IN THE MATTER OF THE APPLICATION OF ELSINORE SHORE ASSOCIATES FOR A RENEWAL OF ITS CASINO LICENSE

Decided: April 14, 1986
Approved for Publication by the Casino Control Commission:
July 8, 1988

SYNOPSIS

Elsinore Shore Associates ("ESA") applied to the Casino Control Commission seeking renewal of its casino license. The Commission conducted a hearing and determined to renew the license, subject to several conditions.

A major issue was the fact that ESA had sought protection under Chapter 11 of the Federal Bankruptcy Code. The Commission had never before conducted a license renewal hearing involving a casino licensee which had filed a bankruptcy petition.

Section 84(a) of the Casino Control Act requires a casino licensee to establish its financial stability, integrity and responsibility. A licensee must also demonstrate adequate financial resources and sufficient business ability. The Commission noted that the mere filing for relief in bankruptcy does not mean that an applicant lacks financial stability.

The Commission concluded that ESA met the statutory requirements for financial stability, despite the bankruptcy petition. Since ESA also satisfied all other statutory criteria, the Commission conditionally renewed ESA's license. Among other conditions, the Commission required ESA to maintain certain cash balances and to submit regular financial reports.

Commissioners Armstrong, Zeitz and Burdge issued separate opinions. Commissioners Armstrong and Zeitz concurred, emphasizing that a finding of financial stability when an applicant has filed for bankruptcy can only be based on specific facts and evidence in a particular case. Commissioner Burdge dissented, concluding that the events leading up to ESA's bankruptcy indicated that the licensee lacked financial stability.

Nicholas F. Moles, Esq., and Michael R. Griffinger, Esq., for Elsinore Shore Assocs.
BY THE CASINO CONTROL COMMISSION:

I. Introduction


In discharging its responsibilities, the Division of Gaming Enforcement ("Division") conducted an investigation of the casino licensee, its affiliated companies, and those individuals and entities required to qualify for licensure. The Division thereafter filed with the Commission a general report dated March 14, 1986 (D-3), a report on Atlantis Casino Hotel Operations (D-1), a report on the financial stability of ESA and Elsinore Corporation (D-2), and recitals in support of a statement of issues (S-2) as well as a statement of issues.1

In an effort to hear this matter expeditiously, three formal prehearing conferences were held which enabled the Commission to conduct this hearing in an orderly fashion.

For the first time in the history of the New Jersey gaming experience, this Commission has conducted a casino license renewal hearing involving a licensee which has sought protection under Chapter 11 of the Federal Bankruptcy Code. 11 U.S.C. §§1101 et seq. This action has thus focused the Commission's attention upon whether the Casino Control Act's requirement of financial stability

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1The Division's recitals in support of its statement of issues was subsequently modified and stipulated to by ESA and the Division. During the course of the hearing, numerous exhibits were admitted into evidence. "S" refers to those exhibits to which the parties have stipulated; "E" refers to exhibits of ESA and its affiliated entities; "J" refers to exhibits entered jointly by the Division and ESA; and "D" refers to Division exhibits.
has been met. See, *N.J.S.A. 5:12-84*. The case has presented, therefore, novel legal issues for the Commission's determination.

In order to obtain a renewal of its casino license, ESA must demonstrate to this Commission that it has satisfied clearly and convincingly all licensing criteria and requirements demanded by the Act. With particular reference to the issues under consideration by the Commission, the licensee and its affiliates and holding companies must establish by clear and convincing evidence that they continue to meet the affirmative criteria of section 84 of the Act while not suffering any of the disqualifying or negative criteria of section 86 of the Act.

ESA is a general partnership of the State of New Jersey, consisting of Elsub Corporation, a New Jersey corporation, and Elsinore of Atlantic City, a New Jersey limited partnership. Elsub has a 45.7 percent interest in ESA and Elsinore of Atlantic City has a 54.3 percent interest in the casino licensee. Elsinore of Atlantic City's general partner is Elsinore of New Jersey, Inc. which has an approximate 85 percent interest therein. It also has five individual limited partners, comprising what might be called the "Whitner Group," which owns approximately 15 percent of Elsinore of Atlantic City. Elsinore of New Jersey, Inc., is a wholly-owned subsidiary of Elsub which, in turn, is wholly-owned by Elsinore Corporation, a publicly-traded Nevada Corporation listed on the American Stock Exchange. In its simplest terms, Elsinore Corporation owns approximately 91.5 percent of the casino licensee (S-2).

On November 13, 1985, Playboy Enterprises, Inc., as a creditor, petitioned the United States Bankruptcy Court for the District of New Jersey to institute involuntary bankruptcy proceedings against Elsub (S-2). Hearings with respect to this involuntary proceeding have occurred and while not a certainty, it appears that Elsub's efforts to have such petition dismissed may well be successful (J-4-T).

Nevertheless, on November 14, 1985, ESA filed a voluntary petition in the United States Bankruptcy Court for the District of New Jersey seeking relief under Chapter 11 of the Federal Bankruptcy Code (S-2).

II. Impact of Bankruptcy Filing on the Application for Casino License Renewal

Before turning to the specific facts adduced during the hearing, the Commission must address the impact that a bankruptcy filing has
upon a licensee’s ability to establish that it satisfies certain license criteria.

Section 84(a) of the Act requires ESA to produce such information, documentation and assurances concerning financial background and resources as may be required to establish by clear and convincing evidence its financial stability, integrity and responsibility. Section 84(b) further requires that the adequacy of financial resources as to the operation of the casino be demonstrated. Lastly, section 84(d) demands that a licensee show that it has sufficient business ability and casino experience so as to establish the likelihood of the creation and maintenance of a successful, efficient casino operation.

