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January 13, 2009

Mr. Mark Fenner
General Counsel
Texas Racing Commission
8505 Cross Park Drive, Suite 110
Austin, Texas 78754

Via Hand Delivery

Re: Written Comments for Racetrack Licensing Sub-committee

Dear Mr. Fenner:

At the meeting of the Racetrack Licensing Sub-committee held December 19, 2008, Commissioners Robert Schmidt and Thomas Clowe requested that specific concerns be addressed in writing prior to the next meeting to be held January 16, 2009. In response to that request, please accept the following comments on behalf of Trinity Meadows.

The criteria for licensing pari-mutuel facilities, for transferring ownership interests in existing licenses, and for relocating sites of racetrack licenses are, by statute and by rule, very clear. Issues relative to racetrack licenses have, for unspecific reasons, become complicated and convoluted due, in part, to over-reaching interpretations of the statutes and the rules and by improperly combining rules sections that do not apply to each other.

The subject of licensing pari-mutuel facilities, for transferring ownership interests in existing licenses, and for relocating sites of racetrack licenses is really very elementary. The subject falls into just a few categories.

In the case of Class 1 licenses, only three are permitted by law. All three are currently active and operating. There are no issues.

Similarly, only three greyhound licenses are permitted by law. All of the licenses have been awarded and two of the licenses are currently active and operating. The license ownership transfer issues related to Corpus Christi Greyhound Racetrack illustrate how the current statutes and rules have been blurred, overlapped, and inappropriately applied. Over the years, and under current rules, the commission has allowed dozens of ownership transfers by virtually all of the licensees. The rules do not require different levels of

information to be provided as it would relate to the percentage of ownership to be transferred, whether it be as little as .01 percent or as much as 100 percent. However, it has been arbitrarily determined that, because the entire ownership will be transferred, other rules sections should apply which consequently require those requesting the transfer to provide far more information than is required by the rules governing ownership transfers. It is especially cumbersome and needless when one takes into account that the facility has existed for many years. To require more than the rules require results in unnecessary, costly, time-consuming work for both the applicant and the Staff. This is an example of a simple request made within the guidelines of the law and the rules that has been made overly complicated and burdensome.

In reality, the meat of the whole racetrack licensing discussion boils down to Class 2 racetracks. In many ways, this issue is the simplest of all. By law, there is no finite number of Class 2 racetrack licenses that may be awarded by the Commission. There are no geographic restrictions where Class 2 racetracks may be located. Clearly, the legislature intended and anticipated that there would be several Class 2 racetracks located throughout the State.

There seems to be great concern that entities that have been awarded Class 2 racetrack licenses have not built their facilities nor have they conducted live racing or engaged in simulcast wagering. So what? If another entity would like to apply for a license in the same area, there is nothing to prohibit the Commission from awarding a license to that entity. If the initial licensee hasn't built it's facility, then it has no room to complain. There is no harm. If the licensee does not conduct racing or simulating, the Commission still receives revenue from annual license fees without any cost of regulation. Given the Commission's diminishing revenue stream, it seems counterproductive to take any action to reduce that stream even more.

Presently, there are racetrack licenses that have no facilities and there are existing multi-million dollar facilities that have no licenses. In the case of Trinity Meadows, it has tried, within existing rules, to engage in the process to prove itself qualified to reopen its facility for live racing and simulcast wagering. The simple action was to promulgate an application form (which was required by rule) and give it to Trinity Meadows, collect the required processing fees, and then determine if Trinity Meadows was qualified to conduct racing and wagering. Instead, the Commission directed Trinity Meadows to go to court (in other words, sue the Commission) to allow the court to determine a "narrow issue of law", it asked for an Attorney General's opinion, it repealed a licensing rule that had been in effect for 14 years, it proposed a rule and then did not bring it back for discussion, and otherwise has stifled Trinity Meadows' every attempt to engage in the racetrack licensing process. In fact, the Staff made suggestions that Trinity Meadows should lease it's facility to an existing Class 2 licensee (no specific entity) that does not have a facility. Not only is this unseemly and downright insulting, it seems to suggest that a decision has been made that Trinity Meadows will never be afforded a fair and unbiased opportunity to engage in the licensing process. Once again, a straightforward legal process has been made complicated, convoluted, difficult, and costly.

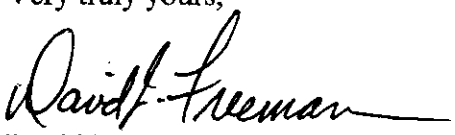
On it's surface, it appears that delays are being created to prevent any actions from being taken with respect to racetrack licenses. Perhaps the Commission is waiting to see what changes to racetrack licensing laws may occur during the legislative session. It also appears that a level of protectionism is being provided for existing licensees to keep the number of racetrack licenses at its current level or fewer in anticipation of VLT legislation. If either, or both, is true, I do not believe it is a legitimate reason to relieve the Commission of its statutory obligation to timely act on matters that are governed by current law. To subject those who wish to participate in the industry to months of costly delays is neither right nor is it fair. Accordingly, I respectfully urge the Commission to administer racetrack licensing concerns under current law and within the rules that the Commission has promulgated.

