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November 15, 2018

Dennis P. Lee, Chairman
Nebraska Racing Commission
5903 Walker Avenue
Lincoln, Nebraska 68507

RE: *Nebraska Racing Commission's October 29, 2018 Meeting*

Dear Chairman Lee:

I am writing with respect to a recent meeting of the Nebraska Racing Commission ["Commission"] held on October 29, 2018. It has come to my attention that Commission members may have committed violations of the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2016, Supp. 2017) ["Act"] during this meeting. It is also my understanding that the Commission considered and approved a request by Fonner Park to implement historic horserace wagering at this meeting. It appears that this action was premised on a vague and ambiguous agenda item and, more importantly, was taken in the absence of any statutory authority. The Commission's purported approval of wagering on historic horseracing also included the attempted adoption of rules and regulations in violation of the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (2014, Cum. Supp. 2016, and Supp. 2017) ["APA"]. The Open Meetings Act violations, a discussion of the Commission's lack of authority to authorize historic horseracing, and the failure to comply with the APA, are set out below.

A. Open Meetings Act.

1. Participation by telephone. Three commissioners were physically present at the October 29, 2018 meeting—you, Feller, and Galyen. Commissioners Beveridge and Patterson participated by telephone. According to a recording of the meeting provided to my office, some agenda items were moved up to accommodate Commissioner Galyen, who had to leave before the conclusion of the meeting. Once Commissioner Galyen left the meeting, only two out of the five commissioners were present at the meeting location.

Neb. Rev. Stat. § 84-1411(6) (Supp. 2017) expressly provides that “[a] public body may allow a member of the public or any other witness *other than a member of the public body* to appear before the public body by means of video or telecommunications equipment.” (Emphasis added.) In addition, as this office has previously advised the Commission’s Executive Secretary, Tom Sage, the Commission is not statutorily authorized to conduct meetings by telephone.¹ Since § 84-1411(6) prohibits members of a public body from appearing at a public meeting by telephone, Commissioners Beveridge and Patterson’s appearance at the October 29 meeting, including any votes they may have cast, violated the Act. Moreover, since the Commission no longer had a quorum once Commissioner Galyen left, any and all actions taken by the Commission following his exit are invalid. Notably, this includes the vote taken under the item described in the minutes as “Hearing for 2019 Live Race Date and Simulcast Facility Applications,” which purportedly approved the live racing dates and simulcast applications for 2019.

2. Insufficient Agenda Item. The Commission’s agenda item number 12 read “Fonner Park – Request to Approve an Additional Pari-Mutuel Wager.” The meeting minutes indicate that representatives from Fonner Park, AmTote International and the Thoroughbred Racing Protective Bureau were present for this item. The minutes further indicate that “[s]ix exhibits were presented and accepted” and “[a] live presentation was given on the PariMax pari-mutuel wager.” Subsequently, the Commission unanimously adopted the following motion, offered by you and seconded by Commissioner Galyen:

(a) the Commission finds that the PariMax historic horseracing wager is pari-mutuel and is a pari-mutuel wager, (b) that the wager does comply with the pari-mutuel requirements in Nebraska statutes and the Nebraska rules and regulations, (c) that the Commission grants the Fonner Park request for the PariMax historic horseracing wager, and (d) that the Commission adopts as directives the Kentucky rules of racing pertaining to historic horseracing wagers with any and all necessary staff modifications to correspond with Nebraska racing statutes and regulations.

Minutes of the Commission, October 29, 2018, at 2.

Neb. Rev. Stat. § 84-1411(1) requires that “[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” As described above, the minutes indicate that that Commission discussed and approved wagering on *historic horseracing* at Fonner Park, which constitutes an entirely new form of wagering under Nebraska law, not just an “additional” pari-mutuel wager. In addition, the Commission purportedly adopted the State of Kentucky’s “rules of racing pertaining to historic horseracing wagers,” with necessary staff modifications to align them

¹ In this regard, telephone meetings may only be held by the specific entities enumerated in Neb. Rev. Stat. § 84-1411(3) and in matters of emergency. Neither scenario is applicable here.

with Nebraska law and regulations. I do not believe that an agenda item to approve Fonner Park's request for an "Additional Pari-Mutuel Wager" was sufficient to give members of the public notice that the Commission would be discussing and taking formal action on the implementation of historic horseracing wagering, or adopting another state's rules to implement such wagering. The Commission's actions as to these matters are in no way supported by the Commission's agenda item. Since agenda item number 12, i.e., "Fonner Park – Request to Approve an Additional Pari-Mutuel Wager," was not sufficiently descriptive under § 84-1411, the Commission's use of that agenda item violated the Act.

