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December 2, 2003

Honorable Peggy Pendleton
Honorable Carolyn Gilman
The Maine Senate
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Augusta, ME 04333-0003

Honorable David Lemoine
Honorable Christopher O'Neil
Honorable Thomas Kane
Honorable Ronald Usher
Maine House of Representatives
2 State House Station
Augusta, ME 04333-0002

RE: Initiated legislation regarding licensing and operation of slot machines at commercial harness racing tracks

Dear Senators Pendleton and Gilman, and Representatives Lemoine, O'Neil, Kane, and Usher:

You have asked a number of questions concerning the initiated legislation that authorizes the licensing and operation of slot machines at certain commercial harness racing tracks in Maine (hereafter "racinos"[1]). Your questions have arisen as various municipalities consider racino proposals. You have indicated that these issues are of interest to you as you consider the relationship between state and local regulation as well as the need for further legislation. Because these issues are time sensitive, we are offering you an informal response rather than a more detailed formal opinion.

1. **Does the initiated legislation preempt local regulation of racino activities, and if not, to what extent can municipalities regulate?**

Answer: The initiated legislation does not contain any provision that expressly limits the authority of a municipality, nor does it use language that might be read as intending to limit the applicability of existing state or local laws. We believe that it is reasonably clear that general municipal regulation in traditional areas such as land use and law enforcement would apply to a

[1] While the term "racino" may be used to refer generally to facilities conducting both horse racing and gambling activities not limited to the use of slot machines, in this letter the meaning of the word racino is limited to a facility housing both a commercial harness racing track and a slot machine operation, as authorized by the initiated legislation which was approved by Maine voters on November 4, 2003.

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racino. The more complex question is whether state regulation of slot machines as established in the initiated legislation preempts local regulation under existing legal principles.

The Legislature has set out the test to be used to determine preemption of municipal authority by state law. "The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law." 30-A M.R.S.A. § 3001(3). The Legislature has also made clear that there is a presumption that a municipal ordinance is a valid exercise of the municipality's home rule authority, and that the laws governing home rule authority are to be liberally construed against preemption. 30-A M.R.S.A. § 3001(1) & (2).

The Maine Law Court has also addressed this issue. "[M]unicipal action will be viewed as preempted only where application of the municipal ordinance prevents the efficient accomplishment of a defined state purpose." *Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257; *see also* Report of the Joint Standing Committee on Local and County Government on the Revision of Title 30 at 11 (Dec. 1986). "A municipal ordinance will be preempted only when state law is interpreted to 'create a comprehensive and exclusive regulatory scheme' inconsistent with the local action." *Sawyer Envtl. Recovery Facilities, supra.* In the *Sawyer* case, for example, the Court found municipal ordinances relating to waste dumps to be preempted because a specific statutory provision stated that municipalities could not impose stricter standards than those contained in state law.

Thus, state preemption of a municipal ordinance can occur in either of two ways: (1) the ordinance conflicts with a specific state law; or (2) the scope of the state law regulation is such that it demonstrates legislative intent to occupy the field to the exclusion of local regulation. The initiated legislation contains no provision with an expressly preemptive effect like that involved in the *Sawyer* case. Therefore, we are left with the question of whether the scope of the initiated legislation demonstrates an intent to preempt the field of racino regulation. While the Legislature certainly has the authority to establish a comprehensive system of state law regulation so as to preempt local regulation of gambling activities at a racino, we do not believe that the initiated legislation creates such a comprehensive regulatory system.

Pursuant to the initiated legislation, a person may not operate or distribute slot machines without a license from the Maine Harness Racing Commission, which may "[r]egulate, supervise and exercise general control over the ownership, operation and distribution of slot machines." 8 M.R.S.A. §§ 902 & 904(1)(A). This general delegation of authority, on its face, does not appear to prevent a municipality from otherwise exercising police power pursuant to its home rule jurisdiction. The Commission may "[a]pprove or disapprove terms and conditions of uniform location agreements," and may adopt rules "to prevent undesirable conduct relating to the ownership, distribution and operation of slot machines." 8 M.R.S.A. §§ 904(1)(I) & (2)(B). The rulemaking authority refers to a list of topics that are not intended to be exclusive, covering, *inter alia,* the "presence of a slot machine in or at premises that may be unsafe due to fire hazard or other conditions," but the Commission's rulemaking authority is not limited to the subjects listed. 8 M.R.S.A. § 904(2)(B)(2).

