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## Gaming Control Board Has Great Deference in Granting Slot Licenses: *Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Board*

GAMING ACT — SLOT MACHINE LICENSING — QUASI-JUDICIAL DELIBERATIONS — SUNSHINE ACT — The Supreme Court of Pennsylvania affirmed the Order and Adjudication of the Pennsylvania Gaming Control Board which granted Category 2 slots licenses to HSP Gaming and the Philadelphia Entertainment and Development Partners, holding, inter alia, that the Pennsylvania Gaming Control Board was a quasi-judicial body entitled to hold private deliberations.

*Riverwalk Casino, L.P. v. Pa. Gaming Control Bd.*, 926 A.2d 926 (Pa. 2007).

The Pennsylvania Race Horse Development and Gaming Act<sup>1</sup> (Gaming Act) was passed in July 2004 and authorized slot machine gambling in Pennsylvania to provide tax relief to residents through the gaming tax revenues.<sup>2</sup> The Gaming Act created the Pennsylvania Gaming Control Board (Board) to set up and regulate this new industry in accordance with the Gaming Act.<sup>3</sup> The Board, which was comprised of seven members, was also charged with awarding the slot machine licenses throughout the state.<sup>4</sup> On February 1, 2007, the Board published an Order and Adjudication awarding slots licenses.<sup>5</sup> Petitioner Riverwalk Casino, L.P. (Riverwalk), having not been awarded a slots license, filed a Petition for Review with the Supreme Court of Pennsylvania.<sup>6</sup>

Riverwalk filed an application with the Board for a Category 2 Slot Machine License in the city of Philadelphia.<sup>7</sup> Under the

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1. 4 PA. CONS. STAT. ANN. §§ 1101-1904 (West 2008).

2. *Riverwalk Casino, L.P. v. Pa. Gaming Control Bd.*, 926 A.2d 926, 953 (Pa. 2007) (Castille, J., dissenting).

3. *Riverwalk*, 926 A.2d at 953 (Castille, J., dissenting).

4. *Id.* The President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House, and the Minority Leader of the House were permitted to appoint one member each to the Board. *Id.* The Governor was permitted to appoint three members to the Board. *Id.*

5. *Id.* at 930 (majority opinion).

6. *Id.* at 931.

7. *Id.* at 930.

Gaming Act, the Board is authorized to issue two Category 2 licenses in the city of Philadelphia.<sup>8</sup> In addition to Riverwalk, four other organizations applied for a Category 2 license: Keystone Redevelopment Partners, PNK Pinnacle Entertainment, HSP Gaming LP, and Philadelphia Entertainment and Development Partners (PEDP).<sup>9</sup>

The five applications were reviewed by the Board pursuant to the guidelines established in the Gaming Act.<sup>10</sup> As part of the application review process, public hearings were held April 10-12, 2006 for the applicants to present their plans and for members of the community to comment publicly on these proposed plans.<sup>11</sup> Final licensing hearings were then conducted November 13-15, 2006, at which time the applicants were provided with an opportunity to present evidence to the Board, including but not limited to witness testimony and documentary and demonstrative evidence, in support of their license applications.<sup>12</sup> Finally, the Board set a deadline of December 8, 2006, for applicants to file a written brief, and scheduled a public meeting for December 20, 2006, to vote on Category 2 slots license applications.<sup>13</sup>

Ultimately, the Board voted to approve the applications submitted by HSP Gaming and PEDP and to deny the applications filed by Riverwalk, Keystone Redevelopment Partners, and PNK Pinnacle Entertainment.<sup>14</sup> The decision by the Board to approve and deny the respective applications for the Category 2 slots licenses was explained in its Order and Adjudication, which it issued on February 1, 2007.<sup>15</sup>

Unsatisfied with the Board's decision, and believing that the Board erred in awarding licenses to HSP Gaming and PEDP, Riverwalk filed a Petition for Review to challenge the Order and

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8. *Riverwalk*, 926 A.2d at 930. A Category 2 license permits the licensee to operate slot machines in a stand-alone venue, a Category 1 license permits the use of slot machines at horse racing tracks, and a Category 3 license authorizes slot machine use at resort hotels. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Riverwalk*, 926 A.2d at 930.

14. *Id.* Commissioner Joseph W. Marshall, III, voluntarily chose to recuse himself from deliberating and voting on the application filed by Keystone Redevelopment Partners to prevent a potential conflict of interest. *Id.* at 937. Likewise, Chairman of the Board Thomas A. Decker voluntarily chose to recuse himself from deliberating and voting on the application for a Category 2 slots license submitted by HSP Gaming. *Id.*

15. *Id.* at 930.