The terms “financial stability, integrity and responsibility” are not defined in the Act. However, in its first casino license hearing in 1979, involving Resorts International Hotel, Inc., the Commission stated:

By its terms, this standard encompasses all financial aspects of the Applicant, the holding company and the other qualifiers. In addition to basic solvency or soundness, the standard relates to honesty and forthrightness in business dealings. Further, it includes the care and prudence exercised by the entity or individual in managing, preserving and enhancing the assets entrusted to such entity or individual. [In the Matter of the Application of Resorts International Hotel, Inc. for a Casino License, Docket No. 79-CL-1, p. 7.]

As indicated previously, this case is one of the first impression because the Commission is faced with applying the Act’s criteria of financial stability, integrity and responsibility to a casino license renewal applicant who has filed for protection under the bankruptcy laws of the United States. While the first Resorts decision discussed the Act’s tripartite financial requirements which have been applied in every casino license hearing since, the Commission is not without guidance as it endeavors to resolve the issues presented by this case.

Specifically, in two prior Commission decisions there was an interplay between the Act’s financial criteria and the provisions of the predecessor statute to the present Bankruptcy Code. 11 U.S.C. §§101 et seq. Those prior decisions, which for convenience will be referred to as the Smith and Taylor cases, were decided respectively in March and May of 1980 and are reported in the volumes of published Commission decisions. See, In the Matter of the Application of Gilbert L. Smith for Licensure as a Casino Employee, CCC Docket No. 79-EA-10, (March 20, 1980); In the Matter of the Application of John
J. Taylor for Licensure as a Casino Key Employee, CCC Docket No. 79-EA-107 (May 8, 1980).

The applicant in both the Smith and Taylor cases had sought an employee license which implicated the provisions of section 89 of the Act. Also, both had filed for some form of Bankruptcy Act protection. While there are differences between section 84 and section 89 of the Act, the operative provisions in sections 84(a) and 89(b)(1) concerning financial stability, integrity and responsibility are essentially the same.

Without going into exhaustive detail here, the Smith and Taylor cases stand for the proposition that, at a minimum, this Commission is concerned with the present and future financial stability, integrity and responsibility of an applicant and will look, among other things, to an applicant's past conduct in an effort to resolve the issue of present and prospective economic well-being. Additionally, this Commission has consistently recognized that the Legislature intended each of the financial criteria—stability, integrity, and responsibility—to be given independent significance.

As for the bankruptcy aspect of the Smith and Taylor cases, it has been recognized, in the Smith case, that the applicant attempted to extricate himself from his financial difficulties through the filing of a wage earner plan. Although that plan did not succeed, the Commission concluded that:

... this unsuccessful attempt [was] indicative of the Applicant's effort to regain financial stability, which in turn reflects positively upon the Applicant's financial integrity and responsibility. [Smith, supra at p. 16-17].

In the Taylor case, this Commission, in adopting, without modification, the initial decision of the Office of Administrative Law, held that the applicant's mere exercise of his statutory right to avail himself of the procedures and protections available under bankruptcy was not, in itself, evidence that the applicant lacked financial integrity.

While the foregoing has just touched on what the Commission has enunciated in two prior cases concerning the interplay between our statute and the bankruptcy laws, the present case has brought into sharp focus the philosophies and policies underlying bankruptcy. In this regard, the parties have provided this Commission with extensive legal briefs, along with supporting testimony. These materials have proved to be extremely helpful in analyzing this case.

At the outset, it should be noted that ESA has called this Commission's attention to the fact that people may misconstrue what
bankruptcy is all about. To the extent the general public has any such misperception, it may have been that it has been fostered by the image from a popular board game of a man in top hat and tails, with his pants pockets turned inside out, who has gone “bankrupt” while speculating on properties having names distinctly familiar to this Commission. While bankruptcy may have gotten a bad name from this, or other popular impressions, it is not one to which this Commission subscribes for the purposes of resolving the issues of this case.

As noted previously, ESA, on November 14, 1985, filed a voluntary petition for reorganization under Chapter 11. Testimony has been presented that Chapter 11 is one of the chapters under Title 11 of the codified laws of the United States.

As described to this Commission, the general philosophy of the Bankruptcy Code is to give a fresh start to a person who has undergone an economic dislocation (T305)². One of the ways to accomplish that goal is through a Chapter 11 proceeding in which a person, known as the debtor, can have a plan of reorganization confirmed by the bankruptcy court. Such a plan is to provide for, among other things, a designation of classes of claims and interests, a specification of any class of claims or interests that is not impaired and a specification of how an impaired class of claims will be treated. 11 U.S.C. §1123. A plan is to provide also for the equal treatment of claims or interests within a class, as well as provide adequate means for the plan’s execution. Ibid.

There are two crucial aspects that the bankruptcy court must be satisfied exist before it confirms the plan. First, the court must be satisfied that the debtor is going to survive once the bankruptcy protections are removed. 11 U.S.C. §1129(a)(11). Second, each holder of a claim in a class must receive at least the value that his claim would receive if the debtor were in liquidation rather than reorganization, unless the holder agrees to accept the plan. 11 U.S.C. §1129(a)(7)(A).

There has been testimony that ESA, while going through reorganization, will be living in a fish bowl since its activities will be exposed to intense supervision and scrutiny at various levels (T318). For instance, ESA will be subject to scrutiny by the bankruptcy court, the United States Trustee, the Unsecured Creditors Committee and, where appropriate, the United States District Court (T318-17 to T323-16).

²“T” refers to the transcripts from the renewal hearing.
In addition to these levels, there is also a possibility that a specific trustee could be appointed for ESA. Under current bankruptcy law, such a trustee will only be appointed under certain circumstances. (T320-16 to T321-14). Until such time, ESA will continue to operate the Atlantis as debtor-in-possession.

To aid a debtor during the reorganization proceeding, the Bankruptcy Code, upon filing a petition, gives the debtor a breathing spell from creditor actions by providing for a general halt against all collection efforts in which creditors might engage in order to recover claims against the debtor’s estate which arose prior to filing the reorganization petition. So broad is this protection that it automatically stays the commencement or continuation of certain legal and administrative proceedings against the debtor. 11 U.S.C. §362.