In a nutshell, the process of issuing and then monitoring racetrack licenses has gone from a concise procedure defined by rules to a confusing, stressful, and overly burdensome ordeal that does not seem to arrive at a rational or positive outcome. My suggestion is to simplify. Do not create problems where none exist. Explore options to streamline the process while maintaining the safeguards to protect the integrity of racetrack ownership.

Finally, I have enclosed a copy of proposed Rules Sec. 309.3 with proposed changes and the written comments submitted to the Commission in September and October of 2008. I am hopeful you will give careful consideration to the proposed changes and that you will agree with me that the rule, with the proposed modification will benefit the racing industry in Texas.

Thank you for the opportunity to submit my written comments to you in advance of the meeting on January 16.

Very truly yours,



David J. Freeman

c: Brent Hamilton

October 1, 2008

Texas Racing Commission
PO Box 12080
Austin, Texas 78711

On August 5, 2008, the Texas Racing Commission (TxRC) voted to post for comment proposed Rules Sec. 309.3, "Racetrack License Application Procedure."

On September 8, 2008, I met with Mark Fenner and Rhonda Fritsche to discuss the proposed rule. The intent of my meeting was to request that the provision requiring a racetrack to have conducted live racing within the past two years be struck from the proposed rule. The requirement only affects Trinity Meadows and does not apply to any other racetrack in Texas (see attached comment letter). During our discussion, Mr. Fenner asked me if I thought the rule addressed the issues of concern voiced by Sam Houston Race Park and Retama Park when Rules Sec. 311.51 was repealed. I told Mr. Fenner that I did not believe that the rule accomplished one of the objectives of the prior rule which was to provide a level of security to bond holders or other financial institutions in the event of a failure of a racetrack.

With respect to my request that the two year live racing provision of the rule be eliminated, Mr. Fenner stated that he did not "have a dog in this fight" and that he would defer to the commissioners whether that portion of the proposed rule should be struck. Mr. Fenner also added that the rule did not appear to adequately remedy the other issue and that it might need some more work. In light of that issue, Mr. Fenner stated that he might not post the rule for final adoption at the October 7, 2008 TxRC meeting.

At the August 5, 2008 TxRC meeting, Mr. Fenner told the commissioners that "I did work with the racetracks on this" (referring to the proposed rule). I do not know if Mr. Fenner did or did not meet with the racetracks, but I find it curious that the rule would require more work if he had, indeed, worked with the racetracks.

Trinity Meadows is very disappointed that the proposed rule was not placed on the October agenda for further public comment, discussion, and open debate.

Sincerely,

David J. Freeman

David J. Freeman

David J. Freeman
3300 Killingsworth Lane, Lot 262
Pflugerville, Texas 78660

September 12, 2008

Ms. Gloria Giberson
Texas Racing Commission
8505 Cross Park Drive, Ste. 110
Austin, TX 78754

Re: Written Comment on proposed Rules Sec. 309.3

On June 3, 2008, the Racing Commission voted to repeal Rules Sec. 311.53. In conjunction with the repeal, the Commissioners also directed its Staff to draft a rule which, in essence, would replace certain aspects of the rule that was repealed.

Trinity Meadows supports the proposed rule as it is written with one important exception. Trinity Meadows strongly urges the Racing Commission to strike the language "within the prior two calendar years." The language, which requires a racing facility to have conducted live pari-mutuel racing within the prior two calendar years, would exclude existing racing facilities, most especially Trinity Meadows, from utilizing the rule to apply for a pari-mutuel racing license. The rule applies only to facilities that are in existence, but do not have a license to conduct pari-mutuel activities. As the proposed rules stands now, it clearly affects, and perhaps even targets, Trinity Meadows. Corpus Christi Greyhound Race Track (CCGRT), which currently is not conducting pari-mutuel activities, has a racing license. The proposed rule would not apply to CCGRT.

The balance of the language in the proposed rule provides for strict regulatory authority and oversight by the Racing Commission. There is no harm to any entity if the two year provision is removed from the language in the proposed rule. We would suggest that it is good public policy not to exclude any racing facility that has the potential to provide more live racing opportunities to horse people in Texas. Trinity Meadows respectfully requests the Racing Commission to strike from the proposed rule the two year provision.

Sincerely,

David J. Freeman

David J. Freeman

c: Brent Hamilton

Texas Racing Commission
Title 16, Part VIII
Chapter 309. Racetrack Licenses and Operations
Subchapter A. Racetrack Licenses

309.3. Racetrack License Application Procedure.

(a) (No change.)

(b) Application process.