B. Commission's Lack of Authority to Approve Wagering on "Historic Horseraces."

As noted, the Commission's purported approval of wagering on historic horseracing was contrary to the agenda requirements of the Open Meetings Act. In the event the Commission seeks to revisit Fonner Park's request for historic horseracing wagering, I would strongly advise the Commission to deny such a request. There is little question that the Commission currently lacks statutory authority to approve such wagering.

In voting to approve wagering on historic horseracing, the Commission appears to be relying on the authorization of historic horseracing through regulations adopted by the Kentucky Racing Commission ["KRC"]. A recent Kentucky Circuit Court decision found that historic horseracing was lawful as the wagering authorized by the KRC met its definition of "pari-mutuel" wagering. *Kentucky Horse Racing Comm'n v. Family Trust Foundation of Kentucky, Inc.*, Civil Action No. 10-CI-01154 (Franklin Circuit Court, Div. II) (Opinion and Order dated Oct. 24, 2018) ["*Kentucky Horse Racing Comm'n*"]. Prior to this decision, the Kentucky Supreme Court held that the KRC had statutory authority to adopt regulations authorizing wagering on historic horseraces. *Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc.*, 423 S.W.3d 726 (Ky. 2014). The court found that Kentucky statutes provided no definition of pari-mutuel wagering, and thus relied on definitions taken from the Interstate Horse Racing Act and prior Kentucky case law. *Id.* at 737. In doing so, it approved the KRC's definition of "pari-mutuel wagering" as "a system or method of wagering approved by the commission in which patrons are wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons." *Id.* (quoting 810 KAR 1:001(48); 811 KAR 1:005(54); and 811 KAR 2:010(68)). The court concluded the regulations were consistent with the statute authorizing "pari-mutuel wagering" on horse racing, and thus were not invalid as exceeding the KRC's statutory authority. *Id.* at 738.²

² The historical horseracing machines at issue in the Kentucky case utilize the Exakta System. *Kentucky Horse Racing Comm'n*, Opinion and Order at 7. Ironically, Parimax Holdings, LLC, has filed a federal court action against Exakta Systems, alleging

In contrast to Kentucky, however, Nebraska case law, and the current statutes authorizing pari-mutuel wagering on horse racing, do not permit such a broad definition of “pari-mutuel” wagering. *State ex rel. Sorenson v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851, 226 N.W. 705 (1929), *permanent injunction entered* 121 Neb. 248, 236 N.W. 736 (1931) [“*Sorenson*”], was an original action brought by the Attorney General to enjoin the conduct of pari-mutuel wagering on horse races conducted at defendant Ak-Sar-Ben’s race track as an unlawful game of chance or lottery. The wagering was described by the Attorney General as follows:

“[D]efendant receives money from patrons at its races, who pay the same to the defendant and the defendant receives said money in the purchase of tickets issued through said pari-mutuel machine designating specific horses taking part in such race meets, and the holder of such ticket receives after the conclusion of the race bet upon a sum of money evidenced by such ticket which depends entirely upon the result of such race between the horses entered in said race; that after issuing to the party purchasing such a ticket and registering the same, the defendant, after the race, pays out an amount of money for said ticket to the purchaser thereof depending on the result of such race between the horses entered in said meet;...that said pari-mutuel machine is a system of betting, wagering and gambling under which all of the money received by the defendant and bet upon the races as aforesaid is thrown into a common pool and is distributed at the conclusion of each race among the bettors backing the winning or victorious horse;...that under this system the bettors make the odds which vary according to the amount of money in the pool thus created and the number of tickets sold on the winning horse” 118 Neb. at 853-54, 226 N.W. at 706.

