BEFORE THE COLORADO LIMITED GAMING CONTROL COMMISSION

STATE OF COLORADO

Case No. DO 04-01

ORDER DENYING PETITION FOR DECLARATORY ORDER

IN THE MATTER OF:

AMERISTAR CASINO BLACK HAWK, INC.,

Petitioner.

THIS MATTER comes before the Colorado Limited Gaming Control Commission ("Commission") upon the Petition filed by Ameristar Casino Black Hawk, Inc. ("Ameristar") for a declaratory order pursuant to Rule 47.1-601, Colorado Limited Gaming Regulations, 1 Code Colo. Reg. 207-1. Ameristar seeks a declaratory order allowing it to include the square footage of that portion of its building and any one floor lying outside the gaming district in calculating the maximum square footage which may be used for limited gaming mandated by the Colorado Constitution, Article XVIII, Section 9 (3)(c) and CRS 12-47.1-103(16), which state that "No more than thirty-five percent of the square footage of any building and no more than fifty percent of any one floor of such building may be used for limited gaming." The method by which this must be calculated is specified in Regulation 47.1-313, Colorado Limited Gaming Regulations, 1 Code Colo. Reg. 207-1 ("Rule 313").

I. Procedural History

By letter of November 22, 2004, from Manuel Martinez, attorney for Ameristar to Mark Wilson, Director of the Colorado Division of Gaming ("Division"), Ameristar requested a written determination from the Division that Ameristar may include the portion of its building and any one floor lying outside the gaming district in calculating the permitted size of the licensed gaming premises. By letter of November 30, 2004 from the Director to Mr. Martinez, the Director states that the Division believes its historical interpretation of Rule 313 in calculating the size of the permitted licensed gaming premises is consistent with the mandates of the Colorado Constitution and Limited Gaming Act. The Division thereby declined the written determination requested by Ameristar.

It should be noted that, based upon the Division's recommendation, the Commission voted to approve Ameristar's application for retail and operator licenses at its meeting on December 16, 2004. During oral argument on March 18, 2005, counsel for Ameristar

conceded that Ameristar submitted a retail floor plan consistent with the Division's historical interpretation of Rule 313 for the Division to recommend approval and for the Commission to vote to approve. Counsel also conceded that Ameristar was aware before it purchased the property in question (Mountain High Casino at Black Hawk) that Mountain High was required to submit a **revised** retail floor plan that complied with the Division's historic interpretation of Rule 313 when Mile High submitted its application for a retail license, as attested to by Affidavit of Thomas Kitts attached as Exhibit A to Intervenors' Response Brief.

At its meeting on January 20, 2005, the Commission ordered Ameristar and the Division to provide it with written legal arguments before the Commission rules on Ameristar's petition for declaratory order. The Commission set a briefing schedule. On February 8, 2005, **Motions to Intervene, or in the Alternative, to Participate as *Amicus Curiae***, were filed on behalf of Black Hawk/Jacobs Entertainment LLC d/b/a The Lodge Casino at Black Hawk; Gilpin Hotel Venture d/b/a The Gilpin Hotel Casino; Centaur Colorado, LLC d/b/a Fortune Valley Hotel and Casino; Double Eagle Resorts, Inc. d/b/a Double Eagle Hotel and Casino; Gold Creek Ventures, LLC d/b/a Gold Creek Casino; Creeker's Inc. d/b/a Creeker's Casino; Pioneer Group Inc. d/b/a Bronco Billy's Sports Bar and Casino and Buffalo Billy's Casino; Midnight Rose Hotel and Casino, Inc.; Casino Holdings, Inc. d/b/a Brass Ass; and Holland ventures Inc. d/b/a J.P. McGill's Hotel and Casino; Isle of Capri-Black Hawk, LLC d/b/a Isle of Capri Casino; and CCSC/Blackhawk, Inc. d/b/a Colorado Central Station.

At the Commission's regular meeting on February 17, 2005, Mr. Grueskin filed a **Request to Include Additional Intervenors** on behalf of Golden Mardi Gras, Inc., d/b/a Golden Gates Casino; Golden Mardi Gras, Inc. d/b/a Golden Gulch Casino; and Golden Mardi Gras, Inc., d/b/a Mardi Gras Casino. During the February meeting, after hearing argument from counsel, the Commission granted the motions to intervene, granted the request to include additional Intervenors, amended the briefing schedule, requested Intervenors to attach to their briefs any documentation concerning the application of Rule 313, and set oral argument.