(1) From time to time, the Commission shall designate an application period not to exceed 60 days, during which the Commission shall accept application documents.

(2) The Commission shall specify the class and general geographic area of the racetrack for which it will consider applications.

(3) The Commission may open an application period that is limited to applications for a license to conduct racing at a racetrack facility that conducted live pari-mutuel racing ~~within the prior two calendar years~~. In the case of an application period opened under this paragraph, the Commission shall specify the class of license and the specific racetrack facility for which it is accepting applications. The Commission may place any conditions on the applications that facilitate the expeditious resumption of live racing while remaining consistent with the Act, the Rules, and the Commission's duty to ensure the integrity of pari-mutuel racing.

(4) [~~(3)~~] The Commission shall publish in the Texas Register an announcement of the beginning of the application process at least 30 days before the first day of the application period.

(5) [~~(4)~~] While an application for a particular class of racetrack in a geographic region is pending before the Commission, the Commission may not designate an additional application period nor accept additional applications for the same class and geographic region.

(6) [~~(5)~~] When deciding whether to open an application period, the Commission shall consider the availability of racing and wagering opportunities in the proposed geographical region, the availability of competitive race animals for the class of racetrack, and the workload and budget status of the Commission.

(c)-(e) (No change.)

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Chairman Rolando Pablos
Texas Racing Commission
P. O. Box 12080
Austin, Texas 78711

Dear Chairman Pablos:

The purpose of this letter is to advise you of the current status of the Corpus Christi Dog Track and the improvements that have been made recently. Before the last race was run in 2007, a methodical plan had been developed to remedy the deteriorating conditions of the track.

As you are aware, the track has been experiencing seven-figure operating losses for many years. In this environment, pouring money back into an ailing facility would be inappropriate. At the time a financial analysis was conducted and the result was a decision to temporarily close the facility, curb operational losses, and upgrade both the kennel and patron areas.

Outstanding results have been achieved during the refurbishing effort for the past eleven months. Facility General Manager, Rick Pimantel, has led the team and has documented tremendous strides. The overall plan is designed to have the clubhouse area ready for patrons by July 1, 2009. The kennel and track surface are scheduled for racing six weeks prior to the proposed return of live racing on July 1, 2010. Every area identified on the TRC deficiency reports is scheduled for repair in advance of reopening. This is an older facility that had greatly deteriorated. It will take a step-by-step and well organized campaign to fully restore the venue. Many of the repairs and improvements are obvious to the naked eye. Others, including roof and tile repairs are not. Rick and his assistant, Lynda Beatty, have been hands on directing the maintenance and cleaning crews. The operations team has pursued an 18 month refurbishment plan designed to return simulcasting to Corpus, with an additional 12 months dedicated to returning live racing in July 2010—while ownership has pursued a sale of the track.

The overall economic health of pari-mutuel facilities in Texas and nationwide has not been good. Most venues are reporting ten to fifteen percent declines. Specific tracks have reported wagering declines up to twenty-five percent. The Corpus track could not have survived these downturns. Instead management curbed operational losses, dedicated itself to facility improvement and fully intends to operate a shorter boutique-meet that will generate newfound customer excitement and interest in visiting the facility.

The intentions of ownership are echoed in the actions that have taken place at the facility over the past eleven months and future plans provided by the track's operating team. The facility is not shuttered and decaying, but rather busy with activity designed to restore and revitalize the physical plant in anticipation of the return of live racing to Corpus Christi.

We hope the results of the Committee's review will be the sale of the Corpus Dog Track to the current proposed owners.

If you have any questions or need further information, please feel free to contact me.

Respectfully,

Nick James
On behalf of Corpus Christi Greyhound Track

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January 16, 2009

Commissioner Clowe
Commissioner Schmidt
Co-members, Subcommittee on Licensing
Texas Racing Commission
8505 Cross Park Drive, Suite 110
Austin, Texas 78754

Via Hand Delivery

RE: Written Comments Submitted to the Subcommittee on Licensing.

Dear Commissioners:

We represent LRP Group, Ltd. (current holder of a Class 2 horse racing license for Laredo, Texas); Valle de los Tesoros (current holder of a Class 2 horse racing license for McAllen, Texas); and 361 Muy Buena Suerte (a co-applicant seeking to obtain an ownership transfer of the existing license for the Corpus Christi Greyhound Racetrack).

We recently attended the first meeting of the Licensing Subcommittee of the Texas Racing Commission ("TRC" or "Commission"), and we appreciated the opportunity provided in that forum to express our clients' concerns regarding certain policies seemingly being adopted by the Texas Racing Commission addressing licensing matters. It is our understanding that the Subcommittee is now seeking written comments from the regulated public. We appreciate the Subcommittee's careful review of the written comments provided herein. We are confident that the Commissioners will then take appropriate measures to insure the Commission's actions in licensing matters conform with the enabling statute and regulations governing the TRC.

