

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT M. McCORD, in his	:	
official capacity as the Treasurer of the	:	
Commonwealth of Pennsylvania,	:	
 Petitioner	:	
	:	No. 446 M.D. 2010
v.	:	
	:	
THE PENNSYLVANIA GAMING	:	
CONTROL BOARD,	:	
 Respondent	:	

**APPLICATION FOR SPECIAL RELIEF
IN THE NATURE OF A REQUEST FOR EXPEDITED CONSIDERATION**

Pursuant to Pa.R.App.P 123 and 1532(a), Pennsylvania Treasurer Robert M. McCord, by and through his undersigned counsel, hereby files this Application for Special Relief in the Nature of a Request for Expedited Consideration of the separately filed Application for Special Relief in the Nature of a Preliminary Injunction. Treasurer McCord seeks an order enjoining the Chairman and members of Pennsylvania Gaming Control Board from taking any action to prohibit, impede, discourage, or otherwise prevent the Treasurer or his designee from participating as fully, as any other Board member, with the exception of voting, in order to enable his unfettered participation and informed involvement at the Board's scheduled executive session and public session scheduled to occur no later than Wednesday, January 26, 2011.

In support thereof, the Treasurer avers the following:

1. On May 11, 2010, Treasurer Robert M. McCord, in his official capacity, initiated the above captioned matter by filing a Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief concerning his legal authority and right, pursuant to the Pennsylvania Race Horse Development and Gaming Act (hereinafter, “the Gaming Act”), to fully participate as a non-voting member of the Pennsylvania Gaming Control Board (hereinafter “the Board”).

2. In response, the Board, without objection from the Treasurer, filed a request with this Court seeking a twenty-five (25) day extension of the period in which to file responsive pleadings.

3. On June 10, 2010, this Court granted the Board’s request for an extension of time in which to file responsive pleadings – until July 6, 2010.

4. On July 6, 2010, the Board filed Preliminary Objections to the Treasurer’s Petition for Review, asserting, among several things, that neither the Treasurer nor his designee was permitted “to participate in executive sessions of the Board.” *See*, Preliminary Objections of the Board at 9, ¶ 48. The Board’s Preliminary Objections included objections on standing, ripeness, and jurisdiction.

5. The Board filed a Brief in Support of Preliminary Objections to Petition for Review on August 5, 2010. The Board argued that: the State Sunshine Act prevented the Treasurer and his designee from participating in the Board’s executive sessions; the Gaming Act creates two classes of Board members of which only voting members may participate in Board deliberations; and, allowing an elected official who accepts

campaign contributions to participate in Board proceedings would create an appearance of impropriety.

6. The Treasurer filed a Brief in Opposition to Preliminary Objections on September 3, 2010, arguing that: 1201(e) of the Gaming Act clearly states that the Treasurer is a non-voting ex officio member of the Board, and is therefore afforded all the rights and privileges of every other Board member, absent a vote; the Sunshine Act does not restrict member participation in executive deliberations; and, that the receipt of lawful campaign contributions by the Treasurer does not create the appearance of impropriety.

7. On September 8, 2010, the Board filed a request with this Court to seek “permission of the court to file a reply brief” which was granted per curium on September 10, 2010.

8. The Board filed a Reply Brief in Support of Preliminary Objections to Petition for Review on September 13, 2010, simply restating the Board’s position.

9. *En Banc* oral arguments before this Court were held on September 16, 2010.

10. On December 10, 2010, this Court, without dissent, overruled the Board’s Preliminary Objections. *McCord v. Pennsylvania Gaming Control Board*, 446 M.D. 2010 slip op. at 3 (Pa. Cmwlth. Ct., December 10, 2010); Attachment 1.

11. This Court acknowledged that: “1201(e) clearly provides that the Treasurer or his designee shall serve on the Board as a non-voting ex officio member of the Board.” (Emphasis added) *McCord* at 3. Further, this Court noted that the Sunshine Act does not limit the executive sessions only to voting members. In fact, this Court

observed that “the legal right to vote as a member of the Board is of no consequence with respect to participation in an executive session.” (Emphasis added); *McCord* at 4. This

Court explained:

[C]oncerning the appearance of impropriety, the court notes that the Treasurer is a Commonwealth official acting on behalf of the Commonwealth, not on behalf of gaming companies, their principal investors or other interested parties. We do not see how the involvement of the Treasurer pursuant to statute creates any appearance of impropriety. *Id.*

Expedited Consideration

12. The Treasurer is seeking an expedited consideration of the contemporaneously filed Application for Special Relief in the Nature of Preliminary Injunction so that he may be able to attend and informatively participate in the next scheduled executive and public sessions of the Board. *See*, Attachment 2.

