NO. 4-06-0051

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

EMERALD CASINO, INC., f/k/a HP, Inc., an Illinois Corporation, Petitioner-Appellant, and THE VILLAGE OF ROSEMONT, an Illinois Municipality, Petitioner, v. THE ILLINOIS GAMING BOARD; THE STATE OF ILLINOIS; AARON JAFFE, in His Official Capacity as the Chairman of the Illinois Gaming Board; CHARLES GARDNER, EUGENE WINKLER, JOE MOORE, JR., and JAMES SULLIVAN, in Their Official Capacities as Members of the Illinois Gaming Board; MARK OSTROWSKI, in His Official Capacity as Administrator for the Illinois Gaming Board; and LISA MADIGAN, in Her Capacity as Attorney General of the State of Illinois, Respondents-Appellees.	Direct Review of the Illinois Gaming Board No. DC0105

ORDER

Emerald Casino, Inc. (Emerald), petitions for judicial review of a final order of the Illinois Gaming Board (Board) revoking Emerald's riverboat-gaming license. See 230 ILCS 10/17.1 (West 2004). We affirm the Board's decision.

I. BACKGROUND

A. Passage of the Riverboat Gambling Act and Adoption of Implementing Regulations

In 1990, the General Assembly passed the Riverboat Gambling Act (Act), and the Governor signed it into law (Pub. Act 86-1029, eff. February 7, 1990 (1990 Ill.

Laws 735)), authorizing riverboat gambling in Illinois "to the extent that [it was] carried out in accordance with the provisions of [the] Act" (230 ILCS 10/3(a) (West 2004)). Section 2(b) of the Act provided as follows:

> "(b) While authorization of riverboat gambling will enhance investment, development[,] and tourism in Illinois, it is recognized that it will do so successfully only if public confidence and trust in the credibility and integrity of the gambling operations and the regulatory process [are] maintained. Therefore, regulatory provisions of this Act are designed to strictly regulate the facilities, persons, associations[,] and practices related to gambling operations pursuant to the police powers of the [s]tate, including comprehensive law[-]enforcement supervision." 230 ILCS 10/2(b) (West 2004).

To implement this policy of strict regulation, section 5(a) of the Act created the Board, a subagency of the Department of Revenue. 230 ILCS 10/5(a)(1) (West 2004). The legislature gave the Board "the powers and duties specified in [the] Act, and all other powers necessary and proper to fully and effectively execute [the] Act for the purpose of administering, regulating, and enforcing the system of riverboat gambling established by [the] Act." 230 ILCS 10/5(a)(1) (West 2004). These powers included, but were not limited to, the following:

> "(1) To investigate applicants and determine the eligibility of applicants for licenses ***.

***

(3) To promulgate rules and regulations for the purpose of administering the provisions of [the] Act and to prescribe rules, regulations[,] and conditions under which all riverboat gambling in the [s]tate shall be conducted. Such rules and regulations are to provide for the prevention of practices detrimental to the public interest and for the best interests of riverboat gambling *** and to impose penalties for violations thereof.

***

(5) To investigate alleged violations of [the] Act or the rules of the Board and to take appropriate disciplinary action against a licensee ***.

* * *

(8) To require *** that any *** licensee involved in the ownership or management of gambling operations submit to the Board *** [a] list of the stockholders or other persons having a 1% or greater beneficial interest in the gambling activities of each licensee, and any other information the Board deems necessary in order to effectively administer [the] Act and all rules, regulations, orders[,] and final decisions promulgated under [the] Act.

* * *

(11) To revoke *** licenses, as the Board may see fit [and] in compliance with applicable laws of the [s]tate regarding administrative procedures ***.

* * *

(15) To *** revoke *** licenses *** for each violation of any provision of the Act, any rules adopted by the Board, any order of the Board[,] or any other action which, in the Board's discretion, is a detriment or impediment to riverboat gambling operations.

* * *

(21) To take any other action as may be reasonable or appropriate to enforce [the] Act and rules and regulations hereunder." 230 ILCS 10/5(c)(1), (c)(3), (c)(5), (c)(8), (c)(11), (c)(15), (c)(21) (West 2004).

Pursuant to section 5(c)(3), the Board has promulgated rules requiring a copious flow of information from licensees and applicants for a license. Under Rules 140(b)(3), (b)(4), and (b)(5), for example, they must "periodically disclose, on forms provided by the Board, changes in[,] or new[,] agreements, whether oral or written, relating to" "[c]onstruction contracts," "[a]greements with or involving [k]ey [p]ersons or relatives of [k]ey [p]ersons," and "[a]greements to sell *** or otherwise transfer or share an ownership interest or interests in a holder of an [o]wner's [l]icense." 86 Ill.

Adm. Code §3000.140(b)(3), (b)(4), (b)(5) (Conway Greene CD-ROM October 1999). (One may transfer such an interest only "with leave of the Board." 86 Ill. Adm. Code §3000.235(a) (Conway Greene CD-ROM October 1999).) Further, licensees and applicants "have a continuing duty to disclose promptly any material changes in information provided to the Board." 86 Ill. Adm. Code §3000.140(a) (Conway Greene CD-ROM October 1999). Failure to do so "may result in discipline[,] up to and including revocation of a license." 86 Ill. Adm. Code §3000.140(c) (Conway Greene CD-ROM October 1999).

In addition to keeping the Board updated on the information in Rules 140(a) and (b), licensees and applicants "must immediately inform the Board[,] and *** obtain prior formal Board approval thereof[,] whenever a change is proposed in the following areas" (86 Ill. Adm. Code §3000.230(d)(1) (Conway Greene CD-ROM October 1999)), among others:

> "(A) Key persons;
>
> ***
>
> (C) Equity and debt capitalization of [the] entity;
>
> (D) Investors and/or debt[-]holders;
>
> (E) Sources of funds;
>
> (F) Economic development plans or proposals;
>
> (G) Riverboat capacity or design change; [or]
>
> * * *
>
> (J) Agreements, oral or written, relating to the

acquisition or disposition of property (real or personal) of a value greater than $1 million." 86 Ill. Adm. Code §3000.230(d)(1)(A), (d)(1)(C), (d)(1)(D), (d)(1)(E), (d)(1)(F), (d)(1)(G), (d)(1)(J) (Conway Greene CD-ROM October 1999).

Subparagraphs (a)(1), (a)(2), and (a)(5) of Rule 110, entitled "Disciplinary Actions," provide as follows:

> "(a) A holder of any license shall be subject to *** revocation *** of such license[] or other disciplinary action for any act or failure to act by himself or by his agents or employees *** that would discredit or tend to discredit the Illinois [g]aming industry or the [s]tate of Illinois. Without limiting the foregoing, the following acts or omissions may be grounds for such discipline[:]
>
> (1) Failing to comply with[,] or make provision for compliance with[,] the Act[] [or] these rules ***[;]
>
> (2) Failing to comply with any order or ruling of the board or its agents pertaining to a [r]iverboat [g]aming [o]peration[;]
>
> * * *
>
> (5) Associating with, either socially or in business affairs, *** persons of notorious or

unsavory reputation or who have extensive police records ***." 86 Ill. Adm. Code §3000.110(a)(1), (a)(2), (a)(5) (Conway Greene CD-ROM October 1999).

B. The Board's Issuance of a Gaming License to HP, Inc., and Its Refusal To Renew the License a Third Time

On July 9, 1992, the Board issued a gaming license to the Jo Daviess Riverboat Joint Venture to operate a riverboat casino in East Dubuque, on the Mississippi River. The Jo Daviess Riverboat Venture was a joint venture between HP, Inc. (HP), and Jo Daviess Riverboat Corporation, and it called its riverboat the "Silver Eagle Casino." (HP and Emerald are the same corporation; the corporation merely changed its name from HP to Emerald in August 1999.) In 1994, with the Board's permission, HP bought Jo Daviess Riverboat Corporation's interest in the joint venture.

On December 1, 1994, the Board issued a disciplinary complaint against HP for failing to obtain the Board's prior approval of changes in HP's equity and debt capitalization and for failing to notify the Board of HP's sources of funding. HP had entered into various loan agreements in July 1994 that it never cleared ahead of time with the Board. For these infractions, the Board fined HP $30,000. In 1995, the Board renewed HP's license for one year; and in 1996, for another year. In April 1997, HP applied for a third renewal, which the Board this time denied because of deficiencies in the renewal application and HP's noncompliance with the Board's rules.

HP administratively appealed the denial of its application for a third

renewal of its gaming license. In July 1997, while that administrative appeal was pending, HP closed down the Silver Eagle Casino. On May 5, 1999, an administrative law judge (ALJ) granted summary judgment in the Board's favor and issued a recommendation to uphold the Board's decision to deny a third renewal of Emerald's gaming license. He thereafter denied HP's two motions for reconsideration.

C. Addition of Section 11.2 to the Act and Litigation Over the Effect of this Amendment

In June 1999, while HP's operations lay dormant and while the ALJ's recommendation of May 1999 awaited final action by the Board, the General Assembly passed Public Act 91-40, and the Governor signed it into law (Pub. Act 91-40, eff. June 25, 1999 (1999 Ill. Laws 1184)). Public Act 91-40 added section 11.2 to the Act. That section provided as follows:

> "(a) A licensee that was not conducting riverboat gambling on January 1, 1998[,] may apply to the Board for renewal and approval of relocation to a new home[-]dock location authorized under [s]ection 3(c) [(230 ILCS 10/3(c) (West 2000)),] and the Board shall grant the application and approval upon receipt[,] by the licensee[,] of approval from the new municipality or county, as the case may be, in which the licensee wishes to relocate[,] pursuant to [s]ection 7(j) [(230 ILCS 10/7(j) (West 2000))].
>
> (b) Any licensee that relocates its home dock pursuant to this [s]ection shall attain a level of at least 20%

> minority[-]person and female ownership, at least 16% and 4% respectively, within a time period prescribed by the Board, but not to exceed 12 months from the date the licensee begins conducting gambling at the new home[-]dock location." 230 ILCS 10/11.2 (West 2000).

Section 7(j), as amended by Public Act 91-40, authorized the Board to approve a relocation under section 11.2(a) only if the local governing body of the municipality or county to which the licensee proposed relocating approved the relocation by a majority vote. 230 ILCS 10/7(j) (West 2000). In July 1999, the local governing body of Rosemont approved the relocation of HP's riverboat to Rosemont. On September 7, 1999, the Board determined that the enactment of section 11.2 rendered moot the ALJ's recommendation of May 5, 1999, to deny the third renewal of HP's license. On September 24, 1999, pursuant to the newly enacted section 11.2(a), Emerald (as the corporation was renamed) applied to the Board for a renewal of its license and for permission to move its operations to Rosemont.

On January 30, 2001, the Board voted to deny this application and to revoke Emerald's gaming license. On March 6, 2001, the Board issued to Emerald not only the formal notice of nonrenewal but also, simultaneously, a five-count disciplinary complaint seeking to revoke Emerald's license on the ground that Emerald had failed to follow the Board's rules regarding disclosures and transfers of ownership, among other alleged infractions. Emerald administratively appealed this latest nonrenewal as well as the revocation.

The chairman of the Board appointed an ALJ to hear the appeal of the revocation (case No. DC-01-05) as well as the appeal of the nonrenewal (case No. GL-01-01). Emerald elected to proceed with case No. DC-01-05 first and case No. GL-01-01 in a separate administrative proceeding.

In May 2001, while the administrative appeals of the nonrenewal and revocation were pending, Emerald filed a complaint in the Cook County circuit court (Emerald Casino, Inc. v. Illinois Gaming Board, No. 01-CH-8368 (Cir. Ct. Cook Co.)). The complaint sought a declaratory judgment that the Board had no choice, under section 11.2(a), but to approve Emerald's application for a third renewal of its gaming license and for relocation to Rosemont. The complaint also sought a writ of mandamus compelling the Board to do so. The parties filed cross-motions for summary judgment, and the circuit court denied Emerald's motion and granted the Board's motion. The court thereafter granted Rosemont's motion to intervene and then denied its motion to vacate the summary judgment in the Board's favor. Emerald and Rosemont appealed to the First District, which, interpreting the word "shall" in section 11.2(a) as mandatory (230 ILCS 10/11.2(a) (West 2000)), reversed the summary judgment in the Board's favor and remanded the case to the circuit court with directions to enter summary judgment in favor of Emerald and Rosemont. Emerald Casino, Inc. v. Illinois Gaming Board, 346 Ill. App. 3d 18, 36-37, 803 N.E.2d 914, 928 (2003) (Emerald I).

While Emerald I was still pending in the First District, a taxpayer challenged section 11.2(a) under the special-legislation clause of the Illinois Constitution (Ill. Const. 1970, art. IV, §13). Crusius v. Illinois Gaming Board, 216 Ill. 2d

315, 318, 837 N.E.2d 88, 90 (2005). The supreme court upheld the constitutionality of the statute. Crusius, 216 Ill. 2d at 318, 837 N.E.2d at 90.

On June 9, 2005, pursuant to the mandate of the First District in Emerald I, the Cook County circuit court issued an order vacating its previous rulings on the summary-judgment motions. The court granted summary judgment in favor of Emerald and Rosemont and "direct[ed] [the Board] to grant Emerald's September 24, 1999[,] [a]pplication for [r]enewal and [r]elocation under [s]ection 11.2."

On June 29, 2005, in response to the circuit court's order, the Board passed a resolution "grant[ing] Emerald's September 24, 1999[,] [a]pplication for [r]enewal of [its] [o]wner's [l]icense, as of September 24, 1999, for a period of four *** years." Illinois Gaming Board Resolution, at 2 (June 29, 2005). The Board noted, in this resolution, that the renewal of Emerald's license did "not render the revocation proceeding moot"; accordingly, the Board directed the ALJ and counsel to "continue with the revocation proceeding." Illinois Gaming Board Resolution, at 3 (June 29, 2005).

On July 5, 2005, in Cook County case No. 01-CH-8368, Emerald filed an amended motion for a rule to show cause why the Board should not be found in contempt of court. Emerald complained that the Board's "empty" resolution of June 29, 2005, violated the circuit court's order of June 9, 2005, as well as the mandate of Emerald I, by giving "useless retrospective relief." In the resolution, the Board "renewed" Emerald's license for a four-year period that, as of the date of the resolution, had already expired (September 24, 1999, to September 24, 2003). As the beginning

date of renewal, the Board used the date when Emerald submitted its application. The application, however, had languished during the intervening five years of delay and litigation, and, consequently, the retroactive four-year period of renewal was over before it began.

On July 18, 2005, the Cook County circuit court entered an order denying Emerald's amended motion for a rule to show cause. The court reasoned that when deciding whether to find a party in contempt for violating a court's order, one had to ascertain "whether the order [was] clear as to what the party [was] required to do." Emerald I "did not discuss the effective date of the license to be renewed." And in the briefs and pleadings that Emerald and Rosemont filed throughout the litigation, they insisted that "the renewal and relocation [were] to be granted upon the date of the filing of the application on September 24, 1999. They *** characterized the renewal as automatic and by operation of law." Thus, "for the Board to reason that September 24, 1999[,] should [have] be[en] the effective date of renewal WAS not precluded by the language of the [a]ppellate [c]ourt's decision or [the circuit] [c]ourt's June 6, 2005[,] order." Finding no willful disobedience by the Board, the court denied Emerald's amended motion for a rule to show cause.

On August 17, 2005, Emerald filed a second amended notice of appeal from the Cook County circuit court's order of July 18, 2005, denying Emerald's motion for a rule to show cause. In Emerald Casino, Inc. v. Illinois Gaming Board, 366 Ill. App. 3d 113, 114, 851 N.E.2d 843, 845 (2006), appeal denied, 222 Ill. 2d 570, 861 N.E.2d 654 (2006) (Emerald II), the First District held that by allowing the Board to issue a license

for a retroactive four-year period that had already expired as of the date of issuance, the circuit court had failed to enforce the mandate of Emerald I. The First District reversed the judgment and remanded the case with directions: the circuit court was to order the Board to issue a license which was "effective as of the date of the issuance" and which would "remain in effect for four years, subject to revocation proceedings." Emerald II, 366 Ill. App. 3d at 119, 851 N.E.2d at 848. The First District stated:

> "We stress that our only intent is to address the question of whether our mandate has been enforced. Nothing else. Whether Emerald and Rosemont possess sufficient moral fiber to conduct and host a gambling business is not now our concern. We said before and we say again: 'Nothing in section 11.2(a) prevents the Board from moving to revoke Emerald's license.' Emerald [I], 346 Ill. App. 3d at 34[, 803 N.E.2d at 926]. The supreme court said it, too:
>
> > 'The Act's license revocation provision still applies to Emerald with full force (230 ILCS 10/5(c)(15) (West 2000)), and revocation proceedings have, in fact, been initiated against it.' Crusius, 216 Ill. 2d at 333[, 837 N.E.2d at 99]." Emerald II, 366 Ill. App. 3d at 118, 851 N.E.2d at 848.

D. The Revocation Proceeding

Generally, the disciplinary complaint accused Emerald of giving the Board false or incomplete information about Emerald's agreements, transfers of ownership interests, and construction activities. The complaint also accused Emerald of selling shares to persons associated with organized crime.

The disciplinary hearing began on May 29, 2002, and halted on June 13, 2002, when creditors forced Emerald into bankruptcy. The hearing resumed on May 12, 2005, and ended on September 27, 2005. The following evidence emerged in the 31-day hearing.

1. The Rationale for Strict Regulation

Nelson Rose, an expert on gaming regulation, testified that historically, in the United States and throughout the world, casinos, left to themselves, tended to act as magnets to organized crime. Because casinos dealt in huge amounts of untraceable cash, they offered unparalleled opportunities for cheating, skimming, money-laundering, and avoidance of taxes. States had learned, from bitter experience, that unless they strictly regulated casinos, organized crime would do it for them. Typically, organized crime installed a front man as the owner of the casino: someone with no criminal record and who, therefore, was eligible to hold a gaming license. But he was not the real owner; "[t]he owner [was] the organized[-]crime family[,] which ha[d] secret agreements, sometimes imposed through threat[s] and even violence." The only hope a state had of thwarting the use of front men and preventing the infiltration of casinos by organized crime was to require detailed information about the ownership

and control of each casino--with zero tolerance for dishonesty.

2. Putting Together a Team To Lobby the General Assembly

About a year before HP shut down the Silver Eagle Casino, Donald Flynn, a major stockholder in HP and the owner of Flynn Enterprises, Inc., agreed to make some loans to HP. In return, he received the right to convert debt into equity and to acquire more stock. The Board approved these loans.

Donald E. Stephens wanted a casino in the Village of Rosemont, where he was the longtime mayor, and to that end, he began cobbling together a group of interested persons to lobby the General Assembly. In his testimony, Mayor Stephens boasted of his power to "squash" any bill he did not want passed (unless the bill had an irresistable groundswell of public support), but getting a bill passed was, he testified, a trickier proposition--especially if it involved gambling. "[W]ithout everybody's participation, it wasn't going to happen."

In 1997, Kevin Flynn, who was Donald Flynn's son, and Victor Cassini, vice president and in-house counsel of Flynn Enterprises, met with Mayor Stephens in his office in Rosemont and discussed the prospects of relocating Emerald's casino to Rosemont. The Duchossois family, which owned the Arlington racetrack (dormant at the time), wanted to know where the casino would ultimately be relocated so as to better understand the impact it might have on the racetrack. On October 28, 1998, David Filkin, vice president and general counsel of Duchossois Industries, met with Donald and Kevin Flynn and Joseph McQuaid, HP's senior vice president of development and compliance, and discussed HP's efforts to relocate its casino and the possibility of

working together to persuade the General Assembly to pass the necessary legislation. (McQuaid testified that the duties of his position included the selection of sites for relocation.) Filkin testified: "We were understanding that the riverboat was closed. There was a similar situation with the racetrack because the racetrack was also closed, so we discussed how we might be able to combine our efforts to allow HP to reopen, which presumably meant to relocate, and [the] Arlington Park [racetrack to] reopen." Filkin had the impression that Kevin Flynn was the primary spokesman for HP. Kevin commented to Filkin that moving the casino to Rosemont was a "no-brainer."

After the meeting of October 28, 1998, Filkin learned that Marvin Davis, a California businessman who controlled the Davis Companies, wanted to put together an ownership group with the Duchossois family and HP shareholders and lobby the legislature to relocate HP's riverboat. Filkin negotiated with Michael Colleran, vice president of the Davis Companies. Mayor Stephens brought Colleran and McQuaid together, and in November 1998, the three of them had a meeting in Rosemont with State Representative Ralph Caparelli.

Filkin testified that on December 1, 1998, he and Richard Duchossois were in a Chicago restaurant, waiting for Kevin Flynn to show up for a meeting on the proposed relocation of the casino to Rosemont. After a half hour, they got tired of waiting and stepped out of the restaurant, when they heard Kevin calling out to them on the street. He apologized for being late, but his meeting with Colleran had taken longer than he had expected. Kevin then announced the terms of an agreement he had reached with Colleran. If the General Assembly passed legislation authorizing the relocation of

HP's casino to Rosemont, the Davis Companies would buy 37.5% of HP, the Duchossois Group would have the option of buying 20%, and 5% would be reserved for "local" investors. (Mayor Stephens testified that this 5% was for him.) The remaining 37.5% would belong to the Flynns. Each year, $6 million of the profits would go to Rosemont. The three shook hands on this agreement, there on the street. Filkin testified: "[Kevin Flynn] agreed to keep [the agreement] quiet at this point so we could pursue the legislative agenda and not have it complicated by changes in ownership structure." They had an understanding that everyone would "'just keep quiet until the legislation passed [and] then [they] could go before the Gaming Board.'"

Mayor Stephens testified that not long before the passage of section 11.2, Donald Flynn had lunch with him and "said *** he thought that they could *** do a casino in Rosemont." At that time, Mayor Stephens told him he was not interested because he had been on the Silver Eagle Casino in Galena and, in his opinion, "it was pretty crappy." Eventually, he warmed to the idea of HP's opening a casino in Rosemont.

In the spring of 1999, the Davis Companies and Duchossois family lobbied the legislature to move HP to Rosemont. About the same time, Mayor Stephens, McQuaid, and several lobbyists went to Springfield and had a meeting with Representative Caparelli for that purpose. Kevin Flynn also showed up, but Mayor Stephens told McQuaid to "get that [individual] out of here" because, in Mayor Stephens's opinion, Kevin had an "abrasive personality" and was not a consensus-builder.

During the legislative debates on Public Act 91-40 in May 1999, Representative Hoeft and Senators Shaw, Welch, and Viverito publicized the open secret that HP's casino was destined to move to Rosemont. Senator Shaw remarked: "Now I know the argument [is] going to be, how do I know it's going to Rosemont. Let me tell you this: [t]hose of us who are elected to this [b]ody, we didn't come out of the dust closet to get here[;] we understand the process." 91st Ill. Gen. Assem., Senate Proceedings, May 24, 1999, at 20 (Statements of Senator Shaw). Senator Welch remarked: "We wanted a--[10th] license to generate revenue. We've got that, but now we've come to some kind of--secret agreement that it's going up to Rosemont. And to get it there, another person, who wanted it up in Arlington Heights, agreed to give up his contention that he deserved it[,] in exchange for a piece of the pie." 91st Gen. Assem., Senate Proceedings, May 24, 1999, at 31 (Statements of Senator Welch). In June 1999, Public Act 91-40 became law.

3. The Davis Companies Sue

Filkin testified that soon after the passage of section 11.2, Colleran gave him some troubling news: "the Davis Companies and Duchossois Industries[] would not be having the ownership interest in relocating the license that [they] thought [they] had back in December." Filkin telephoned McQuaid and asked him if this were true. McQuaid replied that because of the unanticipated requirement, in section 11.2(b), that Emerald "attain a level of at least 20% minority[-]person and female ownership" (230 ILCS 10/11.2(b) (West 2000)), "the Duchossoises wouldn't have any problems but the Davis Companies might be a problem investing in [Emerald]."

On August 18, 1999, an attorney for the Davis Companies, Wayne W. Whalen, wrote Emerald's attorney, Michael A. Ficaro, "in connection with the [a]greement reached among Mike Colleran and Kevin Flynn and others[,] on behalf of their respective principals[,] for the operation, development[,] and financing of a [c]asino [r]iverboat and [e]ntertainment [c]omplex in Rosemont." The letter declared:

> "That [a]greement requires, among other things, our client's prior approval for material business decisions not in the day[-]to[-]day course of running the business[,] such as financing, plans, retention of architects, engineers[,] and contractors[;] and the prosecution of the related applications and approvals concerning the [a]greement before the Illinois Gaming Board, the Village of Rosemont[,] and other governmental agencies.
>
> We look forward to sitting down with you[,] at your earliest convenience[,] to insure a speedy and successful completion and operation of this project.
>
> Unless we hear from you, we will need to present this [a]greement[,] as an interested party[,] [to] the Gaming Board at its September meeting[,] to avoid any misunderstanding[,] which requires we act this week."