As you may be aware, our client 361 Muy Buena Suerte, along with three individuals, is seeking to obtain the ownership interests in the Corpus Christi Greyhound Racetrack. On behalf of these prospective new owners we have provided to the TRC Staff an Application to Transfer the Ownership of the Corpus Christi Greyhound Track. It is through this process that we have learned of the Staff's relatively new policies as to what is required as part of ownership transfer application. We presume these policies are universally applicable and not just being applied to our pending Application. For this reason, we believe these comments within the scope of what the Licensing Subcommittee was charged to consider. We are not, however, asking this Subcommittee to consider or evaluate any of the facts or merits of that Application within the context of these comments or its other deliberations.

Historical Framework

The Texas Racing Commission has routinely received applications for ownership interest transfers of various amounts – anywhere from less than a 1% change in ownership to a 100% change in ownership, although there were obviously many more small ownership changes than there were 100% ownership changes. Historically, these applications were processed pursuant to Texas Rules of Racing at 301.151 (16 TAC Section 301.151), which sets forth the requirements for an application for a transfer of ownership of an interest in a racetrack license. Only recently has the TRC Staff developed a new "form" for transfers of ownership - which essentially mirrors the traditional form used when applying for a new license for an entirely new facility - and is using that form where 100% of the ownership interests are to be transferred despite the fact that the relevant TRC rules make no distinction relating to the percent ownership to be transferred. In other words, an applicant for a 100% ownership transfer of an existing facility must now provide to the TRC essentially the same information required of an applicant seeking an initial license to construct and operate a brand new facility. As is discussed at length below, these new requirements for transfers of ownership go well beyond the authority granted to the TRC by the Texas Racing Act, Article 179e, Vernon's Texas Civil Statutes, arts. 1-18 ("the Act"), as well beyond the Commission's rules adopted pursuant to this Act. We would emphasize that in order to alleviate this over-reaching, all the TRC need do is return to the review process that has heretofore been properly and successfully used by the TRC and is clearly spelled out in existing rules.

The overall point we wish to make by these comments is that there is absolutely no authority either in the Texas Racing Act or in TRC's existing rules which would allow the Staff to require all of the information referenced on the new "form" as part of an ownership transfer. Similarly, there is absolutely no authority which would allow the Commissioners to consider such information in the context of an ownership change approval. While the Commission may well have authority to carefully examine a licensee's facilities and operations, it has no such extensive authority in the context of an ownership transfer. The Commissioners should consider this lack of authority and direct the TRC Staff to resume adhering to the existing rules with respect to ownership transfers and, if deemed necessary, utilize another more appropriate and authorized mechanism to examine such matters.

Statutory and Regulatory Framework

Like all state agencies, the Commission can only exercise the powers given to it by the Texas Legislature in its enabling Act. The Texas Racing Act sets forth the requirements for an application for a transfer of ownership of a racetrack license at Sections 6.13(b) and 6.03(a) and these are the statutory provisions which the Staff was stated it is using as a basis for the new "form". The Commission powers with respect to such transfers of ownership, however, are only as specifically delineated by these applicable statutory provisions. As is discussed in more detail

below, any action by the Commission that effectively expands upon those application criteria outlined in Act is *ultra vires* and therefore void.

The Commission has further adopted rules that address the requirements for a transfer of ownership. Texas Rules of Racing at 301.151 (16 TAC Section 301.151). Those rules specifically state what information the Commission will require of those seeking to transfer an ownership interest in a racetrack license. On its face, Rule 301.151 is generally applicable to all ownership transfers regardless of the fractional interest sought to be conveyed. *Id.* The Commission has historically, routinely, and properly followed these rules for ownership transfers. Unless and until the Commission changes its duly adopted rules, it is bound, as a matter of law, to follow those rules as written. Any action by the Commission that effectively expands upon or ignores the explicit language of its own rules is beyond the agency's authority and contrary to law.

The Newly Imposed Requirements Violate the Statute

Section 6.13(b) of the Act specifies that a "transaction that changes the ownership of the association requires submission of updated information of the type required to be disclosed under Subsection (a) of Section 6.03 of this Act and payment of a fee to recover the costs of the criminal background check". Section 6.03(a) goes on to delineate the specific type of information required to be submitted as follows:

> ***(1) if the applicant is an individual, the full name of the applicant, the applicant's date of birth, a physical description of the applicant, the applicant's current address and telephone number, and a statement by the applicant disclosing any arrest or conviction for a felony or for a misdemeanor, except a misdemeanor under the Uniform Act Regulating Traffic on Highways (Article 6701d, Vernon's Texas Civil Statutes) or a similar misdemeanor traffic offense;***
>
> ***(2) if the applicant is a corporation:***
>
> > ***(A) (A) the state in which it is incorporated, the names and addresses of the corporation's agents for service of process in this state, the names and addresses of its officers and directors, the names and addresses of its stockholders, and, for each individual named under this subdivision, the individual's date of birth, current address and telephone number, and physical description, and a statement disclosing any arrest or conviction for a felony or for a misdemeanor, except a misdemeanor under the Uniform Act Regulating Traffic on Highways (Article 6701d, Vernon's Texas Civil Statutes) or a similar misdemeanor traffic offense; and***

