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June 7, 2006

OFFICIAL OPINION 2006-2

The Honorable Ernest E. Yelton
Executive Director Indiana Gaming Commission
South Tower Suite 950
115 West Washington Street
Indianapolis, Indiana 46204-3408

Re: The Indiana Gaming Commission's Authority to Oversee Local Development Agreements.

Dear Director Yelton:

Recently you requested a legal opinion on the following issue:

Does the Indiana Gaming Commission have the authority to disapprove local development agreements or portions thereof entered between a casino licensee and a third party.

Brief Answer

The Indiana statutes and rules governing the Indiana Gaming Commission (hereinafter "Commission") provide sufficient authority for the Commission to disapprove and cancel local development agreements that do not comply with state law or do not maintain the integrity of the riverboat gambling industry.



Analysis

The Indiana statute that creates and governs the Commission is embodied at Title 4, Article 33 of the Indiana Code (hereinafter "Gaming Statute"). The Gaming Statute states the legislative intent of the statute is to "benefit the people of Indiana by promoting tourism and assisting economic development." Ind. Code § 4-33-1-2. The Commission is created under Indiana Code section 4-33-3-1. The Gaming Statute creates the Commission in Chapter 3 at Indiana Code section 4-33-3-1 and its powers, duties and rule-making authority are set out at Indiana Code section 4-33-4-1 through 21.2. Pertinent statutes are included in Attachment A.

Based on its rulemaking authority, the Commission adopted administrative rules, codified at 68 Indiana Administrative Code 1 through 19. In 1995, the Commission adopted 68 Indiana Administrative Code ("IAC") section 1-4-2 which authorizes the Commission to consider contracts entered into by riverboat licensees:

(a) The commission is required to maintain the integrity of the commission and riverboat gambling. Riverboat licensees and riverboat license applicants must encourage confidence in the commission and the riverboat gambling industry by maintaining high standards of honesty, integrity, and impartiality. Riverboat licensees and riverboat license applicants shall promote this policy by entering into contracts and transactions in accordance with the Act and this title, and shall be held accountable for all contracts or transactions entered into under this rule.

(b) The commission is not undertaking the policy of approving contracts, but will maintain oversight over contracts and transactions entered into by riverboat licensees and riverboat license applicants. *The commission reserves the right to disapprove and cancel any contract or transaction that does not comply with the Act or this title or does not maintain the integrity of the riverboat gambling industry.*

68 IAC 1-4-2 (emphasis added).

A stated purpose of the Gambling Statute is to "benefit the people of Indiana by . . . assisting economic development." Ind. Code § 4-33-1-2. In order to effectuate this intent, the Commission was created and given "[a]ll powers necessary and proper to fully and effectively execute this article." Ind. Code § 4-33-4-1(a)(2). When granting a riverboat license, the Commission was given the duty to "[s]elect among competing applicants the applicants that promote the most economic development in a home dock area and that best serve the interests of the citizens of Indiana." Ind. Code § 4-33-4-1(a)(5). Further, the Commission is authorized to "[t]ake any reasonable or appropriate action to enforce this article." Ind. Code § 4-33-4-1(a)(16). The Indiana Legislature has required the Commission to "[a]dopt rules that the commission determines necessary to protect or enhance . . . the credibility and integrity of gambling operations authorized by this article." Ind. Code 4-33-4-3(a)(1). Based on this statutory mandate, the Commission properly adopted 68 IAC section 1-4-2(b) which notes that, "[t]he commission reserves the right to disapprove and cancel any contract or transaction that does not

comply with the Act or this title or does not maintain the integrity of the riverboat gambling industry.” Additionally, the Commission’s rules provide that “each contract or transaction entered into by a riverboat licensee or riverboat licensee applicant shall contain a provision indicating that the contract may be subsequently disapproved by the commission.” 68 IAC 1-4-1(d).

