

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**ROBERT M. McCORD, in his  
official capacity as the Treasurer of the  
Commonwealth of Pennsylvania,  
Petitioner,**

v.

**THE PENNSYLVANIA GAMING  
CONTROL BOARD,  
Respondent.**

No. 446 M.D. 2010

2010 SEP - 1 P 3: 32

RECEIVED & FILED  
COMMONWEALTH COURT  
OF PENNSYLVANIA

---

**BRIEF OF REPRESENTATIVE CURT SCHRODER, *AMICUS CURIAE*,  
IN OPPOSITION TO PRELIMINARY OBJECTIONS**

---

Rodney A. Corey, Chief Counsel  
Attorney I.D. # 69742  
House of Representatives  
Republican Caucus  
Suite B-6 Main Capitol  
Harrisburg, Pennsylvania 17120  
(717) 783-1510

*Counsel for Amicus Curiae Representative Curt  
Schroder*

September 1, 2010

**TABLE OF CONTENTS**

STATEMENT OF INTEREST OF *AMICUS CURIAE* ..... 1

ARGUMENT OF *AMICUS CURIAE* ..... 2

I. THE PENNSYLVANIA RACE HORSE DEVELOPMENT AND GAMING ACT DESIGNATES EX OFFICIO MEMBERS OF THE PENNSYLVANIA GAMING BOARD AS EQUAL MEMBERS FOR ALL NONVOTING PURPOSES ..... 2

    A. 2004 PASSAGE OF THE PENNSYLVANIA RACE HORSE DEVELOPMENT AND GAMING ACT ..... 3

    B. 2006 AMENDMENTS TO THE GAMING ACT ..... 6

    C. 2010 AMENDMENTS..... 10

II. THE PENNSYLVANIA GAMING CONTROL BOARD DOES NOT HAVE THE RIGHT TO LIMIT THE STATUTORY AUTHORITY OF AN EX OFFICIO MEMBER TO ATTEND AN EXECUTIVE SESSION OF THE BOARD ..... 10

    A. EX OFFICIO MEMBERS WERE APPOINTED TO THE BOARD FOR THEIR INDEPENDENCE AND EXPERTISE..... 11

    B. NONVOTING EX OFFICIO MEMBERS DO NOT CREATE UNDO POLITICAL INFLUENCE UPON BOARD DELIBERATIONS AND DECISIONS ..... 14

    C. THE GENERAL ASSEMBLY MAY LIMIT THE STAUTORY AUTHORITY OF EX OFFICIO MEMBERS..... 16

III. CONCLUSION ..... 16

EXHIBITS 1

## TABLE OF AUTHORITIES

### Case Law

<i>Commonwealth v. Ostrosky</i> , 589 Pa. 437, 446, 909 A.2d 1224 (2006) .....	6
<i>Small v. Horn</i> , 554 Pa. 600, 609, 722 A.2d 664, 669 (1998).....	11

### Statute and Acts of the General Assembly

Act of July 5, 2004 (P.L. 572, No. 71) .....	3
Act of November 1, 2006 (P.L. 143, No. 135).....	6, 16
1 Pa.C.S. § 1903(a).....	2
1 Pa.C.S. § 1921(a).....	5
1 Pa.C.S. § 1921(b).....	5
4 P.S. § 325.201 .....	12
4 Pa.C.S. § 1101 .....	11
4 Pa.C.S. § 1103 .....	7
4 Pa.C.S. § 1201 .....	3
4 Pa.C.S. § 1201(a).....	4
4 Pa.C.S. § 1201(b) .....	4
4 Pa.C.S. § 1201(c).....	4
4 Pa.C.S. § 1201(d) .....	4
4 Pa.C.S. § 1201(e).....	<i>passim</i>
4 Pa.C.S. § 1201(h) .....	5, 8
4 Pa.C.S. § 1201(h)(2).....	5, 8, 10
4 Pa.C.S. § 1201(h)(12).....	8, 10

4 Pa.C.S. § 1201(j) .....	11
4 Pa.C.S. § 1201.1(a)(3).....	15
4 Pa.C.S. § 1202.1 .....	9, 15
4 Pa.C.S. § 1202.1(c)(1).....	15
4 Pa.C.S. § 1202.1(c)(4).....	15
4 Pa.C.S. § 1202.1(c)(5).....	9
4 Pa.C.S. § 1202.1(d) .....	9
4 Pa.C.S. § 1302.....	12
4 Pa.C.S. § 1323 .....	12
4 Pa.C.S. § 1403 .....	12
4 Pa.C.S. § 1404.....	12
4 Pa.C.S. § 1405 .....	12
4 Pa.C.S. § 1501 .....	12
4 Pa.C.S. § 1513 .....	14
24 P.S. § 791.3 .....	3, 6
24 P.S. § 5504 .....	3, 6
24 P.S. § 6901.304 .....	3
24 P.S. § 8501 .....	3, 6
35 P.S. § 1680.202 .....	3
36 P.S. § 3503 .....	3, 6
52 P.S. § 3203 .....	3
53 P.S. § 881.103 .....	3
65 P.S. § 708 .....	15