(B) identification of any other beneficial owner of shares in the applicant that bear voting rights, absolute or contingent, any other person that directly or indirectly exercises any participation in the applicant, and any other ownership interest in the applicant that the applicant making its best effort is able to identify;

(3) if the applicant is an unincorporated business association:

(A) the names and addresses of each of its members and, for each individual named under this subdivision, the individual's date of birth, current address and telephone number, and physical description, and a statement disclosing any arrest or conviction for a felony or for a misdemeanor, except a misdemeanor under the Uniform Act Regulating Traffic on Highways (Article 6701d, Vernon's Texas Civil Statutes) or a similar misdemeanor traffic offense; and

(B) Identification of any other person that exercises voting rights in the applicant or that directly or indirectly exercises any participation in the applicant and any other ownership interest in the applicant that the applicant making its best effort is able to identify;

(4) the exact location at which a race meeting is to be conducted;

(5) if the racing facility is in existence, whether it is owned by the applicant and, if leased to the applicant, the name and address of the owner and, if the owner is a corporation or unincorporated business association, the names and addresses of its officers and directors, its stockholders and members, if any, and its agents for service of process in this state;

(6) if construction of the racing facility has not been initiated, whether it is to be owned by the applicant and, if it is to be leased to the applicant, the name and address of the prospective owner and, if the owner is a corporation or unincorporated business association, the names and addresses of its officers and directors, the names and addresses of its stockholders, the names and addresses of its members, if any, and the names and addresses of its agents for service of process in this state;

(7) identification of any other beneficial owner of shares that bear voting rights, absolute or contingent, in the owner or prospective owner of the

racing facility, or any other person that directly or indirectly exercises any participation in the owner or prospective owner and all other ownership interest in the owner or prospective owner that the applicant making its best effort is able to identify;

(8) a detailed statement of the assets and liabilities of the applicant;

(9) the kind of racing to be conducted and the dates requested;

(10) proof of residency as required by Section 6.06 of this Act;

(11) a copy of each management, concession, and totalisator contract dealing with the proposed license at the proposed location in which the applicant has an interest for inspection and review by the commission; the applicant or licensee shall advise the commission of any change in any management, concession, or totalisator contract; all management, concession, and totalisator contracts must have prior approval of the commission; the same fingerprint, criminal records history, and other information required of license applicants pursuant to Sections 5.03 and 5.04 and Subdivisions (1) through (3) of this subsection shall be required of proposed totalisator firms, concessionaires, and managers and management firms; and

(12) any other information required by the commission.

Clearly, the primary type of information enumerated in Section 6.03(a) is information related to the qualifications and background of the proposed new owner. Specifically Subparagraphs 1, 2, 3, 5, 6, 7, 8, and 10 of Section 6.03(a) of the Act relate solely to whom the new owner will be and that proposed new owner's background and qualifications. The remaining information enumerated within Section 6.03(a) is general in nature including where the track is located (subparagraph 4), the type of racing and when meets will be held (subparagraph 9), and the totalisator, concession, and management contracts (subparagraph 11).

Despite the clear parameters of Section 6.03, much of the information sought by the newly adopted and required form for an ownership transfer is well beyond the type of information the legislature specified in Section 6.03(a). For example: (1) land uses within one half mile of the site, (2) a traffic study, (3) the cost and nature of construction any/or needed repairs, and/or renovation, architectural engineering and similar services, (4) the various pre-racing costs such as promotion, advertising, salaries, fees, administrative costs, and financing, (5) the amount of available working capital, (6) an independently prepared 5-year financial forecast, (7) the purse structure, (8) substantive information regarding fire and safety procedures, (9) social and economic projections, (10) business plans, and (11) a detailed security plan. None of

these items are required or even implied by the enumerated information required by Section 6.03(a).

Apparently, the TRC Staff is attempting to require significant additional information well beyond the type of information enumerated within Section 6.03(a) of the Act under the guise of Subparagraph 12 of Section 6.03(a), which provides that an Applicant to which that section applies is to submit "any other information required by the commission". Clearly, the TRC can not ignore the provision of Section 6.13(b) of the Act which requires an applicant for approval of a transfer of ownership to submit "updated information of the type" enumerated in Section 6.03(a) and request absolutely any information merely because one subparagraph of Section 6.03(a) is general in nature. In fact, much of the additional information specified in the newly created form is required under Section 6.04 of the Act (an entirely different portion of the statute) and the TRC rules adopted thereunder, *both of which only apply to an application for a new license.* Those statutory and regulatory requirements are not applicable to the request for a transfer of ownership and are clearly beyond the mandate of Section 6.13(b) of the Act.

