

LICENSING

APPLYING THE PRUDENT MAN STANDARD IN GAMING LICENSING WHILE CONTINUING TO DISREGARD THE CLEAR AND CONVINCING EVIDENCE REQUIREMENT: *MASON-DIXON RESORTS, L.P. V. PENNSYLVANIA GAMING CONTROL BOARD*

I. INTRODUCTION

When considering gaming license applicants under section 1313(a) of title 4 of the Pennsylvania Consolidated Statutes, members of the Pennsylvania Gaming Control Board (Board) are fiduciaries of the Commonwealth of Pennsylvania, and the prudent man standard is the correct standard to apply to the decisions of Board members.¹ However, this enhanced standard has little value because the Supreme Court of Pennsylvania, the only court with appellate oversight of the Board,² does not interpret section 1310(a), mandating that these decisions be based on clear and convincing evidence, to require a meaningful investigation or record upon which the Board can base a prudent decision.³

*Mason-Dixon Resorts, L.P. v. Pennsylvania Gaming Control Board*⁴ arose from the awarding of the second⁵ of three⁶ Category

¹ 4 PA. CONS. STAT. § 1201(h.1)-(h.2) (2010).

² *Id.* § 1204.

³ *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087, 1113-14 (Pa. 2012).

⁴ *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087 (Pa. 2012).

⁵ The first Category 3 license was awarded to Valley Forge Convention Center Partners, L.P. *See* Order at 1, *In re* Application of Valley Forge Convention Ctr. Partners, L.P., No. 43585 (Pa. Gaming Control Bd. May 8, 2009), available at http://gamingcontrolboard.pa.gov/files/adjudications/Valley_Forge_-_Cat_3_License_-_Order_and_Adjudication.pdf. The awarding of this license also resulted in litigation. *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1091 n.1; *see also* *Greenwood Gaming & Entm't, Inc. v. Pa. Gaming Control Bd.*, 15 A.3d 884, 886 (Pa. 2011).

3 slot machine licenses by the Pennsylvania Gaming Control Board.⁷ An unsuccessful applicant, Mason-Dixon Resorts, L.P. (Mason-Dixon) challenged the Board's decision to award the license to Woodlands Fayette, LLC (Woodlands), which intervened in the case.⁸ The court's decision in this case is important because, for the first time, it clearly applied the prudent man standard to the actions of the Board.⁹ It also applied the Gaming Act, as amended in 2010,¹⁰ when the General Assembly reacted with dissatisfaction with the integrity of the Board's processes¹¹ and were aware¹² of the empaneling of a grand jury investigating the Board's activities, including the Board's investigation of the suitability of license applicants.¹³ However, because the court failed to require the applicant to show suitability through clear and convincing evidence,¹⁴ the court severely circumscribed the value of the prudent man standard.

The Supreme Court of Pennsylvania issued six holdings¹⁵ on seven issues raised by the appellant, Mason-Dixon.¹⁶ First, the court held that Woodlands' plans met the statutory requirement that

⁶ tit. 4, § 1307.

⁷ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1091-92.

⁸ *Id.*

⁹ *Id.* at 1110-11.

¹⁰ Act of January 7, 2010, P.L. 1, Act 2010-1.

¹¹ *See, e.g.*, S. 193-91, 2009 Sess., at 1539 (Pa. 2009) ("[T]he substance and the purpose of this act is to protect the citizens of Pennsylvania."). A major reform in the law was prohibiting campaign contributions by gaming licensees and their owners. *See* Act of January 7, 2010, P.L. 1, Act 2010-1, sec. 1, §§ 10.1-10.2, (amending the legislative intent of title 4, section 1102).

¹² *See, e.g.*, H.R. 194-1, 2010 Sess., at 19 (Pa. 2010).

¹³ Grand Jury Report No. 1, *In re* Thirty-First Statewide Investigating Grand Jury, No. CP-02-MD-1124-2009 (Pa. C.P. Allegheny Cnty. 2009), available at <http://stoppredatorygambling.org/wp-content/uploads/2012/12/Pennsylvania-Gaming-Control-Board-Grand-Jury-Report.pdf>.

¹⁴ *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087, 1114 (Baer, J., concurring and dissenting); *see also* 4 PA. CONS. STAT. § 1310(a) (2010) (providing the statutory standard).

¹⁵ *See infra* notes 16-23 and accompanying text.

