



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

September 9, 1988

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88- 131

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

Re: State Boards, Commission and Authorities--  
Parimutuel Racing; Kansas Parimutuel Racing  
Act--Prohibited Acts; Ability of County Fair  
Associations to Wager On or Participate in Horse  
Race Meetings

Synopsis: A criminal statute should not be extended to  
embrace conduct not clearly included within the  
statute's prohibition. K.S.A. 1987 Supp.  
74-8810(d)(3) and (e), criminal provisions, do not  
clearly include a county fair association licensed  
only as an organization licensee within their  
prohibition. Thus, it is our opinion that county  
fair associations, their directors, officers and  
employees are not statutorily prohibited from  
wagering on or participating in horse race meetings  
conducted in this state. Cited herein: K.S.A.  
2-125 et seq.; K.S.A. 1987 Supp. 74-8802;  
74-8804, as amended by L. 1988, ch. 315, §3;  
74-8810; Kan. Const., Bill of Rights, §1; U.S.  
Const., Amend. Fourteenth.

\*

\*

\*

Dear Chairman Schroeder:

You request our opinion as to whether an officer, director, member, or employee of the Greenwood County Fair Association may place a wager on an entry or participate in a race meeting conducted in this state.

The Greenwood County Fair Association is a nonprofit organization licensed by the Kansas racing commission to conduct parimutuel races at Eureka Downs during the calendar year 1988. In other words, Greenwood County Fair Association is an organization licensee as defined by K.S.A. 1987 Supp. 74-8802(o). However, this organization will also perform the functions of a facility manager licensee and a facility owner licensee in that it will own and manage the racetrack facility. This office opined previously that an organization licensee could conceivably perform all three functions without having to obtain three separate licensees. Attorney General Opinion No. 88-64. Consequently, the Greenwood County Fair Association, though owning and managing the racetrack facility as well as conducting the races thereon, holds only an organization license.

K.S.A. 1987 Supp. 74-8810 provides in part:

"(d) It is a class A misdemeanor for any officer, director or member of an organization licensee, other than a county fair association, to:

. . . .

"(3) place a wager on an entry in a horse or greyhound race conducted by an organization licensee.

"(e) It is a class A misdemeanor for any facility owner licensee or facility manager licensee, or any officer, director or employee thereof, to:

"(1) Participate directly or indirectly as an owner, owner-trainer or trainer of a horse or greyhound, or as a jockey of a horse, entered in a race meeting conducted in this state; or

"(2) place a wager on an entry in a horse or greyhound race conducted by an organization licensee."

We note initially that this is a criminal statute. While the rule of strict construction of criminal statutes does not permit or justify disregard of manifest legislative intent appearing from plain and unambiguous language used in the statute [State v. Walden, 208 Kan. 163 (1971)], ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity. U.S. v. O'Brien, 686 F.2d 850 (10th Cir. 1982). A criminal statute should not be extended to embrace conduct not clearly included within the statute's prohibition. State v. Sexton, 232 Kan. 539 (1983).

County fair associations are specifically excluded from the provisions of K.S.A. 1987 Supp. 74-8810(d)(3). Thus, the prohibition enunciated in this subsection is not applicable to the Greenwood County Fair Association, and, according to the rules of construction cited above, cannot be construed as applicable even in an attempt to save the statute from an equal protection challenge.

While less clear, it is our opinion that the Greenwood County Fair Association officers, directors and employees are also excluded from the prohibitions enunciated in K.S.A. 1987 Supp. 74-8810(e). By its terms, subsection (e) applies only to facility owner licensees, facility manager licensees, and officers, directors and employees thereof. "Facility owner licensee" is defined as "a person, partnership, corporation or association, or the State of Kansas or any political subdivision thereof, licensed by the commission to construct or own a racetrack facility but does not mean an organization licensee which owns the racetrack facility in which it conducts horse or greyhound racing." K.S.A. 1987 Supp. 74-8802(g) (emphasis added). Greenwood County Fair Association is an organization licensee which owns the racetrack facility in which it conducts horse racing. "Facility manager licensee" is defined as "a person, partnership, corporation or association licensed by the commission and having a contract with an organization licensee to manage a racetrack facility." K.S.A. 1987 Supp. 74-8802(f) (emphasis added). Greenwood County Fair Association is the organization licensee and need not contract with itself to manage Eureka Downs. Attorney General Opinion No. 88-64. In that it does not meet the statutory definition of a facility owner licensee or a facility manager

licensee, and does not hold such licenses, we cannot conclude that subsection (e) of K.S.A. 1987 Supp. 74-8810, a criminal provision, applies to the Greenwood County Fair Association or its directors, officers and employees, even though the Fair Association performs the functions of a facility owner and facility manager licensee.

Further, we do not believe construing K.S.A. 1987 Supp. 74-8810(d) and (e) in this way constitutes a violation of the equal protection clause of the United States Constitution or section 1 of the Kansas Bill of Rights.

"The Equal Protection Clause generally provides that all persons similarly situated should be treated alike. Edwards v. Valdelz, 789 F.2d 1477, 1482 (10th Cir. 1986). (Citing Pyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). Traditionally, two standards have been used to determine whether state legislation runs afoul of that clause. The first, and by far the most commonly applied, is the rational basis test. Under this test, the court seeks only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. Pyler, 457 U.S. at 216, 102 S.Ct. at 2394.

"The second standard labeled strict scrutiny, is applied when the challenged classification involves a suspect class or impinges upon a fundamental right." Ferguson v. Garmon, 643 F.Supp. 335, 338 (D.Kan. 1986).

The classification here in question does not impinge upon a fundamental right or involve a suspect class, so the rational basis test is applicable. In our opinion, the distinctive characteristics of a nonprofit organization entitled to an organization license, and particularly county fair associations, are sufficient to justify their differential treatment under the provisions of K.S.A. 1987 Supp. 74-8810(d) and (e). County fair associations must be organized and operated pursuant to statute, K.S.A. 2-125 et seq., and thus are regulated to some degree by the local unit of government and the state board of agriculture. Additionally,

it is believed that organization licensees other than county fair associations are more likely to be influenced by the for profit developers with whom they are in business.

Finally, we should note that the statutes would allow the racing commission to promulgate rules and regulations prohibiting county fair associations and their officers, directors and employees from participating as a horse owner, trainer or jockey in horse race meetings. The commission has broad authority to adopt rules and regulations consistent with the parimutuel racing act. K.S.A. 1987 Supp. 74-8804(p), as amended by L. 1988, ch. 315, §3. While the rule of strict construction of criminal statutes precludes the application of K.S.A. 1987 Supp. 74-8810(d) and (e) to county fair associations licensed as organization licensees, we find no clear legislative intent to preclude the commission from applying similar prohibitions through rules and regulations, and invoking the appropriate administrative action upon violation of the regulation. Indeed, legislative history in this regard indicates some confusion as to the scope of K.S.A. 1987 Supp. 74-8810(e) and would thus encourage administrative action.

In conclusion, a criminal statute should not be extended to embrace conduct not clearly included within the statute's prohibition. K.S.A. 1987 Supp. 74-8810(d)(3) and (e), criminal provisions, do not clearly include a county fair association licensed only as an organization licensee within their prohibition. Thus, it is our opinion that county fair associations, their directors, officers and employees are not statutorily prohibited from wagering on or participating in horse race meetings conducted in this state.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Julene L. Miller  
Deputy Attorney General