It is well-settled that a state agency has only that authority expressly given to it by statute, and those powers necessary to carry out those express functions. *E.g., TNRCC v. Lakeshore Util Co.*, 164 S.W.3d 368 (Tex. 2005); *P.U.C. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315-316 (Tex. 2001). A state agency has "only those powers conferred upon it in *clear and unmistakable* language." *P.U.C. v. City Pub. Serv. Bd. Of San Antonio*, 53 S.W.3d at 315-316. (emphasis added). While an agency is implicitly granted whatever powers are *necessary* to fulfill its express statutory authority, it may not "on a theory of necessary implication from a specific power, function or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes." *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 120, 137-138 (Tex. App. – Austin 1986, writ ref'd n.r.e.). When the Legislature has provided an agency with a power, and the method for implementing that power is prescribed, that method is to the exclusion of all others. *See Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129 (Tex. App. – Austin 1996, writ ref. n.r.e.); *Denton County Elec. Co-op v. Public Util. Comm'n of Texas*, 818 S.W.2d 490 (Tex. App. – Texarkana 1991, no writ); *Cole v. Texas Army Nat'l Guard*, 909 S.W.2d 535, 539 (Tex. App. – Austin 1995, writ denied). Acting outside the scope of the given statutory authority is void. *E.g., TXU Generation Co. et al. v. P.U.C.* 165 S.W.3d 821 (Tex. App. – Austin 2005, pet. denied).

Here, the statutory requirements for an application seeking to change the ownership of racetrack are unambiguously set forth in Section 6.13(b) of the Act, and is conspicuously different from the requirements for a new racetrack license. The Commission may require an application for a transfer of ownership to include information of the type outlined in Section 6.03(a) of the Act. It may not, however, look to other sections of the Act and its regulations, borrow requirements from those inapplicable sections, and apply those requirements to an application for a transfer of ownership. Doing so is beyond the scope of the Commission's

explicit statutory authority. Further, the very general language found in subsection 6.03(a)(12) of the Act, which allows the Commission to require "other information" as part of an ownership transfer application, cannot be the basis for requesting extensive, additional information beyond that specifically enumerated in Sections 6.13(b) and 6.03(a). Section 6.03(a)(12) cannot be interpreted to give the Commission carte blanche to require any information it may wish without running afoul of several basic rules of statutory construction.

Section 6.13(b) is the controlling statute for an ownership transfer application. That Section allows the Commission to require an applicant seeking a transfer of ownership to provide *the type of information* found in Section 6.03 of the Act. That is a specific limiting statutory mandate, which simply does not include the type of information found in other sections of the Act such as Section 6.04 and/or regulations adopted pursuant to Section 6.04 (for example, "the effect of the proposed track on traffic flow" (Section 6.04(a)(4)), "the potential conflict with other licensed race meetings" (Section 6.04(a)(9)), "the facilities for patrons and occupational licensees" (Section 6.904(a)(5)), "facilities for race animals" (Section 6.04(a)(6)), "the anticipated effect of the race meeting on the state and local economy from tourism, increased employment, and other sources" (Section 6.04(a)(11)), and "the availability to the track of support services and emergency services (Section 6.04(a)(7))).

Under applicable rules of statutory construction, where a statute states the methods for carrying out a mandate, then those methods are necessarily to the exclusion of all others. Since in Section 6.13(b) of the Act the legislature only and specifically referenced requirements of the type included in Section 6.03(a), the Agency can not, by implication, include requirements specified in Section 6.04 of the Act. Such an implication renders the specific limitation of 6.13(b) meaningless. As the Court stated in *City Public Service Board of San Antonio v. PUC,* 96 S.W.2d 355, 358 (Tex. App. – Austin 2002, no pet.), "(i)t is a well settled rule of statutory construction that the express mention or enumeration of one person, thing, consequence, or class is equivalent to an express exclusion of all others." Further, the specific language found in Section 6.13(b) of the Act controls over the general language found in Section 6.03(a)(12). Tex. Gov't Code § 311.026; *E.g., Burke v.* State, 28 S.W.3d 545 (2000). The legislature could easily have said that an applicant for a transfer of ownership in a track must submit information of the type found in Section 6.03(a) *and Section 6.04(a)* of the Act. It did not. A statute cannot be read so as to negate other statutory provisions. The general language of Section 6.03(a)(12) can not be read to negate the specific limitation of Section 6.13(b).