On August 19, 1999, Whalen wrote Sergio E. Acosta, the administrator of the Board, informing him that the Davis Companies had "an interest in a gaming license

in Rosemont *** and [in] the proposed establishment of a casino riverboat and entertainment complex there." Acosta telephoned Ficaro and asked him if he could shed any light on this "interest" to which Whalen referred. Acosta testified: "Ficaro stated to me that it was not true, that the Davis Companies did not have an interest in the riverboat proposed for Rosemont[,] and that he was very angry that this letter had come to the Gaming Board." On August 27, 1999, Ficaro wrote Whalen a letter stating as follows: "After discussion with my client[] and a review of your unspecified and undocumented claims to any interest in the owner's riverboat of Emerald Casino, Inc., we have notified the Gaming Board that your claims are spurious and without legal basis." Ficaro warned Whalen that Emerald would "take all necessary action to protect its existing riverboat gaming license," including "seek[ing] legal redress for all damages caused by an interference with [its] rights or interests."

On September 20, 1999, Kevin Flynn and McQuaid met with Richard Duchossois, Craig Duchossois, and Filkin and "talked about all the people [who] were interested in the riverboat" since the passage of section 11.2 three months ago. According to Filkin, "Kevin ultimately indicated that they had run out of ownership interest to offer to the Duchossoises." "'Things changed,'" Kevin said. "He indicated that in terms of the minority interest that they had, it was oversubscribed."

On October 18, 1999, the Davis Companies sued Emerald, Donald and Kevin Flynn, and McQuaid in the United States District Court for the Central District of Illinois. The complaint alleged theories of breach of contract, fraudulent misrepresentation, and civil conspiracy against the individual defendants and theories

of breach of contract and equitable estoppel against Emerald. Davis Companies, Inc. v. Emerald Casino, Inc., No. 99-C-6822 (N.D. Ill. September 20, 2000) (2000 U.S. Dist. LEXIS 14120, lasted visited on April 28, 2007). Whalen faxed a copy of the complaint to Acosta, and Emerald also promptly sent the Board a copy. On September 11, 2003, the district court granted partial summary judgment in favor of the individual defendants on all counts except for the count of fraudulent misrepresentation. Because Emerald was in involuntary bankruptcy, the action against it was stayed. We have no further information on the status of this litigation against Emerald.

4. Agreements To Transfer Shares

On September 6, 1999, Emerald amended its shareholder agreement. According to Acosta's testimony, the earlier version of the shareholder agreement required any shareholder wishing to sell shares to give 90 days' notice to Emerald and to the other shareholders so they could exercise their option of buying the shares at the price negotiated between the shareholder and outsider. The new shareholder agreement eliminated these provisions; it provided that a shareholder wishing to sell shares to an outsider had to provide only 10 days' notice to Emerald--but no notice at all the other shareholders. Further, Emerald and the other shareholders no longer had an option to buy the shares before the outsider did.

In a letter to Emerald dated September 13, 1999, Donald Flynn gave notice that he proposed selling 294 of his shares (amounting to 4.23% of Emerald's stock) to 12 outsiders. The letter stated:

"Each of the [t]ransferees has or will submit a Personal

> Disclosure Form 1 to the Illinois Gaming Board (the 'IGB'), and I am not aware of any circumstances regarding any [t]ransferee which could reasonably be expected to affect [Emerald's] gaming license. The transfer of shares to each [t]ransferee will not occur until such transfer is approved by the IGB, and no transfer shall occur until at least [10] days after the date of this notice."

The 12 outsiders paid Donald Flynn a total of $6,345,000 for these 294 shares. The outsiders included the following: Susan Leonis, a consultant for Rosemont; John Sisto, Representative Caparelli's nephew; Joseph Scarpelli, Representative Caparelli's business partner; Robert Martwick, a Village of Norridge councilman; and Joseph Salamone, who (without Emerald's knowledge) agreed to share his interest with his brother, Vito Salamone, and with the family of Rocco Suspenzi, chairman of Parkway Bank & Trust, where Mayor Stephens did his banking. Donald Flynn originally agreed to sell shares to Vito Salamone, who, according to information the Federal Bureau of Investigation (FBI) had received from confidential sources, was close to members and associates of organized crime. Someone later altered the stock-purchase agreement to show Vito's brother, Joseph, as the buyer (crossing out "Vito" and writing in "Joe").

About the same time, August or September 1999, Emerald separately sold shares to Susan Flaherty, Kathryn Shannon, Albert Johnson, and Althea Knowles as well as to the Sherri Boscarino Trust. Mayor Stephens admitted that before they became investors in Emerald, he introduced Flaherty, Shannon, Johnson, and Knowles to

McQuaid. (Because Johnson and Knowles were African-American, they counted toward fulfilling the minority-shareholder requirement in section 11.2(b) (230 ILCS 10/11.2(b) (West 2004)).) Mayor Stephens also admitted introducing Nicholas Boscarino and Nicholas's wife, Sherry Boscarino, to McQuaid before the Sherry Boscarino Trust became an investor. Emerald sold a 1% ownership interest to the Sherri Boscarino Trust for $1.5 million and reported the trust to the Board as a female shareholder. In reality, Nicholas Boscarino controlled this trust, using his wife and his mother as fronts.

In the revocation hearing, the Board called John M. Mallul, a special supervisory agent of the Chicago organized-crime division of the FBI. Mallul quoted repeatedly from letterhead memoranda written by FBI agents under his supervision. These memoranda compiled relevant information the FBI had garnered from confidential sources and entered into its database. Each memorandum carried a caveat: the FBI might or might not have corroborated any given piece of information therein, so one should not assume that the memorandum necessarily reflected the views and conclusions of the FBI. Mallul testified, however, that he had reviewed each informant and if he saw any reason to challenge an informant's credibility, he excluded that informant's statements from the memoranda.

Mallul testified that according to FBI sources, Nicholas Boscarino was close to members and associates of La Cosa Nostra (LCN, commonly called "the Mafia") and was personally close to Mayor Stephens; he co-owned a business with the mayor and was partners with the mayor's son in another business. (In the revocation hearing, Mayor Stephens testified he had known Boscarino for some 35 years but became

alienated from him in recent years when the FBI investigated Boscarino for an insurance scam.) FBI records revealed that Boscarino was convicted in 2004 of conspiracy, money-laundering, and filing false tax returns. Mayor Stephens denied that either he or Rosemont had a secret deal with Emerald whereby Emerald was to sell shares to Boscarino or anyone else in return for relocation at Rosemont (although, as we said, he admitted that 5% of Emerald was supposed to be his). He denied knowingly associating with anyone connected with organized crime.

According to Mallul, a source reported in 1992 that Boscarino was meeting every week with Michael Magnaficchi, a member of the Chicago LCN and a lieutenant in the Elmwood Park crew, and with Louis Daddano, son of William M. Daddano, an associate of organized crime. (Mallul distinguished between "members," or actual initiates, of LCN and "associates," who merely associated with and assisted the "members.") A source reported in 1993 that "Boscarino was a very powerful and wealthy individual due to the Chicago LCN contacts and his close connections with the Stephens[] and Hogan family" (referring to William T. Hogan, Jr., head of the Teamsters Union Local No. 714). In June 1999, a source reported that on May 29, 1999, Peter DiFronzo held a meeting in a restaurant in Elmwood Park "to discuss certain organized[-]crime matters." John DiFronzo and Mayor Stephens, among others, were in attendance. Peter DiFronzo's brother, John, was "a known Chicago LCN member. John DiFronzo [was] the boss of his own street crew, being the Elmwood Park crew, and [was] considered to be underboss of the entire Chicago LCN." "One topic of discussion [in this meeting] concerned a casino in Rosemont, Illinois[,] and LCN control of various

contracts regarding its construction and operation."

Mallul further testified:

"Source [No.] 3 advised[] [that] Mayor Stephens was close to reputed LCN figures, including Lee Magnaficchi, deceased; John, also known as [']No Nose[,'] DiFronzo; and Fred Allegretti, deceased. Allegretti was Mayor Stephens'[s] main connection to the Chicago LCN. Mayor Stephens is very close to DiFronzo.

Source [No.] 3 stated DiFronzo would correct any problems that the Mayor may have [had] with LCN-connected business.

* * *

*** Source [No.] 4 stated[] [that] the Mayor all but guaranteed that Rosemont would get a gambling vote, but not until there were some changes made with some of the investors/partners.

Some of the invest[ors] would need to be 'filtered out' of the deal."

Nicholas and Sherry Boscarino, Ida Hansen, Vito and Joseph Salamone, and Jeffrey and Rosco Suspenzi appeared at the revocation hearing pursuant to subpoena, but when asked about their dealings with Emerald and Mayor Stephens, they invoked their constitutional right against self-incrimination and refused to answer.

Along with Emerald's sales to the statutory minorities and women (see 230 ILCS 10/11.2(b) (West 2004)), Donald Flynn's sales to the 12 outsiders reduced his ownership interest in Emerald to less than 50%. Within days after the buyers signed their purchase agreements, Donald Flynn bought from other shareholders, for $10.5 million, the identical number of shares he had sold, 294 shares–at a net loss to him of $4.2 million.

In the revocation hearing, Donald Flynn denied that his sale of stock to the 12 outsiders was pursuant to a secret deal with Rosemont and Mayor Stephens. He explained that he sold the shares in August 1999 because he was worried about the Board's delay in taking final action on HP's 1997 renewal application and, therefore, he wanted to "take some money off the table." A month earlier, however, in July 1999, he bought additional shares in HP pursuant to the debt instruments he held, increasing his ownership from 44.6% to 74%. Also, in a board meeting on August 12, 1999, he and four other members of HP's board of directors (including McQuaid) approved a plan to spend millions of dollars on building a new casino in Rosemont.

Donald Flynn's explanation for buying shares at a multimillion-dollar loss soon after selling the identical number of shares to outsiders was that he regained confidence in Emerald's prospects on September 7, 1999, when the Board formally declared Emerald's renewal proceeding to be moot. The Board found this explanation to be "not credible" because he had bought additional shares in July 1999 and had voted to approve major financial commitments by Emerald at the August 12, 1999, meeting--before the Board's formal declaration that the renewal proceeding was moot.

5. Disclosures of Emerald's Transfers of Shares

On August 23, 1999, McQuaid sent Acosta a letter informing him that with the addition of section 11.2 to the Act, many people had expressed an interest in becoming shareholders of Emerald. Attached to McQuaid's letter was a list of 25 such individuals along with one trust, the Sherry Boscarino Trust. The letter further stated as follows:

> "[Emerald] has sent a [s]ubscription [a]greement, a [p]rospective[-][p]urchaser [q]uestionnaire, a [s]hareholders' [a]greement, and an Illinois Gaming Board Personal Disclosure Form 1 ('PDF 1') to the individuals on the attached list. We asked these people to complete the PDF 1 and return it directly to the Gaming Board. ([Emerald] will not receive a copy of anyone's PDF 1[.])[] The list is confidential and is provided to you so you can anticipate receiving a PDF 1 from these individuals."

These documents told the prospective purchasers they had to meet the Board's approval to become a shareholder of Emerald. Not all the listed individuals sent a personal-disclosure form to the Board.

On September 21, 1999, McQuaid sent Acosta a new list of potential shareholders, consisting of 63 individuals and the Sherry Boscarino Trust, along with a cover letter saying essentially the same thing as his previous letter (e.g., "We asked these people to complete the PDF 1 and return it directly to the Gaming Board"). Next to each

listed name were the number of shares the person or trust proposed buying and the percentage of the company the person or trust would own. It was a single, triple-columned list (name, shares, and percentage) that included, without differentiation, both the statutory minorities who were to buy shares directly from Emerald as well as the outsiders to whom Donald Flynn had agreed to sell 294 of his own shares. (Neither the letter nor the enclosed list, however, disclosed any purchase agreements between Flynn and the outsiders.) Again, McQuaid's letter stated: "The [c]ompany is aware that these individuals must make application to the Gaming Board for approval as owners and could be denied by the Gaming Board. The materials that the [c]ompany sent to these individuals clearly indicate that anyone who is not approved by the Gaming Board will not be a shareholder of the [c]ompany." Not all the people on this list sent a personal-disclosure form to the Board.

On September 22, 1999, in response to McQuaid's letter of the day before, Acosta wrote:

> "As we emphasized to you at our meeting of September 17, 1999, we can[]not, and will not[,] continue to accept personal[-]disclosure forms without a cover letter from Emerald acknowledging that the individual submitting the form is in fact a prospective owner of Emerald. While we will process those forms received to date from individuals included in your list of prospective owners, we will not accept any additional forms absent the above-referenced

letter from Emerald. Forms previously received from individuals not on your list of September 21, 1999[,] will be returned to those individuals. As you know, Emerald's lack of control over this process has created confusion on the part of some investors and has resulted in our receiving personal[-]disclosure forms from individuals not being considered by Emerald as prospective owners. This situation must not persist. Therefore, we would appreciate your assistance in adhering to this procedure and in advising potential applicants accordingly."

In a letter to the Board dated September 30, 1999, Walter P. Hanley, senior vice president of Emerald, stated that "one of [the] applicant shareholders recently disclosed to [Emerald] the existence of an arrest and conviction record"; accordingly, Emerald had decided not to accept this shareholder's application and requested the Board to "delete him from [the] list of shareholder applicants." Hanley further stated in his letter, without explanation: "The following individuals should *** be deleted from the list: Howard Warren, Anne O'Laughlin Scott, Richard Forsythe, and Russell Steger." As the Board later learned, these were four of the persons from whom Donald Flynn bought shares--at a $4.2 million loss--after selling 294 of his shares to outsiders.

On October 4, 1999, McQuaid wrote Acosta a letter stating as follows: "I am writing to respond to your letter to me dated September 15, 1999. Enclosed please find a list of Emerald Casino's shareholders and applicant shareholders who are

'minority persons' or females." The list did not distinguish between the "shareholders and applicant shareholders." It merely grouped the names under four headings--African-American, Hispanic, Asian-American, and Other--and indicated the number of shares and percentages beside each name. According to the list, 219.71029 shares, representing 31.1% of the company, had yet "to be issued" to "minority persons."

On October 19, 1999, Allan S. McDonald, deputy administrator of the Board's audit-and-financial-analysis department, sent Hanley a letter requesting "a comprehensive statement of changes in [Emerald's] capitalization." In his response 10 days later, Hanley provided what he characterized as "a statement of changes in ownership of common stock," current "as of Oct[ober] 25, 1999." We will quote part of the list, to illustrate its format and show some of the persons whom Emerald was representing to be its current owners:

"SHAREHOLDER	SHARES ACQUIRED (SOLD)	AMOUNT PAID	SHARES OWNED	OWNERSHIP PERCENTAGE
Donald Flynn	(2,505.00593)		1,094.99407	15.75%
		* * *		
Anne O'Laughlin Scott	(50.00000)		---	0.00%
Richard Forsythe	(50.00000)		---	0.00%
		* * *		
Sherry Boscarino	69.52857	1,500,000	69.52857	1.00%
		* * *		
Althea Knowles	17.38214	375,000	17.38214	0.25%

Walter Payton	17.38214	375,000	17.38214	0.25%
		* * *		
Joseph Salamone	17.38214	375,000	17.38214	0.25%
Joseph Scarpelli	17.38214	375,000	17.38214	0.25%
John Sisto	17.38214	375,000	17.38214	0.25%."

McDonald followed up with a letter to Hanley dated November 17, 1999, in which he "request[ed] additional information relating to certain transactions that [were] shown [in the] shareholders listing." Specifically, he requested the following:

> "1. Donald Flynn:
>
> (a) How[,] specifically[,] were the 2,505.00593 shares of stock 'sold' by Donald Flynn distributed?
>
> (b) Was any consideration paid to Donald Flynn for these shares?
>
> (c) Please supply any related agreements addressing these distributions.
>
> 2. Former Shareholders:
>
> It was noted that the following shareholders 'sold' their shares:
>
> Howard Warren--129.00000 shares
>
> Anne O' Laughlin Scott--50.00000 shares
>
> Richard Forsythe--50.00000 shares

Russel Steger--15.00000 shares[.]

(a) What consideration was paid to these individuals for their shares?

(b) Please supply any agreements relating to the disposition of these shares."

In a letter of December 2, 1999, Hanley responded:

"Subsequent to my October 19, 1999[,] correspondence with you, *** Donald Flynn agreed to acquire 50 shares of the [c]ompany's common stock from Barton Love and 31.44286 shares of common stock from Peer Pederson. I have enclosed *** (b) a new shareholder list as of November 30, 1999; (c) copies of agreements relating to the disposition of shares by Donald Flynn and former shareholders; and (d) the distribution of shares owned by Donald Flynn. Consideration has been paid under the enclosed agreements, but each agreement is subject to the approval of the Illinois Gaming Board. As we discussed, the enclosed materials (and those I have previously submitted to you) assume that the Illinois Gaming Board will approve each of the proposed new shareholders."

Attached to Hanley's letter were the stock-purchase agreements whereby, in September 1999, Donald Flynn sold 294 of his shares to the 12 outsiders for a total of $6,345,000

and, soon thereafter, bought 294 shares from 5 original shareholders for a total of $10,571,194. At that point, it became apparent why Emerald had requested the Board, on September 30, 1999, to "delete" Warren, Scott, Forsythe, and Steger from the list of shareholders: Donald Flynn had bought their shares from them. Each of the stock-purchase agreements enclosed with Hanley's letter provided, however, that the transaction was subject to the Board's approval.

In the revocation hearing, an attorney for the Board, Michael Fries, asked Acosta:

> "Q. Mr. Acosta, did Emerald or any individual seek leave of the Board to transfer any of the shares *** from Mr. Donald Flynn to any of the outsiders ***?
>
> A. No. As a matter of fact, *** it was not until December [2, 1999,] that we even received copies of these agreements.
>
> Q. Did Emerald or any individual ever receive *** pre-Board approval for any of these transactions?
>
> MR. CLIFFORD [(Emerald's attorney)]: Objection to the requirement and foundation for any pre-Board approval for transactions.
>
> [ALJ] MIKVA: I'm going to allow that question. I assume it means Board approval prior to the time of the transaction.

MR. FRIES: That's exactly what it means, Judge.

A. No, there was no prior Board approval[.]

BY MR. FRIES:

Q. Same set of questions for the five individuals [whom] Mr. Flynn purchased from.

[Did] Emerald or any of the individuals [whom] he purchased from get prior approval for those [12] purchases?

A. No."

Emerald never issued any stock certificates to the 12 outsiders or to the statutory minorities or women. Emerald contended it was holding the stock in escrow pursuant to guidance from the Board. This "guidance" was a letter of July 26, 1999, from Robert F. Casey, the Board's acting administrator. He wrote McQuaid that "the adoption of a 'restricted stock[-]award plan' [did] not require the approval of the Board or the [a]dministrator; however, any transfer of ownership interest in the holder of any owner's license [had to] be specifically approved by the Board." Casey recommended holding the stock "in escrow until appropriate [Personal-Disclosure-]Form 1 information ha[d] been submitted by each of the [proposed shareholders] and the suitability of each of these individuals to possess an ownership interest in the license ha[d] been approved by the Board." HP had also sought permission to borrow $5 million from existing shareholders "pursuant to [an] attached credit agreement." Casey replied to that request as follows:

"In October of 1995, the Board adopted a resolution

delegating to the [a]dministrator the authority to approve 'project[-]related financings of a value of $5 million or less.' Accordingly, pursuant to the above-referenced delegated authority, please be advised that HP is hereby authorized to borrow funds and execute the credit agreement you submitted with your request. This approval, however, is based and contingent upon the understanding that the funds borrowed under the credit agreement do not in the aggregate exceed a total value of $5 million. Furthermore, we ask that you promptly forward a copy of the credit agreement to the staff once [it is] executed."

In August and September 1999, before accepting funds from the minority and female shareholders, Emerald had them sign fill-in-the-blank subscription agreements. Under these subscription agreements, the purchaser agreed to buy a certain percentage of Emerald's outstanding capital stock at a certain purchase price, payable immediately. The subscription agreements further provided as follows:

"Upon payment by the undersigned of the [p]urchase [p]rice and written approval of the undersigned by the [Board], the [s]hares shall be issued to the undersigned and shall consist of fully paid, non-assessable, no[-]par[-]value common stock of the [i]ssuer. The actual number of [s]hares to be issued to the undersigned will be finally determined based upon the

total subscriptions received and accepted by the [i]ssuer for the [s]hares offered hereunder, but will represent the percentage interest in the [i]ssuer subscribed for by the undersigned."

During the Board's investigation, Emerald denied it allowed the sale of shares without the Board's approval; it characterized the sales as tentative and conditional upon the Board's approval. Nevertheless, Emerald treated the minority purchasers as shareholders for tax purposes, paid them dividends, sent them federal income-tax Schedule K-1 ("Shareholder's Share of Income, Credits, Deductions, [et cetera]"), and allowed them to vote in shareholder meetings. According to McQuaid's testimony, however, Emerald considered these sales to be incomplete and ineffective because "those shares were not issued to those individuals." Emerald held the shares "in escrow," albeit without any "formal escrow agreement," pending the Board's approval of the sales. The minority shareholders had paid Emerald approximately $31 million for shares, and "Emerald [had] used the money for the construction at Rosemont," but these person never physically received any stock certificates. McQuaid testified: "They were going to be issued the shares of stock *** if and only if the Illinois Gaming Board approved them as a shareholder. If not, their mon[ey] was going to be returned to them." An assistant Attorney General asked McQuaid:

"Q. *** Before you took their money, did you tell them that Emerald would spend it prior to obtaining [the] Illinois Gaming Board['s] approval to have them as a

shareholder?

A. Sir, I wouldn't have that knowledge at that point, so I wouldn't have said that. I didn't know when the Gaming Board was going to approve them. I didn't know when the Illinois Gaming Board was going to approve our financing plan. I didn't know that."

Nor did McQuaid notify the minority shareholders when Emerald began spending their $31 million. He did not think Emerald needed the Board's approval to spend those funds.

In interviews with the Board and in sworn statements, Donald Flynn denied meeting with Mayor Stephens, before the passage of Public Act 91-40, to discuss the relocation of Emerald's casino to Rosemont. With respect to sales of stock to persons associated with organized crime, Emerald maintained it was the Board's responsibility, not Emerald's, to verify the suitability of prospective shareholders. Emerald denied it had a duty of due diligence in that regard.

6. Kevin Flynn's Activities on HP's Behalf Before the Passage of Public Act 91-40

Before the passage of Public Act 91-40, Kevin Flynn had no official position at HP. In December 1996, he applied to the Board for permission to be a "key person" of HP solely in the capacity of a shareholder. Rule 100 defines a "key person" as follows: "A [p]erson identified by the Board under [s]ection 3000.222 [(86 Ill. Adm. Code §3000.222 (Conway Greene CD-ROM October 1999))] as subject to regulatory approval as a [p]erson able to control, or exercise significant influence over, the

management, assets, or operating policies of an owner or supplier licensee." 86 Ill. Adm. Code §3000.100 (Conway Greene CD-ROM October 1999). Because of the closure of the Silver Eagle Casino and the Board's decision in 1997 not to renew HP's license, the Board never acted on Kevin Flynn's application of December 1996.

In November 1997, McQuaid, as vice president of HP, and Glenn K. Seidenfeld, Jr., as chairman and chief executive officer of Lake County Riverboat, L.P., signed an agreement that if the state amended the Act so as to allow HP to relocate its casino, HP would "make all reasonable efforts *** to effect the relocation *** to [Fox Lake, Lake County, Illinois]." That same month, McQuaid and Seidenfeld signed an agreement to keep their negotiations confidential.

Agents of the Board interviewed Seidenfeld in August 2000 and summarized the interview as follows:

> "[Seidenfeld] went on to state that he was looking into developing a casino for Lake County for quite some[]time when he received a call from Kevin Flynn. Mr. Seidenfeld stated that Kevin was looking at sites for the relocation of the license. Mr. Seidenfeld explained that he spoke with Kevin on the phone several times before Kevin saw the site. Mr. Seidenfeld stated after giving directions to Kevin, Kevin went out to the site on his own and report[ed] back to him that he liked the site and that they should further the[ir] discussions on a joint venture.

* * *

*** [An agent] asked Mr. Seidenfeld what specifically was his understanding of Kevin Flynn's role in HP, Inc. He stated that he believed Kevin Flynn was acting as the chairman or president of the company.

*** [An agent] asked who negotiated the agreement between the two parties. Mr. Seidenfeld responded that after many telephone conversations with Kevin Flynn, they agreed to form a union."

Kevin Flynn had never sought or obtained the Board's permission to exercise managerial authority over HP.

McQuaid testified he had no knowledge that "Kevin Flynn *** participated in those negotiations [with] Lake County Riverboat on behalf of HP." Seidenfeld testified, however, that when he and his partner, Gerry Porter, were in Springfield in the first half of November 1997, lobbying for legislation to allow the relocation of gaming licenses, they spoke with McQuaid in a telephonic conference call:

"Mr. McQuaid said that he and Mr. Flynn would be calling to discuss a joint venture[;] they wanted to bring their license to our side in Fox Lake, Illinois[,] if that bill passed, so they want[ed,] [that day, to] talk about a conditional agreement to joint[-]venture our projects.

