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IN THE MATTER OF THE	§	BEFORE THE
APPLICATION FOR CLASS 2	§	
HORSE RACETRACKS LICENSE	§	
IN HIDALGO COUNTY	§	TEXAS RACING COMMISSION

VDLT RESPONSE TO PLEADING TO INSTITUTE A CONTESTED CASE PROCEEDING AND MOTION TO TRANSFER THE HIDALGO COUNTY APPLICATION TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

Valle de los Tesoros files this Response to the Pleading filed by Valley Race Park seeking to refer this matter to the State Office of Administrative Hearings for a contested case hearing, and in support would show as follows:

I. INTRODUCTION

On March 8, 2007, Valley Race Park ("VRP") filed a pleading in this matter which it called "Pleading to Institute a Contested Case Proceeding and Motion to Transfer the Hidalgo County Application to the State Office of Administrative Hearings." VRP asserts various reasons why the Texas Racing Commission ("TRC" or "Commission") is required to refer this matter for consideration at a contested case hearing at the State Office of Administrative Hearings ("SOAH"). None of those arguments are in any way valid. VRP also attacks Valle de los Tesoros' ("VDLT's) Application in that Pleading. None of those arguments are correct either. In total, VRP's Pleading is full of faulty legal assertions, fictional statements, fictional history, and other self-serving arguments all designed to delay VDLT's endeavor to bring horse racing to Hidalgo County.

II. A CONTESTED CASE HEARING IS NEITHER REQUIRED, NOR WARRANTED

A. Rules 307.31 and 307.3.

Texas Rule of Racing Rule 307.31, entitled "Prehearing Procedures," specifies how a person who has a right to a hearing asserts that right, with subsection (a) of the Rule, entitled

"Docketing," specifying what that party must do to get the process started. Rule 307.3 provides that such hearings will be before SOAH. VRP essentially suggests that this delineation of procedural steps to be taken by someone who has a right to a hearing are applicable to anyone and can be used to initiate a hearing where one is otherwise not provided for. In affect, VRP asserts that if anyone at all files a pleading requesting a contested case hearing on any matter whatsoever, the TRC is required to refer that matter to SOAH for a contested case hearing. This is obviously incorrect. Rule 307.31(a) and (c) and Rule 307.3(a) are procedural mechanisms concerning the docketing process for a contested case, an opportunity for settlement, and the authority of SOAH once a hearing has been initiated. Neither of these Rules gives the necessary underlying substantive right to a contested case in the first instance. These Rules explain how the right to a contested case hearing is exercised when, and only when, you are entitled to a contested case hearing in the first place.

VRP's argument regarding Rule 307.3(a) is particularly circular. In essence, VRP argues they have a right to a hearing since the matter is a "contested case" and the matter is a "contested case" because they have a right to a hearing. TRC Rule 307.3(a) basically says that where there is a "contested case," SOAH will have jurisdiction to hold the hearing, and then adopts the Government Code definition of a "contested case." The Government Code definition states that a contested case is a proceeding where legal rights are to be determined after an opportunity for an adjudicative hearing. APA, Tex. Gov't. Code § 2001.003(1). In this case there is no right to an adjudicative hearing and, therefore, there is no contested case. Rule 307.3(a) does not even apply. *See generally, Best & Co. v. Tex. State Bd. of Plumbing Examiners* 927 S.W.2d 306 (Tex. App. – Austin) pet. denied.

VRP's interpretation is further unworkable as a practical matter, in that it would require the TRC to refer any license amendment, change in ownership, change in facility, or any other

minor change to SOAH for a contested case hearing simply because someone filed a pleading asking for one. Each and every piece of licensing business conducted by the TRC would be subjected to a potential SOAH hearing. This is obviously not the intent of the TRC's procedural Rules 307.3(a) and 307.31(a).

