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Commissioners

FRANCESCO ZANZUCCKI
Executive Director

ORDER OF THE NEW JERSEY RACING COMMISSION

CONSIDER PETITIONS FROM PERMIT HOLDERS EVIDENCING THE REQUIREMENT TO CONTINUE TO MAKE PROGRESS ON AN ANNUAL BASIS IN ESTABLISHING AN OFF-TRACK WAGERING FACILITY WITHIN THEIR SHARE IN ACCORDANCE WITH N.J.S.A. 5:5-130.

WHEREAS, the New Jersey Racing Commission, at its September 18, 2013 meeting, established a March 4, 2014 deadline for each permit holder to demonstrate that it has continued to make progress on an annual basis in establishing an off-track wagering facility within its share in accordance with N.J.S.A. 5:5-130 and N.J.A.C. 13:74-2.4(b).

WHEREAS, the New Jersey Racing Commission considered the petition filed by each permit holder in order to demonstrate that it has continued to make progress on an annual basis in establishing an off-track wagering facility within its share at its May 14, 2014 meeting.

WHEREAS, Chairman Pamela J. Clyne, at the May 14, 2014 public meeting, made the following motion:

The Commission has been charged with enforcing the requirement in the Off-Track Wagering Act that each permit holder continue to make progress on an annual basis toward establishing its share of OTW facilities in accordance with benchmarks that this Commission promulgated. At our June 20, 2012 meeting this Commission allowed each of the four permit holders to retain their shares of unlicensed OTW facilities provided that they continued to make progress on an annual basis in accordance with the requirements of N.J.S.A. 5:5-130 and N.J.A.C. 13:74-2.4(b) by June 28, 2013.



This Commission required permit holder to file petitions demonstrating their compliance with the benchmarks set forth in N.J.A.C. 13:74-2.4(b)(1). At the September 18, 2013 meeting, when it was apparent that only Freehold Raceway was able to demonstrate compliance with these benchmarks, this Commission extended the deadline from June 28, 2013 to March 4, 2014 in order to give the permit holders a full year from the effective date of the benchmark rule.

Thereafter, the Commission again required the permit holders to file petitions demonstrating compliance with this new deadline. Upon review of these petitions, it seems apparent that only Freehold Raceway has complied with these benchmarks. The petitions filed on behalf of the NJTHA, NMR and Greenwood ACRA do not explain why these permit holders have not complied with the benchmarks.

Therefore, I move that the Commission direct staff to meet with the industry to discuss the benchmarks in N.J.A.C. 13:74-2.4(b) in an effort to learn what the problem is with building these OTWs and to report back to this Commission with recommended findings regarding the permit holders' inability to comply with the benchmarks and with recommendations as to whether and how the benchmarks should be amended. Staff is also directed to meet with Freehold Raceway to discuss whether it wants the Commission to issue formal findings now as to whether it has complied with the benchmarks in N.J.A.C. 13:74-2.4(b)(1) in connection with the licensure and opening of the Gloucester OTW or to hold such a finding in abeyance pending further action by the Commission upon the report by staff.

The Commission is greatly concerned about the racing industry's welfare. It is apparent that the Legislature, when it amended the Act, intended to promote the development of the unlicensed OTW facilities within each permit holder's share because these OTWs would benefit the industry by increasing purses, improving the quality of the horses that race here and enhancing the public interest in the sport. Finding the horse racing industry is economically important to this State, the Legislature authorized off-track wagering to promote the economic future of the horse racing industry, foster the potential for increased commerce, employment and recreational opportunities, enhance the overall economic well-being of the racing and breeding industries and generate greater interest in the sport.

However, this Commission has cause for concern that rather than unifying, promoting and enhancing the racing industry, the new approach directed by the amendments to the Act and the aggressive benchmarks

established by the Commission may have divided this industry by promoting litigation and destabilized it by creating further uncertainty as to our economic ability to survive. Last year, the United State District Court dismissed the federal lawsuit, ACRA Turf Club v. Zanzuccki, filed on behalf of Freehold Raceway and Atlantic City Race Course, which has challenged the constitutionality of the amendments to the Act as contrary to the Contract Clause, Takings Clause, Equal Protection and Substantive Due Process. On March 31, 2014, the Third Circuit Court of Appeals reversed this dismissal and remanded the litigation back to the District Court.

At the same time, legislation authorizing sports betting at permitted casinos and racetracks has been struck down by the federal courts. Sports betting, if allowed to go forward, would have brought important economic revenue to the racing industry, increasing purses, improving the quality of racing and promoting public interest in the sport. Although New Jersey has petitioned the United States Supreme Court, asking it to authorize sports betting in this State, we do not yet know whether the Court will hear our case.

