IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 49 CD 2011

Philadelphia Entertainment and Development Partners, LP, d/b/a Foxwoods Casino Philadelphia,

Petitioner,

v.

Pennsylvania Gaming Control Board,

Respondent.

Appeal from the Final Order of the Pennsylvania Gaming Control Board, OHA Docket No. 1408-2010, entered December 23, 2010

REPLY BRIEF FOR PETITIONER PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, LP

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INTRODUCTION

Leaving aside its improper recitation of the "facts," one is struck by the crux of the Pennsylvania Gaming Control Board's (the "Board") argument: a sleight of hand which asserts that the Board was "exercising discretion" when the Board did nothing of the sort, nor could it. At the end of the day, notwithstanding its assertions, the Board entered judgment as a matter of law by applying improper and non-existent legal standards and ignoring well-established procedures for adjudicating such a motion.

In December 2006, the Board awarded Philadelphia Entertainment and Development Partners, L.P. ("PEDP") one of the two Category 2 Slot Machine Licenses (the "License") available to develop and operate a Category 2 slot machine casino ("Casino") in the City of Philadelphia. (R. 469a; R. 503a.) As the Board recognized in September 2009, PEDP's efforts thereafter to develop its Casino were thoroughly stymied in the three years that followed by factors beyond its control, including litigation instituted by an unsuccessful applicant (owned in part by current Board Member Trujillo) and obstruction by local politicians and community groups. (App. O at 14, R. 1335a; *see also* R. 737a-1231a; R. 3002a.) On that basis, the Board granted PEDP the maximum additional extension of time then allowed by the Pennsylvania Race Horse Development and Gaming Act (the "Gaming Act") to complete its Casino and make at least 1,500 slot machines available for play. (App. N., R. 1337a-1339a.) (Section 1210(a) of the Gaming Act as it now stands would have permitted the Board to extend the opening date by an additional eighteen months, until December 31, 2012.)

The record is undisputed that, over the next year, PEDP negotiated and entered into agreements for two separate multi-hundred million dollar commercial transactions with two separate development partners to complete and then operate its Casino. (R. 2998a-3005a; R. 3069a-3083a; R. 3085a-3088a; R. 3093a-3179a; R. 5055a-5124a.) Both transactions were negotiated and executed in the wake of an international financial collapse not seen since the Great Depression. Moreover, the second transaction was, in fact, negotiated and executed in the

face of a clearly hostile Board and a pending Complaint for Revocation and Motion for Summary Judgment thereon by the Board's Bureau of Investigations and Enforcement ("BIE") to revoke PEDP's License. (R. 2998a-3005a.) The record is also undisputed that at no time prior to the filing of the Complaint for Revocation did the Board question or assert that PEDP was financially unsuitable.

Though the Board now makes light of the first transaction (the "Wynn Transaction") – PEDP's agreements with Wynn Resorts, Limited (together with wholly-owned subsidiaries, collectively "Wynn"), it is important to remember that on April 5, 2010 PEDP delivered a fully executed set of definitive agreements for the Wynn Transaction to the Board and to BIE. (PEDP's Br. at 15-18.) The Wynn Transaction undisputedly would have allowed PEDP to complete and open its Casino within the timeframe contemplated by the Gaming Act, although for reasons beyond PEDP's control Wynn terminated the agreements before the transaction could be acted upon by the Board. (*Id.*)

The second transaction (the "Harrah's Transaction") – PEDP's agreements with Caesars Entertainment Corporation f/k/a Harrah's Entertainment, Inc. ("Harrah's") – was also fully executed and submitted to the Board and BIE. (R. 5055a-5124a.) The Harrah's Transaction agreements remain in effect to this day, and PEDP and Harrah's are prepared to move forward expeditiously to consummate and effectuate the contemplated transaction if this appeal is decided in PEDP's favor.

The record before the Board at the time of its Order was thus clear that PEDP had made extraordinary efforts and produced exactly the results that the Board asked for – namely, a Casino project at the site location initially approved by the Board that was financially viable and had full funding and financing commitments. If the Board believed that, notwithstanding the foregoing, PEDP was financially unsuitable or its efforts were nevertheless insufficient, then it should have held an evidentiary hearing, and required BIE to put on testimony to carry its burden of proof. It did not. Instead, the Board nonetheless revoked PEDP's License, now improperly saying that its decision was an exercise of its discretion. Nothing could be further from the case.

Contrary to the Board's newfound position, it was *not* sitting in a discretionary capacity when it revoked PEDP's License. Rather, it was constituted as what should have been an impartial tribunal to adjudicate the specific enforcement claims raised in BIE's initiating pleading – the April 29, 2010 Complaint. (R. 1827a-1846a.) BIE raised four Counts in its Complaint, alleging that PEDP was financially unsuitable and was not in compliance with certain interim milestone reporting deadlines in the Board's Orders and would not be able to have 1,500 slot machines available for play by May 29, 2011. The Board in the proceedings below was thus limited to determining whether BIE met its burden of proof with respect to any of these four Counts and the sanction to be imposed if BIE in fact carried its burden. Specifically, since the Board decided this case based solely upon the parties' summary judgment motions, it was limited to evaluating whether there were genuine disputed issues of fact material to the determination of each of the motions and, if not, whether either party was entitled to judgment as a matter of law when viewing the facts in the light most favorable to the non-moving party. The Board erred as a matter of law in failing to do so.

Regretfully, the Board has elected not to respond specifically to most of PEDP's appellate arguments, instead contending that its summary judgment rulings were "discretionary" and therefore supposedly insulated from review. The Board also elected not to defend its Adjudication issued in the proceedings below, addressing the entire Adjudication in less than one page of its brief. (*See* Bd.'s Br. at 28-29.) As if a magic bullet, the Board argues that it has "discretionary" authority over all things gaming which allows it to ignore the law – to paraphrase Mel Brooks, "it's good to be the Board." Thankfully, the constitutional entitlement to due process in this Commonwealth does not except kings, or Boards for that matter, and the Board's legally erroneous decision should be reversed.