B. The Texas Racing Act Does Not Require a Contested Case Hearing

1. *The Texas Racing Act Specifically States When a Hearing is Required*

The law in Texas is quite clear that a contested case proceeding is only required where a statute other than the Administrative Procedure Act ("APA")[1], typically an agency's enabling statute, provides for such a contested case. *See, Tebbs, Inc. v. Silver Eagle Dist., Inc.* 797 S.W.2d 80 (Tex. App. - Austin 1990) no writ; *Best & Co. v. Tex. State Bd. of Plumbing Examiners* 927 S.W.2d 306 (Tex. App. - Austin) pet. denied. The Texas Racing Act ("Act") is likewise quite clear on when a contested case hearing is available. Section 3.15 of the Act specifically and unequivocally states when a licensee is entitled to a contested case hearing before SOAH. That is, when the Commission proposes to "suspend, revoke, or refuse to renew a person's license...". Similarly, Section 6.06 of the Act provides for notice and hearing if the Commission proposes to "refuse to issue a racetrack license" or "revoke or suspend a license." The Commission's rules follow this statutory scheme by providing for notice and hearing where the Commission proposes to deny, suspend, or revoke a license. (*See* TRC Rule 307.5(b) and 309.9(a)). These provisions present a clear and unambiguous statement of the Legislature's and Commission's intent to require a hearing only prior to a negative license decision (i.e., denial, suspension, revocation). This statutory and regulatory scheme is completely consistent with the notion long expressed by the Courts that where a person is to be deprived of something by the government (e.g. denied a license, terminated from government employment, etc.) that person

[1] Tex. Gov't Code §§ 2001.001 *et seq.*.

has a due process right to a hearing. There is no such inherent right of a third party to a hearing to protest the granting of a license to another. Nor should there be.

VRP argues that the Act at least implies a right to "notice and hearing" in a contested license application scenario. But there is no need to look to imagined implications related to "notice and hearing" in the Act because the Act is crystal clear on when a contested case hearing is available. Indeed, it does not say or even imply that the issuance of a license must result from the full contested case hearing process at SOAH and the TRC has never interpreted its Act in that manner.

In support of its argument of a so-called right to a hearing, VRP relies upon *Ramirez v. State Board of Medical Examiners*, 927 S.W.2d 770 (Tex. App. – Austin 1996). In that case, the court found an implied right to a contested case hearing for an applicant based on certain statutory provisions granting the applicant a right to appeal a negative agency decision to the courts pursuant to provisions of the APA, which require an agency "record" as part of the appellate process. *Id.* at 773. Of course, in *Ramirez*, the questions was whether an applicant who was being denied a license should have an opportunity to create a record at an evidentiary hearing, given his right to a judicial appeal of that decision based on a record. That very different situation pursuant to a very different statutory scheme has no relevance here. In the instant matter VRP is a third party who is seeking a contested case hearing on the granting of another's Application pursuant to the Texas Racing Act. Unlike the Texas Racing Act, which specifically addresses when a contested case is available, there was no controlling, specific statute on the issue in *Ramirez*. *Id.* Rather the *Ramirez* court was charged with determining what the Legislature implied in absence of a controlling statutory provision. *Id.* The *Ramirez* holding and discussion is irrelevant.

Interestingly, VRP also discusses *Best* in support of its contentions. But *Best* finds that the definition of a "contested case" in the APA does not require a contested case hearing every time the rights of a person are determined, but that there must be a consideration of whether an adjudicative hearing is required. *Best,* 927 S.W.2d at 309. In *Best*, the court found no error in the failure to hold a contested case hearing where there was no statutory provision that required a full adjudicative hearing (just like there is no statutory requirement for a contested case in granting a license under the Texas Racing Act). *Id.* As stated previously, the law in Texas is clear. Unless an agency's underlying statute grants a right to a hearing, there is none. That is applicable here and that is what the *Best* case holds.

2. *Section 6.04 and 6.06 Do Not Mandate a Contested Case Hearing*

a. Section 6.04

It is true that Section 6.04 of the Act sets forth factors for the TRC to consider in granting a license. But there is no truth to VRP's self-serving argument that this determination cannot be made without a contested case hearing because of the "clear and convincing evidence" standard. There is absolutely no authority whatsoever for the proposition that just because a statute requires the decision makers of a state agency to make a finding by "clear and convincing evidence," that finding must be subjected to a contested case hearing.

