Donna E. Blanton, Esquire
Brittany Adams Long, Esquire
Radey Law Firm, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301

For Intervenor — Ocala Breeders' Sales, Inc. ("OBS"):
Daniel Hernandez, Esquire
Shutts & Bowen LLP
4301 West Boy Scout Boulevard, Suite 300
Tampa, Florida 33607

For Respondent — Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division"):
James A. Lewis, Esquire
Megan S. Silver, Esquire
Johnny P. ElHachem, Esquire
Department of Business and Professional Regulation
Division of Pari-Mutuel Wagering
2601 Blair Stone Road
Tallahassee, Florida 32399

For Respondent — Calder Race Course, Inc. ("Calder"):
Wilbur E. Brewton, Esquire
Brewton Plante, P.A.
215 South Monroe Street, Suite 825
Tallahassee, Florida 32301

Tamara S. Malvin, Esquire
Akerman LLP
350 East Las Olas Boulevard, Suite 1600
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether the FHBPA, FTBOA, and OBS have standing to challenge the Division's issuance of a new summer jai alai permit to Calder; and, if so, whether FHBPA's petition and FTBOA's and OBS's motions to intervene were timely; and, if so, whether the Division properly granted a new summer

jai alai permit to Calder pursuant to section 550.0745(1), Florida Statutes (2019), and Florida Administrative Code Rule 61D-4.002.

PRELIMINARY STATEMENT

On February 9, 2018, the Division issued a new summer jai alai permit to Calder. On July 3, 2018, FHBPA filed a Petition for Formal Administrative Hearing with the Division, challenging the issuance of the permit. On March 25, 2019, the Division forwarded the petition to DOAH to assign an administrative law judge to conduct the final hearing. This matter was assigned to the undersigned under DOAH Case No. 19-1617. On April 2 and 3, 2019, FTBOA and OBS filed motions to intervene. On April 4, 2019, the undersigned set the final hearing for June 17 through 19, 2019. On April 17, 2019, the Division and Calder filed responses in opposition to the motions. On May 7, 2019, following a hearing, the undersigned entered an Order granting the motions.

On May 29, 2019, FHBPA, FTBOA, and OBS filed a separate Petition Challenging Agency Statement as an Unadopted Rule Incorporating a Motion to Consolidate this Proceeding with Pending DOAH Case No. 19-1617 with DOAH. The unadopted rule challenge matter was assigned to the undersigned under DOAH Case No. 19-2860RU. On May 31, 2019, the undersigned entered an Order granting the motion and consolidated DOAH Case Nos. 19-1617 and 19-2860RU.

On May 31, 2019, FHBPA filed a motion to amend its petition in DOAH Case No. 19-1617. On June 3, 2019, the undersigned entered an Order granting the motion. On June 7, 2019, the Division filed an unopposed motion to continue the final hearing. On June 14, 2019, following a hearing, the undersigned entered an Order granting the motion and reset the final hearing for July 29 through 31, 2019.

On July 18, 2019, FHBPA filed a motion to amend its amended petition in DOAH Case No. 19-1617. On July 19, 2019, Calder and the Division filed responses in opposition to the motion. On July 22, 2019, the Division filed a motion to continue the final hearing, which FHBPA, FTBOA, and OBS opposed. On July 22, 2019, a hearing was held on the motions. On July 23, 2019, the undersigned entered Orders granting the motions and reset the final hearing for October 21 through 25, 2019.

On October 15, 2019, Calder filed its Motions in Limine. On October 18, 2019, FHBPA filed a response in opposition to the motions. That same day, Calder filed a motion for official recognition and the parties filed their Joint Pre-hearing Stipulation, in which they stipulated to certain facts. On October 21, 2019, Calder filed another motion in limine.

The final hearing was held in both cases on October 21 through 24, 2019. At the hearing, the undersigned granted Calder's request for official recognition of sections 550.0745 and 550.054, rule 61D-4.002, and various Florida appellate decisions. The Division presented the testimony of Jamie Pouncey and Tracy Swain. The Division's Exhibits 1 through 5 were received into evidence. Calder presented the testimony of Jason Stoess and Marc Dunbar. Calder's Exhibits 1 through 27 were received into evidence. FHBPA presented the testimony of Keith Johnson, Robert Ehrhardt, Milton Roth, John Lockwood, Andrew Lavin, and Steven Screnci. FHBPA's Exhibits 2, 4, 5, 11 through 13, 15, 16B, 16C, 25 through 29, 31, 33, 35, 38, 51, 53, 54, 59, and 60 were received into evidence. FTBOA presented the testimony of Taylor Lonny Powell. FTBOA's Exhibits 1 through 6 were received into evidence. OBS presented the testimony of Tom Ventura. OBS's Exhibits 1 through 4 were received into evidence.

The eight-volume final hearing Transcript was filed at DOAH on December 9, 2019. On December 13, 2019, the parties filed a Joint Motion for Extension of Time to File Proposed Orders. On December 16, 2019, the undersigned entered an Order granting the motion, extending the deadline to January 28, 2020. On January 17, 2020, the Division filed an unopposed motion for an additional extension of the deadline to file proposed orders. On January 21, 2020, the undersigned entered an Order granting the motion, extending the deadline to February 18, 2020. The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

On March 18, 2020, the Division filed an unopposed motion for official recognition. On March 26, 2020, the undersigned entered an Order granting the Division's request for official recognition of the Recommended Order and Final Order issued by Administrative Law Judge Cathy M. Sellers in the cases styled *Florida Standardbred Breeders and Owners Association, Inc. v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering*, DOAH Case No. 18-6339 (Fla. DOAH Mar. 12, 2020), and DOAH Case No. 19-0267RU (Fla. DOAH Mar. 12, 2020).

