NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4171-06T2

IN THE MATTER OF THE APPLICATION
OF N.J.S.A. 5:5-153A(1)(2) AND
B(1)(2): VINELAND CITY OFF-TRACK
WAGERING FACILITY PROCEEDS
DISTRIBUTION.

Argued: May 21, 2008 - Decided: August 15, 2008

Before Judges Cuff, Lihotz and Simonelli.

On appeal from the New Jersey Racing Commission.

Michael D. Schottland argued the cause for appellant, N.J. Thoroughbred Horsemen's Association (Lomurro, Davison, Eastman & Muñoz, P.A., attorneys; Mr. Schottland, of counsel and on the briefs; Peter V. Koenig, on the briefs).

Scott L. Carlson argued the cause for respondents FR Park Racing, LP, Atlantic City Racing Association and ACRA Turf Club, LLC (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; John M. Pellecchia, of counsel and on the brief; Kimmo Z. Hussain, on the brief).

Julie D. Barnes, Deputy Attorney General, argued the cause for the N.J. Racing Commission (Anne Milgram, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Barnes, on the brief).

PER CURIAM

In this appeal, the New Jersey Thoroughbred Horsemen's Association (THA) appeals from the March 15, 2007 order of the New Jersey Racing Commission (Commission) that prescribes the distribution of the proceeds generated by the Vineland City off-track wagering facility. The Commission ordered that 65% of the proceeds are to be distributed to benefit thoroughbred racing and 35% to benefit harness racing. Appellant THA contends that the distribution scheme adopted by the Commission is contrary to the plain language and intent of N.J.S.A. 5:5-153. It argues that 100% of the proceeds from the Vineland City off-track wagering facility should be distributed to benefit thoroughbred racing. THA also contends that the order is void because the Commission failed to provide due process to interested parties.

In 1998, voters adopted an amendment to the State Constitution to allow off-track wagering. N.J. Const., Art. 4, § 7, ¶ 2F. Legislation to implement the constitutional authorization for off-track wagering was enacted in 2001. One of the stated purposes of the Off-Track and Account Wagering Act (the Act), N.J.S.A. 5:5-127 to -160, is "to promote the economic future of the horse racing industry in this State." N.J.S.A. 5:5-128b. The Act authorizes the establishment of an off-track wagering system in this State with up to fifteen licensed off-track wagering facilities under the supervision of the New Jersey Sports and Exposition Authority. N.J.S.A. 5:5-136a. In

turn, the legislation authorizes the Commission to issue a license to the Sports and Exposition Authority to establish an account wagering system. N.J.S.A. 5:5-139. The legislation also establishes the New Jersey Racing Industry Special Fund (the Special Fund), N.J.S.A. 5:5-153, and prescribes the manner in which proceeds of the Special Fund are to be distributed between thoroughbred racing interests and harness racing interests. N.J.S.A. 5:5-153a(1)(2) and -153b(1)(2). Distribution of the Special Fund is the focus of this appeal.

Establishment of off-track wagering facilities proved to be a protracted process. A municipality in which an off-track wagering facility desires to operate retains the authority to block the facility. N.J.S.A. 5:5-131h. Thus, the first facility in Vineland City did not open until March 2007. In anticipation of the commencement of off-track wagering, an issue arose about the distribution of the proceeds generated by this first off-track wagering facility.

On January 23, 2007, the Commission wrote a letter to racing industry representatives seeking input on the interpretation of N.J.S.A. 5:5-153. It invited representatives from the THA, The Standardbred Breeders & Owners Association, and the operating race tracks in the State to a meeting on February 14, 2007. The question under consideration was whether the statutory language