Adjudication on March 2, 2007.<sup>16</sup> Pursuant to Section 1204 of the Gaming Act, the Supreme Court of Pennsylvania has exclusive jurisdiction over an appeal of the Board's Order and Adjudication.<sup>17</sup> On March 14, 2007, the Supreme Court of Pennsylvania ordered that an oral argument be held in connection with the appeal.<sup>18</sup>

Riverwalk's appeal raised seven issues, the first of which alleged that the Board violated the Sunshine Act<sup>19</sup> by conducting private meetings to discuss the merits of the slots license applications.<sup>20</sup> Riverwalk further alleged that the Board made a determination of which applications it would approve and deny at a private meeting, and that the Board vote at the December 20, 2006, public meeting was an attempt by the Board to legitimize a decision that they had reached outside of the public eye.<sup>21</sup>

While the Board admitted to holding a private executive session prior to the December 20, 2006, meeting, it argued that such a meeting was legitimate by way of the Sunshine Act and the holding of *Kennedy v. Upper Milford Township Zoning Hearing Board*.<sup>22</sup> In *Kennedy*, the Supreme Court of Pennsylvania found that a zoning hearing board fulfilled a quasi-judicial role because it was a fact-finder and it engaged in deliberations that were similar to those of a court.<sup>23</sup> As such, the court held that it was appropriate for a zoning hearing board to deliberate privately.<sup>24</sup>

Chief Justice Cappy, writing for the majority in *Riverwalk*, recognized that while the open meeting requirement of the Sunshine Act applied to the Board generally, there were exceptions enumerated in the Act that needed to be considered.<sup>25</sup> Riverwalk argued

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16. *Id.* at 931.

17. *Id.* at 929. The Gaming Act states that "[t]he Supreme Court of Pennsylvania shall be vested with exclusive appellate jurisdiction to consider appeals of any final order, determination or decision of the board involving the approval, issuance, denial or conditioning of a slot machine license." 4 PA. CONS. STAT. ANN. § 1204 (West 2008).

18. *Riverwalk*, 926 A.2d at 931.

19. 65 PA. CONS. STAT. ANN. § 704 (West 2000).

20. *Riverwalk*, 926 A.2d at 931. The Sunshine Act states that "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public, with exceptions for executive sessions." 65 PA. CONS. STAT. ANN. § 704 (West 2000).

21. *Riverwalk*, 926 A.2d at 931.

22. *Id.* at 934 (citing *Kennedy v. Upper Milford Twp. Zoning Hearing Bd.*, 834 A.2d 1104 (Pa. 2003)).

23. *Kennedy*, 834 A.2d at 1115-16.

24. *Id.*

25. *Riverwalk*, 926 A.2d at 932. Exceptions to the general open meeting requirement include 65 PA. CONS. STAT. ANN. §§ 707, 708, and 712 (West 2000), which discuss, respectively, exceptions to open meetings, exceptions concerning executive sessions, and excep-

that there was no sound basis to suggest the Board was a quasi-judicial body and that even if it was to be considered as such, Congress did not intend for all deliberations of a quasi-judicial body to be held in private.<sup>26</sup>

Relying in part on *Man O' War Racing Association v. State Horse Racing Commission*,<sup>27</sup> however, the majority disagreed and held that the Board performed a quasi-judicial role in fact-finding and deliberating in connection with awarding the slot machine licenses.<sup>28</sup>

Like the State Horse Racing Commission, Justice Cappy reasoned that the Board must engage in fact-finding and then consider a great deal of information, including confidential information, pertaining to applicants and their respective applications before they can weigh the relative strengths of each and make a final determination.<sup>29</sup> To that end, private deliberations were not only permissible, but necessary for Board members openly to discuss all elements of a candidate's application, and still protect confidential information with which the Board was entrusted during the application process.<sup>30</sup> These complicated deliberations required the Board to balance and weigh a multitude of facts in order to determine which applicants were best suited to receive the slots licenses.<sup>31</sup> The majority concluded that this level of deliberation by the Board rose to the level of a quasi-judicial operation and therefore was squarely within the open meeting exception of the Sunshine Act.<sup>32</sup>

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tions relating to General Assembly meetings. *Id.* Specifically applicable to the immediate situation was, as the Board had cited, 65 PA. CONS. STAT. ANN. § 708(a)(5) (West 2000), which permits an agency to hold an executive session not open to the public where the matters to be discussed would lead to an unlawful disclosure of privileged or confidential information or are a part of quasi-judicial deliberations. *Id.*

26. *Riverwalk*, 926 A.2d at 932.

