

Westlaw

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THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

Commonwealth Court of Pennsylvania.
GREENWOOD GAMING and ENTERTAINMENT, INC., d/b/a Parx Casino, Petitioner
v.
PENNSYLVANIA GAMING CONTROL BOARD, Respondent.

Nos. 2219 C.D.2011, 94 C.D.2012.
Argued March 11, 2013.
Decided April 22, 2013.

Background: Resort hotel, a Category 3 licensee, filed a **petition** for approval of its plan for controlling access to its gaming floor. Intervenor objected. The **Pennsylvania Gaming Control Board** approved the plan as modified, granted reconsideration, and entered a second order approving the plan with different modifications. Intervenor petitioned for review from both orders.

Holdings: The **Commonwealth Court**, Nos. 2219 C.D. 2011 and 94 C.D. 2012, Leadbetter, J., held that:

- (1) **petition** for review from the board's first order would be dismissed as moot;
- (2) issues related to the quality of the gaming experience at resort hotel were sufficiently raised during the hearing process, such that the board's reconsideration of such concerns did not violate due process or constitute new findings based on facts not of record;
- (3) board could conclude on reconsideration that an overly restrictive environment was both legally un-

necessary and potentially detrimental to business success;

(4) board could approve the plan as modified without requiring resort hotel to conduct multiple identification (ID) checks of guests; and

(5) conclusion of the board that registered overnight guest of a Category 3 licensee would not lose "registered guest" status immediately upon checkout, such that the guest could access the licensee's gaming floor, was reasonable and consistent with the Pennsylvania Race Horse Development and Gaming Act.

Affirmed; **petition** for review of first order dismissed as moot.

See also 609 Pa. 368, 15 A.3d 884.

West Headnotes

[1] Gaming 188

188 Gaming

188I Gambling Contracts and Transactions

188I(A) Nature and Validity

188k4 k. Licenses and taxes. Most Cited Cases

Reviewing court would dismiss as moot intervenor's **petition** for review of the first of two orders entered by **Pennsylvania Gaming Control Board** following resort hotel's **petition** for approval of its plan for controlling access to its gaming floor; board approved the plan as modified but granted reconsideration and entered a second order approving the plan with different modifications, and the second order superseded the first order. 4 Pa.C.S.A § 1305; 58 Pa.Code § 441a.23.

[2] Constitutional Law 92

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

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92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations

92k4285 k. Gambling and gaming.
Most Cited Cases

Gaming 188

188 Gaming
188I Gambling Contracts and Transactions
188I(A) Nature and Validity
188k4 k. Licenses and taxes. Most Cited Cases

Issues related to the quality of the gaming experience at resort hotel were sufficiently raised during the hearing process following resort hotel's petition for approval of its plan for controlling access to its gaming floor that **Pennsylvania Gaming Control Board's** reconsideration of such concerns did not violate due process or constitute new findings based on facts not of record, where chief executive of resort hotel testified that the quality of the gaming experience was a critical factor in determining whether patrons would return and implied that too much intrusion would "prohibit" resort hotel's ability to bring in people and generate tax revenue, and board commissioner acknowledged that concern during the hearing. U.S.C.A. Const.Amend. 14 ; 4 Pa.C.S.A § 1305; 58 Pa.Code § 441a.23.

[3] Gaming 188

188 Gaming
188I Gambling Contracts and Transactions
188I(A) Nature and Validity
188k4 k. Licenses and taxes. Most Cited Cases

Pennsylvania Gaming Control Board could conclude, on reconsideration of its approval, as modified, of resort hotel's plan for controlling access to its gaming floor, that an overly restrictive environment was both legally unnecessary and potentially detrimental to business success; board could have issued its second, more lenient order in the first instance. 4 Pa.C.S.A § 1305; 58 Pa.Code § 441a.23.

[4] Gaming 188

188 Gaming
188I Gambling Contracts and Transactions
188I(A) Nature and Validity
188k4 k. Licenses and taxes. Most Cited Cases

Pennsylvania Gaming Control Board could approve, as modified, a plan of resort hotel, a Category 3 licensee, for controlling access to its gaming floor without requiring resort hotel to conduct multiple identification (ID) checks of guests; Pennsylvania Race Horse Development and Gaming Act and regulation pertaining to Category 3 licensees did not ID checks as an access control and did not require licensees to ascertain the identity of patrons using the casino. 4 Pa.C.S.A § 1305; 58 Pa.Code § 441a.23.

[5] Gaming 188

188 Gaming
188I Gambling Contracts and Transactions
188I(A) Nature and Validity
188k4 k. Licenses and taxes. Most Cited Cases

Conclusion of **Pennsylvania Gaming Control Board** that a registered overnight guest of a Category 3 licensee would not lose "registered guest" status immediately upon checkout, such that the guest could access the licensee's gaming floor, was reasonable and consistent with the Pennsylvania Race Horse Development and Gaming Act. 4 Pa.C.S.A § 1305; 58 Pa.Code § 441a.23.

BEFORE: LEADBETTER, Judge, and COHN JUBELIRER, Judge, and LEAVITT, Judge.

MEMORANDUM OPINION

LEADBETTER, Judge.

*1 [1] Presently before the court are Greenwood Gaming and Entertainment, Inc.'s two consolidated petitions for review challenging orders of the **Pennsylvania Gaming Control Board** (Board), approving as modified the casino gaming floor ac-

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cess control plan submitted by Valley Forge Convention Center Partners, L.P. (Valley Forge).^{FN1} The Board essentially approved a plan that allows some of Valley Forge's customers to use its casino without first producing identification. Greenwood Gaming and Entertainment, Inc. (Greenwood) contends that permitting customers to access the casino without first checking their identification violates Section 1305 of the Pennsylvania Race Horse Development and Gaming Act (Act), *as amended*, 4 Pa.C.S. § 1305, and the Board's regulation, codified at 58 Pa.Code § 441a.23. According to Greenwood, compliance with the Act and regulation mandates an access plan that requires identification (ID) to be checked when a customer is issued an access card for entrance to the casino as well as when the customer actually enters the gaming area. Greenwood also argues on appeal that the Board-approved plan improperly allows registered hotel guests to use the casino after they have checked-out of the hotel. In addition to taking issue with these specific elements of the approved plan, Greenwood argues that the Board improperly modified its original order following reconsideration based upon facts not of record and without a hearing.