The stipulated facts in the parties' Pre-hearing Stipulation have been incorporated herein as indicated below. All references to the Florida Statutes and Florida Administrative Code provisions are to the 2019 versions, unless otherwise indicated.

FINDINGS OF FACT

Parties/Standing

1. The Division is the agency charged with regulating pari-mutuel wagering and issuing pari-mutuel permits under the provisions of

chapter 550, including section 550.0745 pertaining to summer jai alai permits, and rule 61D-4.002.

2. Calder is a pari-mutuel permitholder authorized to operate thoroughbred horse racing and conduct pari-mutel pools on exhibition sports in Miami-Dade County pursuant to chapter 550. Calder has been a pari-mutuel permitholder authorized to operate thoroughbred horse racing in Miami-Dade County since 1971.

3. The Division issued a new summer jai alai permit to Calder on February 9, 2018. The Division did not provide FHBPA, FTBOA, or OBS with formal notice that Calder had applied for a new summer jai alai permit or that the Division intended to issue a new summer jai alai permit to Calder. The Division subsequently licensed Calder to operate its summer jai alai permit in fiscal years 2018/2019 and 2019/2020. Calder is currently licensed to operate both summer jai alai and thoroughbred racing at its Miami-Dade County facility pursuant to the permits and licenses issued by the Division to Calder for thoroughbred horse racing and summer jai alai. Calder is also currently licensed to operate slot machine gaming.

4. Calder receives approximately $85,000,000 in annual gross revenues from slot machine gaming, making this the most profitable activity Calder conducts at its facility.

5. FHBPA is not a pari-mutuel permitholder. FHBPA is a Florida not-for-profit corporation and an association whose membership consists of a majority of horse owners and trainers (approximately 5,000 to 6,000 "horsemen"), whose horses race at thoroughbred race meets operated by the licensed thoroughbred permitholders in South Florida.

6. Pursuant to section 551.104(10)(a)1., Florida Statutes, no slot machine license or renewal license can be issued to an applicant with a thoroughbred horse racing pari-mutuel permit unless the applicant has on file with the Division a binding, written agreement with FHBPA governing the payment of purses on live thoroughbred horse races conducted at the licensee's pari-

mutuel facility. FHBPA and Calder have a contractual agreement, whereby Calder must run 40 days of thoroughbred horse races under its thoroughbred license. Under the current agreement between Calder and FHBPA, Calder is required to pay FHBPA a sum equal to ten percent of Calder's gross slot machine revenues to be used for purses. This amounts to approximately $9,000,000 that FHBPA receives from Calder on an annual basis. This contractual agreement expires in 2020. Since 2014, Calder has satisfied its obligation to run a 40-day thoroughbred racing schedule by contracting with a third party, Gulfstream Park, to run races between October and November of each year.

7. FTBOA is not a pari-mutuel permitholder. FTBOA is a Florida not-for-profit corporation, and the statewide trade association representing the interests of thoroughbred breeders and owners in Florida. Horses owned and/or bred by FTBOA members participate in the thoroughbred horse races at Calder's race course.

8. FTBOA is designated in section 550.2625(3)(h) as the administrator of the thoroughbred breeders' awards program established by the Florida Legislature in sections 550.26165 and 550.2625(3). As part of this program, FTBOA is responsible for the payment of breeders' awards on thoroughbred races conducted in Florida. Pursuant to section 550.26165(1), the purpose of breeders' awards is to "encourage the agricultural activity of breeding and training racehorses in this state."

9. Pursuant to section 551.104(10)(a)1., no slot machine license or renewal license can be issued to an applicant with a thoroughbred horse racing pari-mutuel permit unless the applicant has on file with the Division a binding, written agreement with FTBOA governing the payment of breeders', stallion, and special racing awards on live thoroughbred races conducted at the licensee's pari-mutuel facility. FTBOA receives approximately $1,500,000 from Calder each year in breeders' awards as a result of the Calder racing handle and slot machine revenue.

10. OBS holds a limited intertrack wagering pari-mutuel permit, pursuant to section 550.6308, that authorizes it to conduct intertrack horse racing at its Ocala facility. OBS also holds a non-wagering horse racing permit, pursuant to section 550.505, and a thoroughbred horse sales license, pursuant to chapter 535, Florida Statutes. OBS sells thoroughbred horses at its facility located in Ocala. OBS is the only licensed Florida-based thoroughbred auction sales company in Florida, and it conducts five thoroughbred horse auctions annually. OBS has no pari-mutuel permits located in Miami-Dade County, Florida.

