FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
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CLERK OF THE COURT
Christopher Waites

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

NEW MEXICO HORSEMEN'S ASSOCIATION,

Petitioner,

No. D-202-CV-2020-06564

vs.

NEW MEXICO RACING COMMISSION; SAM BREGMAN, Individually and as Commissioner of the New Mexico Racing Commission; DAVID "HOSSIE" SANCHEZ, Individually and as Commissioner of the New Mexico Racing Commission; BILLY G. SMITH, Individually and as Commissioner of the New Mexico Racing Commission; ISMAEL "IZZY" TREJO, Individually and as Executive Director of the New Mexico Racing Commission; DOWNS AT ALBUQUERQUE, INC. doing business as THE DOWNS RACETRACK & CASINO; SUNRAY GAMING OF NEW MEXICO L.L.C. doing business as SUNRAY PARK & CASINO; MY WAY HOLDINGS, LLC doing business as SUNLAND PARK RACETRACK AND CASINO; ALL-AMERICAN RUIDOSO DOWNS, LLC doing Business as RUIDOSO DOWNS RACE TRACK & CASINO; GAMING AND LEISURE PROPERTIES, INC. doing business as ZIA PARK CASINO HOTEL RACETRACK; PENN NATIONAL GAMING, INC. doing business as ZIA PARK CASINO HOTEL RACETRACK; ZIA PARK LLC doing business as ZIA PARK CASINO HOTEL RACETRACK; THE NEW MEXICO STATE FAIR COMMISSION; and EXPO NEW MEXICO,

Respondents.

ORDER GRANTING, IN PART, SUMMARY JUDGMENT

THIS MATTER coming before the Court on the New Mexico Horsemen's Association ("Movant") "Revised/Substituted Motion for Partial Summary Judgment #1; On Issue of Respondents Violating Statutory Restrictions on What Gaming Tax Monies Must be Used for Under NMSA 1978, Section 60-2E-47 (E)," the Movant appearing by and through its attorneys,

Gary C. Mitchell and Randy K. Clark; Respondent New Mexico Racing Commission ("Commission") appearing through attorney Eric Loman; the individual Commissioners and its Executive Director represented by Eric Loman; Sunray Gaming of New Mexico, LLC represented by Billy R. Blackburn; The Downs at Albuquerque represented by Bret A. Blanchard; Zia Park LLC represented by Harold D. Stratton, Jr. and Joseph C. Haupt; and My Way Holdings, LLC represented by Deron B. Knoner; and the Court having reviewed the pleadings, having listened to the argument of counsel and in all things being advised, hereby Finds and Concludes, as follows:

1. The Court has jurisdiction over the parties and the subject matter of this proceeding.
2. The Movant seeks summary judgment under Rule 1-056 on the grounds that Section 60-2E-47 (E), when read in the context of the entire statutory scheme, precludes the New Mexico Racing Commission from using gaming monies for purposes other than as specifically provided under the Gaming Control Act. NMSA 1978, §60-2E-47 (2021).
3. Although Zia Park, LLC suggested it needs more time to conduct discovery, the Commission conceded during argument that no factual disputes exist in this case with regard to the Movant's allegedly undisputed material facts.
4. This matter has been pending since December 2, 2020, without the parties conducting any substantive discovery; Zia Park was added as a party in the Amended Petition on June 18, 2021, but Zia Park has also failed to conduct any discovery.
5. The primary defendants include the Commission and its Commissioners, while the other later joined defendants consisting of the various New Mexico racing track operators who conduct horse raising events throughout the year.
6. The Zia Park motion to continue under Rule 1-056 (f) was not credible given its failure to actively participate in this proceeding, or to conduct any discovery; also given the

Commission's failure to dispute any of the Movant's assertedly undisputed material facts; and the Commission's concession during argument on the present hearing that the asserted facts are undisputed.

