

#### TEXAS RACING COMMISSION

P. O. BOX 12080 AUSTIN, TEXAS 78711-2080 (512) 833-6699 FAX (512) 833-6907 RECEIVED
AUG 17 2004
OPINION COMMITTEE

August 17, 2004

RQ-0258-GA

The Honorable Greg Abbott
Attorney General of Texas
Attn: Nancy Fuller, Chair, Opinions Committee
P.O. Box 12548
Austin, TX 78711-2548

FILE# ML-43879-04 I.D.# 043879

Re: Request for Attorney General Opinion regarding the Application of Texas Racing Act, Tex. Rev. Civ. Stat. Ann. art. 179e, Article 16, §§16.01 and 16.12.

#### Dear General Abbott:

The Texas Racing Commission ("Commission") requests your formal opinion on an unusual situation that has been presented to the Commission with regard to applications for racetrack licenses under the Texas Racing Act.

Under the Texas Racing Act, the Commission is the state agency charged by the Legislature to regulate pari-mutuel racing in the state of Texas, and specifically to grant licenses for racetracks to qualified individuals or organizations. Currently, the Commission has two applicants for a Class II horse racetrack license in Webb County before it. In addition, The Commission voted to open an application period, but no applications have been received, for a Class II horse racetrack license in Hidalgo County.

#### A. Issues

In November 2000, Webb County conducted a local option election under the Texas Racing Act, Article 16. The voters approved two pari-mutuel propositions. Webb County confirmed the passage of these propositions to the Secretary of State. However, a review of the current records of Webb County and the Secretary of State has not produced any more formal certification of the November 2000 election results than Webb County's submission of the vote totals, which we presume were received by the Secretary of State within the statutorily prescribed deadlines under the Texas Racing Act.

In addition, at the Commission meeting on August 12, 2004, a request to open an application period for a Class II racetrack in Hidalgo County was granted with the application period to begin April 1, 2005. However, the certification of the election results was not filed within

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the statutorily prescribed deadlines under the Texas Racing Act. No application will be accepted by the Commission for Hidalgo County before April 1, 2005.

The Commission does not know whether the Webb County's submission of the election results to the Secretary of State would satisfy Section 16.01(a) of the Texas Racing Act, assuming there was no further evidence of certification. If it did not, then there is the question of whether the lack of proof of formal certification in November 2000 precludes the Commission from going forward with the current applications. If the answer to that question is "yes," then there is the question of whether the Commission may re-initiate the application process based on a more formal certification that occurred more than 10 days after the canvass of returns as provided in Section 16.12(a) of the Texas Racing Act. Is this a mandatory provision or merely directory in nature? As this issue has never previously been addressed by the Commission, there is no established administrative construction of Sections 16.01(a) and 16.12(a) of the Texas Racing Act. Therefore, the Commission is requesting an opinion from the Office of the Attorney General regarding these two provisions of the Texas Racing Act.

Specifically, is the Commission prohibited from granting a license for a racetrack in a county which passed the local option election before the license application was filed if the only record of timely election results certification to the Secretary of State that can now be found is the County's submission of the election results for the two propositions in the form submitted by Webb County? Secondly, may the Commission initiate a license application process for a county following a formal certification that occurs more than 10 days after the canvass of returns?

#### B. The Controlling Statute

Under Section 16.12 of the Texas Racing Act, if a majority of the votes cast in the election are for the legalization of pari-mutuel wagering on horse races or greyhound races, or for the authorization of pari-mutuel wagering on simulcast races in the county, the commissioners court shall certify that fact to the Secretary of State not later than the 10<sup>th</sup> day after the date of the canvass of the returns. Section 16.12(a) of the Texas Racing Act, Art. 179e, Tex. Rev. Civ. Stat. Ann.

