



THE PERFECT STORM: OHIO'S ENTRY INTO LEGALIZED GAMING

By Michael Zatezalo



On Nov. 3, 2009, Ohio voters for the first time passed a ballot initiative, Issue 3, amending the Ohio Constitution to permit casino gaming in the state and thus ending a nearly two-decade campaign by several different pro-gaming sponsors to bring legalized gambling to the state. Prior to the successful 2009 ballot initiative campaign, Ohio voters had soundly defeated four previous ballot initiatives proposing legalized gambling. The 2009 ballot initiative was sponsored and promoted by a partnership between Penn Ventures LLC, a subsidiary of Penn National Gaming Inc., and Rock Ohio Ventures LLC, a group led by Dan Gilbert, the owner of the Cleveland Cavaliers. Together they formed the Jobs and Growth Committee to promote Issue 3. The sponsors have indicated that they spent in excess of \$50 million in order to win the ballot initiative election.

A simple answer to the question of why Issue 3 passed in 2009 and four previous ballot initiatives had failed is jobs and the economy. The fact that nearly all of the states bordering Ohio, with the exception of Kentucky, now have legalized gaming also played a major role. Ohioans comprise the majority of the patrons at casinos in northern West Virginia and southeastern Indiana. However, in addition to the current economic conditions and Ohio being surrounded by gaming in other states, the foundation for the passage of Issue 3 was arguably laid by the state itself when Ohio Governor Ted Strickland issued a directive in 2008 authorizing the Ohio Lottery to allow keno at bars and social clubs. Then, on July 13, 2009, he issued another directive authorizing the Ohio Lottery to license video lottery terminals (VLTs) at the state's seven racetracks. Although Strickland had stated his strong opposition to the expansion of gaming in his 2006 election campaign and had publicly opposed the 2008 casino initiative, large budget deficits and Ohio's struggling economy caused him to rethink his position. The governor received severe criticism from the Ohio Policy Roundtable, a faith-based conservative policy group led by David Zanotti, which has been a vocal opponent of every previous ballot initiative involving gaming as well as an opponent of expansion of the Ohio lottery. The

governor cited the economy and a nearly \$900 million budget deficit, along with the fact that keno and VLTs would be controlled by the state, as justifications for allowing further gaming activities. However, a majority of Ohioans saw this as a hypocritical position on gaming. While the governor was opposing Issue 3 as an expansion of gaming, the state itself was promoting gaming at racetracks and in bars and taverns.

While Penn Gaming was promoting the Issue 3 campaign, Strickland and the Ohio Senate were at odds over the state's budget. The governor's draft of the state budget had proposed the implementation of VLTs at Ohio's racetracks as a way to balance the budget. Ohio's racetracks had lobbied heavily for VLTs or slot machines for several years. However, the democratic governor wanted bi-partisan support for the budget and, by inference, the implementation of the VLTs at racetracks. There were also concerns over a probable constitutional legal challenge to the implementation of VLTs. Therefore, the governor wanted the legislature to amend the lottery statute in order to issue his directive to the Ohio lottery. The republican-controlled Ohio Senate initially refused to amend the Ohio lottery statute as requested by the governor, arguing that the governor could implement the VLTs at the racetracks without any amendments to the lottery statute. Many of the Senate republicans were also against the VLTs on moral grounds as an expansion of gaming and felt that any expansion should be based on a vote of the people, since Ohio voters had rejected legalized gambling by wide margins four times in the recent past.

However, the governor refused to issue a directive authorizing VLTs without legislation that would expressly acknowledge that the Ohio Lottery had legal authority to implement VLTs under existing law. He also argued that time was of the essence and that waiting until November for a vote of the people would cost the state millions of dollars in license fees and revenues. After passing two interim operating budgets and both sides receiving severe criticism, a compromise was reached wherein the laws governing the Ohio Lottery were to be amended as part of the final budget bill, albeit in a much less expansive fashion than the governor had requested. On July 13, 2009, the governor issued an executive order instructing the Ohio Lottery to implement VLTs at racetracks, contingent upon the lottery statute being amended to specifically provide for VLTs. The legislature enacted the required amendments as part of the budget bill on July 13, 2009, and the governor signed the bill on July 17, 2009.

On July 20, 2009, after the governor's VLT directive had been issued and the budget bill has been passed by the Ohio legislature, an organization known as LetOhioVote.org filed a writ mandamus in the Ohio Supreme Court seeking a stay of the budget amendments to the lottery statute contained in the budget bill and claiming that such amendments were subject to the Ohio constitutional right of referendum contained in Article II Section 1c of the Ohio Constitution. Although LetOhioVote.org is an anti-gaming group formed to oppose the governor's VLT initiative, allegations have been made that Penn Gaming is actually funding the litigation.