ARGUMENT IN REPLY

I. The Statutes Upon Which the Board Relies to Support Its Financial Suitability Findings are Inapplicable.

As PEDP explained at length in its opening brief (at 26-38), the Gaming Act nowhere imposes an obligation of financial suitability on a "licensee." Rather, the only basis, *arguendo*, on which to impose a suitability obligation on PEDP, as a "licensee," is through Condition 5 of the Statement of Conditions attached to PEDP's License (which states this requirement in conclusory terms, but does not explain or specify what the standard necessary to evaluate suitability is). Confronted with the statutes' silence and the conclusory language of Condition 5, the Board instead relies on the principles of illogic and discretion as supposedly imposing a financial suitability obligation by stealth on licensees. Neither "principle" overcomes the clear statutory language distinguishing "applicants" from "licensees," which the Board itself has consistently emphasized in its own past interpretations of the Gaming Act. 4 Pa. C.S.A. § 1103. (PEDP's Br. at 28-29.)

The Gaming Act and Regulations do not by their plain terms impose any obligation on a slot machine licensee to maintain financial fitness and suitability. In contrast to the various provisions that reference a finding of financial suitability as a necessary step in deciding to award a license to an applicant, *see, e.g.*, 4 Pa. C.S.A. § 1313(a); 58 Pa. Code § 441a.7(f), not one single provision of the Gaming Act or Regulations makes any mention of financial fitness and suitability with respect to a licensee. (PEDP's Br. at 27-29.) The Board apparently so acknowledges because it has not quoted or cited to a single provision to the contrary, nor can it.

This glaring distinction between financial fitness provisions pertaining to applicants and the absence of any such provisions pertaining to licensees is critical because the Gaming Act and Regulations specifically distinguish between the terms "applicant" and "licensee," the former being an entity "applying for" a license and the latter being an entity that already "holds" a license. 4 Pa. C.S.A. § 1103. The Board moreover has relied on this distinction in its past Orders and Adjudications entered in the proceedings with respect to PEDP. Specifically, the

Board relied on this distinction several times in denying the petitions to intervene of Keystone Development Partners, LLC because it was but a "disappointed applicant" who lacked standing by virtue of its denied application to participate in further proceedings concerning PEDP's License. (Sept. 2, 2009 Adjudication denying petition to intervene, at 5; Oct. 22, 2009 Adjudication denying petition to intervene, at 8-9; Oct. 22, 2009 Adjudication denying petition to re-open, at 8-9.)

Importantly, the Board misrepresents PEDP's argument in an effort to muddy the issues. PEDP has not argued that the Board *cannot* regulate a licensee's financial suitability. Rather, PEDP has explained that the Board *has not* enunciated standards to regulate a licensee's financial suitability by promulgating Regulations or issuing some other form of public guidance to that effect. Contrary to the conclusions reached by the Board in ruling against PEDP, the boilerplate language in Condition 5 does not set any standards or provide any guidance for how financial suitability is to be evaluated. In fact, the Board for the very first time raised licensee financial fitness and suitability as an issue in the proceedings below *only after* BIE filed its Revocation Complaint, and its first explanation of how it purported to review and rule on PEDP's financial suitability was not issued until *after* it had already declared a revocation of PEDP's License, in spite of PEDP's repeated efforts to ascertain the basis for BIE's charges against it.

Because the Gaming Act and Regulations are wholly silent as to any obligation on a licensee to maintain financial fitness or the standard to be applied in conducting such an evaluation (and Condition 5 is nothing more than conclusory boilerplate at best, devoid of any reasonable degree of specificity), the Court should reverse the Board's legally erroneous decision revoking PEDP's License based on alleged standards that had never been publicly disseminated.

II. To the Extent that PEDP is Obligated to Maintain Financial Suitability, the Board Has Now Acknowledged That "Financial Wherewithal" is the Framework for Evaluating Financial Suitability, PEDP Submitted *Prima Facie* Evidence of Its Financial Wherewithal, and BIE Presented No Evidence to the Contrary.

The Board in its brief now acknowledges for the first time in these proceedings that "financial wherewithal" is the framework for evaluating financial fitness.[1] (Bd.'s Br. at 35-36.) This new admission simplifies greatly the issues for decision by this Court because the record is amply clear that PEDP presented evidence sufficient to establish a *prima facie* showing of its financial wherewithal to complete the Casino contemplated under the Harrah's Transaction, and BIE failed to prove otherwise.

As the Board now admits, financial wherewithal means a showing of the financial ability to develop and complete its proposed Casino project, primarily focused on whether the project has secured the funding and financing necessary to complete development.[2] Viewed at the most basic level, the question is whether the evidence of record at summary judgment, when viewed in

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[1] The Board's argument that it always made clear that it would evaluate financial fitness by way of the financial wherewithal framework is utterly implausible and illustrative of the general lack of credibility and substance of the Board's arguments. At the time of oral argument on the summary judgment motions, the Board specifically queried counsel for PEDP as to where the financial wherewithal framework came from. Commissioner Sojka remarked:

> My question will be to Mr. Cozen. . . . [I]t strikes me that you clearly raised the question about the lack of precise clarity of the concept for the words financial suitability. But if you take that out, something has to be in there. And then the word wherewithal began to appear regularly in your argument. We even heard about the wherewithal test. I need to know exactly where that came from, how that can substitute for suitability, why that is less vague. You defined it for us, I think, by describing how you would have the wherewithal, but I think I can take that English word and make it mean other things, hence I want to know why is it any less vague than financial suitability.

(R. 4908a.) If the Board was not even aware of the financial wherewithal framework at the time, it could not possibly have been applying it, nor did the Board have an understanding as to what "suitability" meant.

[2] The Board's newly-stated position that the financial wherewithal analysis means only the financial ability to develop the exact project described in the original license application is wrong as a matter of law and logic. This issue is addressed more fully below.

the light most favorable to PEDP as the non-moving party, establishes a *prima facie* showing that PEDP has the funding and financing necessary to develop its proposed project.

Most recently, PEDP presented this evidence, in the form of the Harrah's Transaction documents. Those documents establish at least a *prima facie* showing that:

- PEDP delivered to the Board and BIE an executed agreement with Harrah's to serve as a development partner in completing and operating PEDP's Casino project. (R. 5056a-5057a; R. 5265a; R. 5139a-5140a; R. 5280a-6160a.)