27. 250 A.2d 172 (Pa. 1969). The issue before the court in *Man O' War* was whether an appeal could be taken from a decision rendered by the State Horse Racing Commission, which was charged with granting four licenses to conduct horse racing meetings. *Man O' War*, 250 A.2d at 174. The court held that an appeal could be taken as a result of the judicial characteristics of the State Horse Racing Commission, which were evident in the complicated statutory provisions from which they were to make a judicial decision regarding which applicants would be awarded a license. *Id.* at 175.

28. *Riverwalk*, 926 A.2d at 934-35. The majority relied upon the *Man O' War* court's distinction between agencies who apply "multi-faceted statutory standards" in considering licensees from other agencies, such as those responsible for occupational licensing, who only seek to determine whether an applicant has met defined minimum standards. *Id.* at 935 (quoting *Man O' War*, 250 A.2d at 175).

29. *Id.* at 935.

30. *Id.*

31. *Id.*

32. *Id.*

The second issue Riverwalk raised on appeal was whether Board members were permitted to deliberate and vote on less than every application.<sup>33</sup> At the Board meeting on December 20, 2006, Board Commissioner Joseph W. Marshall announced that he had voluntarily recused himself from deliberations and voting on the license application filed by Keystone Redevelopment.<sup>34</sup> Chairman of the Board Thomas A. Decker also decided that, in order to avoid a potential conflict of interest, he would voluntarily recuse himself from deliberations and voting on HSP Gaming's application.<sup>35</sup> Both members, after consulting with the Board's Chief Counsel, determined that their recusal from one application did not prohibit them from deliberating and voting on the other applications.<sup>36</sup>

Riverwalk contended that since the licenses were to be awarded to the two best applicants, the Board was required to compare each of the applicants.<sup>37</sup> If all seven members voted on one applicant, Riverwalk argued, and only six voted on another applicant, then the relative chance of each applicant being awarded a license was affected.<sup>38</sup> Riverwalk further alleged that this process provided recused Board members the opportunity to prejudice other Board members.<sup>39</sup> Therefore, Riverwalk sought for the matter to be remanded back to the Board for a fair and impartial hearing in which Commissioner Marshall and Chairman Decker would not participate.<sup>40</sup>

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33. *Riverwalk*, 926 A.2d at 935. "Riverwalk next asserts that the Board's decision should be vacated because Board members who had recused themselves from deliberating and voting on individual license applications were not disqualified from considering the remaining applications." *Id.*

34. *Id.* at 937. Commissioner Marshall recused himself to avoid a potential conflict of interest between his role as a member on the Board and his role as Chairman/CEO of Temple University Health System. *Id.* Temple University Health System was in the middle of an arbitration with Preferred Real Estate over disputed matters concerning a lease between the two parties. *Id.* Preferred Real Estate and its owner, Michael O'Neill, were required to file documents with the Board on behalf of Keystone Redevelopment Partners, LLC, as a part of Keystone's application. *Id.*

35. *Id.* Chairman Decker was the managing partner of Cozen O'Connor prior to being appointed to the Board. *Id.* at 938. After Chairman Decker left Cozen O'Connor, the firm provided HSP with legal assistance in connection with their slots license application. *Id.* Even though Chairman Decker reported that he had performed no legal service for HSP, and neither he nor his family benefited in any way from the legal services provided, he voluntarily recused himself to avoid the appearance of impropriety. *Id.*

36. *Id.* at 937-38.

37. *Id.* at 938.

38. *Riverwalk*, 926 A.2d at 938.

39. *Id.*

40. *Id.* at 935.

In addressing the second issue, the majority considered prior drafts of the Gaming Act that proposed language requiring any member who disqualified himself from deliberating or voting on an application to recuse himself from deliberating and voting on all applications for that license category.<sup>41</sup> The majority reasoned that the prior draft was evidence that such a strategy was considered by the legislature.<sup>42</sup> The General Assembly, however did not accept this provision and instead chose language permitting a member to participate in the remaining matters before the Board.<sup>43</sup>