Obviously, the Commission has conducted an administrative proceeding in which ESA has participated. In this regard, the Commission has been told that specific exceptions exist under the automatic stay provision of the Bankruptcy Code which authorize a governmental unit to commence and continue a proceeding in order to enforce its regulatory and police power.

Part of the discussion concerning the Commission’s regulatory and police power concerns the bounds beyond which it may not go because of a conflict with the Federal Bankruptcy Code. This is not the first time that the Commission has been told that portions of the Casino Control Act, and the authority derived therefrom, are subject to the supremacy of overriding Federal law. See, e.g., Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54, ___ U.S. ___, 104 S. Ct. 3179 (1984). This Commission has never held, however, that the mere filing for relief in bankruptcy means that an applicant lacks financial stability. Further, there is no reason here why that view should be changed.

On the other hand, the Commission is not powerless to act. While ESA’s pre-petition debt has been frozen, that does not answer the question of whether ESA is presently financially stable pursuant to the provisions of the Casino Control Act. The Commission has an obligation to consider whether ESA, in the totality of the circumstances, satisfies the financial criteria set forth in section 84(a). The consideration of that issue may continue unimpeded by the automatic stay. For that matter, if this Commission were to find that ESA, based on an adequate factual record over and above its filing for reorganization, presently lacks financial stability, integrity or responsibility, it would be fully authorized, under the Bankruptcy Code, to deny ESA
a renewal of its casino license. Such governmental authority has been recognized in other cases where the public health and welfare are much less critical than in the intensely regulated and sensitive industry of casino gaming. *Cf. Duffey v. Dollison*, 734 F. 2d 265 (6 Cir. 1984); *In re Alessi*, 12 B.R. 96 (Bkrtcy. N.D. Ill. 1981). Surely then, the Commission’s authority to act would be recognized here, where the primary purpose of section 84(a) is to insure that the economic dislocation of ESA does not render it presently or prospectively subject to the vagaries of untoward influence, nor undermine the essential confidence and trust of the public in casino gaming.

As is readily apparent, the present stability of ESA and its affiliated entities must be satisfactorily demonstrated to the Commission. There has been an intensive hearing (T1 to T1152). The Commission has heard 13 witnesses testify and has evaluated scores of documents admitted into evidence.

III. Financial Stability Issues

In the autumn of 1985, the Atlantis Casino Hotel was financially troubled. Julian Levi, an outside director of Elsinore Corporation, testified that mistakes had been made and that Robert Maxey, former president thereof, had been unsuccessful in making the Atlantis Casino Hotel competitive with the other casino hotels in Atlantic City. In short, the policies of Mr. Maxey which were designed to attract the so-called “high-roller” to the facility had been markedly unsuccessful in increasing the profitability of Atlantis (T808-15 to T816-4). Ultimately, Atlantis lost $35 million last year.

In October 1985, the financial difficulties of Atlantis began to crest and they were having a severe economic impact upon Elsinore Corporation as well. Mr. Maxey departed the company (T815-20 to T816-5). In October, Elsinore Corporation was compelled to issue several press releases (J-5-C) which noted that Atlantis had continued to experience a deteriorating market share and was facing increasing cash flow difficulties. Further, it was announced that negotiation had commenced with representatives of holders of public and private debt in an attempt to restructure all or part of such debt.

As October progressed, however, things grew worse and Elsinore accelerated its efforts to restructure both its public and private debt. Also, Jay Pritzker resigned (T816-5 to 12) as a director of Elsinore and Ronald Azzolina, president of Atlantis, departed. The situation became so serious that it became uncertain whether Atlantis could meet its payroll obligations.
Despite the bleakness of the situation, several positive events were occurring. Jeanne Hood, a director of Elsinore, replaced Mr. Maxey and also became head of the Atlantis. In mid-October a "crisis management team," led by Ms. Hood, traveled to Atlantic City to evaluate the best course of action to undertake. Accompanying her were various specialists who had experience in assisting financially ailing companies, the casino manager of the Four Queens Casino in Nevada which is operated by Elsinore, the marketing director of Elsinore, representatives of Drexel, Burham, Lambert, and Charles Gerber, an Illinois lawyer who succeeded Mr. Pritzker as a director of Elsinore.

In mid-October, the Atlantis was so strapped for operating funds that shutting down operations was an alternative that was considered (T613-1 to 9). Various devices, including the sale of two parking lots of ESA to the parent company, were utilized as a way to infuse cash into the ailing casino while protecting the interests of Elsinore. In fact, $1 million was transmitted to Atlantis this way. The need for more funds seemed essential. However, as a result of actions taken by the "crisis management team" no additional funds were, in fact, required.

During September, October and November 1985, Elsinore representatives had discussions with Playboy Enterprises, Inc. and attempted to persuade that entity that emergency funds were needed by the Atlantis and that Elsinore was prepared to advance those funds provided that Playboy would subordinate its interest to that of the new Elsinore funds. Playboy agreed to subordinate its interest but only under terms that were perceived as unacceptable by Elsinore.

On November 13, 1985, a dramatic event occurred when Playboy filed against Elsub in the United States Bankruptcy Court for the District of New Jersey, an involuntary Chapter 11 petition (S-2). Several witnesses testified that this filing sufficiently unhinged Atlantis' relationships with its creditors so that little choice existed except to have ESA file a voluntary Chapter 11 petition on November 14, 1985, seeking reorganization (T822-11 to 20). Such filing had the positive effect of automatically staying all claims for debts incurred prior to that date.

Stephen Cooper, who specializes in helping troubled companies through their financial difficulties, was hired by Elsinore in October 1985. He testified that Jeanne Hood and the "crisis management team" had done a remarkable job in staunching the bleeding and stabilizing the operation at the Atlantis.