The goal of every permit holder, horsemen's organization and this Commission must be the survival of racing in this State. We must work together to ensure a stable economic future for this industry and decide how to move forward as best we can with the resources we have available.

Therefore, I move that the Commission issue a temporary stay of its September 18, 2013 decision ordering permit holders to comply with the benchmarks set forth in N.J.A.C. 13:74-2.4(b)(1) by March 4, 2014, until the legal challenges to the Off-Track and Account Wagering Act in ACRA Turf Club v. Zanzuccki have been resolved in the District Court. In addition to taking notice of the Third Circuit's decision which reinstated this litigation, the Commission is also mindful of the prior opinion of Judge Pisano who believed that plaintiffs have some likelihood of success on the merits.

I move that the Commission waive and temporarily stay all of the benchmarks in N.J.A.C. 13:74-2.4. The Commission does so pursuant to N.J.A.C. 13:70-1.39 and N.J.A.C. 13:71-1.34 which authorize the waiver of the application of our rules upon the Commission's own motion upon finding "[t]hat such a waiver will benefit the horse racing industry in this State." I cannot believe that a decision requiring NMR, the NJTHA and Greenwood ACRA to forfeit their rights to a total of eight OTW licenses would benefit the racing industry – especially when there are legitimate questions being raised as to the legal validity of the legislative amendments that would require us to do so.

I move that in addition to directing staff to meet with the industry to discuss the benchmarks and learn what the problem is with building these OTWs, the Commission direct staff to file a "Notice of Intent for Proposed Rule-making" pursuant to N.J.S.A. 52:14B-4(e) with the Office of Administrative Law for publication in the New Jersey Register for the purpose of eliciting the views of the permit holders, the horsemen's organizations and the public regarding the benchmarks in N.J.A.C. 13:74-2.4 and their need for amendment.

At our June 20, 2012 meeting, the racing industry called upon this Commission to promulgate stringent benchmarks mandating the expedited establishment and licensure of these OTWs and we responded. The industry has not complied. Maybe the Commission set the bar too high. Maybe the industry currently lacks the necessary resources to establish any more OTWs. Maybe the Off-Track Wagering facility is no longer a viable business model for providing the racing industry with economic support. With this motion, the Commission calls upon the industry to come together to tell us what is wrong and how it can be made right.

I would ask my fellow Commissioners, if you agree with the findings in this motion and the actions proposed herein, to please vote in favor of this motion.

WHEREAS, the aforesaid motion of Chairman Pamela J. Clyne was seconded by Commissioner Anthony G. DePaola.

WHEREAS, Pamela J. Clyne, Anthony T. Abbatiello, Manny E. Aponte, Michael J. Arnone, Anthony R. Caputo, Peter J. Cofrancesco, III, Anthony G. DePaola and Francis X. Keegan, Jr. voted in favor of the motion.

IT IS THEREFORE ORDERED THAT Commission staff shall meet with the industry to discuss the benchmarks in N.J.A.C. 13:74-2.4(b) in an effort to learn what the problem is with building these OTWs and report back to the Commission with recommended findings regarding the permit holders' inability to comply with the benchmarks and recommendations as to whether and how the benchmarks should be amended.

IT IS FURTHERED ORDERED THAT Commission staff shall meet with Freehold Raceway to discuss whether it wants the Commission to issue formal findings now as to whether it has complied with the benchmarks in N.J.A.C. 13:74-2.4(b)(1) in connection with the licensure and opening of the Gloucester OTW or to hold such

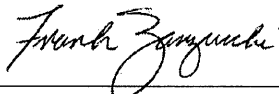
a finding in abeyance pending further action by the Commission upon the report by staff.

IT IS FURTHER ORDERED THAT the Commission hereby issues a temporary stay of its September 18, 2013 decision ordering the permit holders to comply with the benchmarks set forth in N.J.A.C. 13:74-2.4(b)(1) by March 4, 2014, until the legal challenges to the Off-Track and Account Wagering Act in ACRA Turf Club v. Zanzuccki have been resolved in the District Court.

IT IS FURTHER ORDERED THAT the Commission hereby waives and issues a temporary stay of the benchmarks in N.J.A.C. 13:74-2.4.

IT IS FURTHER ORDERED THAT Commission staff shall file a Notice of Intent for Proposed Rule-making pursuant to N.J.S.A. 52:14B-4(e) with the Office of Administrative Law for publication in the New Jersey Register for the purpose of eliciting the views of the permit holders, the horsemen's organizations and the public regarding the benchmarks in N.J.A.C. 13:74-2.4 and the need for amendments.

New Jersey Racing Commission

By: 
Frank Zanzuccki, Executive Director

Date: June 3, 2014