11. On July 31, 2018, Calder filed a Petition for Declaratory Statement with the Division regarding whether it can discontinue the operation of its thoroughbred races and instead operate a full schedule of jai alai performances in order to maintain its eligibility to continue to conduct slot machine gaming. In its petition, Calder made clear its intention to discontinue live thoroughbred horse racing, stating: "Calder desires to discontinue live thoroughbred racing and to obtain a license to operate a full schedule of live jai alai games under its summer jai alai permit. Calder intends on conducting live jai alai games at the same physical location or piece of property where it currently conducts thoroughbred racing."

12. On October 23, 2018, the Division issued its Final Order Granting Declaratory Statement, concluding that Calder may substitute jai alai games in lieu of live horse racing. In its Final Order, the Division also granted FTBOA's and OBS's motions to intervene, concluding that FTBOA met its burden of demonstrating associational standing, and that OBS demonstrated its standing pursuant to *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). The Division's Final Order was affirmed on appeal in *Florida Thoroughbred Breeders' Association, Inc. v. Calder Race Course, Inc.,* 283 So. 3d 843, 845 (Fla. 1st DCA 2019).

13. Calder intends to replace its thoroughbred permit with its jai alai permit as the predicate for maintaining its slot machine gaming permit. An incentive for Calder to substitute its jai alai permit for its thoroughbred permit is that if it stops racing horses after December 2020, Calder will be under no obligation to share the millions of dollars in revenue it receives through its slot machines with FHBPA or FTBOA.

14. FHBPA, FTBOA, and their members will be substantially affected if Calder is allowed to use a summer jai alai permit in place of thoroughbred racing to qualify for the continued operation of its slot machine facility. Millions of dollars that would otherwise be available to FHBPA, FTBOA, and their members through the payment of purses and awards from thoroughbred racing will be lost if Calder is permitted to substitute its underlying pari-mutuel activity from racing thoroughbreds to conducting jai alai games. FHBPA's and FTBOA's substantial injury is of a type or nature which this proceeding is designed to protect.

15. Likewise, OBS will be substantially affected if Calder is allowed to use a summer jai alai permit in place of thoroughbred racing. The demand to breed and purchase racehorses, and the value of breeding and selling thoroughbred horses, will decrease significantly as a consequence of Calder discontinuing thoroughbred horse racing and replacing the races with summer jai alai games. In addition, as a guest track, OBS retains seven percent of the wagers placed at OBS on thoroughbred races in Florida. OBS intertrack wagering generally handles approximately $1,000,000 on thoroughbred races conducted at Calder and Tropical Park, which directly results in revenue to OBS. OBS's substantial injury is of a type or nature which this proceeding is designed to protect.

Calder's Summer Jai Alai Permit Application and the Division's Proper Calculation of "Play or Total Pool" Under Section 550.0745(1)

16. On August 31, 2017, Calder submitted an application to the Division for the issuance of a new summer jai alai permit pursuant to section

550.0745(1). The parties stipulate that, at all times material hereto, Calder was a qualified applicant as to all statutory requirements, but for the dispute as to whether a summer jai alai permit was "made available" pursuant to the second sentence in section 550.0745(1). Section 550.0745(1) provides, in pertinent part, as follows:

> **550.0745 Conversion of pari-mutuel permit to summer jai alai permit.-**
>
> (1) 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 mutual 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.

17. Accompanying Calder's application was a cover letter stating that the application was for the summer jai alai permit associated with state fiscal years 2005/2006 and 2006/2007.

18. The determination of whether the Division properly granted Calder a new summer jai alai permit pursuant to section 550.0745(1) turns on whether a new summer jai alai permit was "made available" for issuance in Miami-Dade County associated with state fiscal years 2005/2006 and 2006/2007.

Whether a new summer jai alai permit was made available, in turn, centers on whether there was a single, pari-mutuel permitholder with the "smallest play or total pool" within the county for the two consecutive fiscal years of 2005/2006 and 2006/2007.

19. FHBPA, FTBOA, and OBS maintain that no new summer jai alai permit was made available for issuance in Miami-Dade County for state fiscal years 2005/2006 and 2006/2007, because there was no single Miami-Dade permitholder that had the "smallest play or total pool" in Miami-Dade County during those two consecutive fiscal years. The disagreement between the parties concerning the existence of an available permit with the "smallest play or total pool" in Miami-Dade for the fiscal years 2005/2006 and 2006/2007 centers on their different methods of interpreting section 550.0745(1) and disagreement regarding the types of wagers the Division must use in its calculation of a permitholder's "play or total pool" pursuant to section 550.0745(1).

20. For purposes of this case, the various types of wagers are summarized as follows:

21. Wagers placed at a permitholder's facility into the pool conducted by the permitholder on its own live performance are called "live on-track wagers."

22. In addition to wagers placed at a particular facility on its live races or games, bettors may place wagers on races or games occurring offsite through intertrack wagering, which allows bettors at a guest-permit facility in Florida to bet on a race or game transmitted from and performed live at another host-permit facility in Florida. The facility holding the live event is referred to as the "host" track, and the facility taking the wager on the event being held elsewhere is referred to as the "guest" track.

23. Wagers placed at the facility of an out-of-state entity on a live event conducted by a Florida host-permitholder are called "simulcast export wagers."

24. Wagers placed at the facility of a Florida permitholder on a live event occurring at an out-of-state facility are called "simulcast import wagers."