Indeed, there is nothing magical about the term "clear and convincing evidence." Just because relevant and material "evidence" adduced pursuant to the Texas Rules of Evidence is placed in a record within a contested case proceeding, it does not follow that evidence considered in another forum and by other standards is somehow not "evidence." Every agency and, indeed, every person considers evidence of many issues daily utilizing some standard. "Clear and convincing" is just a standard by which evidence is judged. That term is commonly used in

statutory and regulatory language without triggering a need for a contested case hearing before SOAH. The following are just two examples quickly chosen at random:

> The Texas Department of Health is given the statutory authority to review applications submitted by hospitals wanting to engaged in what is known as a cooperative agreement, and to issue a "certificate of public advantage" to such applicants. Tex. Health & Safety Code § 314.002. Such a certificate can only be issued, however, upon a finding by the Department that there is clear and convincing evidence that the likely benefits will outweigh the disadvantages. *Id.* at (d). Despite the need for a finding of "clear and convincing evidence," no contested case hearing is provided for. Rather, the statute specifically states that only a "public meeting" is available. *Id.* at (c). As explained in the Department's regulations, that public meeting is for the purpose of taking public comment only during the application review process. 25 Tex. Admin. Code § (c)(3). Those regulations go on to say that if the Department is not convinced that the benefits outweigh the disadvantages by clear and convincing evidence, the application shall be denied. *Id.* at (e). Even in the case of denial, the applicant is only entitled to an informal hearing before the Texas Board of Health.
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> The Texas Department of Public Safety is charged with the review of school bus driver applications, which includes a medical examination. A person that is found to be medically disqualified for a license may seek a waiver by completing a form, and providing "clear and convincing evidence" that he is able to perform the needed functions. 37 Tex. Admin. Code § 14.13. The Director, or his designee, then receives a recommendation from the Medical Advisory Board of the Texas Department of Health, reviews that recommendation, and either grants or denies the request for a waiver. There is nothing in the rules indicating that just because the applicant must show "clear and convincing evidence," the matter must go to SOAH for a contested case hearing.

Of course, "clear and convincing" is simply an adjective of "evidence." The Texas statutes governing state agencies, and the regulations of state agencies, are replete with examples of requiring a showing of "evidence" to a decision maker. Obviously, the fact that there is an "evidence" requirement does not mean that every such decision by every agency must be sent to SOAH for a contested case hearing. The number of examples contained in the Texas statues and regulations are too overwhelming to present here, but the Texas Racing Commission's own rules provides at least one example: Section 303.41 of the Commission's concerns the allocation of race dates. Pursuant to that section, the executive secretary may entertain a request for additional live race dates after the allocation of race dates has already been assigned by the Commission *if*

the request includes *evidence* that granting the additional dates will be beneficial. *Id.* at (f). Certainly, the Texas Racing Commission does not refer every such request to SOAH, just because "evidence" is required. In fact, TRC Rule 307.3(b) specifically states that decision making proceeding such as the allocation of race dates is done "without an evidentiary hearing."

The TRC has the authority to review the VDLT application, the findings of the Texas Department of Public Safety in conducting its related background check of the applicant, any comments received from third parties, and other information the staff may find relevant. These materials can easily provide clear and convincing evidence to satisfy Section 6.04 of the Act. Any contrary interpretation of the "clear and convincing evidence" requirement found in Section 6.04 of the Act would necessarily invalidate all licenses historically issued by the Texas Racing Commission without a full, evidentiary hearing being held at SOAH (or via an independent hearing examiner). Also, since Section 6.04 makes no distinction between classes of tracks, this invalidation would include all Class 1, 2, 3 and 4 tracks.