The Commission shall not issue a racetrack license or accept an application for a license for a racetrack to be located in a county until the commissioners court has certified to the Secretary of State that the qualified voters of the county have approved the legalization of pari-mutuel wagering on horse races or greyhound races in that county at an election held under Article 16 of the Texas Racing Act. Section 16.01(a) of the Texas Racing Act, Art. 179e, Tex. Rev. Civ. Stat. Ann.

#### C. Facts

In the November 2000 election Webb County proposed and passed two propositions regarding the approval of legalized pari-mutuel wagering in Webb County. Attached is a copy of the election ballot as it appeared to voters in the November 2000 election. (Exhibit A) Proposition 1 passed "Legalizing pari-mutuel wagering on horse races in Webb County."

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Proposition 2 passed "Authorizing pari-mutuel wagering on simulcast races in Webb County." Attached is a copy of the precinct by precinct election results, as indicated as received by the Secretary of State from Webb County. (Exhibit B)

Because the precinct by precinct results were not date stamped by the Secretary of State's office, the Commission presumes that the precinct by precinct results were sent in to the Secretary of the State immediately following the November 2000 presidential election.

The language for pari-mutuel election propositions is statutorily mandated. Sec. 16.11(b) of the Texas Racing Act, Art. 179e, Tex. Rev. Civ. Stat. Ann. Therefore, there is no question that the votes "for" Propositions 1 and 2 on the precinct by precinct election results were for the legalization of pari-mutuel wagering in Webb County. The Commissioners Court canvassed the election results on November 14, 2000. (Exhibit C) The official election results were then filed in the county's election register.

The Commission was aware at the time the license applications were filed that Webb County had passed the required propositions legalizing pari-mutuel wagering in the county. In June of 2004, after the Commission had accepted the license applications and had begun an inquiry regarding whether "certification" had occurred, the Webb County Interim Elections Administrator wrote a letter and signed a sworn affidavit seeking to "certify" the election results from November of 2000. (Exhibit D)

With respect to Hidalgo County, the County certified the election results with the Secretary of State on August 12, 2004. (Exhibit E) The County had passed the statutorily required local option referendums in 1987. No evidence has been located that certification of the election results was filed with the Secretary of State's office within the statutorily prescribed deadlines under the Texas Racing Act.

#### D. Considerations

Under the Texas Racing Act, no specific language is set out for a county to use in certifying to the Secretary of State that the legalization of pari-mutuel wagering has been approved. In this specific case, Webb County unequivocally confirmed to the Secretary of State that the propositions authorizing pari-mutuel wagering had passed. No authority was found that any particular language is required.

Due to the lack of any statutory guidance regarding the form of "certification of election results," the county's filing of precinct returns can easily be seen as substantial compliance with the terms of Se. 16.12(a). Further, because the November 2000 election results filed by the county included the results of contested races, a presumption that the results were filed very shortly after the election is logical.

Certification of election results in the contested election statute was found to be merely directory not a mandatory provision. *Beeler v. Loock*, 135 S.W.2d 644, 647 (Tex. Civ. App.—Galveston 1939, writ dism'd). Another court also found that issuance of an election certification is a ministerial duty and a mere matter of form. *Orth v. Benavides*, 125 S.W.2d 1081 (Tex. Civ. App.—San Antonio 1939, writ dism'd).

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The purpose of Sections 16.01 and 16.12 of the Texas Racing Act is to require confirmation that a vote to authorize pari-mutuel wagering actually occurred prior to the Commission beginning the licensing process. There is no question that an election occurred and the voters of Webb County voted to legalize pari-mutuel wagering in their county prior to the Commission beginning its licensing process.

Clearly, Hidalgo County has certified the election results to the Secretary of State's office prior to the Commission accepting a license application, and thus are in full compliance with Section 16.01 of the Texas Racing Act. The only question with regards to Hidalgo County is whether Section 16.12 of the Texas Racing Act is mandatory or merely directory in nature.