25. Wagers placed at the facility of a Florida guest permitholder on a live event, conducted at an out-of-state facility that is being rebroadcast through a Florida host permitholder's facility to the Florida guest-permitholder's facility, are called "intertrack simulcast as a guest." The Florida facility rebroadcasting the out-of-state signal is the "intertrack simulcast in-state host."

26. The Division's calculations of "smallest play or total pool" of permitholders in Miami-Dade County for the two consecutive fiscal years of 2005/2006 and 2006/2007 included the following three types of wagers, only: (1) live wagers; (2) intertrack wagers (a/k/a intertrack wagers as a host); and (3) simulcast export wagers.

27. The Division did not include intertrack wagers as a guest, simulcast import wagers, simulcast intertrack as a guest wagers, or simulcast intertrack as a host wagers in its calculations.

28. In the state fiscal years 2005/2006 and 2006/2007, five or more pari-mutuel permitholders were authorized and licensed by the Division to conduct pari-mutuel pools on exhibition sports in Miami-Dade County. None of them applied to convert their permits to summer jai alai permits.

29. The Division initially determined that West Flagler had the "smallest play or total pool" of permitholders in Miami-Dade County for the state fiscal years 2005/2006 and 2006/2007, and therefore, concluded that a summer jai alai permit was made available in Miami-Dade County.

30. On February 9, 2018, based on the Division's determination that Calder was a qualified applicant under chapter 550, and the rules promulgated thereto, and that a permit was available in Miami-Dade County, the Division approved Calder's application and issued Calder a summer jai alai permit.

31. On November 18, 2018, Calder received an operating license to conduct a full schedule of summer jai alai performances in May and June 2019.

32. On December 9, 2018, the Division received an e-mail from FHBPA's counsel regarding "Bet Miami," a greyhound dog racing permitholder located in Miami-Dade County, which was authorized to conduct pari-mutuel pools on exhibition sports in both Miami-Dade and Broward Counties in the state fiscal year 2005/2006, and in Miami-Dade County in the state fiscal year 2006/2007. In response to this e-mail, the Division reviewed its records, confirmed the dates that "Bet Miami" operated in Miami-Dade County in the state fiscal year 2005/2006, and calculated the amount that "Bet Miami" pooled in Miami-Dade County in this fiscal year. The Division also reviewed the operating licenses for each of the permitholders in Miami-Dade and Broward Counties and confirmed that "Bet Miami" operated in Miami-Dade County during the entire fiscal year of 2006/2007.

33. The Division corrected its data to reflect that "Bet Miami," in fact, had the "smallest play or total pool" in Miami-Dade County for fiscal years 2005/2006 and 2006/2007. The Division now takes the position that "Bet Miami" had the "smallest play or total pool" in Miami-Dade County for the fiscal years 2005/2006 and 2006/2007.[1]

34. "Bet Miami" declined to convert its greyhound dog racing permit to a summer jai alai permit. The "Bet Miami" permit was never converted nor was an application to convert the "Bet Miami" permit to a summer jai alai permit, pursuant to section 550.0745(1), ever received by the Division.

35. Calder built a jai alai fronton in Miami-Dade County and conducted its first jai alai meet in May and June 2019, pursuant to its operating license.

[1] There is no dispute over the authenticity and accuracy of the financial information supplied by the Division's annual reports or of the authenticity and accuracy of the "simulcast export" figures supplied by the Division.

36. On May 15, 2019, Calder received an operating license to conduct a full schedule of jai alai performances in August and September 2019.

37. FHBPA, FTBOA, and OBS contend that the Division erred in failing to consider all the various types of wagers in its calculation of "smallest play or total pool." According to FHBPA, FTBOA, and OBS, had the Division considered all the various types of wagers, no permit would be available for the fiscal years 2005/2006 and 2006/2007.

38. Based on the persuasive evidence presented at hearing, the Division properly considered only live on-track wagers, intertrack wagers, and simulcast export wagers in its calculations of "smallest play or total pool" under section 550.0745(1). This is because pari-mutuel pools are only formed at the host permitholder's track where the live race is conducted, pursuant to the annual license that authorizes that permitholder to conduct pari-mutuel pools in that county. Had the Division included the other types of wagers (i.e., intertrack wagers as a guest, simulcast import wagers, simulcast intertrack as a guest wagers, or simulcast intertrack as a host wagers) in its calculations, the handle for these various wager types would be counted twice--at the host and guest tracks. Double-counting the wagering handle would result in the Division substantially overstating the amount of handle received by permitholders.[2]

39. The Division properly found that "Bet Miami" had the "smallest play or total pool" based on its calculation of the permitholders' in Miami-Dade

[2] All wagering data is compiled by a totalizator system, such as AmTote, which calculates the overall amount of "handle" collected by each pari-mutuel facility for each transaction. The Division utilizes a sub-system called "Central Monitoring System" ("CMS"), which captures the totalizator wagering data and applies it to a racing monitoring system to calculate the overall handle from each pari-mutuel facility. The Division uses the CMS report to calculate the total amount of wagering handle pooled by a facility in state fiscal years, and together with a review of the pari-mutual licenses, determines whether a summer jai alai permit was "made available" in that county for the purpose of section 550.0745(1). "'Handle' means the aggregate contributions to pari-mutuel pools." §550.002(13), Fla. Stat. Handle is not equivalent to revenue or profitability, and a facility's revenue has no impact on the calculation of a facility's play or total pool.