> applied only to any off-track wagering facility which replaces the Atlantic City Race course? In other words, is it to be applied to any off-track wagering facility which may replace the operating Atlantic City Race course either at the existing site of the Atlantic City Race Course, or to any off-track wagering facility which may replace the operating Atlantic City Race Course in the event such a facility is located off the present site of the Atlantic City Race Course. Conversely, is this language to be applied without regard to the status of the Atlantic City Race Course? If this is the case, does it therefore come into play with the opening of the first off-track wagering facility in this State, presumably Vineland City, as that facility will be the one close[s]t to the Atlantic City Race Course? If so, and assuming the off-track wagering facility approved for Vineland City opens in March 2007 as projected, should the subject funds deposited into the special fund from that first off-track wagering facility benefit thoroughbred racing 100%? If this interpretation is adopted, what happens if a second off-track wagering facility opens which is closer to the operating Atlantic City Race Course than the Vineland City site? Are the funds derived from the Vineland city otw facility then split 65% thoroughbred and 35% standardbred, and the funds derived from the newly operating otw site, which is closer to the Atlantic City Race Course, applied 100% to the thoroughbred industry?

The Commission also sought legal advice from the Attorney General.

Due to inclement weather, the February 14 meeting did not occur, but conversations between industry representatives and Commission staff occurred before March 7, 2007. On that date,

the Commission advised racing industry representatives that it had independently resolved the issue. In the March 7, 2007 letter from Michael Vukcevich, Deputy Director of the Commission, industry representatives were advised that 65% of the proceeds generated by the Vineland City facility would be allocated to thoroughbred racing and 35% would be allocated to harness racing. The Deputy Director observed that the closure of the Atlantic City Race Course was a condition precedent to the allocation of 100% of the proceeds from the Vineland City facility to thoroughbred racing. On March 15, 2007, the Commission adopted an order reflecting this determination, and it is from this order that the THA appeals.

The THA asserts that the interpretation afforded section 153 is wrong as a matter of law. It argues that the plain language of the statute requires 100% of the proceeds from the Vineland City off-track wagering facility to be dedicated to thoroughbred racing. It contends that the Legislature did not establish a condition precedent, i.e., the closure and cessation of thoroughbred racing at the Atlantic City Race Course, before 100% of the proceeds from the Vineland City facility should be dedicated to thoroughbred racing. Rather, it asserts that when the statute was enacted in 2001 "the Atlantic City facility was, at best, a former race course." In fact, the THA claims that "[t]he curtailment of thoroughbred racing at that location had

damaged the interests of thoroughbred racing in our State." Furthermore, the Legislature redressed in section 153 the harm inflicted on thoroughbred racing interests in this State due to the demise of the Atlantic City Race Course. It also argues that the legislation authorizing off-track betting must be read in pari materia with the 2001 amendments to the legislation governing simulcasting.

The Commission counters that the interpretation of section 153 is consistent with the plain language of the statute and the legislative history. It rejects the contention that the word "former" refers to the Atlantic City Race Course in its current reduced circumstances. Rather, it contends that the word "former" means that the Atlantic City Race Course must close with no off-track wagering facility operating at that site before 100% of the Special Fund proceeds may be allocated to thoroughbred racing interests. The State agrees the 2001 off-track wagering legislation and the 2001 amendments to the simulcasting legislation are related but argues that the interpretation implemented by the Commission is entirely consistent with the legislative intent of both statutes.

The statute at issue in this appeal, N.J.S.A. 5:5-153, established the Special Fund. It is funded by money remaining in inactive or dormant off-track wagering accounts, N.J.S.A. 5:5-145; undistributed sums wagered at off-track wagering

facilities on races being transmitted to that off-track wagering facility from an in-State sending track, and sums wagered through the account wagering system on a race conducted at an in-State host track, N.J.S.A. 5:5-147; and sums wagered on races conducted at out-of-State tracks, N.J.S.A. 5:5-151. Generally, 65% of the money deposited in the Special Fund shall be disbursed to permit holders conducting thoroughbred racing and 35% to permit holders[1] conducting harness racing. N.J.S.A. 5:5-153a(2) and b(2). One hundred percent of the money deposited in the Special Fund shall be distributed to permit holders conducting thoroughbred racing "in the case of money deposited into the special fund from the off-track wagering facility located on the former site of the Atlantic City Race Course, or, if no off-track wagering facility exists on that former site, the off-track wagering facility located closest to that former site." N.J.S.A. 5:5-153a(1) and b(2).