Furthermore, the majority cited the established rule from *Street Road Bar & Grille, Inc. v. Pennsylvania Liquor Control Board*<sup>44</sup> that gives an administrative agency's interpretation of a statute controlling weight unless it is clearly wrong.<sup>45</sup> In line with that rule, the court rejected Riverwalk's argument and held that Chairman Decker and Commissioner Marshall were not required to refrain from taking part in the deliberations and voting in connection with the applications that were not associated with their recusals.<sup>46</sup> Additionally, the court found no validity in Riverwalk's argument that Chairman Decker or Commissioner Marshall influenced the opinions of the other members by recusing themselves from individual applications.<sup>47</sup> Such an allegation amounted to mere speculation, the majority determined, as no proof was offered to suggest that the remaining Board members were unable to assess each application on the merits independently.<sup>48</sup>

Riverwalk next asserted that the Order and Adjudication by the Board should be vacated because the Board concluded two casinos could not coexist in the North Delaware Avenue region, without having evidence to support such a theory.<sup>49</sup> The decision, Riverwalk contended, was arbitrary, and Riverwalk was never advised

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41. *Id.* at 940.

42. *Id.*

43. *Riverwalk*, 926 A.2d at 940.

44. 876 A.2d 346 (Pa. 2005).

45. *Riverwalk*, 926 A.2d at 940-41 (citing *Street Road Bar & Grille*, 876 A.2d 346).

46. *Id.*

47. *Id.* at 940.

48. *Id.*

49. *Id.* at 944. Riverwalk's proposed site and those of HSP/Sugarhouse and Pinnacle/PNK were located in what the Board referred to as the North Delaware Avenue region. *Id.* This encompassed land "East of Route 95, north of the Benjamin Franklin Bridge, and between North Columbus Blvd./North Delaware Avenue and the Delaware River. *Id.* (citing the Board's Order and Adjudication at 82).

of the concern and thus was unable to present evidence to the contrary.<sup>50</sup>

The Board claimed it was not provided with enough evidence to conclude the North Delaware Avenue region was capable of handling the amount of traffic that would have been created by two casinos.<sup>51</sup> Furthermore, the Board contended that Riverwalk focused solely on traffic, and failed to take into consideration the impact of adding two casinos to the same community.<sup>52</sup>

The court recognized that each applicant was to provide the Board with a local impact report designed to address the impact of building a casino in a particular neighborhood.<sup>53</sup> While each applicant submitted these reports as they pertained to their own casino, none of the three applicants who sought to build at the North Delaware Avenue area detailed the impact of their own casino in addition to that of another casino.<sup>54</sup> To aid it in making a more informed decision, the Board hired a traffic expert to advise it in connection with selecting casino sites.<sup>55</sup>

Based on their own findings and the advice of the traffic expert, the Board determined that the North Delaware Avenue area was advantageous because of the highway access to Interstate 95, which also separated the casino from residential areas.<sup>56</sup> The Board was concerned, however, by the potential impact of locating two casinos in this area because of the additional traffic and the overall impact it would have on the neighborhood.<sup>57</sup>

The Board's concerns were further amplified when, at a Public Input Hearing in April 2006, they received multiple comments from individuals, community organizations, and public figures urging it not to license two casinos in the North Delaware Avenue region.<sup>58</sup> Based on the evidence gathered from applicants' reports, the traffic expert, and community input, the Board felt it would be doing the community a great disservice by licensing two casinos in the North Delaware Avenue region.<sup>59</sup>

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50. *Riverwalk*, 926 A.2d at 945-46.

51. *Id.* at 946.

52. *Id.*

53. *Id.* at 944. The local impact report was to address such issues as the impact on transportation (including traffic studies highlighting adverse impacts), water/sewer service, emergency services, and tourism. *Id.*

54. *Id.* at 946.

55. *Riverwalk*, 926 A.2d at 944. The traffic expert retained was Edwards & Kelcey. *Id.*

56. *Id.* at 945.

57. *Id.*

58. *Id.* at 947.

59. *Id.* at 946-47.

The court found there was sufficient evidence in the record to indicate that the Board considered a multitude of evidence when they determined that licensing two casinos in the same neighborhood would have a negative impact.<sup>60</sup> This evidence properly included the information that the Board received from Public Input Hearings in accordance with *Cashdollar v. State Horse Racing Commission*,<sup>61</sup> which held that the Horse Racing Commission was correct in relying on community comments during a public hearing to gauge the impact an off-track betting facility would have on the community.<sup>62</sup> Additionally, the majority reasoned that no evidence in the record indicated Riverwalk's application was denied because they failed to submit a traffic study outlining the result of two casinos operating in the North Delaware Avenue area.<sup>63</sup>