13. Since this Court’s decision rejecting the Board’s preliminary objections on December 10, 2010, the Board has conducted two executive and public sessions without the participation of the Treasurer.

14. These sessions involved matters of significant public policy importance, including without limitation; the revocation of a Category 2 gaming license within the City of Philadelphia; the consideration of the PA Horsemen’s Benevolent and Protective Association’s Trainer’s Retirement Plan; and, the issuance of Principal and Key Employee Licenses.

15. The Board has publically listed a public session for Wednesday, January 26, 2011. www.pgcb.state.pa.us.

16. Further action by the Board to delay or otherwise impede the Treasurer's or his designee's involvement in Board proceedings will deprive Treasurer of his clear statutory right to access confidential licensing information; participate in executive and public Board deliberations; and, deprive the public of their right to ensure their elected representative is able to represent their interests on the Board.

17. This is a matter of significant public importance as it pertains to the ability of the Treasurer to perform his fiduciary responsibilities, including being an informed and active participant in public and executive sessions of the Board pursuant Section 1201(e) of the Gaming Act on behalf of the public. As this Court has determined, "the Treasurer has a substantial, direct and immediate interest in the outcome of this litigation." *McCord* at 5.

18. During the pendency of this matter, the Board has conducted eleven (11) public Board meetings and an undetermined number of corresponding executive sessions since May 11, 2010. In addition, the Board has scheduled four (4) public meetings in 2011, not accounting for any additional hearings or special meetings of the Board.

19. Despite this Court's clear statement that the Gaming Act "clearly provides" that the Treasurer and his designee shall serve on the Board, the Board has continued its refusal to formally acknowledge that Treasurer McCord is a statutorily identified non-voting *ex officio* member of the Board who is entitled to actively participate in all Board proceedings, public and private, as an equally informed member of the Board, except the right to cast a vote.

20. Currently pending before the Board are various gaming related matters of significant public importance – such as the resolution of competing applications for a

Category III resort-style license; an assessment of the appellate implications of the Board's adoption of the recommendation of the Office of Enforcement Counsel to revoke the gaming license of Philadelphia Entertainment and Development Partners, LP; the licensing of key gaming employees; the adoption of temporary regulations related to the implementation of table gaming, including the collection and accounting of state revenue; and, the establishment and imposition of certain tax rates applicable to electronic table games.

21. Without an expedited resolution of this matter, the Board will be permitted to continue its determined effort to exclude the Treasurer and his designee from Board proceedings and deliberations including executive sessions. As a consequence, the Board is prohibiting the Treasurer and his designee from participating in public deliberations as a fully informed member. To state more clearly, without an immediate resolution of the matter, the Board will be able to perpetuate its segregated treatment of *ex officio* members of the Board in a manner that creates two classes of membership – one class that has access to confidential information and deliberations and one class that is kept in the dark.

22. Without an expedited resolution of this matter permitting the Treasurer and his designee to attend and participate in executive sessions of the Board, the Board will continue its unfettered use of executive sessions to avoid public scrutiny and oversight of its actions and decisions.

23. This is not a hypothetical concern. For example, according to a recent Special Performance Audit conducted by the Pennsylvania Auditor General, the Board has continued its misuse of executive sessions in order to approve over \$8.7 million of

professional service contracts outside of the public eye.¹ Section 708 of the Sunshine Act is clear no official action, such as the adoption of contracts, is to take place outside of the public. *See, Sovich v. Shaughnessy*, 705 A.2d 942, 946 (Pa. Cmwlth. 1998) (citing *Lawrence County v. Brenner*, 135 Pa. Commw. 619, 582 A.2d 79 (1990)).