Q. Now, you made *** mention [of] a Mr. Flynn twice.

Are you referring to Kevin Flynn or Donald Flynn?

A. I've never talked to Donald Flynn. It was only Kevin Flynn [whom] I talked to.

* * *

[Primarily, the negotiations were] between myself and Mr. Flynn, because after that point[,] I don't think there was any participation by Mr. McQuaid[.] [H]e was there and, you know, on the conference calls[,] but mainly it was Kevin Flynn[.] [I]t was his company, and we assumed that he was the chairman of the board. I don't know that he said that."

In addition to dealing with Mayor Stephens, the Davis Companies, and the Duchossois family, Kevin Flynn regularly attended meetings of Emerald's board of directors. In a meeting of June 23, 1999, two days before Public Act 91-40 became law, HP's directors, including Donald Flynn, voted to amend HP's articles of incorporation to change its name to Emerald Casino, Inc. They also voted to increase the board to five members and to appoint Kevin Flynn to the position of chairman and chief executive officer of HP. According to the minutes of this meeting, "Kevin Flynn [told the board of directors] that based on his discussions with potential lenders, the company would be unable to obtain debt financing without sufficient new equity investments to achieve an acceptable debt[-]to[-]equity ratio." In the revocation hearing, Kevin Flynn admitted that earlier than June 23, 1999, he was having discussions with potential lenders for HP; he testified: "[O]nce the law was passed at the end of May [1999], I began doing

that to further the construction of a casino in Rosemont."

7. Kevin Flynn's Second Application To Be a Key Person of Emerald and the Investigation It Engendered

Michael Belletire testified he was the Board's administrator from "the first part of 1995 until April of 1999." He recalled having a meeting with Donald and Kevin Flynn in his office in November 1996. Of the two Flynns, Kevin seemed to be doing the most talking. One of the topics of discussion was Donald Flynn's desire to merge HP with an Indiana casino, of which Kevin Flynn was chief executive officer. By Belletire's understanding, Kevin Flynn had no managerial role in HP. Donald Flynn wanted to merge the two companies, transfer ownership of HP to family members, and make Kevin Flynn the chief executive officer of HP.

An assistant Attorney General asked Belletire:

> "Q. Does the Board always[,] in the instance of private entities [such as HP,] need to be notified of the agreement to transfer ownership shares before the shares are transferred?
>
> A. Yes. Whether written or oral[,] any agreement requires disclosure to the Board. And there is a prohibition against any transaction occurring, not only without notification, but without consummation through the Board's approval.
>
> Q. Did you discuss these procedures with Donald and Kevin Flynn at the meeting?

A. Yes."

Belletire explained to the Flynns that the proposed shareholders, and also Kevin Flynn as the proposed chief executive officer of HP, would have to file personal disclosure-forms with the Board, which would then perform suitability investigations. The assistant Attorney General asked Belletire:

"Q. What was their response to that?

A. They indicated that they would comply. They understand and that they would comply."

The Flynns never mentioned to Belletire any plan to relocate HP's casino.

On August 4, 1999, Kevin Flynn filed an application with the Board to act as a key person in the capacity of shareholder and chief executive officer of HP. Because he was applying to be a key person of a privately held casino, the Board began investigating his suitability. On September 27, 2000, Kevin submitted to an interview by the Board, answering questions under oath and in the presence of his two attorneys. Acosta asked Kevin:

"Q. At what point in time did you become involved with HP, Inc.?

A. June of 1999."

In answer to Acosta's queries, Kevin Flynn testified he aware that in the summer of 1997, the Board voted not to renew HP's license and from then until May or June 1999, HP "pursued legislative initiatives in order to permit it to relocate." Acosta asked him:

"Q. Now, with respect to any role you may have played in those pursuits, could you tell us--did you have any discussions, participate in any meetings, anything of that nature during that period of time?

A. I didn't have any direct involvement. I certainly had conversations relative to the fact that it was going on.

I occasionally was at board meetings that occurred either before or after a Blue Chip meeting when [McQuaid] would give a complete update on what was happening legislatively."

Blue Chip Casino, Inc. (Blue Chip), was the name of the casino in Michigan City, Indiana, of which Kevin Flynn was chief executive officer. It had the same directors as Emerald.

Acosta asked Kevin Flynn:

"Q. And at those meetings, did you have any substantive input of any kind regarding those efforts?

A. No, nobody was really soliciting my input. I was really just listening.

Q. Did you offer your input, whether solicited or not?

A. Not that I remember, Sergio. I certainly may have, but I don't believe that I did."

Actually, as subsequent investigation revealed, of the five HP board meetings that Kevin

attended from April 1997 through April 1999, only one of them occurred right before or after a meeting regarding Blue Chip.

Kevin Flynn testified he had met with Mayor Stephens two or three times. The first meeting was in the mayor's office in Rosemont in 1997. According to Kevin, he went to the mayor's office with no "set agenda." He had heard that the mayor was interested in opening a casino in Rosemont. "I was interested in explaining to the [m]ayor that we were local people from Chicago who had a casino in Michigan City." According to Kevin Flynn, HP was never mentioned. "To the extent that the mayor would have been receptive *** to my story of Blue Chip Casino, I would have loved to have done something in gaming with the Village of Rosemont." But "[i]t never got that far" because the mayor bluntly told Kevin that he had very little interest in people who managed riverboats and that "[h]e'd met with the people who managed the biggest casinos in the world [who] wanted to have a casino in Rosemont." Kevin denied discussing with Mayor Stephens in 1997 the possible relocation of HP's casino to Rosemont; he insisted that HP did not even consider relocating to Rosemont until after the passage of Public Act 91-40. Kevin also denied any deal to give the Duchossois family, the Davis Companies, or associates of Mayor Stephens an interest in Emerald.

An agent of the Board interviewed Kevin Flynn on July 6, 2000, and summarized part of the interview as follows:

> "[The reporting agent] asked Mr. Flynn if he told Mr. Duchossois and Mr. Filkin that he made a deal with the Davis Companies where[by] the Flynn[]s, the Davis

Companies, and the Duchossois[es] would all share in a new casino operation. Mr. Flynn responded he did not. [The reporting agent] asked Mr. Flynn if he told Mr. Duchossois and Mr. Filkin that this agreement must be kept confidential and must be kept from the [Board]. He stated, 'No.' [The reporting agent] asked Mr. Flynn if Mr. Duchossois and Mr. Filkin stated, 'You told them to keep this agreement confidential,' would they be incorrect? Mr. Flynn stated they would be incorrect."

On October 30, 2000, agents of the Board interviewed Kevin Flynn again, and an agent summarized the interview as follows:

"[The reporting agent] asked Mr. Flynn if he ever called Mr. Seidenfeld to discuss a joint venture. Mr. Flynn responded, 'No.'

[The reporting agent] asked Mr. Flynn if he ever went to Lake County to look at a proposed si[te] for a Lake County gaming operation. Mr. Flynn took a minute to answer this question[] and then responded, 'No.'

[The reporting agent] explained to Mr. Flynn that Mr. Seidenfeld stated that he (Kevin Flynn) had called him in the fall of 1997[,] looking for a casino operation to transfer the HP[,] Inc.[,] license to, and that Mr. Seidenfeld stated that

his contact was with *** []Kevin Flynn[] up until Joe McQuaid signed the agreement. [The reporting agent asked] Mr. Flynn how he would like to respond to this statement. Mr. Flynn responded that[] 'Mr. Seidenfeld is a liar.'"

8. Architectural Design and Construction Before the Enactment of Public Act 91-40

In June 1999, after the General Assembly passed Public Act 91-40 but before the Governor signed it into law, Kevin Flynn's office began having discussions with Aria Group Architects (Aria), which HP subsequently hired to design the Rosemont casino complex. On June 8 and 9, 1999, Aria conferred with naval architects DeJong and Lebet and from June 8 to 10, 1999, prepared preliminary site studies for a casino. On June 14, 1999, Aria provided HP a proposal for services (addressed to Kevin Flynn and McQuaid). HP gave Aria verbal authorization to proceed and paid Aria more than $22,000 for its services in June 1999. That same month, HP incurred an additional $24,000 in costs for design and construction. In a meeting on June 23, 1999, the board of directors of HP authorized HP's officers to prepare construction plans and budgets and to negotiate with Rosemont regarding development plans.

9. HP's Initial Disclosure to the Board of Its Intention To Relocate to Rosemont

According to the minutes of the Board's meeting of July 20, 1999, Ficaro first gave formal public notice to the Board of HP's intention to relocate its riverboat gaming license from East Dubuque to Rosemont. He said that in a future meeting, HP would offer, for the Board's consideration and approval, a plan for a "new facility and financing structure."

10. The Letter of Intent Executed By Emerald and Rosemont

On July 21, 1999, Mayor Stephens, on behalf of Rosemont, and McQuaid, on behalf of HP, signed a letter entitled "Letter of Intent for the Village of Rosemont to Enter into a Lease and Development Agreement with HP, Inc." The first paragraph of the letter reads as follows:

> "This letter of intent is intended to memorialize key terms that have been agreed to [and] which are to be incorporated into a Lease and Development Agreement (the 'Lease Agreement') between the Village of Rosemont (the 'Village') and HP, Inc. ('HP')[,] pursuant to which the Village will lease approximately two acres of land[,] located along what is now Milton Parkway between Balmoral Avenue and Bryn Mawr Avenue[,] to HP for use as a site for a casino. The letter of intent will serve as the basis upon which the Village's attorneys, in consultation with HP's attorneys and representatives[,] will draft the Lease Agreement for further review, negotiation[,] and execution by the Village and HP, Inc."

The letter of intent set a goal of finalizing the terms of the lease agreement by August 20, 1999. The parties agreed that until they executed the lease agreement, "neither HP nor the Village [would] publicly disclose any of the terms of this letter of intent[] unless required to do so by court order." The letter of intent further provided:

"This letter of intent does not constitute a binding agreement, but rather is an expression of intent by the Village and HP to enter into the [l]ease [a]greement based on terms of this letter of intent." Among the "key terms that ha[d] been agreed to" were the following: (1) for a term of 99 years, HP would lease the land from Rosemont on which the casino barge would be built; (2) HP would pay annual rent to Rosemont starting at $1.5 million, with adjustments every 10 years based on the increase or decrease in the casino's adjusted gross receipts, i.e., "gross receipts less winnings paid to wagerers" (230 ILCS 10/4(h) (West 1998)), but in no event would the rent be less than $1.5 million per year; (3) HP would pay for the construction of the casino and for the expansion of a nearby parking garage owned and operated by Rosemont; (4) HP would complete the casino within 15 months after beginning construction; (5) each year, HP would contribute the greater of $2 million or .666% of the casino's adjusted gross receipts "to a fund intended to promote tourism in the Rosemont/O'Hare area"; and (6) each year, HP would contribute the greater of $2 million or .666% of the casino's adjusted gross receipts "to a fund intended to promote economic development in the Cook County area."

11. Emerald's Construction Activities After Public Act 91-40 Became Law

John McMahon was Emerald's senior vice president and chief financial officer. He testified: "I was assigned *** as a point person for [Emerald] to interact with professionals, design professionals, contractors[,] and so forth [in the construction of the casino in Rosemont]." He also had "responsibility over the financial aspects of design and construction."

Terry Graber testified he was the senior vice president of Power Construction Company, L.L.C. (Power), "a commercial and general contractor in *** construction management." Power was "in the business of building hotels, hospitals, hi-rise condominiums in downtown Chicago, in the area, also office developments." Degen and Rosato Construction Company (Degen and Rosato) also was a "general contractor [that did] construction management." (According to Mayor Stephens's testimony, Degen and Rosato had "probably done [80%]" of all construction in Rosemont in the past 10 years.) Graber explained that Power "[did] joint ventures for specific projects when it [made] sense, based upon the experience each of the teams [brought] to the table," and that before 1999, Power and Degen and Rosato had formed several such "project[-]specific" joint ventures, including "buil[ding] several hotels together." Around the beginning of July 1999, representatives of Emerald approached Power about building a casino in Rosemont. Power in turn approached Degen and Rosato, and the two construction companies formed a joint venture for that purpose ("the joint venture").

The joint venture sent Emerald a proposal for a contract on July 2, 1999, and immediately thereafter, began work on the "Emerald Casino Complex." According to Aria's minutes of a construction meeting on July 28, 1999, Mayor Stephens had "accelerated the building[-]demolition program," and "the area where the [c]asino [would] be placed [was] very close to being clear of all buildings." Aria's minutes of a meeting two days later reveal that "the demolition of the buildings and the location of the site [were] almost complete." Mayor Stephens "stopped by the meeting [and]

recommend[ed] that construction begin as soon as possible." In the opinion of the architects, "excavation [could] begin on the basin for the casino as early as August [15, 1999]."

On August 2, 1999, Mayor Stephens and McQuaid signed a letter (the "site-access agreement") recognizing that "HP [might] want to start the site work and excavation required for the construction of the casino barge and the parking structure addition prior to September 1, 1999," the date by which (according to the letter of intent) the parties intended to execute a formal lease agreement. The site-access agreement gave HP permission to begin the site work and excavation before the execution of a lease agreement, provided that HP did so "at the sole cost and risk of HP," among other conditions.

Aria's minutes of a construction meeting on August 6, 1999, state as follows:

> "[E]veryone agreed that a sign should be started that will be used at the site. This will contain the names of all of the parties involved and a rendering. John McMahon stated that after the September [7, 1999,] presentation, the Gaming Commission [sic] will take up to a month to review the documents that have been presented and to hold [off] placing the sign on the site until the Gaming Commission comes back with [its] approval of the documents. In addition, any construction on the site needs to be kept

discreet as we prepare the site in [anticipation] of Gaming[-]Board approval."

On September 14, 1999, on the basis of initial drawings approved by Emerald, the joint venture began soliciting bids for constructing the concrete foundations and structural reinforcing steel for the casino. Graber testified:

"A. Power's role would be to take a set of defined documents[,] *** agreed[-]upon between the ownership and the architects and the consultants[,] that were far enough along[,] from the design standpoint[,] to go out into the marketplace and take bids.

Once the bids were received, we would then prepare spreadsheets for ownership to then review. And based upon their agreement, we would then proceed forth in getting a subcontractor signed up for the project.

Q. So would Power make a recommendation to Emerald about which subcontractor to award work to?

A. Yes.

Q. And then would Emerald authorize Power to engage those subcontractors?

A. Yes."

On August 26 and September 28, 1999, Emerald and Rosemont signed letter agreements (the "extension agreements") authorizing Emerald to continue

construction at the casino site and extending the deadline to execute the lease agreement.

On September 29, 1999, James R. Lencioni, senior architect at Aria, wrote the building inspector of Rosemont, requesting "permitting on a fast[-]track basis" for a foundation, structural steel superstructure, architectural shell and core, and interior build-out. In his testimony, Lencioni explained he was seeking "a fast-track process which *** allows you to submit for permits on various parts of the project to allow construction to proceed on those [parts] while the balance of the documents [was] being prepared for submittal."

12. McQuaid Seeks Acosta's Advice and Submits the August Application, in the Process Mentioning That HP Has Begun Preparing the Site for Construction

On August 10, 1999, McQuaid and Hanley had a meeting with Acosta and the Board's chief legal counsel, Mareile B. Cusack. According to Acosta's testimony, McQuaid and Hanley then divulged, for the first time, "that there was some preliminary site[-]preparation work taking place at the proposed Rosemont site."

The next day, Acosta wrote McQuaid a letter to "confirm the substance of [the] conversation [they had the day before]." According to this letter, McQuaid had requested Acosta's advice "whether HP should make a presentation to the Board at the September 7, 1999[,] Board meeting to request 'initial consideration' for, among other things, an equity financing to be provided by minority investors[;] a bank-financing[;] HP's plans for the development of a site in Rosemont[;] and, generally, HP's request for renewal of licensure." Acosta advised McQuaid that until the Board considered the

effect of Public Act 91-40 as well as "the significance and impact of the [ALJ's] recommendation in the proceedings resulting from the Board's initial decision to deny the renewal of HP's owner's license in July 1997," the Board could not make any decision on those matters.

Acosta noted that in the meeting the previous day, McQuaid had given him four bound copies of HP's renewal application. Although Acosta agreed to accept those documents, he emphasized that his acceptance of them did not signify that HP's renewal application was complete. Acosta wrote:

> "To date, the staff has not provided you with a final draft of the renewal application. Indeed, until the Board determines the impact of the new legislation on the proceedings before the ALJ, no decision regarding the content of the renewal application can be made. In the event you were informally provided with preliminary drafts of an application, these drafts were provided to you without appropriate authorization and do not contain the totality of information HP may be required to provide in conjunction with its 'renewal application.'
>
> As Bob Casey explained in a prior conversation with you over the telephone, HP's renewal application has not yet been finalized and any preliminary application you may have

received should have been 'put on a shelf and not considered as [the] HP renewal application.'"

Finally, Acosta warned McQuaid that insomuch as HP incurred expenditures in the development of the Rosemont project, HP did so "at the company's own risk. The Gaming Board ha[d] in no way encouraged and [was] not responsible for any of the costs or risks the company and its principals ha[d] chosen to incur at this point."

In the Board's meeting of September 7, 1999, which Ficaro attended, Chairman Vickrey observed that several licensees had requested initial consideration for the proposed construction of barges. Vickrey informed all licensees that before approving such projects, the Board expected each licensee to submit expert reports that the proposed facility posed no threat to public health and safety. The reports were to include assessments of the engineering structure, electrical system, and interior air quality.

On September 17, 1999, Acosta sent McQuaid a letter following up on Chairman Vickrey's remarks. Reminding McQuaid that under section 5(c) of the Act (230 ILCS 10/5(c) (West 1998)), the Board had "broad powers to address such issues," Acosta cautioned him that "the Board [would] not approve any barge construction projects until certain materials pertaining to health[-]and[-]safety issues [had] been submitted to the [Board's] staff for review and evaluation." Those materials were as follows:

"First, the Board requires all licensees to submit

detailed plans and expert summaries regarding such issues as structural integrity, air quality/ventilation systems, electrical systems, and related fire and safety systems. Second, the Board requires each licensee to submit copies of all required certifications and approvals issued by [f]ederal, [s]tate[,] and local agencies having jurisdiction over such projects. More specifically, each licensee proposing to undertake a barge construction (or similar) project must establish[,] to the Board's satisfaction[,] that such agencies as the [United States] Coast Guard, the Army Corps of Engineers, the Environmental Protection Agency (both [f]ederal and [s]tate), the State Fire Marshal, local zoning and building authorities, and other applicable agencies[] have reviewed and approved the proposed project."

13. The September Application

On September 24, 1999, Emerald filed with the Board an application for the renewal of its license and relocation of its operations to Rosemont, using the revised application form that Acosta had referenced in his letter of August 11, 1999. In its instructions, the form stated: "Applicant is under a continuing duty to disclose promptly any changes in the information provided," and "[a]ny misrepresentation or omission of information *** is grounds for *** disciplinary action."

Emerald's application identified Kevin Flynn as its top executive. It

estimated the total budget for development of the new casino at $161 million, including $46 million in financing expenses and $30 million to construct 3,500 parking spaces. Emerald intended to finance the construction "with a combination of new equity and debt. Proposed new equity [would] be approximately [$31 million,] and new debt [would] be approximately [$130 million,] which [would] be used to finance new construction and refinance existing debt." Emerald anticipated the new debt would "be in the form of a secured[-]credit facility and secured notes."

In paragraphs 8(e) and (f), the application form requested a "list of all current proposed shareholders[] and [their] percentages of ownership," asking Emerald to "specify the shareholders qualified as minorities under [s]ection 11.2(b) of the Act [(230 ILCS 10/11.2(b) (West Supp. 1999))]." (Emphasis added.) In a separate paragraph, paragraph 11a, the form requested "a detailed list of all shareholders ***, including the number of shares held[] and their respective ownership percentages." (Emphasis added.) Emerald submitted a single list, which did not distinguish between existing and proposed shareholders and which included outsiders to whom Donald Flynn had contracted to sell shares (without disclosing him as the seller).

The application form asked if Emerald had "identified any public officials or officers[,] or employees of any unit of government, or relatives of said public officials, officers[,] or employees, who, directly or indirectly, own any financial interest in, have any beneficial interest in, are the creditors of[,] or hold any debt instrument issued by, or hold or have any interest in any contractual employment or service relationship with [the] licensee?" Emerald answered no. The form requested Emerald to "[d]escribe in

detail what steps [Emerald] ha[d] taken to verify the accuracy of" this declaration. Emerald answered that it had given a personal-disclosure form (PDF 1) to each shareholder but that Emerald itself "does not review" any such forms that the shareholders had submitted to the Board.

Paragraph 46 of the application form stated: "Describe [Emerald's] negotiations and dealings with any and all communities in which [Emerald] has initiated steps to locate its gambling operations." Emerald answered as follows:

> "Emerald Casino, Inc.[,] has not initiated any steps to relocate with any community other than Rosemont, Illinois. Prior to passage of the legislation that allows for the relocation of the [c]ompany's license, Emerald Casino spoke with or met with representatives of a number of communities[,] but there were never any negotiations or steps taken to relocate.
>
> Preliminary discussions have been held with representatives of the Village of Rosemont. These discussions are continuing and will eventually result in a development agreement, but[,] to date[,] no formal agreement has been executed."

Beyond the general phrase "[p]reliminary discussions," Emerald did not describe the letter of intent between itself and Rosemont, the site-access agreement, or the extension agreements.

Paragraph 21 requested "all agreements, arrangements[,] and commitments relating to [the] proposed gaming facility and related projects." Emerald responded as follows:

> "Emerald Casino, Inc. (the 'Company')[,] has entered into the following agreements (copies of which are attached):
>
> (a) license agreement for certain technology for use in electronic gaming devices;
>
> (b) agreement with Mackie Consultants, Inc.[,] regarding engineering services;
>
> (c) agreement with Jefferies & Company, Inc.[,] regarding financing;
>
> (d) agreement with Anthony Leone regarding lobbying services; [and]
>
> (e) agreement regarding sale of real estate in Jo Daviess County, Illinois.
>
> The Company has engaged numerous professionals and consultants [(listing Aria, Power Construction, Degen and Rosato, a structural engineer, and a naval architect, among others)] to work on its casino development, but the Company has not executed any agreements except those described above."

Emerald neither mentioned nor produced the documents that McQuaid and Mayor Stephens had signed. Nor did Emerald produce Aria's contract proposal, which Emerald had accepted.

Paragraph 31 asked: "Has [Emerald] or any of its [a]ffiliates, during the past three years[,] been a party to any legal action, including pending or threatened litigation or administrative action not elsewhere disclosed in this application?" Emerald answered yes, and in exhibit No. 31-1, in explanation of its answer, listed two actions: (1) a shareholder's action for a lien on real estate in Jo Daviess County and (2) an administrative action before the Board for the renewal of HP's license in 1997.

14. Representations Emerald Made to the Board in a Meeting of September 30, 1999

On September 30, 1999, Acosta and other personnel of the Board met with McMahon, Hanley, Emerald's general counsel, and Brent Stevens, managing director of corporate finance for Jeffries & Company. Later that same day, the Board drafted the minutes of the meeting. These minutes were admitted into evidence and are part of the record. According to the minutes, Stevens advised that unless the Board, in its upcoming meeting of October 26, 1999, approved Emerald's September renewal application, "'it would have a detrimental effect on financing and would make it extremely unlikely the plan would go forward as stated.'" He explained that his responsibility was to manage risk for the investors and because of "the potential additional risk of [Emerald's] not having [its] license renewed, the investors would require additional compensation to offset this additional risk."

Chief Legal Counsel Cusak and Deputy Administrator McDonald asked

Emerald's representatives if construction had started. Again, we quote from the minutes: "Mr. McMahon explained that they 'don't own the land'[;] it is owned by the Village of Rosemont. He stated that the Village of Rosemont ha[d] begun some preliminary work to prepare the site[] but those costs ha[d] been handled by the Village of Rosemont and ha[d] not been 'part of their costs at this point.' Mr. McMahon added that there [was] 'no lease agreement yet.'"

Again, this meeting happened on September 30, 1999. On August 2, 1999, Mayor Stephens and McQuaid signed the site-access agreement, in which HP agreed that the site work and excavation would be "at the sole cost and risk of HP." On July 21, 1999, they signed the letter of intent, stating, as a "key tERM," that HP would pay for the construction of the casino and expansion of the parking garage. Contrary to the representation McMahon made to the Board's officers in the meeting, Emerald had incurred, to date, a total of $284,196.26 in costs for the design and construction of the Rosemont casino complex--as McMahon subsequently admitted in a fax to McDonald on April 5, 2000, as well as in his testimony before the Board on July 27, 2005. By November 1999, that amount had climbed to $9,944,504.89.

Also, in the meeting of September 30, 1999, McMahon "said that they [were] working with the general contractor and [were] in the process of negotiating a contract with Power Construction in Schaumburg. Mr. Hanley offered that they [were] working with a 'long list of professionals' and would submit contracts to the Board when executed." McDonald "explained the need for any contracts or agreements executed by Emerald to be sent to him." Acosta "explained to the Emerald representatives that they

should be over-inclusive and that [the Board would] communicate to Emerald what [the Board] need[ed] and [did not] need as [they] move[d] forward." As of the date of this meeting, Emerald had already executed the letter of intent, site-access agreement, and extension agreements with Rosemont, none of which Emerald had produced to the Board. Nor had Emerald disclosed or produced Aria's proposal for architectural services, which Emerald had accepted. Nor had Emerald disclosed that it had received a proposal from the joint venture and had authorized payments to Aria and several subcontractors.