¹⁶ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1092-93. The court considered the sixth and part of the seventh issues together, looking at the prudent man standard in conjunction with the financial suitability of Woodlands. *Id.* at 1109.

the casino be located "in" a well-established hotel.¹⁷ Second, the court ruled that the Woodlands facility had enough rooms under common ownership to meet the statutory requirement.¹⁸ Next, the court denied the appellant's due process claims that attacked both Board procedures and specific issues related to the license award.¹⁹ Fourth, the court held that weighing of the statutory factors related to the quality of the facility was within the discretion of the Board.²⁰ The court also rejected the argument that awarding the license to Woodlands was inconsistent with the legislative intent to support horseracing in the Commonwealth.²¹ The court held that the prudent man standard did apply to decisions of financial suitability, but the financial suitability that was in question was absolute rather than relative suitability.²² Finally, the court held the record supported the Board's decision regarding the character of Woodlands' principals.²³ Two of the six justices²⁴ dissented, stating the Board failed to require that the applicant meet the clear and convincing evidence standard required by statute.²⁵

This survey provides in Part II the background of Pennsylvania gaming and other laws bearing on this case, as well as relevant prior Supreme Court of Pennsylvania decisions to allow the reader to understand the arguments made in *Mason-Dixon Resorts, L.P.* This includes the revisions to the Gaming Act in 2010.²⁶ Part III reviews the court's decision in *Mason-Dixon Resorts, L.P.*, including the procedural posture, a brief statement of the facts, the arguments of the parties, and the majority, the concurring, and the dissenting opinions. The survey evaluates the court's decision in Part IV, with a personal critique of the holding. Finally, Part V provides a conclusion.

¹⁷ *Id.* at 1100-01.

¹⁸ *Id.* at 1101.

¹⁹ *Id.* at 1102-07.

²⁰ *Id.* at 1108.

²¹ *Id.*

²² *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1111.

²³ *Id.* at 1113-14.

²⁴ Justice Orié Melvin was not involved in deciding the case. *Id.* at 1114.

²⁵ *Id.* at 1116 (Baer, J., concurring and dissenting).

²⁶ Act of January 7, 2010, P.L. 1, Act 2010-1.

II. GAMING LICENSING IN PENNSYLVANIA

Legal slot machine gambling began in Pennsylvania after the enactment of the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), which established the categories of licenses, created the Pennsylvania Gaming Control Board, and established its procedures.²⁷

A. Slot Machine Licenses

The Gaming Act provides for three types of slot machine licenses, numbered from one to three.²⁸ Category 1 licenses applied to slot machines at licensed racetracks,²⁹ while the act designated Category 2 licenses for Philadelphia, Pittsburgh, and "revenue- or tourism-enhanced location[s]."³⁰ A Category 3 slot machine license, the most restrictive,³¹ was limited to "a well-established resort hotel" with year-round facilities and at least 275 guest rooms under common ownership that was at least fifteen miles from another licensed facility.³² Admittance to the gaming area of a Category 3 licensee was limited to guests of the hotel or resort, though a membership at the resort could also permit access.³³ The Gaming Act provides for three Category 3 licenses.³⁴ A Category 3 licensee was limited to 500 slot machines, but a certificate to operate table games increased this to 600 machines.³⁵

²⁷ Pennsylvania Race Horse Development and Gaming Act, Act of July 5, 2004, P.L. 572, Act 2004-71.

²⁸ 4 PA. CONS. STAT. §§ 1302-1305 (2010).

²⁹ *Id.* § 1302.

³⁰ *Id.* § 1304.

³¹ Category 1 and 2 slot machine licenses do not impose more narrow limits on persons permitted to enter the gaming floor. *See id.* §§ 1302-1304 (showing the absence of any restriction on who may enter the gaming floor). They allow more slot machines—up to 5,000—relative to Category 3 licenses. *Id.* §§ 1210, 1305(a)(1), (c).

³² *Id.* § 1305(a). This distance will increase to thirty miles for any "Category 3 license established on or after July 20, 2017." *Id.* § 1305(b)(1.1).

³³ *Id.* § 1305(a)(1).

³⁴ tit. 4, § 1307.

³⁵ *Id.* § 1305(c).

B. Standards and Procedures for Awarding Licenses

The Gaming Act provides the standards and procedures for issuing slot machine licenses.³⁶

i. Character Requirements for Licensees

Applicants are required to provide the Board with "such information, documentation and assurances" as are needed "to establish by clear and convincing evidence the applicant's suitability, including good character, honesty and integrity."³⁷ This includes information covering the last ten years regarding "family, habits, character, reputation, criminal history background, business activities, financial affairs and business, professional and personal associates."³⁸ The original Gaming Act called for clear and convincing evidence of the applicant's good character, honesty, and integrity,³⁹ but the 2010 amendments inserted the language "suitability, including" before good character.⁴⁰ This broadened the requirements for a license, requiring the applicant prove, through clear and convincing evidence, more than just good character.

ii. Financial Suitability Requirements

The applicant is required to provide the Board with information regarding the applicant's financial condition, business experience, and financial backers.⁴¹ The Board uses this information to make a required finding "that the applicant is likely to maintain a financially successful, viable and efficient business operation and will likely be able to maintain a steady level of growth of revenue to the Commonwealth."⁴²

³⁶ See *infra* notes 37-46 and accompanying text.