24. As this Court has foreseen, if the Chairman and the members of the Board were enjoined:

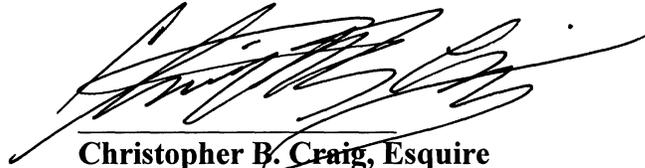
. . . from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from participating, the Treasurer will be able to exercise the statutory right by participating as fully as any other member of the Board, with the exception of voting. *McCord* at 6-7.

25. Continuation of the Board's tactic to delay and obstruct the involvement and participation of the Treasurer and his designee in gaming matters is contrary to Section 1201(e) of the Gaming Act - designating the Treasurer as a non-voting member of the Board, and the public interest. Unless this Court acts in an expeditious manner, the Treasurer will continue to be deprived of his statutory seat on the Board, sharing all the rights and privileges of appointed Board members, absent a vote, as the General Assembly intended. More importantly, the Board will be allowed to continue to determine its own membership despite the provisions of Section 1201 of the Gaming Act.

¹ The Pennsylvania Auditor General found, in part, that “[t]he Gaming Board did not comply with the Sunshine in at least 19 cases by not meeting openly to award contracts worth \$8.7 million for legal and other professional expenses.” *See*, Pennsylvania Department of Auditor General, “The Pennsylvania Gaming Control Board, A Special Performance Audit” at 5 (December 2010).

WHEREFORE, it is respectfully requested that this Honorable Court grant Expedited Consideration of the Treasurer's Application for Special Relief in the Nature of a Preliminary Injunction, and grant such other relief as may be consistent.

Respectfully submitted,



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January 5, 2011

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT M. McCORD, in his :
official capacity as the Treasurer of the :
Commonwealth of Pennsylvania, :
Petitioner :
 : **No. 446 M.D. 2010**
v. :
 :
THE PENNSYLVANIA GAMING :
CONTROL BOARD, :
Respondent :

PROPOSED ORDER

AND NOW, this ____ day of _____, 2011, it is ORDERED that
Petitioner's Application for Expedited Consideration is GRANTED.

J.

On May 11, 2010, the Treasurer filed his petition for review seeking to have this court declare, as a matter of law, that the Treasurer, or his designee, has the statutory right to fully participate in all public and executive sessions of the Board as a non-voting member of the Board. Further, the Treasurer asks this court to enjoin the Board from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from fully participating in public and executive sessions of the Board.

On July 6, 2010, the Board filed preliminary objections to the petition for review in the nature of a demurrer and on the basis of lack of standing and ripeness, and seeks this court's exercise of discretion to decline jurisdiction under the Declaratory Judgments Act.² The preliminary objections are currently before the court.³

While the Sunshine Act⁴ generally states that meetings of Commonwealth agencies are to be open to the public, Section 707 of the Sunshine

² 42 Pa. C.S. §§ 7531-7541.

³ Preliminary objections to an original jurisdiction petition for review are permissible under Pa. R.A.P. 1516(b). Our review of matters before this court on preliminary objections is limited to the pleadings. *Pennsylvania State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res.*, 909 A.2d 413 (Pa. Cmwlth. 2006), *aff'd*, 592 Pa. 304, 924 A.2d 1203 (2007).

[This court is] required to accept as true the well-pled averments set forth in the [petition for review], and all inferences reasonably deducible therefrom. Moreover, the court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.

Id. at 415-16 (citations omitted).

⁴ 65 Pa. C.S. §§ 701-716.

Act, 65 Pa. C.S. § 707, provides that, as an exception to the general rule, agencies may hold executive sessions which are not open to the public. Executive sessions give agency board members opportunity to privately discuss confidential matters such as personnel actions, business and legal strategy or negotiations, and consultations with legal advisors, and the like. *See* 65 Pa. C.S. §§ 703, 707(a), 708(a). The Board argues that the Treasurer is not a member of the Board who may participate in an executive session, and that the Treasurer is not authorized to act on the purposes for which an executive session may be held under Section 708 of the Sunshine Act. 65 Pa. C.S. § 708. The Board further contends that the participation of the Treasurer or his designee in executive sessions would taint the Board with the appearance of corruption, erode public confidence in the oversight of gaming, disrupt the intended structure of the Board, threaten the quasi-judicial function of the Board, and may result in the divulgence of confidential information, as well as the waiver of the Board's attorney-client privilege.

Notwithstanding the Board's concerns, Section 1201(e) of the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa. C.S. § 1201(e), clearly provides that the Treasurer or his designee shall serve on the Board as a non-voting *ex officio* member of the Board. The Board notes, however, that Section 1103 of the Gaming Act, 4 Pa. C.S. § 1103, defines a "member" of the Board as being only the voting members designated under Section 1201(b) of the Gaming Act.⁵ With that, the Board argues that neither the Treasurer, nor his

⁵ The voting membership of the Board consists of: (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, and (iv) The Minority Leader of the House of Representatives. 4 Pa. C.S. § 1201(b).

designee, is entitled to fully participate in executive sessions because they are not voting members of the Board. The Sunshine Act, however, does not limit executive sessions to “voting members.” Further, Section 708 of the Sunshine Act limits the function of an executive session such that no official action takes place behind closed doors. Thus, the legal right to vote as a member of the Board is of no consequence with respect to participation in an executive session.

Moreover, concerning the appearance of impropriety, the court notes that the Treasurer is a Commonwealth official acting on behalf of the Commonwealth, not on the behalf of gaming companies, their principal investors or other interested parties. We do not see how the involvement of the Treasurer pursuant to statute creates any appearance of impropriety.

“For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party by refusing to sustain the objections.” *Smith v. Pa. Emps. Benefit Trust Fund*, 894 A.2d 874, 881 (Pa. Cmwlth. 2006). Here, despite the Board’s concerns or reservations, the General Assembly has spoken with respect to the Treasurer’s serving as an *ex officio* member of the Board. It cannot be said with any certainty that under the statutory scheme at issue, the Treasurer is not a member of the Board who may participate in an executive session. In fact, it appears that the opposite may be true. Accordingly, preliminary objections based on the Board’s statutory interpretation cannot be sustained.⁶

⁶ The Board also objects to the portion of the Treasurer’s petition which requests that this court ensure his ability to fully participate in the Board’s public meetings. The Treasurer has pled that, among other things, his designees have been discouraged from fully participating in public meetings, and that a member of the Board asserted that the Treasurer or his designees are limited in their participation to the scope of their official agency duties.

(Footnote continued on next page...)

Next, the Board argues that the Treasurer does not have standing to bring the petition for review. We disagree.

The core concept of standing is that ‘a party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus, has no right to obtain judicial resolution of his challenge.’ A litigant is aggrieved when he can show a substantial, direct, and immediate interest in the outcome of the litigation. A litigant possesses a substantial interest if there is a discernible adverse effect to an interest other than that of the general citizenry. It is direct if there is harm to that interest. It is immediate if it is not a remote consequence of a judgment.

In re Milton Hershey Sch., 590 Pa. 35, 42, 911 A.2d 1258, 1261-62 (2006) (citations omitted).

Simply on the basis that the Board seeks to preclude the Treasurer from participating in deliberative sessions, the Treasurer has a substantial, direct and immediate interest in the outcome of the litigation. If this court does not grant the relief sought by the Treasurer, it appears that he will not be permitted to participate in deliberative sessions. Accordingly, we hold that the Treasurer does have standing to bring the petition for review in this matter.

The Board further argues that the Treasurer is barred by the doctrine of ripeness from bringing the petition for review. We disagree.

If differences between the parties concerned, as to their legal rights, have reached the state of antagonistic claims, which are being actively pressed on one side and opposed

(continued...)

In the extensive briefing of this case, as well as at oral argument, this aspect of the case has received very little attention, and there is a need for more factual development before this court can make a judgment on this claim. In light of the disposition of the rest of the case, and because it is not certain that the law will permit no recovery on this aspect of the claim, we overrule the objections to this aspect of the petition.

on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.

Mid-Centre Cnty. Auth. v. Boggs Twp., 384 A.2d 1008, 1011 (Pa. Cmwlth. 1978) [quoting *Lakeland Joint Sch. Dist. Auth. v. Scott Twp. Sch. Dist.*, 414 Pa. 451, 456-57, 200 A.2d 748, 751 (1964)]. Here, there is clearly a present controversy over whether the Treasurer or his designee may attend and participate in executive sessions. Accordingly, this controversy is ripe for review.