The Staff has also asserted that what information is to be required is a matter of TRC "policy" not a question of statutory interpretation. We disagree. Where the TRC's enabling statute established what the agency shall require in a particular situation, that agency can not vary from those requirements regardless of the policy or good intentions involved. As the courts have repeatedly stated, when the Legislature has acted as to a particular matter, an administrative agency may not act in a manner that effectively nullifies the Legislative action, even though the matter may fall within the general regulatory field of that agency. *See, e.g., State of Texas v.*

Jackson, 376 S.W.2d 341, 344-45 (Tex. 1964); *Central Educ. Agency v. Sellhorn*, 781 S.W.2d 716, 718 (Tex. App. – Austin 1989, writ denied); *Martinez v. Texas Employment Comm'n*, 570 S.W.2d 28, 31 (Tex. App. – Corpus Christi 1978, no writ). Reading Section 6.03(a)(12) of the Act to allow the Commission to require additional information (some of which is required under sections of the Act that are specifically not applicable, and some of which is not discussed in the Act at all) would negate the specific language found in Section 6.13(b) of the Act. That section specifically and purposefully limits what the Commission may require for a request to transfer ownership of an existing racetrack.

The Newly Imposed Adopted Requirements Circumvent Rulemaking Requirements.

Even assuming the Act could be read to allow the Commission to require additional information not enumerated in Section 6.13(b) and, by reference, of the type required by Section 6.03(a), seeking such information would at the very least require formal rulemaking by the Commission.[1]

The Texas Rules of Racing currently includes a rule that specifically addresses what is required for the transfer of an ownership interest in an existing racetrack. That rule is found at 16 TAC §309.151. The rule, as currently written and applicable, lists with specificity what information must be provided to the Commission for approval of an ownership change. This rule is written so as to be generally applicable to all ownership transfers, no matter what percentage of ownership is being transferred. Unquestionably, the Commission is bound to follow its own rules. *E.g.*, *Flores v. Employees Retirement System of Texas*, 74 S.W. 3d 532, 542 (Tex. App. – Austin 2002, pet. denied). It cannot, either on a case-by-case basis or though the informal adoption of general "policies," decide to require additional information not authorized by the current rule.

The Commission cannot on an ad hoc basis add burdens to the application process that have not been subjected to public comment and the scrutiny that goes with that process, as well as the notice that is attendant to that process. This is especially true in light of the fact that the Commission has approved numerous ownership interest transfers, including some relating to one hundred percent of the ownership interests, over the years and has not, until very recently, even raised the issue of the type of additional information required by the newly adopted form. There is nothing in the Commission's current rules that puts the public on notice that an applicant for a transfer of ownership of an existing facility will be subjected to essentially the same requirements as an applicant for a new license for a new facility.

The Texas Administrative Procedure Act ("APA") defines a "rule" as follows:

[1] We are not, however, suggesting that this Subcommittee propose that the Commissioners consider such a rule change since, as discussed previously, the Texas Racing Act specifically enumerates the type of information to be required in the context of an ownership change and a rule change which goes beyond that statutory mandate would be counter to those statutory provisions.

> ***(A) means a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency;***
>
> ***(B) includes the amendment or repeal of a prior rule; and***
>
> ***(C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.***

Tex. Gov't. Code § 2001.003(6). Prescribing what a requestor seeking the transfer of the ownership of a racetrack must include in its request is unquestionably a generally applicable requirement that interprets the relevant provisions of the Act, prescribes law and policy, and describes the procedures before the Commission. The application requirements are not a statement that only affects the internal management of the Commission, in that the Commission is prescribing what a member of the public must do to obtain a needed approval from the Commission. The APA provides that all agency rules must be adopted pursuant to the rulemaking procedures outlined therein. Tex. Gov't Code §§ 2001.001-.038. Included in these procedures is a requirement that an agency provide notice and invite public comment. *Id.* It has long been established, and is beyond question, that the main purpose behind these notice procedures is to insure "that the public and affected persons are heard on matters that affect them and receive notice of new rules." *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255; *see Fulton v. Associated Indem. Corp.*, 46 S.W.3d 364, 368 (Tex. App. – Austin 2001, writ denied; *Amarillo Indep. Sch. Dist. v. Meno*, 854 S.W.2d 950 (Tex. App. – Austin 1993, no writ. Accordingly, should the Commission wish to revise its currently applicable rule on transfer of ownership, it must do so pursuant to the rulemaking requirements of the APA. Merely creating a new "form" and making that form available is clearly no substitute for the legally required rulemaking procedures.

Additional and New Exemption Criteria

The TRC Staff has also stated a new TRC requirement that an Applicant must either provide the information requested by the new ownership change form or offer a compelling explanation as to why a particular piece of information should not be required. This novel ad hoc requirement serves to highlight the fact that there simply is no authority to require the information in the first place. First a new requirement is created out of whole cloth and then a novel exemption is layered on top totally without any basis in statutory or regulatory authority. The TRC simply can not use the approval process relating to a change in ownership as leverage to create authority it does not otherwise have in that context. Furthermore, the fact that a new owner will have responsibility pursuant to the license does not in any way diminish any authority the TRC may have over the financial and physical conditions at the track.