In fact, from this September 1999 meeting until January 2000, Emerald made no further disclosure to the Board of any construction plans, contracts, or activities. Acosta testified: "Our understanding was that, without the financing, they would not be able to afford the construction of the casino project and that they did not have that financing because the Board had not yet approved the renewal and relocation of the license."

15. Emerald's Construction Activities After the September Application

On October 5, 1999, Graber, on behalf of the joint venture, executed a letter addressed to McMahon. It was entitled "Emerald Casino[:] Letter of Intent/Notice to Proceed," and its purpose was to "confirm [Emerald's] intention to enter into a contract with the joint venture "for the construction of the Emerald [c]asino project located in the entertainment complex in Rosemont." By countersigning the letter, the "Owner," Emerald, "agree[d]" that "the Contractor [(the joint venture) could] proceed with the performance of the work based upon the plans and designs that ha[d]

been approved by the Owner. The date of execution of this letter [was to] serve as the formal [n]otice to [p]roceed." By its signature, Emerald further "agree[d] that upon execution of this [l]etter and upon written approval, Contractor [would] be entitled to enter into and execute [s]ubcontract agreements based upon the plans and designs." The contractor's fee for the performance of the work would be equal to 5% of the cost of the work as well as the cost of preconstruction services already performed. A construction contract, when executed, was to supersede this letter of intent; in the meantime, either party could terminate the letter without cause by giving five business days' written notice. McMahon countersigned the letter on October 6, 1999, and the joint venture thereafter billed, and Emerald paid, for services pursuant to the letter. Emerald never produced this letter of intent to the Board. In response to an inquiry by Acosta, Power's attorney sent him a copy of the letter on November 20, 2000.

In late September 1999, Emerald approved paying the naval architect and structural engineer, DeJong & Lebet, Inc., the sum of $62,365.84 for designing a casino barge. On September 30, 1999, Power requested Commonwealth Edison to supply electricity to the construction site. On October 15, 1999, the joint venture ordered $1,180,660 in construction materials from Trinity Marine Products, Inc. (e.g., head log assemblies, stern log assemblies, side shell assemblies, longitudinal bulkheads). On October 18, 1999, Emerald began construction of the casino complex without having submitted any plans or contracts to the Board for its preapproval. That same day, the joint venture hired Zalk Josephs Fabricators, L.L.C., to supply construction materials and perform subcontractor's work for $3,470,000 (generally, "[f]urnish[ing],

fabricat[ing,] and erect[ing] all structural steel, bar joists, and metal decking"). On October 21, 1999, Rosemont granted Power's application for a building permit to construct the foundation basin for the casino barge.

16. The Board Requests an Update of the September Application

In a letter dated October 19, 1999, the Board requested Emerald to update its disclosures in the September application. Among the items the Board specifically requested were any agreements between Emerald and governmental entities and any significant contracts or agreements that Emerald had executed since its last submission. In its response 10 days later, Emerald disclosed no contracts or agreements; Emerald merely promised that "updating information regarding [Emerald's] proposed financing, governmental agreements[,] and significant contracts [would] be provided when available." Emerald did not disclose its agreements with the joint venture or Aria or the letter of intent, site-access agreement, and extension agreements between itself and Rosemont. When construction ceased in February 2000, Emerald had incurred almost $25 million in design and construction costs.

17. How Emerald Financed the Construction

To finance the construction in Rosemont, Emerald originally planned to raise $20 million from existing shareholders and more than $100 million in outside financing. Emerald later told Board personnel it was thinking about appearing before the Board in an upcoming meeting of September 7, 1999, and asking for "initial consideration" of "an equity financing to be provided by minority investors" as well as "bank financing." Emerald never followed through with that idea; it never formally

requested the Board to approve any specific financing proposal. As we noted, on September 30, 1999, Emerald told Acosta, McDonald, and other Board personnel that outside financing was unobtainable until the Board approved Emerald's application for renewal of its license and relocation to Rosemont.

Without seeking the Board's approval, Emerald paid for construction with the funds that the minority and female shareholders had paid for an ownership interest in Emerald. When the Board found out about this financing arrangement, the money was already spent. Emerald tried to allay the Board's concerns by promising that if the Board did not approve these persons as shareholders, Emerald would return the payments "immediately." This refund never happened. Emerald characterized their funds as "technically" being "loans," but Emerald never obtained the Board's approval for debt-financing from these individuals.

18. Surprised at How Far Construction Has Progressed, Emerald Calls a Meeting and Demands More Information

On or about January 20, 2000, McQuaid telephoned the Board, reported that Emerald had reached a point in its construction project where it was allocating space on the casino barge, and asked where the Board would like to have its office. The Board was surprised because Emerald had never mentioned any changes in the project since the meeting of September 30, 1999, and had never submitted any construction plans or contracts. For all the Board knew, Emerald lacked financing, and without financing, Emerald lacked the means to pay for further construction. On January 25, 2000, the Board sent Emerald a letter expressing concern that construction had

progressed so far without prior notification of the Board. The letter asked Emerald to explain exactly what it had been doing and what agreements were in force--again urging Emerald to be "overinclusive" in its disclosures.

In its response the next day, Emerald mentioned for the first time, but did not produce, its letter of intent with the joint venture. Emerald represented that it "ha[d] not executed any construction contracts since September 24, 1999." (Again, Emerald failed to mention its agreement with Aria or the letter of intent, site-access agreement, and extension agreements it had executed with Rosemont.) Emerald admitted that "construction without contracts [was] unusual" but stated that "drafts" of construction contracts with the joint venture "and all other construction contracts [were] either being negotiated or [would] not be executed until Emerald obtain[ed] financing." Emerald promised to produce all such contracts "[u]pon execution." Also, Emerald asserted that "at several meetings with [the Board's] staff, Emerald ha[d] described the nature and status of its construction in Rosemont."

Acosta wrote back disputing Emerald's assertion that it had advised the Board of the construction at the Rosemont site. He observed that Emerald had apparently entered into several "agreements" and had refrained from producing them on the ground that they were not "contracts." Acosta said he was not interested in "engag[ing] in a discussion of legal semantics"; instead, Emerald's representatives were to meet with him "as soon as possible" to eliminate any further misunderstandings and divulge all relevant information.

This meeting occurred on January 31, 2000, after which the Board

requested Emerald to provide the following by February 17, 2000: (1) an itemized list of expenditures by Emerald since July 1, 1999; (2) a list, and an executed copy or most recent draft, of "all written and/or oral contracts, arrangements, work orders, change orders, engagements, hires, commissions of work, requests for performance, exchanges of mutual promises, letters of intent, [et cetera] entered into since July 1, 1999," including, if the terms were not reduced to writing, a summary identifying the parties, the nature and purpose of the transaction or relationship, the agreed terms, and when the parties agreed to them; (3) "all building, site[,] and construction plans"; and (4) "any changes or updates of any nature" to Emerald's application of September 24, 1999. In response to this request, Emerald failed yet again to disclose or produce the letter of intent, site-access agreement, and extension agreements between itself and Rosemont. The Board first received those documents, along with the building permits, from Rosemont's lawyer in September 2000. Nor did Emerald produce the letter of intent it had executed with the joint venture.

19. The Lease Agreement with Rosemont

On February 10, 2000, Emerald gave the Board a copy of its lease agreement with Rosemont, dated the same day. After producing this lease agreement, Emerald took the position that while the Board had the right to reject the Rosemont casino after it was built, the Board lacked any statutory or regulatory authority to require Emerald to obtain the Board's permission before building the casino.

20. The Board's Meeting of February 22, 2000

In a meeting of the Board on February 22, 2000, Ficaro produced some

renderings for the Rosemont casino, including architectural "concepts." He informed the Board that construction costs through January 2000 were less than $10 million. He also said that "a significant amount of non-barge work ha[d] taken place" and that "the basin for the barge [was] almost complete, the pavilion foundation [was] substantially complete, the structural steel [was] being installed, excavation for the parking[-]garage addition [was] almost complete, and the foundation footings [were] being poured." Asked if Emerald had "entered into any construction agreements," Ficaro answered that "no contracts ha[d] been signed in relation to construction." Hanley also attended the meeting and stated that after consultation with its architects and owner's representative, Emerald was approving payments for construction.

21. Emerald Runs Out of Money and Ceases Construction

Three days after the meeting of February 22, 2000, having exhausted the funds it had received from the minority shareholders, Emerald announced it was halting construction--at the same time providing the Board, for the first time, with a set of the actual construction plans.

E. Bankruptcy and the Two "Side Letters"

On June 13, 2002, the revocation hearing temporarily halted when Rosemont and three other creditors forced Emerald into bankruptcy, making Emerald a debtor-in-possession in a Chapter 11 case.

The bankruptcy reorganization plan contemplated the sale of Emerald's business, including the riverboat casino license. The Board, however, was a party to neither the bankruptcy case nor the reorganization plan. Emerald filed an action to

enjoin the disciplinary proceeding as a violation of the automatic stay, but the federal courts refused to do so. Emerald then attempted to negotiate a settlement with the Board.

These negotiations led to a conditional settlement agreement memorialized in a letter to Emerald dated December 15, 2003 (the "first side-letter"). The letter bore the signatures of the Board and the Attorney General and made the following commitments, subject to certain conditions: (1) the Board and the Attorney General would stay, and ultimately dismiss, the revocation proceeding; (2) the Board would transfer Emerald's license to the winning bidder at an auction; (3) the Board would assess the suitability of the winning bidder; (4) the State would release Emerald and its agents and shareholders, as well as certain members of the Flynn family, from all claims in connection with Emerald. The proceeds of the auction would go to the State. The Board and Attorney General made these commitments only on condition that the following events, among others, did not happen: (1) Emerald withdrew, waived a condition of, or modified "in any manner" the amended plan of reorganization (the "December 2003 plan"); (2) the bankruptcy court confirmed a plan that altered the December 2003 plan; (3) the December 2003 plan failed to become effective by July 1, 2004; and (4) the Illinois Appellate Court reversed the judgment of the Cook County circuit court in case No. 01-CH-8368. If any of these events happened, either the Board or the Attorney General could resume the disciplinary proceeding with 60 days' notice to Emerald. On December 20, 2003, Emerald I reversed the judgment in case No. 01-CH-8368. On May 17, 2004, Emerald presented to the bankruptcy court a proposed

reorganization plan that modified the December 2003 plan. The bankruptcy court confirmed this version of the plan on May 19, 2004. On July 20, 2004, Emerald submitted another proposed reorganization plan with further modifications, which the bankruptcy court confirmed on July 22, 2004.

Despite the failure of these conditions in the first side-letter, the Board took steps to sell and transfer Emerald's license. The Board held an auction on March 10, 2004, and the next day, by a 4-to-1 vote, chose a publicly traded Delaware corporation, Isle of Capri Casinos, Inc. (Isle of Capri), as the winning bidder at $518 million, with Rosemont as the new location of the license. The Board never completed a suitability review of Isle of Capri, however, and never actually transferred the license from Emerald to that company. Nor did the Board dismiss the disciplinary complaint against Emerald.

The Attorney General was unwilling to excuse the failure of the conditions. On March 25, 2004, she wrote a letter to the four board members who had voted to accept the Isle of Capri as the new operator of the tenth gambling license and to accept Rosemont as the new site of the license. Essentially, the Attorney General had five concerns. First, the Board had "ignored specific safeguards written into the [reorganization] [p]lan to ensure that the playing field of all potential bidders was not tilted toward Rosemont based on previous, failed attempts to locate [the license] there." Second, it was unclear to the Attorney General how the Board had "overcome the evidence of problems with Rosemont," especially Mayor Stephens's reputed connections to organized crime and the secret agreement whereby he was to acquire 5% of Emerald's

stock. Third, the chairman and chief executive officer of Isle of Capri was Bernard Goldstein, and he and his family owned more than 50% of the company's stock. The Goldstein family and the casinos they controlled had incurred large fines for repeated violations of gaming regulations. Fourth, Isle of Capri's liabilities exceeded its assets, and Standard & Poor's had given the company a "junk-bond" rating. The Attorney General had doubts that Isle of Capri could come up with $518 million. Fifth, in selecting Isle of Capri and Rosemont, the Board had ignored the recommendations of its own staff. Warning that she reserved the right to resume the disciplinary proceeding, the Attorney General urged the Board to consult with her staff and publicly address her concerns.

On May 11, 2004, dissatisfied with the Board's response to her expressed concerns, the Attorney General sent Emerald a letter declaring her intention to resume the disciplinary proceeding. By then, the bankruptcy court had lifted the stay.

On May 17, 2004, in a confirmation hearing before the bankruptcy judge, a majority of the Board's members testified in favor of Emerald's proposed reorganization plan, whereby Emerald's license was to be transferred to Isle of Capri. The Attorney General filed an objection to the plan on the ground that it prevented the Board from resuming the revocation hearing. In response to the Attorney General's objection, Emerald's counsel disavowed any intention to restrict either the Board or the Attorney General and urged the bankruptcy judge to confirm the plan even if it were not "guaranteed to succeed." To head off any misunderstanding, the bankruptcy judge asked Emerald's counsel:

"THE COURT: Is there anything that would prevent the resumption of the revocation proceeding and the revocation of the license here, despite confirmation of the plan that's presently before [this] [c]ourt, other than a majority vote of the Illinois Gaming Board?

[Emerald's counsel]: No.

THE COURT: So *** if the membership of the [G]aming [B]oard changed, or if members of the [G]aming [B]oard changed their mind, there would still be a potential for revocation?

[Emerald's counsel]: Well, Your Honor, there's all sorts of things that could happen."

On that understanding, the bankruptcy court confirmed the reorganization plan, and as we said, it confirmed an amended plan on July 22, 2004.

On June 11, 2004, in the Cook County circuit court, the Attorney General filed a quo warranto complaint against the Board and the four of its members who had selected Isle of Capri. People ex rel. Madigan v. Illinois Gaming Board, No. 4-CH-9418 (Cir. Ct. Cook Co.). The complaint sought (1) an injunction prohibiting the Board from performing a suitability review of Isle of Capri and (2) a declaration that the Attorney General, rather than the Board, had the sole authority to resume the disciplinary proceeding against Emerald. We have no information on the status of that litigation.

On July 28, 2004, the Board adopted a resolution approving Emerald's

fifth amended and restated plan of reorganization. On August 2, 2004, pursuant to that resolution, the Board sent Emerald a letter (the "second side-letter") bearing only the Board's signature and disclaiming any warranty of authority to make the commitments therein. Subject to that disclaimer and to certain conditions, including the condition that this latest version of the reorganization plan become effective by January 1, 2005, the second side-letter purported to excuse the nonfulfillment of the conditions in the first side-letter "as they concerned the [Board]," and insomuch as the Board had legal authority to do so, promised to stay and ultimately dismiss the disciplinary proceeding as well as review the suitability of a proposed transferee of Emerald's license.

A few weeks later, two members of the Board resigned, depriving the Board of a quorum to take any action. One of the resigning members wrote the Attorney General a letter of protest. The Board regained a quorum in March 2005.

On April 14, 2005, the newly constituted Board announced it would resume the disciplinary proceeding against Emerald. Pursuant to Rule 1126(a) (86 Ill. Adm. Code §3000.1126(a), as amended by 22 Ill. Reg. 4390, 4410 (eff. February 20, 1998)), Chairman Aaron Jaffe appointed Abner J. Mikva as the new ALJ, replacing ALJ Holzman, who had recused himself because of a conflict of interest. (While presiding over the disciplinary hearing, he was simultaneously a special assistant Attorney General representing the Illinois Department of Transportation in condemnation cases.)

F. Resumption of the Revocation Hearing

The revocation hearing resumed in April 2005. Emerald filed motions to dismiss the case, arguing that Emerald I mandated dismissal. ALJ Mikva denied the

motions. Emerald also moved to start the evidentiary hearing over again so that ALJ Mikva could observe the demeanor of all witnesses as they testified, including those who had testified before ALJ Holzman. ALJ Mikva denied this motion but told Emerald it could recall witnesses who had previously testified and could examine them on any relevant matter, including the subjects of their prior testimony. Emerald recalled those witnesses and questioned them.

ALJ Mikva denied motions to intervene by Rosemont and the creditors' committee in Emerald's bankruptcy. He also denied two other motions by Emerald: (1) a motion to require disclosure of the minutes of the Board's closed meetings regarding the decision to bring the disciplinary proceeding and (2) a motion to issue a subpoena requiring Chairman Jaffe to appear and testify about the Board's reasons for resuming the disciplinary proceeding. At the conclusion of the evidentiary hearing, the ALJ issued an order recommending the revocation of Emerald's license.

G. The Revocation Order

In its final administrative order on December 20, 2005, the Board unanimously adopted ALJ Mikva's recommendation to revoke Emerald's gaming license.

The Board found Acosta's testimony "regarding Emerald's and its principal[s'] conduct" to be "exhaustive, compelling[,] and credible." The Board also found Filkin's testimony to be "credible in all aspects." The Board also believed Mallul's testimony and accepted his assessment of "the veracity and credibility of the source information" set forth in the FBI memoranda. The Board noted that "seven individuals

[had] invoked the [f]ifth[-][a]mendment right against self-incrimination [(U.S. Const., amend. V)] and refused to testify in this hearing."

Essentially, the Board made six findings of fact. First, "Emerald and its principals dissembled about its plans to move the license location to Rosemont." Second, "the renewal application filed by Emerald on September 24, 1999[,] was neither accurate nor complete." Third, "Emerald and its principals dissembled about its construction activities." Fourth, "Kevin Flynn, as a shareholder and chief executive officer of Emerald, consistently dissembled to the [Board] as to his activities on behalf of Emerald." Fifth, "Emerald failed in its obligation to prevent ineligible interests from investing in its casino. As a result, numerous ineligible interests were sold stock in the casino." Sixth, "there was no evidence of bias on the part of the staff or members of the [Board] in this revocation proceeding."

> In connection with the sixth finding, the Board observed: "Emerald presented some evidence concerning a 'voodoo doll' which was given to a departing employee on the day of her departure from the [Board's] staff. She allegedly stuck a pin into it and stated that the pin was for Joe McQuaid. [Citation to record.]
>
> There was never any connecting evidence to show that if this incident took place, it was anything more than [a] jest or an expression of irritation against McQuaid. There was nothing to indicate that this employee did anything, said

anything[,] or wrote anything which affected the decision to revoke Emerald's license because of any bias. Additionally, if this incident took place, it occurred over five years ago. If it occurred, it has no bearing on this Board's determination.

It is always unfortunate when lawyers decide to challenge the tribunal or the process rather than present their case. In this instance, Michael Ficaro, then attorney for Emerald, delivered his opening statement in this proceeding by turning his back to the presiding officer, ALJ Holzman, and announcing to the assemblage of reporters and others who were present in the room[,] 'I would like to welcome everybody to Kangaroo Court. This proceeding is a sham.' [Citation to the record.] At the same time, various computers were displayed to the audience showing kangaroos jumping on the screen."

Having reviewed Ficaro's testimony, the Board found he was "not credible."

This appeal followed.

II. ANALYSIS

A. Motions We Have Ordered To Be Taken With the Case

1. Emerald's Motion To File a Reply to the Board's Response to Emerald's Motion To File a Supplemental Record

On June 30, 2006, Emerald filed a motion to file a supplemental record.

On July 7, 2006, the Board filed a response to the motion. On July 11, 2006, we granted Emerald's motion in part. On July 12, 2006, Emerald filed a motion for leave to file, instanter, a reply to the Board's response to Emerald's motion to file a supplemental record. Because our ruling resolved this issue the day before (on July 11, 2006), we deny Emerald's motion to file a reply to the Board's response.

2. The Board's Motion To Strike Parts of Emerald's Reply Brief

"The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee." 210 Ill. 2d R. 341(j). "Points not argued [in the appellant's initial brief] are waived and shall not be raised in the reply brief." 210 Ill. 2d R. 341(h)(7). Thus, in the reply brief, the appellant cannot make new arguments in the guise of "responding" to the appellee's arguments. If the appellant could have made the argument in the appellant's initial brief, the argument does not belong in the reply brief. On March 23, 2007, pursuant to Rule 341(h)(7), the Board filed a motion to strike three arguments from Emerald's reply brief.

a. Legislative Debates

In its reply brief, Emerald cites and quotes, for the first time, the discussion Representatives Moore and Brunsvold had with one another during the legislative debates on section 11.2. 91st Ill. Gen. Assem., House Proceedings, May 21, 1999, at 221-22 (statements of Representatives Moore and Brunsvold). On the basis of these two lawmakers' discussion, Emerald argues that the legislature "intended that the [Board] could only begin revocation proceedings after Emerald's license had been renewed." The Board moves to strike this argument from the reply brief because

Emerald omitted the argument from its opening brief.

Emerald contends that it quoted the remarks of Representatives Moore and Brunsvold because the Board, in its own brief, selectively quoted Emerald I. In support of the Board's argument that it could proceed with the revocation case despite the enactment of section 11.2, the Board quoted the First District as follows: "Nothing in section 11.2(a) prevents the Board from moving to revoke Emerald's license. In fact, the Board began revocation proceedings on March 6, 2001." Emerald I, 346 Ill. App. 3d at 34, 803 N.E.2d at 926. Immediately after that statement, however, the First District quoted the same remarks by Representatives Moore and Brunsvold that Emerald quotes in its reply brief. The Board, however, omitted the remarks of Representatives Moore and Brunsvold. According to Emerald, by reading the First District's statement in the context of the legislative debates that it quoted, one may perceive that the First District really did not mean that the Board could resume the present revocation proceeding. Essentially, Emerald quotes the legislative debates because Emerald I quoted them and Emerald intends to show that the Board, in its brief, decontextualized what the First District said. This is a bona fide response to the Board's brief. Therefore, we deny the Board's motion to strike this argument.

b. A "Binding" Agreement Between the Board and Emerald

According to the Board, Emerald argues, for the first time in its reply brief, that the Board "entered into a binding 'agreement' with Emerald not to pursue the revocation of Emerald's license." We do not see where, in the cited pages of the reply brief, Emerald actually makes that argument. We see where Emerald refers to "an

agreement to conduct an auction and sale of Emerald's license," but that passing phrase hardly qualifies as a legal argument that the agreement is contractually binding. In parentheses in its brief, the Board makes the following assertion: "Emerald does not advance, and thus abandons, any claim it had a legally binding 'contract' with the [Board]." In a footnote in its reply brief, Emerald responds as follows:

> "The [Board] also asserts, in passing, that Emerald 'abandoned' its claim that it had a legally[]binding contract with the [Board] regarding the auction process. [Citation to the Board's brief.] This is flatly incorrect. On November 17, 2005, Emerald filed suit against the [Board] in the Illinois Court of Claims[,] seeking to enforce the [Board's] obligations and commitments. See Emerald Casino, Inc. v. Ill[inois] Gaming Board, No. 06-CC-1390 (Ill. Ct. of Claims). That case remains pending before the Illinois Court of Claims."

Emerald merely disputes the Board's assertion that Emerald has abandoned its theory of breach of contract; Emerald offers no argument in favor of that theory. We find nothing to strike in this respect.

c. Waiver of Sovereign Immunity

In its initial brief, Emerald seeks to hold the members of the Board liable, in their individual and official capacities, for damages under the Civil Rights Act of 1871 (42 U.S.C. §1983 (2000)). In its reply brief, Emerald argues that the state has waived its

sovereign immunity to section 1983 claims. The Board moves to strike that argument. As we have explained, a reply brief must strictly confine itself to responding to the appellee's arguments. 210 Ill. 2d R. 341(j). The Board does not invoke sovereign immunity in its brief. Instead, the Board argues that section 1983, by its terms, creates no right of recovery against state officers in their official capacities. In support of that argument, the Board cites Will v. Michigan Department of State Police, 491 U.S. 58, 65, 105 L. Ed. 2d 45, 54, 109 S. Ct. 2304, 2309 (1989), which held that when Congress used the word "person" in section 1983 as a designation of those who "shall be liable" (42 U.S.C. §1983 (2000)), Congress did not mean to include the states. In Will, the states' sovereign immunity had only an indirect relevance to the decision, as part of the constitutional background that the Supreme Court considered when arriving at its inference of legislative intent. See Will, 491 U.S. at 67, 105 L. Ed. 2d at 55, 109 S. Ct. at 2310. We grant the Board's motion to strike from Emerald's reply brief the argument that Illinois has waived its sovereign immunity to section 1983 claims.

3. The Board's Motion To File Supplemental Authority

The Board moves to file, as supplemental authority, the consolidated decision of the United States Court of Appeals for the Seventh Circuit in Emerald Casino, Inc. v. Illinois Gaming Board, No. 06-1984, and Village of Rosemont v. Jaffe, No. 05-4558 (7th Cir., April 3, 2007). Emerald opposes the motion.

