2017 IL App (1st) 162323-U

No. 1-16-2323

Order filed August 24, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

HOMETOWN PLAZA, LLC, an Illinois Limited Liability Company; BELLA'S HOMETOWN, LLC, an Illinois Limited Liability Company; and GIGI'S HOMETOWN, LLC, an Illinois Limited Liability Company,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	
v.	)	
	)	No. 15 CH 15439
THE ILLINOIS GAMING BOARD; DONALD TRACY, in his capacity as Chairman of the Illinois Gaming Board; HECTOR ALEJANDRE, THOMAS A. DUNN, LEE A. GOULD, DEE ROBINSON, in their official capacities as Members of the Illinois Gaming Board; and MARK OSTROWSKI, in his official capacity as Administrator of the Illinois Gaming Board,	)	Honorable Diane J. Larsen, Judge presiding.
Defendants-Appellants.	)	

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Gaming Board properly denied the video gaming license applications of Bella's Hometown, LLC and Gigi's Hometown, LLC, after finding that their proposed inclusion within a video gaming mall would risk the integrity of video gaming in Illinois and be inconsistent with the intent of Illinois' video gaming law. Accordingly, we reinstate the Illinois Gaming Board's decisions to deny the licenses and reverse the order of the circuit court, which had reversed the Illinois Gaming Board's decisions.

¶ 2 Hometown Plaza, LLC (Hometown Plaza) owns a shopping center in Hometown, Illinois, part of which it sought to convert into an entertainment center consisting of video gaming terminals, such as video poker and blackjack, within establishments serving food and beverages, including alcohol. Bella's Hometown, LLC (Bella's) and Gigi's Hometown, LLC (Gigi's) signed leases with Hometown Plaza in order to be part of the entertainment center. At the time, the shopping center already had three tenants with licenses to provide video gaming, and including Bella's and Gigi's, Hometown Plaza sought to have up to 11 such establishments providing video gaming in the shopping center. After signing their leases with Hometown Plaza, Bella's and Gigi's applied to the Illinois Gaming Board (Board) for licenses to operate video gaming terminals in their establishments. However, the Board denied their applications, finding that Hometown Plaza intended to operate the shopping center as a video gaming mall and their location within the proposed mall made them unsuitable for licenses.

¶ 3 Hometown Plaza, Bella's and Gigi's (plaintiffs) subsequently sought administrative review in the circuit court, seeking to reverse the Board's denials of Bella's and Gigi's applications. The circuit court reversed the Board's decisions, finding that it improperly denied the applications based on the "density" of video gaming establishments in an area, a consideration beyond the ambit of the Board's regulatory powers. The Board, its chairman, its members and its administrator (defendants) now appeal the circuit court's order, contending that the Board properly exercised its discretion in denying Bella's and Gigi's applications for video

gaming licenses. For the reasons that follow, we agree with defendants, reverse the order of the circuit court and reinstate the Board's decisions to deny Bella's and Gigi's applications for licenses.

¶ 4 I. BACKGROUND

¶ 5 In July 2009, the Illinois legislature enacted the Video Gaming Act (Gaming Act) (Pub. Act 96-34 (eff. July 13, 2009) (adding 230 ILCS 40/1 *et seq.*)), which legalized the use of video gaming terminals, such as video poker and blackjack, as a form of commercial gambling in certain establishments, including bars, veteran and fraternal organizations, and truck stops. Under the Gaming Act, nearly every individual or business involved in video gaming in Illinois must be licensed. 230 ILCS 40/25 (West 2014). This licensure requirement includes manufacturers of video gaming terminals, distributors of video gaming terminals, owners and operators of video gaming terminals, technicians of video gaming terminals, and the establishments where video gaming terminals are located. *Id.*; 230 ILCS 40/45(a) (West 2014). Each licensed establishment is allowed up to five video gaming terminals on its premises. 230 ILCS 40/25(e) (West 2014). Under the Gaming Act, the Board has the complete authority to supervise video gaming in Illinois, and it has the responsibility to investigate applicants, determine their eligibility for licenses and select those that best serve the interests of Illinois residents. 230 ILCS 40/78(a) (West 2014).