FN1. After the Board approved the access control plan as modified, it granted reconsideration and a second order was then entered approving the plan with different modifications. Greenwood has petitioned for review from both orders. Because the Board's first order has been superceded by its subsequent order on reconsideration, we will dismiss the first petition for review as moot.

Valley Forge is one of two Category 3 licensees in the Commonwealth. A Category 3 licensee is located in a well-established resort hotel having no fewer than 275 guest rooms as well as substantial year-round recreational guest amenities. Section 1305(a)(1) of the Pennsylvania Race Horse Development

and Gaming Act (Act), *as amended*, 4 Pa.C.S. § 1305(a)(1). A Category 3 licensee is limited to 500 slot machines. *Id.*, § 1305(c). Greenwood, on the other hand, is a Category 1 licensee with 3,300 slot machines. *Greenwood Gaming & Entm't Inc. v. Pa. Gaming Control Bd.*, 609 Pa. 368, 372, 15 A.3d 884, 886 (2011) (*Greenwood I*).

Prior to addressing the factual history and the parties' arguments in detail, we note the regulatory provisions at issue. Section 1305(a) of the Act provides, in pertinent part:

A Category 3 license may only be granted upon the express condition that an individual may not enter a gaming area of the licensee if the individual is not a registered overnight guest of the established resort hotel or if the individual is not a patron of one or more of the amenities provided by the established resort hotel.

The corresponding regulation provides, in pertinent part:

(b). A Category 3 slot machine applicant shall submit, as part of its application and its internal controls required under Chapter 465a (relating to accounting and internal controls), a plan detailing how the applicant will monitor the gaming area to ensure compliance with Chapters 503a, 511a and 513a (relating to self-exclusion; persons required to be excluded; and underage gaming) and that only the following persons are permitted to enter the gaming area:

- (1) Registered overnight guests.
- (2) Patrons of one or more amenities.
- (3) Authorized employees.
- (4) Other persons authorized by the Board.

(c). Individuals holding a valid seasonal or year-round membership, which has been approved by the Board and entitles the individual to use one or

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more of the amenities at the well-established resort hotel holding the Category 3 slot machine license, may be allowed on the gaming floor at any time....

(d). A patron of an amenity at a well-established resort hotel holding a Category 3 slot machine license may be permitted unlimited access to the gaming floor for one 24-hour period within 72 hours of the use of the amenity.

*2 58 Pa.Code § 441a.23. Thus, unlike the other categories of licensees, a Category 3 license gaming floor can only be used by specified individuals, essentially hotel guests and individuals using the resort's amenities or attending an event at the resort.^{FN2}

FN2. "Amenities" is defined as:

Any ancillary activities, services or facilities in which a registered guest or the transient public, in return for non-de minimis consideration [\$10 or more], may participate at a resort hotel, including but not limited to, sports and recreational activities and facilities such as a golf course or golf driving range, tennis courts or swimming pool; health spa; convention, meeting and banquet facilities; entertainment facilities; and restaurant facilities.

4 Pa.C.S. § 1305(e). A "patron of the amenities" is defined, in turn, as "any individual who is a registered attendee of a convention, meeting or banquet event or a participant in a sport or recreational event or any other social, cultural or business event held at a resort hotel or who participates in one or more of the amenities provided to registered guests of the resort hotel." *Id.*

Turning to the facts, Valley Forge filed a petition with the Board seeking approval of its plan for

controlling access to its gaming floor. Greenwood, an intervenor, and Office of Enforcement Counsel objected to the plan on various grounds and a hearing followed. Woodlands Fayette LLC, the only other Category 3 licensee in the Commonwealth, was granted status as a participant.^{FN3} In short, the plan and the hearing evidence demonstrated that Valley Forge's gaming floor can be accessed by swiping an activated Gaming Access Card or Membership Card through an optical scanner at one of three entrances to the casino floor; if the card is valid, a light flashes green and the patron can move through the entrance turnstile. If the card is not valid, the light will turn red and security personnel will investigate. Gamblers are not required to produce ID when they enter the gaming floor. The entrances to the gaming area are also monitored by security and surveillance personnel. Security personnel will have handheld devices that enable the employee to spot-check guests on the gaming floor to verify the validity of the cards.

FN3. A "participant" is defined as "[a] person admitted by the Board to limited participation in a proceeding." 58 Pa.Code § 491a .2 (Compare to a "party," which is defined as, "[a] person who is named in or admitted to a proceeding before the Board and who has a direct interest in the subject matter of the proceeding." *Id.*).

Access cards will be issued to registered overnight hotel guests, patrons of the hotel's amenities (e.g., restaurant, bar and nightclub patrons) who have paid consideration of at least \$10, and registered event participants (e.g., convention, meeting, banquet, and wedding attendees/guests) where the requisite consideration has been paid.^{FN4} The access cards are signed by the holder in front of a Valley Forge employee; the back of the card summarizes the restrictions of card use. The card's magnetic strip contains data relative to the card's activation and expiration (the card is deactivated following expiration), the identity of the employee issuing/activating card, and the name of the person who

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made payment if the card was issued in connection with a debit/credit card transaction.

FN4. Consideration can be paid individually or by an individual on behalf of the whole group; total consideration paid must equal at least \$10 per person.

Membership cards will be issued to members of Valley Forge's dining, entertainment and health and fitness clubs.^{FN5} In addition to the information above, a membership card will also bear the member's name and the magnetic strip will contain the member's name, address and other personal information.

FN5. While not relevant to this appeal, the Board did not approve Valley Forge's proposed health and fitness club membership.