Because the Seventh Circuit issued its decision after the Board filed its brief, the Board did not have a chance to cite the decision. The subject of Emerald's involuntary bankruptcy comes up in this appeal, and the Seventh Circuit's decision

provides a helpful factual background. We can always take judicial notice of proceedings in the federal courts. City of Chicago v. Pooh Bah Enterprises, Inc., No. 99804, slip op. at 4 n.3 (Ill. October 5, 2006). We grant the Board's motion to file the supplemental authority.

B. "The Facts Necessary to an Understanding of the Case"

According to Illinois Supreme Court Rule 341(e)(6), the appellant's brief shall contain a "Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly[,] without argument or comment, and with appropriate reference to the pages of the record on appeal." 210 Ill. 2d R. 341(h)(6). We feel constrained to remark that given the convoluted history of this case, the 31-day evidentiary hearing, and the 96 volumes of the administrative record, the 4 1/2-page statement of facts in Emerald's brief is rather cursory. To the extent that Emerald disagrees with our recitation of any material fact, Emerald cannot reasonably complain unless the relevant fact appears, with a citation to the record, in the statement of facts in its brief.

C. The Legal Significance of Emerald II for the Already-Issued Order of Revocation

On June 13, 2006, the First District directed the Cook County circuit court to issue a mandate ordering the Board to approve Emerald's application for relocation to Rosemont and to renew Emerald's gaming license prospectively for a term of four years, "subject to revocation proceedings." Emerald II, 366 Ill. App. 3d at 119, 851 N.E.2d at 848. Emerald argues the First District thereby nullified the Board's final order of December 20, 2005, which purported to revoke Emerald's license. According to

Emerald, the qualification "subject to revocation proceedings" cannot mean "the revocation proceedings at issue here because presumably all of the conduct on which that revocation was based predated [the] order to renew [the license] for four years." (Emphasis in original.) The appellate court's order in Emerald II "would be pointless," Emerald argues, "if the prior revocation rendered the renewed license dead on arrival a second time."

In Emerald II, 366 Ill. App. 3d at 116, 851 N.E.2d at 846, the First District did indeed speak, with disapproval, of "a license that would be dead on arrival"; but, in that case, the Board was the cause of death, by issuing the license retroactively. In the present case, if the license is "dead on arrival," Emerald will be the cause of death by its violations of the Board's rules. In Emerald II, 366 Ill. App. 3d at 119, 851 N.E.2d at 848, the First District "caution[ed] against placing artifice over responsibility." But if Emerald loses its license because of its own previous misconduct, Emerald will be the party that failed to exercise responsibility. The difference is crucial.

The First District quoted Crusius for the proposition that despite section 11.2(a), "'[t]he Act's license[-]revocation provision still applie[d] to Emerald with full force (230 ILCS 10/5(c)(15) (West 2000)), and revocation proceedings ha[d], in fact been initiated against it.'" Emerald II, 366 Ill. App. 3d at 118, 851 N.E.2d at 848, quoting Crusius, 216 Ill. 2d at 333, 837 N.E.2d at 99. When referring to "revocations proceedings [that had], in fact, been initiated" (emphasis added), the supreme court obviously did not mean (to quote Emerald's brief) "revocation for *** future wrongful conduct" (emphasis in original); it meant the revocation proceedings already pending in

case No. DC-01-05, the case on appeal before us. Crusius, 216 Ill. 2d at 320, 837 N.E.2d at 92. Thus, we reject Emerald's argument that in passing section 11.2, the legislature intended to forgive and forget any wrongdoing by Emerald that predated section 11.2. Although renewal of the license and relocation to Rosemont were mandatory, the license was still subject to revocation for such wrongdoing.

D. The Board's Statutory Authority To Revoke Emerald's License

1. Survival of the Board's Power To Discipline Emerald for the Charged Misconduct

Section 11.2(a) provides that the Board "shall grant the application" for renewal and relocation after approval by the new locality. (Emphasis added.) 230 ILCS 10/11.2(a) (West 2004). In Emerald I, 346 Ill. App. 3d at 35, 837 N.E.2d at 928, the Board argued that the legislature intended the word "shall," in section 11.2(a), to be permissive because if it were mandatory, it would "create an exception to the license[-]renewal requirements of section 7 of the Act (230 ILCS 10/7 (West 2002))." Section 7(a) provided: "Upon the termination, expiration, or revocation of each of the first 10 licenses, *** all licenses are renewable annually upon payment of the fee and a determination by the Board that the licensee continues to meet all of the requirements of [the] Act and the Board's rules." (Emphasis added.) 230 ILCS 10/7(g) (West 2002). The Board was concerned that if "shall" meant it had no choice but to renew Emerald's license, section 11.2(a), so interpreted, would effectively divest the Board of its power under section 7(g) to determine whether Emerald "continue[d] to meet all of the requirements of [the] Act and the Board's rules" (230 ILCS 10/7(g) (West 2002)). The First District agreed that interpreting "shall" as mandatory would indeed have that

effect--but it so interpreted "shall." Emerald I, 346 Ill. App. 3d at 35-36, 803 N.E.2d at 928.

Emerald argues that because section 11.2(a) gave Emerald the right to "automatic and immediate relicensure" (Crusius, 216 Ill. 2d at 328, 837 N.E.2d at 96), the Board had no statutory authority to investigate the renewal application of September 1999 or the disclosures therein: section 11.2(a) stripped the Board of its power, under section 7(g), to determine whether Emerald "continue[d] to meet all of the requirements of [the] Act and the Board's rules" (230 ILCS 10/7(g) (West 2000)). Emerald reasons that because the Board's investigation was ultra vires and void, so was the revocation that resulted from the investigation.

Again, we find this argument to be irreconcilable with the supreme court's rationale in Crusius. In Crusius, 216 Ill. 2d at 322, 837 N.E.2d at 92, a taxpayer sought a declaratory judgment that section 11.2(a) violated the special-legislation clause of the Illinois Constitution (Ill. Const. 1970, art. IV, §13). That clause provided as follows: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Ill. Const. 1970, art. IV, §13. The special-legislation clause forbade the General Assembly from conferring a special benefit or privilege upon one group while excluding similarly situated persons or groups. Crusius, 216 Ill. 2d at 325, 837 N.E.2d at 94. When deciding whether a statute was special legislation, a court had to ask two questions: (1) whether the statutory classification discriminated in favor of a select group and (2) whether the classification was arbitrary. Crusius, 216 Ill. 2d at 325,

837 N.E.2d at 94. Unless the statute affected a fundamental right or involved a suspect classification, the court reviewed it under the rational-basis test, asking whether the classification was rationally related to a legitimate state interest. Crusius, 216 Ill. 2d at 325, 837 N.E.2d at 94.

Clearly, section 11.2(a) discriminated in favor of a select group. The statute discriminated between licensees that were not conducting riverboat gambling on January 1, 1998 (230 ILCS 10/11.2(a) (West 2000)), and those that were, conferring a benefit, i.e., automatic relicensure and relocation, on the former but not on the latter. Crusius, 216 Ill. 2d at 325-26, 837 N.E.2d at 95. It was equally clear that Emerald was the only licensee that fell within that select group. Crusius, 216 Ill. 2d at 326, 837 N.E.2d at 95.

But discrimination in favor of a select group was only half of the analysis; the classification was nevertheless constitutional if it was "rationally related to a legitimate state interest." Crusius, 216 Ill. 2d at 325, 837 N.E.2d at 94. The supreme court agreed with the defendants that by reviving Emerald's gambling operations, section 11.2(a) had a rational relationship to the economic goals in section 2(a) of the Act, namely "'assisting economic development and promoting Illinois tourism and *** increasing the amount of revenues available to the [s]tate to assist and support education.'" Crusius, 216 Ill. 2d at 327, 837 N.E.2d at 95-96, quoting 230 ILCS 10/2(a) (West 2000)).

As the plaintiffs pointed out, however, section 2(b) stated a regulatory goal as well: that of "'strictly regulat[ing] the facilities, persons, associations[,] and practices

related to gambling operations.'" Crusius, 216 Ill. 2d at 329, 837 N.E.2d at 97, quoting 230 ILCS 10/2(b) (West 2000). Under section 7(g) (230 ILCS 10/7(g) (West 2000)), the Board had an obligation, before reviewing Emerald's license, to confirm that Emerald was in compliance with the Act and the Board's rules. Section 11.2(a) short-circuited section 7(g). Crusius, 216 Ill. 2d at 326-27, 837 N.E.2d at 95. The plaintiffs argued that section 11.2(a) was not rationally related to a legitimate state interest because by "circumvent[ing] *** the Board's regulatory authority," it undermined the legislature's economic goals. Crusius, 216 Ill. 2d at 328, 837 N.E.2d at 96.

The supreme court disagreed that section 11.2 lacked any rational relationship to a legitimate state interest. "Legislation often ha[d] multiple purposes whose furtherance involve[d] balancing and compromise by the legislature. For a provision in a law to pass the rational[-]basis test, it [did] not have to promote all of the law's disparate and potentially conflicting objectives." Crusius, 216 Ill. 2d at 329, 837 N.E.2d at 97. Moreover--and here is the crucial point for our purposes--the supreme court was unconvinced that section 11.2(a) actually undermined the legislative goal of strict regulation. Crusius, 216 Ill. 2d at 332, 837 N.E.2d at 98. The supreme court explained:

> "As for license renewal, it is only one facet of the Board's regulatory authority. If any riverboat gambling licensee, including Emerald, fails to comply with the Act's requirements, the Board has the authority to investigate and take appropriate disciplinary action. 230 ILCS 10/5(c)(5)

(West 2000). The Act's license[-]revocation provision still applies to Emerald with full force (230 ILCS 10/5(c)(15) (West 2000)), and revocation proceedings have, in fact, been initiated against it. Thus, regardless of Emerald's eligibility for license renewal and relocation under section 11.2(a), if Emerald has failed to comply with the requirements of the Act, it could lose its riverboat gambling license in accordance with the Act's provisions, as is the case with any other licensee." (Emphasis added.) Crusius, 216 Ill.2d at 333, 837 N.E.2d at 98-99.

The statutory provisions that the supreme court cited, sections 5(c)(5) and (c)(15), provide as follows:

"(c) The Board shall have jurisdiction over and shall supervise all gambling operations governed by this Act. The Board shall have all powers necessary and proper to fully and effectively execute the provisions of this Act, including, but not limited to, the following:

* * *

(5) To investigate alleged violations of this Act or the rules of the Board and to take appropriate disciplinary action against a licensee ***.

* * *

(15) To suspend, revoke, or restrict licenses ***." 230 ILCS 10/5(c)(5), (c)(15) (West 2004).

The supreme court held that even though, in Emerald's case, section 11.2(a) short-circuited section 7(g), sections 5(c)(5) and (c)(15) remained in full force. According to the supreme court, Emerald could lose its freshly renewed license "if Emerald has failed to comply with the requirements of the Act"–signifying, by its use of the past tense, not only future but past violations. (Emphasis added.) Crusius, 216 Ill. 2d at 333, 837 N.E.2d at 99. In this very context, the supreme court mentioned the "revocation proceedings [that] ha[d], in fact, been initiated [against Emerald]"--i.e., those now before us--plainly implying that these revocation proceedings could still go forward and, depending on their merits, validly divest Emerald of its license. Crusius, 216 Ill. 2d at 333, 837 N.E.2d at 99.

During oral arguments before us, Emerald contended that the supreme court's discussion in Crusius of the continued viability of the revocation proceeding was a dictum, since the supreme court had already explained that to pass the rational-basis test, a statutory provision did not have to promote all of the statute's disparate and potentially conflicting objectives (Crusius, 216 Ill. 2d at 329, 837 N.E.2d at 97). Emerald overlooks, however, the difference between two types of dicta. If indeed the supreme court's discussion of the revocation proceeding was a dictum, it was a judicial dictum, not an obiter dictum. Though strictly unnecessary to the disposition of the case in the

sense that it was an alternative rationale, the discussion of the Board's surviving revocation power addressed an issue briefed and argued by the parties. See People v. Williams, 204 Ill. 2d 191, 206, 788 N.E.2d 1126, 1136 (2003). "Judicial dicta have the force of a determination by a reviewing court and should receive dispositive weight in an inferior court." Williams, 204 Ill. 2d at 206, 788 N.E.2d at 1136. "Even [an] obiter dictum of a court of last resort can be tantamount to a decision and[,] therefore[,] binding in the absence of a contrary decision of that court." Cates v. Cates, 156 Ill. 2d 76, 80, 619 N.E.2d 715, 717 (1993).

We give Crusius its dispositive weight. In its reply brief, Emerald quotes the remarks of Representatives Moore and Brunsvold in support of its argument that the Board could revoke Emerald's license only for misconduct that postdated the renewal of the license pursuant to section 11.2(a). See 91st Ill. Gen. Assem., House Proceedings, May 21, 1999, at 221-22 (statements of Representatives Moore and Brunsvold). We need not decide whether these legislators meant what Emerald argues they meant; Crusius plainly states that this revocation proceeding can move forward, and for us, that is the end of the matter. We have no power to review Crusius--on the basis of legislative debates or anything else. Under the supreme court's interpretation of section 11.2(a), just because the Board had no choice but to approve Emerald's application, it does not follow that Emerald had a carte blanche to provide misleading or incomplete information therein or to otherwise make false representations to the Board. Emerald still had to obey the Board's rules, and the penalty of disobedience could be revocation of the gaming license.

2. Whether the September Application Form Was an Unpromulgated "Rule"

According to Emerald, the Board publicly approved the August application form, but Acosta developed the September application form on his own, "in direct response to Emerald's attempt to relocate to Rosemont." Emerald argues that this "unique" new form was a "rule" within the meaning of section 1.70 of the Illinois Administrative Procedure Act (APA) (5 ILCS 100/1-70 (West 1998)) and because the Board never approved this rule in a public meeting, it "cannot form the basis of a [d]isciplinary [p]roceeding, thus rendering the entire [d]disciplinary [p]roceeding void ab initio."

Section 5-10(c) of the APA provides: "No agency rule is valid or effective against any party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act." 5 ILCS 100/5-10(c) (West 1998). Section 5-35(a) of the APA prescribes procedures for rulemaking. 5 ILCS 100/5-35(a) (West 1998). Section 1-70(iv) of the APA defines a "rule" as follows: "'Rule' means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include *** the prescription of standardized forms ***." 5 ILCS 100/1-70(iv) (West 1998). Thus, by prescribing the use of the September application form, Acosta did not purport to make a "rule" within the meaning of section 1-70(iv). If his prescription of the form was not a rule, the form itself was not a rule either. The rulemaking procedures of the APA were inapplicable.

Insomuch as the September application form was not a "standardized

form[]" within the meaning of section 1-70 in that it was designed for Emerald's use alone, Acosta's prescription of that form still would not be a "rule." A "rule" is an "agency statement of general applicability." 5 ILCS 100/1-70 (West 1998). By prescribing the September application form for Emerald alone, Acosta made a statement of particular, not general, applicability.

3. Whether the Resumption of the Revocation Proceeding Amounted to a Revision of a Final Administrative Order

Emerald argues that after "enter[ing] final orders approving an auction process for the license," the Board had no statutory authority to "undo [those] final and binding administrative decisions" by resuming the disciplinary proceeding. Emerald cites Pearce Hospital Foundation v. Illinois Public Aid Comm'n, 15 Ill. 2d 301, 307, 154 N.E.2d 691, 695 (1958), for the proposition that "an administrative agency may rehear and revise its final decisions only if authorized to do so by statute."

In Pearce, 15 Ill. 2d at 302-03, 154 N.E.2d at 693, Dr. Pearce owned a hospital, and he and his hospital appeared on the lists of the physicians and hospitals permitted to participate in the Public Aid Commission's medical-aid program. On June 2, 1956, Pearce appeared before the commission's medical advisory committee and answered questions about the admission practices of his hospital. Pearce, 15 Ill. 2d at 305, 154 N.E.2d at 694. On the basis of that hearing, the committee notified Pearce that as a condition of staying on the list of approved medical providers, his admissions had to begin approximating the county and state averages with respect to the rate of admission and length of hospitalization of recipients of public assistance. In six

months, he was to present a report of his practices in caring for public-aid patients during that six-month period. Pearce, 15 Ill. 2d at 305, 154 N.E.2d at 694. In six months, he submitted the report, which showed no change in his admission practices; therefore, in a letter of April 26, 1957, the commission "terminated the administrative proceeding by notifying Pearce that both he and his hospital would be dropped from the rolls of the medical[-]aid program." Pearce, 15 Ill. 2d at 305-06, 154 N.E.2d at 694.

Section 4 of the Administrative Review Act provided that judicial proceedings had to "'be commenced by the filing of a complaint and the issuance of summons within [35] days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby.'" (Emphasis in original.) Pearce, 15 Ill. 2d at 305, 154 N.E.2d at 694, quoting Ill. Rev. Stat. 1957, ch. 110, par. 267. The statute defined a "decision" as "'any decision, order[,] or determination of any administrative agency[,] rendered in a particular case, which affects the legal rights, duties[,] or privileges of parties and which terminates the proceedings before the administrative agency.'" (Emphasis in original.) Pearce, 15 Ill. 2d at 304-05, 154 N.E.2d at 693-94, quoting Ill. Rev. Stat. 1957, ch. 110, par. 264.

On January 8, 1958, Pearce appeared again before the Public Aid Commission and petitioned for a retroactive restoration to the medical-aid program. Pearce, 15 Ill. 2d at 303-04, 154 N.E.2d at 693. The commission allowed him to make a statement. Pearce, 15 Ill. 2d at 304, 154 N.E.2d at 693. On February 7, 1958, the commission denied his petition and affirmed its previous decision of April 26, 1957. Pearce, 15 Ill. 2d at 304, 154 N.E.2d at 693. Pearce received notice of the decision on

February 17, 1958, and within 30 days thereafter, filed a complaint for administrative review. Pearce, 15 Ill. 2d at 304, 154 N.E.2d at 693.

The supreme court held that on April 26, 1957, the Public Aid Commission "terminated the administrative proceeding by notifying Pearce that both he and his hospital would be dropped from the rolls of the medical[-]aid program." Pearce, 15 Ill. 2d at 306, 154 N.E.2d at 694. Because Pearce failed to file his complaint within 35 days after April 26, 1957, section 4 of the Administrative Review Act (Ill. Rev. Stat. 1957, ch. 110, par. 267) barred the action. Pearce, 15 Ill. 2d at 307-08, 154 N.E.2d at 695. The supreme court further held as follows:

> "Nor does the action of the commission in entertaining the petitions for retroactive reinstatement subsequent to its final order of April 26, 1957, have the effect of reopening the cause[] or of detracting from the finality of its determination. The commission is a creature of statute and has no greater powers than those conferred upon it by the legislature. Accordingly, it has been consistently held that an administrative agency may allow a rehearing, or modify and alter its decisions, only where authorized to do so by statute. [Citations.]" Pearce, 15 Ill. 2d at 307, 154 N.E.2d at 695.

When the supreme court spoke of an agency's lack of statutory authority to modify or alter the agency's own "decisions," it meant "decisions" within the meaning of section 1 of the Administrative Review Act, i.e., decisions that "'terminate[d] the

proceedings before the administrative agency.'" (Emphasis omitted.) Pearce, 15 Ill. 2d at 305, 154 N.E.2d at 694, quoting Ill. Rev. Stat. 1957, ch. 110, par. 264. In the present case, the two side-letters were conditional, and regardless of whose fault it was that the conditions failed, they did fail. The side-letters were not, by their terms, final decisions. Being conditional, they did not end the disciplinary case against Emerald. By actually transferring Emerald's license to the Isle of Capri, the Board would have effectively ended the disciplinary proceeding against Emerald by making it moot. One could not have revoked a license that Emerald (by reason of the transfer) no longer possessed. But the transfer never actually happened. Although the Board held an auction and chose Isle of Capri as the winning bidder, it never transferred the license to Isle of Capri. Nor (as Emerald admits) could the Board have done so until Isle of Capri passed a suitability review--which, for whatever reason, the Board never performed. (We say "for whatever reason" because the only relevant inquiry, under Pearce, is whether a final administrative decision was in fact entered.) Contrary to Emerald's contention, the mere choice of Isle of Capri as a proposed transferee of Emerald's license did not end the disciplinary proceeding against Emerald. Absent a final decision terminating the disciplinary proceeding, Pearce is inapplicable.

4. Equitable Estoppel

Emerald invokes the common-law doctrine of equitable estoppel. According to Emerald, the Board agreed to transfer Emerald's license to a suitable purchaser, perform a suitability review of Isle of Capri (or one of the other bidders if the Board found Isle of Capri to be unsuitable), and stay and ultimately dismiss the

disciplinary proceeding. Emerald claims it "justifiably relied, to its detriment, on its agreement with the [Board] as a way to satisfy its creditors and resolve the bankruptcy" and that "[a] substantial miscarriage of justice [would] result if the [Board were] allowed to repudiate that agreement."

A party may invoke the doctrine of equitable estoppel only if the party has "reasonably and detrimentally relie[d]" on the words or conduct of the opposing party. Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). Generally, courts do not favor applying the doctrine of equitable estoppel against public bodies; they will do so only in "rare and unusual circumstances," when "necessary to prevent fraud and injustice." Halleck v. County of Cook, 264 Ill. App. 3d 887, 893, 637 N.E.2d 1110, 1114 (1994).

The first side-letter made it clear to Emerald, from the start, that either of two entities, the Board or the Attorney General, could resume the revocation proceeding upon the failure of any of the conditions in the side-letter. We need not decide whether article V, section 15, of the Illinois Constitution (Ill. Const. 1970, art. V, §15) forbade the Board from settling the disciplinary proceeding without the Attorney General's approval. By the terms of the first side-letter, signed by representatives of the Board and the Attorney General, both the Board and the Attorney General had to excuse the failure of a condition in order to release Emerald from the disciplinary proceeding. That was the deal. Emerald's reliance had to be reasonable (see Blisset v. Blisset, 123 Ill. 2d 161, 169, 526 N.E.2d 125, 128-29 (1988)), and if Emerald selectively relied on one term of the first side-letter to the exclusion of other terms, its reliance was not reasonable.

Emerald could not have reasonably relied upon the Board's waiver of the failed conditions in the first side-letter, because, by the terms of that side-letter, the Attorney General also had to waive the failed conditions before the Board dismissed the disciplinary proceeding. Certain conditions failed, partly because of Emerald: Emerald requested modifications of the reorganization plan and obtained a reversal of case No. 01-CH-8368. At the very least, from the perspective of a reasonably cautious person, this written requirement of the Attorney General's approval would have made it risky to rely on the Board's unilateral waiver of the failed conditions.

As for the second side-letter, its disclaimer of any warranty of authority negated the possibility of reasonable reliance on it. The Board clearly signaled therein that it could not speak for the Attorney General.

Not only the terms of the side-letters but the comments of the bankruptcy court negated the possibility of reasonable reliance on the Board's unilateral actions. On May 17, 2004, the bankruptcy court confirmed the reorganization plan on the express understanding that the Board was perfectly free to change its mind and resume the revocation proceeding.

5. The Open Meetings Act

On April 14, 2005, Chairman Jaffe announced, at a special meeting of the Board, that he would sign two orders: (1) an order resuming the disciplinary proceeding and (2) an order refraining from any suitability investigation pursuant to the auction until the disciplinary proceeding was concluded. On April 14, 2005, the Board entered an order appointing Mikva as ALJ. On May 18, 2005, the Board entered an order

holding in abeyance the issue of the denial of Emerald's renewal application.

Emerald argues that by taking these actions without previous notice on a public agenda and without a formal vote in a meeting open to the public, the Board violated sections 2(a) and 2(c) and 2.02 of the Open Meetings Act (5 ILCS 120/2(a), 2(c), 2.02 (West 2004)). Rule 105 required the Board to "make[] all of its decisions on adjudicatory cases *** at public meetings of the Board noticed and held in accordance with the Open Meetings Act [(5 ILCS 120/1 through 120/6 (West 2004))]." 86 Ill. Adm. Code §3000.105, added by 22 Ill. Reg. 17324, 17335 (eff. September 21, 1998).

Section 3(a) of the Open Meetings Act provides: "[If] the provisions of this Act are not complied with, *** any person *** may bring a civil action *** prior to or within 60 days of the meeting alleged to be in violation of [the] Act ***." 5 ILCS 120/3(a) (West 2004). Insomuch as the meetings and decisions of which Emerald complains violated the Open Meetings Act, Emerald failed to bring suit on the violations within 60 days after their occurrence and, therefore, has forfeited this issue. See Bromberek School District No. 65 v. Sanders, 174 Ill. App. 3d 301, 312, 528 N.E.2d 1336, 1343 (1988).