71 P.S. § 66 (Adm. Code § 206) .....	6
71 P.S. § 115 .....	3
71 P.S. § 156 .....	3, 6
71 Pa.C.S. § 5901 .....	3
71 P.S. § 745.5 .....	1
72 P.S. § 301.....	13
73 P.S. § 400.2503 .....	3

**Pennsylvania Constitution**

Pa. Const., art. II § 1.....	1, 11, 16
Pa. Const., art. II, § 7.....	9
Pa. Const., art. VI, § 7.....	9

**Other**

<i>Webster's II Dictionary</i> 250 (3 <sup>rd</sup> ed. 2005) .....	2
<i>Black's Law Dictionary</i> 616, 620 (8 <sup>th</sup> ed. 2004) .....	2, 6

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Representative Curt Schroder, in his capacity as a duly elected member of the Pennsylvania House of Representatives and Republican Chairman of the House Gaming Oversight Committee, files this brief of *Amicus Curiae*. Representative Schroder seeks to provide this court with the perspective of a member of the Pennsylvania General Assembly who, in addition to his role in the development of statutory law related to the Pennsylvania Race Horse Development and Gaming Act (“Gaming Act”), has a role in the consideration and review of proposed administrative regulations related to gaming operations. *See* 71 P.S. § 745.5.

As the question before this Honorable Court will ultimately involve interpreting the legislature’s statutory intent as to the limits imposed on the role of *ex officio* members of the Pennsylvania Gaming Control Board (“PGCB”), this Court may benefit from the perspective of a member of the legislature who was present and voted on the Gaming Act initially in 2004 and the subsequent amendments in 2006 and 2010. The legislature, not the PGCB, determines the composition of the PGCB and, more importantly, the authority of its members. Pa. Const., art. II, § 1. Accordingly, the views and opinions of a member of the General Assembly who has been there from the beginning and now serves as the Republican Chair of the relevant legislative committee are particularly germane to the resolution of this matter.

Simply stated, Representative Schroder takes the extraordinary step to file, as *Amicus Curiae*, this brief in support of the Treasurer’s efforts to actively participate in public and executive sessions of the Board and in opposition to the preliminary objections.

**ARGUMENT OF AMICUS CURIAE**

**I. THE PENNSYLVANIA RACE HORSE DEVELOPMENT AND GAMING ACT DESIGNATES EX OFFICIO MEMBERS OF THE PENNSYLVANIA GAMING CONTROL BOARD AS EQUAL MEMBERS FOR ALL NONVOTING PURPOSES.**

The Pennsylvania Race Horse Development and Gaming Act (“Gaming Act”) is clear – the State Treasurer is directed to serve “on the board as [a] nonvoting ex officio member[] of the board.” 4 Pa.C.S. § 1201(e). Despite numerous pages of legal briefing, the Pennsylvania Gaming Control Board (“PGCB”) has yet to explain away the unambiguous language in Section 1201(e) which plainly designates the Treasurer as a member of the Board.

Since 2004, when the General Assembly legalized gaming, there have been significant statutory reforms enacted in both 2006 and 2010 to strengthen control over the regulatory oversight of gambling in the Commonwealth. Throughout each of the legislative changes, one consistent thread was the General Assembly’s inclusion of the Secretaries of Agriculture and Revenue and the State Treasurer as ex officio members of the PGCB. The only distinction between the authority of ex officio members and those who are politically appointed is that ex officio members cannot vote. No other legislative limitation on their authority is, or has ever been, contained in the Gaming Act.

The PGCB argues that ex officio members have more limited roles on the Board than politically appointed members. However, the term “ex officio” does not limit someone’s role on a board. Rather, it describes how the person came to serve on the board. “Words and phrases shall be construed... according to their common and approved usage.” 1 Pa.C.S. § 1903(a). Webster’s Dictionary defines “ex officio” to mean “because of office or position.” *Webster’s II Dictionary* 250 (3<sup>rd</sup> ed. 2005). See also *Black’s Law Dictionary* 616, (8<sup>th</sup> ed. 2004). Robert

McCord serves on the PGCB by virtue of the fact that he is the State Treasurer. In fact, Treasurer McCord serves on a number of Commonwealth boards because he is the State Treasurer and the General Assembly saw fit in the enabling legislation of each to appoint him as a member to those boards.<sup>1</sup> The term “ex officio” is used in enabling legislation to identify that the public official serves as a board member during the time he occupies the identified office. The Gaming Act specifies that the Treasurer is “a nonvoting ex officio member of the Board,” however, the statute does not limit his participation on the PGCB in any other way. 4 Pa.C.S. § 1201(e). Ex officio nonvoting PGCB members are presumed to have the same participatory rights and privileges as other Board members, including the right to attend executive sessions.

The statutory history of the Gaming Act provides a better understanding of the treatment of ex officio PGCB members in the law.