¶ 6 A. Bella's and Gigi's Applications for Licenses

¶ 7 Hometown Plaza owns a shopping center spanning the addresses of 4050 to 4140 Southwest Highway in Hometown, Illinois. It intended to use a portion of the shopping center as an entertainment center called the Hometown Plaza Entertainment Center, in which various tenants would provide video gaming and sell food and beverages, including alcohol. Hometown

Plaza billed the center as "the first entertainment facility of its kind." Bella's and Gigi's wanted to be tenants in the entertainment center and signed nearly identical leases with Hometown Plaza with Bella's occupying 4122 Southwest Highway and Gigi's occupying 4126 Southwest Highway.

¶ 8 As part of these agreements, Bella's and Gigi's agreed to apply for video gaming licenses from the State of Illinois and liquor licenses from the City of Hometown and any other government agency with jurisdiction over the shopping center. However, if Bella's or Gigi's could not obtain the required licenses, they, along with Hometown Plaza, had the right to terminate their individual leases. Bella's and Gigi's also agreed to use their premises for the sole purpose of operating video gaming establishments.

¶ 9 In the summer of 2015, Bella's and Gigi's each applied to the Board for a video gaming license as a retail establishment. At the time, each had a liquor license from the City of Hometown and the State of Illinois. The Board subsequently conducted an investigation into Bella's and Gigi's.

¶ 10 During the investigation period, several individuals and groups voiced their opposition to Bella's and Gigi's obtaining licenses and video gaming malls in general. Among them was Illinois State Representative Robert Rita, who wrote a letter to the Board, asserting that the Gaming Act did not intend "for video gaming facilities to become neighborhood casinos." Representative Rita attached to his letter a resolution he had filed in the Illinois House of Representatives that repeated his assertion that the Gaming Act never intended to legalize video gaming malls. Bill Service, chief executive officer of Illinois Gaming Systems, LLC, a licensed video gaming terminal operator, also wrote a letter to the Board opposing the concept. He attached an article from the Portland (Oregon) Tribune that detailed drug dealing and other

criminal activity at a local strip mall dubbed "Lottery Row," which contained several establishments with video lottery terminals.

¶ 11 Multiple people, however, expressed their support for granting Bella's and Gigi's licenses. Among them was Geno Giuntoli, the owner of Gigi's, who wrote a letter to the Board indicating that he had discussed the plan with representatives of Hometown Plaza and the mayor of Hometown, who assured him that such a venture was legal. They further informed Giuntoli that an agent of the Board had inspected the property and "said everything was legal." Giuntoli stated that he had invested time, energy and money into his business, including rent, expenses to build-out the property, and obtaining various liquor licenses and insurance. He asserted that his business would hire residents of Hometown as employees and the shopping center offered "far more than just gaming." Kevin Casey, the mayor of Hometown, also wrote a letter urging the Board to grant the licenses because of the positive impact in terms of local revenue and jobs the proposed gaming establishments would create.

¶ 12 In September 2015, the Board denied Bella's and Gigi's applications for licenses in identical letters, citing sections 45(a), (d) and (e) and 78 of the Gaming Act (230 ILCS 40/45(a), (d), (e) (West 2014); 230 ILCS 40/78 (West 2014)) and section 9(d)(4) of the Riverboat Gambling Act (Riverboat Act) (230 ILCS 10/9(d)(4) (West 2014)) as its reasons.

¶ 13 The Board initially noted that, under sections 45(a) and (e) (230 ILCS 40/45(a), (e) (West 2014)), the applicant had the burden to demonstrate its qualifications and suitability for an application. The Board next discussed that, pursuant to section 45(d) (230 ILCS 40/45(d) (West 2014)), it had the responsibility to deny an application when, *inter alia*, the applicant "create[s] or enhance[s] the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the

conduct of video gaming" or "present[s] questionable business practices *** incidental to the conduct of video gaming activities."

¶ 14 The Board then detailed the relevant facts to Bella's and Gigi's applications, observing that Hometown Plaza had built out small, separate storefronts in order to attract up to eight video gaming establishments. The Board noted that these storefronts shared the same bathroom and a common hallway. Given that the shopping center already had three licensed establishments, the Board determined that, if the remaining storefronts were to obtain licenses, the shopping center could eventually have up to 55 video gaming terminals.