Next, the Board argues that this court should exercise its discretion under the Declaratory Judgments Act to decline jurisdiction over the petition for review. We disagree.

Under the Declaratory Judgments Act: “The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding” 42 Pa. C.S. § 7537. As the Treasurer has standing to bring the petition for review, and the matter is ripe, this court concludes that a decree rendered by this court would terminate the uncertainty and controversy giving rise to this proceeding. Accordingly, we will not decline jurisdiction.

Finally, the Board argues that this court should refuse to enter a declaratory judgment where the relief in question would not resolve how the Treasurer may “fully participate” in such meetings. We disagree. If this court confirms that the Treasurer has a statutory right to fully participate in all public and executive sessions of the Board as a non-voting member, and enjoins the chairman and members of the Board from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from participating, the Treasurer

will be able to exercise the statutory right by participating as fully as any other member of the Board, with the exception of voting. Clearly then, granting the relief requested would, in fact, resolve the present controversy.

For all of the above reasons, the Board's preliminary objections are overruled.

BONNIE BRIGANCE LEADBETTER,
President Judge

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT M. McCORD, in his :
official capacity as the Treasurer of the :
Commonwealth of Pennsylvania, :
Petitioner :
 : **No. 466 M.D. 2010**
v. :
 :
THE PENNSYLVANIA GAMING :
CONTROL BOARD, :
Respondent :

**APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A
PRELIMINARY INJUNCTION**

Pursuant to Pa.R.App.P. 123 and 1532(a), Pennsylvania Treasurer Robert M. McCord, by and through his undersigned counsel, hereby files this Application for Special Relief in the Nature of a Preliminary Injunction, requesting that this Honorable Court issue an order -- (1) immediately enjoining the Respondent Pennsylvania Gaming Control Board ("Board") from taking any action preventing or otherwise inhibiting the Treasurer or his designee from attending and participating in all sessions and deliberations of the Board (public and private), beginning no later than its public session on Wednesday, January 26, 2011; and, (2) immediately, upon the execution by the Treasurer of an appropriate confidentiality agreement, provide to the Treasurer all confidential or proprietary information relevant to deliberations of the Board. In support thereof, the Treasurer avers the following:

Statement of Facts

1. On May 11, 2010, Treasurer Robert M. McCord, in his official capacity, initiated the above captioned matter by filing a Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief concerning his legal authority and right pursuant to the Pennsylvania Race Horse Development and Gaming Act (hereinafter, “the Gaming Act”), to fully participate as a non-voting member of the Pennsylvania Gaming Control Board (hereinafter “the Board”) in public and executive sessions and deliberations.

2. In response, the Board, without objection from the Treasurer, filed a request with this Court seeking a twenty-five (25) day extension of the period in which to file responsive pleadings.

3. On June 10, 2010, this Court granted the Board’s request for an extension of time in which to file responsive pleadings – until July 6, 2010.

4. On July 6, 2010, in lieu of filing an Answer to the Petition, the Board filed Preliminary Objections to the Treasurer’s Petition for Review, asserting, among several things, that neither the Treasurer nor his designee was permitted “to participate in executive sessions of the Board.” *See*, Preliminary Objections of the Board at 9, ¶ 48.

5. The Gaming Board’s Preliminary Objections did not raise any new matter or contest any of the underlying facts pled in the Petition for Review. Accordingly, as a matter of law, there are no issues of fact which would otherwise prevent an immediate resolution of the underlying question of law.

6. On September 3, 2010, Treasurer McCord filed a Brief in Opposition to Preliminary Objections.

7. In response, the Board filed a request with this Court to seek permission to submit a Reply Brief. The Board's request was granted by this Court on September 10, 2010.

8. On September 13, 2010, the Board filed a Reply Brief in Support of Preliminary Objections.

9. On September 16, 2010, this Court, sitting *en banc*, conducted Oral Arguments on the Board's Preliminary Objections.

10. On December 10, 2010, this Court, without dissent, issued an Order overruling the Board's Preliminary Objections and directing that an Answer to the Petition for Review be filed within thirty (30) days. *See, McCord v. Pennsylvania Gaming Control Board*, 446 M.D. 2010 slip op. (Pa. Cmwlth. Ct., December 10, 2010); Attachment 1.