**A. 2004 PASSAGE OF THE PENNSYLVANIA RACE HORSE DEVELOPMENT AND GAMING ACT**

In 2004, the initial Gaming Act was passed by the General Assembly. Act of July 5, 2004 (P.L. 572, No. 71). The Gaming Act created the PGCB as the regulatory body to oversee the implementation and regulation of gaming in the Commonwealth. The language that created the PGCB was contained in Section 1201 of the 2004 Gaming Act, which originally provided as follows:

- (a) Board established - There is established an independent administrative board to be known as the Pennsylvania Gaming Control Board, which shall be implemented as set forth in this section.

---

<sup>1</sup> Board of Finance and Revenue, 71 P.S. § 115; Board of Commissioners of Public Grounds and Buildings, 71 P.S. § 156; State Employees’ Retirement Board, 71 Pa.C.S. § 5901; Public School Employees’ Retirement Board, 24 P.S. § 8501; Pa. Municipal Retirement Board, 53 P.S. § 881.103; State Public School Building Authority, 24 P.S. § 791.3; Pa. Higher Educational Facilities Authority, 24 P.S. § 5504; Pa. Housing Finance Agency, 35 P.S. § 1680.202; Pa. Tuition Account Programs Advisory Board, 24 P.S. § 6901.304; The Coal and Clay Mine Subsidence Insurance Board, 52 P.S. § 3203; Delaware River Port Authority, 36 P.S. § 3503; Pa. Community Development Bank Operational Committee, 73 P.S. § 400.2503.

(b) Membership.--The board shall consist of the following members, who shall serve a set term and may not be removed except for good cause:

- (1) Three members appointed by the Governor, each being referred to as a "gubernatorial appointee."
- (2) One member appointed by each of the following legislative caucus leaders, each being referred to as a "legislative appointee":
  - (i) The President pro tempore of the Senate.
  - (ii) The Minority Leader of the Senate.
  - (iii) The Speaker of the House of Representatives.
  - (iv) The Minority Leader of the House of Representatives.

See 4 Pa.C.S. §§ 1201(a)-(b).<sup>2</sup> Sections 1201(c) and (d) of the 2004 Gaming Act addressed the initial political appointments to the Board, terms of office, and vacancies. Section 1201(e) provided for the appointment of ex officio members to the PGCB:

Ex Officio Members.--The Secretary of Revenue, the Secretary of Agriculture and the State Treasurer shall serve on the board as nonvoting ex officio members of the board.

*Id.* § 1201(e) (as passed in 2004, emphasis added).

Section 1201(e) clearly stated, and still states, that the Secretaries of Revenue and Agriculture and the State Treasurer are "members of the board." *Id.* Ex officio PGCB members, identified as Board members, are essentially no different from the political appointments set forth in Section 1201(b) except in their voting authority. Ex officio members are not limited

---

<sup>2</sup> 4 Pa.C.S. § 1201(a)-(b) currently reads as follows:

§ 1201. Pennsylvania Gaming Control Board established.

(a) Board established.--There is established an independent board which shall be a body corporate and politic to be known as the Pennsylvania Gaming Control Board.

(b) Membership.--The board shall consist of the following members:

- (1) Three members appointed by the Governor.
- (2) One member appointed by each of the following:
  - (i) The President pro tempore of the Senate.
  - (ii) The Minority Leader of the Senate.
  - (iii) The Speaker of the House of Representatives.
  - (iv) The Minority Leader of the House of Representatives.

members who may only participate in proceedings at the discretion of the PGCB. Rather, the legislature has provided that ex officio members are to “serve on the board” as “members of the board.” *Id.* § 1201(e).

Other than the appointment of ex officio members within Section 1201(e), the 2004 Gaming Act referred to ex officio members separately from the politically appointed members only as follows:

Except for ex officio members, no person shall be appointed a member of the board or hold any place, position or office under the board if that person holds any other elected office or party office as defined in section 1512 (relating to public official financial interest) in this Commonwealth or any of its political subdivisions.

4 Pa.C.S. § 1201(h)(2) (*as passed in 2004*).

A host of restrictions were imposed on all PGCB members in Section 1201(h). *Id.* § 1201(h). Since ex officio members were only specifically mentioned in an exception in Section 1201(h)(2), as opposed to the rest of Section 1201(h), it is clear that the General Assembly treated the ex officio members of the PGCB the same as the politically appointed members but for the limited distinctions which have been discussed. In 2004, the Gaming Act did not differentiate between ex officio members and politically appointed members anywhere except Section 1201(e) and Section 1201(h)(2). Rather, the statute simply used the term “member” interchangeably. “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b).

There should be no confusion about the plain language of the Gaming Act conferring all but voting powers to ex officio members. To the extent a question arises, we may nevertheless turn to another provision in the Statutory Construction Act which states that the object of all statutory interpretation is to ascertain and effectuate the intent of the legislature. *Id.* § 1921(a).