³⁷ tit. 4, § 1310(a)(1).

³⁸ *Id.*

³⁹ Pennsylvania Race Horse Development and Gaming Act, Act of July 5, 2004, P.L. 572, Act 2004-71, § 1310(a).

⁴⁰ Act of January 7, 2010, P.L. 1, Act 2010-1, § 1310(a).

⁴¹ tit. 4, § 1313.

⁴² *Id.* § 1313(e).

iii. Statutory Factors to Be Considered for Licensing

In addition to the individual licensing requirements, the Gaming Act provides eleven factors that the Board *may* consider in issuing a license.⁴³ These factors consist largely of economic development considerations, plans for diversity and equal opportunity, past treatment of labor, and the risks of any adverse effects from the license.⁴⁴

iv. Procedures for Granting Licenses

The Board must hold at least one public hearing before granting a license, but it "may resolve disputed material facts without conducting an oral hearing where constitutionally permissible."⁴⁵

Information related to "character, honesty, and integrity" is confidential, and the Board is not permitted to release this information to the public.⁴⁶ Thus, part of the record in this appeal is sealed.⁴⁷

C. Other Relevant Laws and Standards

The Gaming Act incorporates other statutes and standards applicable to decisions about licensing.⁴⁸

i. The Fiduciary Standard

The Gaming Act states that members of the Board are fiduciaries of the Commonwealth.⁴⁹ They are required to apply the prudent man standard as described in section 7302(b) of title 20 when performing their duties.⁵⁰ This standard usually applies to

⁴³ *Id.* § 1325(c).

⁴⁴ *Id.*

⁴⁵ *Id.* § 1205.

⁴⁶ *Id.* § 1206.

⁴⁷ *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087, 1098 n.7 (Pa. 2012).

⁴⁸ *See infra* notes 49-57 and accompanying text.

⁴⁹ tit. 4, § 1201(h.1).

⁵⁰ *Id.* § 1201(h.2).

fiduciaries of municipal retirement plans⁵¹ and requires "that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs."⁵² The General Assembly added the fiduciary status and prudent man standard in 2006.⁵³

ii. The Clear and Convincing Evidence Standard

The clear and convincing standard falls between the preponderance of the evidence standard and the beyond a reasonable doubt standard.⁵⁴ It has been defined as requiring "evidence that is 'so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.'"⁵⁵

iii. Executive Sessions

The Board may hold executive sessions closed to the public for the matters enumerated in the statute.⁵⁶ This includes the preservation of confidentiality when the law prohibits public disclosure of information.⁵⁷

D. Review of Board Decisions

The Supreme Court of Pennsylvania has exclusive appellate jurisdiction over any order or decision of the Board.⁵⁸ The statute provides that the court "shall affirm . . . unless it shall find that the board committed an error of law or that the . . . decision of the

⁵¹ See 20 PA. CONS. STAT. § 7301 (2010) (defining a fiduciary in Chapter 73 of the Pennsylvania Consolidated Statutes as the "administrator of a municipal pension or retirement plan," as well as any other fiduciaries specified by law).

⁵² *Id.* § 7302(b).

⁵³ Act of Nov. 1, 2006, P.L. 1243, Act 2006-135, § 1201(h.2).

⁵⁴ *Commonwealth v. Maldonado*, 838 A.2d 710, 715 (Pa. 2003).

⁵⁵ *Id.* (alterations in original) (quoting *Rohm & Haas Co. v. Continental Cas. Co.*, 781 A.2d 1172, 1179 (Pa. 2001)).

⁵⁶ 65 PA. CONS. STAT. § 708 (2006).

⁵⁷ *Id.* § 708(a)(5).

⁵⁸ 4 PA. CONS. STAT. § 1204 (2010).

board was arbitrary and there was a capricious disregard of the evidence."⁵⁹ Thus, for errors of law, the court has a de novo standard of review and a plenary scope of review.⁶⁰ The arbitrary and capricious standard finds "a capricious disregard of the evidence to exist 'when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.' "⁶¹

E. Previous Supreme Court of Pennsylvania Decisions

The Board's award of Category 2 slot machine licenses led to three appeals argued before the Supreme Court of Pennsylvania on the same day.⁶² An appeal over the award of a Category 3 license followed two years later.⁶³

i. *Pocono Manor Investors, L.P. v. Pennsylvania Gaming Control Board*⁶⁴

The court decided a number of issues in *Pocono Manor Investors, L.P.* The court rejected the appellant's request to obtain the successful applicant's unreleased economic impact data, holding that the Gaming Act's confidentiality provisions outweighed any procedural due process claim by the appellant for the applicant's information.⁶⁵ The court rejected the contention that the Board had capriciously disregarded relevant evidence.⁶⁶ The court held that the Board had not acted capriciously regarding the applicant's character or failed to apply the clear and convincing

⁵⁹ *Id.*

⁶⁰ *Pocono Manor Investors, L.P. v. Pa. Gaming Control Bd.*, 927 A.2d 209, 216 (Pa. 2007).

