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May 4, 1988

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ATTORNEY GENERAL OPINION NO. 88- 64

The Honorable Alfred G. Schroeder
Chairman
Kansas Racing Commission
128 North Kansas Avenue
Topeka, Kansas 66603-3621

Re: State Boards, Commissions and Authorities--
Parimutuel Racing; Kansas Parimutuel Racing
Act--Nonrefundable License Application Fees;
Forfeiture of Deposit

Synopsis: It is our opinion that: 1) A nonprofit organization applicant proposing to construct or own, or both, and manage a racetrack facility need only pay the application fee required by K.S.A. 1987 Supp. 74-8813(a) for an organization license; 2) a fair association or national greyhound association applicant proposing to construct or own, or both, and manage a racetrack facility need only pay the application fee established by the racing commission pursuant to K.S.A. 1987 Supp. 74-8814; 3) a for profit applicant proposing to construct or own, or both, and manage a racetrack facility must obtain a facility owner license and a facility manager license and pay an application fee for each as provided in K.S.A. 1987 Supp. 74-8815(c); 4) a facility owner license applicant seeking to construct or own, or both, racetrack facilities in more than one geographic location must pay multiple application fees to cover the costs associated with processing the information required relative to each location; 5) a facility owner or facility manager applicant may propose to construct, own and/or manage racetrack facilities

in more than one county; and 6) if a facility owner license expires pursuant to K.S.A. 1987 Supp. 74-8815(i), the deposit required by subsection (d) of 74-8815 will be forfeited. Cited herein: K.S.A. 1987 Supp. 74-8801; 74-8810; 74-8813; 74-8814; 74-8815; K.A.R. 112-3-2; 112-3-6; 112-3-9; 112-3-10; 112-3-12; 112-3-13; 112-3-14 (Kan. Reg.)

* * *

Dear Chairman Schroeder:

On behalf of the Kansas racing commission (commission) and at your request, Assistant Attorney General Janet Chubb has requested our opinion regarding the following:

"(1) In accordance with the provisions of the Kansas parimutuel racing act, what amount of nonrefundable application fee(s) should be paid to the Kansas racing commission by:

"(a) A not-for-profit organization applicant (K.S.A. 1987 Supp. 74-8813) that proposes to construct or own, or both, and manage a racetrack facility;

"(b) a fair association or national greyhound association applicant (K.S.A. 1987 Supp. 74-8814) that proposes to construct or own, or both, and manage a racetrack facility; and

"(c) a for profit applicant (K.S.A. 1987 Supp. 74-8815) that proposes to construct or own, or both, and manage a racetrack facility.

"(2) If any entity referred to in paragraph (1) above submits an application for multiple licenses (e.g. organization, facility owner or facility manager application for two or three separate geographic locations), what amount of nonrefundable application fee(s) should be paid to the Kansas racing commission.

"(3) May a facility owner or facility manager applicant propose to construct or own, or both, and/or manage a racetrack facility in more than one county. [Organization applicants are limited to one county by K.S.A. 1987 Supp. 74-8813(c)(5).]

"(4) If a license expires as a result of the activity described in K.S.A. 1987 Supp. 74-8815(i), is the facility owner applicant entitled to a refund of the \$500,000 deposit, and the interest thereon, pursuant to K.S.A. 1987 Supp. 74-8815(d)."

So as to not further complicate the analysis, and since the question has not been raised, our discussion in this opinion is limited to non-dual racetrack facility applications.

K.S.A. 1987 Supp. 74-8813(a) provides in part:

"A nonprofit organization may apply to the commission for an organization license to conduct horse races or an organization license to conduct greyhound races, or both such licenses. In addition, an organization license may authorize the licensee to construct or own a racetrack facility if so provided by the commission. . . . A nonrefundable application fee in the form of a certified check or bank draft shall accompany the application. Except as provided pursuant to K.S.A. 1987 Supp. 74-8814, such fee shall be as follows:

"(1) For an application for an organization license to conduct horse or greyhound races with parimutuel wagering, a fee of \$5,000 for each application; and

"(2) for an application for an organization license to conduct horse races without parimutuel wagering, a fee of \$500 for each application." (Emphasis added.)

"Organization licensee is defined at K.S.A. 1987 Supp. 74-8802(o) as "a nonprofit organization licensed by the commission to conduct races . . . and, if the license so provides, to construct or own a racetrack facility."
(Emphasis added.)