¶ 15 After the Board discussed the various proponents and opponents for the video gaming mall concept, it stated that:

> "It is the Board's position that having multiple licensed video gaming establishments located within the same strip mall would be akin to having a mini-casino or a back-door casino, but without any of the traditional safeguards of a casino such as security, [a Board] Agent on staff, position limits, self-exclusion or internal controls. Based on the negative impact this video gaming mall concept has had in other jurisdictions, the Board wishes to safeguard the integrity of the video gaming industry by not permitting this concept to enter the Illinois market. It is also the Board's position that it was not the legislature's intent to permit video gaming malls when it passed the Video Gaming Act, and that this concept is inconsistent with the regulatory scheme of the Video Gaming Act."

¶ 16 The Board next observed that, under section 45(a) of the Gaming Act (230 ILCS 40/45(a) (West 2014)) and section 9(d)(4) of the Riverboat Act (230 ILCS 10/9(d)(4) (West 2014)), it had the authority to deny a license for "any just cause." It "determined that this video gaming mall

concept adversely affects public confidence and trust in gaming and poses a threat to the public interests of the State and to the security and integrity of video gaming." And based on Bella's and Gigi's location "within a proposed video gaming mall," the Board concluded it had "just cause to deny licensure." Lastly, the Board noted that, under section 78 of the Gaming Act (230 ILCS 40/78 (West 2014)), it had the jurisdiction and power to supervise all gaming operations in the State and to select the applicants that would best serve the interests of Illinois residents. The Board concluded that "permitting video gaming malls would not best serve the interests of the citizens of Illinois or promote integrity in gaming."

¶ 17 Following the denial of Bella's and Gigi's applications for licenses, they each unsuccessfully requested a hearing with the Board to contest its decisions.

¶ 18 B. Proceedings in the Circuit Court

¶ 19 In October 2015, plaintiffs filed a three-count complaint in the circuit court against defendants for declaratory relief, seeking a judgment that the Board's denials were improper and should be reversed. Count I alleged that the Board had no authority under the Gaming Act or its regulations to deny Bella's and Gigi's applications for licenses based on a policy against video gaming malls. Count II alleged that a policy against video gaming malls would in effect be a new rule promulgated by the Board in violation of the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et seq.* (West 2014)). Count III alleged that the Board's new policy against video gaming malls and its denial of Bella's and Gigi's applications for licenses violated the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2014)).

¶ 20 Defendants filed a motion to dismiss, raising several arguments, but, in pertinent part, asserting that plaintiffs' only recourse was administrative review. The circuit court entered an

order, granting plaintiffs leave to amend their complaint to raise a claim for administrative review.

¶ 21 Plaintiffs subsequently filed an amended complaint that included the original three counts for declaratory relief, but added a count for administrative review on behalf of Bella's and Gigi's, and a fifth count for a regulatory taking on behalf of Hometown Plaza. In response, defendants filed an answer to plaintiffs' administrative review count, which consisted of the administrative record from the Board, and filed a motion to dismiss the remaining counts. The parties then simultaneously briefed plaintiffs' administrative review count and defendants' motion to dismiss.

¶ 22 On July 21, 2016, the circuit court held a hearing to resolve the pleadings. Initially, the court granted defendants' motion to dismiss, finding that administrative review was the only method for plaintiffs to review the Board's decisions. Concerning administrative review, the court found that the Board's decisions were "clearly erroneous" because, while section 25(h) of Gaming Act contained restrictions on where video gaming terminals could be located, the law did not allow for the regulation of "density."[1] Because density "was the sole basis for rejection of the license[s]," the court reversed the Board's decisions.

¶ 23 Defendants subsequently appealed. After filing their notice of appeal, they filed a motion in this court requesting a stay of the circuit court's order during the pendency of the appeal, which we have granted.

¶ 24 II. ANALYSIS

[1] Section 25(h) of the Gaming Act generally prohibits an establishment from operating a video gaming terminal if it is located within: (1) 1,000 feet of an existing horse track facility or home dock of a riverboat casino; or (2) 100 feet of an existing school or religious place of worship. 230 ILCS 40/25(h) (West 2014).