The court therefore held that since the Board selected the applicants with the best proposal, giving consideration to what was in the public's best interest and not using any applicant's failure to report on the impact of multiple casinos in a neighborhood, Riverwalk's claim failed.<sup>64</sup> The court affirmed the Board's Order and Adjudication which granted a Category 2 slots license to HSP and PEDP.<sup>65</sup>

Justice Castille wrote a dissenting opinion in which he disagreed with the majority that the Board's Order and Adjudication should be affirmed.<sup>66</sup> Justice Castille argued that while the majority may have been correct in finding the Board's deliberations were quasi-judicial, there was no reason that the Board could not have been more open in deliberating over the applications.<sup>67</sup> A more open approach, Justice Castille argued, would have prevented many of Riverwalk's procedural complaints, in-

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60. *Riverwalk*, 926 A.2d at 947.

61. 600 A.2d 646 (Pa. Commw. Ct. 1991).

62. *Riverwalk*, 926 A.2d at 947 (citing *Cashdollar*, 600 A.2d at 650).

63. *Id.*

64. *Id.* at 948.

65. *Id.* at 952. In addition to the those issues raised by Riverwalk discussed *supra*, Riverwalk contended that PEDP lied to the Board when it said it did not have an interest in Atlantic City gambling. *Id.* at 941. The court found that PEDP's representatives did not lie concerning their involvement in Atlantic City gaming. *Id.* at 944. Riverwalk also alleged that the Board failed to consider the City of Philadelphia's support for Riverwalk's application, which was a violation of their due process rights. *Id.* at 948. The majority found that the letter was submitted after the deadline for submissions and they held not only that the Board had the ability to set deadlines for public comment, but that its decision to evaluate only evidence which was present in the record in determining the best overall proposal was reasonable. *Riverwalk*, 926 A.2d at 949. The Board found that all claims made by Riverwalk lacked merit. *Id.* at 952.

66. *Id.* at 953 (Castille, J., dissenting).

67. *Riverwalk*, 926 A.2d at 954 (Castille, J., dissenting).

cluding the traffic issue and the due process claim.<sup>68</sup> Justice Castille further argued that the Board's decision to adopt a policy whereby the selection of one applicant in the North Delaware Avenue area required the rejection of other applications in that area indicated a clearly dispositive conclusion, and as the deliberations of the Board occurred in private, it is unknown how much of a role this factor played in their voting.<sup>69</sup> Finally, Justice Castille stated his belief that when the evaluation process involves a comparative analysis of multiple applicants, a recusal from one should be a recusal from all.<sup>70</sup>

Approximately five months after the Gaming Act was signed into law, a group of individuals, organizations, and legislators filed a lawsuit alleging that Act 71 (the Gaming Act) was unconstitutional.<sup>71</sup> The petitioners' primary argument was that Act 71 had been amended so extensively through the legislative enactment process that it violated multiple provisions of Article III of the Pennsylvania Constitution.<sup>72</sup>

The Gaming Act was first introduced in February 2004 as House Bill 2330.<sup>73</sup> At the outset, HB 2330 was drafted to provide the Pennsylvania State Police with the duty of performing criminal background checks of those persons seeking to acquire a license from the State Harness and Horse Racing Commission and was a total of one page in length.<sup>74</sup> After several revisions and amendments by the House and the Senate, the bill became 145 pages in length, created the Board, provided for a means by which to issue gaming licenses for slot machine casinos, and established

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68. *Id.*

69. *Id.* at 955-56.

70. *Id.* at 956.

71. *Pennsylvanians Against Gambling Expansion Fund v. Pennsylvania*, 877 A.2d 383, 390 (Pa. 2005).

72. *Pennsylvanians Against Gambling*, 877 A.2d at 392. Specifically, the petitioners charged that Act 71 was passed in violation of Article III, Sections 1, 3, 4, 6, and 10 of the Pennsylvania Constitution, which govern the enactment of legislation. *Id.* Section 3 was designed to prevent the practice of "logrolling," or inserting numerous distinct matters into one piece of legislation, particularly when no single issue could on its own obtain the approval of the legislature. *Id.* at 394. In addition to the Article III challenges, petitioners alleged that the Gaming Act provided for an unconstitutional delegation of power to the Gaming Control Board. *Id.* at 392.

