

MICHAEL A. STAFFORD
First Assistant County Attorney



1001 Preston, Suite 634
Houston, TX 77002-1891
(713) 755-5101
Fax (713) 755-8924

RECEIVED

OCT 28 1997

GOVERNMENTAL INQUIRY
UNIT

MICHAEL P. FLEMING
County Attorney
Harris County, Texas

FILE # ML-39873-97
I.D. # 39873

October 22, 1997

The Honorable Dan Morales
Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RO-1016

RECEIVED

OCT 28 1997

Opinion Committee

Re: Constitutionality of an admission fee to Sam Houston Race Park imposed for and to be allocated among the cities in Harris County under the Texas Racing Act, Tex. Rev. Civ. Stat. Ann. art. 179e (Vernon's Supp. 1997).

Dear General Morales:

This letter is to request your opinion regarding the constitutionality of the fifteen cents admission fee (the "Fee") authorized to be charged for each admission to a racetrack to be imposed by the county and allocated among the cities and towns in the county pursuant to the Texas Racing Act, Tex. Rev. Civ. Stat. Ann. art. 179e, § 6.17 (Vernon's Supp. 1997).

Pursuant to the referenced act, a majority of the incorporated cities and towns in Harris County have requested the Commissioners Court of Harris County to impose the Fee and to allocate same in accordance with the act. Sam Houston Race Park (the "Race Park"), the holder of a Class 1 horse racing license located in the unincorporated area of Harris County, has challenged the constitutionality of the Fee. The Race Park suggests that the Fee is an occupation tax that does not comply with the requirements of the Texas Constitution, art. VIII, § 1(f).

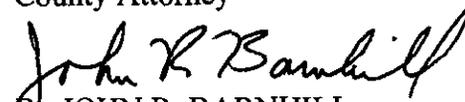
Our specific question is as follows:

Is the proposed fifteen cents admission fee to Sam Houston Race Park, to be collected by Harris County and allocated among the cities and towns in Harris County, a levy authorized by the Constitution?

Our memorandum and the brief prepared by counsel for the Race Park are attached. If you need any additional information, please do not hesitate to call.

Sincerely,

MICHAEL P. FLEMING
County Attorney


By JOHN R. BARNHILL
Assistant County Attorney

Approved:



MICHAEL A. STAFFORD
First Assistant County Attorney

MEMORANDUM

Twenty-six (26) of the thirty-four (34) cities and towns in Harris County, a clear majority, have requested the Commissioners Court to collect the additional fifteen cents admission fee that the Race Park challenges. Our analysis indicates that resolution of the issue revolves around whether the subject levy and any of the various levies by the State of Texas are an "occupation tax", as that term has evolved in Texas. We believe that the subject levy is not an occupation tax. But even if it is an occupation tax, it is not prohibited by the Constitution since the State of Texas also levies an occupation tax on racetracks.

The controlling provision of the Constitution provides that,

"The occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one half of the tax levied by the State for the same period on such profession or business." Tex. Const. art. VIII, § 1(f).

This provision has been interpreted to prohibit a municipality from levying an occupation tax where no such tax has been previously levied by the State. *City of Houston v. Harris County Outdoor Advertising Association*, 879 S.W. 2d 322, 326 (Tex. App.- Houston [14th Dist.] 1994, writ denied, cert. denied 116 S. Ct. 85 1995).

The distinction to be drawn is between occupation taxes whose purpose is to provide revenue and license fees whose purpose is to fund regulation of the activity involved. The Supreme Court has said,

"It is sometimes difficult to determine whether a given statute should be classed as a regulatory measure or as a tax measure. The principle of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, and this regardless of the name by which they are designated. On the other hand, if its primary purpose appears to be that of regulation, then the fees levied are license fees and not taxes." *Hurt v. Cooper*, 110 S.W. 2d 896, 899 (Tex. 1937).

The subject levy is authorized by the Texas Racing Act (the "Act") as follows,

"...If the racetrack is not located in an incorporated city or town, the court shall collect the additional fee if requested to do so by the governing bodies of a majority of the incorporated cities and towns in the county. Allocation of the fees shall be based on the population within the county of the cities or towns." The Texas Racing Act, Tex. Rev. Civ. Stat. Ann. art. 179e, § 6.17(a) (Vernon's Supp. 1997).

While the cities and towns requesting the fee have no regulatory responsibility directly for the Race Park, the Legislature was undoubtedly aware that those communities in the general vicinity of any racetrack concerned would feel the effects of increased traffic and other pressures from attendees at the racetrack. Using the boundaries of the county wherein the racetrack is located is an expedient means of identifying those cities and towns likely to experience such effects. The Legislature has provided this means of revenue to offset expenses resulting from attendance at the racetrack. Thus, the purpose of the fees is for regulation, not revenue, and therefore the fees are not an occupation tax, and, accordingly, not unconstitutional as claimed by the Race Park. Note that the fee of fifteen cents per admission imposed by the County is not at issue. The Race Park is not challenging this levy due to the expense that the county bears in the form of infrastructure, such as roads, and services, such as law enforcement, which support the racetrack.