¶ 25 A. Video Gaming in Illinois

¶ 26 In Illinois, there is no right in the common law to engage in, or profit from, gambling. *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 26. In fact, gambling is generally illegal unless authorized by statute. See 720 ILCS 5/28-1 (West 2014). The Gaming Act, which legalized video gaming in certain circumstances, is one such statutory authorization. 230 ILCS 40/1 *et seq.* (West 2014). Pursuant to this statute, the Board has "jurisdiction over and shall supervise all gaming operations" in the State of Illinois and "all powers necessary and proper to fully and effectively execute the provisions of [the Gaming] Act." 230 ILCS 40/78(a) (West 2014).

¶ 27 The Board's authority includes the power to adopt rules and regulations to administer the Gaming Act, to prevent "practices detrimental to the public interest" and to further "the best interests of video gaming." 230 ILCS 40/78(a)(3) (West 2014). The legislature granted the Board these rulemaking powers "to provide for the prevention of practices detrimental to the public interest and for the best interests of video gaming." *Id.* The Board's authority also includes the responsibility to investigate applicants, determine their eligibility for licenses and select those that best serve the interests of Illinois residents. 230 ILCS 40/78(a)(1) (West 2014). To this end, the Gaming Act authorizes the Board to deny an application for a gaming license based on several statutory criteria and numerous criteria contained in the Gaming Act's regulations. See 230 ILCS 40/1 *et seq.* (West 2014); 11 Ill. Adm. Code 1800.110 *et seq.* (2014).

¶ 28 Relevant to this appeal, section 45(a) of the Gaming Act (230 ILCS 40/45(a) (West 2014)) allows the Board to deny an application based on the "criteria set forth in Section 9 of the Riverboat Gambling Act," which provides, in pertinent part, that the Board may refuse to issue a license to an applicant:

> "(1) who is unqualified to perform the duties required of such applicant; (2) who fails to disclose or states falsely any information called for in the application; (3) who has been found guilty of a violation of this Act or whose prior gambling related license or application therefor has been suspended, restricted, revoked or denied for just cause in any other state; or (4) for any other just cause." 230 ILCS 10/9(d) (West 2014).

Under the Gaming Act, the Board will also refuse to grant a license to an applicant who "create[s] or enhance[s] the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of video gaming" or "present[s] questionable business practices *** incidental to the conduct of video gaming activities." 230 ILCS 40/45(d)(2), (3) (West 2014). Ultimately, the applicant has the burden to demonstrate its suitability for licensure. 230 ILCS 40/45(a), (e) (West 2014).

¶ 29 B. Standard of Review

¶ 30 Before discussing the merits of this appeal, we must first discuss the applicable standard of review. Our review of the Board's decisions is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2014)). See 230 ILCS 10/17.1 (West 2014); 230 ILCS 40/80 (West 2014). In administrative review cases, we review the decisions of the administrative body, here the Board, rather than those of the circuit court. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 386 (2010). The applicable standard of review depends on whether the question presented is one of law, fact, or a mixed question of both law and fact. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 390 (2001). Here, the parties dispute the applicable standard of review.

¶ 31 Defendants argue that the main issue on appeal is whether the Board properly determined whether the relevant facts, *i.e.*, Bella's and Gigi's location within a proposed gaming mall, satisfied the statutory standards for granting licenses. Defendants therefore contend that this case presents a mixed question of both law and fact to be reviewed under the clearly erroneous standard. See *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶ 68. Plaintiffs meanwhile argue that the main issue on appeal is whether the Board had the power under the Gaming Act to deny Bella's and Gigi's applications "based on considerations of the density of video gaming establishments in a certain area." Plaintiffs therefore contend that this issue is purely one of law and thus subject to *de novo* review. See *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill. 2d 546, 554-55 (1999).

¶ 32 We first note that there are no factual disputes among the parties, as Bella's and Gigi's unquestionably applied to the Board for video gaming licenses as establishments to become part of a video gaming entertainment center located in Hometown Plaza's shopping center. But we agree with defendants that the true issue on appeal is whether the Board properly determined that Bella's and Gigi's were not suitable applicants for licensure based on the relevant statutory standards of the Gaming Act. We therefore find that this issue presents a mixed question of law and fact. See *C.Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696, ¶¶ 35, 41 (finding that, where the factual findings made by the Illinois Gaming Board were not challenged and the issue on appeal was whether the Board properly exercised its discretion under the Gaming Act in denying a video gaming license, the case presented a mixed question of law and fact).