7. The Commission promulgated various regulations for Associations (race track operators) addressing the qualification for licensees to conduct horse racing meetings as far back as March 15, 2001. *See* NMAC Part 2, 15.2.2.1, *et seq.*
8. Rule 15.2.2.3 recognizes the statutory authority under which the Commission operates: "Section 60-1A-4 NMSA 1978 empowers the state racing commission to make rules and regulations for the holding, conducting and operating of all race meets and races. Section 60-1A-20 NMSA 1978 empowers the racing commission to establish such qualifications for licenses to conduct horse race meets as it deems to be in the public interest."

   [15.2.2.3 NMAC - Rp, 15 NMAC 2.2.3, 03/15/2001; A, 09/15/2009; A, 12/01/2010]
9. Rule 15.2.2.8 (A) provides that: "An association, its officers, directors, officials and employees shall abide by and enforce the Horse Racing Act and the rules and orders of the commission and stewards."
10. Many years ago, the Commission realized the importance of ensuring that jockeys and exercise riders had insurance coverage given the inherently dangerous horse racing profession; the Commission explained during the hearing that various stakeholders met and agreed to that medical insurance premiums should be paid out of gaming monies received.
11. Subsection B of Rule 15.2.2.8 (11) (Financial requirements; insurer of the race meeting) explains the key rule that the Movant relies upon in support of the insurance premium payments:

"An association [race track] is authorized to *offset a portion of the jockey and exercise rider insurance premium* from gaming monies subject to the approval of the commission." (italics added).

12. The question presented in this case is whether the Commission exceeded the terms of Section 60-2E-47 (E) in promulgating this Rule to allow the use of gaming monies to pay for the disputed insurance premiums. NMSA 1978, §60-2E-47 (2021).

13. Section 60-2E-47 (E) provides, in relevant part:

> In addition to the gaming tax, a gaming operator licensee that is a racetrack shall pay twenty percent of its net take to purses to be *distributed in accordance with rules adopted by the state racing commission*. An amount not to exceed twenty percent of the interest earned on the balance of any fund consisting of money for purses distributed by racetrack gaming operator licensees pursuant to this subsection may be *expended for the costs of administering the distributions*.
>
> NMSA 1978, §60-2E-47 (E) (2021) (italics added).

14. This language reserves use of gaming monies for the purses, but does not on its face allow use of the gaming monies for the purpose of paying jockey and exercise rider insurance premiums, no matter how laudable might be this policy decision.

15. The question of whether an agency rule is valid is based on whether it is consistent with the overall statutory scheme under which it was established, i.e., whether the Legislature's intent will support the rule.

16. "When construing a statute, 'a reviewing court's central concern is to determine and give effect to the intent of the [L]egislature.'" *Communities for Clean Water v. N.M. Water Quality Control Com'n*, 2018-NMCA-024, ¶14, 413 P.3d 877.

17. This Court is charged with following the "plain meaning" rule in determining legislative intent. *See id.*; *Public Serv. Co. of N.M. v. N.M. Public Util. Com'n*, 1999-NMSC-040, ¶18,

128 N.M. 309, 992 P.2d 860 ("The plain language of a statute is the primary indicator of legislative intent.").

18. The Commission argues in support of Rule 15.2.2.8 (11)'s validity that distributions of the net purse money received under 60-2E-47 (E) may be "distributed in accordance with rules adopted by the state racing commission."

19. Although Rule 15.2.2.8 (11) specifically provides that jockey and exercise trainer insurance premiums may be paid from purse monies by means of a "distribution," this argument fails to address the fundamental question of whether the *statute* itself provides such authority.

20. The Commission argues that the practice of using a small portion of the purse money to pay the insurance premiums is good policy and that this practice has continued for years without objection, but the reality is that the practice is being questioned now; the parties presented no authority supporting the proposition that a party somehow waives a rulemaking overreach by the mere passage of time.

21. The terms of Section 60-2E-47 (E) do not expressly or implicitly support the Commission's promulgation of Rule 15.2.2.8(11)'s authorization to use gaming monies to pay for jockey and exercise trainer insurance premiums.

22. The Commission alternatively argues that the Rule authorizes expenditures for costs of "administering the distributions," and that the payment of insurance premiums somehow qualifies as such a cost.