Recommendation

Obviously, the TRC Staff has some policy considerations they would like to address with respect to certain existing tracks. We will not attempt to speak for the Staff nor speculate as to exactly what those policy considerations may be. We recommend that the Subcommittee determine what those policy considerations may be and evaluate what, if any, action should or can be taken and what the proper authority and procedure is, if any, to address those issues. The current developing approach, addressing these issues in the context of an ownership change, is simply inappropriate and contrary to law.

Thank you for your consideration. We look forward to working with you going forward on these and other licensing issues.

Very truly yours,

William J. Moltz

WJM/pjp
cc: TRC Commissioners
Charla Ann King (via hand delivery)
Mark Fenner (via hand delivery)

MEC

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January 20, 2009

Sent via Facsimile ((512) 833-6907)

Charla Ann King
Executive Secretary
Texas Racing Commission
8505 Cross Park Drive
Suite 110
Austin, Texas 78754

Dear Ms. King

This letter reflects the comments of MEC Texas Racing, Inc., general partner of MEC Lone Star, LP ("Lone Star Park") regarding the proposed Request For Approval of Change of Location and/or Acquisition of Pecuniary Interest in a Horse or Greyhound Association (the "Application") issued by the Texas Racing Commission (the "Commission"). We appreciate the opportunity to provide comment on this draft and look forward to our continuing participation in this process.

Lone Star Park's sole comment is to request that the Application be revised to include a request of the applicant for information regarding the existence or status of any agreement between it and any Class 1 racetrack within a specified radius (we suggest 50 miles) of the applicant's proposed site, which agreement should address, among other possible matters, a resolution of issues concerning the possible impact that the applicant's proposed site will have on the affected Class 1 racetrack. We suggest that this request could be included in Item 1 of Section IV of the Application. Below is some suggested language that the Commission may wish to use:

> Please indicate whether you have an agreement with a Class 1 racetrack located within [fifty (50)] miles of your proposed site to mitigate any potential negative market impact that may result to such Class 1 racetrack from any live racing and pari-mutuel wagering conducted on your proposed site. If so, please provide a copy of this agreement. If not, please summarize the status of any negotiations that have taken place with such Class 1 racetrack.

We see this request as part of a greater effort by Lone Star Park to ensure that the Commission's rules and approach to license relocation recognize the potential negative market impact that may result to a Class 1 racetrack in respect of any racetrack license relocation. We also anticipate, to the extent deemed necessary, requesting a rule and/or

statutory amendment designed to ensure that any effort to relocate a racetrack license be accompanied by a requirement that the applicant reach a market impact mitigation agreement with the affected Class 1 racetrack.

We look forward to explaining our comments further at the Commission's next committee meeting on this issue. In the meantime, please let me know if you have any questions.

Sincerely,

Gregg A. Scoggins
National Director of Regulatory Affairs

cc: Drew Shubeck
Bill Ford, Esquire
Galt Graydon
Tommy Azopardi
Dave Hooper
Rob Wersler
Mark Fenner, Esquire

Texas Greyhound Association

Representing the Greyhound Breeding and Racing Industry in Texas

January 19, 2009

Mr. Mark Fenner
Texas Racing Commission
PO Box 12080
Austin, Tx 78711-2080

Dear Mark:

As the state breed registry, the Texas Greyhound Association is not directly involved in the track association licensing process. However, as greyhound owners and breeders, we have a significant stake in the successful operation of a greyhound racetrack.

When Corpus Christi Greyhound Track (CCGRT) was running live, approximately 75%, or 400, of the greyhounds competing there were Texas-bred. The majority of these greyhounds came from Gulf Greyhound Park, since Gulf's higher purses made the competition there a higher level than Corpus. The track at Corpus functioned well as the alternative for a less-competitive greyhound, and a venue for young greyhounds just breaking into racing. It created a good racing system for Texas. Since the closing of CCGRT, roughly 300-400 Texas-bred greyhounds now must run out-of-state.

We understand that CCGRT may be changing ownership, subject to Texas Racing Commission approval. Since CCGRT is not a new operation, holds a license, and the Commission has already identified its deficiencies in facilities and operations, the TGA urges that the Commission act expeditiously to re-open the racetrack and offer Texas greyhound owners, breeders and kennels a much-needed opportunity to race their greyhounds.

As you know, under current law only three licenses are available for greyhound tracks and all must be located on the Gulf coast. This makes a greyhound track the equivalent of a Class I horse racetrack. If Sam Houston Race Park, Retama Park or Lone Star Park were to cease operations, we imagine every effort would be made to re-open as quickly as possible.

The TGA is anxious that CCGRT make swift progress to provide our membership a racing venue. If we can provide you with additional information, please contact us.

Sincerely,

Diane Whiteley
Executive Director

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