¶ 33 In arriving at this conclusion, we reject plaintiffs' reliance on *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill. 2d 546 (1999). In *Highlands*, the plaintiff sought

injunctive relief from a county so that it could build a hog-confinement facility on its land in an unincorporated part of the county. *Id.* at 548-50. The county had been preventing the plaintiff from constructing the facility through the enforcement of certain zoning regulations. *Id.* at 549. The circuit court subsequently granted summary judgment in favor of the plaintiff, including a finding that the county lacked jurisdiction to proceed in the matter because the plaintiff was engaged in an agricultural purpose, which was exempt from zoning regulations under the Counties Code (55 ILCS 5/5-12001 (West 1998)). *Highlands*, 188 Ill. 2d at 550. Under the Counties Code at the time, counties had the authority to regulate and restrict land use and structures located thereon, but they could not " 'impose regulations *** or require permits with respect to land used for agricultural purposes.' " *Id.* at 555 (quoting 55 ILCS 5/5-12001 (West 1998)). On appeal to this court, we initially found that the circuit court could hear the plaintiff's claim for injunctive relief and further that the county lacked zoning authority over the plaintiff. *Id.* at 550. Consequently, the county appealed to our supreme court. *Id.*

¶ 34 Before reaching the merits of the appeal, our supreme court discussed whether the appellate court correctly held that the circuit court could hear the plaintiff's claim for injunctive relief and in turn, whether the plaintiff had exhausted its administrative remedies before bringing a challenge in the circuit court for injunctive relief. *Id.* at 551. Our supreme court found that, because the plaintiff had challenged the county's jurisdiction to regulate land used for agricultural purposes, it had established an exception to the exhaustion doctrine. *Id.* at 552-54. In other words, "where an administrative assertion of authority to hear or determine certain matters is challenged on its face as not authorized by the enabling legislation, such a facial attack does not implicate the exhaustion doctrine and exhaustion is not required." *Id.* at 552. Thus, the

preliminary issue on appeal was one of the jurisdiction or the scope of the administrative body's authority, which presented a question of law. *Id.* at 554-55.

¶ 35 In the present case, there is no similar jurisdictional question, as based on the express language of the Gaming Act, the Board has "jurisdiction and supervision over all video gaming operations in" the State of Illinois. 230 ILCS 40/78(a)(2) (West 2014). By this sweeping grant of jurisdiction, the legislature has not exempted any aspect of video gaming from the purview of the Board, as was the case in *Highlands*, where the Counties Code had specifically exempted land used for agricultural purposes. See *Highlands*, 188 Ill. 2d at 555 (citing 55 ILCS 5/5-12001 (West 1998)). Thus, we are reviewing not whether the Board had the authority to deny Bella's and Gigi's applications for licenses, a power it undeniably possessed, but rather, in exercising that power, whether it properly found that Bella's and Gigi's did not meet the Gaming Act's suitability requirements based on the relevant statutory standards. Accordingly, this case presents a mixed question of law and fact. See *Jaffe*, 2014 IL App (1st) 132696, ¶¶ 35, 41.

¶ 36 In mixed questions of law and fact, " 'the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard.' " *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577 (2005) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). When reviewing mixed questions of law and fact, we utilize the "clearly erroneous standard" of review. *Board of Education*, 2017 IL 120343, ¶ 68. Under this standard of review, we afford some deference to the Board's experience and expertise (*Lelis v. Board of Trustees of Cicero Police Pension Fund*, 2013 IL App (1st) 121985, ¶ 12), reversing its determination only when we are "left with the definite and firm conviction that a mistake has been committed." *Board of Education*, 2017 IL 120343, ¶ 68.