⁶¹ *Id.* (quoting *Arena v. Packaging Sys. Corp.*, 507 A.2d 18, 20 (Pa. 1986)).

⁶² Oral arguments for the cases were heard on May 15, 2007. *See infra* notes 64, 72, 75.

⁶³ *Greenwood Gaming & Entm't, Inc. v. Pa. Gaming Control Bd.*, 15 A.3d 884, 886 (Pa. 2011).

⁶⁴ *Pocono Manor Investors, L.P. v. Pa. Gaming Control Bd.*, 927 A.2d 209 (Pa. 2007).

⁶⁵ *Id.* at 223, 225.

⁶⁶ *Id.* at 225-27.

standard,⁶⁷ but noted that clear and convincing evidence of character would be a mixed question of fact and law, subject to a sliding scale of deference depending on the intensity of the fact component.⁶⁸ Finally, the court decided that the Board could make aesthetic determinations⁶⁹ and the Board was not required to have a qualified majority when issuing an order as long as there was a qualified majority at the time of the vote.⁷⁰

The court also criticized the lack of procedures to challenge a Board decision as required under section 1204, and encouraged the Board "to adopt a procedure for [applicants to] lodg[e] procedural objections."⁷¹

ii. *Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Board*⁷²

Riverwalk Casino, L.P. objected to the award of a Category 2 license to another applicant on a number of grounds, each of which the court rejected. The court held that the Board could meet privately in executive session when performing a quasi-judicial function, including considering confidential applicant information.⁷³ The court also rejected a due process challenge, finding that the application process had been fluid and there was no requirement for public comment for late changes to the application.⁷⁴

⁶⁷ *Id.* at 228-30.

⁶⁸ *Id.* at 229 n.14.

⁶⁹ *Id.* at 230-31.

⁷⁰ *Pocono Manor Investors, L.P.*, 927 A.2d at 231-32.

⁷¹ *Id.* at 218 & n.7.

⁷² *Riverwalk Casino, L.P. v. Pa. Gaming Control Bd.*, 926 A.2d 926 (Pa. 2007).

⁷³ *Id.* at 934-35.

⁷⁴ *Id.* at 951-52.

iii. *Station Square Gaming, L.P. v. Pennsylvania Gaming Control Board*⁷⁵

The court avoided defining whether the prudent man standard added to section 1201 was the appropriate standard for the Board to apply,⁷⁶ as advocated by the appellants.⁷⁷ The court held that the prudent man standard was not the standard for appellate review of board decisions; the standard of review remained the standard specified in section 1204 of the Gaming Act.⁷⁸ However, four of the seven justices were dissatisfied with the court's treatment of the prudent man standard and filed concurring or dissenting opinions expressing these concerns.⁷⁹

The court also rejected the appellant's arguments that the Board acted capriciously or misapplied the statutory factors under section 1325(c), finding factual support for the Board's decisions in the Board's adjudication.⁸⁰

iv. *Greenwood Gaming and Entertainment, Inc. v. Pennsylvania Gaming Control Board*⁸¹

In this appeal from a Board award of a Category 3 license,⁸² the court upheld the Board's determinations.⁸³ It rejected the argument that the Board had acted capriciously in deciding the successful applicant was financially suitable.⁸⁴ The court applied

⁷⁵ *Station Square Gaming, L.P. v. Pa. Gaming Control Bd.*, 927 A.2d 232 (Pa. 2007).

⁷⁶ *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087, 1109 (Pa. 2012).

⁷⁷ *Station Square Gaming, L.P.*, 927 A.2d at 241.

⁷⁸ *Id.* at 242; *see also supra* notes 58-61 and accompanying text.

⁷⁹ *Station Square Gaming, L.P.*, 927 A.2d at 250 (Saylor, J., concurring); *id.* at 252 (Baer, J., concurring); *id.* (Baldwin, J., concurring); *id.* (Castille, J., dissenting).

⁸⁰ *Id.* at 247-48.

⁸¹ *Greenwood Gaming & Entm't, Inc. v. Pa. Gaming Control Bd.*, 15 A.3d 884 (Pa. 2011).

⁸² *Id.* at 886.

⁸³ *Id.* at 892.