Meanwhile, on Aug. 17, 2009, the Ohio Lottery issued its proposed rules for the implementation of the VLTs at the racetracks, and the governor issued an executive order on Aug. 18, 2009, declaring an emergency and giving the rules immediate effect. Under the rules,

the initial installment of the \$65 million VLT license fee for each racetrack was to be paid by Sept. 15, 2009. However, in light of the LetOhioVote.org lawsuit, only two of Ohio's seven racetracks paid the initial installment of the license fee. On Sept. 21, 2009, the Ohio Supreme Court, in a 6-1 decision, issued a ruling that granted LetOhioVote.org the relief it had requested and gave the relators until Dec. 21, 2009, to collect the signatures necessary to place a referendum on the VLT amendments in the November 2010 general election.

The Ohio Policy Roundtable had also filed a lawsuit in the Ohio Supreme Court, on Sept. 3, 2009, challenging the constitutionality of the budget bill VLT amendments. But on Oct. 13, 2009, in light of its decision in the LetOhioVote.org case, the court dismissed the suit for lack of subject matter jurisdiction. From early August through the election in November, there were continuous television ads urging the passage of Issue 3. The campaign stressed the fact that 34,000 jobs in Ohio would be created and that significant revenue was leaving the state, since Ohioans were traveling to surrounding states to gamble. With the promise of new jobs, the state's most powerful labor unions also got behind Issue 3.

The 2009 amendments to the Ohio Constitution authorized the development of four casinos in Ohio—one each in Cleveland, Columbus, Cincinnati and Toledo. The constitutional amendment included the specific legal description of each site so that the casinos can only be located on those specific parcels of land. Each of the four sites were either owned or under option to entities controlled by the sponsors. Penn Gaming will develop

the casinos in Columbus and Toledo while Dan Gilbert will be the developer of the casinos in Cleveland and Cincinnati. Ironically, shortly after the Nov. 3 election, it was disclosed that Lakes Entertainment Inc., headed by Lyle Berman, had entered into an agreement with Penn National to contribute 10 percent of the cost of the ballot initiative campaign in return for a 10 percent equity interest in the Columbus and Toledo casinos, and had entered into agreement with Gilbert pursuant to which Lakes Entertainment has the option but not the obligation to acquire a 10 percent interest in the Cleveland and Cincinnati casinos by contributing 10 percent of the costs of the ballot initiative and the equity required to develop the casino sites. Berman had led the unsuccessful ballot initiative in 2008 to allow the development of a casino in Wilmington, Ohio. Penn National had been a major opponent of the 2008 initiative and spent nearly \$30 million dollars to defeat the Berman initiative.

Pursuant to the provisions of Issue 3, each licensed casino operator will pay an upfront license fee of \$50 million, which will be used by the state to support job-training programs. In addition, each licensed casino operator will be required to make a minimum investment of \$250 million in the development of their casino facilities. The casinos will be subject to a 33 percent tax on gross casino revenue. The Ohio legislature is required to pass laws within six months of the effective date of the constitutional amendment to facilitate the implementation of the casinos.

Issue 3 also calls for the creation of an Ohio Casino Control Commission, which will license and regulate casino operators, management companies, key employees and gaming-related vendors. The commission will consist of seven members appointed by the governor with the advice and consent of the Ohio senate. Not more than four members of the commission may be affiliated with

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the same political party.

Interestingly, the distribution of the tax proceeds on casino gross revenue provides great insight as to how Penn Gaming and Gilbert were able to create a coalition of divergent interests and prevail in the election. Fifty-one percent of the casino tax revenues are to be shared by all Ohio counties in proportion to their population, with half of the county's share going to its largest city (but only if the city has a population greater than 80,000). This was meant to address the criticism from several areas of the state that would not be entitled to have a casino. Nevertheless, several areas of the state that had historically supported legalized gambling voted against Issue 3 because they would not be authorized to develop a casino in their county. Thirty-four percent of the tax revenues are to be distributed among all 88 counties in proportion to such counties' respective public school district populations and will be distributed by each county to all public school districts in the county. This, like the argument for the constitutional amendment creating the Ohio Lottery that "gambling revenues are going to help our schools," supplied another reason to support Issue 3. Five percent of the tax revenues goes to casino host cities. This helped alleviate the concerns raised by some that casinos could place an undue financial burden on the host cities, which would likely need major infrastructure improvements. Three percent of the tax revenues goes to fund the Ohio Casino Control Commission. Another 3 percent of tax revenues goes to the Ohio State Racing Commission to support purses, breeding programs and operations at existing horse tracks. This was an attempt to placate the track owners, who were stymied, as noted above, in their attempt to have VLTs installed at the tracks. Two percent of tax revenues goes to a state fund for training opportunities for Ohio's law enforcement community. This provision was a significant reason Issue 3 was endorsed by the Fraternal Order of Police, whose vice president appeared in television commercials urging people to vote for the casino initiative. Finally, 2 percent of the tax revenues goes to a state fund for the treatment of problem gambling, substance abuse and related research. As you can tell from the allocation of taxes, an attempt was made to placate all constituencies who had either opposed or objected to casino initiatives in the past.