To determine if the Commission has sufficient statutory authority to disapprove local development agreements, one must first determine whether the administrative rule that authorizes the Commission to disapprove contracts was a proper exercise of the Commission’s rulemaking authority. It is well settled that agencies have implicit power and authority as is necessary to fulfill the broad grant of authority given that agency by the legislature. *Knox Co. Rural Elec. Memb. Corp. v. PSI Energy, Inc.*, 663 N.E.2d 182, 189 (Ind. Ct. App. 1996), *trans. denied*. See also *Barco Beverage Corp. v. Ind. Alcoholic Beverage Comm’n*, 595 N.E.2d 250, 254 (Ind. 1992) ; and *N. Ind. Pub. Serv. Co. v. Citizens Action Coalition*, 548 N.E.2d 153, 158 (Ind. 1989). When reviewing an administrative rule, one “must consider whether the rule lies within the scope of the authority conferred, whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statute, and whether the rule is reasonable.” *Bd. of Reg. for Land Surveyors v. Bender*, 626 N.E.2d 491, 495 (Ind. Ct. App. 1993). Moreover, the interpretation given a statute by an agency charged with the duty of implementing that statute is entitled to great weight. *Marion Teachers Ass’n v. Bd. of School Trs. of Marion Cmty. Sch. Corp.*, 643 N.E.2d 370, 372 (Ind. Ct. App. 1994), *aff’d*, 672 N.E.2d 1363 (Ind. 1996). Furthermore, when reviewing administrative regulations, “courts exercise a greater degree of self-restraint ... as the process [administrative rulemaking] may involve a generally applicable interpretation of the basic public purpose of the governing statute, and it is not desirable to unduly restrict the freedom of the agency to do that.” *Ind. Bd. of Pub. Welfare v. Tioga Pines*, 622 N.E.2d 935, 939 (Ind. 1993), *cert. denied* 510 U.S. 1195 (1994).

The rule adopted under 68 IAC 1-4-2(b) is consistent with the broad grant of authority given the Commission to implement the Gambling Statute. The ability of the Commission to disapprove contracts is a proper and reasonably necessary exercise of power if the credibility and integrity of riverboat gambling is to be protected. Absent that power, the confidence and trust of the public could not be maintained. The Commission would be powerless to prohibit the involvement and influence of crime and corruption in riverboat gambling or address issues the Commission determines are “required to maintain the integrity of the commission and riverboat gambling.” 68 IAC 1-4-2(a).

Additionally, in order to determine whether a local development agreement is a contract that is within the scope of 68 IAC 1-4-2(b), one must first look to the language of the rule. The rule states, “the commission reserves the right to disapprove and cancel *any contract or transaction* that does not comply with the Act or this title or does not maintain the integrity of the riverboat gambling industry.” 68 IAC 1-4-2(b) (emphasis added).

The terms “contract” and “transaction” are not defined in Indiana Code article 4-33 or in the Commission’s rules. When a term in a statute or administrative rule is undefined or unclear, rules of statutory construction are followed to determine the meaning. *Ind. Dep’t of Pub. Welfare*

v. Payne, 622 N.E.2d 461, 465 (Ind. 1993). Because neither the applicable statute nor the Commission has defined “contract” or “transaction” we must attribute the common and ordinary meaning to the undefined term, unless doing so would deprive the statute of its purpose and effect. See Ind. Code § 1-1-4-1(1), *Consol. Coal Co. v. Ind. Dep't of Revenue*, 583 N.E.2d 1199, 1201 (Ind. 1991). The common and ordinary meaning of the word “contract” is “a binding agreement between two or more persons or parties” especially “one legally enforceable.” Webster’s Colleg. Dictionary, 284 (9th ed. 1988).

A “development agreement,” for example, is a type of “contract” that may be disapproved or cancelled by the Commission. Indiana Code section 36-1-8-9.5(a) defines “development agreement” for the purpose of providing administrative instruction to local governmental entities regarding funds received from riverboat licensees. Section 36-1-8-9.5(a) states:

As used in this section, "development agreement" means an agreement between a licensed owner (as defined in IC 4-33-2-13) and a unit setting forth the licensed owner's financial commitments to support economic development in the unit.

Based on this statutory definition of “development agreement,” and the common and ordinary meaning of “contract,” it is our opinion that local development agreements are among the “contracts” that may be disapproved or cancelled pursuant to the Commission’s rule at 68 IAC 1-4-2(b).