- PEDP delivered commitments for the full amount of the additional $75 million in equity funding necessary to complete development of the initial phase of the Casino project, including a commitment by Harrah's to fund on a loan basis any shortfall above the already-pledged equity commitments. (R. 5280a-6160a.)

- PEDP delivered fully executed Commitment Letters (the "Commitment Letters") from two large commercial banks (the "Banks") to provide the full amount of the additional $200 million in financing necessary to complete development of the initial phase of the Casino project. (R. 6161a-6185a; *see also* R. 5139a-5140a (earlier highly confident letters).))

- In addition, PEDP filed all applications and supporting materials necessary for the Board and the Board's Staff to commence review of and comment to the proposed Harrah's Transaction and contemplated adjustments to the originally-proposed Casino project, including the contemplated, but aborted, negotiations as to any further adjustments that may be needed to address any concerns raised by the Board and its Staff with respect to the substance and implementation of the Harrah's Transaction. (R. 5055a-5124a.)

- Moreover, PEDP had previously arranged two prior transactions for the development of its Casino that provided full funding and/or financing to develop its proposed Casino—the original commitment letter from Merrill Lynch and the subsequent Wynn Transaction—although neither of these transactions ultimately were effectuated for reasons beyond PEDP's control and despite its best efforts. (R. 501a-502a; R. 3458a; R. 1570a-1689a; R. 3069a-3083a; R. 3085a-3088a; R. 3093a-3179a; R. 3002a-3003a, ¶¶ 10, 12.)

This is precisely the documentation that is necessary to demonstrate that PEDP has the financial wherewithal to complete its proposed Casino. It is precisely the documentation necessary to show that PEDP has a financially viable project that will generate substantial tax revenue streams for the Commonwealth and create approximately 650 construction jobs and more than 1000 permanent jobs. (R. 5137a.) Indeed, the documentation that PEDP submitted

demonstrates unequivocally that "the capital markets – neutral entities motivated wholly by their financial self-interest – found [PEDP and Harrah's] to be worthy entities to which to loan substantial sums of money," a factor which the Pennsylvania Supreme Court has described as "critical" in evaluating the financial suitability of a license applicant. *Station Square Gaming, L.P. v. Pennsylvania Gaming Control Board*, 592 Pa. 664, 683, 927 A.2d 232, 243-44 (2007).

Major commercial banks simply do not *commit* $200 million in financing to development projects that are not financially viable, nor do investors *commit* $75 million in equity funding to projects that are not financially viable. In other words, lenders and investors do not *commit* to entrust $275 million (in addition to of the $160 million PEDP has already spent to date) to a project developer that does not have the financial wherewithal to complete the project and generate sufficient revenue to pay a return on the investment. The Banks in particular would certainly have undertaken a sophisticated financial analysis of the project before agreeing to *commit* this substantial amount of financing, in contrast to the wholesale lack of any financial analysis effort, evidence, or testimony presented by BIE or considered by the Board here.

Focusing solely on PEDP's financial suitability – the only matter at issue in Counts II and IV of BIE's Complaint (the initiating pleading below) – PEDP submitted evidence sufficient to establish a *prima facie* showing of its financial wherewithal. BIE presented no evidence to the contrary. Viewing this evidence in the light most favorable to PEDP, as the Board was required – but failed to do, BIE's motion for summary judgment should have been denied.

III. Under Any Semblance of Due Process and Fair Procedure, the Board Could Not Have Revoked PEDP's License by Summary Judgment.

The Board has apparently taken the view that its alleged statutory "discretion" to revoke a gaming license somehow excuses it from adhering to the requirements of due process of law. Even if the License is a revocable privilege, that is not the law.[3] To the contrary, the Board was

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[3] A license, once obtained in compliance with law, becomes a valuable privilege or right in the nature of property, and is safeguarded by due process principles that apply to property lawfully acquired. *See, e.g., Shah v. State Bd. of Med.*, 139 Pa. Cmwlth. 94, 103-05, 589 A.2d 783, 788-89 (1991); *see also Balfour Beatty Constr., Inc. v. Dep't of Transp.*, 783 A.2d 901, 908

required to construct and apply a process for adjudicating the claims in BIE's Complaint that comported with the constitutional protections of due process.

At the barest minimum, the Board was required to accord PEDP a process that: (1) required BIE to meet its burden of proof as to the alleged conduct of PEDP as set forth in its Complaint; (2) ensured PEDP the right to be heard in its defense by presenting its own evidence and cross-examining the evidence against it with respect to genuine disputed issues of material fact; (3) ensured that the Board's decision was based upon material, competent evidence and did not capriciously disregard material, competent evidence that lay contrary to the Board's desired outcome; and (4) ensured PEDP fair notice of the claims and issues to be litigated, including notice of the standards to be applied and a guarantee that the Board would not base its decision on matters that were not at issue. The Board's process failed on all of these accounts – had it applied any semblance of due process and fair procedure, it could not have entered summary judgment against PEDP.

A. The Board Did Not Conduct an Evidentiary Hearing.

The Board throughout its brief asserts that it conducted multiple "public hearings" on the summary judgment motions. (*See* Bd.'s Br. at 1, 2, 4, 30, 37, 50.) That is patently false. The Board very clearly did *not* conduct any evidentiary hearing, did *not* hear any witness testimony, and did *not* permit the cross-examination of any witnesses in the proceedings below. Rather, it held "oral arguments" on the summary judgment motions as part of regularly-scheduled public meetings of the Board. (*See* R. 4839a.) "Oral arguments" are by no measure the same as an evidentiary hearing. *See, e.g.*, *Bader v. Highway Truck Drivers & Helpers No. 107*, 214 Pa. Super. 123, 125, 251 A.2d 692, 693 (1969) ("The hearing on a motion for summary judgment is not a trial on the merits, and the court on such a motion should not attempt to resolve conflicting contentions of fact or conflicting inferences which may be drawn from such facts."). Thus,

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(Pa. Cmwlth. 2001); *Pa. Inst. Health Svcs., Inc. v. Dep't of Corrections*, 168 Pa. Cmwlth. 135, 140-41, 649 A.2d 190, 192-93 (1994).

although the law required it do so, the Board did *not* conduct an evidentiary hearing, and its dissimulating argument to the contrary should be rejected.