Often courts apply the maxim, *expressio unius est exclusio alterius*, a canon of construction holding that to express one thing implies the exclusion of the other, or the alternative. *Commonwealth v. Ostrosky*, 589 Pa. 437, 446, 909 A.2d 1224, 1230 n.7 (2006). See also *Black's Law Dictionary* 620 (8<sup>th</sup> ed. 2004). The General Assembly stated in Section 1201(e) of the 2004 Gaming Act that the Secretary of Agriculture, the Secretary of Revenue, and the State Treasurer are ex officio nonvoting members of the PGCB. Since the General Assembly specifically stated that ex officio PGCB members cannot vote, it supports the general rule that no other limitations on their powers are presumed. This language has survived through all the Gaming Act amendments.

#### **B. 2006 AMENDMENTS TO THE GAMING ACT**

Underscoring the importance that the General Assembly places on the involvement of ex officio PGCB members, and to encourage the active participation of the Treasurer, as well as other ex officio members, in 2006 the legislature amended the Gaming Act to allow ex officio members to have designees serve on the PGCB. Act of November 1, 2006 (P.L. 1243, No. 135). Traditionally, the enabling legislation of a board provides for designees to sit in the stead of board members.<sup>3</sup> In similar fashion, Section 1201(e) of the Gaming Act was rewritten from the 2004 statute to state:

**Ex officio members.--The Secretary of Revenue, the Secretary of Agriculture and the State Treasurer, or their designees shall serve on the board as nonvoting ex officio members of the board. The designee shall be a deputy secretary or an equivalent position within the agency.**

---

<sup>3</sup> Similar legislation includes that of Public School Employees Retirement Board (24 P.S. § 8501); Delaware River Port Authority (36 P.S. § 3503); Pennsylvania Higher Educational Facilities Authority (24 P.S. § 5504); State Public School Buildings Authority (24 P.S. § 791.3); Board of Commissioners of Public Grounds and Buildings (71 P.S. § 156); 71 P.S. § 66 (Adm. Code § 206).

*Id.* § 1201(e) (*emphasis added*). Far from restricting the participation of each ex officio member, the amendment to Section 1201(e) demonstrated the legislature’s desire to facilitate each ex officio member’s active participation in the deliberations of the PGCB.

The 2006 amendments expanded the Section 1103 definitions by adding:

Member. An individual appointed to and sworn in as a member of the board in accordance with section 1201(b) (relating to the Pennsylvania Gaming Control Board established).

*Id.* § 1103. The PGCB argues that the term ex officio is not included in the definition of the term “member” as contained in Section 1103. Section 1103 defines “member” as those persons politically appointed to the Board. *Id.* However, the PGCB overlooks Section 1103’s introductory language that limits the indiscriminate application of the definition. Section 1103 is prefaced as follows:

The following words and phrases...shall have the meanings given to them in this section unless the context clearly indicates otherwise. (*emphasis added*).

The context of the Gaming Act, especially in Section 1201(e), “clearly indicates otherwise” -- by stating that ex officio members or “their designees shall serve on the board as nonvoting ex officio members of the board.” *Id.* § 1201(e) (*emphasis added*). The Secretaries of Revenue and Agriculture and the State Treasurer are members of the PGCB as provided in Section 1201(e). The plain import of Section 1201(e) is to include the ex officio members within the meaning of the term “member.” The General Assembly’s 2006 amendment to Section 1201(e) underscores the intent to facilitate the active involvement and participation of ex officio members – not to limit their participation.

As illustrated by Section 1201(h), the term “member” is deemed to include all members unless otherwise stated. *Id.* § 1201(h). Ex officio members are specifically exempted from the restriction in Section 1201(h)(2), rewritten in 2006, stating:

Except for ex officio members, no person shall be appointed a member of the board or be employed by or be an independent contractor of the board if that person is a public official or party officer as defined in 1512 (relating to financial and employment interests) in this Commonwealth or any of its political subdivisions.

*Id.* § 1201(h)(2) (*Emphasis added*). This continuation of the exception in the statute highlights the fact that the General Assembly intended the term “member” to have general application unless stated otherwise.

Similar to the language in (h)(2), a 2006 change to Section 1201(h)(12) supports the interpretation that “member” is a term of general application which includes ex officio members. *Id.* § 1201(h)(12). The original language of that paragraph, in 2004, stated the rule that PGCB members convicted of various crimes would be removed from the Board. The 2006 language, which remains as the current law, established a slightly different option for ex officio members who had been convicted of those same offenses. *Id.*

(12) A member who has been convicted during his term in any domestic or foreign jurisdiction of a felony, infamous crime or gambling offense shall, upon conviction, be automatically removed from the board and shall be ineligible to become a member in the future. If an ex officio member is convicted during his term in any domestic or foreign jurisdiction of a felony, infamous crime or gambling offense, the ex officio member shall, upon conviction, be automatically removed from the board, and a designee shall be designated pursuant to subsection (e) to serve the remainder of the ex officio member’s term.