The Texas Racing Commission respectfully requests clarification of the Texas Racing Act in order to determine if the Commission has jurisdiction over the pending license applications, and the jurisdiction to accept any applications for a racetrack license in Hidalgo County. Due to the pending nature of the license applications the Commission would request an expedited opinion.

Thank you for your attention to this request. If you or your staff require any additional information, please do not hesitate to contact me or my executive staff.

Very truly yours.

R. Dyke Rogers Chairman of the

Texas Racing Commission

(512) 833-6699

Enclosures

cc: Ann McGeehan, Elections Division, Secretary of State

Oscar Villarreal, Interim Webb County Elections Administrator

Rex VanMiddlesworth, Andrews & Kurth Jamie McNally, Clark, Thomas & Winters

Bill Moltz, Jenkins & Gilchrist

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The State of Texas

Elections Division P.O. Box 12060 Austin, Texas 78711-2060 www.sos.state.tx.us



Phone: 512-463-5650 Fax: 512-475-2811 TTY: 7-1-1 (800) 252-VOTE (8683)

May 27, 2004

Ms. Nicole Galwardi General Counsel Texas Racing Commission P.O. Box 12080 Austin, Texas 78711-2080

VIA FACSIMILE 512.833.6907

Dear Ms. Galwardi:

This is in response to your recent inquiry concerning whether Webb County filed a certification of election results of a November 7, 2000 countywide election on two pari-mutuel wagering propositions pursuant to Section 16.12 of the Texas Racing Act (Article 179e).

We have searched our local option election records and have found no specific certification pursuant to the Texas Racing Act. However, Webb County did submit precinct by precinct election returns for the November 7, 2000 general election to this office pursuant to Section 67.017 of the Texas Election Code. The precinct election returns clearly reflect that the voters of Webb County passed two pari-mutuel wagering propositions on November 7, 2000.

I hope you find this information helpful. Please do not hesitate to contact me if this office can be of further assistance.

Sincerely,

Ann McGeehan Director of Elections

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#### NOVEMBER 7, 2000 - GENERAL ELECTION

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Number of Volers who Voted:	32,085
Percent of Volers who Voted:	36.81%

Declared Write-In Candidates
for President / Vice President

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#### NOVEMBER 7, 2000 - GENERAL ELECTION

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# NOVEMBER 7, 2000 - GENERAL ELECTION

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#### CANVASS OF GENERAL ELECTION

I, Mercurio Martinez, County Judge, of Webb County, Texas met with the Commissioners Court sitting as the canvassing board to canvass the General Election of November 7, 2000, on November 14, 2000, at Laredo, Webb County, Texas.

I certify that the figures on the tally sheets (E.R.S. Report) correspond with the figures on the returns in addition to any overseas ballots accepted and tallied under Section 86.007 (d) (3) (A).

Witness my hand this \_\_\_\_\_ 14th \_\_\_ day of \_\_\_\_ November \_\_\_\_, 2000.

Mercurio Martinez, Jr.

County Judge



The State of Texas \{ County of Webb

#### Sworn Affidavit

I. Oscar Villarreal, Interim Elections Administrator, do solemnly swear that the foregoing statement is true and accurate:

In November 2000, I was employed as the Chief Deputy Administrator in the Elections Office by the County of Webb. The Webb County Commissioners Court had ordered a local option election to include two propositions on the November 7, 2000 General Election ballot. These propositions read and the votes cast were as follows:

Prop. #1: "Legalizing Pari-Mutuel Wagering on horse races in Webb County."

18,763

Against:

8,889

Prop. #2: "Authorizing Pari-Mutuel Wagering on Simulcast Races in Webb County."

For:

17,502

Against:

9,185

The voters of Webb County passed both propositions by an overwhelming majority.

The Commissioners Court canvassed the election results, which included these two propositions, on November 14, 2000. The "official" election results were then included and filed in the county's election register.

Villarrea

The State of Texas \{

County of Webb

Before mc, the undersigned authority, on this day personally appeared Oscar Villarreal known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed. Given under my hand and scal of office this 28th day of June. 2004.