73. H.R. 2330, 188th Gen. Assem., Reg. Sess. (Pa. 2004). House Bill 2330 was titled "An Act Providing for the Duties of the Pennsylvania State Police Regarding Criminal History Background Reports for Persons Participating in Harness or Horse Racing." *Id.*

74. *Id.* The granting of licenses by the State Harness and Horse Racing Commission is governed by the Race Horse Industry Reform Act of 1981, 4 PA. STAT. ANN. §§ 325.101-.402 (West 2008).

numerous funds.<sup>75</sup> The title of the bill was also amended to express the multitude of changes.<sup>76</sup>

In determining whether Act 71 met the requirements of Article III, the Supreme Court of Pennsylvania employed a two-prong test.<sup>77</sup> The first prong required the court to determine whether the purpose of the original bill matched the purpose of the final bill, and the second prong required the court to determine whether the final bill and its title, when considered together, were deceptive.<sup>78</sup> Ultimately, the court held that the original purpose of the bill was to regulate gaming and that the subsequent amendments did not alter that original purpose.<sup>79</sup> Furthermore, the court reasoned that the title of the final bill was clear enough to notify a reasonable person as to the subject matter of the bill.<sup>80</sup>

While the majority of Act 71 was ultimately upheld, the court found several provisions to violate the Pennsylvania Constitution, and therefore severed them from the Act.<sup>81</sup> The court determined that transferring money from the State Gaming Fund to the Volunteer Fire Company Grant Program and the Forest Reserves Municipal Financial Relief Law violated the single subject requirement of Article III, Section 3, as these organizations lacked a clear connection to the primary objective of regulating gaming.<sup>82</sup> Additionally, the court agreed with the petitioners that the powers

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75. H.R. 2330, 188th Gen. Assem., Reg. Sess. (Pa. 2004) (as amended by Senate July 1, 2004). The funds created by Act 71 included the Gaming Fund, the Pennsylvania Horse Race Fund, the Gambling and Economic Development and Tourism Fund, the Property Tax Relief Fund, and a Compulsive and Problem Gambling Treatment Fund. *Id.*

76. *Id.*

77. *Pennsylvanians Against Gambling*, 877 A.2d at 408.

78. *Id.* at 408-09.

79. *Id.* at 409.

80. *Id.*

81. *Id.* at 403. Taking into consideration Section 1902(a) of Act 71, the court found that it was able to separate the invalid provisions from the rest of the Act. *Id.* That section reads:

(a) General rule.—Except as provided in subsection (b), the provisions of this part are severable. If any provision of this part or its application to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this part which can be given effect without the invalid provision or application.

(b) Limitation.—If any of the provisions of section 1201 (relating to Pennsylvania Gaming Control Board established) or 1209 (relating to slot machine license fee) or their application to any person or circumstance are held to be invalid by any court, the remaining provisions of this part and its application shall be void.

4 PA. CONS. STAT. ANN. § 1902 (West 2008).

82. *Pennsylvanians against Gambling*, 877 A.2d at 403.

granted to the Board in connection with resolving zoning issues were unconstitutional.<sup>83</sup>

A provision not challenged in *Pennsylvanians Against Gambling* on constitutional grounds, but of importance in the present case, is Section 1201.1(a)(3) of the Gaming Act, which requires the Board to adhere to the Sunshine Act.<sup>84</sup> While the majority in *Riverwalk* found the Board to be exempt from the open meeting requirement while conducting quasi-judicial deliberations on the license applications, Justice Castille, in his dissent, argued that the Board should have conducted the deliberations in public.<sup>85</sup> In line with Justice Castille's dissent, quasi-judicial bodies have not always been exempt from the open meeting requirements of the Sunshine Act in Pennsylvania, as is evidenced in *In re Emmanuel Baptist Church*.<sup>86</sup>

In *Emmanuel Baptist Church*, a church applied to a township zoning board for a special building permit variance that would allow them to construct church facilities on land zoned for mechanical uses.<sup>87</sup> The zoning board made its decision to deny the application through a series of phone calls between the board members, and not at a public meeting.<sup>88</sup> The church appealed the decision of the zoning board, and argued, inter alia, that the zoning board had violated the Sunshine Act.<sup>89</sup>

The 1974 Open Meeting Law required that formal action of an agency be taken at a meeting open to the public, or such action would not be valid.<sup>90</sup> The term "agency" was defined very broadly

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83. *Id.* at 419. Act 71 gave the Board power to override local zoning ordinances, which the petitioners equated to a super zoning board with unlimited discretion. *Id.* at 415-16. While the Board was required to make available a 60-day comment period for the public on the location of a casino, they were not required make a decision based on this input. *Id.* at 416. The court concluded that the General Assembly failed to provide the board with the requisite standards to resolve local zoning and land use problems and thus did not comply with Article II, Section I of the Pennsylvania Constitution. *Id.* at 419.