*Id.* (*emphasis added*). In particular, the types of offenses which preclude participation on the board, such as “gambling offenses,” might not be synonymous with the offenses that would

prevent the State Treasurer from continuing to hold his elected office. Pa. Const. art. II, § 7<sup>4</sup> and art. VI, § 7.<sup>5</sup> As a result, there was a need to differentiate the treatment of politically appointed PGCB members and ex officio members. Again, the need for this separate treatment establishes the general rule that, in all other circumstances, an ex officio member is a “member” of the PGCB.

In 2006, the General Assembly also enacted Section 1202.1, codifying a Code of Conduct (“Code”) for members and employees, among others. Section 1202.1 provides, among various things, restrictions upon the activities of board members, including, but not limited to: ex parte communications; accepting gifts, gratuities, and compensation from applicants, licensees, permittees, and licensed entity representatives. Members are also banned from holding a political office:

Restrictions – A member of the Board shall:  
Not hold or campaign for political office, hold an office in any political party or political committee, contribute to or solicit contributions to a political campaign, party, committee or candidate, publicly endorse a candidate or actively participate in a political campaign.

*Id.* § 1202.1(c)(5).

However, Section 1202.1(d) provides for an exception for ex officio PGCB members. “The restrictions under subsection (c)(5) shall not apply to ex officio members.” *Id.* § 1202.1(d). The legislature’s exception once again demonstrates the rule of application that the term “member” includes all PGCB members unless clearly stated otherwise. Section 1202.1(d) stands for this proposition, as the campaign restrictions set forth in Section 1202.1(c)(5) do not apply to ex officio PGCB members. Accordingly, the implication is that all other provisions of the Code

---

<sup>4</sup> “embezzlement of public moneys, bribery, perjury or other infamous crime...”

<sup>5</sup> “shall be removed on conviction of misbehavior in office or of any infamous crime...”

do apply to “members” of the PGCB whether they serve as ex officio or politically appointed members.

Sections 1201(h)(2), 1201(h)(12) and 1202.1(d) are, to put it simply, the exceptions that prove the rule. The term “member” includes voting and nonvoting members.

The General Assembly included one limitation on the authority of PGCB members who serve “ex officio,” i.e., by virtue of their office. They do not have a vote. Other than this restriction, there is no other specific limitation enacted or implied by the General Assembly in the Gaming Act on the authority of ex officio PGCB members. This was not changed by the 2006 amendments.

### C. 2010 AMENDMENTS

The 2010 amendments did not change any language from the 2006 Gaming Act in relation to ex officio members of the PGCB. Act of January 7, 2010 (P.L. 1, No. 1). More importantly, the 2010 Gaming Act did not include any additional distinctions between politically appointed and ex officio members of the PGCB. As the statutory language continues to impose only one restriction on the authority of a member who serves on the PGCB by virtue of his office, that being lack of a vote, the intent of the General Assembly is to treat politically appointed and ex officio members of the PGCB essentially the same with little distinction. The General Assembly intended ex officio PGCB members to have all of the rights, privileges, and obligations of Board membership unless otherwise set forth in the Gaming Act.

## II. THE PENNSYLVANIA GAMING CONTROL BOARD DOES NOT HAVE THE RIGHT TO LIMIT THE STATUTORY AUTHORITY OF AN EX OFFICIO MEMBER TO ATTEND AN EXECUTIVE SESSION OF THE BOARD.

In our system of government, it is the General Assembly, not the executive branch of government, that is empowered to create and define the composition of administrative agencies.

Pa. Const. art. II, § 1. The PGCB is a public agency whose existence and authority is a function of legislation passed by the General Assembly. 4 Pa.C.S. § 1101, *et seq.* Accordingly, the PGCB may only exercise such powers as are provided by statute. *Small v. Horn*, 554 Pa. 600, 609, 722 A.2d 664, 669 (1998) (citations omitted). The Gaming Act does not convey to either the Chairman or the PGCB majority the right to restrict the involvement or participation of its membership - in particular, the involvement or participation of the ex officio members in executive sessions.<sup>6</sup>

In 2004, when the General Assembly debated and ultimately voted to legalize gambling in the Commonwealth, it was recognized that there had to be a regulatory body to oversee gaming; thus, the legislature created the PGCB. When the General Assembly decided how membership on the Board would be established, there were obvious reasons that political appointees were given the ultimate voting power. However, there are also reasons why the General Assembly saw fit to place ex officio members on the PGCB.