11. In support of its Order, President Judge Leadbetter, writing for this Court, addressed the threshold question in the matter and determined, that as a matter of law:

Notwithstanding the Board's concerns, Section 1201(e) of the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa.C.S. § 1201(e), clearly provides that the Treasurer or his designee shall serve on the Board as a non-voting member of the Board. (Emphasis added) *Id* at 3.

12. The Board's primary argument in support of its exclusion of the Treasurer and his designees was rejected by this Court, ruling that the Sunshine Act does not limit executive sessions only to voting members. In fact, the Court stated that, "the legal right to vote as a member of the Board is of no consequence with respect to participation in an executive session." (Emphasis added); *Id* at 4. As this Court explained:

[C]oncerning the appearance of impropriety, the court notes that the Treasurer is a Commonwealth official acting on behalf of the Commonwealth, not on behalf of gaming companies, their principal investors or other interested parties. We do not see how the involvement of the Treasurer pursuant to statute creates an appearance of impropriety. *Id.*

13. Immediately following the release of this Court's Opinion overruling the Board's Preliminary Objections, the Treasurer sought the Board's cooperation to permit his and his designee's immediate attendance and participation in Board executive sessions in a manner consistent with this Court's opinion.

14. However, ignoring this Court's clear acknowledgement of the Treasurer's and his designee's legal authority pursuant to the Gaming Act to serve on the Board, the Board has continued its obstruction of the Treasurer's efforts to attend and actively participate in Board matters, including executive session, as an equally informed member.

15. Since December 10, 2010, the Board has conducted two public and executive sessions without the fully informed participation of the Treasurer or his designee and without permitting them access to relevant confidential information.

16. In doing so, the Board has attempted to impose extra-statutory requirements upon the Treasurer as a precondition to his participation in executive sessions or receipt of confidential information, including: (a) prohibiting the Treasurer's designee from attending executive sessions involving any quasi-judicial deliberation; (b) limiting the Treasurer to appoint only one designee – without the right to change or substitute as circumstances warrant; and, (c) requiring the Treasurer to sign a sworn statement swearing he has not received any campaign contributions from lobbying or law

firms that may represent a party before the Board and attest that he has not engaged in any *ex parte* conversations prior to attending any executive deliberation.

17. These preconditions are without legal support and are contrary to this Court's Opinion. Consequently, a preliminary injunction is necessary or the Board will continue to impose unreasonable and unlawful restrictions on the Treasurer's statutory right to sit on the Board. Additionally, the Gaming Act clearly permits the Treasurer to appoint a designee "who shall serve as a member of the Board." 4 Pa.C.S.A. § 1201(e). Neither the Gaming Act nor this Court provides to the Board the legal right to exclude the Treasurer's statutorily authorized designee from an executive session. Furthermore there is no legal support for the Board's attempt to restrict the ability of the Treasurer to appoint an alternate designee when that designee is unable to attend a Board session.¹

18. The Board also attempts to impose the unprecedented requirement that the Treasurer (who cannot cast a vote) must sign a sworn statement, attesting that he has not received any campaign contributions (at any time) from a lobbying or law firm that may represent a party or that he has not engaged in an *ex parte* conversation. No judge, legislator or administrative officer is required to sign a similar statement prior to participating in a deliberative proceeding.

19. Significantly, the Board seeks to impose these conditions solely upon the non-voting members of the Board. Yet it was the former Chairman of the Board and another voting member who were accused of violating the Board's *ex parte* prohibition when considering a change in ownership of the Pittsburgh slots license. See, Toland and

¹ Voting members of the Board serve in no other public capacity – this is their sole position. The annual salary for their service to the Board is between \$145,000 and \$150,000. By contrast, the Treasurer alone serves on sixteen (16) different boards and commissions. As a result, the General Assembly recognized that scheduling conflicts occur, placing a greater need for reliance on a designee to represent the Treasurer's interest on the Board. 4 Pa.C.S.A. § 1201(e).

Barnes, “Those not in on Barden discussions criticize deal,” *Pittsburgh Post-Gazette* (July 18, 2008); Editorial “The slots saga; What’s to hide?” *Philadelphia Inquirer* (August 4, 2008); *See* Attachment 2.

