HOLLYWOOD Casino AT KANSAS SPEEDWAY®

OPPOSITION TESTIMONY

House Bill 2545
An Act concerning gaming; relating to the Kansas Expanded Lottery Act

House Federal and State Affairs
February 13, 2018

Good morning Chairman Barker and Members of the House Federal and State Affairs Committee:

Kansas Entertainment, LLC appreciates the opportunity to present testimony to the Committee in opposition to HB 2545 and share with you what we see as potential ramifications impact of this legislation on Kansas Entertainment and the State of Kansas.

By way of information, Kansas Entertainment, LLC is a joint-venture partnership of Penn Hollywood Kansas, Inc., and Kansas Speedway Development Corporation, and was selected by the State of Kansas in 2009 to develop a destination casino for the Northeast Kansas Gaming Zone.

Once again, Kansas Entertainment finds itself forced to appear before a legislative committee and inform the Legislature on the risks of making substantive amendments to SB 66, the Kansas Expanded Lottery Act passed in 2007, as you will not hear such comments from the proponents of this legislation.

This year we will dispense with the history lesson. Most of you are familiar with the passage of KELA in 2007 due to the fact we have had legislation sponsored by Phil Ruffin every year since its enactment. Suffice to say, the State authorized up to four gaming zones for state-owned and operated casinos selected through a competitive process and provided the opportunity for "slots-at-tracks" at the three existing pari-mutuel tracks. To be eligible for a gaming facility in the approved zones, all that was required was an affirmative vote of the people, which as we know, failed in Sedgwick County.

Page one of HB 2545, on lines 17-20 makes an interesting statement which deserves some scrutiny:

WHEREAS, There are positive economic and agribusiness benefits derived from revitalizing our exiting racetracks, which have been idle since the passage of 2007 Senate Bill 66 due to the inability to make a sustainable profit, including farms and breeding operations; and (emphasis added)

Inability to make a sustainable profit? How do we know that? Mr. Ruffin shuttered his racetracks and convinced the owner of The Woodlands to do the same before even opening their doors with slot machines allowed under SB 66 that they were involved with writing. Mr. Ruffin later purchased The Woodlands knowing full well what Kansas law allowed and has still refused to open the facility for pari-mutuel racing.

During the 2017 legislative session, the casino interests were challenged by legislators to meet with Mr. Ruffin's lobbying team and representatives of the pari-mutuel interests and see of a compromise could be reached.

A meeting was scheduled for September when the chair of House Appropriations could be available to participate, and all participants were confirmed. The date was then changed to accommodate participation by Mr. Phil Ruffin. All participants reconfirmed their availability. The meeting was then canceled altogether. We inquired about follow-up dates, but nothing ever materialized.

During the interim, we have had discussions with a representative of Mr. Ruffin and were told, "Phil may just open the tracks under current law and see what happens."

Kansas Entertainment encouraged him to do just that, as we have for the past nine years. Phil Ruffin made a commitment to the citizens of Kansas and the pari-mutuel industry over the years and has failed to live up to those promises. The Kansas Legislature should suggest to Mr. Ruffin he should give the Kansas law he helped write a try before asking for changes that materially increase his revenues at the expense of the State, especially at a time when the State needs the money more than a billionaire residing in Las Vegas.

Kansas Entertainment's 50/50 partner is Penn National Gaming, the nation's leading mid-market casino owner/operator with interests in 29 facilities in 17 jurisdictions, including pari-mutuel tracks with slots. Penn National Gaming successfully operates pari-mutuel tracks in several jurisdictions with higher tax rates that those contained in SB 66.

Under SB 66, the track owner receives 25% of the revenue and an additional 15% for expenses. The state's share is 40% with the remainder divided by the breed groups, city and county share, problem gaming and horse racing support for fairs. These percentages were negotiated and agreed-upon by Mr. Ruffin.

Two examples worth considering:

In West Virginia at Hollywood Casino at Charles Town Races, Penn successfully operates a pari-mutuel facility with slots where the state imposes an effective tax rate of 57.9%. Penn has made an approximate $450 million investment in that property. Penn receives 41.5% share of the revenues.

In Plainville, Massachusetts at Plainridge Park Casino, Penn successfully operates a pari-mutuel facility with slots where the state imposes an effective tax rate of 53%. Penn has made an approximate $250 million investment in that property. Penn receives 45.7% of the revenues.

In both of these states, expenses for operating a pari-mutuel track are significantly higher than in Kansas due to costs of labor, real property, taxes and related expenses, plus larger distributions of revenue to host jurisdictions, the horse racing industry, and for regulatory oversight.

Phil Ruffin has no minimum investment requirement under KELA and has yet to prove through independent study or better yet, a history of actual operation in Kansas that he cannot make slots-at-tracks work financially.

Financial Ramifications of Passing HB 2545:

Legislators who have heard our testimony before understand that both KELA and the contracts the State and casino operators entered into have very rigid language intended to prohibit the expansion of gaming beyond the four gaming zones. A 2016 Kansas Attorney General Opinion (*AG Opinion 2016-6*) clearly indicated passage of an expanded gaming bill could lead to a financial liability for the State, which if found in breach of contract would be required to return up to $61 million in privilege fees to the casinos along with 10% interest from date of payment. We have not seen a fiscal note for this bill. However, the potential fiscal note for last year's legislation was approximately $111 million, so it is reasonable to add another eleven million dollars to that number for HB 2545.

In the bill, Mr. Ruffin's creative attorneys have attempted to limit the casino operator's rights to appeal and potential damages, abrogate contractual rights and otherwise predetermine judgment before a case is filed. Kansas Entertainment does not believe Kansas courts will find such restrictions constitutional. Another interesting element of the legislation is Mr. Ruffin promises to cover any losses the State might incur (as provided for under his bill, not all potential costs), yet he also pays himself back for such expenses out of the State's share. Win/Win proposition for Mr. Ruffin… although his legislation fails to take into account all other causes of action a casino might explore (breach of contract, loss of future earnings, etc.). Perhaps the State should take notice of how well Mr. Ruffin has lived up to promises he made to the pari-mutuel industry in our state before considering this deal.

In closing, Kansas Entertainment asks the Committee to again reject this legislation as harmful to existing businesses licensed under Kansas law who have kept their promises to the State of Kansas. It is time for Mr. Ruffin to appear before the Legislature personally and not through surrogates and explain why a billionaire cannot keep the promises he made to the State and pari-mutuel industry and at least give the law he helped write a chance.

Thank you for your consideration of our comments.

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Final Note.

Promotional media by the proponents of this legislation have suggested a 2002-argued U.S. Supreme Court case and subsequent decision on remand by the Iowa Supreme Court that under equal protection provisions of the U.S. Constitution, the same or similar taxpayers cannot be assessed at unequal rates (*Fitzgerald v. Racing Association of Central Iowa*, 539 US 103 (2003)). Racetrack owners charged that their 36% tax rate should be equal to the riverboat tax rate of 20%. The U.S. Supreme Court held there was no equal protection violation. Subsequently the Iowa Supreme Court did find for the racetracks on the theory that the differences between the two taxpayers was "arbitrary or irrational."

We do not believe the same could be said for the different tax provisions of SB 66, which contains a well-defined basis for a different tax structure, including competitive nature of the license process, emphasis on destination attractions and minimum investments of the successful bidder.

In *Fitzgerald v. Racing Association of Central Iowa*, Justice Breyer's opinion included the following reference to a previous U.S. Supreme Court decision:

Where that is so, the law is subject to rational-basis review:

"[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Nordlinger v. Hahn, 505 U. S. 1, 11-12 (1992) (citations omitted).