II. Issue to Be Determined

Ameristar seeks a declaratory order declaring that the entire rentable area of a floor need not be located within the Gaming District for purposes of calculating the portion of building floors that can be used for limited gaming. Specifically, Ameristar in its petition asks the Commission to answer the following question:

The Colorado Constitution at Article XVIII, Section 9, paragraph (3)(c) and Colorado Revised Statutes 12-47.1-103(16) declare that "No more than thirty-five percent of the square footage of any building and no more than fifty percent of any one floor of such

building may be used for limited gaming." In calculating the size of the permitted gaming licensed premises, must the entire rentable area of a floor be located within the Gaming District, as the Director has concluded, or may the portion of a floor that is not located within the Gaming District be taken into account in such calculation, as [Ameristar] contends?'

The Commission believes the specific issue presented by this case is whether Ameristar may include the portion of its building and of any one floor located outside the Gaming District in calculating the permitted size of its licensed gaming premises.[1]

After careful review of all briefs filed, including attachments, and consideration of lengthy oral arguments by the parties, the Commission concludes that the entire rentable area of a floor must be located within the Gaming District to be taken into account of the calculation of the size of permitted gaming licensed premises. In support of its determination, the Commission finds and concludes as follows:

III. Rule 313

Attachments to Ameristar's petition, as well as Ameristar's briefs in support of the petition, request that the Commission also interpret and apply Rule 47.1-313 to require that all rentable space, whether or not it is within the Gaming District, be included in calculating the size of the area used for limited gaming activities.

Regulation 47.1-313(2)(b), Licensed Premises-Location, provides that the total square footage comprising the licensed premises:

> (a) shall not exceed 35% of the total square footage of the building as determined in subparagraph (1) above; and
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> (b) shall not exceed 50% of the square footage of any one floor.

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[1] As stated in the Division's **RESPONSE BRIEF**, a previous Commission was made aware of this issue by way of a Petition for Declaratory Order filed by a developer (Pine Holdings, Inc.) in 1997 requesting Rule 313 be amended to specifically state language which would allow calculation of the permitted size of licensed gaming premises in the manner requested by Ameristar here.

However, as pointed out by the Division in its Response Brief, that 1997 Petition was delayed until after the Commission's rule-making hearings on the gaming district boundaries (Rule 19) and voluntarily withdrawn by Pine Holdings at the conclusion of those hearings without the need for a final decision by that Commission.

Therefore, the Commission deems the issue to be decided here as a case of first impression.

A "licensed gaming establishment" is a premises licensed for the conduct of gaming. CRS 12-47.1-103(15). The "licensed premises" of an establishment is the portion of any premises licensed for the conduct of limited gaming. CRS 12-47.1-103(16).

Ameristar contends that the plain language of Rule 313 requires that all rentable area of the floor of the building be included in calculating the gaming licensed premises. It contends that the Regulation contains no exclusion for, nor prohibition against, including the portion of a building or of any one floor located outside the gaming district in calculating the permitted size of the licensed gaming premises. Ameristar contends further that no such prohibitive language appears in the voter approved amendment to the Colorado Constitution, Article XVIII, Section 9, paragraph (3)(c), which states,

> No more than thirty-five percent of the square footage of any building and no more than fifty percent of any one floor of such building, may be used for limited gaming.

nor in the enabling statute passed by the General Assembly, CRS 12-47.1-103(16), which states in part:

> In no event shall the licensed premises exceed thirty-five percent of the square footage of any building and no more than fifty percent of any one floor of such building.

Further, Ameristar argues that had the drafters of Rule 313 (as well as the voters who passed the Constitutional Amendment and the General Assembly which passed the enabling statute) intended to exclude rentable area located outside of the gaming district in determining a licensed premises, they could easily have written such an exclusion into these provisions. Finally, Ameristar urges that interpreting Rule 313 in the manner requested by Ameristar is consistent with the public policy as declared by the Colorado legislature in CRS 12-47.1-102(1)(a)(b) and (c); that interpreting Rule 313 in the manner requested by Ameristar would be good for Colorado's economy because potential licensees would know they could rely on the plain language of the Regulation to accurately predict the Division's decision, would result in an increased density and number of gaming devices creating more jobs, resulting in an increase in gaming tax revenue paid to the state, and would further the Constitutional Amendment's intent to preserve the history and character of the towns where limited gaming is permitted.