20. The Board’s continued attempt to construct new hurdles (without cause or need) to prevent the Treasurer and his designee from attending and participating, as an equally informed Board member, in executive deliberations may be reasonably construed as a deliberative ploy to avoid public scrutiny, oversight of its liberal use of executive sessions and prevent outside review and questioning of the Board’s decisions.

21. This is not a hypothetical concern. For example, according to a recent Special Performance Audit conducted by the Pennsylvania Auditor General, the Board has misused executive sessions in order to approve over \$8.7 million of professional service contracts outside of the public eye.² Section 708 of the Sunshine Act provides that no official action, such as the adoption of contracts, is to take place outside of the public. *See, e.g., Sovich v. Shaughnessy*, 705 A.2d 942, 946 (Pa. Cmwlth. 1998) (citing *Lawrence County v. Brenner*, 135 Pa. Cmwlth. 619, 582 A.2d 79 (1990)).

22. The Board’s actions continue to frustrate attempts by the Treasurer to effectively participate in public and private deliberations of the Board in considering matters of significant public importance. Based on this Court’s recent decision, the Board’s actions are without legal support or justification.

23. Contemporaneous with this Application for Special Relief, Treasurer McCord has filed an Application for Expedited Consideration – seeking quick resolution

² The Pennsylvania Auditor General found, in part, that “[t]he Gaming Board did not comply with the Sunshine in at least 19 cases by not meeting openly to award contracts worth \$8.7 million for legal and other professional expenses.” *See*, Pennsylvania Department of Auditor General, “The Pennsylvania Gaming Control Board, A Special Performance Audit” at 5 (December 2010).

of this request for injunctive relief in order to permit his attendance at scheduled executive and public sessions of the Board, occurring no later than January 26, 2011.

Standard for Grant of Special Relief in the Nature of Preliminary Injunction

24. The test for granting preliminary injunctive relief under Rule 1532(a) of the Appellate Rules is the same as that for the grant of a preliminary injunction under the Rules of Civil Procedure. *Pappert v. Coy*, 860 A.2d 1201, 1205 (Pa. Cmwlth. 2004). Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See*, Pa.R.App.P. 1532(a).

25. The prerequisites for preliminary injunctive relief are: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by damages; (2) greater injury will result by not granting the relief; (3) preliminary injunction will restore the parties to their status prior to the wrongful conduct; (4) the Petitioner is likely to succeed on the merits; (5) the injunction will abate the offending action; and, (6) the preliminary injunction will not adversely affect the public interest. *Free Speech LLC v. Philadelphia*, 884 A.2d 966, 970 (Pa. Cmwlth 2005); Pa.R.Civ.P. 1531.

26. As applied to this matter, granting of the injunction is necessary to ensure the ability of the Treasurer, who, as has been determined by this Court, “shall serve on the Board,” to attend and participate in scheduled public and executive sessions of the Board. As this Court has recognized, “[i]f this court does not grant the relief sought by the Treasurer, it appears that he will not be permitted to participate in deliberative sessions.” *McCord* at 5. The Board has scheduled a public meeting to be held on

Wednesday, January 26, 2011. Among various public policy matters related to the implementation and oversight of gaming activities, the Board may consider additional gaming licensing matters, including the issuance of a Category 3 resort license; the adoption of temporary administrative regulations, and the licensing of principal and key employees. Any action by the Board to limit, impede, discourage or otherwise prevent the Treasurer and his designee from attending and participating in public and private deliberations, as an equally informed member, concerning these matters pending before the Board would irreparably undermine the ability of the Treasurer, as a public official, to fulfill his fiduciary duty as a member of the Board to consider such matters and act on behalf of the public interest.

27. The Board is unable to claim any injury that would result by permitting the Treasurer or his designee from attending and participating in public and executive sessions of the Board. In fact, granting injunctive relief will likely benefit the Board and the general public by ensuring the ability of the Treasurer to share his perspective as the chief financial officer of the Commonwealth. The Board's primary objection, that the attendance and involvement of Treasurer McCord and his designee in executive sessions of the Board would create an appearance of impropriety, has been rejected by this Court without dissent. As this Court explicitly stated, "we do not see how the involvement of the Treasurer pursuant to statute creates any appearance of impropriety." *McCord* at 4.

28. Treasurer McCord has made several representations to both the Board and to this Court of his willingness to execute appropriate confidentiality agreements consistent with the directives of the Gaming Act prior to his receipt of confidential information and his or his designee's attendance and participation of Board proceedings.