84. 4 PA. CONS. STAT. ANN. § 1201.1(a)(3) (West 2008).

85. *Riverwalk*, 926 A.2d at 954 (Castille, J., dissenting).

86. 364 A.2d 536 (Pa. Commw. Ct. 1976), *superseded by statute*, Sunshine Act of 1986, No. 84, 1986 Pa. Laws 388 (1986), *as recognized in* *Kennedy v. Upper Milford Twp. Zoning Hearing Bd.*, 834 A.2d 1104 (Pa. 2003).

87. *Emmanuel Baptist Church*, 364 A.2d at 537.

88. *Id.*

89. *Id.* (citing Open Meeting Law of 1974, 65 PA. CONS. STAT. ANN. §§ 261-269 (West 1974), *repealed by* Sunshine Act of 1986, No. 84, 1986 Pa. Laws 388 (1986)).

90. *Id.* at 538-39. The relevant section of the Open Meeting Law read: "[t]he meetings or hearings of every agency at which formal action is scheduled or taken are public meetings and shall be open to the public at all times. No formal action shall be valid unless such formal action is taken during a public meeting." 65 PA. CONS. STAT. ANN. § 262 (West 1974), *repealed by* Sunshine Act of 1986, No. 84, 1986 Pa. Laws 388 (1986).

and only expressly exempted the judiciary from its scope.<sup>91</sup> The Township argued that the actions of its zoning board were quasi-judicial in nature and therefore fell within the judiciary exception to the open meeting requirement.<sup>92</sup> The court disagreed.<sup>93</sup>

Citing *Canney v. Board of Public Instruction of Alachua County*,<sup>94</sup> the court adopted the reasoning of the Supreme Court of Florida, and held that a government agency acting in a quasi-judicial nature was not a part of the judiciary and therefore was not excluded from the open meeting requirement.<sup>95</sup> The court further held that the act of the zoning board to deny the church's application for a variance by way of a telephone conversation between board members violated the Open Meeting Law.<sup>96</sup>

The *Emmanuel Baptist Church* decision was described as the leading case on the extent to which zoning boards were required to operate under the terms of the Sunshine Act in Pennsylvania.<sup>97</sup> That is, it was the leading case until the General Assembly of Pennsylvania amended the Sunshine Act and the Supreme Court of Pennsylvania in *Kennedy v. Upper Milford Township Zoning Hearing Board* found that the holding in *Emmanuel Baptist Church* was no longer representative of the legislative intent of the 1998 Sunshine Act.<sup>98</sup>

In *Kennedy*, the Pennsylvania Turnpike Commission applied to a zoning hearing board to obtain relief to increase the height of a communications tower from 120 feet to 200 feet.<sup>99</sup> In considering the Turnpike Commission's application, the zoning board recessed after it heard evidence and argument on the matter.<sup>100</sup> Following the recess, the zoning board reconvened and offered a new proposal which would permit the Turnpike Commission to build a new tower at a height of 180 feet, which they then approved.<sup>101</sup> The Kennedys, who opposed the increase in tower height, filed a claim alleging that the zoning board violated the Sunshine Act

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91. *Emmanuel Baptist Church*, 364 A.2d at 539.

92. *Id.*

93. *Id.*

94. 278 So.2d 260 (Fla. 1973).

95. *Emmanuel Baptist Church*, 364 A.2d at 540 (citing *Canney*, 278 So.2d at 263-64).

96. *Id.* at 541-42.

97. *Kennedy v. Upper Milford Twp. Zoning Hearing Bd.*, 834 A.2d 1104, 1119 (Pa. 2003) (citing EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING & PLANNING § 57.71 (1975)).

98. *Kennedy*, 834 A.2d at 1120.

99. *Id.* at 1106.

100. *Id.* at 1108.