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Since Ohio has liberalized the use of absentee ballots in recent years, the sponsors of Issue 3 intentionally started their media campaign early, targeting absentee voters. This turned out to be a brilliant strategy. A majority of the voters who used absentee ballots in the major cities supported Issue 3. In Franklin County, where the Columbus casino will be located, 51 percent of absentee voters supported Issue 3 even though the initiative lost by a margin of 58 percent to 42 percent in the county. Interestingly, although Issue 3 passed by a 53 percent to 47 percent margin statewide. The majority of its support came from the urban counties in which the casinos would be located, with the exception of Columbus. Issue 3 passed by significant majorities in Cleveland and Cincinnati and by a lesser margin in Toledo.

The main opposition to Issue 3 came from (a) TruthPac, a group primarily funded by Cleveland developer Jeff Jacobs, who, through his investment in MTR Gaming, has interests in a racetrack near Columbus as well as interests in casinos or racinos in West Virginia and Pennsylvania; (b) the Ohio Policy Roundtable; and (c) several current and former state officials, including Senator George Voinovich, a staunch opponent of legalized gambling throughout his

political career. Strickland also opposed Issue 3 but took a lower profile in the debate, given organized labor's support of Issue 3 and the severe criticism he had received in connection with the VLT directive. In the end, none of these opponents had the financial resources of Penn Gaming and Gilbert, and their message of the evils of casino gaming did not ring true with Ohio voters, especially in light of the state's own attempt to expand gambling.

However, the fight over the casino initiative is not yet over. Several legislators have already stated they will attempt to place yet another initiative on the ballot by joint legislative resolution. It will take a three-fifths majority of the Ohio legislature to place a constitutional amendment on the May ballot, and the measure would have to be filed with the Ohio Secretary of State's office on or before Feb. 3, 1010.

The *Columbus Dispatch* newspaper in Ohio has been adamant in its opposition to the Columbus casino. Columbus Mayor Michael B. Coleman has urged the legislature to put an amendment on the ballot to raise the tax rate, put the casino licenses up for bid, and let cities regulate their locations and operations. On Nov. 30, 2009, legislators in the Ohio House of Representatives introduced resolutions that would amend Issue 3 to give the electors of a county the right to vote on whether to approve the operation of a casino within the county before casino gaming may be conducted in that county; and for Franklin County to authorize (with the

consent of the mayor of Columbus) a different location for the casino facility in Columbus. The proposed site for the Columbus casino is near the thriving Arena District, developed by Nationwide Insurance, and near the Nationwide Arena, where the Columbus Blue Jackets NHL hockey team plays. The *Columbus Dispatch* is also a minority owner of the Blue Jackets and a minority partner in several of the real estate developments in the Arena District.

LetOhioVote.org has indicated in recent press releases that they will in fact have enough signatures to place a referendum on the VLT statutory amendments on the November 2010 ballot.

It took a struggling Ohio economy; a nearly \$900 billion state budget deficit; a well-funded and well-run campaign by the casino gaming sponsors; the governor proposing the expansion of state-run gaming at racetracks and in bars and taverns; and the reality that Ohio is now surrounded by states with legalized gambling and Ohioans are traveling to these states in large numbers to gamble to create the perfect storm and convince Ohio voters to bring casino gaming to their state. However, given the local opposition in Columbus, stay tuned for Round 2!



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Serving as chairman of Kegler, Brown, Hill & Ritter's gaming law practice, Michael Zatezalo represents local, national and international clients, including charitable organizations, suppliers, distributors and manufacturers within the gaming industry. He is experienced in the legal issues that affect operators of skill games, sweepstakes and the online gaming community.