Regarding the need to provide ID in order to obtain an access or membership card, the plan as submitted noted that a registered overnight hotel guest paying for a room is required to provide government-issued ID. If the guest is interested in acquiring an access card to use the casino, his or her ID is checked to insure that the guest is not under age and does not appear on any of the Exclusion Lists.^{FN6} If other guests staying in the room are interested in access cards, they are not required to produce ID unless they appear less than thirty years of age. In addition, pursuant to the plan, registered overnight hotel guests would be permitted to use the casino during their stay and for one 24-hour period within 72 hours of their check-out.

FN6. The Exclusion Lists pertain to self-excluded gamblers and persons prohibited from gambling for other reasons, such as cheating. *See generally* Sections 1514–1516 of the Act, 4 Pa. §§ 1514–1516 (pertaining to certain persons required to be excluded); Chapters 503a, 511a, and 513a of Title 58 of the Administrative Code (pertaining to self-excluded persons, persons required to be excluded and under-

age gamblers, respectively). Persons under twenty-one years of age are not permitted to enter the gaming floor or gamble, whether personally or through an agent. 58 Pa.Code § 513a.2.

*3 Persons interested in applying for membership in one of Valley Forge's clubs will also be required to produce ID, regardless of age. A member's name will be also checked against the Exclusion Lists. Members may bring a guest into the gaming area; guests are not required to provide ID unless they appear under thirty years of age. Patrons of the resort's amenities and registered event attendees will not be required to produce ID to obtain an access card unless they appear to be under thirty years of age.

After considering the plan and the hearing evidence, the Board stated:

[C]ategory 3 licensees are obligated to ensure that persons seeking access to their gaming floors are entitled to be there ... there must be some assurance that persons using Access Cards and Membership Cards ... are, in fact, the persons who rightfully obtained the cards.[^{FN7}] The Board, therefore, believes it is imperative that everyone being issued either an Access Card or Membership Card present valid government issued identification prior to a card being issued. Receiving [ID] allows Valley Forge to confirm the age of the person and also quickly confirm whether the person is on one of the Exclusion Lists.

FN7. Greenwood expressed concern during the hearing that, without multiple ID checks, patrons would try to by-pass the access controls and fraudulent use of cards would occur.

Adjudication at 20.^{FN8} Accordingly, the Board held that everyone was required to produce ID and be checked against the Exclusion Lists before ob-

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taining a casino access card. Noting that it is industry custom to allow hotel guests that have checked-out to continue to use the hotel facilities for the remainder of the day and that overnight hotel guests generally pay a greater consideration to the hotel than patrons of the amenities, the Board opined that it seemed inequitable to cut-off guest access to the casino at the precise moment of check-out. Consequently, the Board ordered that:

FN8. The Board did note, however, that guests of members did not need to present ID unless they appeared under the age of thirty.

2. Overnight hotel guests will be entitled to gain access to the gaming floor, through use of a Casino Access Card, during their stay and up until 11:59 PM on their checkout date.

....

8. All persons wishing to access the Gaming Floor, at the time of Access or Membership Card issuance, will present [ID].

9. Patrons seeking access to the gaming floor shall be randomly asked for identification to confirm that their identity matches the information on the Access or Membership Card. Any incidents of unauthorized persons seeking access to the gaming floor shall be immediately reported ... Valley Forge shall submit a plan for establishing such random checks-with no less frequency than one patron per half hour at each gaming floor entrance—in its internal controls.

10. When identification is first presented by a patron, the person's name shall be checked against the Exclusion and Self-Exclusion Lists maintained by the Board.

Board's Order at 1–2 (October 31, 2011). Both Valley Forge and Greenwood petitioned for partial reconsideration. Reconsideration was granted, memoranda were accepted and oral argument presented.

In its petition for reconsideration, Valley Forge sought to vacate or modify paragraphs 8 and 10 of the order, seeking relief from the requirement that it check all individuals against the Exclusion Lists. In doing so, it argued that a licensee's access plan pursuant to Section 1305 is not required to address underage gambling or persons prohibited from gambling. Noting that it cannot quickly check each patron's name against the Exclusion Lists except during a registration process, it sought an exception from the requirement for patrons who do not register with the hotel (i.e., patrons of its restaurants, bar, nightclub, etc.).^{FN9}

FN9. While the Act does not define “registered,” the evidence demonstrated that overnight guests go through a registration process with the front desk clerk when they check-in to the hotel. In addition, the hotel maintains a list of the individuals registered as participants or guests of an event.

*4 In its supporting memorandum, Valley Forge also argued that requesting ID from all patrons was overly broad, and “will degrade patrons' resort and gaming experience ... discourage customer loyalty and repeat business, and defeat the purpose of the Category 3 license by chilling resort business that might otherwise be developed by adding the gaming amenity to the existing well-established resort hotel.” Reproduced Record (R.R.) at 285–86a.^{FN10} Valley Forge further argued that knowing the name of every access card holder is not required, is unnecessary and creates an administrative burden because it essentially requires Valley Forge to register every patron before an access card can be issued. According to Valley Forge, enforcement would require cocktail waitresses and other non-gaming employees to perform the function of security officers, thereby requiring specialized training and access to the Exclusion Lists, which are “highly confidential.” *Id.* at 295a.

FN11

FN10. In support of these and similar argu-

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ments, Valley Forge cited a survey by the American Gaming Association and a study prepared for the Missouri Gaming Commission, which was either attached to or referenced in Woodlands' brief.

FN11. Woodlands raised similar concerns in its post-hearing brief. *See* Board's Amended Adjudication at 12 (December 29, 2011).

In its petition, Greenwood sought reconsideration of paragraphs 8 and 9 of the Board's order, contending that they did not meet the standard required by the Act and suggesting that patron ID should be checked both when access cards are issued and when patrons seek to enter the gaming floor.

