

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6569-03T1

IN THE MATTER OF:
CONSIDER DISTRIBUTION OF
CASINO SIMULCASTING SPECIAL
FUND (ACCUMULATED IN 2003)
PURSUANT TO N.J.S.A.

5:12-205(d)

Argued: May 9, 2006 - Decided: May 31, 2006

Before Judges Skillman, Axelrad and
Sabatino.

On appeal from a Final Decision of the New
Jersey Racing Commission.

Dennis A. Drazin argued the cause for
appellant, New Jersey Thoroughbred
Horsemen's Association (Drazin and Warshaw,
attorneys; Mr. Drazin, on the brief).

Julie D. Barnes, Deputy Attorney General,
argued the cause for respondent, New Jersey
Racing Commission (Zulima V. Farber,
Attorney General, attorney; Michael J. Haas,
Assistant Attorney General, of counsel;
Juliet T. Wyne, Deputy Attorney General, on
the brief).

Mark D. Schorr argued the cause for
respondent, Standardbred Breeders and Owners
Association (Sterns & Weinroth, attorneys;
Mr. Schorr, on the brief).¹

¹In its Notice of Appearance, the Standardbred Breeders and
Owners Association refers to itself as a respondent, but it
should more accurately be classified as an intervenor, based on
its position that the New Jersey Racing Commission's award was
arbitrary based on the initial deferral of its request for
funds.

John M. Pellecchia argued the cause for intervenor-respondent, Pennwood Racing, Inc., Greenwood Racing, Inc., FR Park Racing, Greenwood ACRA, and Atlantic City Racing Association (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Mr. Pellecchia, of counsel and on the brief; Richard E. Hamilton, on the brief).

PER CURIAM

The New Jersey Thoroughbred Horsemen's Association ("THA") and the New Jersey Thoroughbred Breeders' Association ("TBA") appeal from the New Jersey Racing Commission's June 29, 2004 final decision distributing the Casino Simulcasting Special Fund ("Fund") for 2003.

The Fund, established pursuant to N.J.S.A. 5:12-205, is comprised of a percentage of monies generated from casino simulcasting of out-of-state races. N.J.S.A. 5:12-203(g)(3). The Racing Commission is required to administer the fund and, after making mandatory payments, it is authorized to then distribute the balance in order of priority first to New Jersey racetracks and then to horsemen's associations. N.J.S.A. 5:12-205. The statute provides:

From any amounts remaining after the payments required by subsections a., b. and c. of this section are made, the New Jersey Racing Commission shall compensate, in such amounts as that commission deems appropriate, the following entities in the following order of priority:

(1) any racetrack in this State which can demonstrate to the satisfaction of that commission that its financial well-being has been negatively affected by casino simulcasting;

(2) any racetrack in this State which that commission finds to be financially distressed;

(3) any horsemen's organization which will use the money to fund a project which that commission determines will be beneficial to the racing industry; and

(4) all racetracks located in this State on an equal basis.

[N.J.S.A. 5:12-205d.]

In 2003, the Fund had an account balance of \$1,821,472.42. The Fund received applications for distribution from the four New Jersey racetracks, Atlantic City Racecourse, Freehold Raceway, Monmouth Park and Meadowlands Racetrack; and three horsemen's associations, the THA, TBA and Standardbred Breeders and Owners Association ("SBOA"). Following a review of the applications and applicable data and documentation, the Racing Commission issued a final decision and order of distribution in which it determined that each of the racetrack's applications was "valid, compelling and supported by facts which evidence the increasingly pervasive adverse impact of casino simulcasting on New Jersey Racetrack financial interests." To reach this conclusion, the Racing Commission relied in part on the comparison of table game and slot wins at casinos to their less

profitable horse wagering opportunities; the comparison of casino win figures to the total New Jersey racetrack handles; the 2001 to 2003 decline in New Jersey track and intrastate and interstate simulcasting handles; and the swelling of the Atlantic City transportation infrastructure and increase in daily traffic to Atlantic City as compared to the decline in racetrack attendance. The Racing Commission concluded that each of the New Jersey racetracks qualified under the "highest priority category" of N.J.S.A. 5:12-205d(1).

Next, the Racing Commission determined that the Atlantic City Racecourse was the only racetrack that qualified under subsection d(2) as "financially distressed." It considered the racetrack's financial status; declining attendance and handles; physical location preventing it from drawing on a large local fan base; the interstate competition it faced; and the level of its live racing presentation. Accordingly, the Racing Commission distributed all but \$200,000 of the Fund balance to the four New Jersey racetracks.

In accordance with the statutory scheme, the Racing Commission proceeded to the next priority category. The Commission awarded the THA \$100,000 for purposes of supplementing its Backstretch Program out of the \$600,000 it had requested. The Racing Commission declined to award the TBA any of its \$350,000 request, concluding that it would be

inappropriate and unfair to the other applicants to allocate Fund money for TBA's out-of-state breeder awards program, which was not yet legally authorized by the Legislature. The Commission also noted that TBA was operating with a large surplus and was expected to receive additional funding for the program through traditional sources.

The Racing Commission initially deferred action on the SBOA's request for funds. However, during the pendency of this appeal, by order of November 21, 2005, the Commission designated \$100,000 of its remaining funds for the SBOA's Health and Welfare Fund with conditions. At oral argument the SBOA's counsel advised that he believed the conditions were satisfied and the SBOA soon expected to receive the funds.

On appeal, the THA and TBA challenge the Racing Commission's distribution as arbitrary and contend its disproportionate distribution to the racetracks was not supported by the credible evidence in the record.

The Racing Commission has been vested with "the power and duty to govern all aspects of horse racing in the State, including all those employed in the industry." De Vitis v. New Jersey Racing Comm'n, 202 N.J. Super. 484, 490 (App. Div.), certif. denied, 102 N.J. 337 (1985). Under N.J.S.A. 5:12-205d, the Racing Commission is given the discretion to allocate the Casino Simulcasting Special Fund as it "deems appropriate." It

is statutorily required to use its expertise in allocating and distributing the Fund to New Jersey racetracks and horsemen's associations, limited only by the order of priority set forth by the Legislature in N.J.S.A. 5:12-205(d)1-4. As previously stated, New Jersey racetracks meeting the statutory criteria of "adversely impacted" and "financially distressed," are given first priority for distribution and appellants are both horsemen's organizations, which are next in the order of priority of the Fund's allocations.

We have consistently held that "a court may not substitute its judgment for the expertise of an agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable" and that "[t]he interpretation of a statute by the administrative agency charged with its enforcement is entitled to great weight." In Re Dist. of Liquid Assets, 168 N.J. 1, 10-11 (2001). In addition to its review of the applications, the Racing Commission considered data from the casinos and compared it to the attendance and handles of the various New Jersey racetracks. We are satisfied the record contains compelling evidence that the financial well-being of the racetracks has been negatively affected by casino simulcasting and that this negative effect has been substantial. We are also satisfied there was an adequate basis in the record for the Racing Commission's determination with respect to the

Atlantic City Racetrack and note this is not the appropriate forum for the challenges made by appellants respecting the bona fides of the racetrack's short racing season. The Racing Commission considered appropriate information and documentation, following the prioritized statutory scheme established by N.J.S.A. 5:12-205d in making its distribution of the Casino Simulcasting Fund for 2003 and reasonably allocated it in amounts it deemed appropriate, within its broad discretion, based upon sufficient credible evidence in the record. We discern no basis to second-guess this distribution.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION