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August 25, 1989

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ATTORNEY GENERAL OPINION NO. 89- 108

Dr. Harry Anthony
Chairman
Kansas Racing Commission
3400 Van Buren
Topeka, Kansas 66611

Re: State Boards, Commissions and Authorities--
Parimutuel Racing--Effect of Surrender of Facility
Owner/Manager License

Synopsis: The application deposit required by K.S.A. 1988
Supp. 74-8815(d) is forfeited upon voluntary
surrender of a facility owner license. An
organization license is not affected by voluntary
surrender of the licenses of the facility owner and
facility manager with whom it has contracted. The
organization license remains intact unless and
until the organization licensee violates a
provision of the racing act, a regulation of the
commission, or a term of the license. Cited
herein: K.S.A. 1988 Supp. 74-8803; 74-8813;
74-8815; K.A.R. 112-3-3; 112-3-5; 112-3-18.

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Dear Dr. Anthony:

On behalf of the Kansas Racing Commission and at your
direction, Assistant Attorney General Warren Wiebe has
requested our opinion regarding the effects of surrender of a
facility owner's or facility manager's license. Specifically
your questions are these:

- "(1) What is the status of the application deposit required by K.S.A. 1988 Supp. 74-8815(d) if the facility owner licensee voluntarily returns the conditional facility owner license to the commission? May the deposit be refunded, and if so, under what circumstances and statutory procedure; and
- "(2) What is the status of the organization licensee's license, K.S.A. 1988 Supp. 74-8813, when the facility owner licensee and facility manager licensee, contracted to construct and operate a racetrack, voluntarily return the conditional facility owner and conditional facility manager licenses to the commission."

Your first question requires a consideration of K.S.A. 1988 Supp. 74-8815(d) which specifies the conditions under which an application deposit may be returned:

"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. Only one such deposit shall be required for a dual racetrack facility. The executive director shall promptly remit any deposit received pursuant to this subsection to the state treasurer. The state treasurer shall deposit the entire amount in the state treasury and credit it to the racing applicant deposit fund created by K.S.A. 1987 Supp. 74-8828 and amendments thereto. 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 licensee 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.)

Mindful that the racing commission is a creature of statute, K.S.A. 1988 Supp. 74-8803, and thus has only such powers as expressly conferred by or necessarily implied from the relevant statutes, Olathe Community Hospital v. Kansas Corporation Comm'n, 232 Kan. 161, 167 (1982), it is our opinion that the commission does not have the authority to refund the applicant deposit upon voluntary surrender of a facility owner license prior to the completion of the racetrack facility. We believe the language of the statute expresses the legislative intent to insure applicants' earnestness to provide a racetrack facility meeting the commission's standards, and to compensate for any unauthorized delay in providing that facility. If the racetrack facility is not completed within the time agreed upon, for whatever reason, the deposit is forfeited. However, several arguments have been presented in favor of refunding the deposit which are deserving of comment.

A deposit is not forfeited pursuant to K.S.A. 1988 Supp. 74-8815(d) unless the licensee has "failed" to complete a racetrack facility in accordance with the terms of the license. It is argued that there has been no "failure" on the part of the facility owner licensee if the commission requests a voluntary surrender of the license. However, the commission generally should not be in a position of having to request surrender of a license if problems with the license do not exist. It is our understanding that, in the specific situation before us, the licensee's request for approval of a transfer of ownership triggered the commission's concern with proceeding under the current license. To the extent the facility owner licensee does not carry through its original proposal (which is incorporated into the license) or any approved amendment to that proposal, it has "fail[ed] to

complete the racetrack facility in accordance with the terms of the license." [The commission is under no obligation to approve a proposal to convey control of a facility owner license. See K.S.A. 1988 Supp. 74-8815(f)(6); K.A.R. 112-3-18. We note, however, that the commission should take care not to arbitrarily deny such a proposal.]

Similarly, it is argued that the provisions of K.S.A. 1988 Supp. 74-8815(d) do not preclude the return of an applicant deposit any time before construction of a racetrack facility is commenced. The theory is that use of the language "fail to complete" necessarily implies that the statute contemplates only those situations where construction is under way. We disagree. The statute requires the deposit at the time applications are submitted, not at the time construction is commenced. Thus, we believe a failure to commence construction is a failure to complete the racetrack facility in accordance with the terms of the license, triggering forfeiture of the deposit.

It is argued that if the commission does not accept the facility owner licensee's proposal for financing, K.S.A. 1988 Supp. 74-8815(j) operates to void the license ab initio and thus the application has effectively been denied. The language of subsection (j), however, signifies that a license was granted, but it expires if the condition contained therein is not met. Providing for expiration of the license in lieu of revocation procedures (compare K.S.A. 1988 Supp. 74-8815(k)(2)) indicates a legislative intent to avoid stigmatizing licensees with a revocation merely for failure to obtain financing. But, in our opinion, it does not evidence an intent to allow refund of the applicant deposit. In Attorney General Opinion No. 88-120 we concluded that "the final agency action which denies a license occurs when a competing applicant is granted a license. No distinction is made between a conditional license and any other license." It follows from this that even though the license was conditioned on the timely submission of an acceptable financial commitment, the license was indeed granted regardless whether the condition was fulfilled.