The specific language in dispute provides as follows:

> Money deposited in this special fund shall be disbursed monthly by the commission and used as follows:
>
> a. 92% shall be distributed as follows:

[1] A "permit holder" is "the holder of an annual permit to conduct a horse race meeting" issued by the Commission. N.J.S.A. 5:5-129.

(1) in the case of money deposited into the special fund from the off-track wagering facility located on the former site of the Atlantic City Race Course, or, if no off-track wagering facility exists on that former site, the off-track wagering facility located closest to that former site, 100% to permit holders conducting thoroughbred racing;

(2) except as provided in paragraph (1), 65% to permit holders conducting thoroughbred racing and 35% to permit holders conducting harness racing;

. . . .

b. 8% shall be distributed as follows:

(1) in the case of money deposited into the special fund from the off-track wagering facility located on the former site of the Atlantic City Race Course, or, if not off-track wagering facility exists on that former site, the off-track wagering facility located closest to that former site, 100% to thoroughbred funds; and

(2) except as provided in paragraph (1), 65% to thoroughbred funds and 35% to harness funds.

[N.J.S.A. 5:5-153 (emphasis added).]

The issue is whether the term "former site of" contemplates the closure of the Atlantic City Race Course and the failure to operate an off-track wagering facility on the site of the Atlantic City Race Course.

It is undisputed that the Atlantic City Race Course had been allotted ten race days for the 2001 season.[2] It is undisputed that this allocation is substantially less than the days allocated to the Meadowlands and Monmouth Park, both of which conduct thoroughbred race meets. It is undisputed that the Atlantic City Race Course operates a simulcasting facility, as does the Meadowlands and Monmouth Park. The THA acknowledged at oral argument that the Atlantic City Race Course had just been sold at the time the Act was enacted. Finally, it is undisputed that the facility in Vineland City was the first off-track wagering facility to open, and by necessity is the closest facility to the site of the Atlantic City Race Course. Thus, the meaning of the term "former site" determines whether 100% of the money deposited from the Vineland City facility and the other designated thoroughbred funds goes to the Meadowlands and Monmouth Park as the two permit holders that conduct thoroughbred race meets.

The Supreme Court directs that the best indicator of the intent of the Legislature is the language used in the statute. The Court has stated this principle as follows:

> The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent

[2] For the 2008 season, the Atlantic City Race Course was allotted six days of live racing.

> is the statutory language. We ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole. It is not the function of this Court to rewrite a plainly-written enactment of the Legislature or presume that the Legislature intended something other than that expressed by way of the plain language. We cannot write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment, or engage in conjecture or surmise which will circumvent the plain meaning of the act. Our duty is to construe and apply the statute as enacted.
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> [Fitzgerald v. Coddington Stables, 186 N.J. 21, 31 (2006) (quoting DiProspero v. Penn, 183 N.J. 477, 492-93 (2005)).]

We note that the term "former" connotes something that no longer exists. Merriam Webster's Collegiate Dictionary (Tenth Edition) defines "former" as "1 a: coming before in time [or] b: of, relating to, or occurring in the past." The primary meaning of the term selected by the Legislature suggests closure rather than reduced or changed circumstances as urged by the THA.

The various statements accompanying the statute as it made its way through the Legislature also indicate that the Legislature anticipated the demise of the Atlantic City Race Course. The Senate Economic Growth, Agriculture and Tourism Committe Statement to the second reprint of A-3315 dated June 25, 2001, provides that

> of the money in the New Jersey Racing Industry Special Fund, 65% will be disbursed

> to permit holders conducting thoroughbred racing for purses and thoroughbred programs and 35% will be disbursed to permit holders conducting standardbred racing for purses and standardbred programs, except that of the money deposited into the New Jersey Racing Industry Special Fund from the off-track wagering facility located on or closest to the former site of the Atlantic City Race Course, 100% will be disbursed to permit holders conducting thoroughbred racing. (emphasis added.)

Accord Assembly Commerce, Tourism, Gaming and Military and Veterans' Affairs Committee, Statement to A. 3315, with Assembly committee amendments (May 17, 2001). These statements strongly suggest that closure of the Atlantic City Race Course was considered whether imminent or a strong probability.