⁸⁴ *Id.*

the arbitrary and capricious disregard of the evidence standard,⁸⁵ despite the 2006 changes to the Gaming Act, establishing the prudent man standard for the Board.⁸⁶

The lengthiest part of the decision related to whether the Valley Forge Convention Center was a well-established resort hotel.⁸⁷ The court found the Board's regulations and procedures sufficient to establish that it was,⁸⁸ but two justices dissented.⁸⁹ Justice Saylor considered the Board's decision to be an error of law because the Board's regulations and adjudication failed to meet the statutory requirement.⁹⁰ Justice Eakin applied a common-sense test and believed the Convention Center did not meet the statutory requirement for a well-established resort hotel.⁹¹

F. The Thirty-First Statewide Investigating Grand Jury

While not law, the grand jury report, issued on May 19, 2011, regarding the investigation of the Board and its licensing practices,⁹² was significant. The grand jury found that the Board failed to maintain the public policy objectives of the Gaming Act, to maximize revenue for the Commonwealth, and was primarily concerned with starting gaming quickly at the expense of other goals.⁹³

III. *MASON-DIXON RESORTS, L.P. V. PENNSYLVANIA GAMING CONTROL BOARD*

A. Procedural History

Mason-Dixon Resorts, L.P. is an appeal to the Supreme Court of Pennsylvania under section 1204 of the Gaming Act by Mason-Dixon, one of four applicants for a Category 3 slot machine

⁸⁵ *Id.* at 886-87.

⁸⁶ Act of Nov. 1, 2006, P.L. 1243, Act 2006-135, § 1201(h.2).

⁸⁷ *Greenwood Gaming & Entm't, Inc.*, 15 A.3d at 887-89.

⁸⁸ *Id.* at 889.

⁸⁹ *Id.* at 892 (Saylor, J., dissenting); *id.* at 895 (Eakin, J., dissenting).

⁹⁰ *Id.* at 894 (Saylor, J., dissenting).

⁹¹ *Id.* at 895 (Eakin, J., dissenting).

⁹² Grand Jury Report No. 1, *supra* note 13, at 5.

⁹³ *Id.* at 7-8.

license.⁹⁴ Each of the parties submitted an application and underwent a review by the Board that included an extensive investigation and a public hearing with testimony.⁹⁵ The appellant was seeking a license for its Eisenhower Hotel and Conference Center in Gettysburg, Adams County.⁹⁶ After a vote of six to one, the Board awarded the license to Woodlands,⁹⁷ owner of the Nemaocolin Woodlands Resort in Fayette County,⁹⁸ in a May 20, 2011 order.⁹⁹ The Board issued an adjudication providing findings of fact and conclusions of law explaining the license award to Woodlands.¹⁰⁰ Woodlands intervened in the appeal in support of the Board.¹⁰¹

B. Facts

The Board issued its conclusions of law and findings of fact in a 106-page adjudication awarding the license to Woodlands because "it possess[ed] the finest well-established resort hotel out of all the applicants and [was] best positioned to benefit from the addition of a Category 3 licensed facility."¹⁰² The Board concluded that Woodlands' location was "deserving" and in an underserved area, while other applicants were in areas likely to cannibalize revenue from other licensed facilities, or, in the case of Mason-Dixon, were unpopular with a significant number of local

⁹⁴ *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087, 1091 (Pa. 2012).

⁹⁵ *Id.* at 1092.

⁹⁶ *Id.* at 1091; *see also supra* notes 32-35 and accompanying text (providing the features of a Category 3 license).

⁹⁷ Adjudication at 1, 105, *In re* Bushkill Grp. Inc. Applications for Category 3 Slot Machine Licenses, No. 19404 (Pa. Gaming Control Bd. May 20, 2011) [hereinafter Adjudication]. The dissenting vote was for an applicant that was not a party to the appeal, Bushkill Group, Inc. Dissenting Opinion of Commissioner Trujillo, *In re* Bushkill Grp. Inc. Applications for Category 3 Slot Machine Licenses, No. 19404 (Pa. Gaming Control Bd. May 20, 2011).

⁹⁸ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1091 & n.2.

⁹⁹ Order at 2, *In re* Application of Woodlands Fayette, LLC Category 3 Slot Machine License, No. 2366-2 (Pa. Gaming Control Bd. May 20, 2011).

¹⁰⁰ Adjudication, *supra* note 97, at 1.

¹⁰¹ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1098.

¹⁰² Adjudication, *supra* note 97, at 105.

residents.¹⁰³ The Board stated that the Woodlands' facility was superior to that of the other applicants in all categories.¹⁰⁴ The Board found "that Woodlands is likely to maintain a financially successful, viable, and efficient business operation,"¹⁰⁵ and that investigation had not shown that Woodlands, or any affiliate, was of unsuitable character.¹⁰⁶

The Board's Bureau of Investigation and Enforcement (BIE) investigated allegations against one of Woodlands' principals, and concluded the allegations did not affect the suitability of Woodlands.¹⁰⁷ The Board considered this evidence and directly questioned the individual and his counsel in a closed session before concluding good character was not an issue.¹⁰⁸ This investigation was limited, consisting primarily of affidavits and testimony from the Woodlands' principals.¹⁰⁹

C. Arguments of the Parties

i. Arguments of the Appellant

Mason-Dixon appealed the license award to Woodlands based on a number of arguments. First, it offered a plain language argument that Woodlands' gaming facility would not be located "in" the hotel, but 1.2 miles away.¹¹⁰ Next, it argued that the record did not support the Board's holding that Woodlands met the 275-guest room minimum, since the number of guest rooms varied widely between documents.¹¹¹

¹⁰³ *Id.* at 83-85.