Ana Escobedo, Notary Public

in and for the State of Texas

#### Certification of November 3, 1987 Election, Hidalgo County, Texas

I, Juan D. Salinas, III., County Clerk of Hidalgo County, Texas, do hereby certify the returns of the election held on November 3, 1987 as shown on the attached official canvass statement are true and correct as certified by the Hidalgo County Commissioners Court on November 9, 1987.

Signature

County

Hugust 12, Roof

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this

 $12^{1}$  day of \_

, 2004, to which witness my hand and

official seal.

LY T. NGUYEN
Notary Public, State of Texas
My Commission Expires
JULY 19, 2006

Notary Public, State of Texas

Printed Name: LY NG-URA

Commission expires: 7-19-06

ELECTIONS DESIGNOM

2004 AUG 13 AM 8:35

RECEIVED





#### OFFICE OF VILLIAM (BILLY) LEO COUNTY CLERK HIDALGO COUNTY

TO:

J. Edgar Ruiz

County Judge

FROM:

William R. Leo W

County: Clerk

DATE:

November 4, 1987

RE:

Canvass Election Returns

I am hereby requesting that the following item be placed on the Commissioners' Court Agenda for Monday, November 9, 1987.

> CANVASS ELECTION RETURNS FOR THE CONSTITUTIONAL AMENDMENT ELECTION

If you may have any questions, please do not hesitate in contacting me.

WRL; cw

DATE

A true copy I certify

County Clerk Hidatgo County, texas

PAGE TO THE THE TOTAL TEXAS 78540

PUNAS III

.go County, Texas

County C

## EXHIBIT B

TOTAL VOTES CAST 17	.905	
Chusta Perinal Copp.		
- Mecil	HIDALGO	County

roposition Humber 1 Surety of grain	warehouse fund
For	8486
Against	6660
reposition Number 2 Rural fire preve	ention districts
For	7405
Against	7820
Proposition Number 3 Limit school ta	x increases on homestead
For	12,311
Agninst	3460
Proposition Number 4 Encourage econo	mic development
For	8048
Against	6943
Proposition Number 5 Aiding turnpike	es, toll road, etc. by bonds
For	6568
Against	7877
Proposition Number 6 Development of	Texas products and businesses
For	7436
For Against	7508
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Against	7508
Against Proposition Number 7 Bonds to finance	
Proposition Number 7 Bonds to finance for Against  France Against B Bonds-projects mental facility	7508  ce local public facilities
Against  Proposition Number 7 Bonds to finance for Against  From Against	7508  ce local public facilities  5800  7953  corrections institutions,  ies  9710

# vol 693<sub>Page</sub> 585

# EXHIBIT B 4

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	For	•	•		9111
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	For	•			11.302
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	Against				7193
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	Against			• • •	6948
	For				7216
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	Against			4	7438
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# VOL 093PAGE 586

## EXHIBIT B

Proposition Number 17 Defin	ing governmental and proprietary functions
For ·	7239
Against :	5831
Proposition Number 18 Created at the composition of	tion, operation, financing of jail ricts
for	6772
Against	6185
Proposition Number 19 Super faci	erconducting super collider research
For	6044
Against	6992
Frapoultion Number 20 Tax equ:	relief for certain offshore drilling ipment
For	6213
Against	6099
Proposition Number 21 Inc	lude speaker or appointed in membership of ncy
For	5789
Ngainat	7977
Proposition Number 22 Lin vac	niting the authority of a governor to fill ancies
for	7241
Against	6027
Proposition Number 23 Ion bot	suance of an additional \$400 million of wate
For	7950
Against	5921
Proposition Number 24 Co	unty to perform work without compensation
For	6248
DATE	A true copy I certify  A true Copy I certify  JUAN D. SALINAS III
The Sales of the Control of the Cont	County Clerk, Fidalgo County, lexas

## EXHIBIT B

VOL 093PAGE 587

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