The Division contends that its historical interpretation of Rule 313 is consistent with the intent of the voters who passed the Constitutional Amendment to impose limits on the uses and location of gaming space to protect non-gaming retail uses and limit gaming density

within the commercial districts, and consistent with the legislative declaration contained in the Colorado Limited Gaming Act which requires the Commission to strictly construe and regulate limited gaming provisions.

Ultimately, the Division contends that at the time the voters adopted the Constitutional Amendment, and at the time the Colorado General Assembly passed the Colorado Limited Gaming Act, as well as at the time the first Commission adopted Rule 313, it was never contemplated by the voters, the legislature, nor the first Commission that eventually there would be large casinos in buildings which would straddle the Gaming District boundary. In the early years of limited gaming in Colorado, the Division argues, only smaller casinos were envisioned in order to control the density of limited gaming so it serves as an adjunct to, and not a replacement of, non-gaming retail usage thereby furthering the goal of historic preservation.

In support of its arguments, the Division cites language from the Legislative Council's Blue Book, published by the Colorado General Assembly, discussing the purpose of the proposed constitutional amendment authorizing limited gaming, as well as some testimony during the House and Senate debates on the proposed legislation which eventually became the Colorado Limited Gaming Act.

The Intervenors set forth arguments in their Response Brief stating that the Division's historic interpretation of Rule 313 is correct for many of the same reasons urged by the Division. Intervenors argue that this historic interpretation is consistent with the voters' intent in authorizing limited gaming in the Colorado Constitution and the intent of the General Assembly in passing the Colorado Limited Gaming Act in preserving the diversification of the gaming towns' economic base and furthering the goal of historic preservation. As in the Division's Response Brief, Intervenors quote language from the Colorado Legislative Council Blue Book published prior to the 1990 general election which resulted in the passage of the Constitutional Amendment.

Intervenors advance an additional argument, which they support by attached affidavits to their Response Brief, that prior to the filing of Ameristar's Petition for Declaratory Order other casinos which planned to abut or expand beyond the gaming district boundary were notified by the Division of its historic interpretation of Rule 313, and have invested hundreds of millions of dollars in purchasing, developing, and expanding casino properties in compliance with that interpretation. Intervenors contend that granting Ameristar's petition for declaratory relief would result in economic disadvantage to said casinos, foster instability in the industry, and undermine competition.

IV. Commission's Analysis and Decision

The Commission concludes that the constitutional and statutory parameters of limited gaming preclude the Commission from considering floor space outside a gaming district in applying Rule 313.

The Commission finds Rule 313 to be ambiguous as to the issue to be decided in this case. The Rule mentions the terms "building," "gross building area," and "rentable area of a floor," but is silent as to whether portions of a building located outside the gaming district may be included in calculating the permitted size of licensed gaming premises. It should be noted that the Colorado Constitution, Article XVIII, Section 9 (3)(c) and CRS 12-47.1-103(16) are also silent as to this issue. The Commission believes this silence is because at the time the voters adopted the Constitutional Amendment, and at the time the Colorado General Assembly passed the Colorado Limited Gaming Act, as well as at the time the first Commission adopted Rule 313, it was never contemplated by the voters, the legislature, nor the first Commission that eventually there would be large casinos in buildings which would straddle the gaming district boundary. Indeed, this is specifically stated with respect to Rule 313 by Pine Holdings, Inc., in Exhibit 2 to the Division's Response Brief.

In ***Tivolino Teller House, Inc. vs. Fagan, et al.,*** 926 P.2d 1208 (Colo.1996), the Colorado Supreme Court held that the Limited Gaming Amendment provides for the creation of a Commission that is authorized to resolve possible ambiguities in the language of the Amendment. Section 9(2) of the Limited Gaming Amendment specifically mandates:

> The administration and regulation of this Section 9 shall be under an appointed Limited Gaming Control Commission….The Commission shall promulgate all necessary rules and regulations relating to the licensing of limited gaming….Such rules and regulations shall include the necessary defining of terms that are not otherwise defined. 926 P.2d at 1212-1213.