¹⁰⁴ *Id.* at 92.

¹⁰⁵ *Id.* at 49.

¹⁰⁶ *Id.* at 55.

¹⁰⁷ *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087, 1113 (Pa. 2012).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1115-16 (Baer, J., concurring and dissenting).

¹¹⁰ *Id.* at 1093.

¹¹¹ *Id.* at 1100-01; *see also* note 32 and accompanying text (providing the statutory basis for this requirement).

Mason-Dixon also argued there were a number of due process violations in the licensing process.¹¹² These included: a refusal by the Board to reopen the record to allow Mason-Dixon to add to the record; the use of executive, nonpublic, sessions by the Board; the Board's refusal to reconsider its decision based on the release of the grand jury report critical of Board practice; public opposition to Mason-Dixon from Governor Rendell; and excessive emphasis on facility quality.¹¹³ The appointment of two new board members during the process in order to break a tie, one of whom had received campaign contributions from a Woodlands' principal while a legislator, and an unannounced visit to the applicant facilities by these new Board members were also objected to.¹¹⁴

The appellant also contended that the Board misapplied the Gaming Act by overemphasizing facility quality, which was an optional factor, and failed to follow the legislative objective to maximize revenue for the Commonwealth and to support the horseracing industry.¹¹⁵

Finally, Mason-Dixon argued that the Board made an error of law in failing to apply the prudent man standard to Woodlands' financial suitability and good character, and capriciously disregarded the evidence in determining Woodlands and its personnel were financially suitable and of good character.¹¹⁶

ii. Arguments of the Appellee

The Board argued its decision was proper and, under the deferential standard and limited scope of review, the court should affirm.¹¹⁷ It contended that, under the statute, a hotel included any building on resort grounds and that Woodlands did have over 275 guest rooms.¹¹⁸ The Board also denied Mason-Dixon's due process

¹¹² *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1094.

¹¹³ *Id.* at 1093 n.3.

¹¹⁴ *Id.* at 1093 n.3, 1095 n.4.

¹¹⁵ *Id.* at 1093 (quoting Brief for Appellant at 4, *Mason-Dixon Resorts, L.P. v. Pa. Gaming Control Bd.*, 52 A.3d 1087 (Pa. 2012) [hereinafter Appellant Brief]).

¹¹⁶ *Id.* at 1093 (quoting Appellant Brief, *supra* note 115, at 4).

¹¹⁷ *Id.* at 1096.

¹¹⁸ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1096.

claims, arguing that the appellant waived many claims by failing to assert them before the Board, and that other alleged violations were proper actions by the Board or otherwise did not constitute a violation.¹¹⁹

The Board argued it did not overweigh facility quality or fail to consider the other factors.¹²⁰ It also maintained that the distances between licensees established by statute¹²¹ addressed concerns about cannibalizing revenue from a regional horseracing track. In addition to revenue for the state, the Gaming Act also sought to increase out-of-state tourism, so licensee revenue was not the determinative factor for the Board.¹²²

Finally, the Board contended that the arbitrariness or capricious disregard of the evidence standard expressed in section 1204 was the appropriate standard of review, rather than the prudent man standard.¹²³ Further, the Board denied it had capriciously disregarded the evidence relevant to financial suitability or good character.¹²⁴

Woodlands, as intervener, made many of the same arguments as the Board,¹²⁵ and further noted that counsel for the appellant had thanked the Board for its professionalism and fairness, in contrast to their subsequent claims of due process violations.¹²⁶ Woodlands also contended that the grand jury report was irrelevant because it dealt only with Category 1 and Category 2 licenses, and that the clear and convincing evidence standard was met.¹²⁷

D. Majority Opinion

The majority agreed with the Board that Woodlands' proposed gaming facility was "in" the hotel according to the statute,

¹¹⁹ *Id.* at 1096-97.

¹²⁰ *Id.* at 1097.

¹²¹ 4 PA. CONS. STAT. § 1305(b) (2010).

¹²² *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1097-98.

¹²³ *Id.* at 1098; *see also supra* notes 58-61 and accompanying text (discussing the standard from section 1204).

¹²⁴ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1098.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1099.