Following argument, the Board modified its earlier order, stating:

Upon reconsideration and reevaluation of the positions of the parties—in particular, the consensus among all of the parties and the Board that it is unknown exactly how successful a Category 3 casino will be with its legislatively mandated small size and access restrictions—the Board has, in fact, amended its earlier holding in this matter to create a situation which is less burdensome and intrusive for the licensee and its patrons, yet complies with the Act.

....

[V]alley Forge asks that persons paying [at least] \$10 out-of-pocket to [attend an event or use an amenity] not be required to present [ID] or be checked against the Exclusion Lists....

Valley Forge ... believ[es] persons paying a small fee to participate in something will be taken aback when asked to present [ID] before using the casino, while persons who are not paying a fee will be more open to the extra step as a sort of quid pro quo for getting “free” access to the gaming floor. The Board agrees with Valley

Forge's logic in this area.

....

[Although Valley Forge has not asked for relief in this regard,] upon further reflection, the Board believes that checking Event participants, such as wedding guests, against the Board's Exclusion Lists [including the Self-Exclusion List, which has been held as strictly confidential with limited persons having access thereto] can be problematic for two reasons: First, because doing so may be deemed unduly intrusive by the Event Participants and have a negative business impact on Valley Forge; and, more importantly, because the Board now has concerns about wide dissemination of the List of Self-Excluded Persons among a large array of Valley Forge employees.

*5 Board's Amended Adjudication at 23–24 (December 29, 2011). The Board concluded as a matter of law that the Act does not mandate that every person seeking access to the gaming floor confirm his/her right to gamble. According to the Board, the Act requires only that reasonable steps be taken to limit access to the gaming floor to persons authorized to be there. Accordingly, the Board modified its earlier order, ordering that participants of an event, such as a convention, meeting or banquet, who had not themselves paid the minimum requisite \$10 consideration, must present ID in order to obtain a casino access card. On the other hand, patrons of the amenities who had paid the requisite consideration (for a meal, drink, attendance fee, etc.) were not required to show ID in order to obtain an access card.^{FN12} Greenwood's petitions for review followed.

FN12. More specifically, the Board ordered that: (1) all overnight hotel guests must present ID and be checked against the Exclusion Lists in order to obtain a Casino Access Card; (2) guests at a convention, meeting or banquet who do not themselves pay the requisite \$10 consideration must present ID in order to obtain a card but

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their names do not need to be checked against the Exclusion Lists; (3) a patron of the amenities who spends the requisite consideration does not need to present ID or be checked against the Exclusion Lists to obtain a card; (4) patrons seeking access to the gaming floor shall be randomly asked for ID to confirm that their identity matches the information on the access or membership Card at a frequency of no less than one patron every thirty minutes; and (5) the identity of all persons appearing under the age of thirty shall be checked at the time of card issuance and when accessing the gaming floor.

[2] We begin with Greenwood's argument that the Board erred in amending its original order following reconsideration based upon facts which were not admitted into the record, subject to cross-examination or rebuttal in violation of the Administrative Agency Law and its due process rights. Specifically, Greenwood argues that there is no evidence to support the factual assertions that: (1) checking patrons' ID is an unwarranted intrusion on their gaming experience; (2) patrons who have paid the non-de minimis consideration will be "taken aback" if required to produce ID before using the casino (and vice versa—that is, patrons who have not paid consideration to use an amenity will be "more open" to producing ID); and (3) requiring all gamblers to produce ID before entering the casino could be detrimental to return business. According to Greenwood, the lack of record evidence as well as an opportunity to challenge the veracity of these facts and theories precludes the Board from considering them in deciding to amend its original order.

After a review of the record as well as the Board's adjudication, we conclude that there is no merit to this contention. First, while Valley Forge's concerns regarding the need to avoid a gaming atmosphere that is too restrictive may not have been demonstrated as persuasively during the hearing as it articulated in its request for reconsideration, its

main witness, Sal Scheri, the President and CEO of Valley Forge Casino Resort, touched upon these issues during his testimony. Notably, Scheri testified that the quality of the gaming experience was a critical factor in determining whether patrons would return (R.R. at 64a), and he noted that in considering different methods of controlling access to the gaming floor, various options were rejected because industry experience demonstrated that approximately 30% of customers wish to remain anonymous, thereby implying that too much intrusion "would really prohibit [Valley Forge's] ability to bring people in and generate tax revenue." *Id.* at 201–202a.

Commissioner Trujillo also acknowledged this concern during the hearing, stating: "I sense, frustration with the notion that you can't be handcuffed in creating an atmosphere that people don't want to go to because it would be so restrictive in point of entry or tracking or however else that it becomes an unpleasant and not a fun environment and one that's not welcoming." *Id.* at 232a. Scheri's testimony, along with the Board's acknowledgement of the concern, sufficiently raised the issue during the hearing process such that its reconsideration of such concerns does not violate due process nor constitute new findings based upon facts not of record.

*6 [3] Second, the Board, realizing that it was setting a standard in uncharted territory, which could impact the ultimate success of the Category 3 gaming venture, agreed with counsel to conclude that an overly restrictive environment was both legally unnecessary and potentially detrimental to business success. This was a proper exercise of the Board's discretion. *A fortiori*, the Board, in its discretion, could have entered its amended, more lenient order in the first instance. It is well settled that the Board has sole regulatory authority over gaming in Pennsylvania and that the Act vests it with broad discretion to administer all aspects of the industry. See Section 1202, 4 Pa.C.S. § 1202; *Rubino v. Pa. Gaming Control Bd.*, 1 A.3d 976, 980 (Pa.Cmwlth.2010), *appeal denied*, 609 Pa. 704, 16

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A.3d 504 (2011). *See also Greenwood Gaming & Entm't Inc. v. Pa. Gaming Control Bd.*, 609 Pa. 368, 15 A.3d 884 (2011) (*Greenwood I*). As the Court stated, "The Board's decision is to be given great deference, and [the] Court is not to substitute its judgment for the Board's nor intrude upon the Board's fact-finding role and discretionary decision-making authority." *Id.* at 373, 15 A.3d at 887.