County live wagers, intertrack wagers as a host, and simulcast export wagers for the two consecutive fiscal years 2005/2006 and 2006/2007.[3]

Calder's Application Complies with rule 61D-4.002

40. The parties stipulate that Calder was a qualified applicant as to all rule requirements, but for the dispute as to whether it has complied with rule 61D-4.002. Rule 61D-4.002 provides, in pertinent part, as follows:

> **61D-4.002 Evaluating a Permit Application for a Pari-Mutuel Facility.**
>
> (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.

41. In determining the financial profitability of an applicant, the Division evaluates the applicant's overall financial situation, including its total assets and liabilities. The Division does not measure financial profitability by simply looking at the prospective pari-mutuel activity to be conducted pursuant to the permit application.

[3] As discussed more fully in the Conclusions of Law below, the Division's method of calculating the "smallest play or total pool" for purposes of section 550.0745(1) is consistent with the clear, unambiguous, and plain language of section 550.0745(1), and Florida appellate decisions.

42. In the instant case, Calder demonstrated its profitability as derived from its assets and liabilities. Calder submitted financial statements, annual reports, balance sheets, and tax reports. The uncontroverted evidence adduced at hearing demonstrates that Calder is a financially stable and profitable company.

43. As to the existence of any judgment or current litigation, whether civil, criminal, or administrative, Calder submitted a list of its active litigation.

44. As to the type of pari-mutuel activity to be conducted and the desired period of operation, Calder provided the information on its application.

45. As to the net income projected over the first three years of operation with the permit, Calder submitted an initial pro forma. The Division sent Calder a deficiency letter following its review of the initial pro forma. In response, Calder submitted an amended pro forma showing the projected net income derived from the operation of the permit over the first three years.

46. Ms. Swain, the Division's program administrator, testified that the amended pro forma included $32,329 in year one for projected live gaming taxes to the State, which is not unreasonable. The amended pro forma also included additional amounts for projected intertrack gaming taxes to the State and an additional $72,000 to the State each year for projected license fees. As Ms. Swain persuasively testified, the amounts paid by Calder to the State of Florida in taxes and license fees over the first three years of operation of the permit would result in an increase in state revenues. These tax revenues and license fees would not be available to the State of Florida without the issuance of the summer jai alai permit to Calder.

CONCLUSIONS OF LAW

47. DOAH has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

Standing

48. As an initial matter, the Division and Calder challenge the standing of FHBPA, FTBOA, and OBS to maintain this proceeding. Third parties who are not named parties in administrative proceedings have standing if they can establish: (1) they will suffer injury in fact which is of sufficient immediacy to entitle them to a section 120.57(1) hearing; and (2) their substantial injury is of a type or nature which the proceeding is designed to protect. *SCF, Inc. v. Fla. Thoroughbred Breeders' Ass'n*, 227 So. 3d 770 (Fla. 1st DCA 2017); *Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

49. A claim of standing by third parties based solely upon economic interests is not sufficient to establish standing unless the statutes governing the issuance of the permit contemplate a consideration of the third-parties' economic interests. *Gadsden Jai Alai, Inc. v. State*, 26 So. 3d 68, 69 (Fla. 1st DCA 2010). In addition, associations such as FHBPA and FTBOA have standing to intervene or initiate in administrative proceedings if they can establish: (1) a substantial number of their members are "substantially affected" by the challenged agency action; (2) the subject matter of the challenged action is within the association's general scope of interest and activity; and (3) that the relief requested is appropriate for the association to request on behalf of its members. *Fla. Home Builders Assoc. v. Dep't of Labor & Emp't Sec.*, 412 So. 2d 351, 353-54 (Fla. 1982).

50. In *SCF, Inc. v. Florida Thoroughbred Breeders' Association*, 227 So. 3d 770 (Fla. 1st DCA 2017), the court held that SCF had standing to challenge the annual plan for distribution of owners' and breeders' awards as noncompliant with statutory requirements. In reaching this decision, the court examined the statutory framework governing the payout of prize money and awards resulting from thoroughbred horse races and found SCF's economic interests in obtaining an award to be sufficient to confer its standing.

51. In *Florida Standardbred Breeders and Owners Association*, DOAH Case No. 18-6339 (Fla. DOAH Mar. 12, 2020), Recommended Order pages 72 through 75, Judge Sellers recently held that FSBOA had standing to challenge the Division's proposed issuance of a summer jai alai permit to PPI, Inc., under section 550.0745(1), based on the identical issues presented in the instant case regarding the types of wagers the Division must consider in determining the "smallest play or total pool."

52. Applying the foregoing legal principles to the instant case, FHBPA, FTBOA, and OSB have established standing to participate in this proceeding. Chapters 550 and 551 specifically contemplate a consideration of the economic interests of FHBPA and FTBOA and their members in receiving revenue and awards, which serve as an incentive for the racing, breeding, and training of thoroughbreds. In addition, section 550.0745, which must be satisfied in order to convert an existing pari-mutuel permit to summer jai alai or create a new summer jai alai permit, necessarily contemplates a consideration of the economic interests of entities involved in thoroughbred horse racing as a pari-mutuel activity. These requirements exist in order to protect pari-mutuel activities and the economic interests of entities such as FHBPA and FTBOA.