These references do not, in our view, present the sort of state "comprehensive and exclusive regulatory scheme" found by the Court in *Sawyer* to preempt a municipality from exercising its police powers. Nor would the exercise by a municipality of its police powers over slot machines, to the extent a municipality might regulate slot machine activities within its borders more stringently than the State, appear to frustrate the purposes of the initiated legislation. Indeed, the provision of the initiated legislation requiring that slot machines be approved by a referendum election of the municipality (8 M.R.S.A. § 911(1)(B)) is consistent with our conclusion that the initiated legislation leaves room for some municipal regulation.

2. Can the municipality write the referendum question so as to impose conditions on voter approval concerning issues such as location of the racino, property tax relief triggers, and mitigation of local costs?

Answer: While we can offer comments on this question based on our analysis of state law and our view of the initiated legislation, the proper wording of the referendum measure and the enforceability of conditions expressed therein is primarily a matter for the municipality's legal counsel. As a general matter, it seems clear that a condition could not be imposed if it would conflict with a provision of state law. If the initiated legislation is determined by the courts to preempt the field of racino regulation, that conclusion might render some conditions unenforceable even in the absence of a direct conflict with state law.

In view of our answer to question 1 above that the initiated legislation is not so comprehensive as to preempt all local regulation, we offer the following comments on the conditions you identify.

Location. Limiting voter approval to a specified location is perhaps most clearly within the traditional area of municipal regulation. Provided that the location is at or within a five-mile radius of a commercial track that meets the requirements of 8 M.R.S.A. §911(1), such a condition does not conflict with any particular provision in the initiated legislation.

Property tax relief triggers. By the term "property tax relief trigger" we understand you to mean a condition that would require that the additional municipal revenue generated by property taxes on a racino facility be used to reduce the municipal property tax burden by reducing the mill rate. This area, again, is one of traditional municipal authority, and does not conflict with any provision of the initiated legislation. Of course, the constitutional limitations on the imposition of taxes must be observed. For example, the additional revenue cannot be used to rebate property taxes paid by other taxpayers in any way that would violate the constitutional requirement that taxes be assessed equally based on fair value. Me. Const. Art. IX, § 8.

Mitigation assistance. By the term "mitigation assistance" we understand you to mean a condition that would require the racino operator to pay specified monetary amounts or defray identified municipal costs that result from the existence of the racino. In this area, we believe that the municipality lacks the authority to impose what would effectively be fees or taxes without legislative authorization. *See* discussion of question 7, below.

While not raised in your questions concerning allowable conditions, the ability to limit the number of slot machines is raised in your question 5 below.

3. **Does the initiated legislation allow Scarborough Downs to relocate its harness racing track to a neighboring community that approves the use of slot machines?**

Answer: Eligibility for a license to operate slot machines under 8 M.R.S.A. §911(1) is limited to persons who are licensed under §275-A to operate a commercial track "located at or within a five mile radius of the center of a commercial track that conducted harness racing with pari-mutuel wagering on more than 25 days during calendar year 2002." In addition, §275-A requires that the slot machines be operated at the commercial track, and that local approval be obtained. A commercial track such as Scarborough Downs that meets the race dates requirement in §911(1) could relocate within a five-mile radius of its 2002 location and remain eligible for a slot machine operator's license. We note that relocation might well result in scrutiny of various issues (*e.g.*, source of financing if a new facility is built) by the Harness Racing Commission in the 2004 commercial track license proceedings.

4. **Does the initiated legislation violate the state and federal constitutions by effectively specifying only two persons who might operate racinos?**

Answer: We understand that you are asking whether the limitations on eligibility for a slot machine operator's license in 8 M.R.S.A. §911 would violate the equal protection provisions of the Maine and United States Constitutions. Where, as here, a statute involves neither a fundamental right nor a suspect class, different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest. The statute bears a strong presumption of validity, and the party challenging it has the burden of proving that no conceivable state of facts exists to support it. *School Administrative Dist. No. 1 v. Commissioner, Dept. of Educ.*, 659 A.2d 854 (Me. 1995). Thus, the statute is likely to be upheld assuming a rationale can be advanced for limiting licenses (*e.g.*, restricting licensing for slot machines to those persons with commercial track licenses advances the stated goal of supporting harness racing, and allowing only a small number of licenses for gambling activities in the State is consistent with preserving public safety).