The "crisis management team" made a number of significant decisions. Costs were trimmed; mainly through attrition the number
of employees was reduced from 3200 to 2500; the third level of the casino was closed on certain days; restaurants were closed or were reopened with new, less expensive menus; the junket program was scrapped; the former policy of seeking "high rollers" was altered and a new marketing strategy of catering to the average patron budget was implemented; complimentaries were reduced; and hotel rooms were less likely to be given as complimentaries. As a result of cost trimming measures and the protection afforded by the Chapter 11 proceeding, Atlantis has built cash reserves of approximately $7 million to $9 million.

Where Atlantis goes from here is of critical importance to the Commission. The renewal of the casino license hinges upon this Commission finding that Atlantis is financially stable today and will be so in the future.

During 1985, Atlantis had a net income loss of $35 million. In 1986, it is projected that it will have a working capital loss of $9 million. It is also projected, however, that there will be a positive cash flow of $14 million from operations, before debt service and taxes on income, for the calendar year 1986 (T638-1 to 5). Most of the financial witnesses who testified, Mr. Cooper, Bruce McKee, Atlantis' Chief Financial Officer, and Saul Leonard of Laventhal and Horwath, all emphasized that the projections were reasonable and that, even if not exactly met, management could compensate for revenue shortfalls by further expense reductions. The thrust of their testimony and of the evidentiary exhibits is that, while under the favorable operating conditions permitted by the Federal Bankruptcy Code, Atlantis could stand on its own and would not need funds from any external source. However, as insurance, Elsinore Corporation has received permission from the bankruptcy court to advance, if necessary, $5 million to Atlantis which funds will have certain priority over the debt claims of other creditors (E-27; E-28). Thus, the fact that Atlantis has not met revenue projections for the first three months of 1986, is not a decisive matter. Nor is the fact that the State of Nevada has entered into stipulations with the Hyatt Lake Tahoe and Four Queens Casino Hotel concerning funds that can be transferred to the Atlantis (J-8-A; J-8-B) cause for alarm. Pursuant to those stipulations, funds can be transferred under certain circumstances. Moreover, Elsinore Corporation has other assets, principally the Hyatt note (E-28), that is not subject to the stipulations.

Ultimately, of course, a plan of reorganization must be filed with the bankruptcy court concerning pre-petition debt. A plan was origi-
inally due to be filed in March, but is now scheduled to be filed in mid-June (J-9-D). Having listened to the testimony of a bankruptcy expert, Frank Vecchione, however, a plan of reorganization may not be filed for some time and the possibility exists that an approved plan of reorganization will not be confirmed by this time next year. In the meantime, Atlantis will continue to operate.

Director Levi stated before this Commission that Elsinore ought to sell the Atlantis provided that an adequate offer is received and that the sale is suitable to the Commission and to the bankruptcy court. Whether a prospective buyer will materialize is obviously unknown.

Certainly, it cannot be predicted whether every pre-petition creditor will be fully or partially compensated for the debts that are claimed. Whether such is the case is plainly within the parameters of the plan of reorganization, the creditors themselves, and the bankruptcy court's judgment.

One thing is clear though. The bankruptcy court will not permit ESA to emerge from reorganization unless it is firmly convinced that the plan of reorganization will succeed and ESA will be financially stable for some reasonable period of time thereafter.

As for the financial situation described during the hearing, there exist things from which the Commission can draw comfort. The employee payroll, both pre- and post-petition, has been met. Every gaming patron who has legitimately been entitled to a payout has been paid. Indeed, in recent months, a number of large jackpots has been paid by Atlantis. There is a $3 million cash balance at the cage. Another $1.5 million is expressly reserved for progressive slot winnings. Also, as noted previously, other cash reserves now exist.

Post-petition vendors are receiving payment. In fact, some are now providing better credit terms than was initially the case immediately after the bankruptcy filing.

Post-petition fees and taxes owed the Commission are being paid and the projections include future payments to the Commission. The January 15, 1986 quarterly payment to the Casino Reinvestment Development Authority has not been paid nor will the one due on April 15. Nevertheless, a deferral petition is pending before the CRDA and presumably will be dealt with expeditiously. Even if a deferral is not granted though, the projections have made adequate provisions for payments to the CRDA. Real estate taxes have been paid and have been budgeted for in the future.

Some uncertainty exists, however, as to whether certain bond-
holders can be satisfied. Frequent discussions have occurred in an effort to reach a reasonable solution. Confidence has been expressed that a satisfactory solution can be achieved. Certainly, the failure to reach an accommodation could cause significant financial disruption. For now, however, the outlook is positive. If, in the future, this optimism dampens, the Commission and the Division will have to evaluate the effect upon the licensee and affiliated companies and take appropriate action. Additionally, the Commission can take assurance from the fact that five months have passed since the bankruptcy filing and the casino hotel is operating on a sounder basis than before.

In enacting the Casino Control Act, the Legislature declared that economic stability in casino operations was essential and New Jersey licensees were to be free from any improper influences by persons or entities likely to erode the public’s confidence and trust in legalized casino gaming in New Jersey. N.J.S.A. 5:12-1(b). Various management officials testified before this Commission that they knew of no attempts by unsuitable persons to take advantage of Atlantis’ financial woes and gain a foothold in the industry. In addition to the usual monitoring of a casino licensee done by the Commission and Division, this licensee has unquestionably been the subject of heightened regulatory scrutiny over the past six months. No evidence was presented at this hearing to suggest that the public should lose faith in this regulated industry or in the sophisticated mechanisms designed to thwart unsavory elements.

At the outset of the hearing the Commission permitted counsel for the Unsecured Creditors Committee, Alan I. Gould, Esq., to be a “participant” herein. See, N.J.A.C. 1:1-12.6(c)(3). In his oral presentation, Mr. Gould stated that he believes that present financial stability exists and that the Commission should give the bankruptcy process a chance. He further stated that, in addition to the monitoring performed by the Commission and Division, that the bankruptcy court and the Unsecured Creditors Committee perform similar tasks. He thus saw no reason to deny licensure (T1094 to T1106).