VRP claims that the Commission would "break past precedent" by not referring VDLT's Application to SOAH, because in the past "almost all" applications have been considered either at SOAH or via a hearings examiner prior to the creation of SOAH. That is simply not true. The Texas Racing Commission has, in fact, issued many racetrack licenses in the past without a full evidentiary hearing (whether by SOAH or by a hearing examiner). The Commissioners have found the requisite clear and convincing evidence needed to satisfy Section 6.04 without a contested case. Nothing has changed which would require different treatment of VDLT's pending application.

b. Section 6.06

Inexplicably, VRP also cites to Section 6.06 of the Act. Section 6.06 of the Act states that a license may be denied, suspended, or revoked *after notice and hearing* based on

enumerated factors. Here, the TRC is not proposing to deny, suspend, nor revoke VDLT's requested license. While VDLT agrees that a contested case hearing would be required to "deny, suspend or revoke a license," that is simply not the action being considered here.

C. The Texas Racing Commission Rules 309.3(e)(4) and (5).

VRP argues that Rules 309.13(e)(4) and (5) require a contested case hearing because a the Texas Racing Commission sought clarification from VDLT as to certain aspects of its Application and a decision of whether to allow VDLT's response much be made by SOAH. VRP is either misreading Rule 309.13, or is purposefully misleading the Commission. The Rule provisions relied upon by VRP do not even apply.

Rule 309.3(e)(5) requires a decision by an Administrative Law Judge when an applicant seeks to amend an application due to purported change circumstances pursuant to Rule 309.3(e)(2)(C). Rule 309.3(e)(3) makes clear that no such ALJ consideration is required where the Commission staff merely seeks clarifying information. It is ludicrous to assert that only an ALJ can allow the TRC's staff to ask clarifying questions. Rule 309.5(e)(5) is not even applicable.

Rule 309.5(e)(4), also cited by VRP, simply says that an applicant must serve a copy of an amendment request on all parties. It is a huge stretch to say that such a procedural requirement means that the Texas Racing Commission is obligated to refer all Rule 309.5(e) requests to SOAH for a contested case hearing.

D. Summary

Despite its attempts to confuse the Texas Racing Commission, the fact remains that there is no requirement that VDLT's Application be referred to SOAH for a contested case hearing. The Texas Legislature made clear in the Texas Racing Act when a hearing is required - when the

Commission proposes to "suspend, revoke, or refuse to renew a person's license...". Act at § 3.15. No SOAH referral is needed to grant a license.

III. THE APPLICATION IS IN THE PUBLIC INTEREST

Because there is no legal authority for forcing this matter to a contested case at SOAH, VRP resorts to unsubstantiated and self-serving claims that the VDLT Application "appears" to be contrary to the public interest, and that it is flawed. The arguments offered in support are completely transparent.

A. The Impact on Valley Race Park

VRP begins by painting a rosy picture of a "successful" VRP, and then providing a tale of the horrible effects VDLT will have on this success. VDLT is completely perplexed by this argument, given that the owner of VRP claims that it is engaging in an arms-length sale of at least 95% of its share in VRP.[2] Indeed, VDLT understands that this sale is to be considered by the Commissioners on the very same day at the very same meeting that approval of the VDLT license will be considered. So, while touting the imagined plight of VRP as an obstacle to VDLT's Application on the one hand, the owner of VRP is simultaneously selling its interest on the other hand. Whatever the owner's interest is in stopping VDLT from obtaining a license, it is not its devotion to VRP.

But what is most concerning is VRP's assertion that the TRC has "previously determined that it is simply not economically feasible to have two competing racetracks in the same market." That is flat wrong. In fact, the exact opposite is true. In the Parker County Squaw Creek matter relied upon by VRP, the Texas Racing Commission was very careful to <u>not</u> base licensing decisions on the economic impact on a marketplace. The Proposal for Decision in the Squaw Creek case did contain a finding that the market could not support two tracks. The

[2] Of course, this will be the second time the Commissioners are being asked to approve the so-called "sale" of Valley Race Park. At a prior TRC meeting, the sale and transfer of the license was rejected as a one-sided, not arms-length transaction that left too much power and financial interest in the hands of the current ownership.

Commissioners, however, unanimously voted to reject that finding, stating that the finding was not necessary to support the final decision.[3] Notably, the Commission adopted the Proposal for Decision as presented, other than that very purposeful deletion. VRP states that Lone Star Race Park made the argument that the market could not support two tracks and "won that argument." Lone Star did make that argument and the Commission unanimously rejected its relevance. Squaw Creek did not receive a Class 2 license but the market was not even a partial reason.