The Court in *Sorenson* noted this description of the pari-mutuel wagering system was consistent with that “recently described in a notable case” as follows:

“When a group of persons, each of whom has contributed money to a common fund and received a ticket or certificate representing such contribution, adopt a horse race, the result of which is uncertain, as a means of determining, by chance, which members of the group have won and which have lost upon a redivision of that fund, each contributor having selected a stated horse to win such race, the redeemable value of the

violations of the Lanham Act, § 43(a), 15 U.S.C. § 1125(a)(1). Parimax alleges, in part, that Exacta Systems has made false and misleading representations by advertising and promoting Exacta’s historic horseracing system and games (“Exacta Systems” or “Exacta Games”) as being “strictly pari-mutuel.” *Parimax Holdings, LLC v. Exacta Systems, LLC f/k/a Encore Gaming, LLC*, Civil Action No. 16-CV-259-J (D. Wyo.), Amended Complaint filed May 31, 2018 at ¶¶ 1, 3, 46, 47, and 103.

certificates so obtained and held by the contributors to such fund being varied or affected by the result of such race, so that the value of some is enhanced, while that of others is reduced or destroyed, the original purchase price of all having been the same, those who chose the winning horse being paid, from the fund so accumulated, more than they contributed thereto, by dividing amongst them the money contributed by those who chose losing horses and who therefore receive nothing, that process constitutes a 'game of chance'; and those who buy, sell, or redeem such certificates, for the purposes and in the manner stated, are 'engaged' in such game within the contemplation of § 5639, Rev. Gen. Stat. 1920. The acts just outlined also constitute 'gambling' as defined and prohibited by § 5514, Rev. Gen. Stat. 1920." 118 Neb. at 858-59, 226 N.W. at 708 (quoting *Pompano Horse Club v. State*, 93 Fla. 415, 111 So. 801 (1927)).³

Nebraska statutes, while not containing a separate definition of "pari-mutuel wagering," provide specific limits on the authorization of such wagering on horse races. Neb. Rev. Stat. § 2-1216 (Cum. Supp. 2016) provides: "The parimutuel system of wagering on the results of horseraces, when conducted within the racetrack enclosure at licensed horserace meetings, shall not under any circumstances be held or construed to be unlawful, any other statutes of the State of Nebraska to the contrary notwithstanding." Pari-mutuel wagering on horse racing is authorized and governed by Neb. Rev. Stat. § 2-1207 (Cum. Supp. 2016), which provides, in pertinent part:

(1) Within the enclosure of any racetrack where a race or race meeting licensed and conducted under sections 2-1201 to 2-1218 is held or at a racetrack licensed to simulcast races or conduct interstate simulcasting, the parimutuel method or system of wagering on the results of the respective races may be used and conducted by the licensee. Under such system, the licensee may receive wagers of money from any person present at such race or racetrack receiving the simulcast race or conducting interstate simulcasting on any horse in a race selected by such person to run first in such race, and the person so wagering shall acquire an interest in the total money so wagered on all horses in such race as first winners in proportion to the amount of money wagered by him or her. Such licensee shall issue to each person so wagering a certificate on which shall be shown the number of the race, the amount wagered, and the number or name of the horse selected by such person as first winner....[After taking out authorized or required deductions from amounts wagered],...[t]he balance remaining on hand shall be paid out to the holders of certificates on the winning horse in the proportion that the amount wagered by each certificate holder bears

³ After *Sorenson*, the Nebraska Constitution was amended in 1934 to allow the Legislature to authorize pari-mutuel wagering on horseracing.

to the total amount wagered on all horses in such race to run first. The licensee may likewise receive such wagers on horses selected to run second, third, or both, or in such combinations as the commission may authorize, the method, procedure, and authority and right of the licensee, as well as the deduction allowed to the licensee, to be specified with respect to wagers upon horses selected to run first. (emphasis added).