IV. Financial Integrity and Good Character

Although the primary thrust of this hearing has focused on financial stability, the financial integrity and the good character of the licensee and several of its officials have been placed in issue by virtue of a land transaction involving two parking lots in Atlantic City owned by ESA. In October 1985, Elsinore Corporation was searching
for a mechanism to infuse funds into the rapidly weakening Atlantis operation and, at the same time, to protect such funds.

A real estate agreement was signed whereby ESA would convey two tracts of land, commonly called the Georgia Avenue and Bellevue Avenue lots, to Elsinore Corporation (J-6-A). One million dollars was to be paid by Elsinore on the date of the agreement. This money was transferred and was crucial for ESA to obtain. The agreement further required that at closing another $4 million was to be paid to ESA and a promissory note in the amount of $4.4 million payable to ESA was to be delivered. An appraisal of the properties was also contemplated to determine their fair market value in order to set the final sale price (J-6-A).

In mid-October 1985, a deed was written and given to Elsinore Corporation. This deed conveyed the Georgia and Bellevue Avenue lots (J-6-B). The deed was recorded and since that time Elsinore corporation has paid the mortgage and real estate taxes while permitting ESA to utilize the lots rent-free.

A promissory note in the amount of $4.4 million was executed and delivered to ESA. The $4 million cash that was supposed to be transmitted to ESA at closing was not.

The foregoing was a sloppy real estate transaction between a corporate parent and one of its affiliated companies. Plainly, $4 million should have been conveyed at closing from Elsinore Corporation to ESA. The fact that ESA did not receive this money does not negatively impact upon the licensee or Elsinore officials. The purpose of the transaction was unmistakably to allow money to be given to ESA. However, upon the arrival of the "crisis management team," it became evident that the additional $4 million in cash was unnecessary and that the entire transaction was going to be restructured.

We do not perceive anything nefarious about the transaction; nor do we find, on the record before us, that Elsinore Corporation was attempting to remove a valuable asset from ESA for less than full market value. Thus, the Commission draws no negative inference from the land transaction.

Similarly, in the course of this hearing, questions were also raised concerning the application of the proceeds of a $115 million bond offering in 1984. Based on the evidence presented here, we find no attempt by Elsinore Corporation to improperly extract funds from ESA to the latter's detriment.
V. Business Ability

Among the other concerns raised by the Division is the question of whether ESA has the necessary business ability to maintain sufficient casino operations. The current management team, headed by Ms. Hood, has the requisite ability. Specifically, Ms. Hood's experience at the Four Queens Casino Hotel, her recruitment of the able members of the "crisis management team," as well as the experience of Atlantis' current casino manager, provides adequate support for the Commission to conclude that the necessary ability exists. Of course, we are troubled by the fact that the departure of some of the members of this team, although not imminent, appears to be inevitable. Assuredly, steps must be taken to recruit talented replacements and the Commission will scrutinize carefully any new management personnel.

Another concern seemingly expressed by the Division revolves around the multiple roles in which several individuals are engaged. More specifically, the Division has questioned the allegiance and impartiality of various members of Elsinore Corporation to ESA. We do not believe that any present regulatory concerns exist under these circumstances.

VI. Commission Fees and Taxes

One of the legal issues raised by the filing of the reorganization petition concerns the payment to the Commission of approximately $1.2 million in fees and taxes. Section 88 of the Act provides in pertinent part as follows:

Subject to the power of the commission to deny, revoke, or suspend licenses, any casino license in force shall be renewed by the commission for the next succeeding license period upon proper application for renewal and payment of license fees and taxes as required by law and the regulations of the commission. [N.J.S.A. 5:12-88].

There are various categories of fees and taxes for which payment has not been received. As Exhibit J-14 indicates, the unpaid fees amount to $993,709.99, and the unpaid gross revenue tax amounts to $146,411. At the third prehearing conference, the Chairman indicated that ESA should be prepared to present testimony on the question of its failure to petition the Bankruptcy Court for permission to pay the pre-petition fees and taxes owed to the Commission. See,
Third Pre-Hearing Conference Order filed March 24, 1986. Thereafter, ESA voluntarily sought relief from the Bankruptcy Court and, on April 11, 1986, the Court denied ESA’s request without prejudice.

The Act requires fulfillment of these obligations and we find, as an express condition of licensure, that ESA must make roughly equal installment payments on May 15, 1986, June 16, 1986, and June 30, 1986, of the fees and taxes owed. If ESA believes that it requires Bankruptcy Court approval to pay the obligations, it should seek such approval. Regardless of such approval, however, these fees and taxes must be paid. Moreover, interest in an appropriate amount will be assessed.

VII. Playboy Enterprises, Inc. Divestiture Conditions

Another matter which must be addressed involves ESA’s petition to amend or suspend paragraphs 161 through 168 of Commission resolution #85-251 relating to conditions of divestiture imposed as a result of the disqualification of Playboy Enterprises, Inc.

In April 1982, PEI was found to be unqualified to hold a casino license, and this ruling was subsequently upheld by the courts. Following the filing of a petition by the Division of Gaming Enforcement seeking to condition the issuance of Playboy Elsinore Associates’ 1984 licensure upon the immediate divestiture of the Hugh M. Hefner and PEI interests, Elsub entered into an agreement with PEI in February 1984, to purchase the outstanding common stock of Playboy of New Jersey (now Elsinore of New Jersey), and submitted the agreement to the Commission for approval.

By order dated March 14, 1984, the Commission approved the divestiture agreement subject to certain conditions which have been memorialized in Commission resolution #85-251 (J-4-E). The purpose of the divestiture agreement was to effectuate the separation of the unqualified entity from the licensee; the separation was to take place over a period of time.