23. While it is true that the Rule authorizes costs for administering the distributions, and this purpose *is* authorized under the statute, *see* Section 60-2E-47 (E) ("An amount not to exceed twenty percent of the interest earned on the balance of any fund consisting of money

for purses distributed by racetrack gaming operator licensees pursuant to this subsection may be *expended for the costs of administering the distributions*.") (italics added), payment of insurance premiums for any purpose cannot be reasonably characterized as a "cost for administering the distributions."

24. There was little said during the hearing on the question of how payment of insurance premiums can be, under any circumstances, considered a "cost for administering the distributions."

25. The Commission further argues that Rule 15.2.2.8 (11)'s authorization of the insurance premium offset from gaming monies reasonably falls within its legislative authorization to adopt rules to ensure "horse racing in New Mexico is conducted with fairness." *See* NMSA 1978, §60-1A-5 (A) (2021).

26. However, the Commission fails to reasonably explain the logical connection between a "fair" horse race, or fair gambling at horse racetracks, and the provision of insurance for jockeys and exercise riders.

27. The Commission next argues that the Gaming Control Act provides that the Commission "shall…regulate the size of the purses to be offered at horse races run in the state," *see* NMSA 1978, §60-1A-4 (B)(9), and that Rule 15.2.2.9(B)(1) NMAC provides for the creation of "interest-bearing accounts, designated as gaming funds for purses."

28. Under this argument, when each of the five (5) casinos associated with the state's five (5) racetracks routinely extract twenty percent (20%) of their net take, *see* Section 60-2E-47 (E), those funds are transferred into "gaming accounts," but these monies are not yet technically "purse" account monies.

29. Using gaming monies (not yet called purse monies), as the Court understands the Commission's argument, somehow avoids the limiting language of Section 60-2E-47 (E), which does not authorize the payment of insurance premiums.

30. As a result, under this convoluted argument the Commission maintains that no "purse" monies are used to pay the insurance premiums because the 20 percent of the net take of the horse racing operation is first deposited into a "gaming account" before it is transferred into the "purse account."

31. This argument exalts form over substance, and circumvents Section 60-2E-47 (E)'s clear intent of limiting the use of the 20 percent portion of horse racing revenue for purses only.

32. Neither does the statute suggest that this circumvention is authorized, nor that it would authorize the use of gaming monies to pay insurance premiums before the funds are deposited into the more restrictive "purse account."

33. It is neither the Commission's nor this Court's role to decide and implement policy which would essentially allow the skimming of racing revenue for the admittedly favorable purpose of protecting jockeys and exercise riders who may sustain injuries in the course of engaging in the inherently dangerous profession of horse racing.

34. Absent a clear legislative guidance that the Legislature intends to protect jockeys and exercise riders by authorizing a funding mechanism for payment of insurance premiums, or that it intends to authorize the Commission to promulgate a regulatory scheme to protect jockeys and exercise riders who may sustain accidental injuries/disability in the course and scope of performing the inherently this dangerous occupation, the Court will not exceed its own constitutional role to lend assistance to this venture. *See* N.M. Const., Art. VI (Judicial), Sec. 13.

35. The present motion, therefore, is well-taken.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the present Motion for Partial Summary Judgment, should be, and the same is hereby, GRANTED, provided that this order only extends to a declaration that Rule 15.2.2.8 (11) is prospectively invalid and of no effect to the extent it exceeds the legislative mandate of Section 60-2E-47 (E), which does not currently allow racetrack revenues to be used to pay, reimburse, or otherwise compensate for the payment of insurance premiums, as discussed herein.

IT IS FURTHER ORDERED the Zia Park motion to continue under Rule 1-056 (f) should be, and the same is hereby, DENIED.

IT IS FINALLY ORDERED that, given the likelihood of an appeal (or legislative action to address the gap in protection for injured/disabled jockeys and exercise riders in the horse racing occupation), this Order should be, and it is hereby, STAYED until at least the completion of the 2023 Legislative Session (ending March 18, 2023) to allow the parties to consider legislative intervention, if appropriate.

VICTOR S. LOPEZ, JUDGE
Second Judicial District, Div. XXVII