**A. EX OFFICIO MEMBERS WERE APPOINTED TO THE BOARD FOR THEIR INDEPENDENCE AND EXPERTISE**

The General Assembly placed ex officio members on the PGCB to advise the PGCB on matters within their expertise and to encourage open and frank discussions concerning licensing and regulatory decisions. This includes discussion in executive sessions. Ex officio members serve on the PGCB by virtue of their positions as Secretary of Revenue, Secretary of Agriculture, and State Treasurer. Ex officio membership on the PGCB is based solely on the office, not the identity of the office-holder. The General Assembly included the Secretaries of Revenue and Agriculture and the State Treasurer as members of the PGCB because of their responsibilities as

---

<sup>6</sup> It is worth noting that the PGCB cannot even select its chairman, as that right is granted to the Governor. 4 Pa.C.S. § 1201(j).

the heads of Commonwealth agencies. In 2004, the General Assembly understood that an ex officio member's normal duties would now involve the world of legalized gaming and that each ex officio member would bring a unique and vital perspective to the Board.

Under the Gaming Act, Category 1 licensees are racetrack slot operators. 4 Pa.C.S. § 1302. Racetracks are regulated by the State Horse Racing Commission and State Harness Racing Commission, which are two commissions under the Department of Agriculture. 4 P.S. § 325.201. The Secretary of Agriculture serves on both commissions as an ex officio nonvoting member. *Id.* § 325.201(c).<sup>7</sup> The Gaming Act requires that licensees maintain backside areas of the racetracks and pay assessments into the Pennsylvania Race Horse Development Fund. 4 Pa.C.S. § 1404, 1405. As such, the General Assembly designated the Secretary of Agriculture an ex officio member of the PGCB due to his expertise on the interplay between racetracks and casinos. Additionally, the Secretary's membership would ideally provide protection for the integrity of horse racing.

The Secretary of Revenue serves on the PGCB since the Department of Revenue ("Revenue") arguably holds the most important job in the legalization of gaming, i.e., the collection of revenues. *Id.* § 1501. Revenue controls the central computer system, which interfaces with all slot machines in the Commonwealth, allowing Revenue to account for the casino slot machine collections each day. *Id.* § 1323. The Gaming Act also gives Revenue the power to audit "any equipment and records relating to all aspects of the operation of slot machines." *Id.* § 1501(b). Further, Revenue makes the assessments concerning the amount of money the casino must contribute to various funds established by the PGCB. *Id.* § 1403.

---

<sup>7</sup> It is worth noting that while the Secretary of Agriculture serves as an ex officio member of each racing commission which oversees gambling activities related to horse racing, there is no evidence that either horse racing commission has attempted to exclude or otherwise limit the participation of the Secretary in any deliberative proceeding.

Accordingly, the General Assembly designated the Secretary of Revenue an ex officio member of the PGCB due to his expertise in the area of revenue collection.

The Gaming Act establishes a variety of funds in the State Treasury, including the State Gaming Fund. *Id.* One of the State Treasurer's core statutory functions is to act as a custodian of Commonwealth funds. 72 P.S. § 301 *et seq.* This function requires the State Treasurer to manage assets as well as evaluate financial risk, investment potential and asset growth. The General Assembly believed the PGCB would benefit from this expertise. The Treasurer was put on the PGCB because his statutory functions and everyday obligations can be used to assist the PGCB with the evaluation and licensing of gaming development plans. The Treasurer sits on the PGCB because the General Assembly determined it was in the public interest, not for any other reason.

The Gaming Act imposes a structure which places the Commonwealth as a significant stakeholder in the performance and profitability of each licensed facility. In other words, each gaming license is a valuable public asset, valued at much more than the \$50 million licensing fee would suggest. As such, gaming licenses must be carefully managed and allocated. Chairman Fajt acknowledged this fact at a July 30, 2010, public hearing, when he told counsel for the Foxwoods' gaming license that, "Your client has an asset of this commonwealth and that asset is wasting."<sup>8</sup> The Treasurer's expertise in asset management provides an important element to PGCB deliberations.

The General Assembly also appointed the State Treasurer to the PGCB to provide an independent voice in Board decisions. As the only independently elected official on the PGCB, who is directly accountable to Commonwealth citizens, the State Treasurer provides a

---

<sup>8</sup> Jennifer Lin, *Foxwoods gets two-week extension in license fight*, Philadelphia Inquirer, July 30, 2010 (Exhibit 1).

perspective to policy decisions related to gaming oversight that is not otherwise shared by political appointees.

The General Assembly envisioned a Board that would be guided by open and informed deliberations, taking into consideration differing perspectives and expertise relating to the licensing and regulation of gaming. Each ex officio member was designated by the legislature to contribute to the deliberations and to actively participate in the functions of the PGCB. While the legislature reserved the ultimate decisions to the voting members of the PGCB, it was the intention of the General Assembly to ensure those decisions took into account the experiences and opinions of the ex officio members. Further limitation and segregation of the involvement of the ex officio members was neither envisioned by the legislature nor evidenced in the provisions of the Gaming Act. It is imperative that the State Treasurer, and the other ex officio members of the PGCB, be included in executive sessions in order to fulfill these roles.