¹²⁷ *Id.*

recognizing that year-round resorts often must have several different buildings on the property, though Justice Saylor only concurred in this result.¹²⁸

The court agreed on many matters with unanimity. It dismissed as immaterial the fact that the number of Woodlands guest rooms varied from document to document, since each of the variations was over 275 rooms, and, while there was little evidence supporting ownership by the applicant, there was no evidence refuting ownership.¹²⁹ The court also found the Board's emphasis on the quality of the facility to be within the Board's discretion,¹³⁰ and the appellant's concerns about supporting horseracing to be unfounded, as the Board concentrated on maximizing revenue for the Commonwealth.¹³¹

The court rejected the due process claims, finding the appellant waived many of these claims by failing to assert them before the Board, as required under Board regulations.¹³² It also found nothing improper about the appointment of Board members during the licensing process or their visits to the applicants' facilities.¹³³ The court also recognized that the Board had provided post-decision process that it had formerly not provided¹³⁴ and had responded to the appellant's concerns regarding the grand jury report, though the Board argued it was not obligated to do so.¹³⁵ While the Board declined to reopen the record when Mason-Dixon requested, it did consider the late information they provided.¹³⁶

However, the court agreed with the appellant and held that the prudent man standard did apply to the Board when determining financial suitability, basing this decision on a majority of

¹²⁸ *Id.* at 1099-1100, 1114.

¹²⁹ *Id.* at 1101 (noting that the number of rooms was variously reported as 336, 335, 322, and 322 or 280).

¹³⁰ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1108-09.

¹³¹ *Id.*

¹³² *Id.* at 1101-02; *see also* 58 PA. CODE §§ 441a.7(t), 494a.1(c), 494a.7(a) (2012).

¹³³ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1106-07.

¹³⁴ *Id.* at 1104; *see also supra* note 71 and accompanying text.

¹³⁵ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1104-05.

¹³⁶ *Id.* at 1103.

concurring and dissenting opinions in *Station Square Gaming L.P.*¹³⁷ The court held this standard applied to the applicant's absolute rather than comparative suitability, and the fact that Woodlands' revenue projections were the lowest of the four applicants was not determinative because Woodlands offered the potential to draw out-of-state revenue that would not cannibalize revenue from existing licensees.¹³⁸

Finally, the majority held that the finding of financial suitability and good character of Woodlands and its principals was not capricious.¹³⁹ The court accepted the Board's review of information and documents from the BIE investigation plus the Board's own questions as sufficient, noting that "[t]he Board was apparently satisfied with the explanations provided, and the timeline of relevant events."¹⁴⁰

E. Concurring and Dissenting Opinions

i. Justice Baer's Concurring and Dissenting Opinion

Justice Baer, joined by Justice Todd, dissented only from the portion of the opinion regarding the suitability of character.¹⁴¹ During the licensing investigation, questions arose regarding the character of one of Woodlands' principals.¹⁴² As the majority noted, no criminal charges or other substantiation developed from this alleged incident.¹⁴³ However, the majority did not discuss a serious allegation that a state police officer with ties to the Woodlands' principal attempted to interfere with the criminal investigation.¹⁴⁴

The Justice also noted the findings of the grand jury that identified problems with background investigations and observed

¹³⁷ *Id.* at 1110-11.

¹³⁸ *Id.* at 1111.

¹³⁹ *Id.* at 1113.

¹⁴⁰ *Id.*

¹⁴¹ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1114 (Baer, J., concurring and dissenting).

¹⁴² *Id.* at 1113 (majority opinion).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1114 (Baer, J., concurring and dissenting).

that the Board relied on these investigations without requiring applicants to prove their character with clear and convincing evidence, as mandated by statute.¹⁴⁵ This practice was continued in the license award to Woodlands, where the Board accepted "BIE's seemingly obvious failure to investigate fully the allegations" as sufficient, while relying on "self-serving affidavits [and] very brief testimony" to make the determination of suitability, despite evidence to suggest otherwise.¹⁴⁶

ii. Justice Saylor Concurring Only in the Result for Part A

Justice Saylor concurred only in the result regarding the first issue, regarding whether the successful applicant was a well-established resort hotel.¹⁴⁷ While he provided no opinion giving his reasoning, his dissent in *Greenwood Gaming & Entertainment, Inc.* showed that he found the Board's regulations defining these hotels to be of little value.¹⁴⁸ However, the successful applicant in *Mason-Dixon Resorts, L.P.* was one of two resort hotels the legislature specifically had in mind when it passed the Gaming Act.¹⁴⁹ This may explain Justice Saylor's concurrence in the result, and his reluctance to concur in the methodology of the court in concluding that the Board appropriately determined that Woodlands met the statutory requirement.