¶ 37 C. The Board's Decisions

¶ 38 With the proper standard of review in mind, we now turn to the Board's decision. Both parties devote significant portions of their briefs discussing whether the Board had "just cause" to deny Bella's and Gigi's applications for licenses, seeming to suggest that this was the primary justification for the Board's denials. Our review of the denial letters, however, reveals that the Board's primary justification was, in fact, based on section 45(d) of the Gaming Act (230 ILCS 40/45(d) (West 2014)).

¶ 39 In the letters, after the Board cited the various statutory sections it relied on in denying the applications, it quoted section 45(d)'s prohibition on granting a license to any person who, in pertinent part, "create[s] or enhance[s] the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of video gaming" or "present[s] questionable business practices *** incidental to the conduct of video gaming activities." *Id.* The Board then detailed its factual findings, observing that Hometown Plaza intended to create a video gaming mall, and discussed the various proponents and opponents of such a concept. The Board subsequently stated its position on gaming malls, finding that the concept would, in essence, create a back-door casino without any of the traditional safeguards of a casino. In light of this, the Board concluded that precluding gaming malls would help safeguard the integrity of the video gaming industry and maintain the intent of the Gaming Act.

¶ 40 After making this conclusion, the Board found that "[s]ection 45(a) of the [Gaming] Act *also* provides that the Board may issue or deny a license" for just cause. (Emphasis added.) 230 ILCS 40/45(a) (West 2014). The inclusion of the word "also" demonstrates that the Board's reliance on "just cause" to deny the applications was an additional justification, not the primary one. Following its discussion of "just cause," the Board lastly found that it had the power to deny

the licenses based on section 78 of the Gaming Act (230 ILCS 40/78 (West 2014)). Given the denial letters' organization, the Board's primary statutory basis for denying Bella's and Gigi's applications was based on section 45(d) of the Gaming Act (230 ILCS 40/45(d) (West 2014)).

¶ 41 With this important clarification in mind, we now discuss whether the Board's decisions to deny Bella's and Gigi's applications was clearly erroneous, beginning with whether the Board properly denied the applications based on section 45(d) of the Gaming Act. As previously discussed, section 45(d), in relevant part, states that the Board may not license any "person" who "create[s] or enhance[s] the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of video gaming" or "present[s] questionable business practices *** incidental to the conduct of video gaming activities." 230 ILCS 40/45(d)(2), (3) (West 2014). The Gaming Act's regulations contain a similar rule, stating that the Board will not grant a license until it is satisfied that the applicant is "[a] person who does not create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of video gaming" and the applicant is "[a] person who does not present questionable business practices *** incidental to the conduct of video gaming activities." 11 Ill. Adm. Code 1800.420(a)(5), (6) (2014). The regulations also make clear that a "person" includes "both individuals and business entities." 11 Ill. Adm. Code 1800.110 (2014).

¶ 42 Here, the Board investigated the suitability of Bella's and Gigi's as applicants, knowing that they intended to be part of a video gaming mall, and heard from proponents and opponents of the plan. After its review of the evidence, the Board determined that video gaming malls had negatively impacted "other jurisdictions," created risks to the integrity of the video gaming industry in Illinois and would not be consistent with the intent of the Gaming Act. In administrative review, it is not the role of the reviewing court "to reweigh the evidence or

substitute our judgment for that of the administrative agency." *Jaffe*, 2014 IL App (1st) 132696, ¶ 41. This is so because the administrative agency, here the Board, has the highly specialized experience and expertise in regulating the video gaming industry. See *AFM Messenger Service*, 198 Ill. 2d at 394-95. The Board's various findings about the potential negative effects from a video gaming mall are therefore beyond our purview to overrule. Given the findings of the Board, it was not clearly erroneous for the Board to conclude that, by licensing Bella's and Gigi's and thus helping develop a video gaming mall, the result would be to create or enhance unsuitable practices or activities in the conduct of video gaming, or questionable business practices incidental to the conduct of video gaming.

¶ 43 Although plaintiffs argue that, in denying Bella's and Gigi's applications, the Board was impermissibly regulating the density of video gaming establishments, the Board never used the word "density" in its denial letters or rationalized its decisions based on the close proximity of video gaming establishments. Rather, the Board's denials were based on the detrimental effects that a video gaming mall, or in essence a back-door casino, would have on video gaming in Illinois. This is not a case where there were several completely autonomous video gaming establishments located within a close area. Rather, the Hometown Plaza Entertainment Center concept involved several interrelated video gaming establishments located within one shopping center for the sole purpose of providing a first-of-its-kind video gaming center. The density of these proposed video gaming establishments was merely incidental to the Board's decisions. Consequently, the Board was justified in denying Bella's and Gigi's applications for licenses based on section 45(d) of the Gaming Act.