**B. NONVOTING EX OFFICIO MEMBERS DO NOT CREATE UNDO POLITICAL INFLUENCE UPON BOARD DELIBERATIONS AND DECISIONS**

The PGCB has criticized the Treasurer for accepting campaign contributions from members of lobbying firms and law firms who have clients that have gaming interests. Section 1513 of the Gaming Act prohibits gaming applicants and licensees from making political campaign contributions to elected officials. 4 Pa.C.S. § 1513. However, it appears none of the campaign contributions made to the State Treasurer violated this section of the law. The onus for complying with this section of the Gaming Act has been placed squarely on the shoulders of those individuals making the contributions. *Id.* The nature of the PGCB's accusations is that the Treasurer has received campaign contributions from members of lobbying firms and law firms, whose clients include gaming companies. These insinuations are akin to arguing that the

Attorney General should not prosecute environmental crimes because his campaign accepted a contribution from a law firm whose clients include a mining company. The same law firms and lobbying firms who have given to the Treasurer can also contribute to members of the General Assembly, the Governor, Attorney General and judges -- all of whom are involved in gaming related matters. The important point, with regard to the Treasurer's participation on the PGCB, is that he has no vote.

The General Assembly understood political influence and included provisions in the Gaming Act to mitigate its impact. The legislature enacted safeguards in the Gaming Act including, but not limited to:

- Restricting campaign contributions. *Id.* § 1513.
- Imposing a Code of Conduct. *Id.* § 1202.1.
- Prohibiting ex parte communication. *Id.* § 1202.1(c.1).
- Prohibiting financial or business dealings which would compromise objectivity. *Id.* § 1202.1(c)(4).
- Subjecting the PGCB to Sunshine Act. *Id.* § 1201.1(a)(3).
- Subjecting the PGCB to Ethics Act. *Id.*

For the PGCB to suggest that the Treasurer's participating in executive sessions would exert some undue influence on the Board suggests that the PGCB political appointees have no ability to exercise independent judgment. Noteworthy is the fact that votes cannot be conducted in executive session. *See* 65 P.S. § 708. If the Treasurer voices an opinion in either a public or executive session, the members are free to follow his opinion, disagree with the opinion, criticize his opinion or ignore him entirely.

While this case involves the Treasurer, it is important to recognize that there are two other ex officio members that the General Assembly appointed to the Board. The Secretaries of Agriculture and Revenue are appointed to their positions in state government by the Governor

with the advice and consent of the Senate. As a result, this case will determine the PGCB's role and effectiveness well into the next gubernatorial administration.

The PGCB is not allowed to segregate other Board members in a fashion not provided in the Gaming Act. The actions of the Board are at odds with the intent of the General Assembly and the provisions of the Gaming Act. There are sufficient safeguards in the Gaming Act to protect against any undue influence which an ex officio member might attempt to exert in executive session. Once again, it bears repeating that the Treasurer does not have voting rights. This alone should be enough to vitiate any concerns about past political contributions.

**C. THE GENERAL ASSEMBLY MAY LIMIT THE STATUTORY AUTHORITY OF EX OFFICIO MEMBERS**

The PGCB is not without resources to seek the desired change to the authority of its ex officio members. The Gaming Act has been amended on two occasions.<sup>9</sup> The requests of the PGCB were taken into consideration on both of those occasions. If the PGCB wishes to change the makeup of the Board or exclude ex officio members from executive sessions, the PGCB's remedy is to seek a statutory change from the General Assembly through validly enacted legislation. Pa.Const. art. II, § 1. Until such time as the General Assembly acts, with the concurrence of the Governor, to impose additional limits on ex officio members beyond the restriction on voting, the PGCB lacks the right to impose new constraints on ex officio members or prevent them from attending executive sessions of the Board.

**III. CONCLUSION**

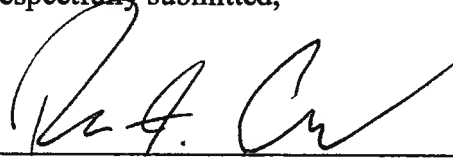
For the foregoing reasons, Pennsylvania State Representative Curt Schroder respectfully requests this Honorable Court to overrule the preliminary objections in this case and declare that

---

<sup>9</sup> Act of November 1, 2006 (P.L. 1243, No. 135) and Act of January 7, 2010 (P.L. 1, No. 1).

the State Treasurer and all nonvoting ex officio PGCB members, as well as their designees, are entitled to fully participate in all public and executive sessions of the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. A. Corey", written over a horizontal line.

Rodney A. Corey, Chief Counsel  
Attorney I.D. # 69742  
House of Representatives  
Republican Caucus  
Suite B-6 Main Capitol  
Harrisburg, Pennsylvania 17120  
(717) 783-1510

*Counsel for Amicus Curiae  
Representative Curt Schroder*

# **EXHIBIT 1**

## Foxwoods gets 2-week extension in license fight

Lawyers had sought three months. A new plan for financing the casino was mentioned.

By Jennifer Lin  
INQUIRER STAFF WRITER

HARRISBURG — Lawyers for Foxwoods Casino came here Thursday to ask the Pennsylvania Gaming Control Board for an extra three months to gather documents and depositions for their fight to keep the project's gambling license.