There are many reasons behind the Commission's prior decisions not to engage in an economic analysis of the market. First, as the Commission Staff explains in its Exceptions to the PFD in the Squaw Creek matter, having two racetracks in an area may actually promote public interest in the racing and horse breeding industries; increase the job opportunities in the area and thus the local economy; increase racing opportunities for breeders and trainers; and increase the impact on tourism. The Commission Staff further believes competition could lead the owners to find ways to increase their patron audience. Indeed, the Commission has previously noted that the competition between San Houston Race Park and Gulf Greyhound makes both of those tracks, in some ways, "better for it."[4] Indeed, Robert Bork, General Manager of VRP, has himself recognized that there are tracks in close proximity all over the country, and that those race tracks have learned to work together to insure the success of both.[5]

A second reason the Commission has historically avoided basing licensing decisions on economic viability analyses is the Staff's concern that the Commission might create precedent

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[3] Tex. Racing Comm'n, *In the Matter of Parker County's Squaw Creek Downs*, SOAH Docket No. 476-98-0801 (May 12, 1999) (Order of the Commission).

[4] Tex. Racing Comm'n Meeting Tr. at 21, 136 (April 30, 1999).

[5] *In the Matter of the Application for Class 2 Horse Racetrack License in Webb County*, SOAH Docket No. 476-04-5361, (Tr. Vol. 3, pp. 163-164).

that would inadvertently tie its hands in future decisions.[6] Yet VRP argues that the Commission should do exactly the opposite.

Finally, as the Staff has pointed out in previous Exceptions to a proposal for decision, the Racing Commission is not in the business of protecting the success of any individual license. The Racing Commission is tasked with overseeing the business of racing, and making sure that licensees and applicants are qualified. But that does not mean that it is the financial "big brother" of the companies that own and operate racing facilities.

B. VDLT Has Submitted a Sound Application Proposing a Successful Track

1. Race Dates

It is interesting to VDLT that VRP complains that VDLT's proposed live race dates will conflict with live race dates at other racetracks. As the TRC is well aware, the management team and owners of VRP are the same management team and owners of Laredo Race Park, which submitted an Application for a new Class 2 license in Webb County, Texas. In that Application, Laredo Race Park ignored Texas Race Act Section 6.03(a)(9) by failing to submit any proposed race dates at all. Robert Bork, who is President for Laredo Race Park, LLC, and is also the President and General Manager for VRP testified that proposed race dates did not really matter because it is the TRC that determines the live racing schedule for all of Texas once a year, and that the tracks all work together to create a schedule to avoid overlapping race dates. Now VRP takes the position that the VDLT Application is flawed because it conflicts with other race dates.

Like all live racing calendars, the VDLT live race dates would be pre-approved by the TRC. Like all racing entities, VDLT would cooperate with all the other tracks to mitigate overlapping schedules.

[6] Tex. Racing Comm'n Meeting Tr. at 21, 136 (April 30, 1999).

2. Financial Stability

The Texas Racing Commission Staff has reviewed the financial projections submitted as part of the VLDT Application, and VDLT understands that they have been found to be realistic. These Staff members assigned to this review were certainly qualified to make this determination. VRP's attempt to throw mud on the VDLT Application is not well taken.

3. Partnership Structure

Again, the Texas Racing Commission Staff has been provided with and has reviewed the ownership structure of VDLT and have found it to be sound. It is true that the partnership structure utilizes capital contributions for funding and that any particular partner has the option of participating or not in any particular capital call. This means that while the partners do not change, and while the partnership insures that no partner with less than a 5% interest rises above that level, the exact percentage of ownership of any given partner may fluctuate somewhat as the result of a capital call. But this in no way makes the partnership "unstable" and to say otherwise is a thinly disguised red-herring.