Subsection (3) of § 2-1207 further provides that “there shall be no wagering except under the parimutuel method outlined in this section.”⁴

The Legislature has limited its authorization of pari-mutuel wagering to “live” horse races conducted at Nebraska licensed racetracks and pari-mutuel wagering on intrastate and interstate simulcast horse races. Such wagering may be conducted on horse races under licenses issued to qualifying entities that designate “the place where the races or race meetings are to be held, and the time and number of days during which racing may be conducted by such licensee.” Neb. Rev. Stat. § 2-1205 (2012). In addition to licensing these “live” races or race meetings at which parimutuel wagering is conducted, the Commission may license racetracks to conduct intrastate and interstate simulcast wagering on horse races. Neb. Rev. Stat. §§ 2-1223 to 2-1229 (2012). “[S]imulcast” is defined to “mean the telecast of live audio and visual signals of any horserace conducted in the state for the purpose of parimutuel wagering. . . .” Neb. Rev. Stat. § 2-1225(7) (2012).⁵ “Interstate simulcast” is defined to “mean parimutuel wagering at any licensed racetrack within the state on the results of any horserace conducted outside the state.” Neb. Rev. Stat. § 2-1225(2) (2012).

Any licensed racetrack “which operates at least one live race meet during each calendar year” may be “issued a[n] [intrastate] simulcast facility license” allowing the licensee to “display the simulcast of a horserace on which parimutuel wagering shall be allowed.” Neb. Rev. Stat. § 2-1226 (2012). Intrastate simulcast licensing requires execution of a written agreement between the sending and receiving tracks, which must

⁴ Exotic wagers, such as daily double, exacta, quinella, trifecta, pick six, and other similar types of bets, may also be approved by the Commission. Neb. Rev. Stat. § 2-1208.03(1) (2012). Not all live or simulcast bets involve wagering on a single race. In pick six wagering, for example, a bettor must correctly select the first place finisher in six consecutive races to win the jackpot. If no better has a winning ticket, a portion of the pot is paid to those coming closest to the winning combination, and the remainder is carried forward to subsequent racing days until a pick six winner occurs.

⁵ The definition of “simulcast” as the telecast of a live horse race is consistent with the commonly understood meaning of this term, which, in this context, refers to “a closed-circuit television broadcast of an event, as a horse race, while it is taking place.” Dictionary.com, <http://dictionary.reference.com/browse/simulcast> (accessed October 12, 2018).

be approved by the organization representing a majority of licensed owners and trainers at each track. Neb. Rev. Stat. § 2-1227(1) (2012). Simulcasts between racetracks in Nebraska “shall result in the combination of all wagers placed at the receiving track located in the state with the wagers placed at the sending track located in the state so as to produce common parimutuel betting pools for the calculation of odds and the determination of payouts from such pools” Neb. Rev. Stat. § 2-1227(4) (2012).

Licensed racetracks which conduct “live” racing for a certain number of days are eligible to receive interstate simulcast facility licenses. Neb. Rev. Stat. § 2-1228 (2012). “Any racetrack issued an interstate simulcast facility license may conduct the interstate simulcast of any horserace permitted under its license, and parimutuel wagering shall be allowed on such horserace.” *Id.* An interstate simulcast facility license issued to a licensed racetrack in Nebraska allows the racetrack “to receive the interstate simulcast of horseraces for parimutuel wagering purposes from any track located outside of the state.” Neb. Rev. Stat. § 2-1229(1) (2012). Among the factors the Commission is to consider in acting on an interstate simulcast facility license is “whether such interstate simulcast would have a significant effect upon either live racing or the simulcasting of live racing of the same type and at the same time conducted in this state” *Id.*

Commission approval of an interstate simulcast facility license is conditioned upon: (1) Prior written approval of “any other racetrack issued a license . . . and conducting live racing of the same type on the same day at the same time as the proposed interstate simulcast race or races and of the organization which represented a majority of the licensed owners and trainers at the racetrack’s immediately preceding live thoroughbred race meeting;” (2) Prior written approval of “any other racetrack issued a license . . . which is simulcasting the racing program of any licensee conducting live racing in this state of the same type on the same day at the same time as the proposed interstate simulcast race or races and of the organization which represented a majority of the licensed owners and trainers at the racetrack’s immediately preceding live thoroughbred race meeting;” and (3) “A written agreement between the receiving track and the sending track located outside of the state . . . setting forth the division of all proceeds between the sending and receiving tracks and all other conditions under which such interstate simulcast will be conducted.” Neb. Rev. Stat. § 2-1229(1)(a)-(c) (2012). The agreement between the sending and receiving track “shall have the consent of the group representing the majority of horsepersons racing at the sending track and of the organization which represented a majority of the licensed owners and trainers at the receiving track’s immediately preceding live thoroughbred race meeting.” § 2-1229(1)(c).