¶ 44 In light of our finding that the Board properly relied on section 45(d) of the Gaming Act when denying Bella's and Gigi's applications, it is irrelevant whether the Board also had just

cause to deny their licenses because the Board had an independent and sufficient statutory basis for the denials. This holds true regardless of whether the Board's primary justification for the denials was based on section 45(d) or section 45(a), as plaintiffs suggest, of the Gaming Act. Accordingly, the Board properly denied Bella's and Gigi's applications for licenses.

¶ 45 We also briefly note that the Board recently adopted a regulation concerning video gaming malls. See 11 Ill. Adm. Code 1800.815, added at 41 Ill. Reg. 2939 (eff. Feb. 24, 2017). According to the regulation, the Board "shall not grant an application to become a licensed video gaming location within a mall if the Board determines that granting the application would more likely than not cause *** licensed video gaming locations," *i.e.* establishments such as Bella's and Gigi's, "to operate the video gaming terminals in two or more licensed video gaming locations as a single video gaming operation." 11 Ill. Adm. Code 1800.815(a), added at 41 Ill. Reg. 2939 (eff. Feb. 24, 2017). The regulation lists several factors that the Board must consider in making this determination, such as whether the locations share common entrances and operating resources, and whether any agreements exist that involve conducting a video gaming business or the sharing of costs or revenues. *Id.* The rule also contains a rebuttable presumption that a single video gaming operation has been created if "the combined number of licensed video gaming locations within a mall exceeds half the separate locations within the mall." 11 Ill. Adm. Code 1800.815(b), added at 41 Ill. Reg. 2939 (eff. Feb. 24, 2017). Although we need not determine whether plaintiffs' gaming mall falls within the purview of this regulation, we highlight it simply to show that the Board has more specifically addressed the issue of gaming malls.

¶ 46 D. Equitable Estoppel

¶ 47 Plaintiffs next contend that, even if we determine that the Board properly found that Bella's and Gigi's did not meet the Gaming Act's suitability requirements based on the relevant statutory standards, the Board should be estopped from denying their applications for licenses. Plaintiffs argue that, prior to the submission of Bella's and Gigi's applications, the Board's staff and general counsel at the time "assured" them that the proposed locations would not violate the Gaming Act.

¶ 48 In a letter from David Israel, the owner of Hometown Plaza, to the Board during its investigation process, he stated that, prior to building out the vacant spaces in the shopping center, he had contacted the Board's "staff" and its general counsel at the time who ensured him that his plans would comply with the Gaming Act and its regulations. Israel stated that, on November 11, 2014, an unnamed senior staff member of the Board visited the shopping center and confirmed that their gaming mall concept would not violate the Gaming Act. Plaintiffs claim that, in reliance on these assurances, Bella's and Gigi's executed leases with Hometown Plaza and invested considerable time, money and energy in the endeavor.

¶ 49 The doctrine of equitable estoppel is generally invoked "when a party reasonably and detrimentally relies on the words or conduct of another." *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 431 (1996). For the doctrine to apply, the plaintiff must show that (1) there was an affirmative act by either the government entity itself or an official with express authority to bind the entity and (2) "reasonable reliance upon that act by the plaintiff that induces the plaintiff to detrimentally change its position." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40. The affirmative act that prompted the plaintiff's reliance generally must be from "the public body itself, such as a legislative enactment, rather than the unauthorized acts of a ministerial officer or a ministerial misinterpretation." *Morgan Place of Chicago v. City of*

Chicago, 2012 IL App (1st) 091240, ¶ 33. "The usual elements of estoppel are further supplemented with the additional restriction that a public body will be estopped only when necessary to prevent fraud or injustice." *Underwood v. City of Chicago*, 2016 IL App (1st) 153613, ¶ 29.