In addition, other legislation pending before the Legislature at the same time as the off-track wagering legislation recognized that the Atlantic City Race Course was still an active permit holder, albeit in reduced circumstances. In 2001, the Legislature adopted amendments to the statute authorizing and governing casino simulcasting. Effective August 5, 2001, a permit holder who desires to conduct casino simulcasting shall request approval to do so from the Commission in its annual application for horse race meeting dates. N.J.S.A. 5:12-195. In the case of running races, "Monmouth Racetrack shall conduct at least the same number of live racing programs conducted in 1991 and each of the other permit holders

conducting running races shall conduct at least five live racing programs." N.J.S.A. 5:12-195b. All parties agree that the intent of this section was the hope that the Atlantic City Race Course and the Meadowlands would meet the minimum number of live racing programs in order to allow those tracks to resume casino simulcasting of thoroughbred races and thereby generate revenue to the thoroughbred horsemen. As noted in the Assembly Commerce, Tourism, Gaming and Military and Veterans' Affairs Committee Statement:

> Because [under the percentage system, Garden State Racetrack, the Meadowlands and Atlantic City Race Course] are not eligible to participate in casino simulcasting of thoroughbred races, the thoroughbred horsemen, already hurt by the decline in race dates, are further harmed by not receiving a share of casino simulcasting revenue. The purpose of [establishing a new] lower minimum requirement is to allow these tracks to resume casino simulcasting of thoroughbred races so that the thoroughbred horsemen may share in casino simulcasting revenue.
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> [Assembly Commerce, Tourism, Gaming and Military and Veterans' Affairs Committee, Statement to A. 2598, with Assembly committee amendments (May 17, 2001), L. 2001, c. 198, contained at N.J.S.A. 5:5-63.2.]

This statement and the resulting amendment is pertinent to the issue in this appeal because this 2001 amendment not only recognizes the demise of Garden State Racetrack but also the reduced operational circumstances of the Atlantic City Race

Course. The five-day live racing program requirement is consistent with the racing date allocation for Atlantic City Race Course at that time. In short, the Legislature acknowledged that the Atlantic City Race Course remained a permit holder. When the off-track wagering provision of N.J.S.A. 5:5-153 is read in conjunction with the 2001 casino simulcasting amendments, we discern that in addressing off-track wagering, the Legislature was mindful of the reduced operational status of the Atlantic City Race Course and sought to plan or account for the possible complete cessation of all wagering at that site. Furthermore, the Legislature could have provided in clear and unambiguous language that 100% of the funds deposited in the Special Fund from the off-track wagering site closest to Atlantic City Race Course should be distributed to thoroughbred racing interests, if that was its purpose and intent. It did not do so.

The record reflects that the Atlantic City Race Course remains open. It is a permit holder and conducts a six-day live thoroughbred meet. It operates a simulcast wagering facility for both in-State and out-of-State racing year round. The proceeds generated by these activities benefit the thoroughbred industry and thoroughbred horsemen's groups. N.J.S.A. 5:5-126. Its contribution to the welfare of thoroughbred racing in this

State may be reduced, but it remains a licensed permit holder in this State.

We hold that N.J.S.A. 5:5-153a(1) and b(1) establish a condition precedent to distribution of 100% of the funds deposited in the Special Fund to thoroughbred interests and that condition precedent, the closure of the Atlantic City Race Course, has not occurred. Therefore, we affirm the March 15, 2007 Commission order governing distribution of the proceeds from the Special Fund derived from the Vineland City off-track wagering facility.

We also reject the contention that the THA was entitled to a hearing prior to the determination of the Commission and that the decision violates due process. No facts were in issue. N.J.S.A. 5:5-153 contains a formula for distribution of a fund. The statute does not vest any discretion in the Commission; it does not prescribe any standards for the exercise of any discretion. The issue before the Commission was purely a legal issue. The Commission had no obligation to seek input from the various interests that are subject to regulation by it.

Affirmed.