B. The Board Improperly Refused to View the Harrah's Transaction Documents in the Light Most Favorable to PEDP.

Settled law required the Board, when considering BIE's motion for summary judgment, to view the Harrah's Transaction documents and other evidence of record in the light most favorable to PEDP as the non-moving party. The Board failed, and indeed, refused to do so in the proceedings below, and its legally erroneous decision should therefore be reversed.

At the Board's direction, PEDP submitted the Harrah's Transaction documents to the Board and BIE on December 10, 2010, and they were made part of the summary judgment record. (R. 5129a-5130a.) On January 7, 2011, PEDP submitted additional documents concerning the Harrah's Transaction in a good faith effort to respond to certain unwarranted criticisms of the originally-submitted documents first raised by the Board immediately before it entered summary judgment against PEDP on December 16th. As explained in PEDP's opening brief and above, these documents established a *prima facie* showing of PEDP's financial wherewithal to complete its Casino project that as a matter of law was sufficient to at least create triable issues of fact and preclude the entry of summary judgment against PEDP.

The Board was required to accept the documents for what they were and what they purported on their face to be – namely, evidence of a fully-executed agreement with Harrah's as a development partner and PEDP's mortgage lender, Citizens Bank, and evidence that PEDP had secured commitments for full funding and financing of the initial phase of its Casino. The Board instead drew unwarranted and incorrect inferences, based on its one-sided, last-minute, and unexpected review of the documents, without requiring BIE to present any evidence to prove that the Harrah's Transaction was not viable or did not evidence PEDP's financial wherewithal, or affording PEDP an opportunity to fairly and fully respond to any such evidence, if and when proffered.

For example, the Board criticized the Harrah's Transaction documents as "far from finalized" and containing "blank spaces" and "unexecuted exhibits." (Bd.'s Br. at 56.) There is a very simple response to this criticism, which PEDP was and is prepared to offer testimony and evidence on had it been given the opportunity. Some pages of the documents and exhibits are not signed *because the Gaming Act requires the Board to approve them before they can be executed*. This included the proposed Partnership Agreement for the reorganized PEDP. If the Board questioned the Harrah's Transaction documents, it was required to conduct an evidentiary hearing at which BIE – which had the burden of proof – could present testimony challenging the documents, and to which PEDP would have an opportunity to cross-examine and respond.

The Board also criticized the documents as containing too many "contingencies." (Bd.'s Br. at 56-57.) It again was not entitled to draw this erroneous inference based on its last minute, one-sided review of the documents, without permitting PEDP an opportunity to respond. PEDP was and is prepared to present testimony to establish that the contingencies and related terms in the agreement are standard practice and commercially reasonable in a transaction of this size and nature. The fact that a commercial contract contains reasonable contingencies, *such as that it is contingent on receipt of prerequisite Board approval of the contract itself*, does not render the contract illusory or unenforceable. Indeed, no reasonable and legitimate investor in a casino or any other comparable commercial transaction would have agreed to a wholly unconditioned agreement under these or any circumstances. The Board was not permitted to reject the Harrah's Transaction without contrary testimony, which BIE never presented, and which in any event PEDP would have a right to defend against by presenting evidence in support of the documents.

Finally, the Board complained that the Harrah's Transaction documents did not show a full equity funding or financing commitment. (Bd.'s Br. at 57.) PEDP's original December 10, 2010 submissions contained commitments to fund 75% of the project's anticipated equity needs and highly confident letters from two creditworthy banking institutions sufficient to cover the project's remaining financing needs. (R. 5265a; R. 5139a-5140a.) PEDP's January 7, 2011 supplemental submissions (submitted within the timeframe required to seek reconsideration and

well before the Board's Adjudication issued) included commitments for the full amount of financing and equity funding necessary to complete the project. (R. 5280a-6185a.) The Harrah's Transaction was then and is fully funded and financed, and the Board was not entitled to nor could it draw any other conclusion on this record, nor did BIE establish otherwise.

C. The Board Did Not Even Deign to Address the Numerous Other Genuine Disputed Issues of Material Fact Identified by PEDP.

PEDP in its opening brief identified numerous genuine disputed issues of fact that are directly material to PEDP's financial suitability and its compliance with the Board's milestone reporting deadlines. (PEDP's Br. at 47-52.) Following its standard practice in this matter, the Board has simply flippantly declined to address any of these genuine disputed issues of material fact, other than to place quotes around the word "facts." (Bd.'s Br. at 54.) The Board's refusal to engage the issue should be seen for what it is – an admission that it has nothing to say in defense of its erroneous refusal to conduct an evidentiary hearing in the proceedings below to resolve these genuine disputed issues of material fact, or to compel BIE to meet its burden of proof. The Board's woefully deficient decision should be reversed on these grounds alone.

D. The Board Improperly Failed to Consider Any Financial Analysis Testimony or Evidence.

The Board has nowhere explained how it could possibly have reached the conclusion, in a manner that is consistent with due process of law, that PEDP was no longer financially suitable to hold its License without having considered a single quantum of financial analysis testimony or evidence. With all due respect to the Board, it cannot have done so. A finding of financial unsuitability necessarily requires some form of financial analysis evidence and testimony, particularly where, as here, PEDP presented documentary evidence that established a *prima facie* showing that it has the financial wherewithal to complete its project.

Indeed, the Board throughout its brief emphasized the extensive efforts and analysis it supposedly undertook to evaluate the financial suitability of PEDP and the other applicants for the Philadelphia licenses during the application process. According to the Board, its Staff logged

more than 3,500 hours in evaluating PEDP's financial suitability at that time. (Bd.'s Br. at 6.) In contrast, now, BIE has not presented and the Board has not heard a single minute, let alone hour, of financial analysis testimony or evidence, nor is there anything of record in this case to suggest that either BIE or the Board commissioned or undertook any such financial analysis whatsoever.