In its petition seeking relief from the divestiture conditions, the licensee asserts that due to the involuntary petition filed by PEI against Elsub, and the subsequent filing of the voluntary petition by ESA, both seeking Chapter 11 relief, those entities are prohibited from paying their pre-petition debts, including the April 3, 1986 installment due PEI. Testimony by Mr. Gerber has reinforced this assertion (T261-20). Consequently, by failing to make that payment, and by failing to establish the required escrow arrangement, Elsub and ESA
have seemingly violated the express provisions of the Commission's divestiture order.

When the Commission approved the divestiture agreement, it firmly believed that a rational scheme for the ultimate removal of PEI by 1990 had been effectuated. However, the bankruptcy filings have called into question the entire divestiture scheme.

At this time, we do not believe it is appropriate to remove the conditions of divestiture. To do so would defeat the State's purpose of preventing entanglement between the unqualified entity and Elsinore Shore Associates. However, an indefinite suspension of the operation of those divestiture conditions until the presentation and confirmation of a plan of reorganization, or until further order of the Commission, appears reasonable. In the interim, the State's interest in this matter will be protected by its heightened regulatory oversight of ESA which continues to bar PEI from participation in the New Jersey casino industry, as well as by established bankruptcy procedures.

VIII. Proposed Affirmative Action Condition

A proposed condition has been set forth by the Division of Affirmative Action and Planning (C-5), which requires the licensee to revise the job specifications for the position of Director of Human Resources/Affirmative Action Officer as well as the position of Affirmative Action Administrator, to include knowledge and experience in the field of EEO/AA. Elsinore Shore Associates has objected to the proposed condition.

Although we are disturbed about Atlantis' achievement during the past year regarding affirmative action matters, we do not find it necessary to impose the proposed condition at this time; rather, we will review Atlantis' progress in affirmative action in six months. Additionally, the Commission staff and the Division are requested to review the recommendation contained in C-5 and make a suggestion to the Commission concerning whether or not uniform regulations are necessary for the entire industry.

IX. Conclusion

The Commission is satisfied that ESA and its affiliated entities have met all applicable statutory requirements. Accordingly, a plenary license shall issue to ESA subject to strict compliance with the con-
ditions referenced below and set forth in the formal license Resolution regarding this matter, which is numbered 86-251.

As noted earlier, paragraphs 161 through 168 of Commission Resolution 85-251 shall not be deleted but their operation shall be suspended indefinitely or until further order of the Commission. Also, it is an express condition of licensure that ESA make roughly equal payments on May 15, 1986, June 16, 1986 and June 30, 1986, of the fees and taxes owed the Commission, together with appropriate interest.

The casino license is also expressly conditioned upon compliance by ESA with the following conditions:

1. ESA shall maintain a casino cash balance of at least $3 million, as defined in the Commission's Uniform Chart of Accounts as account numbers 1020 and 1021, at all times. This cash balance shall be exclusive of cash held for progressive slot machine jackpots, as defined in the Uniform Chart of Accounts as account number 2480.

2. ESA, with respect to its progressive jackpots, shall maintain a dedicated account equal to 100 percent of the aggregate amount of progressive jackpots then available, said amount to be certified on a weekly basis by ESA's chief financial officer.

3. ESA shall submit monthly balance sheets, statements of income, statements of cash flow, and changes in components of working capital to the Commission within 15 calendar days of the end of each month.

4. ESA shall prepare, on a daily basis, a Daily Operating Report and a Daily Cash Report (both substantially in the forms presently used), which reports shall be available to the Commission and Division.

5. ESA and Elsinore each shall immediately notify the Commission and Division of any change in the conditions of, or the use of, any credit lines relating to borrowed money.

6. ESA shall advise the Commission of any significant deviation in its financial plan that was filed with the Commission in February 1986. A significant deviation shall be determined on a monthly basis within 15 calendar days of the end of each month based on the following criteria:

   ... a 5.0 percent or greater variance between actual total operating revenue and the forecasts submitted to the Commission on February 18, 1986;

   ... a 5.0 percent or greater variance between actual total operating costs and expenses and those forecasted;
. . . a 2.5 percent or greater variance between actual net income (loss) and that forecasted;
. . . any variance between actual sources and uses of cash and those forecasted.

The information provided to the Commission shall disclose the specific variance and management's analysis of the factors contributing to any such variance.

7. ESA shall maintain in a restricted account an amount estimated to be necessary to satisfy payroll and related employee benefit programs for the ensuing week.

8. ESA shall maintain in a restricted account, in an amount, or pursuant to a formula, approved by the Commission, funds allocated for the specific purpose of satisfying all “Section 88” fees and taxes incurred on or after November 14, 1985.

9. ESA shall not seek or utilize any funds from any new financial source, as defined by Section 84(b), without the express prior approval of the Commission.

10. No settlement shall be entered or implemented in a matter entitled Playboy Enterprises, Inc., v. Elsinore Corporation, Elsinore Finance Corporation and Elsinore Shore Associates (Civil Action No. 85-5344), in the United States District Court unless such settlement is expressly conditioned on obtaining all required approvals of the Commission.

11. With respect to the above referenced civil litigation and the two pending reorganization proceedings:
   (a) No plan of reorganization shall be implemented without the express approval of the Commission;
   (b) ESA shall cause to be filed with the Commission and Division all pleadings, motions and orders as they are received or filed by the parties or the Court; and
   (c) ESA, by the tenth calendar day of each month, shall file a status report with the Commission and Division listing the significant events and developments of the prior month.