Finally, we note that the Board's amended order also rests on the purely legal conclusion that the Act does not require an access plan that identifies patrons by name or determines their status on the Exclusion Lists. Thus, the reconsideration was based upon additional arguments, not new facts.

[4] Next, Greenwood posits that Section 1305 and the accompanying regulation require a plan that "ensures" that only certain individuals have access to the gaming floor. According to Greenwood, the plan that was approved fails to satisfy this requirement. Greenwood contends:

Checking some (but fewer than half) of the patrons' government-issued IDs at the time of issuance of the card, but not at the point of access, invites noncompliance, and provides no comfort that the access or membership card will not be lent to, given to, or otherwise fall into the hands of an ineligible person to be used for gaming floor entry.

Brief at 29. As noted, Greenwood advocates an access plan that checks ID both when a card is issued and when the patron attempts to enter the gaming floor. Greenwood suggests that failure to confirm that a patron is a legitimate access card holder will lead to use of cards by unauthorized individuals.

The Board's order represents neither an error of law nor an abuse of discretion. The Act and regulation do not mandate ID checks as an access control method, nor do they require licensees to ascertain the identity of patrons using the casino. In fact, in

defining a "patron of the amenities," the Act clearly contemplates gamblers that are both registered with the hotel (and, therefore, their identity is known) and unregistered. *See* Section 1305(e) (distinguishing between registered attendees and participants); *see also* 58 Pa.Code § 441a.1. In addition, neither Section 1305, nor Regulation 441a.23(b) establishes specific criteria for limiting access to the gaming floor; the access control methods employed are left to the licensee subject to the Board's approval. Accordingly, in light of the flexibility afforded to licensees, we decline to construe the term "ensure" to mandate multiple ID checks.^{FN13} Rather, because the statutory scheme places the adequacy of a licensee's control measures within the Board's administrative expertise and discretion, we will not substitute our judgment for the Board's expertise nor intrude on its discretionary decision-making authority. *Greenwood I*, 609 Pa. at 373, 15 A.3d at 887.^{FN14}

FN13. The Board obviously discredited Greenwood's expert's testimony regarding his concerns that young people, in particular, will try to skirt access restrictions and that access cards could be obtained fraudulently. *See* Board's Adjudication at 17 n. 15 (stating: "Upon questioning by Commissioner Trujillo at oral argument, however, counsel for Greenwood Gaming conceded that projections of widespread fraudulent access were speculative and that Greenwood Gaming had no evidence as to what will occur in the future, nor statistical evidence that sheds any guidance on this concern."). The lack of any credited evidence establishing a prevalent abuse of access cards in the industry is further reason to decline to intrude on the Board's exercise of discretion.

FN14. In reaching this conclusion, we note that while the restricted access applicable to the Category 3 gaming floor may benefit Category 1 and 2 licensees to some extent,

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we reject any suggestion that the access restrictions serve or were intended to protect competitive interests. There is nothing in the Act to support that suggestion. Moreover, in addressing Greenwood's contention that Valley Forge's gaming operation would reduce gaming revenues at other area licensed facilities, our Supreme Court noted that the Act only limited the location of licensed facilities and Valley Forge satisfied the Act's distance requirement. *Greenwood I*, 609 Pa. at 381–82, 15 A.3d at 891–92.

*7 [5] Finally, Greenwood contends that the Board committed an error of law in permitting overnight hotel guests to access the gaming floor after they have checked-out. According to Greenwood, this violates the plain language of the Act, which it contends limits admission to only “registered overnight guests.” Greenwood maintains that once an individual has checked-out of his room, he or she is no longer a “registered guest” entitled to access the gaming floor.^{FN15}

FN15. As commonly used and understood, the term “register” means to record or enter in a register (which is a book or record that records names, events, acts, etc.); the term does not address or relate to any period of time. *See generally* Webster's Third New International Dictionary 1912 (1993).

Unlike the other category of licensees, a Category 3 licensee is not open to the general public. Rather, only customers of the well-established resort hotel may take advantage of the casino amenity.^{FN16} Presumably, this limitation is intended to enhance the legislative goal of furthering “development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations....” Section 1102(6) of the Act, 4 Pa.C.S. § 1102(6).^{FN17} While the Board's regulation delineates access periods for club members and patrons of the amenities

(e.g., a club member “may be allowed on the gaming floor at any time;” a patron of the amenities “may be permitted unlimited access to the gaming floor for one 24-hour period within 72 hours of the use of the amenity”),^{FN18} there is no similar limitation on registered overnight hotel guests. Notwithstanding this silence, the Board's conclusion that a “registered guest” does not lose that status immediately upon check-out is reasonable and consistent with the Act. The Board's construction serves the Act's purpose of enhancing the tourism experience, while still ensuring that only those who have provided business to the resort are accessing the casino. Moreover, as the Board noted, permitting registered overnight guests to use the casino the remainder of the day of check-out is consistent with the access afforded to patrons of the amenities as well as in accord with general industry standard.^{FN19} We conclude that the Board's construction is not arbitrary or clearly erroneous. Accordingly, we defer to the Board's interpretation and reject Greenwood's arguments to the contrary.^{FN20}

FN16. Consequently, Category 3 licensees have fewer slot machines than Category 1 or 2 licensees.

FN17. This limitation serves practical considerations as well in that it minimizes overcrowding a smaller gaming area or too many customers per slot machine.

FN18. 58 Pa.Code § 441 a.23(c) and (d), respectively.

FN19. It is common knowledge that guests are often required to check-out of a room before they are ready to leave the hotel premises in order that housekeeping may service the room for incoming guests.

FN20. An administrative agency's interpretation of the statute it is charged with administering is entitled to great deference unless it is clearly erroneous, arbitrary or constitutes an abuse of discretion. *See gen-*

Not Reported in A.3d, 2013 WL 3984742 (Pa.Cmwltlth.)
 (Cite as: 2013 WL 3984742 (Pa.Cmwltlth.))

erally Martsolf v. State Employees' Ret. Bd., 44 A.3d 94, 97 n. 3 (Pa.Cmwltlth.2012), *appeal denied*, — Pa. —, — A.3d — (No. 344 MAL 2012, January 30, 2013); *Turchi v. Phila. Bd. of License & Inspection Review*, 20 A.3d 586, 591–92 (Pa.Cmwltlth.2011).

