



DEPARTMENT OF
**LEGAL AND
ADMINISTRATIVE
SERVICES**

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TO: Safety and Licensing Committee

From: ACA Zak Buruin

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RE: Amusement Device Application and Big Daddy Games Devices

At issue are Amusement Device Licenses applied for by two applicants, both of which involve devices produced by Big Daddy Games. In question is whether the devices as they are to be used would constitute gambling machines which would be prohibited by state statute and or local municipal code and therefore not licensable.

In addition to the statutory definition of a “gambling machine,” which is discussed at length below, “gambling devices” and “slot machines” are also discussed by Appleton’s municipal code. Non-exhaustively, they are addressed in:

- Chapter 9, Sec. 9-52(3)ⁱ where gambling and games of chance are prohibited upon (alcohol) licensed premises; devices of chance, including slot machines¹, are prohibited upon the premises “except those permitted by law.”
- Chapter 10, Sec. 10-18ⁱⁱ, which addresses the City’s adoption Wisconsin Statutes §945.04.
- Chapter 12, Sec. 12-29(2)ⁱⁱⁱ, which defines all gambling devices and slot machines as “public nuisances offending public morals and decency(.).”

Gambling Device As Defined by Statute

Subject to certain exclusions, a gambling machine is defined as “a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine.” Wis. Stat. §945.01(3)(a).^{iv}

There has been, to this point, no dispute that the machines in question constitute a “contrivance.” Likewise, there seems to be no dispute that the machines require payment to play. To the extent this is in question, Lt. Goodin and I were able to observe this function

¹ “slot machine” is not defined by Appleton’s code or Wisconsin Statutes, leaving interpretation to be based upon common definition and understanding.

of the machines when an example of the machine was demonstrated for us.

The questions at hand are whether the game affords the player an opportunity to obtain something of value, and whether the award is determined predominantly by chance or skill.

Chance vs. Skill

Based upon the opportunity to view the operation of an example machine, they appear to operate primarily as video slot machines. The different games within the machine appear distinct from each other only visually. No functional difference was observed or pointed out.

As had previously been highlighted by the applicant's representative, the machines indicate to the player in advance what the outcome of any particular wager or play will be. It was further clarified during demonstration that after that play is made, only that exact wager's results are recalculated for the next play. The outcomes of all other potential wagers remain unaffected and visible to the player. They remain unaffected until a player makes that specific wager, be it minutes, hours, days, or weeks later.

Through their legal representative, the applicant has argued that the available foreknowledge of the outcome of any wager made changes the fundamental nature of the game from one of luck to one of skill. In fact, the outcome of any particular wager is predetermined before the player makes their bet. Likely in most cases, it is predetermined before the player even deposits their payment to be able to play the game.

The fact that this calculation is made by the machine's programming and displayed for all to see before the player interacts with the machine does not mean the result is any less determined by chance. It is still determined entirely by the machine. Utilizing the ability to know the result of the game in advance and to choose not to play if the result will be a loss "simply eliminates the risk of losing money, not the element of chance for winning." *JD Prime Games Kiosk, LLC v. Wis. Dep't of Revenue*, 2022 WI App 6, 400 Wis. 2d 499, 506, 969 N.W.2d 778, 781.

The other argument asserted in support of the proposition that the games in question are games of skill is the "Skill Wheel," utilized to determine what portion of their "winnings" a player may "cash out" after playing the main portion of the game. In the strictest sense, this additional element of the game does require some level of skill. However, the proposition that this additional element causes skill to predominate the outcome of the game over chance is dubious at best. As this game element was demonstrated, the result of the wheel is no worse than 80% payout of the accumulated winnings. To the extent that skill is a gatekeeper to success with this element, its impact is, at most, 20%.

Additionally, based on the demonstration Lt. Goodin and I received, the skill required to complete this portion of the game with optimal success remains quite small. The virtual wheel that determines the outcome must be started and stopped by the user. Once the user initiates the stopping of the wheel, it does continue with simulated momentum for what

is indicated to be a predictable distance. On its face, this requires skill. However, the low speed and momentum of the wheel requires such a low degree of skill so as to further diminish any effect that skill might have on the outcome of the prize awarded. The degree of customizability that these settings may have was not explored during this demonstration, so this aspect of consideration may be subject to alteration. However, it is unlikely that an increase to the level of skill required to obtain optimal results on the “Skill Wheel” would alter an evaluation of the predominance of skill versus luck for the machines in question.

Based upon observations of how the machines in question function as demonstrated to Lt. Goodin and to me, it appears clear that chance is the predominant factor in determining the outcome of the games in question. Slot machines, be they video or mechanical, are games of chance. As the Court of Appeals indicated, the additional contrivance of knowing the predetermined outcomes “simply eliminates the risk of losing money, not the element of chance for winning.”

There is some element of skill involved in the “Skill Wheel,” but it cannot reasonably be said to predominate over the chance elements at play in the game. This is based both upon the level of skill required to complete this portion of the game and based upon the limited overall impact that this layer of contrivance can have on the overall outcome of the game.