The State of Texas requires application fees and annual license fees to be paid by applicants for a license under the Texas Racing Act. The Act provides that,

“(e) The *minimum* application fee for a horse racing track is \$15,000 for a class 1 racetrack,.... Using the minimum fees, the commission by rule shall establish a schedule of application fees for the various types and sizes of racing facilities. *The commission shall set the application fees in amounts that are reasonable and necessary to cover the costs of administering this Act.*” (Emphasis added). Tex. Rev. Civ. Stat. Ann. art. 179e, § 6.03(e) (Vernon’s Supp. 1997).

The annual license base fee for a Class 1 racetrack such as the Race Park is fixed at \$15,000. 16 TAC § 305.71 (b)(1) (West 1997). In addition to the foregoing application and annual license base fees, the State levies a daily fee that is a variable fee equal to certain fixed amounts of money that range from \$275 for a race day on which less than \$225,000 is wagered, to a maximum of \$2,750 on a race day on which more than \$1,000,000 is wagered. 16 TAC § 305.71(c) (West 1997). The fees are expressed in relation to a handle, which is defined as the total amount of money wagered at a racetrack during a particular period. 16 TAC § 301.1 (West 1997).

From the emphasized language of the Act above, it appears that the Legislature’s purpose in the application fees was to fully fund the expenses of the Texas Racing Commission. However, the Legislature has gone further and provided for annual license fees to include a base fee plus a daily fee. This levy appears to be for the purpose of providing revenue to the State. If so, the levy is an occupational tax. *Hurt*, 110 S.W. at 899.

The Race Park appears to contend that since the basis of the State’s levy (the daily handle) is different from the basis of the levy for cities and towns (the number of admissions), that the State’s levy is not an occupation tax. However, we find no

requirement for the bases of state and local occupation taxes to be the same as to any given business or occupation.

In conclusion, the fifteen cents admission fee to be collected for the benefit of cities and towns is constitutional. It is not an occupation tax, but that if you find it is an occupation tax, then it is limited in amount to no more than one-half that levied by the State.

MAYOR, DAY, CALDWELL & KEETON, L.L.P.

700 LOUISIANA, SUITE 1900
HOUSTON, TEXAS 77002-2778
(713) 225-7000
TELECOPIER (713) 225-7047

100 CONGRESS AVENUE
SUITE 1500
AUSTIN, TEXAS 78701-4042
(512) 320-9200
TELECOPIER (512) 320-9292

J. KENT FRIEDMAN
PARTNER
225-7036

August 11, 1997

VIA MESSENGER

Michael P. Fleming
Harris County Attorney
1001 Preston, 6th Floor
Houston, Texas 77002

Attention: Michael Stafford
First Assistant County Attorney

Dear Mr. Fleming:

We are writing on behalf of our client, Sam Houston Race Park (the "Race Park"), to address the concerns that we expressed to you recently as to a proposal pending before Commissioners Court. Specifically, the proposal is that, under Art. 179e, TEX. REV. CIV. STAT. ("Art. 179e"), Harris County levy a new and additional admissions fee of fifteen cents for each admission to the Race Park. This charge would be imposed and collected by Harris County and then allocated among the cities in Harris County on the basis of their relative populations. As you know, several of those remittances would be less than \$100 per year, and some are even less than \$10 per year. Based upon the limitations prescribed in the Texas Constitution regarding the imposition of taxes, we believe this charge is not authorized.

As you will recall, the Race Park is located in the unincorporated area of the County. Accordingly, it does not receive the benefit of municipal services. It does, however, receive the benefits of County public improvements and services, for which the Race Park pays a very significant amount of ad valorem taxes to the County. In addition, the Race Park pays to the County, and has every expectation that it will continue to pay, a fifteen cent fee for each admission.

Our legal concern is that the new fifteen cent admission fee proposed to be imposed by the Commissioners Court represents an occupation tax that does not comply with the requirements of Article VIII, Section 1 of the Texas Constitution. That provision allows counties and municipalities to levy an occupation tax, but the existence of a State occupation tax is a necessary legal prerequisite for the imposition of the proposed local tax. Further, the amount of a local occupation tax may not be greater than one-half of an authorized State occupation tax. In this case there is no State occupation tax on the Race Park. The absence of a State occupation tax on the Race Park results in the County's not having the constitutional authority to impose this proposed admission fee for the benefit of the cities in Harris County.