4. TDPS Background Checks

VRP claims that "some" of the partners in VDLT have not complied with the requirement to submit the paperwork for a "background check" by the Texas Department of Public Safety ("TDPS"). In support, VRP cites to a letter from the TRC to VDLT seeking additional information about one person listed as a partner – Mr. Raul Romero. VDLT has since informed the TRC that Mr. Romero was erroneously listed as a partner in VDLT. In fact, Mr. Romero is not now and has never been a partner VDLT. Every Partner in VDLT completed the required TDPS paperwork, and that agency further found that all Partners are eligible to hold the licenses sought.

5. Facilities for Patrons

In another desperate attempt to defeat VDLT's Application, VRP complains about the patron facilities. Again, the Texas Racing Commission is certainly familiar with patron facilities, and is fully capable of reviewing the proposed facilities.

6. The Facilities are in Compliance with the Commission Rules

VRP cites to the December 4, 2006, TRC letter to VDLT seeking additional information concerning certain portions of the Application as evidence that the design plans submitted by VDLT are too conceptual to determine compliance with various Commission Rules. This is not the case. The TRC sought clarification on certain very specific issues related to the facilities. VDLT has provided the TRC with responses to each of those very specific questions, and has shown full and fair compliance with the Texas Racing Act and the TRC Rules.

7. Facilities for Horses

VRP's complaints again stem from the TRC's requests for clarification. Again, VDLT has provided the TRC with responses to each of those specific requests.

8. VDLT's Location is Ideal

VRP complains that VDLT's site is unsuitable because: (1) it is near a fever tick eradication zone, and (2) the site is 125 acres.

First, it is incorrect to say that the tick quarantine zone is 500 yards away, as stated by VRP. Rather, the tick quarantine zone is approximately 1000 yards (over a half mile) from the edge of the VDLT property. The quarantine line lies on the Eastern side of Twenty-third Street in McAllen. That Street was originally a two-lane road, but is now a major four lane divided highway.

In this particular circumstance, the proximity to the tick quarantine zone does not render the site unsuitable, and no preventative measures are needed. Human development lessons the risk of tick exposure. The land surrounding the VDLT property is either developed or cultivated,

with no adjacent property being used for livestock purposes. Because of the surrounding development/cultivation, wild animals do not frequent the area. Mr. Mario Morales, an inspector with the U.S.D.A. located in Hidalgo County, has indicated to VDLT that he does not believe that the VDLT proposal will pose any threat to the race animals because of the development of the surrounding area. Mr. Morales explained that there has been no quarantine on or nearby the property in question for at least 15 or 20 years, and perhaps longer. Further, an expert entomologist, Dr. Bill Clymer stated that he does not believe the VDLT proposal will pose any threat to the race animals because the area surrounding the proposed site is developed land, which is a non-conducive environment for tick survival.

VRP suggests that the 125 acres allocated for facilities is insufficient, given certain easements on the property which it opines "may affect the ability to build." In fact, those easements will not effect the vertical development as proposed in the Application. VDLT has previously provided the TRC with a detailed clarification of the relationship of each of the easements to the vertical development, which will not be re-iterated here. By way of summary, it is not expected that the easement/utilities shown will cause any problem with VDLT development. In the worst case scenario, the gas line and canal can be moved, which would not be cost prohibitive.

9. There is no violation of the Texas Alcoholic Beverage Code

Finally, VRP brings out the tired argument of a Texas Alcoholic Beverage Code violation. In support, VRP relies upon the Webb County license proceeding. Neither the Administrative Law Judges nor the Commission were convinced of any violations in that proceeding. This argument continues to be without merit.

IV. CONCLUSION

There is absolutely no statutory or regulatory requirement for the Commission to refer this matter to a contested case hearing before the SOAH. VRP's arguments to the contrary are completely unsupportable. As to Valley Race Park's claims that VDLT's Application "appears" to be against the public interest, those arguments are both self-serving and transparent. VDLT prays that VRP's request that this matter be subjected to a contested case hearing proceeding be denied, that the Commission issue the license VDLT seeks in its Application at the Commission meeting to be held March 20, 2007, and for any further relief to which VDLT may be entitled.

Respectfully submitted,

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I hereby certify that on the 12th of March, 2007, the foregoing was forwarded via the method specified to the following counsel of record:

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