Based upon the foregoing, the Board is affirmed.

ORDER

AND NOW, this 22nd day of April, 2013, the petition for review docketed at 2219 C.D.2011 is dismissed as moot.

Further, the Pennsylvania Gaming Control Board's order dated December 29, 2011 (subject to the appeal docketed at 94 C.D.2012) is hereby affirmed.

Pa.Cmwltlth.,2013.

Greenwood Gaming, Entertainment, Inc. v. Pennsylvania Gaming Control Bd.

Not Reported in A.3d, 2013 WL 3984742 (Pa.Cmwltlth.)

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H

Commonwealth Court of Pennsylvania.
Gregory J. RUBINO and Passport Realty, LLC, Petitioners
v.
PENNSYLVANIA GAMING CONTROL BOARD,
Respondent.

Argued April 19, 2010.
Decided July 23, 2010.

Background: Real estate agent sought a declaration that, as a "professional," he was exempt from the certification and registration requirements applicable to any vendor or person seeking to conduct business with a slot machine licensee. The Pennsylvania Gaming Control Board, No. 43127, disagreed, and the agent appealed.

Holding: The Commonwealth Court, No. 1947 C.D. 2009, Flaherty, Senior Judge, held that real estate agents and brokers were not the type of professional contemplated by the Gaming Control Board's regulations exempting "providers of professional services" from the registration and certification requirements applicable to any vendor or person seeking to conduct business with a slot machine applicant or licensee.

Affirmed.

McCullough, J., did not participate in the decision in this case.

West Headnotes

[1] Administrative Law and Procedure 15A 413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other

Policymaking

15Ak412 Construction

15Ak413 k. Administrative construction. Most Cited Cases

A reviewing court must give considerable weight and deference to an agency's interpretation of a regulation the agency is charged with enforcing; an agency's interpretation of its regulation is controlling unless the interpretation is plainly erroneous, inconsistent with the regulation or statute, or unreasonable.

[2] Brokers 65 3

65 Brokers

65I Regulation and Conduct of Business in General

65k3 k. Licenses and taxes. Most Cited Cases

Gaming 188 4

188 Gaming

188I Gambling Contracts and Transactions

188I(A) Nature and Validity

188k4 k. Licenses and taxes. Most Cited Cases

Real estate agents and brokers were not the type of professionals contemplated by the Gaming Control Board's regulations exempting "providers of professional services including accountants, attorneys, engineers and architects" from the registration and certification requirements applicable to any vendor or person seeking to conduct business with a slot machine applicant or licensee, even though the agents and brokers were required to complete continuing education in order to maintain required licensure. 58 Pa.Code § 437a.1(a, b), (c)(8).

[3] Gaming 188 4

188 Gaming

188I Gambling Contracts and Transactions

188I(A) Nature and Validity

188k4 k. Licenses and taxes. Most Cited

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Cases

The Gaming Control Board has sole regulatory authority over the conduct of gaming and related activities, and is vested with broad discretion to administer all aspects of the gaming industry in the state. 4 Pa.C.S. § 1202(a)(1).

*977 Andrew G. Jenkins, Pittsburgh, for petition- ers.

Stephen S. Cook, Deputy Chief Counsel, Harris-
burg, for respondent.

BEFORE: McGINLEY, Judge, and BROBSON,
Judge, and FLAHERTY, Senior Judge.

OPINION BY Senior Judge FLAHERTY.^{FN1}

FN1. This matter was argued before a panel consisting of Judge McGinley, Judge McCullough and Senior Judge Flaherty. Following argument, Judge McCullough found it necessary to recuse and the case was assigned to the authoring Judge on June 10, 2010 and was submitted on briefs to Judge Brobson for consideration as a member of the panel.

Gregory J. Rubino and Passport Realty, LLC (collectively, Rubino) petition for review of the September 2, 2009, order of the Pennsylvania Gaming Control Board (Board) which held that real estate agents and brokers are not exempt from the registration and certification requirements of section 437a.1 of the Board's regulations, 58 Pa.Code § 437a.1. We affirm.

Rubino is a licensed Pennsylvania real estate agent transacting business through Passport Realty, LLC. Rubino sought to offer professional real estate services to MTR Gaming Group, Inc. (MTR), the parent company of Presque Isle Downs, Inc. (PIDI), which had been awarded a slot machine license by the Board on December 20, 2006. The grant of this license was subject to a statement of

conditions (SOC), including SOC 58. SOC 58 required MTR and PIDI to refrain from entering into or engaging in any business activity or transaction with Rubino or his affiliates, with an exception relating to a transaction involving the Green Shingle property.^{FN2} PIDI's *978 chairman, Ted Arneault, signed the SOC on August 20, 2007.

FN2. Rubino also owned Tecnica Development Corporation (Tecnica). In 2001, Tecnica entered into a consulting agreement with MTR to provide services related to the development of a racetrack in Erie, Pennsylvania, including land acquisition and acquisition of land development and zoning permits. The consulting agreement provided for compensation of an initial fee of \$50,000, a fee of \$250,000 when property for the racetrack was acquired, a \$10,000 monthly retainer and, after the racetrack is opened, 3% of the earnings of the racetrack before interest, taxes, depreciation and amortization. After the Board expressed concerns over compensation in the nature of a percentage of the earnings, MTR and Tecnica reached an agreement whereby MTR and PIDI paid Tecnica \$4.2 million to terminate the consulting agreement. During the course of the consulting agreement, Rubino assisted MTR with the acquisition of three properties, the International Paper property in Erie, a site located along Interstate 90, and the Green Shingle property. MTR is considering the sale of the International Paper property to Erie Renewable Energy. Rubino is president of Erie Renewable Energy and handles its real estate and development work. Additionally, Rubino's wife owns fifty percent of Conservation Associates, LLC, which in turn owns thirteen percent of Erie Renewable Energy. Rubino sought relief from SOC 58 to participate in the sale of the International Paper property as well as other properties of MTR/PIDI.