Addressing the limitations placed by the Legislature on the conduct of pari-mutuel wagering on horseracing by these statutes, this office previously stated:

A review of the Nebraska statutes authorizing pari-mutuel wagering on horse races demonstrates the Legislature has approved only pari-mutuel wagering on: (1) “live” horse races conducted in Nebraska within the

confines of a license racetrack; (2) “live” horse races simulcast “intrastate” from one racetrack in Nebraska to other licensed Nebraska racetracks; and (3) “live” horse races simulcast from racetracks outside Nebraska to licensed Nebraska racetracks. The statutory scheme authorizing pari-mutuel wagering on horse races does not permit wagering on replays of races previously run in Nebraska or elsewhere. Only pari-mutuel wagering on live races conducted at licensed race meets in Nebraska, or wagering on live events simulcast from within or outside Nebraska, is permitted under Nebraska’s current statutes governing parimutuel wagering on horse racing. Op. Att’y Gen. No. 10009 at 11 (March 29, 2010).

Indeed, some basic requirements associated with the statutes authorizing pari-mutuel wagering illustrate how wagering on historic horseraces is inconsistent with Nebraska statutory requirements. For example, § 2-1207(1) provides that persons selecting a horse to run first “shall acquire an interest in the total money so wagered on all horses in such race as first winners” It also requires the person wagering be issued “a certificate on which shall be shown the number of the race, the amount wagered, and the number or name of the horse selected by such person as first winner.” *Id.* After allowing for certain deductions from amounts wagered, “[t]he balance remaining on hand shall be paid out to the holders of certificates on the winning horse in the proportion that the amount wagered by each certificate holder bears to the total amount wagered on all horses in such race to run first.” *Id.* These pari-mutuel wagering requirements cannot apply to historic horseracing, as no certificate is issued and there is no pooling of wagers on a single horse race or series of races. As one commentator has explained, in historic horseracing or “Instant Racing”,

[t]here is no pooled wager. All bets of the same type are pooled together, but there is no provision for betting on the same race. Nobody shares a pool. The pools do not apply to specific races. There is no share of the pools since nobody else is betting on the same race. Thus, Instant Racing would fail the “pool” test. Without pools, there is no way to assess whether there are proportionate payouts to winning bettors, since that requirement presupposes the existence of pools. Bennett Liebman, *Pari-Mutuels: What Do They Mean and What Is at Stake in the 21st Century?*, 27 Marq. Sports L. Rev. 45, 109-10 (2016).

The Maryland Attorney General also explained how historic or “Instant Racing” differs from traditional pari-mutuel wagering:

In traditional pari-mutuel wagering, those who successfully bet on the same winning outcome share a betting pool This is not the case with Instant Racing. There, individual players — even those using machines in the same location — are each wagering on different races with different horses and different outcomes. A bettor who successfully chooses a winning horse can therefore never “share the mutuel pool” with another who

has done the same, for the simple reason that *no one else is betting on the same race*. In traditional pari-mutuel wagering, only the same type of bets on the same race or series of races are pooled together. By contrast, with Instant Racing, wagers on completely different races are pooled together based only on the various types of “wins” available to the players. Instead of each betting pool being shared by all of those who selected the correct order of finish in a particular race, the Instant Racing winner takes all of the money that has accumulated in the applicable betting pool at the time of that person's successful bet. This may be pooled betting, but it is not pari-mutuel betting as contemplated in the Maryland Horse Racing Act.

Furthermore, bettors in a traditional pari-mutuel system, through their differing opinions and the money wagered on such opinions, participate directly in setting the odds on the various possible outcomes of a given race. Typically, the bettors are the only determinant of what the odds will be. For obvious reasons, this *cannot* occur in Instant Racing because, as noted above, no two players are ever betting on the same race. To the extent the success or failure of other players, or other factors such as the timing of “wins,” may influence the size of payouts available in Instant Racing, it does not occur through the same process which is at work in traditional pari-mutuel wagering. 94 Md. Op. Att’y Gen. 32, 2009 WL 998670, at 4-5 (citation omitted) (emphasis in original).