They walked away with a two-week extension.

Since late spring, the board has been moving toward revocation of the South Philadelphia casino's \$50 million license.

As a Friday deadline in the discovery process loomed, Robert Graci, an attorney for Foxwoods, said the project was facing a "death sentence" and complained that the board was not giving the partners "what we think we're reasonably entitled to."

However, while refusing to move Foxwoods' deadline to Oct. 30, the commissioners did direct their own lawyers to negotiate some wiggle room if they saw cause.

In the midst of arguing for more time, another Foxwoods lawyer, F. Warren Jacoby, let slip that his clients expect to submit by next week the outline of a deal with a new investor to replace Steve Wynn. In April, the Las Vegas mogul abruptly backed out of an agreement to build and operate the gaming hall.

Jacoby did not name the new player in the project, but Harrah's Entertainment has confirmed that it is in talks with the Foxwoods group.

"I hope we'll have a term sheet" — spelling out non-binding elements of the deal — "to the board next week," Jacoby said after the hearing.

According to sources, Harrah's would invest in the founding project and operate a casino on the Delaware River waterfront.

With the collapse of the Wynn deal, lawyers for the gaming board moved on April 29 to revoke the project's license on grounds that it was no longer financially viable. The board will hold a hearing, but a date has yet to be set.

During Thursday's hearing,

lawyers for both the gaming board and Foxwoods complained about a difficult discovery process. Each side accused the other of not being forthcoming with documents or individuals to depose.

Dale Miller, an enforcement lawyer for the gaming board, said that some of the documents Foxwoods had requested were confidential. Jacoby, meanwhile, took issue with enforcement lawyers' deposing Foxwoods' former general counsel, Nick Moles.

At the hearing, commissioners expressed impatience and frustration with the Foxwoods group, Philadelphia Entertainment & Development Partners (PEDP), which won a competitive bid for a slots license in Philadelphia in December 2006.

During the hearing, gaming board Chairman Gregory Fajt told Jacoby, "Your client has had an asset of this commonwealth and that asset is wasting." Kenneth McCabe, another commissioner, added, "Part of my frustration is this seems to keep dragging out for years. We have to get a resolution."

PEDP includes the Mashantucket Pequot Indian tribe of Connecticut and a group of individual investors, including Comcast-Spectacor chairman Ed Snider and the charitable interests of South Jersey lawyer Lewis Katz and Philadelphia developer Ron Rubin. Under the original licensing agreement, the Mashantucket Pequot tribe was supposed to lead the effort, but it is facing economic problems of its own.

PEDP has \$100 million at stake, Jacoby said. That includes \$50 million spent on the license, plus additional debt to develop a casino on Columbus Boulevard.

Jacoby said the request for more time for discovery was not an attempt to delay a revocation hearing.

"We're only trying to get due process and reasonable discovery," he said.

Contact staff writer Jennifer Lin at 215-854-5659 or [jl@phillynews.com](mailto:jl@phillynews.com).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT M. McCORD, in his  
official capacity as the Treasurer of the  
Commonwealth of Pennsylvania,  
Petitioner,

v.

THE PENNSYLVANIA GAMING  
CONTROL BOARD,  
Respondent.

No. 446 M.D. 2010

---

CERTIFICATE OF SERVICE

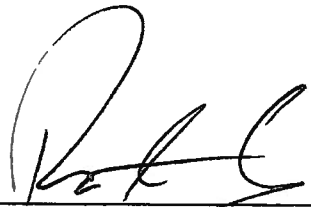
---

I, Rodney A. Corey, Chief Counsel, on behalf of Representative Curt Schroder, hereby certify that on this date, September 1, 2010, a copy of the foregoing **Brief of Representative Curt Schroder, Amicus Curiae, in Opposition to Preliminary Objections**, has been served by first class mail at the addresses indicated below.

Jason G. Benion, Esquire  
James J. Kutz, Esquire  
Barbara A. Zemlock, Esquire  
John W. Dornberger, Esquire  
Post & Schell, P.C.  
17 North Second Street, 12<sup>th</sup> Floor  
Harrisburg, Pennsylvania 17101

Christopher B. Craig, Esquire  
Jennifer Langan, Esquire  
Pennsylvania Treasury Department  
127 Finance Building  
Harrisburg, Pennsylvania 17120

Stephen S. Cook, Esquire  
R. Douglas Sherman, Esquire  
Pennsylvania Gaming Control Board  
Strawberry Square, 5<sup>th</sup> Floor  
Post Office Box 69060  
Harrisburg, Pennsylvania 17106-9060



---

Rodney A. Corey, Chief Counsel  
Attorney I.D. #69742  
Pennsylvania House of Representatives  
Republican Caucus  
Suite B-6 Main Capitol  
Harrisburg, Pennsylvania 17120  
(717) 783-1510  
*Counsel for Amicus Curiae  
Representative Curt Schroder*

September 1, 2010