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Subsequent to the execution of the SOC, the Board promulgated regulations requiring any vendor or person seeking to conduct business with a slot machine applicant or licensee to apply for registration and/or certification from the Board. 58 Pa.Code § 437a.1(a), (b). However, the regulations specifically exempt “[p]roviders of professional services including accountants, attorneys, engineers and architects” from the registration and certification requirements. 58 Pa.Code § 437a.1(c)(8).^{FN3} On February 13, 2008, Rubino filed a petition for relief from SOC 58 with the Board. In furtherance of this objective, Rubino sought a declaration that he and his company are exempt from the certification and registration requirements set forth in the Board's new regulations. The Board's Office of Enforcement Counsel (OEC) filed an answer, and the case ultimately was heard before Linda Lloyd, Director of the Office of Hearings and Appeals (OHA).

FN3. As a result of recent amendments, this exemption is now found at section 437a.1(d)(8) of the Board's regulations, 58 Pa.Code § 437a.1(d)(8). However, for purposes of clarity, the opinion will continue to refer to the original section 437a.1(c)(8).

On January 30, 2009, Director Lloyd issued a report and recommendation that the Board deny the relief requested in Rubino's petition, finding insufficient evidence to support a change to SOC 58 and noting that PIDI freely signed the SOC. However, Director Lloyd disagreed with OEC's argument that the exemption list found in the Board's regulations is all-inclusive and recommended that a licensed real estate agent or broker be included in this exemption. Rubino and OEC filed exceptions to the report and recommendation.

On September 2, 2009, the Board issued an adjudication and order rejecting the exceptions filed by both parties. The Board first addressed what it deemed to be a threshold issue, i.e., whether a licensed real estate agent or broker is included in the exemption. In its analysis, the Board agreed with Director Lloyd that the regulation's list of exempted

professionals is not all-inclusive. Nevertheless, the Board distinguished the type of professions identified in the regulation as professions that required “prolonged courses of specialized education at the collegiate level and beyond,” from “[r]eal estate agents, [which], although required to be licensed by the Pennsylvania Real Estate Commission, are not required to complete any secondary education, nor are they required to hold a college or high school diploma.” (Board op. at 4.)

The Board reviewed the licensure requirements for a real estate salesperson: an applicant must be eighteen years of age and have completed sixty hours of approved, general real estate coursework before taking and passing an examination.^{FN4} The Board also noted the requirements for a real estate broker's license: the applicant must be twenty-one years of age, must be a high school graduate, must complete 240 hours in real estate instruction, and must have been engaged as a licensed *979 real estate salesperson for at least three years.^{FN5}

FN4. Section 521 of the Real Estate Licensing and Registration Act (Real Estate Act), Act of February 19, 1980, P.L. 15, as amended, 63 P.S. § 455.521.

FN5. Section 511 of the Real Estate Act, 63 P.S. § 455.511.

Citing *Ridley Township v. Pronesti*, 431 Pa. 34, 244 A.2d 719 (1968) and *Reich v. Reading*, 3 Pa.Cmwlt. 511, 284 A.2d 315 (1971), the Board observed that the mere requirement of licensure of real estate brokers does not, itself, categorize this occupation as a profession. In *Ridley Township*, our Supreme Court held that a licensed real estate broker was not permitted to operate an office as an accessory use in a single-family dwelling. The applicable ordinance allowed accessory uses that were “customarily incidental” to a permitted use and defined the “customarily incidental” to include the *professional* office or studio of a doctor, dentist, masseur, teacher, artist, architect, musician, lawyer, magistrate or practitioner of a similar character.

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In *Reich*, this court held that the office of a licensed insurance broker was a “business office” rather than a “professional office” and, therefore, was not a permitted use in a multi-family zoning district. In doing so, we specifically held that the mere fact that an insurance broker was licensed by the state did not, of itself, categorize his occupation as a “profession.” “There are various occupations required to be licensed by the Commonwealth but which have been held not to be professions, such as real estate brokers....” *Reich*, 284 A.2d at 320 (citations omitted). Furthermore, we acknowledged in *Reich* that an exact definition of the term “profession” and “professional” was difficult, was not limited to the traditional professions of theology, medicine, and law, and included professions such as teaching, architecture, and engineering “for which considerable educational preparation and continuing study are required.” *Id.*, 284 A.2d at 320. While acknowledging the occupation of an insurance agent/broker as “important and specialized,” after consideration of the provisions of the ordinance at issue, as well as the applicable licensure requirements, we concluded that an insurance office was a business office rather than a professional office. *Id.*

The Board determined that unlike accountants, engineers, attorneys and architects, which professions require prolonged courses of specialized education at the collegiate level and beyond, real estate agents and brokers are not required to complete any secondary education and thus, real estate agents and brokers are not the type of professionals contemplated by the regulation. (Board's decision at 4, 5.) Accordingly, the Board rejected Director Lloyd's recommendation to extend the exemption to real estate agents and brokers. The Board held in abeyance the remainder of the matter, concerning SOC 58, until such time as Rubino submits certified vendor applications through PIDI and a background investigation is completed. Rubino then filed a petition for review with this Court.^{FN6}

FN6. By order dated November 2, 2009,

this Court directed the Board to issue an amended order clarifying whether its September 2, 2009, order was an interlocutory order or a final order certified pursuant to Pa. R.A.P. 341(c). The Board issued an amended order dated November 12, 2009, declaring that its September 2, 2009, order was not a final order pursuant to Pa. R.A.P. 341(c). Accordingly, this Court dismissed Rubino's petition for review by order dated December 18, 2009. Rubino filed an application for reconsideration with this Court, which was granted by order dated December 28, 2009, finding that Rubino had timely filed a petition for review under the note to Pa. R.A.P. 341(c). By subsequent order dated January 25, 2010, this Court granted the petition for review from the Board's interlocutory order and stated that it would consider the issue of whether real estate agents and brokers are exempt from Board jurisdiction by virtue of the regulatory exemption of certain “professionals” found at 58 Pa.Code § 437a.1(c)(8).