12. If, during ESA's reorganization proceeding, ESA is unable to meet its obligations incurred in the normal and ordinary course of business, then Elsinore Corporation shall immediately make available to ESA, as needed, funding from the $5 million debtor-in-possession financing approved by the United States Bankruptcy Court on April 11, 1986, which shall be promptly reported to the Commission.
X. Separate Opinion of Commissioner Valerie H. Armstrong

At the outset of this proceeding, I was substantially troubled by the critical issue to be addressed during this license renewal hearing, namely, how could a casino licensee which has filed for protection under Chapter 11 of the Federal Bankruptcy Code, possibly demonstrate its financial stability as required by the Casino Control Act? Contemplating that legal issue in a vacuum, without having the benefit of the record which was ultimately presented in this matter, led to the reasonable question of whether Chapter 11 proceedings are inherently irreconcilable with a determination of financial stability.

However, having now had the opportunity to evaluate the record which evolved during the extensive hearings held in this matter, it is apparent to me that the reconciliation of Chapter 11 proceedings with the concept of financial stability, is an issue which I would describe as extremely "fact sensitive."

It is also apparent to me that the mere act of filing a Chapter 11 proceeding on November 14, 1985, does not, in and of itself, tell this Commission whether Atlantis is or is not financially stable. Rather, the circumstances which caused the reorganization proceeding to be filed and the licensee's course of action since the filing, as well as the reasonableness of its projections for the ensuing year, are the important considerations.

In his testimony, Professor Frank Vecchione analogized a debtor in distress to an individual who has a heart attack, noting that we do not immediately bury a heart attack victim without giving him the opportunity to survive (T307). A heart attack victim who is listed in stable condition has no guarantee that he will live or die. Nevertheless, that stable condition is at least some assurance that, for the short term, the outlook is optimistic. Likewise, the determination that Atlantis is sufficiently financially stable to warrant relicensure for an additional year, does not necessarily guarantee Atlantis' ultimate survival. However, a failure to renew its license would certainly result in its demise. I think we all would like to see Atlantis afforded every opportunity to survive and prosper although, under the Casino Control Act, Atlantis may not be granted that opportunity based on sympathy or artificial optimism. Rather, Atlantis must first affirmatively demonstrate by clear and convincing evidence its financial stability and sufficient business ability and casino experience.

I am convinced, based upon the record in this case, that Atlantis has satisfactorily met its burden of proof. For me, the critical factors
were the following: The crisis management team under the direction of ESA's President, Jeanne Hood, took immediate and practical steps to resuscitate a licensee which unquestionably was experiencing financial difficulty. We are being asked to place a certain amount of faith in the projections and predictions of this management team concerning the revenues, expenses and effectiveness of its marketing techniques over the next year. However, the actions of the crisis management team warrant us placing that faith in those projections. Ms. Hood has clearly reduced costs. Atlantis is meeting its current obligations, albeit with the protection of a Chapter 11 proceeding, and the licensee has not required any infusion of capital for several months. The dedication of the crisis management team to save this property comes through loud and clear. Ms. Hood's experience with the very market which Atlantis is attempting to cultivate, i.e., the middle-line customer, when combined with actual marketing techniques being utilized, including a carefully planned advertising campaign, tends to build confidence that the projections which we have been asked to accept are reasonable. The fact that the entity can satisfy its obligations to its gaming patrons, the fact that it has met its payroll, and that employee morale has improved substantially (an important factor because the employees must be able to support management's new direction), are important aspects of financial stability.

While the general success rate of Chapter 11 debtor is apparently less than impressive, those bleak statistics should not be generalized to Atlantis' potential for success or failure. What we are looking at is Atlantis' stability for the ensuing year. If, for some reason, Atlantis should fail to continue to meet the affirmative criteria for licensure as to financial stability, or any other issue, for that matter, the Commission obviously can take whatever action is appropriate under the Casino Control Act.

While I sincerely hope that we are never confronted with another licensee in the same circumstances as Atlantis, I note that Nicholas F. Moles, Esq., ESA's General Counsel, commented in his closing remarks on the significance of the precedent which may be set by the decision in this case. I hope that we never have to look to this case as a precedent, but in granting relicensure, the significant precedent to be established is that the mere filing of a Chapter 11 action does not, in and of itself, warrant a conclusion that a licensee is financially unstable. Beyond that, these cases are like fingerprints—no two are alike. The absence of one or more of the critical positive factors presented in this case, or evidence of unsound or illegal activities
related to a licensee’s financial troubles, could clearly tip the balance of the scale in the opposite direction. Each such case must be judged strictly on the unique facts and circumstances presented in that case.

XI. Separate Opinion of Commissioner Carl Zeitz

I would like to underscore two points upon which a vote for relicensure revolves. First, a determination of financial stability by the Commission is really a snapshot at the instant it is made. The conditions set out in the opinion would bring Atlantis back before us if the picture changes in the intervening license year.

Second, as to the Casino Control Act’s requirements for a showing of financial stability and integrity, it seems to me that the law is not a dry bone. It has flesh on it and the flesh is the body of purpose underlying the statute. In a caption, the chief purpose of the Casino Control Act always is to guard against intrusion in the Atlantic City casino industry by unsuitable persons or their agents. There is no evidence of such here nor is there any contention by the Division of Gaming Enforcement of any such interference or intervention in the business of the Atlantis Casino Hotel by such unsavory individuals. In fact, the Division has noted and the witnesses for the Atlantis have testified that the financial events that began to occur in October 1985 have not produced any such invasion of its control or operations.

Thus, I concur in the Commission’s decision in this matter. I would add only these minimum observations concerning the present operation and financial condition, post petition, of the Atlantis.

A hotel room or restaurant service for which a patron pays cash produces income. A hotel room or restaurant service given to a patron and charged back to the casino produces income which is an accounting fiction.

Credit issuance in Atlantic City casinos typically is between 30 and 32 percent of table game drop and is costly to achieve because of complimentary expenses. Atlantis has reduced credit issuance to about 26 percent of table game drop, clearly reducing promotional expense, and thus should continue to realize a greater revenue percentage even if from reduced drop.

Slot machines are, whatever else they are, cost effective casino revenue producers. The Atlantis is adding nearly 100 slot machines. They will produce more revenue with less expense than table games.