Article VIII, Section 1(f) of the Texas Constitution provides in relevant part as follows:

" . . . The occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business."¹

Texas courts have interpreted this provision to prohibit a local occupation tax in the absence of a State occupation tax.² The proposed fee represents an occupation tax because it is imposed only on a business that operates a licensed race track located in the County.³ The proposed admissions fee represents a tax, that is, a burden or charge imposed by legislative power to raise money for public purposes, despite the statutory characterization as a fee.⁴ A governmental fee imposed on a business that produces revenue in excess of the cost of regulation is an occupation tax.⁵ Unlike Harris County, none of the municipalities that would receive the new fee expends any public funds to provide services or to regulate the operations of the Race Park. The proposed distribution of revenue is not offset by any municipal costs. The sole purpose of the imposition of the admissions fee is to raise revenues and, therefore, it represents an occupation tax, subject to the limitations of the Texas Constitution.⁶

In contrast, while Harris County also imposes an admissions tax on the Park, it provides governmental improvements and services such as roads and law enforcement to the Race Park. The result is that the revenues received are offset by the County's costs of providing such improvements and services. No such improvements or services are provided to the Race Park by municipalities located in the County.

The State imposes initial and annual license fees, as well as one time fees for the filing of an application for a license from the Texas Racing Commission.⁷ The annual fee for a Class 1 race track such as the Race Park is a fixed amount of \$15,000.⁸ The daily fee is a variable fee equal to certain fixed amounts of money that range from \$275 for a race day on which less than \$225,000 is wagered to a maximum of \$2,750 on a race day on which more than a million

¹Article VIII, Section 1(f), Tex. Const.

²*City of Houston v. Harris County Outdoor Advertising Ass'n*, 879 S.W.2d, 322, 326 (Tex. App.—Houston [14th Dist.] 1994 error denied, cert. denied 116 S.Ct.85).

³Sec. 6.17, Art. 179e, Tex. Rev. Civ. Stat. Ann. (Vernon).

⁴*Conlen Grain & Mercantile Co., Inc. v. Texas Grain Sorghum Producers Bd.* (Tex. 1975) 519 S.W.2d 620, 623.

⁵*City of Houston v. Harris County Outdoor Advertising Ass'n.*, 879 S.W. 2d at 325.

⁶*Hurt v. Cooper*, (Tex. 1937) 110 S.W.2d 896, 899.

⁷Sec. 603(e), Art. 179e Tex. Rev. Civ. Stat. Ann. (Vernon).

⁸16 T.A.C. § 305.71 (b)(1).

Michael P. Fleming
August 11, 1997
Page 3

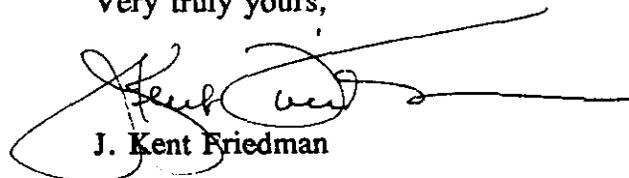
dollars is wagered.⁹ None of the fees imposed by the State on the business of operating a licensed race track in the County is imposed on the basis of admission to the race track. Rather, they are imposed either once each year on the license holder or upon the daily amount of money wagered at the race track.

Unless the proposed new County fee is authorized to be levied at a rate one-half or less of the fees imposed by the State, the proposed tax does not meet the requirement of Article VIII, Sec. 1(f) of the Texas Constitution. It is clear that the State and local fees are imposed on a completely different basis. Any result by which the amount proposed to be collected by the County for the benefit of cities would equal one-half or less of the fees collected by the State would be an unpredictable coincidence. As noted above, in order to meet the requirement of Article VIII, Section 1(f), the tax must be limited to an amount not greater than one-half of the State occupation tax. The proposed tax is not so limited and, therefore, does not comply with the requirements of Article VIII of the Texas Constitution.

We hope that you agree with our legal analysis as to the invalidity of the proposed new tax and further that it is distinguishable from the County's fee, in connection with which the County provides services. If you are not in a position to agree with us, and we recognize that this question may be a matter of first impression, we would respectfully suggest that you seek guidance from the Texas Attorney General by way of a formal request for an opinion as to the validity of the collection of this new and additional fifteen cent admission fee for the municipalities.

We are, of course, available to discuss this matter with you further. Thank you for your consideration.

Very truly yours,



J. Kent Friedman

:lge

cc: James D. Noteware
Michael J. Vitek
Byron L. Wade
Robert M. Collie, Jr. (Firm)
Charles M. Williams (Firm)

0398438.01
089711/1209

⁹16 T.A.C. § 305.71 (c). The fees are expressed in relation to a handle, which is defined as the total amount of money wagered at a race track during a particular period. 16 T.A.C. § 301.1.