*980 On appeal, Rubino argues that the Board erred as a matter of law in concluding that real estate agents and brokers are not exempt from Board jurisdiction by virtue of the regulatory exemption of certain “professionals” found at 58 Pa.Code § 437a.1(c)(8).^{FN7} We disagree.

FN7. Our scope of review of an agency's adjudication is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704. Moreover, because Rubino raises a question of law, appellate review of the Board's order is plenary. *Tire Jockey Service, Inc. v. Department of Environmental Protec-*

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tion, 591 Pa. 73, 915 A.2d 1165 (2007).

[1] We begin by noting that a reviewing court must give considerable weight and deference to an agency's interpretation of a regulation the agency is charged with enforcing. *Bayada Nurses, Inc. v. Department of Labor and Industry*, 958 A.2d 1050 (Pa.Cmwlth.2008). Moreover, an agency's interpretation of its regulation is controlling unless the interpretation is plainly erroneous, inconsistent with the regulation or statute, or unreasonable. *Portatatin v. Department of Corrections*, 979 A.2d 944 (Pa.Cmwlth.2009).

[2] In support of his argument that real estate agents are, in fact, professionals, Rubino reiterates the licensure requirements for real estate salespersons and notes that real estate licensees must maintain a good reputation and complete fourteen hours of continuing education every two years.^{FN8} However, Rubino acknowledges our holding in *Reich* that the mere requirement of licensure does not categorize an occupation as a profession. In addition, the educational requirements were specifically considered by the Board and found to be insufficient to warrant the classification of real estate salespersons as professionals for purposes of applying section 437a.1(c)(8) of the Board's regulations. We conclude that such requirements do not compel a finding that the Board's interpretation of section 437a.1(c)(8) is plainly erroneous, inconsistent with the regulation or the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa.C.S. §§ 1101 – 1904, or unreasonable, especially in light of the Board's consideration of the “prolonged courses of specialized education at the collegiate level and beyond” for the professionals recognized in the regulation. (Board decision at 4.)

FN8. Sections 501 and 404a of the Real Estate Act, respectively. 63 P.S. §§ 455.501, 455.404a. Section 404a was added by the Act of July 9, 1990, P.L. 338.

Rubino contends that more recent decisions reflect the courts' recognition of real estate agents and

brokers as professionals. However, in support of this assertion, Rubino relies entirely upon general statements taken out of context from cases involving issues not relevant here. For example, Rubino relies on a single reference to the “profession of selling real estate” in *Younkin v. Bureau of Professional and Occupational Affairs, State Real Estate Commission*, 774 A.2d 1281 (Pa.Cmwlth.2001). The issue in *Younkin*, however, was whether a licensed auctioneer brokered a sale of real estate without being licensed to do so. There was no discussion as to whether real estate agents are, by definition, professionals. Rubino also cites *D.J. Malatesta Associates, Inc. v. Century 21 Rueter, Inc.*, 739 A.2d 1076 (Pa.Cmwlth.1999), a case involving claims against real estate brokers brought under *981 Real Estate Recovery Fund (Fund).^{FN9} A footnote in the case describes the Fund as similar to other funds that protect the public from “professional” fraud or misconduct.^{FN10} Again, this case also did not address the issue of whether real estate agents meet the definition of a professional. Rubino's reliance on *Krauss v. Claar*, 879 A.2d 302 (Pa.Super.), *appeal denied*, 586 Pa. 713, 889 A.2d 1217 (2005), is also misplaced. Therein, the court determined that Pa. R.C.P. No. 1042.1, which addresses professional liability actions, does not include real estate agents/brokers as a licensed professional subject to the rule. Rather, Pa. R.C.P. No. 1042.1 only recognizes the following as licensed professionals: health care provider, accountant, architect, chiropractor, dentist, engineer or land surveyor, nurse, optometrist, pharmacist, physical therapist, psychologist, veterinarian, and attorney at law.

FN9. The Real Estate Recovery Fund was established by the Act of February 19, 1980, P.L. 15.

FN10. Rubino also quotes a statement in *Gobao v. State Real Estate Commission*, 96 Pa.Cmwlth. 341, 507 A.2d 917 (1986), which held that the penal provisions of the Real Estate Act were not intended to cover

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a felony such as possession of controlled substances but were meant to curb the fraudulent practices that had crept into the practice of "the real estate profession."

[3] Furthermore, we note that in accordance with 4 Pa.C.S. § 1202(a)(1) of the Gaming Act, the Board has sole regulatory authority over the conduct of gaming and related activities in the Commonwealth, vesting broad discretion with the Board to administer all aspects of the gaming industry in Pennsylvania. The Board, as authorized by 4 Pa.C.S. § 1102(1), has the responsibility to protect the public by enacting regulations and policing all activities involving gaming. Additionally, the Board via 4 Pa.C.S. § 1202(b)(12), has the specific power and duty to issue, approve, renew, revoke, suspend, condition or deny issuance or renewal of slot machine licenses at its discretion. The vendor registration and certification regulation represents one effort by the Board to fulfill this responsibility. In this capacity, the Board determined that real estate agents and brokers are not the type of professional contemplated by the Board's regulations at 58 Pa.Code § 437a.1(c)(8) and are, therefore, not exempt from the Board's vendor registration and certification requirements. We conclude that the Board's interpretation of section 437a.1(c)(8) is both reasonable and consistent with the Board's statutory obligations.

Accordingly, the order of the Board is affirmed.

Judge McCULLOUGH did not participate in the decision in this case.

ORDER

Now, July 23, 2010, the order of the Pennsylvania Gaming Control Board, in the above-captioned matter, is affirmed.

Pa.Cmwlt., 2010.
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