The Commission may also disapprove or cancel “transactions” of licensees. “Transaction” is commonly defined as “a business deal” or “a communicative action or activity involving two parties or things that reciprocally affect or influence each other.” Webster’s at 1252. “Transactions” may involve selling, leasing, borrowing, lending or any act or agreement between two parties. Black’s Law Dictionary 1496 (6th ed. 1990). “Transaction” is interpreted more broadly than the term “contract.” *Id.* “Transaction” is paired with the term “contract” throughout the Commission’s rules indicating a presumption by the Commission that the term “transaction” includes a business act or agreement that is not necessarily the subject of a formal contract. See 63 IAC 1-4-1 through -4. While no Indiana case defines “transaction,” a review of other state court decisions on similar matters can be instructive. *Warrick Co. v. Waste Mgmt. of Evansville* 732 N.E.2d 1255, 1258 (Ind. Ct. App. 2000). In determining the term “transaction” is more broadly defined than “contract,” courts have held the term includes delivery dates in a contract, verbal communication among business partners to enter into an agreement, and an agreement to extend credit. See *Miles v. Starks*, 590 S.W.2d 223, 227 (Tex. Civ. App. 1979); *Steeks v. Diamond Hill Farms*, 605 N.W.2d 110, 120 (Neb. 2000) *Transamer. Commerical Fin. Corp. v. Naef*, 42 P.2d 539, 542 (Wyo. 1992).

Conclusion

It is the opinion of this office that Indiana statutes and rules that governing the Indiana Gaming Commission provide sufficient authority for the Commission to disapprove and cancel

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contracts, including local development agreements, and transactions that do not comply with laws or regulations governing riverboat gaming or that do not maintain the integrity of the riverboat gambling industry.

Sincerely,

A handwritten signature in black ink that reads "Stephen Carter". The signature is written in a cursive style with a large, prominent "S" at the beginning.

Stephen Carter
Attorney General

Gregory F. Zoeller

SC/GZ:jl312288

Attachment

Attachment A: Pertinent Statutes

Indiana Code section 4-33-4-1 sets out relevant powers and duties of the Commission as follows:

Sec. 1. (a) The commission has the following powers and duties for the purpose of administering, regulating, and enforcing the system of riverboat gambling established under this article:

- (1) All powers and duties specified in this article.
 - (2) All powers necessary and proper to fully and effectively execute this article.
 - (3) Jurisdiction and supervision over the following:
 - (A) All riverboat gambling operations in Indiana.
 - (B) All persons on riverboats where gambling operations are conducted.
 - (4) Investigate and reinvestigate applicants and license holders and determine the eligibility of applicants for licenses or operating agent contracts.
 - (5) Select among competing applicants the applicants that promote the most economic development in a home dock area and that best serve the interests of the citizens of Indiana.
 - (6) Take appropriate administrative enforcement or disciplinary action against a licensee or an operating agent.
 - (7) Investigate alleged violations of this article.
 - (8) Establish fees for licenses issued under this article.
 - (9) Adopt appropriate standards for the design, appearance, aesthetics, and construction for riverboats and facilities.
 - (10) Conduct hearings.
 - (11) Issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, and other relevant documents.
 - (12) Administer oaths and affirmations to the witnesses.
 - (13) Prescribe a form to be used by an operating agent or a licensee involved in the ownership or management of gambling operations as an application for employment by potential employees.
 - (14) Revoke, suspend, or renew licenses issued under this article.
 - (15) Hire employees to gather information, conduct investigations, and carry out other tasks under this article.
 - (16) Take any reasonable or appropriate action to enforce this article.
- (b) Applicants and license holders shall reimburse the commission for costs related to investigations and reinvestigations conducted under subsection (a)(4).

Indiana Code sections 4-33-4-2 provide the Commission's rule making authority as follows:

The commission shall adopt rules under IC 4-22-2 for the following purposes:

- (1) Administering this article.

- (2) Establishing the conditions under which riverboat gambling in Indiana may be conducted.
- (3) Providing for the prevention of practices detrimental to the public interest and providing for the best interests of riverboat gambling.
- (4) Establishing rules concerning inspection of riverboats and the review of the permits or licenses necessary to operate a riverboat.
- (5) Imposing penalties for noncriminal violations of this article.

And section 4-33-4-3(a)(1) adds:

- (a) The commission shall do the following:
 - (1) Adopt rules that the commission determines necessary to protect or enhance the following:
 - (A) The credibility and integrity of gambling operations authorized by this article.
 - (B) The regulatory process provided in this article. . . .