53. As detailed above, pursuant to section 551.104(10)(a)1., FHBPA and FTBOA have contractual agreements with Calder which provide them with a direct financial interest in the continuation of thoroughbred horse racing. Under the current agreement between Calder and FHBPA, Calder is required to pay FHBPA a sum equal to ten percent of Calder's gross slot machine revenues to be used for purses. This amounts to approximately $9,000,000 that FHBPA receives from Calder on an annual basis. FTBOA receives approximately $1,500,000 from Calder each year in breeders' awards as a result of the Calder racing handle and slot machine revenue.

54. As detailed above, Calder intends to replace its thoroughbred permit with its jai alai permit as the predicate to maintaining its slot machine

gaming permit. An incentive for Calder to substitute its jai alai permit for its thoroughbred permit is that if it stops racing horses after December 2020, Calder will be under no obligation to share the millions of dollars in revenues it receives through its slot machines with FHBPA or FTBOA.

55. FHBPA, FTBOA, and their members will be substantially affected if Calder is allowed to use a summer jai alai permit in place of thoroughbred racing to qualify for the continued operation of its slot machine facility. Millions of dollars that would otherwise be available to FHBPA, FTBOA, and their members through the payment of purses and awards from thoroughbred racing will be lost if Calder is permitted to substitute its underlying pari-mutuel activity from racing thoroughbreds to conducting jai alai games. FHBPA's and FTBOA's substantial injury is of a type or nature which this proceeding is designed to protect.

56. Likewise, OBS will be substantially affected if Calder is allowed to use a summer jai alai permit in place of thoroughbred racing. The demand to breed and purchase racehorses and the value of breeding and selling thoroughbred horses will decrease significantly as a consequence of Calder discontinuing thoroughbred horse racing and replacing the races with summer jai alai games. In addition, as a guest track, OBS retains seven percent of the wagers placed at OBS on thoroughbred races in Florida. OBS intertrack wagering generally handles approximately $1,000,000 on thoroughbred races conducted at Calder and Tropical Park, which directly results in revenue to OBS. OBS's substantial injury is of a type or nature which this proceeding is designed to protect.

57. Finally, in the Final Order Granting Declaratory Statement, the Division concluded that both FTBOA and OBS had standing to intervene. There, the facts found by the Division to support standing are basically the same as those demonstrated by FHBPA, FTBOA, and OBS in the instant matter.

Timeliness

58. The Division and Calder contend that the petition filed by FHBPA and motions to intervene filed by FTBOA and OBS were untimely. However, there is no statute of limitations in administrative proceedings. *Sarasota Cty. v. Nat'l City Bank*, 902 So. 2d 233, 234 (Fla. 2d DCA 2005). Moreover, no clear point of entry was provided by the Division to contest the permit issued to Calder. Accordingly, the Division's and Calder's position is without merit. *Capeletti Bros., Inc. v. State Dep't of Transp.*, 362 So. 2d 346 (Fla. 1st DCA 1978).[4]

Burden of Proof

59. This is a de novo proceeding to formulate final agency action. As the party seeking issuance of the permit, Calder has the burden of proving, by a preponderance of the evidence, that the applicable requirements for issuance of the permit under section 550.0745(1) and rule 61D-4.002 have been met. *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981); *Cohen v. Dep't of Bus. Reg., Div. of Pari-Mutuel Wagering*, 584 So. 2d 1083, 1086 (Fla. 1st DCA 1991); *Pershing Industries, Inc. v. Dep't of Banking and Fin.*, 591 So. 2d 991, 994 (Fla. 1st DCA 1991).

The Division Properly Concluded That a New Summer Jai Alai Permit Was Made Available in Miami-Dade County for Fiscal Years 2005/2006 and 2006/2007 Pursuant to Section 550.0745(1)

60. Under the first sentence of section 550.0745(1), a permitholder 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

[4] The Division and Calder contend that FHBPA, FTBOA, and OBS had actual notice in February 2018 of the Division's issuance of the summer jai alai permit to Calder. This contention was disputed and not proven at hearing. Even if FHBPA, FTBOA, and OBS had actual notice of the proposed agency action in February 2018, however, they were not informed of their right to request a formal hearing and the time limits for doing so, and therefore, such actual notice would have been inadequate to trigger the commencement of the administrative process and any requirement to file a petition or motion to intervene by a certain date. *Sterman v. Fla. State Univ. Bd. of Regents*, 414 So. 2d 1102, 1104 (Fla. 1st DCA 1982).

mutuel play from the operation of such pari-mutuel pools was the "smallest play or total pool" for the immediately prior two consecutive-year periods, has a one-year period in which to file an application to convert its pari-mutuel to a summer jai alai permit. If that permitholder declines to convert its pari-mutuel permit to a summer jai alai permit, then under the second sentence of section 550.0745(1), a new summer jai alai permit is "made available" for which other permitholders may apply to obtain, provided that a single pari-mutuel permitholder exists with the "smallest play or total pool" for two consecutive fiscal years. *W. Flagler Assocs. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering,* 216 So. 3d 692, 695 (Fla. 1st DCA 2017).[5]

61. In addition to a consideration of the evidence adduced at hearing, a proper analysis in determining the specific types of wagers which should be included in the Division's calculations of "smallest play or total pool" requires an examination of certain unambiguous statutory provisions and case law.