As a practical matter, all regulatory licenses are "conditional" in that licensees must continue to meet certain standards and obligations in order for the license to continue. 31 Am.Jur.2d Licenses and Permits §45 (1970). It would not be reasonable to conclude that the license of a licensee who fails to meet the conditions of licensure is necessarily void ab initio. In any event, we have opined

previously that "if a facility owner license expires pursuant to K.S.A. 1988 Supp. 74-8815[(j)], the deposit required by subsection (d) of 74-8815 will be forfeited." Attorney General Opinion No. 88-64 [subsequent to the issuance of this opinion, subsection (i) of K.S.A. 74-8815 was amended to be subsection (j)].

Finally, it is argued that K.S.A. 1988 Supp. 74-8815(d) and (j) should be interpreted as operating similar to a typical residential house sale contract:

"Nearly all residential house sale contracts have a condition subsequent to the contract requiring that the buyer produce a financial commitment within a specified time frame. At the execution of the contract, a security deposit is placed with an escrow agent by the proposed purchaser. In the event that the purchaser is unable to satisfy the financial conditions subsequent, the contract provides that it is void *ab initio* and the security deposit or escrow deposit is returned to the purchaser in full."

Contrary to a typical residential house sale contract, there is no provision in the license granted the facility owner for return of the deposit upon failure to obtain financing. Neither, in our opinion, does the statute authorize such a refund. (We have stated previously our reasons for not deeming the license void *ab initio* upon its expiration for failure of the licensee to timely submit an acceptable financial commitment.) We believe the applicant deposit is more analogous to a combination bid bond/performance bond. A bid bond is a "[t]ype of bond required in public construction projects which must be filed at the time of the bid and which protects the public agency in the event that the bidder refuses to enter into a contract after the award to him. . . ." Black's Law Dictionary 147 (5th Ed. 1987). A performance bond is generally defined as a "[t]ype of contract bond which protects against loss due to the inability or refusal of a contractor to perform his contract. . . ." *Id.*, at 163. The application deposit serves as compensation for lost time in the event a racetrack facility is not in place by a time certain.

In summary, the application deposit required by K.S.A. 1988 Supp. 74-8815(d) is forfeited if the facility owner licensee voluntarily surrenders the license to the commission.

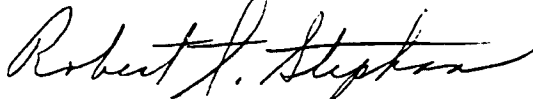
Your second question concerns the status of an organization licensee's license upon surrender of the licenses of the facility owner and facility manager who have contracted with the organization licensee to construct and operate the racetrack facility. We believe that the organization license is independent of the facility owner and facility manager licenses and remains intact regardless whether the other two licenses are surrendered.

K.S.A. 1988 Supp. 74-8815(e) provides that "[a] facility manager license shall be granted only to an applicant that has a facility management contract with an organization licensed pursuant to K.S.A. 1987 Supp. 74-8813 and amendments thereto." Facility owner applicants are not specifically required to have a contract with an organization licensee to be eligible for licensure, but various provisions of the racing act appear to contemplate such an arrangement. See K.S.A. 1988 Supp. 74-8815(f)(4); 74-8813(n). Additionally, the commission, through regulations, has indicated a desire to have the three license applications submitted as a package. K.A.R. 112-3-3; 112-3-5. Beyond the initial application process, however, the statutes and regulations do not tie the maintenance of one license to that of the others. For instance, if the facility manager license is revoked pursuant to K.S.A. 1988 Supp. 74-8815(i), nothing requires that the organization license also be revoked. An organization license may only be revoked for violation of applicable statutory or regulatory provisions, K.S.A. 1988 Supp. 74-8813(j), and pursuant to the due process proceedings prescribed in K.S.A. 1988 Supp. 74-8813(k) & (j). See Rydd v. State Board of Health, 202 Kan. 721, 726 (1969). Surrender of a facility owner or facility manager license is not listed as a ground for revocation under these provisions.

Further, we believe the intent of the legislation, K.S.A. 74-8801 et seq., was to have an organization licensee independent of the for-profit facility manager and facility owner licensees, where the dealings would be at arm's length. See K.S.A. 1988 Supp. 74-8813(n) ("The commission shall reject any such contract or agreement [of an organization licensee] which . . . in the case of a contract or agreement with a facility owner licensee or a facility manager licensee, would not protect the organization licensee from incurring losses due to contractual liability); K.S.A. 1988 Supp.

74-8813(p). For these reasons, we conclude that the organization license is not effected by the surrender of the facility owner's and facility manager's licenses. The organization license remains intact unless and until the organization licensee violates a provision of the act, a regulation of the commission, or a term of its license.

Very truly yours,



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