This juxtaposition is utterly incredible. The Board contends that it required 3,500 hours of analysis for it to reach the conclusion that PEDP as an applicant was financially suitable for a slot machine license at a point when PEDP had invested nothing in the project beyond the time and cost of the application itself. Yet, after the License was awarded, and after PEDP had paid the $50 million licensing fee, and after PEDP had invested a further $110 million and several years in the project, the Board determined that it was able to conclude based on no testimony or financial analysis whatsoever that PEDP is now financially unsuitable, thereby revoking its License. This math simply does not work and, indeed, the Board's position is so outrageous that it exposes to the light of day the utter lack of credibility the Board has in any of its arguments.

E. The Board Improperly Gave Controlling Consideration and Weight to Irrelevant Considerations That Were Not Placed at Issue by BIE's Complaint.

As is apparent from the Board's brief and its Adjudication below, the Board relied heavily on supposed differences between the project contemplated under the Harrah's Transaction and the project contemplated in PEDP's initial license application to justify its revocation of PEDP's License. Specifically, the Board argued at length that there were differences in the conceptual plans for the Casino, changes in the level of minority ownership in PEDP, and changes in the charitable contribution regimes contemplated under each plan. None of these supposed issues are relevant or material to the matters placed at issue by BIE's Complaint, and it was a violation of PEDP's due process right to fair notice for the Board to inject them at the eleventh hour into the proceedings below and then place controlling reliance on them in its decision to revoke PEDP's License.

BIE's Complaint was the pleading that, according to due process of law, was supposed to afford PEDP notice of the claims against it. That pleading raised two issues: (1) financial suitability; and (2) compliance with the interim milestone reporting deadlines set forth in the Board's September 2, 2009 and March 3, 2010 Orders and the ability to have at least 1,500 slot machines available for play by May 29, 2011. BIE never amended its Complaint nor were any other issues joined throughout the course of the proceedings below – the questions at issue were always related solely to financial suitability and compliance with Board Orders. Most importantly, in response to the Board's directive, PEDP supplemented the summary judgment record by submitting definitive documents for the Harrah's Transaction on December 10, 2010. As explained above, this documentation amply established that PEDP had the financial wherewithal to complete its proposed Casino.

Then, on December 16, 2010, when it voted to enter summary judgment against PEDP, the Board for the first time *sua sponte* injected the new issues of supposed differences between the contemplated Casino plans, and changes in minority ownership and contemplated charitable contributions. After questioning counsel on these issues, and without any advance warning, without requiring BIE to present any evidence which would justify the Board's apparent conclusions on these issues which formed the basis for its decision, and without giving PEDP an opportunity to present evidence or otherwise respond on them, the Board then entered summary judgment. Casino design plans, minority ownership, and charitable contributions have nothing whatsoever to do with financial suitability or compliance with the Board's interim reporting Orders – these were the only matters at issue at summary judgment and more broadly in the proceedings below. These other issues are properly addressed as part of the Board's review of PEDP's requests for a change of control as was acknowledged by BIE, and it was error and a violation of PEDP's right to due process of law for the Board to make these findings at summary judgment without an evidentiary hearing or prior notice and an opportunity for PEDP to be heard.

However, PEDP was given no prior notice that these irrelevant issues would be considered at the December 16th presentation or that they would form the basis of the Board's decision to revoke its License. Indeed, the Board had specifically indicated to the contrary – that the Harrah's Transaction documents were to be considered in the proceedings below solely for the purposes of determining whether it was viable. (R. 5025a-5026a (by Commissioner McCabe: "I think we just want to determine can they build a casino? Can they finance and build a casino? That other stuff I think we realize comes afterwards.").) As the Board and BIE's counsel made clear, the substance of the definitive documents would be considered in a separate, established Board and Staff review process. (R. 5018a; R. 5025a-5026a.) Substantive issues concerning the definitive documents – beyond the basic question of whether they evidenced a viable transaction – were thus specifically *not* and should not have been a part of the revocation proceedings below. Rather, they were to be addressed in the ordinary course of an established, separate review process. (R. 5025a-5026a; R. 5055a-5124a.)

As part of that process, the Board Staff would review and comment on the Harrah's Transaction documents. PEDP would then have an opportunity to respond to the Staff's comments and negotiate any revisions to the documentation necessary to resolve any concerns. Only when the Staff was satisfied with the documentation would it be presented to the Board for review and approval, or if necessary, further negotiation to resolve any outstanding concerns the Board may have raised, and PEDP would also have had the opportunity to present testimony and evidence in support of the Harrah's Transaction documents. Thus, the established procedures through which the Board should have considered the substance of the Harrah's Transaction documents specifically involved a collaborative process of further discussion and negotiation that would have given PEDP an opportunity to resolve any concerns the Board had relating to the Casino design plan, minority participation, and charitable contributions, as well as a hearing on these issues. The Board's *sua sponte* injection of these issues into the proceedings below without requiring BIE to prove that they negatively impacted PEDP's financial wherewithal and

affording PEDP notice or an opportunity to respond violated due process and equally calls for the Board's decision to be reversed.[4]

Furthermore, the Board's supposed concerns on each of these matters lack merit. First, the Board seems to suggest that it was not until the Harrah's Transaction documents were submitted that it learned that PEDP contemplated applying to change the design of its Casino. That is not true. PEDP had always been clear from May 2009 when it filed its initial petition for an extension of time to commence operations that the Casino design plan would change and that PEDP intended to seek Board approval for such changes at the appropriate time. (*See, e.g.*, R. 685a-686a.) This was not a game of hide-the-ball. The Board was always aware of PEDP's intentions, and it allowed PEDP to move forward knowing full well what PEDP was intending.