The detailed description of Patent No. US 9,747,748 B2 dated August 29, 2017, listing Parimax Holdings, LLC, as the applicant, titled “Web Based Methods and Apparatus for Pari-Mutuel Historical Gaming,” confirms that the gaming system does not involve pooling of wagers on a single event:

One aspect of the present gaming system is to enable pari-mutuel wagering to offer instant payoffs. In the paradigm of live pari-mutuel wagering, a number of players place bets on the outcome of a single event. The players then wait for the results of the event, and then the winning players share the profits from their combined pool of wagers. Pools, such as, the Pick-6 and Twin-Trifecta add the elements of multi-tiered payoffs and a progressively increasing carryover pool by withholding a portion of the profits.

The present gaming system emphasizes the role of the progressive carry-over pools, so that all tiers of winning payoffs are made from progressive pools. Each player is presented with a unique event, so there is no pooling of other players’ wagers on that event. Each wager forms a trivial pool of one, and either loses and is apportioned among the tiers of progressive pools, or wins and is awarded one of the progressive pools. U.S. Patent No. 9,747,748 B2 at 5 (emphasis added).

Moreover, while Nebraska's simulcasting statutes authorize pari-mutuel wagering only on live horseraces simulcast from Nebraska racetracks or from racetracks located outside Nebraska, those statutes also include provisions which negate any authorization of wagering on machines utilizing previously run horse races. Intrastate simulcasting is conditioned on written agreements with the receiving and sending racetracks, which agreements must have the consent of the organization representing the majority of the licensed owners and trainers at these racetracks. § 2-1227(1). Further, any intrastate simulcast must "result in the combination of all wagers placed at the receiving track located in the state with the wagers placed at the sending track located in the state so as to produce common parimutuel betting pools for the calculation of odds and the determination of payouts from such pools, which payout shall be the same for all winning tickets" § 2-1227(4). Again, these requirements cannot be squared with the manner in which historic horserace wagering is conducted.

The same is true with respect to the authorization of pari-mutuel wagering on interstate simulcast horse races. As with intrastate simulcasting, written agreements with the receiving and sending racetracks are required. § 2-1229(1). Also, such agreements must receive the consent of the group representing the majority of the horsepersons at the sending track and the group which represented the majority of licensed owners and trainers at the receiving track's immediately preceding live thoroughbred race meeting. § 2-1229(1)(c). The conduct of historic horseracing is inconsistent with these statutory requirements.

Administrative bodies have only that authority which is specifically conferred upon them by statute or by a construction necessary to achieve the purpose of the relevant act. *Southeast Rural Fire Dept. v. Nebraska Dept. of Revenue, Charitable Gaming Div.*, 251 Neb. 852, 560 N.W.2d 436 (1997); *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 436 (1997). The Commission simply has no statutory authority to approve wagering on historic horseracing. Nebraska statutes governing the conduct of pari-mutuel wagering permit such wagering only on live or simulcast horse race events. The Constitution authorizes "the enactment of laws providing for the licensing and regulation of wagering on the results of horseraces, wherever run, either within or outside of the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure" Neb. Const. art. III, § 24(4). The statutes enacted by the Legislature authorize only pari-mutuel wagering on live horse races conducted either at Nebraska licensed racetracks or simulcast from Nebraska racetracks or racetracks outside Nebraska. No law has been enacted purporting to authorize wagering on historic horseracing as a form of lawful "parimutuel wagering" permitted under art. III, § 24. As noted in our 2010 opinion, there is a serious question as to whether legislation attempting to allow wagering on historic horseracing is permitted under art. III, § 24(4). Op. Att'y Gen. No. 10009 at 4-8. Legislation proposing to authorize wagering on historic horseracing has been proposed, but not enacted. LB 1102 (2010); LB 806 (2012); and LB 590 (2013). Recognizing that legislation alone was likely not sufficient, a proposed constitutional amendment to permit wagering on replayed races (LR 41CA) was approved

by the Legislature in 2014. The Nebraska Supreme Court, however, held the proposed amendment violated the separate vote provision in Neb. Const. art. XVI, § 1, preventing the measure from being placed on the ballot. *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014). While it is questionable if the Legislature could pass legislation authorizing pari-mutuel wagering, it has not done so, and the Commission has no authority to attempt to allow what the Legislature has refused to permit.