62. To begin with, section 550.0745(1) does not expressly specify the types of pari-mutuel wagers that are included in calculating a permitholder's "play or total pool." However, the phrase "pari-mutuel wagering pool" is statutorily defined in section 550.002(24) to mean "the total amount wagered on a race or game for a single possible result."

63. Moreover, although section 550.0745(1) does not limit the calculation of the applicant's pool to bets physically placed within the county, the statute does limit the calculation to include only wagers placed toward the applicant's pool, and not pools conducted by other facilities inside or outside of the state. §550.0745(1), Fla. Stat. ("The [permitholder authorized to conduct pools] *whose* mutuel play from the operation of *such* pari-mutuel pools…has had the "smallest play or total pool" within the county.")(emphasis added).

---

[5] There is no time limitation imposed under the second sentence of section 550.0745(1) for determining the two consecutive year period, which explains why Calder relies on the two consecutive fiscal years of 2005/2006 and 2006/2007. *Id.*

64. An examination of the unambiguous and plain language of sections 550.002(24) and 550.0745(1), and specifically, the Legislature's use of the phrases "pari-mutuel pool," and "*whose* mutuel play from the operation of *such* pari-mutuel pools," can lead to only one conclusion: only the licensed permitholder's pool in Miami-Dade County should count toward the Division's calculations. To hold otherwise would ignore the plain and unambiguous language in section 550.0745(1).

65. Furthermore, in *South Florida Racing Association v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering*, 201 So. 3d 57, 61 (Fla. 3d DCA 2015), the court addressed the parties' dispute involving the types of wagers that should be included in calculating a permitholder's "play or total pool" under section 550.0745(1). In that case, the Division had used only live on-track wagers in its calculations. The court held that, in addition to live on-track wagers, wagers placed remotely as intertrack wagers must also be included in the calculations because the statute does not limit the calculation to wagers physically placed within the county. *Id.*

66. More recently, in *West Flagler Associates v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering*, 219 So. 3d 149, 155 (Fla. 3d DCA 2017), the court addressed whether simulcast export wagers should also be included in the Division's calculations. The court held that simulcast export wagers, intertrack wagers, and live on-track wagers must be included in calculating a permitholder's "play or total pool." In reaching this conclusion, the court stated:

> We can discern nothing in the language of the statute which would require, for the purpose of calculating the smallest play or total pool under section 550.0745(1), drawing a distinction between intertrack wagers and simulcast export wagers. As this court recognized in *South Florida Racing*, 201 So. 3d at 61, "[a]lthough '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," and "[n]othing in Chapter 550 of the Florida Statutes limits the total pool to solely physical in-county wagers." *Id.* Our interpretation in the instant case –that the statutory language includes simulcast export wagers – is consistent with our analysis in *South Florida Racing*, and the contrary construction proposed by West Florida would conflict with the plain meaning of section 550.0745(1).

Id. at 154.

67. Thus, of those Florida appellate courts that have addressed the issue of what types of wagers should be included in the Division's calculation of "play or total pool," only three types of wagers have been recognized: (1) live on-track wagers; (2) intertrack wagers; and (3) simulcast export wagers.

68. Most recently, in *Florida Standardbred Breeders and Owners Association, Inc.*, DOAH Case No. 18-6339 (Fla. DOAH Mar. 12, 2020), Recommended Order pages 52-53, Judge Sellers addressed the identical issue presented in the instant case, and held that only live on-track wagers, intertrack wagers, and simulcast export wagers should be used in the calculation of a permitholder's "play or total pool." Judge Sellers expressly rejected the same argument presented by FHBPA, FTBOA, and OBS in the instant proceeding that other types of wagers (i.e. intertrack wagers as a guest, simulcast import wagers, simulcast intertrack as a guest wagers, or simulcast intertrack as a host wagers) should be included. In reaching her conclusion, Judge Sellers examined and relied on the same statutory provisions and appellate decisions in *South Florida Racing* and *West Flagler* cited above. The undersigned agrees with Judge Sellers's well-reasoned legal analysis and conclusion.

69. In sum, the undersigned concludes, as a matter of law, that the only types of wagers that are correctly included in determining a permitholder's

play or total pool for purposes of section 550.0745(1) are live on-track wagers, intertrack wagers, and simulcast export wagers. Intertrack wagers as a guest, simulcast import wagers, simulcast intertrack as a guest wagers, or simulcast intertrack as a host wagers should not be included in calculating total play or pool for purposes of section 550.0745(1).

An "Affirmative Declination" by a Permitholder Eligible to Convert is not Required for a New Permit to be Made Available Under Section 550.0745(1)

70. FHBPA's, FTBOA's, and OBS's contention that a permitholder eligible to convert its pari-mutuel permit to a summer jai alai permit pursuant to the first sentence of section 550.0745(1) must "affirmatively decline" to convert its permit to a summer jai alai permit before a new permit becomes available under the second sentence of section 550.0745(1), is without merit.