E. The Statutory and Constitutional Validity of the Rules Under Which the Board Acted

1. The Emergency Amendment to Rule 230

On July 2, 1999, the Board promulgated emergency amendments to its rules. It amended Rule 230 so as to require an existing licensee applying for relocation under the newly enacted section 11.2(a) (230 ILCS 10/11.2(a) (West 2000)) to undergo the same suitability review as a first-time applicant for a license. 86 Ill. Adm. Code

§3000.230, as amended by 23 Ill. Reg. 8191, 8198 (eff. July 2, 1999). Emerald argues that this amendment to Rule 230 conflicts with the mandatory language of section 11.2(a) and, therefore, exceeds the Board's authority. Insomuch as a rule conflicts with a statute, the rule is invalid. Popejoy v. Zagel, 115 Ill. App. 3d 9, 11, 449 N.E.2d 1373, 1375 (1983). Emerald reasons that because "the amended Rule 230 is invalid," any agency action taken pursuant thereto is likewise invalid. Emerald does not specify where, in its decision, the Board invoked amended Rule 230. As we have discussed, even though section 11.2(a) short-circuited the Board's power to determine the suitability of an applicant for renewal, it left the Board's separate power of revocation unimpaired. Crusius, 216 Ill. 2d at 333, 837 N.E.2d at 98-99. Because Rule 230 is inapplicable to the issue of revocation, we need not decide whether this rule, as amended, conflicts with section 11.2(a).

2. The Alleged Unconstitutional Vagueness of Rules 110(a) and (a)(5)

a. Acts or Failure To Act That Tend To Discredit the Illinois Gaming Industry

Rule 110(a) provides as follows:

> "(a) A holder of any license shall be subject to imposition of fines[;] suspension[,] *** revocation[,] or restriction of such license[;] or other disciplinary action for any act or failure to act by himself or by his agents or employees that is injurious to the public health, safety, morals, good order[,] and general welfare of the people of the [s]tate of Illinois, or that would discredit or tend to discredit

the Illinois [g]aming industry or the [s]tate of Illinois. Without limiting the foregoing, the following acts or omissions may be grounds for such discipline[:]

(1) Failing to comply with or make provision for compliance with the Act[] [or] these rules ***[;]

(2) Failing to comply with any order or ruling of the Board or its agents pertaining to a [r]iverboat [g]aming [o]peration[;]

* * *

(5) Associating with, either socially or in business affairs, *** persons of notorious or unsavory reputation or who have extensive police records, or who have failed to cooperate with any officially constituted investigatory or administrative body and would adversely affect public confidence and trust in [g]aming." 86 Ill. Adm. Code §3000.110(a)(1), (a)(2), (a)(5) (Conway Greene CD-ROM October 1999).

Emerald argues that the language, in subsection (a), relating to acts or omissions that "would discredit or tend to discredit the Illinois [g]aming industry or the [s]tate of Illinois" and, in subsection (a)(5), relating to "associations with organized

crime" is unconstitutionally vague, giving no real guidance to licensees as to what conduct is prohibited. See Union National Bank & Trust Co. of Joliet v. Village of New Lenox, 152 Ill. App. 3d 919, 922, 505 N.E.2d 1, 3 (1987).

Recently, the supreme court reminded courts in Illinois that "cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort." In re E.H., 224 Ill. 2d 172, 178, 863 N.E.2d 231, 234 (2006). "[C]ourts 'should not compromise the stability of the legal system by declaring legislation unconstitutional when a particular case does not require it.'" E.H., 224 Ill. 2d at 179, 863 N.E.2d at 235, quoting People v. Lee, 214 Ill. 2d 476, 482, 828 N.E.2d 237, 243 (2005).

We need not decide whether the phrase "any act or failure to act *** that would discredit or tend to discredit the Illinois [g]aming industry" (86 Ill. Adm. Code §3000.110(a) (Conway Greene CD-ROM October 1999)) is unconstitutionally vague. After that general, catch-all provision in paragraph (a), the rule lists specific examples of qualifying misconduct, including "[f]ailing to comply with or make provision for compliance with the Act[] [or] these rules" (86 Ill. Adm. Code §3000.110(a)(1) (Conway Greene CD-ROM October 1999)) and "[f]ailing to comply with any order or ruling of the Board or its agents pertaining to a [r]iverboat [g]aming [o]peration" (86 Ill. Adm. Code §3000.110(a)(2) (Conway Greene CD-ROM October 1999)). Subparagraphs (a)(1) through (a)(9) amplify, with specific content, the more general phrase in paragraph (a). The Board did not simply find that Emerald violated paragraph (a) by behaving in such a way as to discredit or tend to discredit the Illinois gaming industry; the Board found

violations of subparagraphs (a)(1), (a)(2), and (a)(5).

When reviewing an administrative agency's decision, we do not reweigh the evidence or make independent findings of fact. Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 88, 606 N.E.2d 1111, 1117 (1992). We defer to the agency's findings of fact unless they are against the manifest weight of the evidence. Abrahamson, 153 Ill. 2d at 88, 606 N.E.2d at 1117. It is not enough that the testimony is conflicting (Wegmann v. Department of Registration & Education, 61 Ill. App. 3d 352, 359, 377 N.E.2d 1297, 1303 (1978)) or that the opposite factual finding would have been reasonable or that we ourselves might have made the opposite finding (Abrahamson, 153 Ill. 2d at 88, 606 N.E.2d at 1117); we are justified in overturning an agency's finding of fact only if "all reasonable and unbiased persons would agree that the decision is erroneous and that an opposite conclusion is clearly evident" (Kankakee County Board of Review v. Property Tax Appeal Board, 337 Ill. App. 3d 1070, 1074, 787 N.E.2d 865, 869 (2003)). "An administrative decision is not against the manifest weight of the evidence where the record contains some competent evidence to support the agency's finding." Kankakee County Board of Review, 337 Ill. App. 3d at 1074, 787 N.E.2d at 869; see also Abrahamson, 153 Ill. 2d at 88, 606 N.E.2d at 1117.

(1) Changes in Debt-Capitalization, Debt-Holders, and Sources of Funds

Rules 230(1)(C), (1)(D), and (1)(E) required Emerald to "immediately inform the Board[,] and *** obtain prior Board approval thereof, whenever a change [was] proposed in" Emerald's "debt[-]capitalization," "debt[-]holders," or "[s]ources of funds." See 86 Ill. Adm. Code §3000.230(1)(C), (1)(D), (1)(E) (Conway Greene CD-

ROM October 1999). Without the Board's prior approval, Emerald accepted some $31 million from the minority shareholders and spent it on construction. Emerald characterized these funds as a "loan" to the extent that the Board denied anyone's application to be a shareholder. One of the conditions in the subscription agreement was that the Board approve the person's application; the purchaser and seller agreed that if the Board denied the application, the purchaser could not be a shareholder. If that condition of Board approval failed, Emerald effectively became a debtor, owing restitution to the applicant in the amount of the purchase price. See Restatement (Second) of Contracts §377, Comment a, at 224 (1981) ("If both parties have rendered some performance [when a condition fails to occur], each is entitled to restitution against the other"). The Board could have reasonably found that by failing to obtain the Board's prior approval of this financing arrangement with the minority shareholders, Emerald violated Rules 230(1)(C), (1)(D), and (1)(E) (86 Ill. Adm. Code §3000.230(1)(C), (1)(D), (1)(E) (Conway Greene CD-ROM October 1999)) and, therefore, Rule 110(a)(1) (86 Ill. Adm. Code §3000.110(a)(1) (Conway Greene CD-ROM October 1999) ("[f]ailing to comply with *** these rules").

(2) Dissembling About Negotiations With Lake County Riverboat

Rule 110(a)(5) prohibited Emerald or its "agents and employees" from "[a]ssociating with *** persons *** who ha[d] failed to cooperate with any officially constituted investigatory or regulatory body." 86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999). The Board was such a "body." If Emerald's agents and employees were not to associate with persons who had failed to cooperate

with the Board, then, obviously, Emerald's agents and employees were not to be such persons.

McQuaid told the Board he had no knowledge that "Kevin Flynn *** participated in *** negotiations [with] Lake County Riverboat on behalf of HP." Seidenfeld had a different recollection. He testified that McQuaid telephoned him in Springfield in 1997 and told him "that he [(McQuaid)] and [Kevin] Flynn would be calling to discuss a joint venture." Seidenfeld further testified that after this call from McQuaid, Kevin Flynn was thereafter the primary negotiator for HP. The Board believed Seidenfeld over McQuaid, as it was entitled to do. By giving this misleading answer to the Board, McQuaid, senior vice president of Emerald, failed to cooperate with the Board in its investigatory and regulatory capacities, thereby violating Rule 110(a)(5).

An investigator for the Board asked Kevin Flynn, chief executive officer of Emerald, if he had ever telephoned Seidenfeld to discuss a joint venture and if he had ever gone to Lake County to look at a proposed site for a gaming operation. Kevin answered no to both questions. The Board could have reasonably believed Seidenfeld over Kevin Flynn and, therefore, could have found further falsehoods in violation of the duty of cooperation in Rule 110(a)(5) (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)).

(3) Dissembling About the Agreement With Duchossois Industries and the Davis Companies

On July 6, 2000, after Kevin Flynn was appointed chief executive officer of

Emerald, an investigator "asked [him] if he told Mr. Duchossois and Mr. Filkin that he made a deal with the Davis Companies where[by] the Flynn[]s, the Davis Companies, and the Duchossois[es] would all share in a new casino operation. Mr. Flynn responded he [had] not." The investigator "asked [him] if he told Mr. Duchossois and Mr. Filkin that this agreement must be kept confidential and must be kept from the Board. He stated, 'No.'" The Board could have reasonably believed Filkin over Kevin Flynn. Again, by giving these false answers, Kevin Flynn failed to cooperate with the Board and twice again violated Rule 110(a)(5) (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)).

(4) Dissembling About Emerald's Liability For the Cost of Preliminary Work at the Construction Site

On September 30, 1999, McMahon assured agents of the Board that the cost of preliminary work to prepare the construction site "ha[d] been handled by the Village of Rosemont and ha[d] not been 'part of [Emerald's] costs at this point.'" That representation appears to be false because on August 2, 1999, HP and Rosemont executed the site-access agreement, whereby Emerald agreed that the site work and excavation would be "at the sole cost and risk of HP." According to McMahon's own testimony, he had "responsibility over the financial aspects of design and construction," so he must have known the costs that Emerald had contractually incurred. The Board could have reasonably found this misrepresentation to be yet another failure to cooperate on Emerald's part and, therefore, another violation of Rule 110(a)(5) (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)).

(5) Disobeying the Board's Orders To Produce Contracts and Agreements

In a meeting on September 30, 1999, in which the topic of discussion was Emerald's plans to build a casino in Rosemont, Deputy Administrator McDonald asked McMahon and Hanley to send him "any contracts or agreements executed by Emerald." Administrator Acosta seconded the request and urged McMahon and Hanley to be "over[]inclusive." Thus, if an argument could be made for and against characterizing a document as an agreement, they should send it. In response to this order by the Board's agents (politely phrased, perhaps, as a request), Emerald did not produce the letter of intent, site-access agreement, and extension agreements it had executed with Rosemont. Clearly, the site-access agreement and extension agreements were agreements. Even though the letter of intent said it was not a contract, i.e., a judicially enforceable agreement, it nevertheless was an agreement because it was "intended to memorialize key terms that ha[d] been agreed to."

On October 19, 1999, the Board again requested any agreements between Emerald and governmental entities and any significant contracts or agreements Emerald had executed since its last submission. In its response 10 days later, Emerald disclosed no contracts or agreements: neither the letter of intent it had executed with the joint venture on October 5, 1999 (in which Emerald "agree[d]" that the joint venture could proceed with construction and that Emerald would pay the joint venture at a certain rate), nor the agreements Emerald had executed with Rosemont. This stonewalling was not only a failure to cooperate (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)) but also a violation of another subparagraph

of Rule 110: "[failure] to comply with [an] order *** of the Board or its agents" (86 Ill. Adm. Code §3000.110(a)(2) (Conway Greene CD-ROM October 1999)).

b. Associations With Organized Crime

Emerald contends that the "'associations[-]with[-]organized[-]crime' standard" in Rule 110(a)(5) (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)) "is unconstitutionally vague." Actually, Rule 110(a)(5) does not use the phrase "associating with organized crime." Instead, it provides that the holder of a license can incur discipline for "[a]associating with, either socially or in business affairs, *** persons of notorious or unsavory reputations or who have extensive police records." (Emphasis added.) 86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999). Rather than address the constitutionality of this language in Rule 110(a)(5), we hold that the Board's findings are against the manifest weight of the evidence insomuch as it found that Emerald or its agents or employees associated with persons of notorious or unsavory reputation or with persons who had extensive police records.

If Rule 110(a)(5), by its terms, simply forbade Emerald from "associating with members or associates of organized crime," the Board could have reasonably found Emerald to be in violation of that prohibition. According to FBI memoranda, Nicholas Boscarino, Vito Salamone, and Mayor Stephens had connections to organized crime. In its business affairs, Emerald associated with those three persons. But, as written, Rule 110(a)(5) does not purport to hold a licensee "strictly liable," so to speak, for "associating with members or associates of organized crime ***." Instead, the rule

forbids a licensee from "[a]associating with *** persons of notorious or unsavory reputation or who have extensive police records." (Emphases added.) 86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999). "Reputation" means "overall quality or character as seen or judged by people in general" (emphasis added) (Merriam-Webster's Collegiate Dictionary 992 (10th ed. 2000)) or "the beliefs or opinions that are generally held about someone" (emphasis added) (New Oxford American Dictionary 1447 (2001)). A "police report" is commonly understood to mean police reports of alleged criminal wrongdoing. See, e.g., People v. Longstreet, 23 Ill. App. 3d 874, 881, 320 N.E.2d 529, 533 (1974) ("[the defendant complained that] the sole purpose of the State in introducing these [mug shots] was to bring attention to the fact that he had a police record"); People v. Davis, 285 Ill. App. 3d 1039, 1042, 675 N.E.2d 194, 197 (1996) ("[a detective] got [the] defendant's picture because he had a police record").

FBI files are not readily accessible to the public. 28 C.F.R. §16.22 (1999). The Board had to obtain permission from the federal government to use the FBI letterhead memoranda in the revocation hearing. One cannot reasonably assume that what a confidential source knows is generally known so as to form a reputation. Just because a confidential source told the FBI, for example, that on a certain date, he saw a certain individual meet with members of organized crime in a restaurant, it does not follow that the individual had a notorious or unsavory reputation (or, in other words, that his association with organized crime was widely known). We are unaware of any evidence that Nicholas Boscarino had a police record, "extensive" or otherwise, before

2004; Emerald entered into the stock-purchase agreement with the Sherry Boscarino Trust some five years earlier, in 1999. It appears, from the language of Rule 110(a)(5), that the Board intended the licensee to have some practical means of knowing a person was unsavory before punishing the licensee for associating with that person. The doctrine of ejusdem generis counsels against finding a prohibition of "associating with organized crime" in the general language of Rule 110(a) (86 Ill. Adm. Code §3000.110(a) (Conway Greene CD-ROM October 1999)). See People v. Davis, 199 Ill. 2d 130, 138, 766 N.E.2d 641, 645 (2002). The way it is drafted, Rule 110(a)(5) requires proof that Mayor Stephens, Joseph and Vito Salamone, and Nicholas Boscarino had notorious or unsavory reputations or extensive police records, and we find no such proof in the record. Therefore, insomuch as the Board found Emerald's association with those persons to be a violation of Rule 110(a)(5), the finding is against the manifest weight of the evidence.

That said, Emerald's proved violations of the Board's rules are plentiful. Each one of these violations, standing alone, could support a revocation of Emerald's gaming license. There is no such thing as a trivial violation of Rule 110(a). In section 5(c)(15), the legislature gives the Board the power "[t]o *** revoke *** licenses *** for each violation of any provision of the Act[] [or] any rules adopted by the Board." (Emphases added.) 230 ILCS 10/5(c)(15) (West 2004). Rule 110(a) plainly holds out revocation of the license as one of the possible penalties. 86 Ill. Adm. Code §3000.110(a) (Conway Greene CD-ROM October 1999). Emerald had fair and ample warning.

3. Holding Emerald to a Higher Standard of Proof Than the Board

Rules 1140(a) and (e) provide as follows:

> "(a) The licensee bears the burden of rebutting the charges contained in the complaint by clear and convincing evidence.
>
> * * *
>
> (e) Upon conclusion of the Board's case, the licensee may move for a directed finding. The hearing officer may hear arguments on the motion or may grant, deny[,] or reserve decision thereon, without argument." 86 Ill. Adm. Code §3000.1140(a), (e) (Conway Greene CD-ROM October 1999).

Because the licensee may move for a directed finding at the conclusion of the Board's case, it must follow that the Board has the initial burden of proving the charges in the complaint. The concept of a "directed finding" is familiar from civil litigation. See 735 ILCS 5/2-1110 (West 2004). "[A] court may grant a motion for a directed finding if it finds that the plaintiff failed to establish a prima facie case." Thomas Hake Enterprises, Inc. v. Betke, 301 Ill. App. 3d 176, 181, 703 N.E.2d 114, 118 (1998). A "prima facie case" is "[t]he establishment of a legally required rebuttable presumption" or "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary 1209 (8th ed. 2004). Rule 1140 does not say what standard of proof the Board must meet. Section

10-18 of the APA says, however: "Unless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence." 5 ILCS 100/10-15 (West 2004). Therefore, on pain of a directed finding, the Board must prove its prima facie case by a preponderance of the evidence. Then the burden shifts to the licensee to rebut the charges in the complaint by a higher standard of proof: clear and convincing evidence. 86 Ill. Adm. Code §3000.1140 (Conway Greene CD-ROM October 1999); In re D.T., 212 Ill. 2d 347, 362, 818 N.E.2d 1214, 1226 (2004) ("The clear and convincing standard requires proof greater than a preponderance, but not quite approaching the criminal standard of beyond a reasonable doubt"). Emerald argues that "[b]y improperly shifting the traditional burden of proof, Rule 1140(a) would allow the [Board] to deprive Emerald of its constitutionally protected property interest even if, based upon all the evidence, Emerald proved by a preponderance of the evidence that it did nothing wrong. [Citation.] Due process cannot allow this result."

Again, we must decide cases "on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort." E.H., 224 Ill. 2d at 178, 863 N.E.2d at 234. We should consider Emerald's claim of unconstitutionality only if the allegedly unconstitutional feature of Rule 1140(e) caused prejudice to Emerald by "affect[ing] the outcome." See In re Marriage of De Bates, 212 Ill. 2d 489, 518, 819 N.E.2d 714, 730 (2004); Bi-State Development Agency v. Department of Revenue, 205 Ill. App. 3d 668, 672, 563 N.E.2d 1154, 1157 (1990). In its final order of revocation, the Board stated: "Emerald did not rebut the proof with clear and convincing evidence or

even with credible evidence." (Emphasis added.) Board order at 36. To meet any standard of proof, Emerald had to adduce some credible evidence, that is, evidence one could believe. We understand the Board to be saying that not only did Emerald fail to meet the standard of clear and convincing evidence; Emerald failed to adduce any credible evidence so as to meet any standard of proof at all, including the standard of proof by a preponderance of the evidence. If the Board found that Emerald failed to meet a lesser standard of proof, the question of whether Emerald failed to meet the standard of clear and convincing evidence is academic.

F. Punishment for Conduct That, According to Emerald, the Rules Did Not Prohibit

1. Emerald's Failure To Investigate Shareholders and Others With Whom It Associated

The Board found that Emerald had violated Rule 110(a)(5) (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)) by the following acts or omissions, among others:

> "(c) failing to conduct any reasonable inquiry into the background of its investors and other individuals [whom] it chose to associate with;
>
> (d) selling shares of its stock to individuals of notorious or unsavory character, specifically[,] individuals identified as known members of organized crime and individuals identified as associates of known members of organized crime."

Emerald argues that under the rules, the Board alone has a duty to

investigate prospective shareholders. Anyone wishing to transfer an ownership interest in the holder of a gaming license must apply to the Board to do so. 86 Ill. Adm. Code §3000.235(a) (Conway Greene CD-ROM October 1999). The individual or entity applying for such a transfer must complete a business-entity form or personal-disclosure form, and the information from this form "will form the basis of [a] Board investigation to determine [the] suitability of the person or entity seeking transfer. All costs associated with [the] Board investigation of the applicant for transfer will be born[e] *** by the holder of [the] license the transfer of ownership interest in which is being sought." 86 Ill. Adm. Code §3000.235(a)(1) (Conway Greene CD-ROM October 1999). Emerald reasons that if, under these rules, the prospective shareholder must file with the board a personal-disclosure form, which will serve as the basis of the Board's investigation, and if Emerald must pay for the Board to perform this investigation, the Board is supposed to be the investigator, not Emerald. According to Emerald, it must investigate only job applicants and marketing agents. See 86 Ill. Adm. Code §3000.150 (Conway Greene CD-ROM October 1999).

We agree that under the Board's rules, the Board had the primary duty to investigate prospective shareholders and key persons of Emerald. As we have discussed, Rule 110(a)(5) forbids a licensee from "[a]ssociating with *** persons of notorious or unsavory reputation or who have extensive police records." 86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999). Because no licensee has knowledge of everyone's reputation and police records and because of the paramount importance of keeping criminal influences out of the gaming industry, one

could argue that Rule 110(a)(5) requires a licensee to perform a reasonable investigation into the reputation and police records (if any) of persons with whom the licensee intends to form business relationships. Otherwise, a licensee could blindly associate with strangers and then plead, as a defense, that the licensee was unaware of publicly accessible information such as reputations and police records. Other than Rules 110(a)(5) and 150, however, we are aware of no rules imposing a duty of investigation or due diligence upon a licensee. Expressio unius est exclusio alterius.

2. Commencing Construction Without the Board's Prior Approval

According to Emerald, "[a] further basis for revocation was the [Board's] finding that Emerald improperly began construction in Rosemont and failed to disclose agreements with Rosemont." (From our reading of its conclusions of law, we understand the Board to be more concerned with Emerald's failure to disclose agreements and plans relating to construction. Of course, prompt disclosure of these agreements and plans theoretically would have prevented unapproved construction, so one violation probably amounts to the other.) Emerald asserts that "neither the [Act] nor the [Board's] [r]ules prohibit a licensee from proceeding with construction without [the Board's] approval."

Actually, in July 1999, when the joint venture began work on the Emerald casino complex, Rules 230(d)(1)(G) and (d)(1)(J) provided as follows:

> "(d) Approval for Proposed Changes
>
> (1) In addition to an applicant's and licensee's duty under [s]ection 3000.140 [(86 Ill. Adm. Code

§3000.140 (Conway Greene CD-ROM October 1999))] to disclose information to the Board, an applicant or owner licensee must immediately inform the Board and *** obtain prior formal Board approval thereof whenever a change is proposed in the following areas:

* * *

(G) Riverboat capacity or design change[;] [and]

* * *

(J) Agreements, oral or written, relating to the acquisition or disposition of property (real or personal) of a value greater than $1 million." (Emphases added.) 86 Ill. Adm. Code §3000.230(d)(1)(G), (d)(1)(J) (Conway Greene CD-ROM October 1999).

"Riverboat" includes a "permanently moored barge." 230 ILCS 10/4(d) (West 2000). One may reasonably infer that Emerald did not pay architects a total of $46,000 in June 1999 to produce a copy of the riverboat Emerald had in East Dubuque. Common sense would suggest that if Emerald could not change the design of its riverboat without prior formal Board approval, Emerald could not build an altogether new boat and associated structures without prior formal Board approval. Emerald hired architects in June 1999

to design a new casino complex in Rosemont, and two months later, when preliminary site preparation was underway, Emerald mentioned the project to Acosta as a fait accompli. The Board could reasonably find a violation of Rule 230(d)(1)(G).

According to Emerald, "the undisputed facts show that [the] Board had detailed knowledge of Emerald's construction activities in Rosemont and made no attempt to advise Emerald that it believed such construction threatened Emerald's license." On the contrary, the record appears to contain evidence that the Board lacked "detailed knowledge of Emerald's construction activities." On September 17, 1999, when construction was already underway, the Board requested "detailed plans and expert summaries regarding such issues as structural integrity, air quality/ventilation systems, electrical systems, and related fire and safety systems." On January 31, 2000, the Board was still requesting "all construction plans." Moreover, the Board had no obligation to warn Emerald that unapproved construction would threaten Emerald's license; Rules 230(d)(1)(G) and 110(a)(1) already contained that warning.

The Board could also have reasonably found Emerald to be in violation of Rule 230(d)(1)(J). The letter of intent that McQuaid and Mayor Stephens executed on July 21, 1999, states: "This letter of intent is intended to memorialize key terms that have been agreed to which are to be incorporated into a Lease and Development Agreement," and then the letter of intent enumerates those key terms. (Emphasis added.) Although the letter of intent states that it "does not constitute a binding agreement," i.e., a contract, it is nevertheless an agreement (or it proves that the parties reached an oral agreement before the execution of the letter) because it sets forth "key

terms that have been agreed to."