29. Granting injunctive relief would restore the rights of the parties to a status consistent with the provisions of the Gaming Act. As a statutorily designated non-voting member of the Board pursuant to Section 1201(e) of the Gaming Act, the Treasurer and his designee are entitled, as a matter of state law, to attend and participate (with the sole exception of voting) in all public and private sessions and deliberations of the Board. The Treasurer seeks simply to enjoin the Chairman and members of the Board from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from participating -- thus enabling the Treasurer to exercise all rights and privileges accorded to all other members of the Board – with the exception of voting.

30. The Treasurer’s ultimate success on the merits is likely in light of this Court’s decision overruling the Board’s preliminary objections. Writing for the Court, President Judge Leadbetter, without equivocation, rejected the primary legal arguments offered by the Board in justification of its exclusion of the Treasurer from executive sessions of the Board. In particular, President Judge Leadbetter wrote that: (a) the Gaming Act “clearly provides that the Treasurer or his designee shall serve as a non-voting member *ex officio* member of the Board;” (b) the Sunshine Act “does not limit executive sessions to voting members . . . the legal right to vote as a member of the Board is of no consequence with respect to participation in an executive session;” and (c) “the Treasurer is a Commonwealth official acting on behalf of the Commonwealth, not on behalf of gaming companies, their principal investors or other interested parties.” Thus, “[w]e do not see how the involvement of the Treasurer pursuant to statute creates any appearance of impropriety.” *McCord*, at 3-4.

31. The granting of injunctive relief would effectively protect and enable the Treasurer's ability to exercise his statutory right to fully participate in all public and executive deliberations of the Board without impediment. As this Court has already observed, if this Court issues an order enjoining the Chairman and members of the board:

. . . from taking any action to prohibit, impede, discourage or otherwise prevent the Treasurer or his designee from participating, the Treasurer will be able to exercise the statutory right by participating as fully as any other member of the Board, with the exception of voting. *Id* at 6.

32. Granting of injunctive relief to enable the Treasurer and his designee to attend and fully participate in public and executive deliberations of the Board is consistent with Section 1201(e) of the Gaming Act and the public interest. *See*, Opinion at 3. Furthermore, an injunction would remove any existing uncertainty and controversy surrounding the authority of the Treasurer to participate in public and private proceedings of the Board. *See, McCord* at 6.

Conclusion

WHEREAS, for the forgoing reasons, Treasurer McCord respectfully requests that this Honorable Court (1) enter an order enjoining the Chairman and the members of the Pennsylvania Gaming Control Board, its agents, servants, employees, and attorneys, from taking any action prohibiting, impeding, discouraging or otherwise preventing the Treasurer or his designee from fully participating in all public and executive sessions of the Board as a non-voting member, including, without limitation, the ability to: question witnesses; make motions; receive and review confidential information; propose the adoption of rules and regulations; voice objections and opinions; request and receive

records or information from applicants; participate in deliberations and issue public statements; and, attend executive sessions; and, (2) immediately, upon the execution by the Treasurer of an appropriate confidentiality agreement as required by the Gaming Act, provide to the Treasurer all confidential, proprietary or other such information, documents, reports, analyses, studies and such other similar materials relevant to matters pending before the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Christopher Craig', written over a horizontal line.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

No. 446 M.D. 2010

v. :

THE PENNSYLVANIA GAMING :
CONTROL BOARD, :
Respondent. :

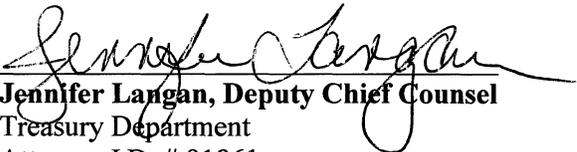
CERTIFICATE OF SERVICE

I, Jennifer Langan, Esquire, Deputy Chief Counsel, on behalf of Treasurer Robert M. McCord, hereby certify that a copy of the foregoing **Application for Special Relief in the Name of a Request for Expedited Consideration**, will be served by first class mail or hand delivery at the addresses indicated below on this date. I further certify that the manner of service satisfies the requirements of Pa.R.A.P. 121 and Pa.R.Civ.P 422.

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January 5, 2011