71. In support of its position, FHBPA, FTBOA, and OBS do not cite any legal authority. Indeed, a plain reading of the first sentence of section 550.0745(1) supports the opposite conclusion. Section 550.0745(1) expressly states in the first sentence that a permitholder who is eligible to convert "may apply to the division to convert its permit to a permit to conduct a summer jai alai fronton in such county." Thus, in order to convert, it is the eligible permitholder that must take affirmative action by filing an application for the summer jai alai permit. *Fla. Standardbred Breeders & Owners Ass'n*, DOAH Case No. 18-6339 (Fla. DOAH Mar. 12, 2020), Recommended Order pp. 53-54.

72. The second sentence of section 550.0745(1) further states: "[i]f a permittee who is eligible to convert under this section to convert a permit declines to convert, a new permit is hereby made available in that permittee's county." Because converting a summer jai alai permit is not automatic and requires a permittee to apply to convert, it makes no sense that the phrase "declines to convert" in the second sentence requires the permitholder to affirmatively notify the Division that it is not going to apply to convert its permit to a summer jai alai permit in order for a new summer jai alai permit

to be made available. Thus, the phrase "declines to convert" can only mean that the permittee does not file an application to convert. *Id.*

73. Finally, the Division's and Calder's position is further supported by the court's decision in *West Flagler Associates v. Department of Business & Professional Regulation*, *Division of Pari-Mutuel Wagering,* 139 So. 3d 419 (Fla. 1st DCA 2014). There, the court expressly stated: "the statute plainly provides that the permitholder with the lowest handle for 'the two consecutive years next prior to filing an application' may apply for a summer jai alai permit and, if it declines to do so, a new summer jai alai permit is made available." *Id.* at 422. As recognized by Judge Sellers on pages 54 and 55 of her Recommended Order in DOAH Case No. 18-6339, the phrase "to do so" in the court's opinion clearly refers to the affirmative act of "apply[ing] for" a summer jai alai permit. This language can only be construed to mean that "declining," under the second sentence of section 550.0745(1), is accomplished by not filing an application to convert under the first sentence of section 550.0745(1). Accepting the position of FHBPA, FTBOA, and OBS would render the plain language within the statute meaningless.

Profitability Under rule 61D-4.002(1)

74. FHBPA's, FTBOA's, and OBS's contention that Calder failed to demonstrate its profitability under rule 61D-4.002(1) based on Calder's proposed summer jai alai operations is without merit. As detailed above and as recognized in *West Flagler Associates, Ltd. v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering*, DOAH Case No. 15-6773 (Fla. DOAH June 20, 2016)(Fla DBPR Sept. 16, 2016), profitability is not based on the pari-mutuel jai alai events conducted under the proposed permit. Rather, profitability is based on the assets and liabilities of the company as a whole.

75. In the instant case, Calder demonstrated its profitability as derived from its assets and liabilities. Calder submitted financial statements, annual reports, balance sheets, and tax reports. The uncontroverted evidence

adduced at hearing demonstrates that Calder is a financially stable and profitable company.

76. In addition, Ms. Swain testified that the amended pro forma included $32,329 in year one for projected live gaming taxes to the State, which is not unreasonable. The amended pro forma also included additional amounts for projected intertrack gaming taxes to the State and an additional $72,000 to the State each year for projected license fees. As Ms. Swain persuasively testified, the amounts paid by Calder to the State of Florida in taxes and license fees over the first three years of operation of the permit would result in an increase in state revenues. These tax revenues and license fees would not be available to the State of Florida without the issuance of the summer jai alai permit to Calder.

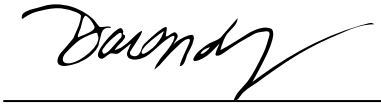
77. In sum, for the reasons stated above, it is concluded that Calder Race Course, Inc., is entitled to issuance of the summer jai alai permit and subsequent licenses.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that that the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, enter a final order approving Calder Race Course, Inc.'s, application for a new summer jai alai permit and subsequent licenses.[6]

[6] FHBPA, FTBOA, and OBS challenge the issuance of Calder's operating licenses for fiscal years 2018/2019 and 2019/2020 based solely on the alleged invalidity of the underlying summer jai alai permit. Because Calder is entitled to the summer jai alai permit, it is also entitled to the operating licenses.

DONE AND ENTERED this 7th day of April, 2020, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2020.

COPIES FURNISHED:

Megan S. Silver, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399
(eServed)

Bradford J. Beilly, Esquire
Beilly and Strohsahl, P.A.
1144 Southeast Third Avenue
Fort Lauderdale, Florida 33316
(eServed)

Wilbur E. Brewton, Esquire
Brewton Plante, P.A.
215 South Monroe Street, Suite 825
Tallahassee, Florida 32301
(eServed)

Daniel Hernandez, Esquire
Shutts & Bowen LLP
4301 West Boy Scout Boulevard, Suite 300
Tampa, Florida 33607
(eServed)

Tamara S. Malvin, Esquire
Akerman LLP
350 East Las Olas Boulevard, Suite 1600
Fort Lauderdale, Florida 33301
(eServed)

Raymond Frederick Treadwell, General Counsel
Office of the General Counsel
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Brittany Adams Long, Esquire
Radey Law Firm, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301
(eServed)

Johnny P. ElHachem, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399
(eServed)

Halsey Beshears, Secretary
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Louis Trombetta, Director
Division of Pari-Mutuel Wagering
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399
(eServed)

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.