IV. EVALUATION

The court followed precedent and upheld its tradition of deference to the Board in *Mason-Dixon Resorts, L.P.* The majority of the court's holdings were consistent with the court's previous

¹⁴⁵ *Id.* at 1115; *see also* 4 PA. CONS. STAT. § 1310(a) (2010).

¹⁴⁶ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1116 (Baer, J., concurring and dissenting).

¹⁴⁷ *Id.* at 1114 (majority opinion).

¹⁴⁸ *Greenwood Gaming & Entm't, Inc. v. Pa. Gaming Control Bd.*, 15 A.3d 884, 893 (Pa. 2011) (Saylor, J., dissenting); *see* 58 PA. CODE § 441a.23(a) (2010).

¹⁴⁹ *Greenwood Gaming & Entm't, Inc.*, 15 A.3d at 893 (Saylor, J., dissenting).

decisions regarding slot machine licensing specifically,¹⁵⁰ and administrative law generally. The court affirmed the discretion of the Board to interpret and implement the Gaming Act by deciding how to weigh the statutory factors and which goals of the statute to focus on. This is consistent with the law and expectations.

Two areas, however, are noteworthy. The first is the court applying the prudent man standard to Board decisions and recognizing that Board members are fiduciaries of the Commonwealth.¹⁵¹ The General Assembly amended the Gaming Act to add this standard two years after first enacting the Gaming Act.¹⁵² *Mason-Dixon Resorts, L.P.* was the court's first real application of this standard,¹⁵³ an opportunity narrowly missed in *Station Square Gaming, L.P.*¹⁵⁴ This decision was contrary to the expectation of the Board, which argued in its brief that the arbitrary and capricious disregard for the evidence standard was the appropriate standard for Board decisions.¹⁵⁵ In light of the findings of the grand jury regarding significant deficiencies in Board procedures,¹⁵⁶ judicial recognition of this higher standard of care for Board members is significant.

However, the court failed to hold the Board to the clear and convincing evidence standard¹⁵⁷ mandated by statute,¹⁵⁸ and thus, enforced the prudent man standard for the Board members. This limits the importance of the recognition of the prudent man standard for Board decisions. The dissent ably pointed out glaring deficiencies in the BIE's investigation that the Board ignored and

¹⁵⁰ See *supra* notes 65-92 and accompanying text.

¹⁵¹ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1110-11.

¹⁵² Act of Nov. 1, 2006, P.L. 1243, Act 2006-135, § 1201(h.2).

¹⁵³ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1110-11.

¹⁵⁴ See *id.*; see also *Station Square Gaming, L.P. v. Pa. Gaming Control Bd.*, 927 A.2d 232, 250 (Pa. 2007) (Saylor, J., concurring); *id.* at 252 (Baer, J., concurring); *id.* (Baldwin, J., concurring); *id.* (Castille, J., dissenting).

¹⁵⁵ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1098.

¹⁵⁶ Grand Jury Report, *supra* note 13, at 7-8.

¹⁵⁷ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1116 (Baer, J., concurring and dissenting).

¹⁵⁸ 4 PA. CONS. STAT. § 1310(a)(1) (2010).

about which the majority was silent.¹⁵⁹ In light of the numerous problems with past Board practices and procedures identified by the grand jury investigation, the decision by the majority is difficult to understand. The court should have remanded the matter to the Board for Woodlands and the principals of Woodlands to bear the burden of proving by clear and convincing evidence suitability, including good character, for the slot machine license. This would have furthered the Gaming Act's legislative objective of ensuring that gaming in Pennsylvania will "not be perceived as corrupt."¹⁶⁰

V. CONCLUSION

In *Mason-Dixon Resorts, L.P.*, the Supreme Court of Pennsylvania again affirmed the Pennsylvania Gaming Control Board's discretion in selecting a licensee under the Gaming Act, discretion that is necessary for the Board to fulfill the purpose of the Gaming Act. Importantly, however, the court also expressly recognized that the prudent man standard applied to the Board's decisions. The recognition of this standard could ultimately be important in implementing the legislative objective that gaming in the Commonwealth be free of perceived corruption and help the Board move beyond the practices and procedures criticized in the grand jury report. Unfortunately, the majority in *Mason-Dixon Resorts, L.P.* chose not to require the Board to apply the Gaming Act by requiring that prospective licensees meet the clear and convincing evidence standard regarding character, a decision that allows the Board to avoid confronting some of the very issues condemned by the grand jury report.

*Patrick M. Erne**

¹⁵⁹ *Mason-Dixon Resorts, L.P.*, 52 A.3d at 1116 (Baer, J., concurring and dissenting).

¹⁶⁰ *Id.* at 1113 (majority opinion) (quoting *Pocono Manor Investors, L.P. v. Pa. Gaming Control Bd.*, 927 A.2d 209, 228 (Pa. 2007)).

* J.D., Widener University School of Law (Harrisburg), 2013.