In our opinion, these sections indicate the legislature's intent to allow a nonprofit organization, upon approval of the commission, to construct or own a racetrack facility, as well as conduct horse or greyhound races, without having to apply for a separate license to do so. In other words, an organization licensee may, pursuant to one license, construct and own a racetrack facility and conduct races therein. [See also K.S.A. 1987 Supp. 74-8813(b), (c) (3) and (r) which speak to the construction of a facility by an organization licensee, but do not mention a separate license to construct, known as a "facility owner license," and K.S.A. 1987 Supp. 74-8802(g) which specifically excludes organization licensees owning or constructing a racetrack facility from the definition of "facility owner licensee."]

Further, we do not believe the legislature intended to require organization licensees to obtain a facility manager license in order to manage the races they are licensed to conduct. Several sections of the Kansas parimutuel racing act (act) indicate that an organization licensee must either contract with a separate entity for management services (a "facility manager licensee"), or manage the facility itself without having to obtain a separate license to do so. See K.S.A. 1987 Supp. 74-8802(f), 74-8815(e), 74-8810(d) (2). Sections 112-3-2(b), (d) and 112-3-12 of the commission's rules and regulations also evidence an intent to allow organization licensees to conduct racing, construct, own and manage a racetrack facility all pursuant to one license. An applicant for an organization license need merely respond to the application sections regarding construction and management and be approved by the commission to obtain one license to do all three functions. Therefore, it is our opinion that a nonprofit organization applicant that proposes to construct or own, or both, and manage a racetrack facility need only pay the nonrefundable application fee required by K.S.A. 1987 Supp. 74-8813(a).

K.S.A. 1987 Supp. 74-8814 provides for the licensing of fair associations and the national greyhound association of Abilene. The commission is to establish application fees for such associations within the guidelines of K.S.A. 1987 Supp. 74-8814, but otherwise licensing considerations are the

same as for nonprofit organizations under K.S.A. 1987 Supp. 74-8813. K.S.A. 1987 Supp. 74-8814(c). Thus, we believe that a fair association or national greyhound association applicant that proposes to construct or own, or both, and manage a racetrack facility need also only pay one application fee to perform all three functions.

For profit applicants proposing to construct or own, or both, and manage a racetrack facility are covered by K.S.A. 1987 Supp. 74-8815. While this section does not seem to preclude a for profit applicant from both constructing (and/or owning) and managing a racetrack facility, it in no way indicates that both functions may be performed pursuant to one license. In contrast to the provisions of K.S.A. 1987 Supp. 74-8813 dealing with nonprofit applicants, K.S.A. 1987 Supp. 74-8815 appears to require for profit applicants to obtain two licenses, one to construct or own a facility (a facility owner license), and one to manage a facility (a facility manager license) in order to perform both functions. See also K.A.R. 112-3-3, 112-3-4, 112-3-5 and 112-3-6. (Neither a facility owner or manager licensee may conduct races pursuant to the act, but rather must contract with an organization licensee to conduct the races. Thus, application fees for the function of conducting races is not a consideration in these circumstances.) Since two licenses are required, it is our opinion that two nonrefundable application fees must be paid pursuant to K.S.A. 1987 Supp. 74-8815(c).

K.S.A. 1987 Supp. 74-8813(c)(5) states that an organization applicant may apply to conduct races in only one county. There is no such limitation on applicants for facility owner or facility manager licenses to construct, own or manage racetrack facilities. The question thus arises whether a facility owner or facility manager applicant seeking multiple licenses for separate geographic locations must pay multiple nonrefundable application fees. An applicant seeking a license to construct or own, or both, a racetrack facility must provide information detailing plans for construction of the facility. K.S.A. 1987 Supp. 74-8815(e). Such plans must include location-specific information such as a legal description of the property, record owners of the property, local ordinances regulating zoning, construction and ownership of such a facility, the geographic layout (if new roads or other improvements are needed to access the area, proximity to populated areas, etc.), K.A.R. 112-3-9, and certain demographic information such as climatic conditions in the area and how a facility may affect the area socially, K.A.R. 112-3-13. This information will clearly differ from area to

area. Certain financing and development, K.A.R. 112-3-10, and employee information will also differ. Since multiple application responses must be processed for multiple locations, we believe multiple application fees are required.