101. *Id.* at 1112-13.

when it recessed and conducted deliberations on the application outside of public view.<sup>102</sup> The zoning board contended that it conducted quasi-judicial deliberations during the recess, which were excluded from the open meeting requirement by Section 708 of the Sunshine Act.<sup>103</sup>

The court determined that a zoning hearing board fulfilled a quasi-judicial function, given its need to engage in fact-finding and deliberative functions that were often similar to those of a court.<sup>104</sup> The court reasoned that given this role, the public interest was best served if the zoning board could exchange ideas and opinions freely and that the best way to accomplish that was if they deliberated privately.<sup>105</sup> This conclusion was consistent, the court concluded, with the intent of the legislature in amending the Sunshine Act to exclude quasi-judicial deliberations from the open meeting requirement.<sup>106</sup>

The issues raised in *Riverwalk* were matters of first impression for the Supreme Court of Pennsylvania, yet they were resolved by the majority in a largely predictable manner. This was a result of the standard by which the court was required to review the case. The Gaming Act requires the Supreme Court of Pennsylvania to “affirm all final orders, determinations, or decisions of the board involving . . . a slot machine license unless it shall find that the board committed an error of law or that the order, determination or decision of the board was arbitrary and there was capricious disregard of the evidence.”<sup>107</sup>

The Supreme Court of Pennsylvania has determined that an agency capriciously disregards evidence when it willfully and deliberately disregards competent and relevant evidence that a person of ordinary intelligence would have to consider to resolve an

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102. *Id.* at 1108.

103. *Kennedy*, 834 A.2d at 1113. Section 708 of the Sunshine Act, entitled “Executive Session,” reads in pertinent part:

(a) Purpose—An agency may hold an executive session for one or more of the following reasons:

...  
(5) To review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and quasi-judicial deliberations.

65 PA. CONS. STAT. ANN. § 708 (West 2000).

104. *Kennedy*, 834 A.2d at 1114.

105. *Id.* at 1115-17.

106. *Id.* at 1120.

107. 4 PA. CONS. STAT. ANN. § 1204 (West 2008).

issue.<sup>108</sup> Furthermore, the determination of an administrative agency is given "great deference," and, therefore, relief is rarely granted because an appellate tribunal should not merely enter its own judgment in place of the judgment of the lower tribunal.<sup>109</sup>

While it would be wrong to permit an appellate tribunal arbitrarily to replace a lower tribunal's judgment with its own, it would be equally wrong to establish an appeals process whereby an appellate tribunal can do little more than rubber stamp the decision of the lower tribunal. With respect to the present case, the Supreme Court of Pennsylvania has exclusive jurisdiction to hear appeals of Board decisions regarding the granting of slots licenses.<sup>110</sup> Yet, unless the court determines that the Board violated the law or deliberately did not consider relevant evidence, the Gaming Act requires that the Supreme Court of Pennsylvania affirm the decision of the Board.

Justice Castille acknowledged in his dissenting opinion that the Gaming Act was passed largely to provide the citizens of Pennsylvania with tax relief.<sup>111</sup> To that end, an argument can be made that the Gaming Act seeks to create an expeditious licensing process because revenue cannot be generated until casinos are licensed and operational. Therefore, board members are appointed by individual politicians rather than being elected by citizens or the legislature, and the appeals taken by unsuccessful applicants are resolved as quickly as possible.

In vesting exclusive appellate jurisdiction in the Supreme Court of Pennsylvania and then binding their hands with such a limited scope of review, the legislature has seriously limited the ability of unsuccessful applicants to successfully appeal a decision by the Board. After all, the Board does not need to show what weight, if any, it afforded to the relevant evidence; it only needs to show that it considered the relevant evidence. As the court in *Riverwalk* found the Board to be exempt from the open meeting requirement of the Sunshine Act, the Board is free to deliberate on the relative merits of each application outside of the public eye.<sup>112</sup> Without public scrutiny of the deliberative process, the court will have little definitive proof beyond the Board's records of whether the

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108. *Riverwalk*, 926 A.2d at 929 (citing *Arena v. Packaging Sys. Corp.*, 507 A.2d 18, 20 (Pa. 1986)).

109. *Id.* (citing *Wintermyer v. WCAB (Marlowe)*, 812 A.2d 478, 484 (Pa. 2002)).

110. 4 PA. CONS. STAT. ANN. § 1204 (West 2008).

111. *Riverwalk*, 926 A.2d at 953 (Castille, J., dissenting).

112. *Id.* at 935 (majority opinion).

Board deliberately failed to consider relevant evidence when considering slots applications. Without such proof, and unless it is clear the Board violated the law, its decision must be affirmed.

The impact of *Riverwalk* extends far beyond whether Riverwalk will have the ability to operate a slots casino in Pennsylvania. *Riverwalk* is a beacon of light which serves to illuminate the great discretion that the Pennsylvania Gaming Control Board has in awarding slots licenses in Pennsylvania and the lack of authority that the Supreme Court of Pennsylvania has been given to check that power.

*Brock E. McCandless*