5. **How many slot machines are or could be authorized under the initiated legislation, and how and by whom are they to be regulated?**

Answer: The initiated legislation does not contain any limit on the number of slot machines that a licensee may operate. The Harness Racing Commission has certain regulatory authority with respect to the operation of a racino that might indirectly limit the number of machines (*e.g.*, staffing and security requirements), as might state and local codes, but there is no direct limit. (It is our understanding that the City of Bangor, as lessor of Bass Park, established a limit of 1500 slot machines as a term of its agreement with the proposed developer of a Bangor area racino, but this is not a statutory or regulatory requirement.) In light of the facts that a racino will increase municipal costs, that these costs may be less than fully covered by property taxes paid by a racino, and that the municipality cannot assess new taxes or fees on the racino without legislative authorization, a reasonable argument can be made that traditional interests of local

government would be served by a limit on the number of slot machines installed, as a proxy for a limit on the size of the facility. Just as a municipality may limit the number of seats at a concert hall, theater or stadium based upon public health, safety and welfare considerations, arguably it could limit the number of slots at a particular location as a condition of local approval.

6. **How would any tax revenues generated by a racino affect a host community's eligibility for State support through revenue sharing, school funding, road assistance, etc.?**

Answer: With respect to State revenue sharing programs such as State-municipal revenue sharing, 30-A M.R.S.A. §§ 5681 *et seq.*, and school funding, 20-A M.R.S.A. §§ 15601 *et seq.*, a municipality's share is generally inversely proportional to the State valuation of taxable property in the municipality, i.e. the higher the property value in a municipality, the lower the amount of State revenues to be shared with the municipality. The location of a racino in a municipality would likely have the effect of increasing the total property value of a municipality and would, therefore, probably decrease the amount of State revenue sharing.

State-provided local road assistance is typically based on the mileage and condition of roads located within a municipality and would not be not be adversely affected by an increase in taxable property. *See* 23 M.R.S.A. §§ 1801 *et seq.*

7. **Are there limitations on the charges that the state or municipality can assess against a racino to cover the public costs of providing for regulation of gaming activities and for public safety?**

Answer: A municipality can apply a property tax of general applicability on all taxable property in the municipality and use the proceeds to cover local costs of government, including public safety costs associated with gaming activities. A municipality cannot, however, enact a new tax applicable only to a racino without the Legislature's approval. Me. Const. Art. I, Section 22; *see also Greaves v. Houlton Water Co.*, 59 A.2d 217 (Me. 1948).

A municipality would have a limited ability to assess a fee against a racino. Municipalities, under home rule authority, can require construction of off-site capital improvements or payment of impact fees in lieu of such construction under 30-A M.R.S.A. § 4354. Such a fee applies to capital projects and is not applicable to day-to-day public safety costs such as policing, which are usually supported through local property taxation. Thus, a municipality could assess a fee on a racino to create infrastructure facilities such as those delineated under section 4354(1)(A) of Title 30-A.

8. **Can the Legislature extend the December 31, 2003, deadline for municipal approval after that date has passed, or would the proponents of the initiative have to start a new petition process if no municipal approval is given by that date?**

Answer: The initiated legislation, like any other statute, can be amended or repealed by the Legislature. The most obvious question that might arise if the Legislature extends the December 31, 2003, date after it passes is whether such a change affects rights of any party that "vested" under the law in place before the amendment. We believe it unlikely that a party could successfully claim that it had a "vested" right in limiting the number of eligible licensees.

9. **If a municipality obtains voter approval for a racino but the council and/or planning board cannot come to terms with a developer, would the municipality have any liability to the developer in light of the approval? Should the municipal referendum be clarified on this point?**

Answer: These are matters that should be discussed with the municipality's legal counsel. As a practical matter, making the language of the proposed referendum clear on this point would seem to be beneficial, but, again, we recommend that this issue be discussed with the municipality's legal counsel.

10. **How does 21-A M.R.S.A. §752 governing the time that absentee ballots must be available in advance of a referendum "unless an emergency exists" impact the ability of a city council to decide on December 1 to conduct a referendum before the December 31, 2003, deadline in the initiated legislation?**

Answer: Title 21-A M.R.S.A. §752 does not apply to municipal referenda such as those that are being held with respect to location of a proposed racino, nor is there any interpretive guidance at the state level of what might qualify as an emergency. To the extent that a city or town charter incorporates the requirements of this statute by reference, questions concerning its requirements and the meaning of "emergency" should be referred to legal counsel for the city or town.

We hope this information is helpful. This Office is confident in offering views on issues of state law; however, as has been noted at several points in the discussion of your questions, we do not practice in the area of municipal law. We therefore defer to counsel for the affected municipality to the extent that your questions address matters of local authority and procedure. Please let us know if we can be of further assistance.

Sincerely,

G. Steven Rowe
Attorney General

GSR/dah