In its brief, Emerald seems to suggest that the terms "agreement" and "contract" are interchangeable and there could be no agreement until there was a contract. Actually, parties can reach an agreement without creating a contract. "An agreement, as the courts have said, 'is nothing more than a manifestation of mutual assent' by two or more legally competent persons to one another. [']Agreement[']is in some respects a broader term than contract ***" 1 W. Jaeger, Williston on Contracts §2, at 6 (3d ed. 1957), quoting Roberts v. Veterans Cooperative Housing Ass'n, 88 A.2d 324, 325-26 (D.C. 1952); see also Restatement (Second) of Contracts §3 (1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons"). "The word 'agreement' contains no implication that legal consequences are or are not produced." Restatement (Second) of Contracts §3, Comment a, at 13 (1981). It is difficult to imagine a letter of intent, signed by two parties, that would not be an agreement: either an agreement with open terms or an agreement to negotiate further (E. Farnsworth, Precontractual Liability & Preliminary Agreements: Fair Dealing & Failed Negotiations, 87 Columbia L. Rev. 217, 250 (1987)). The "key terms" that McQuaid and Mayor Stephens "agreed to" in their letter of intent related to the "disposition" of millions of dollars per year. See 86 Ill. Adm. Code §3000.230(d)(1)(J) (Conway Greene CD-ROM October 1999). Creating an agreement where none existed before was a "change." See 86 Ill. Adm. Code §3000.230(d)(1) (Conway Greene CD-ROM October 1999). By entering into the letter of intent with Rosemont without "prior formal Board approval," Emerald violated Rules 230(d)(1)(G) and 110(a)(1) (86 Ill.

Adm. Code §§3000, 230(d)(1)(G), 3000.110(a)(1) (Conway Greene CD-ROM October 1999)).

If anyone could reasonably doubt that a letter of intent met the description of an "agreement," paragraph 21 of the September application form ordered Emerald to produce "all agreements, arrangements[,] and commitments relating to [the] proposed gaming facility and related projects." At a very minimum, the letter of intent between Emerald and Rosemont was a "commitment" to negotiate the final terms of a lease agreement for the proposed casino. By withholding this letter of intent from its September application, Emerald disobeyed an order by the Board's agents, thereby violating Rule 110(a)(2) (86 Ill. Adm. Code §3000.110(a)(2) (Conway Greene CD-ROM October 1999)).

Then there was the letter of intent with the joint venture. By withholding it from the Board, Emerald disobeyed paragraph 21 of the September application form as well as Rule 140(b)(3), which provided as follows:

> "(b) *** [L]icensees and applicants for licensure shall periodically disclose, on forms provided by the Board, changes in or new agreements, whether oral or written, relating to:
>
> * * *
>
> (3) Construction contracts ***." 86 Ill. Adm. Code §3000.140(b)(3) (Conway Greene CD-ROM October 1999).

Emerald never disclosed to the Board the letter of intent that Emerald executed with the joint venture on October 5, 1999, even though the September application form ordered Emerald to "disclose promptly any changes in the information provided" and Rule 140(a) laid on Emerald a "continuing duty to disclose promptly any material changes in information provided to the Board" (86 Ill. Adm. Code §3000.140(a) (Conway Greene CD-ROM October 1999)).

Emerald seems to erroneously assume that just because the signatories to a document call it a "letter of intent," it cannot be a contract. The letter of intent between Emerald and the joint venture expressly contemplated the future execution of a construction contract that would supersede the letter of intent. But just because the "parties contemplate that a formal agreement will eventually be executed does not necessarily render prior agreements 'mere negotiations, where it is clear that the ultimate contract will be substantially' based upon the same terms as the previous document." Interway, Inc. v. Alagna, 85 Ill. App. 3d 1094, 1097-98, 407 N.E.2d 615, 618 (1980), quoting Frank Horton & Co. v. Cook Electric Co., 356 F.2d 485, 490 (7th Cir. 1966). "If the parties in the instant case intended that the [l]etter [of intent] be contractually binding, that intention would not be defeated by the mere recitation in the writing that a more formal agreement was yet to be drawn." Interway, 85 Ill. App. 3d at 1098, 407 N.E.2d at 618.

In the letter of intent between the joint venture and Emerald, the joint venture promises to begin construction and hire subcontractors, and in return, Emerald promises to pay the joint venture an amount equal to 5% of the total cost of

construction. The parties further agree to give five business days' written notice before canceling the letter of intent. Unlike the letter of intent between Rosemont and Emerald, this one does not disclaim an intention to be binding. See Interway, 85 Ill. App. 3d at 1098, 407 N.E.2d at 618. Clearly, the letter of intent between the joint venture and Emerald is itself a construction contract, and by failing to disclose and produce it to the Board, Emerald violated Rules 110(a)(2), 140(a), and 140(b)(3) (86 Ill. Adm. Code §§3000.110(a)(2), 3000.140(a), (b)(3) (Conway Greene CD-ROM October 1999).

3. Transferring Shares Without the Board's Prior Approval

a. Rule 140(a)

Count I of the disciplinary complaint alleges a violation of Rule 140(a), which imposed upon Emerald "a continuing duty to disclose promptly any material changes in information provided to the Board." 86 Ill. Adm. Code §3000.140(a) (Conway Greene CD-ROM October 1999). In its final order revoking Emerald's license, the Board finds that Emerald violated Rule 140(a) with respect to "transfers of shares of Emerald" and "agreements or understandings to sell ownership interests in Emerald." According to the Board, Emerald either failed to promptly disclose material changes of information or provided false, misleading, or incomplete information regarding these topics.

To prove a violation of Rule 140(a), the Board had to prove three elements: (1) Emerald initially provided information to the Board, (2) the information materially changed, and (3) Emerald failed to promptly inform the Board of the change. See 86 Ill.

Adm. Code §3000.140(a) (Conway Greene CD-ROM October 1999)). The essence of the violation is not merely a change in the status quo but an undisclosed change in information that Emerald previously provided to the Board. Obviously, transfers of shares and agreements to transfer shares changed the status quo, but we are unclear how these transfers and agreements changed previously disclosed information.

b. Rule 235(a)

Count IV of the disciplinary complaint alleges a violation of Rule 235(a) (86 Ill. Adm. Code §235(a) (Conway Greene CD-ROM October 1999)). Rules 235(a)(1) and (a)(3) provide as follows:

> "(a) An ownership interest *** in a holder of an [o]wner's license may only be transferred with leave of the Board. ***
>
> (1) Any individual or entity filing an application for transfer of any ownership interest *** in a holder of an [o]wner's license[] must complete a Personal Disclosure Form 1[,] which will form the basis of Board investigation to determine suitability of the person or entity seeking transfer. ***
>
> ***
>
> (3) If the Board denies the application for transfer, it shall issue the applicant a

[n]otice of [d]enial." 86 Ill. Adm. Code §3000.235(a)(1), (a)(3) (Conway Greene CD-ROM October 1999).

The Board found as follows:

"2. Emerald, through its officers, employees, representatives, shareholders, [k]ey [p]ersons, and others, failed to apply for or obtain pre-approval to transfer ownership, including but not limited to:

(a) transfers between Donald Flynn and [12] outside, non-statutory [sic] minority investors:

(b) transfers between Donald Flynn and five original investors; [and]

(c) transfers between Emerald and the statutory minority investors.

3. By failing to comply with [s]ection 3000.235(a), Emerald has failed to maintain its suitability for licensure."

For two reasons, Emerald contends that the "transfers" of shares, as alleged above, could not and did not occur: (1) Emerald never issued any stock certificates; and (2) the stock-purchase agreements and subscription agreements were, by their terms, conditional on the Board's approval.

Can one be a shareholder of Emerald without the issuance of a stock

certificate and despite the nonfulfillment of a condition, in the stock-purchase agreement or subscription agreement, that the Board approve the application of the prospective shareholder? The Board seems to think so, but really does not explain how, in a legal sense, these two obstacles are surmountable.

At common law, "[p]ossession of a stock certificate is not a prerequisite to ownership of an interest in a corporation ***." Connelly v. Estate of Dooley, 96 Ill. App. 3d 1077, 1082, 422 N.E.2d 143, 147 (1981). "The stock certificate is not the stock itself but is the evidence of the aliquot part of the holder's ownership in the stock." Bombal v. Peoples State Bank of Ramsey, 367 Ill. 113, 117, 10 N.E.2d 651, 653 (1937). The First District has explained:

> "[I]f a person owns a share of stock[,] he is no less entitled to the enjoyment of his rights in respect thereof, including the rights to collect dividends, to vote the share, and to transfer the share, simply because he does not have in his possession a certificate of stock issued by the corporation evidencing his ownership. The share of stock is the property, the certificate a mere evidence of muniment of title." Home for Destitute Crippled Children v. Boomer, 308 Ill. App. 170, 187, 31 N.E.2d 812, 821 (1941).

Section 8-102 of the Uniform Commercial Code (UCC) defines two types of securities: (1) a "'[c]ertificated security,'" meaning "a security that is represented by a certificate" (810 ILCS 5/8-102(4) (West 1998)); and (2) an "'[u]ncertificated security,'"

meaning "a security that is not represented by a certificate" (810 ILCS 5/8-102(18) (West 1998)). A person acquires a security if "the person is a purchaser to whom a security is delivered pursuant to [s]ection 8-301 [of the UCC (810 ILCS 5/8-301 (West 1998))]." 810 ILCS 5/8-104(a)(1) (West 1998). Section 8-301(b)(1) provides that "[d]elivery of an uncertificated security to a purchaser occurs when *** the issuer registers the purchaser as the registered owner, upon original issue or registration of transfer." 810 ILCS 5/8-301(b)(1) (West 1998). Thus, under article 8 of the UCC, one need not possess a stock certificate to be a shareholder; in that respect, article 8 does not alter the common law (see 810 ILCS 5/1-103 (West 1998) ("Unless displaced by the particular provisions of [the UCC], the principles of law *** shall supplement its provisions")).

We have established that under the common law and article 8 of the UCC, the lack of a stock certificate would not necessarily prevent someone from becoming a shareholder of Emerald or from acquiring additional shares in Emerald. Would the conditional clauses in the stock-purchase agreements and subscription agreements stand in the way? Parties can waive conditions in contracts, including conditions precedent. Quake Construction, Inc. v. American Airlines, Inc., 141 Ill. 2d 281, 311, 565 N.E.2d 990, 1005 (1990). Waiving the Board's approval would put the contracts in violation of Rule 235(a), and illegal contracts are void (T.E.C. & Associates, Inc. v. Alberto-Culver Co., 131 Ill. App. 3d 1085, 1095, 476 N.E.2d 1212, 1220 (1985)). But we are aware of no authority that the existence of a legally enforceable agreement is essential to the transfer of shares.

Having determined that the alleged transfers of shares are theoretically possible, we now consider whether the Board's finding that the transfers did in fact occur is against the manifest weight of the evidence. Let us begin with the 12 outsiders. Does the record contain any evidence from which the Board could reasonably conclude that Emerald transferred the 294 shares from Donald Flynn to the 12 outsiders? The 12 outsiders were Edwin Zeman, Susan Leonis, Michael Blumenthal, Wayne Douglas, Barbara Levey, Robert Martwick, Joseph Salamone, Joseph Scarpelli, John Sisto, Mark Triffler, George Voutiritsas, and Michael Parrillo. Paragraph 11a of the September application form stated: "Provide a detailed list of all shareholders of [Emerald], including the number of shares held[] and their respective ownership percentages." (Emphasis added.) That paragraph was in contrast to paragraph 8(e), which requested a "list of all current proposed shareholders." (Emphasis added.) In response to paragraph 11a (requesting a "list of all shareholders"), Emerald stated: "See [e]xhibit [No.] 8e." (Emerald numbered the exhibit to correspond to paragraph 8(e) but submitted it in response to paragraph 11a.) Exhibit No. 8e was a list of 64 shareholders, stating the number of shares and percentage of ownership for each shareholder, and 11 of the 12 outsiders were on the list (Parillo was not listed). On September 24, 1999, McQuaid signed the application, swearing to its truth. A reasonable trier of fact could conclude that exhibit No. 8e listed the actual shareholders of Emerald. In his letter of October 29, 1999, to Deputy Administrator McDonald, Hanley enclosed "a statement of changes in ownership of common stock of Emerald," which listed each of the 12 outsiders as owning a certain number of shares and a certain percentage of the

company. It does not appear that the Board ever approved the 12 outsiders as shareholders.

Does the record contain any evidence that Emerald transferred 294 shares from the 5 original shareholders to Donald Flynn? The five original shareholders were Howard Warren, Anne O'Laughlin Scott, Richard Forsythe, Russell Steger, and Barton Love. These five names are listed in exhibit No. 8e, and each of them except for Love has the word "out" written next to it. In his letter of September 30, 1999, to Acosta, Hanley requested, without explanation, that Warren, Scott, Forsythe, and Steger "be deleted from the list." With his letter of December 2, 1999, to Deputy Administrator McDonald, Hanley enclosed a statement of "the distribution of shares owned by Donald Flynn." (Emphasis added.) The statement shows that Donald Flynn acquired 294 shares from the 5 original shareholders. It does not appear that the Board ever approved the transfer of those shares to him.

As for the minority shareholders, Emerald sent them letters greeting them as "Dear Shareholder," with federal income-tax Schedule K-1 ("Shareholder's Share of Income, Credits, Deductions, [et cetera]") enclosed; paid them dividends; and allowed them to vote at shareholder meetings. In the revocation hearing, ALJ Mikva asked McQuaid:

> [ALJ] MIKVA: I understand what a pending applicant is, but when you spent [their] money on bricks and mortar, did they have an interest in that brick and mortar?
>
> * * *

[McQuaid]: What I think, sir? I think the [Internal Revenue Service] recognized them as a shareholder at that time. I think the Illinois Department of Revenue recognizes them as a shareholder at that time.[] I think business law recognizes them as a shareholder at that time. They were voting as shareholders. They had not yet been approved by the Illinois Gaming Board."

The Board could have reasonably found that Emerald made no clear distinction between prospective shareholders and shareholders. Insomuch as the Board found a violation of Rule 235(a) (86 Ill. Adm. Code §3000.235(a) (Conway Greene CD-ROM October 1999)) in the unapproved transfers of shares from Donald Flynn to the 12 outsiders, from the 5 original shareholders to Donald Flynn, and from Emerald to the minority and female purchasers, its findings are not against the manifest weight of the evidence.

4. The Secret Agreement To Split Joseph Salamone's Shares

In the first half of its order, entitled "Findings of Fact," the Board made six findings of fact, each of which served as a heading for further discussion. The fifth heading reads as follows: "Emerald failed in its obligation to prevent ineligible interests from investing in its casino. As a result, numerous ineligible interests were sold stock in the casino." The discussion under this heading includes the following paragraph:

"Vito Salamone was identified by the FBI as being close with members and associates of organized crime.

[Citation to record.] The stock certificate issued by Emerald was originally in the name of Vito Salamone but was changed to Joseph Salamone, his brother. Whatever the effect of this crude change of ownership, there was in fact a secret memorandum of agreement, not provided to the [Board], which showed that both brothers, as well as officers of the Parkway Bank and Trust Company, were sharing ownership in the interest purchased in the name of Joseph Salamone."

Emerald argues it should not be punished for this "secret" agreement because the agreement was just as much a secret to Emerald as it was to the Board. We agree. We are aware of no statute or regulation making licensees "strictly liable" for the unsavory dealings or associations of its prospective shareholders. As Rule 110(a)(5) says, Emerald may not associate with those who have a "notorious or unsavory reputation" or who have "extensive police records." 86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM 1999). Just because the FBI has information, hidden away in its database, that Vito Salamone is connected to organized crime, it does not follow that such information is generally known or that Vito--let alone his brother, Joseph--has a notorious reputation. The Board refers to Emerald's "obligation to prevent ineligible interests from investing in its casino," but we are unaware of any regulatory basis for such an obligation other than Rule 110(a)(5).

5. Public Officials Holding Shares in Emerald

Paragraph 16 of the September application form asked: "Has [Emerald]

identified any [public officials] or officers or employees of any unit of goverment, or [relatives] of said [public officials], officers[,] or employees, who, directly or [indirectly], own any financial [interest] in, have any beneficial interest in, are the creditors of[,] or hold any [debt instrument] issued by, or hold or have any interest in any contractual employment or service relationship with [Emerald]?" Emerald answered no. The Board contends that this answer was a falsehood because three of Emerald's shareholders either held public office or were related to someone who held public office: Leonis was on the board of directors of the Chicago Transit Authority, Sisto was related to Representative Capparelli, and Martwick was a Norwood Park Township Democratic committeeman. In its brief, Emerald does not deny knowing that Leonis and Martwick were public officials and that Sisto was related to a public official. Emerald contends, however, that because the Board had not yet approved Leonis, Martwick, and Sisto as shareholders, they were not shareholders and, therefore, Emerald's response to paragraph 16 was true. In his letter of October 29, 1999, to Deputy Administrator McDonald, Hanley represented Leonis, Martwick, and Sisto as having "ownership of common stock of Emerald." Their names appear as shareholders in exhibit No. 8e of the September application. The Board could reasonably find that these three persons were shareholders and that Emerald gave a false answer to paragraph 16, in violation of Rule 110(a)(2) (86 Ill. Adm. Code §3000.110(a)(2) (Conway Greene CD-ROM October 1999) ("Failing to comply with any order *** of the Board")) and Rule 110(a)(5) (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999) ("failed to cooperate")).

6. Punishing Emerald for What Kevin Flynn Did

Emerald complains that the Board "based its [o]rder [of revocation] in part on alleged misconduct committed by Donald and Kevin Flynn." Actually, in the pages of the order that Emerald cites, Emerald speaks only of the misdeeds of Kevin Flynn. The heading of the cited pages is as follows: "Kevin Flynn, as a shareholder and chief executive officer of Emerald, consistently dissembled to the [Board] as to his activities on behalf of Emerald." Specifically, Emerald challenges four findings under that heading.

a. Kevin Flynn's Agreement With the Davis Companies and the Duchossois Family

According to Emerald, the Board "found that the Flynns intentionally violated the [Act] by *** entering into an agreement with the Davis Companies ('Davis') whereby Davis would acquire an interest in Emerald." Emerald argues that before Kevin Flynn became chief executive officer of Emerald on June 23, 1999, he had no power to bind Emerald and, therefore, he could not have created a contract between Emerald and the Davis Companies.

Whether Emerald and the Davis Companies had a valid contract is irrelevant to the point the Board is making in its order. As the heading to the cited pages suggests, the Board is concerned about the misrepresentations Kevin Flynn made to the Board after he was appointed chief executive officer of Emerald. The Board found he was dissembling when he "repeatedly denied that he [had] made any kind of deal with the Davis Companies or the Duchossois group." Regardless of whether he could bind Emerald, Kevin Flynn himself made the deal and afterward falsely denied doing so.

This was a violation of Rule 110(a)(5), which required Emerald and its agents and employees to cooperate with the Board in its investigation of Kevin's application to be a key person. See 86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999).

b. Failing To Disclose Threatened Litigation

Emerald argues "it was against the manifest weight of the evidence for the [Board] to find that Emerald intentionally concealed the existence of the Davis [l]itigation from [the] Board." More precisely, the Board found that McQuaid (not the Flynns) failed to disclose, in the September application, that the Davis Companies had threatened to sue Emerald. Paragraph 31 of the application form sought disclosure of all litigation, including "pending or threatened" litigation, in which Emerald was a party.

In its brief, Emerald does not dispute that sometime before McQuaid filed the September application, the Davis Companies threatened to sue Emerald. Instead, Emerald argues it "reasonably believed that [the] Davis [Companies] would not file litigation against Emerald" because such litigation would lack a "factual predicate." Paragraph 31 of the application form, however, did not request disclosure of threatened litigation only if Emerald "reasonably believed" that the prospective plaintiff would make good on the threat. It requested disclosure of "threatened" litigation--period. This issue illustrates the difficulty Emerald has had simply taking the Board's directives at face value and following them. By giving an incomplete answer to paragraph 31 of the application form, Emerald failed to obey the Board's order. See 86 Ill. Adm. Code

§3000.110(a)(2) (Conway Greene CD-ROM October 1999).

c. Dissembling About Pre-Amendment Negotiations With Rosemont To Move the Casino There

On September 27, 2000, Kevin Flynn voluntarily testified before the Board. Acosta remarked to him that in June 2000, the Board interviewed Peer Peterson, a shareholder of Blue Chip, and Peterson "indicated that HP[']s interest in Rosemont *** commenced in approximately March of 1998." Acosta asked Kevin Flynn if he "ha[d] any knowledge of that." Kevin answered: "No, absolutely not. *** The whole notion of Rosemont was not anything that was considered[,] as far as I know[,] until the legislation passed."

Evidence in the record suggests otherwise. On November 13, 2000, an investigator for the Board interviewed Issac Degan of Degan and Rosato Construction Company. Degan said he had a 30-year relationship with Mayor Stephens, both as a friend and business associate. The sister of Victor Cassini, vice president and in-house counsel of Flynn Enterprises, was married to Degan's son. "[A]bout [two] or [three] years ago," Degan set up a meeting in the mayor's office between the mayor, himself, Kevin Flynn, and Cassini. "'The purpose of the meeting was to discuss the [dormant] gaming license that the Flynn family held in Illinois.'" Asked if Kevin Flynn spoke of Blue Chip during this meeting, Degan answered no, adding that he was unaware Blue Chip even existed at that time.

On September 29, 2000, Mayor Stephens testified that as a favor to Degan, he met with Kevin Flynn. "Something about bringing the boat from--getting the boat

from--the license from Galena into Rosemont." The meeting lasted only 10 minutes or so and did not go well because the mayor decided he did not like Kevin Flynn. After the meeting, Mayor Stephens spoke with Governor Edgar, who told him that HP was "not going to have a license" because the state was "going to take it away from them."

On September 15, 2005, Mayor Stephens testified a second time about the meeting with Kevin Flynn. In the fall of 1987, he "had a visit from a Kevin Flynn[,] and he was talking about transferring a license." After the meeting, Mayor Stephens called Governor Edgar, who told him the license was going to be revoked. Both Governor Edgar and, subsequently, Governor Ryan told the mayor they would not sign legislation creating an eleventh casino license, but Governor Ryan said he was willing to sign legislation transferring the tenth license.

Emerald argues the Board "erred in finding that the Flynns lied about their initial interest in moving their casino operations to Rosemont." But the only evidence Emerald offers in support of this argument is the Flynns' testimony "that they did not consider Rosemont as a possible site until [s]ection 11.2 was enacted." The Board could have reasonably believed Degan and Mayor Stephens over the Flynns. It is the Board's prerogative, not ours, to choose between competing versions of fact. See Wegmann, 61 Ill. App. 3d at 359, 377 N.E.2d at 1303.

d. Dissembling About Kevin Flynn's Activities on Behalf of HP Before He Became Chief Executive Officer

The Board stated in its order of revocation: "[T]he record is replete with clear and convincing evidence that Kevin Flynn dissembled to the [Board] about his

activities in and on behalf of Emerald prior to June 1999." According to the Board, one example of such dissembling was Kevin Flynn's insistence that the only reason he attended Emerald's board meetings from April 1997 to April 1999 was because they coincided with the dates of the Blue Chip board meetings. The evidence showed, however, that only one of the five board meetings of Emerald coincided with a board meeting of Blue Chip during that period. According to Emerald, the Board "ignored *** the fact that Kevin Flynn was not active in Emerald at that time." (Emphasis added.) This so-called "fact" is not clearly evident to us. See Kankakee County Board of Review, 337 Ill. App. 3d at 1074, 787 N.E.2d at 869. For instance, in the presence of HP's vice president, McQuaid, and with his express approval, Kevin Flynn acted as HP's primary spokesman regarding possible relocation to Lake County.

In part because of what Kevin Flynn did (or, more precisely, because of the falsehoods he told), the Board revoked Emerald's gaming license, depriving Emerald of an extremely valuable asset. Emerald considers this punishment to be "disproportionate and unjust." "Based upon findings from an investigation into the character, reputation, experience, associations, business probity[,] and financial integrity of a [k]ey [p]erson, the Board may enter an order upon the licensee to require the economic disassociation of such [k]ey [p]erson." 86 Ill. Adm. Code §3000.224(b) (Conway Greene CD-ROM October 1999). Emerald argues that instead of putting Emerald at the mercy of Kevin Flynn's misconduct and imposing the severe penalty of revocation, the Board should have simply ordered Emerald to disassociate with Kevin Flynn--as, in fact, Emerald had offered to do.

We find Emerald's argument to be unpersuasive for two reasons. First, Kevin Flynn's misconduct was not the only reason for revocation. Second, the argument effectively claims corporate immunity. "A corporation can only act through its officers, agents[,] or servants" (Trust Co. of Chicago v. Sutherland Hotel Co., 389 Ill. 67, 72, 58 N.E.2d 860, 863 (1945)) and is "bound by their actions when performed within the scope of their authority" (First Chicago v. Industrial Comm'n, 294 Ill. App. 3d 685, 691, 691 N.E.2d 134, 138 (1998)). "Scope of authority" means "[t]he reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." Black's Law Dictionary 1348 (7th ed. 1999). Emerald appointed Kevin Flynn to be its chief executive officer. To validate that appointment, he had to answer the Board's questions. See 86 Ill. Adm. Code §§3000.155(a), (b), 3000.222(b)(1) (Conway Greene CD-ROM October 1999). While doing so, he was carrying out Emerald's business; and in the process, he failed to tell the truth. If, in such circumstances, a corporation could characterize its chief executive officer as a renegade and disavow responsibility for his or her actions, corporations would effectively have blanket immunity, because they always act through their officers and employees.