The Gaming Act specifically contemplates and provides a procedure for changes in facility designs. Such changes in design plans have moreover proven to be the rule, not the exception, as the Commonwealth's gaming industry has developed, including HSP/Sugarhouse, the other Philadelphia licensee. PEDP respectfully submits that there is not a licensee in this Commonwealth whose design plans did not change, with Board approval, from the application phase to the time when they commenced operations. PEDP of course cannot make that averment with absolute certainty because the Board wrongfully deprived it of discovery relating to that and other matters, despite the fact that such discovery would clearly have been relevant to show the Board's arbitrarily disparate treatment of PEDP. The Board's conclusion that the Harrah's Transaction represented a reduction from 3,000 to 1,500 slot machines in the initial phase of the

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[4] *See, e.g., Soja v. Pennsylvania State Police*, 500 Pa. 188, 194-97, 455 A.2d 613, 615-17 (1982) (due process requires prior notice and the opportunity to disprove the government's evidence); *Snyder v. Com., Dep't of Transp., Bureau of Motor Vehicles*, 977 A.2d 55, (Pa. Cmwlth. 2009) (analogizing to the law of lesser-included offense and holding that, consistent with due process of law, an administrative body cannot sanction a respondent for a regulatory violation that is not charged in the initial pleading unless it is not possible to commit the greater offense that was charged without also committing the lesser offense that was not charged); *RESPA of Pennsylvania, Inc. v. Skillman*, 768 A.2d 335, 339 (Pa. Super. 2001) ("When notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process." (citation omitted)).

Casino is also misplaced. (Bd.'s Br. at 58.) The Board's September 2, 2009 Order always contemplated that the initial phase of development would include 1,500 slot machines and is only addressed to this initial complement of 1,500 slot machines. (App. N.)

Second, the Board's emphasis on changes in the minority ownership percentage in PEDP is misplaced and another example of the Board's arbitrarily disparate treatment of PEDP. For example, Pittsburgh licensee PITG also originally had significant minority ownership, and the Board raised no objection in the PITG change-in-control proceedings when that minority ownership interest was substantially diluted in the change-in-control transaction. (R. 2738a-2740a (showing a dilution of Don Barden's interest in the licensee from 100% to 16.67%).) Moreover, the Board ignored the fact that while the Mashantucket Pequot Tribal Nation's interest in PEDP would be diluted, participation by women investors would actually increase because the Silver Trust, established by Melissa Silver, will invest $10.5 million in equity, thereby becoming a significant equity shareholder in PEDP.

Third, the Board's poorly-reasoned conclusions about the supposed dilution of PEDP's charitable giving commitment were both wrong and contrary to Condition 57 of PEDP's Statement of Conditions. Condition 57 required PEDP investor Washington Partners Community Charities, LP ("WPCC") to "irrevocably commit[] to allocate all of their net profits to charities and non-profit organizations, as selected by such owners. . . ." (R. 586a.) However, that Condition also specifically contemplates and permits WPCC's ownership interest in PEDP to be diluted, so long as WPCC maintains its irrevocable commitment of its full share of net profits to charity. Specifically:

> In the event that Philadelphia Entertainment and Development Partners, LP obtains additional equity owners which causes WPCC's ownership interest held therein to fall or be diluted below 42%. WPCC will nevertheless continue to contribute all funds, income, dividends or other distributions of either cash, partnership interests or other assets received as a result its ownership of partnership interests in Philadelphia Entertainment and Development Partners, LP to charities and other non-profit organizations pursuant to the terms of the limited partnership agreement of WPCC.

(R. 586a.) The proposed dilution of WPCC's interest in PEDP under the Harrah's Transaction fully complies with both the letter and spirit of Condition 57. WPCC's interest will be diluted as expressly permitted, but it will maintain and reaffirm its commitment to contribute the full amount of its net profits to charity. The Board cannot and should not be permitted to penalize PEDP for doing exactly what the Board permitted and required in its Statement of Conditions.

In any event, the Board's simplistic finding that the total amount of charitable contributions to be made under the Harrah's Transaction is less than what was contemplated under the original application is simply wrong. It fixated on the fact that the original application stated a figure of $300 million while the Harrah's Transaction did not, and concluded on that basis alone that the charitable commitment was being diluted. This sort of unsubstantiated finding is precisely why financial analysis testimony and evidence from BIE would have been critical to any fair hearing in this matter.

The $300 million original charitable contribution estimate was based on a projected liquidity event a number of years down the road – that is, the bulk of that contribution would have been paid in the future from the projected potential sale of the charities' interests and/or from refinancing proceeds. In contrast, under the Harrah's Transaction, in addition to the charitable giving structure under Condition 57 that will be carried forward, the reconstituted PEDP also commits to make annual charitable contributions in the amount of 2% of net revenue. All income paid on the $10.5 million in Class A shares to be acquired by the Silver Trust would also be committed to charitable purposes. These contributions would be paid on an annual basis, and thus, have a higher net present value than the originally contemplated contributions, such that there is a substantial likelihood that the resultant charitable giving will actually be greater under the Harrah's Transaction than it would have been under the original contribution program.

Finally, by revoking PEDP's License, the Board has guaranteed that no charitable benefits will flow from this license because it is highly unlikely that any other potential applicant would make a charitable contribution commitment, which is not required under the Gaming Act,

let alone a commitment in an amount anywhere near what PEDP committed.[5] That certainly does not lie in the public interest for which the Board purports to stand.

F. The Board Improperly Denied PEDP Necessary Discovery.

The Board has now taken the position that it appropriately exercised its "discretion" in the proceedings below to "limit" the discovery that PEDP sought to take. Any fair review of the record shows that that was not the case. To the contrary, the Board and the Director did not "limit" discovery; they embarked on a wholesale effort to prevent PEDP from obtaining any meaningful discovery necessary to defend against BIE's claims. Despite the fact that the Board's Regulations provide for discovery, and despite the fact that the Director specifically confirmed PEDP's right to discovery in the proceedings below, the only "discovery" that the Board and the Director ultimately allowed was the re-production of PEDP's own documents back to it and two starkly limited depositions of BIE Agents that, in the end, had no real substantive knowledge pertaining to the issues in this case. This was not the exercise of discretionary limitation of discovery in certain areas, it was a complete denial of discovery.