¶ 50 Though equitable estoppel may preclude some action by a government entity, public policy generally disfavors applying the doctrine (*McDonald v. Illinois Department of Human Services*, 406 Ill. App. 3d 792, 803 (2010)), and "Illinois courts have consistently held that the doctrine of equitable estoppel will not be applied to governmental entities absent extraordinary and compelling circumstances." *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 94. Otherwise, frequent application could " 'impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.' " *Wagner*, 171 Ill. 2d at 431-32 (quoting *Hickey v. Illinois Central R.R. Co.*, 35 Ill. 2d 427, 447-48 (1966)).

¶ 51 In the present case, although plaintiffs allege that they relied on the representations of the Board's "staff" and its general counsel at the time, assertions made by these individuals are not affirmative acts of the Board itself or an official with the express authority to bind the Board. See *Morgan Place*, 2012 IL App (1st) 091240, ¶ 34 (finding equitable estoppel inapplicable against the City of Chicago where the plaintiffs maintained that they acted in reliance on assertions made by the City's department of law and department of construction and permits because "the assertions of City officials are not an affirmative act of the public body itself"). For this reason, the doctrine of equitable estoppel is inapplicable.

¶ 52 Although plaintiffs cite to our supreme court's decision in *Cities Service Oil Co. v. City of Des Plaines*, 21 Ill. 2d 157 (1961), we find that case clearly distinguishable from the present

case. There, the City of Des Plaines had issued a permit for the construction of a gas station, but subsequently revoked the permit because the station would have been too close to a church in violation of a city ordinance. *Id.* at 158-59. In the circuit court, the plaintiff successfully argued that the city should be estopped from enforcing the ordinance. *Id.* at 159. Our supreme court agreed, finding that, while "the mere issuance of an unauthorized permit and reliance thereon to one's injury does not provide grounds for relief," the city allowed construction to go forward for seven months before revoking the permit and the plaintiff could therefore reasonably infer that the issuance of the permit had been ratified. *Id.* at 163.

¶ 53 In *Cities Service*, the City of Des Plaines had approved the project and issued a permit, thus the affirmative act relied on by the plaintiff came from the public body itself. On the contrary, in the present case, the affirmative act allegedly relied on by plaintiffs came not from the public body itself, but rather "staff" of the board and its general counsel at the time, which, as discussed, precludes the applicability of equitable estoppel. See *Morgan Place*, 2012 IL App (1st) 091240, ¶ 34.

¶ 54 E. Arbitrary and Capricious Denial

¶ 55 Plaintiffs lastly contend that, because the Board has approved and licensed multiple video gaming locations in shopping centers similar to the proposed plan of Hometown Plaza, the Board's decision was arbitrary and capricious such that it demonstrates the Board's abuse of discretion. Plaintiffs also assert that following Bella's and Gigi's unsuccessful attempts to obtain licenses, the Board approved a license for a video gaming establishment "in the exact same location" and "under the exact same conditions" that Bella's and Gigi's intended to operate. Plaintiffs specifically highlight that, on January 26, 2017, the Board issued a video gaming establishment license to Sapphyre, Inc., located at 4104 Southwest Highway in Hometown.

¶ 56 Under administrative law review, "[n]o new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court." 735 ILCS 5/3-110 (West 2014). Our review is therefore limited to the administrative record (*Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 532 (2006)), and we must ignore this argument, as it is based on evidence not contained within the administrative record.

¶ 57 Moreover, plaintiffs' claim that the granting of a license to Sapphyre demonstrates the Board acted arbitrarily and capriciously is meritless. We may take judicial notice that, on January 26, 2017, the Board issued a video gaming establishment license to Sapphyre located at 4104 Southwest Highway in Hometown. See *Illinois Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 725 (2009) (a court may take judicial notice of public documents issued by administrative agencies). However, we may take further judicial notice that, on May 26, 2017, the Board revoked Sapphyre's license.

¶ 58 III. CONCLUSION

¶ 59 For the foregoing reasons, we reverse the order of the circuit court of Cook County and reinstate the Illinois Gaming Board's decisions to deny Bella's and Gigi's applications for video gaming licenses.

¶ 60 Circuit court reversed; Illinois Gaming Board's decisions reinstated.