G. Disputes Over Discovery

1. Staff Reports

After initially refusing to do so, the Board produced to Emerald two staff reports consisting of over 1,000 pages. Emerald complains that by the time the Board produced these two staff reports on August 8, 2005, it was too late for Emerald to use them because the Board's "case was virtually completed." Emerald claims that this late

production violated its right to due process.

Due process requires fundamental fairness in administrative proceedings, and to be fundamentally fair, an agency must disclose evidence in its possession that might be helpful to the accused. Lyon v. Department of Children & Family Services, 335 Ill. App. 3d 376, 384, 780 N.E.2d 748, 755 (2002), aff'd, 209 Ill. 2d 264, 807 N.E.2d 423 (2004). Without a specific explanation, however, of how the complaining party suffered prejudice, we will not conclude that a late production of documents made the administrative proceeding fundamentally unfair. See Lyon, 335 Ill. App. 3d at 385, 780 N.E.2d at 755. Emerald states: "Without these reports in hand[,] Emerald was forced to proceed blindly through the course of the [Board's] case [in chief]. Any opportunity Emerald had to establish its defense to the [Board's] allegations was lost as a result of the [Board's] maneuvering and wrongful withholding of the [s]taff [r]eports." This statement is vague and conclusory and tells us virtually nothing. What information in these reports would have been useful to Emerald in the Board's case in chief, and how specifically would it have been useful? What material did these reports offer for purposes of impeachment? What previously unknown witnesses did they reveal? Emerald does not say.

2. Minutes of a Closed Meeting

In closed meetings, the Board's former interim administrator, Jeannette Tamayo, updated the Board on the investigation of Emerald and expressed her opinion of Emerald and its chief compliance officer, McQuaid. In the revocation proceeding, Emerald requested the Board to produce the minutes of these closed meetings, and the

Board refused. After reading the minutes in camera, ALJ Mikva confirmed that they contained discussions of the investigation as well as Tamayo's opinions about Emerald, but he denied Emerald's motion to compel production of the minutes. Emerald argues that this ruling violated its right to due process, considering that, by Tamayo's own admission in the revocation proceeding, the voodoo doll "sat in [her] office pending [its] being given as a gift [to Cusack]."

We are unconvinced that denying these minutes to Emerald made the revocation proceeding fundamentally unfair. Even if Tamayo displayed bias against Emerald during the closed meetings, it would not follow that the members of the Board were biased. It appears to us, from our review of the record, that Emerald fell afoul of the Board's rules mainly by (1) failing to obtain the Board's prior approval before entering into some important agreements with Rosemont and the joint venture; (2) withholding the agreements from the Board once Emerald did enter into them; and (3) transferring shares and entering into financing arrangements without the Board's prior approval; and (4) making material representations to the Board, orally and in writing, that were factually false. We cannot imagine how anything Tamaro said to the Board could possibly mitigate or serve as a defense to such serious and repeated misconduct. Realistically, the violations produced the result in this case, not Tamayo's supposed baleful influence on the Board members.

3. The Wilke Report

Nicholas Wilke was the Board's former auditing financial consultant. The morning of his testimony, he gave Emerald a copy of a 15-page report he had prepared

for the Board, in which he criticized the staff reports on which the Board relied in bringing the revocation action. Emerald complains of the Board's failure to produce this report. In its brief, "Emerald adopts *** those arguments establishing the impropriety of refusing to produce the [s]taff [r]eports." Again, Emerald fails to explain how, specifically, it suffered prejudice by receiving Wilke's report immediately before his testimony instead of earlier. Emerald had an opportunity to question Wilke on the report during the hearing. We agree that receiving documentary evidence ahead of time is preferable to receiving it the day of the hearing, but late disclosure does not inevitably cause prejudice. If not for Emerald's late receipt of the Wilke report, what favorable facts would Emerald have uncovered? What other evidence would Emerald have elicited that it did not elicit by questioning Wilke in the hearing? Emerald does not say. Therefore, we cannot and do not find the proceeding to be fundamentally unfair.

4. The Letterhead Memoranda From the FBI

Although the Board had in its possession the letterhead memoranda from the FBI for two to three years, it did not produce them to Emerald until just before their use in the disciplinary hearing. The Board's excuse for the late production was that it was not until the day of the hearing that the federal government gave the Board permission to release the memoranda. Emerald moved to bar the memoranda, arguing that the Board could have requested permission earlier. The ALJ denied Emerald's motion and admitted the memoranda into evidence. According to Emerald, the ALJ thereby "denied [Emerald] the opportunity to conduct its own analysis of these reports" and "denied [Emerald] its right to a fair hearing and due process."

We do not see the relevance of these FBI letterhead memoranda other than to the allegation that Emerald "[a]ssociat[ed] with *** persons of notorious or unsavory reputation or who ha[d] extensive police records" (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)). As we explained, a reputation is that which is generally known about a person, and just because the FBI's confidential source saw someone associate with a member of organized crime, it does not follow that the person's association with organized crime is generally known. Nor is an FBI letterhead memorandum the same thing as a publicly accessible police record. Because we overturn the finding that Emerald associated with persons of unsavory reputation or with persons having extensive police records, Emerald's complaint about the late production of the memoranda is moot.

5. Campaign Contributions

During the revocation hearing, an assistant Attorney General, Paul J. Gaynor, asked McQuaid if he remembered attending a fund-raiser for the Donald E. Stephens Committeeman Fund on October 21, 1999. McQuaid answered: "There might have been. I don't remember the date." In an attempt to refresh McQuaid's memory, Gaynor showed him Board's exhibit No. 413, entitled "Campaign Disclosure," a list of people who made campaign contributions to Mayor Stephens on that date. Gaynor asked McQuaid if he recalled who, from Emerald, attended the fund-raiser. When McQuaid answered that he did not remember, Gaynor referred him again to exhibit No. 413, showing that four "[e]xecutives" from HP attended, including McQuaid himself, contributing $1,000 apiece. Gaynor also referred McQuaid to the portion of the exhibit

showing that Brian, Donald, Kevin, and Robert Flynn contributed $5,000 apiece on behalf of Flynn Enterprises.

Emerald's attorney objected on the grounds that the Board never produced exhibit No. 413 in discovery and discovery was closed. ALJ Mikva asked:

> "[ALJ]: It's a public document, isn't it?
>
> MR. GAYNOR: Yes. It's from the website of the Illinois State Board of Elections. And right now[,] I am simply trying to use it to refresh his recollection.
>
> [ALJ]: I'm going to overrule the objection."

Whether the nondisclosure of documentary evidence makes a proceeding fundamentally unfair depends on whether it caused unfair surprise. Presumably, McQuaid, the vice president of Emerald, knew that he and other employees of Emerald made $1,000 campaign contributions to Mayor Stephens. Presumably, Kevin Flynn, the chief executive officer of Emerald, knew that he and other members of the Flynn family made $5,000 contributions. We find no unfair surprise to Emerald and, therefore, no fundamental unfairness.

6. A Document Entitled "Illinois Gaming Board Due Diligence Concerns"

On July 26, 2005, during the course of the disciplinary hearing, one of Emerald's attorneys, Robert A. Clifford, told the ALJ he had received, that day, a document entitled "Illinois Gaming Board Due Diligence Concerns." By Clifford's understanding, the document was "prepared either by or at the direction of Sergio Acosta" and "distributed internally among the Gaming Board's staff by *** Acosta

during his administration." "[I]t [was] a document that [spoke] to how the regulator should assist the licensee" in "due diligence concerns." Clifford complained of the Board's failure to produce this document to him during discovery. An attorney for the Board, Michael Fries, replied that he himself did not seem to have this document in his files but that did not mean the document did not exist. Then Fries made this offer:

> "MR. FRIES: So the record is clear, and Mr. Clifford can examine to his heart[']s content, I would suggest that I will try to get *** hold of Mr. Acosta. I understand he is on vacation this week. I think he is in Florida, I'm not sure. And I'll hustle counsel back here[,] and we can question him about this.
>
> [ALJ]: In the meantime[,] there is a[n] understanding about any documents, *** whatever they are ***, that [any] part[s] [of] the administrative record are discoverable and available to counsel.
>
> ***
>
> MR. CLIFFORD: I guess in response to what Mr. Fries said, I'm not going to file anything, they ought to be able to look in their file."

It appears, from this dialogue, that the parties resolved this discovery dispute. We consider it resolved.

7. The ALJ's Refusal To Quash a Subpoena Duces Tecum

In May 2005, after the revocation hearing had begun, the Board issued a subpoena duces tecum to Parkway Bank and Trust Company requiring it to produce, among other records, "any and all documents related to Nicholas Boscarino, Ida Hansen, Sherri Boscarino, [and] the Sher[r]i Boscarino Trust." Emerald moved to quash this subpoena on the ground that discovery was closed--the same reason the Board's chief legal counsel had given for refusing Emerald's request for staff reports. Without explanation, the ALJ denied Emerald's motion to quash the subpoena.

According to Emerald, the documents the Board obtained by this subpoena were part of the basis of the Board's revocation of Emerald's license, including the following: (1) a summary of the account balance of Sherri Boscarino for the benefit of the Nicole Boscarino Trust; (2) a cashier's check in the amount of $1,500,000 payable to the order of Nick S. Boscarino; (3) a deposit ticket in the amount of $1,500,000, with Sherri Boscarino's name on it; and (4) a check payable to the order of Emerald and signed by Ida L. Hansen, in the amount of $1,500,000. Emerald argues: "The admission of these documents was prejudicial to Emerald both because they were not disclosed and because Emerald had no knowledge of how the Sherri Boscarino Trust was [funded]. Nor did Emerald have the means to learn what the [Board] learned almost six years after the fact through the subpoena power that it (but not Emerald) had at its disposal."

As far as we can see, the only relevance of these documents is to show that Nicholas Boscarino--who, according to the FBI, was close to members and associates of organized crime--used the Sherry Boscarino Trust as a "front" to acquire an interest in

Emerald. Again, this evidence goes to the allegation that Emerald "[a]ssociat[ed] with *** persons of notorious or unsavory reputation or who ha[d] extensive police records" (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)). The record appears to contain no evidence that Nicholas Boscarino had a "notorious and unsavory reputation." Closely guarded FBI investigative files do not prove a reputation. Nor does the record appear to contain any evidence that in August 1999, when Ida Hansen wrote Emerald a check for $1,500,000, Nicholas Boscarino had an "extensive police record." Those conclusions make this discovery issue moot.

H. The Fairness of the Hearing

1. ALJ Mikva's Refusal To Restart the Revocation Hearing

On August 4, 2004, ALJ Holzman recused himself. Before disclosing his conflict of interest and recusing himself, he denied a motion by Emerald to compel discovery as well as Emerald's motions for summary judgment. He also heard the testimony of three witnesses: Acosta, Belletire, and Kevin Pannier.

The successor ALJ, Abner Mikva, refused Emerald's motion to restart the revocation hearing or to strike the three witnesses' testimony. Emerald's attorney cited to him In re Marriage of Sorenson, 127 Ill. App. 3d 967, 469 N.E.2d 440 (1984), and other cases for the proposition that "the judge cannot take[]over a proceeding and rely on the transcript." ALJ Mikva replied:

> "I'm aware of that. This is[,] as you will recall [and] I will remind you[,] an administrative proceeding and [is] not necessarily *** governed by those same precedents. Let me

> also say[,] if this gives you any comfort, there has not been cross[-examination] on two of the three witnesses that you are concerned about.
>
> Obviously[,] you will have your full measure of cross-examination as to those witnesses. As to the third one[,] cross[-]examination was completed. If[,] when the testimony of all of the witnesses is in, there is something that you think is necessary to establish by way of cross[-examination], credibility purposes[,] or otherwise by way of cross-examination of that witness which you previously pleaded in cross [sic], I would certainly entertain a request for that."

Emerald subsequently examined all three witnesses with ALJ Mikva presiding. In its brief, Emerald says that the testimony of these three witnesses "differed in many respects from that given to ALJ Holzman three years earlier," but Emerald does not say how their testimony differed and does not cite any pages of the record in support of that assertion.

Emerald cites Sorenson for the proposition that "a successor judge may not make findings of fact based upon a transcript of proceedings over which another judge presided." In Sorenson, 127 Ill. App. 3d at 968, 469 N.E.2d at 441, a judge took over a divorce case from a previous judge, who had recused himself, and entered judgment on the basis of transcripts of the testimony the previous judge had heard. The

Fifth District held this procedure was improper:

> "While the courts of other jurisdictions are divided on the issue of whether a successor judge may make findings of fact based upon a transcript of proceedings over which another judge presided, it is generally held that such a procedure is improper ***. [Citation.] The rationale of this holding is the longstanding principle that a litigant is entitled to a resolution of factual questions by a trier of fact who has been afforded an opportunity to assess the credibility of witnesses by observing their demeanor."
> Sorenson, 127 Ill. App. 3d at 969, 469 N.E.2d at 442.

Sorenson is distinguishable for two reasons. First, ALJ Mikva had an opportunity to assess the credibility of Acosta, Belletire, and Pannier because they testified before him. Second, unlike the judicial proceeding in Sorenson, this was an administrative proceeding. The Second District has reasoned that because due process allows an administrative board to make the ultimate decision without hearing any of the testimony in person, "a substituting hearing officer [may] base[] his decision not only on the evidence presented before him but also on the evidence contained in the report of proceedings before a prior hearing officer." North Shore Sanitary District v. Illinois State Labor Relations Board, 262 Ill. App. 3d 279, 294-95, 634 N.E.2d 1243, 1255 (1994). We agree with the Second District and find no abuse of discretion in ALJ Mikva's ruling.

2. FBI Memoranda and the "Side-Show About Rosemont"

Emerald complains of the admission of the FBI letterhead memoranda because they contained "triple and quadruple hearsay." Emerald also contends that ALJ Mikva erred in allowing the disciplinary proceeding to turn into "a side-show about Rosemont" as a haven for organized crime. The only apparent relevance of such evidence was to prove that Emerald "[a]ssociat[ed] with *** persons of notorious or unsavory reputation or who ha[d] extensive police records" (86 Ill. Adm. Code §3000.110(a)(5) (Conway Greene CD-ROM October 1999)). Insomuch as the Board found that Emerald associated with such persons, we have held that finding to be against the manifest weight of the evidence. Our holding makes these two evidentiary issues moot.

3. Refusal To Subpoena Chairman Jaffe

On September 16, 2005, Emerald requested the issuance of a subpoena to compel Chairman Jaffe to testify on the following topics: (1) any bias or prejudice he or other members of the Board had against Emerald and (2) whether an "outside influence" (such as the Attorney General) or an anti-Rosemont policy motivated the disciplinary proceeding. On September 21, 2005, ALJ Mikva denied the request and allowed Emerald to make an offer of proof. Emerald contends that because bias on the part of administrative decision-makers is relevant, ALJ Mikva violated Emerald's right to due process by refusing to issue the requested subpoena.

In United States v. Morgan, 313 U.S. 409, 413, 85 L. Ed. 1429, 1430-31, 61 S. Ct. 999, 1000 (1941), pursuant to his federal statutory authority, the United States Secretary of Agriculture issued an order setting the maximum rates that market

agencies could charge for their services at the Kansas City stockyards. The market agencies brought an action to set aside the order. Morgan, 313 U.S. at 413, 85 L. Ed. at 1431, 61 S. Ct. at 1000. Over the federal government's objection, the district court allowed the market agencies to take the Secretary's deposition. Morgan, 313 U.S. at 421-22, 85 L. Ed. at 1435, 61 S. Ct. at 1004. "He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates." Morgan, 313 U.S. at 422, 85 L. Ed. at 1435, 61 S. Ct. at 1004. Writing for the majority, Justice Frankfurter declared that the "the Secretary should never have been subjected to this examination." Morgan, 313 U.S. at 422, 85 L. Ed. 2d at 1435, 61 S. Ct. at 1004. The administrative proceeding before the Secretary was a quasi judicial proceeding, and just as "an examination of a judge would be destructive of judicial responsibility," so the examination of the Secretary threatened "the integrity of the administrative process." Morgan, 313 U.S. at 422, 85 L. Ed. 2d at 1435, 61 S. Ct. at 1004-05.

Courts do not subpoena a judge to momentarily come down from the bench and take the witness stand in a case over which the judge is presiding. As a member of the Board, Chairman Jaffe was comparable to a judge in that he was one of the ultimate decision-makers. Subpoenaing him to testify would have compromised the integrity and dignity of the administrative proceeding because, in the end, it would have put him in the ludicrous position of assessing the evidentiary value of his own testimony.

4. The 90-1 Investigative Reports

The ALJ admitted into evidence the Board's 90-1 investigative reports, in which agents summarized their interviews with Kevin Flynn, Seidenfeld, and others. Emerald argues the ALJ thereby abused his discretion because the reports were hearsay. Section 10-40(a) of the APA provides: "Evidence not admissible under those rules of evidence may be admitted *** (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." 5 ILCS 100/10-40(a) (West 2004). "While hearsay evidence has generally been held to be inadmissible in an administrative hearing [citations], section [10-40(a)] appears to create an exception to the rule when the hearsay is reliable. [Citation.]" Metro Utility v. Illinois Commerce Comm'n, 193 Ill. App. 3d 178, 185, 549 N.E.2d 1327, 1331 (1990). Emerald does not cite section 10-40(a), let alone explain why the 90-1 investigative reports fail to meet the standard for admissibility therein.

5. Motion for Disqualification of ALJ Mikva

Under Rule 1126(b)(4), the grounds for disqualification of an ALJ include a "[d]emonstrable pre[]disposition on the issues." 86 Ill. Adm. Code §3000.1126(b)(4), as amended by 22 Ill. Reg. 4390, 4411 (eff. February 20, 1998). On September 27, 2005, Emerald filed a motion for ALJ Mikva to recuse himself or, in the alternative, for the Board to disqualify him. In support of this motion, Emerald's three attorneys signed an affidavit stating as follows:

> "On or about June 6, 2005, after certain witnesses took the [f]ifth [a]mendment, the [a]dministrative [l]aw [j]udge, Abner Mikva, in a conference in chambers[,] where

no court reporter was present[,] made the following statement[] in my presence:

'No public official in their right mind could allow this casino to go to Rosemont.'"

Emerald contends that the denial of this motion violated due process and Rule 1126(b)(4).

We disagree. A "[d]emonstrable pre[]disposition on the issues" is grounds for disqualification. (Emphasis added.) 86 Ill. Adm. Code §3000.1126(b)(4), as amended by 22 Ill. Reg. 4390, 4411 (eff. February 20, 1998). Whether relocation to Rosemont was a good idea was not an issue in this revocation proceeding; the legislature had already decided that issue in section 11.2(a). The issue before ALJ Mikva was whether Emerald committed the violations alleged in the disciplinary complaint. We presume that Judge Mikva was a man "of conscience and intellectual discipline, capable of judging a particular controversy fairly," on the basis of the evidence before him, even if the outcome would be, in his personal opinion, regrettable. See Morgan, 313 U.S. at 421, 85 L. Ed. 2d at 1435, 61 S. Ct. at 1004. Judges routinely enforce laws that they consider to be bad public policy.

I. Denial of Intervention

Emerald's minority investors, Rosemont, and Emerald's committee of unsecured creditors petitioned to intervene in the revocation proceeding, and ALJs Holzman and Mikva denied their petitions. Emerald contends that these rulings violated section 5(b)(1) of the Act. That statute provides as follows:

"(b) The Board shall have general responsibility for the implementation of this Act. Its duties include, without limitation, the following:

> (1) To decide promptly and in reasonable order all license applications. Any party aggrieved by an action of the Board denying, suspending, revoking, restricting[,] or refusing to renew a license may request a hearing before the Board. A request for a hearing must be made to the Board in writing within 5 days after service of notice of the action of the Board. Notice of the action of the Board shall be served either by personal delivery or by certified mail, postage prepaid, to the aggrieved party. Notice served by certified mail shall be deemed complete on the business day following the date of such mailing. The Board shall conduct all requested hearings promptly and in reasonable order ***[.]" (Emphases added.) 230 ILCS 10/5(b)(1) (West 2004).

As the Board points out, section 5(b)(1) does not say that any aggrieved

person may request a hearing on the revocation of a license; it says that any aggrieved party may do so. Interpreting this statute as authorizing intervention by the licensee's creditors is problematic for three reasons. First, the statute really does not speak of intervention, and one would think that if the legislature meant "intervention" (a familiar legal term), it would have simply said so. A "request for a hearing" would be an awkward and imprecise way of signifying the concept of intervention because intervention presupposes that a hearing has already been requested. An "intervenor" is "[o]ne who voluntarily enters a pending lawsuit." (Emphasis added.) Black's Law Dictionary 826 (7th ed. 1999). An intervenor requests to be heard but does not request a hearing; a party has already made that request. Second, interpreting "any aggrieved party" as "any aggrieved person" (a term potentially describing a multitude of persons) would seem inconsistent with the singular form, "the aggrieved party," which appears later in the subsection. Third, Emerald's interpretation would make section 5(b)(1) unworkable. If the Board failed to serve any aggrieved person, that person could request a hearing at any time and thereby prevent the finality of the proceeding.

The Board also cites section 1-55 of the APA, which defines a "party" as "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." 5 ILCS 100/1-55 (West 2004). The petitioners for intervention were neither named nor admitted as parties; nor, under the authorities that Emerald has cited to us, were they entitled as of right to be admitted as parties. We find no error in the denial of the petitions to intervene.

J. Comparison of Emerald's Punishment to That of Other Wrongdoers

Emerald names four licensees and gives a brief, one-paragraph summary of each one's wrongdoing. Because none of the other wrongdoers incurred the ultimate penalty of revocation of their license, Emerald contends that revocation in its own case is "an unprecedented, unlawful, and disparate sanction." In its revocation order, the Board stated: "[T]he transgressions committed by Emerald in this action occurred while Emerald was not operating or generating revenue, against which, pursuant to the Act, monetary fines against [o]wner [l]icenses are normally calculated. Moreover, the evidence in this case does not remotely compare to any disciplinary action referenced by Emerald." We will defer to the Board's conclusion that Emerald's case is more egregious than the previous ones. We note that Emerald previously incurred a fine for failing to obtain the Board's approval of changes in debt-capitalization and sources of funding. Generally, repetition of misconduct calls for ratcheting up the penalty. "[T]he facts in [Emerald's] case, as compared to the available facts in [the other] case[s], are not sufficiently related to render the [revocation] arbitrary and unreasonable." See Launius v. Board of Fire & Police Commissioners of the City of Des Plaines, 151 Ill. 2d 419, 443, 603 N.E.2d 477, 488 (1992).

Nor do we find the revocation to be an excessive fine prohibited by the eighth amendment (U.S. Const., amend. VIII). As we held in Kerner v. State Employees' Retirement System, 53 Ill. App. 3d 747, 754, 368 N.E.2d 1118, 1123 (1977), the eighth amendment applies to criminal, not civil, actions.

K. The Board's Duty To Review the Record

Section 5(b)(8) of the Act provides: "The record made at the time of the

hearing shall be reviewed by the Board, or a majority thereof, and the findings and decision of the majority of the Board shall constitute the order of the Board in such case[.]" 230 ILCS 10/5(b)(8) (West 2004). The 96-volume record certified by the Board's clerk omitted exhibits as well as some pages of the transcripts. We granted Emerald's motion to add the omitted materials to the record on appeal.

Emerald assumes that because the Board's clerk omitted certain parts of the record when preparing the record for our review, the Board must not have seen those parts of the record and, therefore, did not perform its duty of reviewing the record. See 230 ILCS 10/5(b)(8) (West 2004). This seems to us a dubious assumption. Not uncommonly, when preparing records for appeal, circuit clerks inadvertently omit parts of the record that we know the trial court saw and considered. "An administrative agency *** is entitled to a presumption that all of its official acts have been performed properly and this presumption extends to a reading and consideration of the evidence." Watra, Inc. v. License Appeal Comm'n, 71 Ill. App. 3d 596, 601, 390 N.E.2d 102, 106 (1979). Emerald has not rebutted that presumption.

L. Economic Damages Under Section 1983

Emerald argues that the Board has violated its rights to equal protection and due process and that the Board is, therefore, liable to Emerald for damages and attorney fees under section 1983 of the United States Code (42 U.S.C. §1983 (2000)). Emerald requests that we "either a conduct a hearing [ourselves] before a jury on Emerald's [section] 1983 charges and claims for damages[] or remand the case to a new hearing officer to conduct a jury trial on those same claims." Section 17.1 of the Act

describes our subject-matter jurisdiction: "judicial review of a final order of the Board relating to owners *** licenses." (Emphasis added.) 230 ILCS 10/17.1(a) (West 2004). The Board's final order says nothing about a section 1983 claim; therefore, we have no jurisdiction to review such a claim. We are a court of review, not a trial court.

III. CONCLUSION

For the foregoing reasons, we affirm the Board's final order revoking Emerald's gaming license.

Affirmed.

APPLETON, J., with KNECHT and TURNER, JJ., concurring.