The discovery sought by PEDP was proper and narrowly tailored to obtain information necessary to its defense. For example, contrary to the Board's argument, PEDP was entitled to discover the legal standard that was to be applied in the proceedings below. Contention interrogatories and related document requests are certainly a fairly common aspect of modern discovery practice. *See, e.g.*, Pa. R. Civ. P. 4003.1(c) (stating that contention interrogatories are not objectionable). And, here, they were absolutely essential because there was no other way for PEDP to learn the standard that was to be applied, as is evident from the record on appeal. Indeed, it was not until the Board filed its response brief that PEDP was finally informed that the

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[5] The Board's emphasis on the fact that a small portion of the charitable contributions contemplated under the Harrah's Transaction would be directed to the Mashantucket Pequot Tribal Museum in Connecticut is particularly insulting, when juxtaposed with the Board's emphasis on minority ownership interests. To the Board, the Tribal Nation is apparently a key partner to ensure diversity of ownership in PEDP, but the Board cannot sanction a relatively minimal charitable contribution to an organization that preserves and supports its heritage.

financial wherewithal framework was the supposed standard by which its financial suitability was purportedly judged, and the Board did not even address this in its Adjudication.

Discovery concerning PITG and other similarly-situated licensees was equally relevant and important, particularly given the Board's admission that PEDP and PITG are similarly situated. (R. 1688a; PEDP's Br. at 55-56.) One of PEDP's principal defenses is that the Board is treating PEDP differently than it has treated other similarly-situated licensees and that the Board is selectively applying and changing its interpretation of financial suitability and other purported Gaming Act requirements. This information is not contained in the public record as the Board contends, and an appropriate confidentiality order could certainly have been imposed to protect any arguably confidential materials that may have needed to have been produced.

For example, nothing in the public record to which the Board cites (which consists entirely of the Adjudication issued by the Board in the PITG change-in-control proceedings) shows whether the Board imposed interim milestone reporting deadlines on PITG or any other similarly-situated licensee who applied to modify its ownership structure, casino design, or any other aspects of its development and operations plans. Likewise, nothing in the public record shows whether other licensees were temporarily unable to meet such reporting dates and what, if anything, the Board did in response, which an evidentiary hearing would have exposed.

Similarly, nothing in the public record shows whether and how the Board evaluated the financial suitability of these other licensees in connection with their modification applications. Yet, if the financial wherewithal framework that the Board now espouses was applied to these other licensees in the manner that the Board contends it should apply to PEDP, there should certainly be significant records of the Board's actions. Alternatively, the absence of such records would be strong proof of the Board's disparate treatment of PEDP.

Thus, the discovery PEDP sought was appropriate and narrowly-tailored to obtain information and documents necessary to its defense. The Board should not be permitted to hide behind the purported cloak of "discretion" to justify its wholesale denial of relevant, material discovery.

IV. The Board's Newly-Announced Limiting Construction of the "Financial Wherewithal" Framework, if Accepted, Establishes that the Financial Suitability Requirement is Unconstitutionally Vague.

According to the Board, now, the "relevant question" in evaluating financial wherewithal "is whether PEDP had the ability to develop the casino *for which the Board granted PEDP a license* – not, as PEDP suggests, 'to develop the project *that it proposes*' four years later." (Bd.'s Br. at 55.) There is no better proof that the standard is unconstitutionally vague than this newly-announced position on the meaning of "financial wherewithal." There is no reasonable way that PEDP could have gleaned this understanding (which is not sustainable) from Condition 5 of the Statement of Conditions, the Gaming Act, Regulations, or any other available guidance.

First, this purported limitation on the financial wherewithal analysis solely to the design plan contemplated in the original license application is nowhere set forth in Condition 5 or the Gaming Act or Regulations. Moreover, the Board's argument is without basis since in the January 2010 amendments to the Gaming Act, the Legislature added a new provision (4 Pa. C.S.A. § 1205) that specifically provided a procedure for modifications to a facility.

Second, the language of the Financial Suitability Report, which enunciates the financial wherewithal framework cannot reasonably be read so narrowly. Rather, the relevant portion of the Report is stated simply in terms of "financial wherewithal to develop the proposed project." (R. 106a.) In other words, as is logical, the financial wherewithal framework asks whether one can financially develop the project that it proposes.

Third, the Board's newly-asserted interpretation is directly contrary to any understanding of this language that could potentially be gleaned from the Gaming Act and the limited publicly-disseminated information concerning the Board's treatment of other licensees. The Gaming Act specifically permits a licensee to petition to modify its facility, and the Board has considered and granted such applications in the past. 4 Pa. C.S.A. § 1205. For example, the Board permitted HSP to modify the design of its facility when financial and other market conditions so required, without instead revoking its license as lacking the financial wherewithal to complete its initially-licensed project. Clearly then, at least for other licensees, financial wherewithal has tested the

financial viability of the proposed project, not solely the financial viability of the originally-proposed project.

Based on all of this information, PEDP reasonably understood the financial wherewithal framework to mean what the plain language of the Suitability Report said – the financial ability to complete the proposed project. To the extent that the Board now contends that it means something else, then the financial wherewithal framework is plainly subjective and unconstitutionally vague because no reasonable licensee could have understood the standard to be as the Board now contends.[6]

The fundamental purpose of vagueness review is to ensure that regulated parties receive reasonable and appropriate notice of the standards to which they are being held and to guarantee that a tribunal's discretion is appropriately channeled and guided.[7] In other words, adjudicative decisions should not be based on *ad hoc* standards announced *post hoc*. This basic purpose is utterly frustrated where the Board, as the tribunal below, is permitted to wait until the case is on appeal to announce the standard that it was supposedly applying in the underlying proceedings.

The Board's glib arguments in its response brief are unenlightening and not on point. The Board first argues that the financial suitability standard is "clearly" set forth in the Gaming Act and Regulations. It does not, however, cite any provision that defines a standard for *how* to assess financial suitability – rather, it relies solely on conclusory statements to the effect that the Board *is* to assess financial suitability. The fact that an assessment is to occur gives no guidance as to the means of assessment. Moreover, the Board's argument is focused entirely on the financial suitability assessment that was undertaken during the initial application proceedings.

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6 *See, e.g., Whymeyer v. Comm., Dep't of State, Bureau of Prof'l & Occupational Affairs, State Registration Bd. for Prof'l Engineers, Land Surveyors & Geologists*, 997 A.2d 1254, 1259 (Pa. Cmwlth. 2010); *Blanco v. State Bd. of Private Licensed Schools*, 158 Pa. Cmwlth. 411, 418-19, 631 A.2d 1076, 1081 (1993). (*See also* PEDP's Br. at 38-44.)