Award of Something of Value

While the game as demonstrated to Lt. Goodin and me is a contrivance for which consideration must be paid by the player and for which the outcome is predominantly based upon chance, that is insufficient for it to be considered a gambling machine. The predominance of chance must be the basis for awarding something of value to the player. For the machines at issue in the current Amusement Device License applications under consideration, this remains an open question.

As explained during the in-person demonstration, the machines themselves do not dispense money or prizes in any direct or recognizable sense. When one “cashes out,” the machine prints a “Skill Report,” displaying the player’s “Points Achieved.” What value there is, if any, is up to the operating business establishment, according to the information provided. With exceptions to be discussed below, the assignment of any value to “points” would satisfy the remaining criteria for the devices in question to meet the statutory definition of a gambling machine.

Exceptions

The exception most likely to apply to the machines in question is contained in Wis. Stat. §945.01(b)(2). Devices that would otherwise qualify as gambling machines are not considered so if the thing of value awarded to the player is exclusively free replays of the game for achieving certain scores and does not change the ratio or record the number of the free replays awarded. Therefore, if the points redeemed could be used to allow the player to continue playing the game and had no further value, this would likely meet the requirement of this exception contained in Wis. Stat. §945.01(b).^v

Whether the machines in question are intended to be operated in a manner consistent with the exception in §945.01(b) is an open question. When I inquired about the applicants' intent for any form of credit / points redemption, I was advised by their common legal representative that the applicant "Taste of Thai Appleton, LLC" (DBA Mad Elephant) had not decided how the machine was going to be used. No indication was given as to the intent for "Santino LLC" (DBA Houdini's Escape Gastropub) in that or subsequent communications. The same communication reiterated the applicants' position that whether there was to be value assigned to the points should not matter based on the contention that the way the machine operates "virtually eliminate(s)" chance from the awarding of any prize. A subsequent communication did reference "differences" between the machines at Mad Elephant versus those at Houdini's Escape Gastropub, but no further clarification has been received.

For the reasons indicated above, not only is the answer to the question of what value would be assigned to the points one is able to "cash out" of these games relevant, it is likely the dispositive question on whether the machines in question are gambling machines, and therefore whether they are lawful and licensable as amusement devices under Appleton's municipal code.

Recommendations

Based upon the information currently available, the following recommendations are made to the Safety and Licensing Committee and the Common Council and are likely to be applicable to future applications involving similar machines:

1. The applicants should be afforded the opportunity to provide information to the Committee and Council explaining their intent with respect to the assignment of value of points cashed out of the devices in question to assure that their use conforms with the requirements of the statutes.
2. Any approval should be explicitly premised upon assurance from the applicant that the machines will be operated in accordance with the statutes, specifically that the value assigned to points will be limited to free replays of the machine. Such assurance should preferably be in writing.
3. Applicants should be advised licensed amusement devices remain subject to the City's municipal regulations of gambling, gambling devices, slot machines, and gambling houses.
4. If the Committee and Council are satisfied with the responses to any inquiries made under recommendation 1, as well as the assurances made under recommendation 2 and acknowledgement of the advisory contained in recommendation 3, the Committee and Council should approve the license application for any relevant devices.

ⁱ ACC Sec. 9-52(3) – "No gambling or games of chance shall be permitted upon the licensed premises. Dice, slot machines, or any other devices of chance are prohibited and shall not be kept upon the premises, except those permitted by law."

ii ACC Sec. 10-18 – W.S.A. §943.04 on offenses regarding gambling, exclusive of the penalty, is hereby adopted by reference and made an offense punishable as a violation of this Code.

iii ACC Sec. 12-29(2) – “(The following acts, omissions, places, conditions and things are hereby specifically declared to be public nuisances offending public morals and decency, but such enumeration shall not be construed to exclude other nuisances offending public morals and decency coming within the provisions of §12-27.)(...) (2) All gambling devices and slot machines.

iv Wis. Stat. §945.01(3)(a) – “A gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine.”

v Wis. Stat. §945.01(3)(b) – “Gambling machine” does not include any of the following:

1. A device used in conducting a bingo occasion or raffle under ch. [563](#), used in conducting a lottery under ch. [565](#), or used in conducting a race under ch. [562](#).

2. Any amusement device if it rewards the player exclusively with one or more nonredeemable free replays for achieving certain scores and does not change the ratio or record the number of the free replays so awarded.

3. An amusement device involving skill, if it rewards the player exclusively with merchandise contained within the amusement device proper and limited to prizes, toys and novelties, each having a wholesale value which is not more than 7 times the cost charged to play the amusement device once or \$5, whichever is less. In this subdivision, “skill” means, within an opportunity provided for all players fairly to obtain prizes or rewards of merchandise, a player’s precision, dexterity or ability to use his or her knowledge which enables him or her to obtain more frequent rewards or prizes than does another less precise, dextrous or knowledgeable player.