C. Administrative Procedure Act.

The minutes of the Commission's meeting also state "that the Commission adopt[ed] as directives the Kentucky rules of racing pertaining to historic horseracing wagers with any and all necessary staff modifications to correspond with Nebraska racing statutes and regulations." The Commission cannot adopt another state's rules and regulations as agency directives. This would be an unconstitutional delegation of authority to another governing body, and is an attempt to circumvent the requirements that such regulations be adopted pursuant to the APA. If the Commission wishes to adopt rules of general applicability which are binding on its regulated public, it must do so through the procedures found in the APA. See Neb. Rev. Stat. § 84-901(2).⁶ Attempting to adopt a "directive"⁷ in place of a rule or regulation is invalid and in violation of the APA. Consequently, we advise the Commission that it may not re-adopt this directive.

⁶ Neb. Rev. Stat. § 84-901(2) provides, in pertinent part: "Rule or regulation shall mean any standard of general application adopted by an agency in accordance with the authority conferred by statute and includes, but is not limited to, the amendment or repeal of a rule or regulation. Rule or regulation shall not include (a) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public, (b) guidance documents as issued by an agency in accordance with section 84-901.03, and (c) forms and instructions developed by an agency. For purposes of the act, every standard which prescribes a penalty shall be presumed to have general applicability and any standard affecting private rights, private interests, or procedures available to the public is presumed to be relied upon to bind the public."

⁷ The Commission appears to be using the term "directive" to refer to a "guidance document," which is "any statement developed by an agency which lacks the force of law but provides information or direction of general application to the public to interpret or implement statutes or such agency's rules or regulations. A guidance document is binding on an agency until amended by the agency. A guidance document shall not give rise to any legal right or duty or be treated as authority for any standard, requirement, or policy. Internal procedural documents which provide guidance to staff on agency organization and operations shall not be considered guidance documents" Neb. Rev. Stat. § 84-901(5). Guidance documents are not to be used in place of rules and regulations and are enforceable only against the agency, not the regulated public.

D. Remedial Action Required by the Commission.

Pursuant to Neb. Rev. Stat. § 84-1414(1) (2014), any formal action of a public body made in violation of the Act may be declared void by the district court when a civil action is commenced within 120 days of the meeting. However, the Commission may cure the open meetings violations which occurred at the October 29 meeting by reconsidering those matters in a subsequent meeting which complies with all statutory requirements. *Pokorny v. City of Schuyler*, 202 Neb. 334, 341, 275 N.W.2d 281, 285 (1979) (“[W]here a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred.”). Once the Commission lost its quorum on October 29, the public meeting ceased to exist. In addition, the agenda item the Commission relied on to approve Fonner Park’s request to approve an additional parimutuel wager was insufficient to authorize the purported approval of wagering on “historic horseracing.” Consequently, until the Commission takes affirmative action to cure the defects, we will caution all parties, including Fonner Park, from relying on the Commission’s defective actions taken on October 29, 2018. The Commission must properly notice another meeting to cure the Open Meetings Act violations associated with these actions.

Further, with respect to the Commission’s attempt to approve wagering on “historic horseracing,” the Commission lacks statutory authority to take such action. As explained above, Nebraska case law and statutes addressing pari-mutuel wagering on horse races do not allow betting using machines containing previously run or “historic” horseraces. Any attempt to authorize such wagering would, at a minimum, require legislation. Even if the Legislature were to enact enabling legislation, there is a serious question whether it could do so consistent with art. III, § 24. But the Commission alone may not act to approve wagering on historic horseraces. Accordingly, the Commission must act to rescind its attempted approval, and deny any application seeking to approve wagering on historic horseracing. The Commission must also rescind its directive improperly attempting to adopt rules promulgated by another state’s racing commission.

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If the Commission fails to take these remedial measures, litigation to void the actions noted above pursuant to Neb. Rev. Stat. § 84-1414(1) (2014) will be necessary.

Very truly yours,



DOUGLAS J. PETERSON
Attorney General

cc: Janell Beveridge, Commissioner
Helen Abbott Feller, Commissioner
Jeffrey Galyen, Commissioner
Thomas Patterson, Commissioner
Tom Sage, Executive Secretary
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