The Atlantis revenue projections for 1986 shift 10 percent of income production from the casino to hotel operations. This is an
intelligent direction and one which should, through the business
strategies designed to achieve it, directly serve the public policy of
the Casino Control Act which call for restoration of Atlantic City
as a complete resort rather than the purely gambling destination it
has become.

The Atlantis has operated until these changes under various
managements who adhered to one basic business strategy which, no
matter how long and how often it failed, was not discarded. It was
based on the self-deception that what succeeded someplace else at
some other time or even for others in the same place and time is
guaranteed to work. It is a vanity the Atlantis can no longer afford.
However, it has been eliminated and some lessons have been learned.
Unlike General Custer, who learned nothing and so did not see 1877,
the Atlantis will see 1987.

I believe the financial projections for the Atlantis and the business
revisions upon which they are based are reasonable, prudent and may
well be exceeded.

It is high time the public, which will continue to descend upon
Atlantic City by the tens of millions, has a chance to make that trip
without being skewered. If the financial situation of the Atlantis has
helped to achieve that, so much the better.

XII. Separate Opinion of Commissioner E. Kenneth Burdge

For the reasons which follow, I cannot join the majority opinion
in this case. Accordingly, I respectfully dissent.

I have sat through an entire week of testimony and I have carefully
scrutinized the numerous exhibits that have been admitted into
evidence. In my opinion, the crucial issue that must be decided in this
case is whether or not this licensee is financially stable and should
be permitted to operate under the direction of so-called new manage-
ment.

The financial stability standard in the Casino Control Act is not
meaningless. The Legislature obviously envisioned that the economic
viability of casino hotels was crucial to the confidence and trust that
the public was being asked to place in legalized casino gaming in New
Jersey.

The Commission has not had many opportunities to deal with
the specific question of financial stability nor issue decisions based
solely on that question. In the Resorts International Hotel, Inc. casino
license hearing in 1979, the Commission gave some meaning to the
standards set forth in section 84 of the Act. Significantly, it was noted that there should be basic financial solvency or soundness. It was also noted that the standard included an evaluation of the care and prudent exercised by the applicant or licensee in managing, preserving and enhancing its assets.

The unquestionable message that rings loud and clear is that this is a financially weakened casino. The events leading up to the November 1985 bankruptcy filing do not give me the confidence that I need to grant relicensure. In short, the picture that I believe has been presented to the Commission is one of chaos, poor decisions, and lack of foresight.

Throughout 1985 it should have been evident to both the management of the Atlantis Casino Hotel and its parent, Elsinore Corporation, that things were not going smoothly in Atlantic City. While the President of Elsinore Corporation, Robert R. Maxey, was apparently assuring the management of Elsinore that things would turn around and that they should "have faith," a more active role should have been played much earlier in 1985 than is evident by the testimony and exhibits adduced at the hearing. Moreover, I find it somewhat disturbing that upon the departure of Mr. Maxey, a crisis situation developed and that a need for a "crisis management team" was considered essential. While that may have been a prudent business practice at that point in time, proper management should have foreseen the difficulties on the horizon and should have been able more adequately to prepare for the economic woes that seemingly lay ahead.

I recognize that a filing for reorganization under Chapter 11 has some positive aspects to it. One negative aspect, of course, is the fact that some pre-petition creditors may not receive their just payment on monies that are owed. That, of course, is the American way since bankruptcy is a constitutional prerogative that has been afforded to the American public.

Nevertheless, I do not fully accept the rationale that bankruptcy has made the licensee more "stable." That may be a truism in the short term, but full financial stability can only be achieved after a plan of reorganization is filed with, and confirmed by, the bankruptcy court. As I have been made aware of during the hearing in this matter, it could well be next year before such an event occurs.

We should not flee from the obvious here. This casino hotel has never been competitive, nor has it been able to successfully emerge from the disqualification of its partner, Playboy Enterprises, Inc. Moreover, ESA's own bankruptcy expert, Frank Vecchione, testified
that the majority of his clients who filed for Chapter 11 protection did not survive (T370-18 to T371-2). Whether ESA successfully emerges from this Chapter 11 proceeding is speculative, at best.

We have been told that we should believe in the projections that have been provided to us and which a number of experts claim are reasonable. The facts, in my opinion, demonstrate that we should not place much faith in ESA’s projections. Projections were not met in 1985. They have not been met for the first three months of 1986. Yet, ESA asks us to accept that it can quickly adjust to the vagaries of the marketplace and that appropriate cash reserves will be maintained throughout the next license renewal year.

If such were the case, we would not have had the need for a crisis management team in the first place. As I see it, Elsinore Shore Associates sustained a $35 million loss in calendar year 1985. Indeed, I find it somewhat remarkable that a working capital loss of $9 million is projected for 1986. Should we approve a licensee that seemingly only knows losses?

The major part of the hearing in this case and of the exhibits that have been introduced attempts to persuade the Commission that a new management group has taken over and that new strategies have been imposed which will turn around this casino hotel. I believe that different strategies definitely have been employed. Whether they ultimately prove successful is certainly questionable. What I do not believe is that the “new management team” is new at all.

Further, I note that Elsinore Corporation asks us to place a great deal of faith in its ability to work out a satisfactory arrangement with its bondholders. In my opinion, a satisfactory solution to that difficulty is crucial because a failure to do so can only result in additional economic turmoil and distress.

Hope may spring eternal, but only hope is what is offered here. I am not so optimistic.

I question whether we would view this matter differently if Elsinore Shore Associates had just completed the construction of a casino hotel and were seeking initial licensure.

Financial stability is not a meaningless standard. While cash flow projections may be met, and while debtor-in-possession financing from Elsinore Corporation may be had, there are no guarantees in my mind that the prospects for 1986 will be bright.

Accordingly, I dissent.

However, since the Commission’s determination is to grant re-
licensure, I would agree that the conditions set forth in the majority opinion, at a minimum, must be imposed.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.