Similarly, a facility manager applicant wishing to manage more than one facility must provide information pertaining to each location such as public safety and security information, K.A.R. 112-3-14, contract information, K.A.R. 112-3-6(a)(5), and employee information, K.S.A. 74-8815(f), (g) and K.A.R. 112-3-6(a)(4). Processing multiple application responses, particularly when additional fingerprinting, background checks and additional administrative processing will be required, will lead to added costs to the commission and thus, in our opinion, such multiple applications must be accompanied by multiple application fees.

Your final question concerns the refundability of the deposit required by K.S.A. 1987 Supp. 74-8815(d) when the facility owner license expires pursuant to K.S.A. 1987 Supp. 74-8815(i). We note that the provisions covering non-profit organizations are nearly identical. See K.S.A. 1987 Supp. 74-8813(b) and (r). K.S.A. 1987 Supp. 74-8815(d) provides as follows:

"If an applicant for a facility owner license is proposing to construct a racetrack facility, such applicant, at the time of submitting the application, shall deposit with the commission, in such form as prescribed by rules and regulations of the commission, the sum of (1) \$500,000, if the number of racing days applied for by organization licensee applicants proposing to race at the facility is 150 days or more in a racing season; (2) \$250,000, if such number of racing days applied for is less than 150 days; or (3) a lesser sum established by the commission, if the applicant is the state or a political subdivision of the state. . . .

"If the application is denied by the commission, the deposit, and any interest accrued thereon, shall be refunded to the applicant. If the license is granted by the commission in accordance with the

terms of the application or other terms satisfactory to the applicant, the deposit, and any interest accrued thereon, shall be refunded to the licensee upon completion of the racetrack facility in accordance with the terms of the license. If the license fails to complete the racetrack facility in accordance with the terms of the license, the deposit, and any interest accrued thereon, shall be forfeited by the applicant." (Emphasis added.)

Subsection (i) of 74-8815 states:

"If an applicant for a facility owner license proposes to construct a racetrack facility and the commission determines that such license should be issued to the applicant, the commission shall issue to the applicant a facility owner license conditioned on the submission, by the licensee to the commission, within a period of time prescribed by the commission, of a commitment for financing the construction of the racetrack facility by a financial institution or other source, subject to approval by the commission. If such commitment is not submitted within the period of time originally prescribed by the commission or such additional time as authorized by the commission, the license shall expire at the end of such period." (Emphasis added.)

As indicated by the above-underscored language in K.S.A. 1987 Supp. 74-8815(i), a license issued to a facility owner applicant proposing to construct a racetrack facility may be conditioned on submission to the commission of a commitment for financing. We believe that such a condition becomes a term of the license as contemplated by K.S.A. 1987 Supp. 74-8815(d), and thus if the condition is not met, the racetrack facility will not be completed in accordance with the terms of the license and the deposit will be forfeited by the applicant. This may seem harsh, but we believe it is necessary to encourage applicants to meet the deadlines agreed

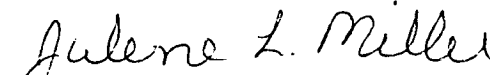
upon and prevent unnecessary delays in the construction of facilities.

In conclusion, it is our opinion that: 1) A nonprofit organization applicant proposing to construct or own, or both, and manage a racetrack facility need only pay the application fee required by K.S.A. 1987 Supp. 74-8813(a) for an organization license; 2) a fair association or national greyhound association applicant proposing to construct or own, or both, and manage a racetrack facility need only pay the application fee established by the racing commission pursuant to K.S.A. 1987 Supp. 74-8814; 3) a for profit applicant proposing to construct or own, or both, and manage a racetrack facility must obtain a facility owner license and a facility manager license and pay an application fee for each as provided in K.S.A. 1987 Supp. 74-8815(c); 4) a facility owner license applicant seeking to construct or own, or both, racetrack facilities in more than one geographic location must pay multiple application fees to cover the costs associated with processing the information required relative to each location; 5) a facility owner or facility manager applicant may propose to construct, own and/or manage racetrack facilities in more than one county; and 6) if a facility owner license expires pursuant to K.S.A. 1987 Supp. 74-8815(i), the deposit required by subsection (d) of 74-8815 will be forfeited.

Very truly yours,



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