A. Adjudicatory Proceeding vs. Rule-making Proceeding

An administrative agency such as the Commission may take action to determine the rights of the parties and resolve particular issues, including interpreting an agency regulation, either in an adjudicatory proceeding or a rule-making proceeding. An adjudicatory proceeding by an agency involves a determination of rights, duties, or obligations of identifiable parties by applying existing legal standards to facts developed at a hearing conducted for the purpose of resolving the particular interests in questions. ***AVICOMM, Inc.***

vs. The Colo. Pub. Util. Comm., 955 P.2d 1023 (Colo. 1998). The fact that an agency's decision may have collateral effects upon others similarly situated to the parties in the case does not transform an adjudicatory action into a rule-making proceeding. ***Id.***

The Commission is deciding the rights of Ameristar pursuant to its Petition for Declaratory Order requesting that the Commission interpret Rule 313. The Commission believes the issue raised by the Petition may be resolved by applying existing legal standards to facts developed during the hearings and filings in response to Ameristar's Petition. Therefore, the Commission concludes that its decision in this case is an adjudicatory action. That the Commission's decision in this case may have collateral effects upon others similarly situated to Ameristar "does not transform an adjudicatory action into a rule-making proceeding." ***Id.***

B. Powers and Duties of the Commission

In addition to the powers and duties noted in the Limited Gaming Amendment and in ***Tivolino Teller House, Inc., supra***, CRS 12-47.1-302(1)(e) requires the Commission's rules to "be so administered **as to serve the true purpose and intent of this Article." (**Emphasis added). CRS 12-47.1-102(1)(c) The Colorado Limited Gaming Act sets forth the General Assembly's declaration of the public policy of this state that "establishments where limited gaming is conducted…must therefore be licensed, controlled, and assisted to protect the public health, safety, good order, and the general welfare of the inhabitants of this state to **foster the stability** and success of limited gaming and **to preserve the economy and policies of free competition of the State of Colorado."** (Emphasis added).

The Commission is thereby empowered and required to interpret its Rules, including Rule 313, in a manner it deems necessary to carry out the true purpose and intent of the Colorado Limited Gaming Act as well as the Limited Gaming Amendment.

C. Rules of Construction

When construing a constitutional amendment, courts must ascertain and give effect to the intent of the electorate adopting the amendment. Courts should not engage in a narrow or technical reading of language contained in a constitutional amendment if such a reading would defeat the intent of the voters. If the intent of the voters is not clear from an amendment's language, courts should consider the amendment as a whole and construe it in light of the objective it seeks to achieve and the mischief it seeks to avoid. ***Zaner vs. City of Brighton***, 917 P.2d 280 (Colo. 1996). Courts are obligated to construe the Constitution in

such a manner as will prevent an evasion of its legitimate operation. ***Colo. Common Cause vs. Bledsoe***, 810 P.2d 201 at 207 (Colo. 1991).

When, as here, a provision of a constitutional amendment was adopted by popular vote, courts must determine what the voters believed the language of the amendment meant when they approved it, by giving the language the natural and popular meaning usually understood by the voters. ***Grossman vs. Dean***, 80 P.3d 952 (Colo. App. 2003). When interpreting a constitutional amendment, the courts may look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue Book. While not binding, the Blue Book provides important insight into the electorate's understanding of the amendment when it was passed and also shows the public's intentions in adopting the amendment. The Blue Book provides helpful source equivalent to the legislative history of a proposed amendment. ***Id.***

The Commission finds persuasive the citations of the Blue Book contained in the response briefs of the Division and Intervenors. This publication by the Colorado General Assembly before the 1990 general election, at which the Limited Gaming Amendment was passed, describes the intent and purpose of the proposed amendment. The first argument in favor of the initiative in the Blue Book states:

> Limited gambling would ***help to ensure the preservation of historic buildings in Central City, Black Hawk, and Cripple Creek***, and in other areas of the state. With the diminishing economies of these communities, legalized gambling would help raise the necessary funds to ***restore the historic character of the designated towns*** without burdening the taxpayers of Colorado or the citizens of the communities. The ***flavor of the frontier gold mining life should be maintained*** since the significance of these areas was in large part responsible for Colorado becoming a state in 1876. Without additional resources being committed to the preservation of the structures and character of these historic towns, the buildings will continue to deteriorate and collapse. If this is permitted to occur, a treasured national and state resource will eventually be lost.

Legislative Council of the Colo. Gen. Assembly, An Analysis of the 1990 Ballot Proposals, Research Pub. No. 350 at 16 (1990) (emphasis added).