7 It is particularly troubling for the Board to argue that a lesser standard of vagueness should apply here because the Gaming Act constitutes economic regulation and PEDP "can be expected to consult relevant legislation in advance of action." (Bd.'s Br. at 43.) PEDP's efforts to do so through, *inter alia*, relevant discovery were completely shut down by the Board.

The Board even goes so far as to take the position that the supposed financial suitability "requirements are to be viewed *from the perspective of a potential gaming licensee*." (Bd.'s Br. at 44 (emphasis added).) The Board's initial suitability determination – when it found PEDP to be financially suitable – was not then and is not at issue in this case, and the Board's argument is completely off the mark.

The Board's second argument that PEDP always knew the standard to be applied and never raised the vagueness issue earlier is equally baseless. First, contrary to the Board's current revisionism, the issue of financial suitability was first raised on April 29, 2010, when BIE filed its Complaint, commencing the proceedings below. Nothing in the Board's prior Orders or Adjudications even referenced the phrase "financial suitability." Thus, PEDP raised the constitutional vagueness argument at the first point that it could have done so – promptly after BIE's Complaint was filed, and repeatedly sought discovery to obtain clarification.

Second, the Board's repeated emphasis on the fact that PEDP did not challenge the financial suitability standard during the initial application proceedings is odd and misplaced. PEDP could not and would not have challenged the financial suitability standard then because the Board, in fact, found PEDP financially suitable. PEDP was not aggrieved by the Board's decision and would not have had standing to appeal it. Moreover, the Board at that time applied a subjective standard, which apparently all of the applicants for the Philadelphia licenses passed.

In sum, there is no statutory or other guidance to explain the objective standard that must be used to evaluate PEDP's financial suitability under Condition 5 of the Statement of Conditions, let alone the new interpretation of the financial wherewithal framework that the Board has now advanced for the first time in its appellate briefing. In the absence of a clearly-defined objective standard for evaluating financial suitability, PEDP is afforded no prior notice of how it is to be judged and is thus equally denied the ability to meaningfully defend itself. As set forth above, the financial suitability requirement is unconstitutionally vague and it was error for the Board to apply it to to revoke PEDP's License.

V. PEDP Sufficiently Responded to and Countered All Counts of BIE's Complaint.

The Board contends, wrongly, that PEDP only addressed Count IV of BIE's four-Count Complaint in its opening papers. To the contrary, PEDP thoroughly addressed all four Counts of the Complaint and explained how the Board erred in each instance.

Since the Board acknowledges that PEDP addressed Count IV, it would also have to admit that PEDP addressed Count II, because those two Counts are duplicative of each other. They both alleged that PEDP's License should be revoked for the alleged failure to maintain financial suitability. Count II premised this allegation on PEDP's Statement of Conditions, and Count IV premised the identical allegation on the Gaming Act. PEDP addressed at length in its opening brief BIE's flawed arguments and the Board's unsupported conclusions concerning financial suitability. (*See* PEDP's Br. at 26-50.) PEDP even specifically discussed at length the Statement of Conditions. (*See* PEDP's Br. at 29-33.)

PEDP also specifically addressed Counts I and III, which were also largely duplicative of one another. They alleged that PEDP's License should be revoked for noncompliance with the Board's Orders setting interim milestone reporting deadlines and for the inability to have 1,500 slot machines available for play by May 29, 2011. PEDP responded with evidence that: (a) it had attained compliance with those Orders, albeit not on the unduly strict and arbitrary milestone schedule originally set forth by the Board, and by doing so, effectively cured any temporary noncompliance; (b) any temporary noncompliance was inadvertent and despite PEDP's best efforts; it was not "willful"; and (c) even if PEDP were temporarily noncompliant, the ultimate sanction of license revocation was not warranted, particularly where the Board's imposition of the lesser sanction of a $2,000 per day fine (all of which assessments have been paid by PEDP) had achieved its purpose and brought PEDP into full compliance with the Board's reporting requirements. (PEDP's Br. at 57-60.)

* * *

The Board erred as a matter of law in entering summary judgment against PEDP based on a genuinely disputed material factual record without requiring BIE to meet its burden of proof

and conducting an evidentiary hearing. The proceedings below were not a plenary exercise of the Board's discretion as it now contends – they were an enforcement action where the Board should have, but failed, to sit as an impartial tribunal judging the specific allegations raised by BIE against PEDP against established standards. In the end, the Board even lost sight of the most basic aspects of these proceedings and the fundamental due process protections that attach as a result – namely, contrary to its suggestion in its brief, the Board was not supposed to be sitting in judgment of whether PEDP met some burden to *keep* its License, the Board was supposed to determine whether BIE had met its burden to *take* PEDP's License. BIE failed to adduce such evidence to meet its burden, and there was no basis on the record for the Board to enter a judgment as a matter of law against PEDP, particularly where there was no clearly-defined basis in law to do so nor did the Board cite to same.

CONCLUSION

For all of the reasons set forth above and in its opening brief, PEDP respectfully requests that this Court enter an Order reversing the Board's December 23 and November 19 Orders, as well as the Board's other prior non-final Orders relating to discovery, and direct the entry of summary judgment in PEDP's favor or, alternatively, remand the matter to the Board with instruction as to the governing law and direction to accord PEDP due process of law in the prosecution of further proceedings.

Respectfully submitted,

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Dated: May 25, 2011

CERTIFICATE OF SERVICE

I, F. Warren Jacoby, hereby certify that on this 25th day of May, 2011, I caused two true and correct copies of the Reply Brief of Petitioner Pennsylvania Entertainment and Development Partners, L.P., to be served upon the following persons in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

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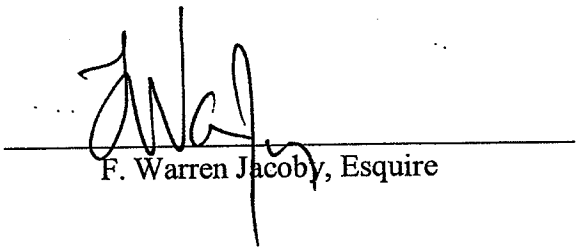

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