At page 17 of the same publication, the Blue Book states:

> Limited gambling is designed to act as a supplement to, and not a replacement of existing businesses in the communities. … The proposal is an effort to enhance the historic qualities of the communities, boost the economies of the

> areas by providing a year-round tourist attraction, and capture a portion of Colorado gambling dollars which are now being spent in other states.

Legislative Council of the Colorado General Assembly, Research Publication No. 350 (1990) at 17.

These descriptions in the Blue Book clarify that improving the economies of the gaming towns was one purpose of the Amendment, however, that purpose must also be balanced with a clear intent to preserve non-gaming businesses and to ensure preservation of historic buildings in the gaming towns. The Commission believes the relief requested by Ameristar in this case would undermine the intent and purposes of the Amendment. The relief requested by Ameristar would greatly increase the density of licensed gaming premises and eventually could well drive out non-gaming retail businesses, thereby undermining the clearly stated intent that limited gaming should be a supplement to these businesses. Further, the Commission fails to understand how Ameristar's requested relief would help ensure the preservation of historic buildings and restore the historic character of the gaming towns, with the exception that a significant gaming density would most likely increase gaming tax revenues paid to the state, a substantial portion of which would be paid to the Colorado Historical Society as mandated by the Amendment. However, by having the tendency to drive out non-gaming retail businesses as gaming density increases, there would ultimately be significantly fewer historic buildings to preserve.

Further, the 1992 voter approved Amendment described in subsection 6 places yet more limitations on the expansion of limited gaming, by prohibiting it in cities or unincorporated portions of counties unless approved by a majority of voters in such areas. This highlights the emphasis on limits imposed on limited gaming found in the 1990 Amendment as well as the Limited Gaming Act.

This emphasis on limitations may also be seen in Rule 19 "Gaming District Boundaries." Regulations 47.1-1901 and 1902, Colorado Limited Gaming Control Regulations, 1 Code Colo. Reg. 207-1, each state in subsection 5:

> This rule shall be construed strictly so as to avoid expansion of limited gaming beyond that which is constitutionally permissible by virtue of Colo. Const. Art. XVIII Sec. 9.

The descriptions of the purposes and intent of the Amendment as stated in the Blue Book citations above are clearly revealed by subsection 5 of the Amendment which creates the limited gaming fund and describes how the fund shall be used. The language mandates significant portions of the fund to go toward historic preservation as well as to the gaming cities and counties. The Limited Gaming Act reiterates this distribution of the gaming fund

and specifies that a substantial amount of the fund to be paid to the gaming cities and counties, as well as to the Division for the purpose of coping with the obvious impacts that were known to arrive as a result of limited gaming. ***See***, CRS 12-47.1-601, "Gaming Tax;" CRS 12-47.1-701,"Limited Gaming Fund;" and CRS 12-47.1-1201, "State Historical Fund – Administration."

In interpreting the Limited Gaming Amendment, the Colorado Limited Gaming Act, and Rule 313, we must do so in a manner which serves the true purposes and intent of these laws. The General Assembly's declaration of public policy in enacting the Limited Gaming Act, upon which this Commission is statutorily directed to place great weight, is clear.

V. Conclusion

For the reasons stated above, the Commission believes the Division's historic interpretation of Rule 313 is correct, and that the relief requested by Ameristar, if granted, would undermine the stated purposes and intent of the voters who adopted the Constitutional Amendment and the General Assembly which adopted the Colorado Limited Gaming Act. Therefore, Ameristar's Petition for Declaratory Relief is hereby denied.

FOR THE COMMISSION:

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Natalie Meyer
Commissioner and Chairman of the
Limited Gaming Control Commission,
State of Colorado

NOTICE OF APPEAL RIGHTS

This Order Denying Petition for Declaratory Relief is subject to appeal pursuant to CRS sections 12-47.1-521 and 24-4-106. Pursuant to CRS section 24-4-10-6(11) judicial review of this decision is commenced by filing a notice of appeal with the Court of Appeals within forty-five days after the date of service of this final order, together with a certificate of service of said notice of appeal on the Colorado Limited Gaming Control Commission and on all parties appearing before the Commission in this matter.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ORDER DENYING PETITION FOR DECLARATORY RELIEF upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Lakewood, Colorado, this ____day of April 2005 addressed as follows:

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