



KENTUCKY GENERAL ASSEMBLY

State Capitol

Frankfort, Kentucky 40601

502-564-8100

October 14, 2011

The Honorable Jack Conway
Attorney General of Kentucky
P.O. Box 4041
Frankfort, Kentucky 40604

Dear Mr. Attorney General:

We are writing to respectfully and formally request that you investigate the instant racing slot machines which are being operated by Kentucky Downs, LLC ("Kentucky Downs"), in Franklin, Kentucky. We have seen photographs of the gambling devices. Please take the opportunity to view these photographs. We are confident that you and all reasonable people will agree that the pictures show gaming devices which are prohibited under Section 226 of the Kentucky Constitution and Chapter 528 of the Kentucky Revised Statutes. The pictures simply do not lie.

The media reported that you were previously provided with these photos and asked by The Family Foundation to take action to stop the instant racing slot machines at Kentucky Downs, but that you declined, stating that the Attorney General does not intervene in litigation. Surely there must be a misunderstanding. Based on press reports, that response appears to be declining to do what attorneys general are supposed to do.

As the chief law enforcement officer of the Commonwealth, the Office of the Kentucky Attorney General is to attend to all litigation in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties, including seeking an injunction where necessary (KRS 15.020). Certainly, the Commonwealth has an interest in the instant racing slot machines. Chapter 528 of the Kentucky Revised Statutes prohibits them, and surely this litigation has an obvious

The Honorable Jack Conway

Page 2

October 14, 2011

connection with the official duties of the Kentucky Racing Commission. If you recall, on January 5, 2010, your office rendered a legal opinion about the propriety of the Racing Commission adopting regulations to permit instant racing gaming. Importantly, you reserved opinion and cautioned proponents of instant racing about the impropriety of the devices used to implement instant racing gambling. Are we to correctly understand that your office has no interest in this matter, even after writing an opinion about it? Moreover, can it be true that the Office of the Kentucky Attorney General will defer any action on requests if litigation is pending, even if the request involves violations of the penal code? Doing so would render you impotent to address clear statutory violations anytime litigation is pending. Surely that is not the official position of the Kentucky Attorney General. If it is, we respectfully urge you to reconsider.

The policy question of whether expanded gambling will be allowed in Kentucky and whether slot machines will be permitted at the racetracks has been in the General Assembly for the last twenty-plus years. Recognizing this, when running for Governor in 2007, Governor Beshear stated, "Now the question is, what happens if we don't pass it? Well, I'm gonna tell you something. I'm not going to have to answer that question because I am going to pass it." (*Lexington Herald Leader* article entitled "Many of Governor Beshear's 2007 Campaign Pledges Remain Undone," Sunday, October 9, 2011.) Governor Beshear is recognized as an accomplished and capable lawyer. Even he realized that legalizing slot machines was an initiative which would require passage by the General Assembly. As we write, however, nothing new has passed the General Assembly. Yet, Kentucky Downs is operating instant racing slot machines anyway, with the blessing and sanction of the Beshear Administration, and your office has refused to do anything about it.

What seems to be happening here will eventually cause constitutional damage to our Commonwealth. Few things could be any more dangerous to the underpinnings of a representative democracy than for an unelected Racing Commission and for a court, selected only by the residents of Franklin County, to thwart the expressed will of the general population of voters as expressed by the representative membership of the General Assembly.

The 138 members of the legislature represent approximately 4.1 million people of Kentucky. As has been recognized by policy makers for decades, the issue of expanding gambling and/or slot machines at the tracks is a matter of public policy for the General

The Honorable Jack Conway

Page 3

October 14, 2011

Assembly to address, not the courts and certainly not an unelected Racing Commission. This circumstance is especially bothersome when the Racing Commission is admittedly working in what the Commission itself calls a "common interest" with the racetracks. No other commercial entity is allowed to work so closely with the state appointed oversight agency to flagrantly thwart the clear limits of our statutes. We also understand that your office has twice refused to enforce open records requests by The Family Foundation to the Racing Commission on the topic of instant racing. Given your reluctance to act, perhaps it would be preferable to appoint a special investigator or prosecutor to investigate both the operations of the instant racing machines at Kentucky Downs and those involved in facilitating their operation and to enforce the open records requests made by The Family Foundation to the Racing Commission. If you find yourself compromised by a personal or family conflict of interest in this extremely important matter, we would encourage you to pursue that option.

The enactment of Chapter 528 of the Kentucky Revised Statutes cannot be regarded as merely an expression of policy preference by members of the General Assembly. Rather, the legislature has imposed penalties for unlawful gambling under Chapter 528 pursuant to its sacred constitutional duty to enforce Section 226 of the Kentucky Constitution "by proper penalties." As the Attorney General of this Commonwealth, you have both the duty to defend the constitutionally mandated act of the General Assembly and the authority to investigate any activity that contravenes it.

We, therefore, would further urge you to act promptly and not to rely on the well publicized opinion of the Franklin Circuit Court which is under appeal in the Kentucky Court of Appeals. That lower court opinion, entered on December 29, 2010, did not even mention KRS 230.361—the statute passed by the General Assembly which limits the Racing Commission's statutory authority and precludes it from promulgating regulations to allow slot machines. KRS 230.361 allows wagering only on horse races by the pari-mutuel system of wagering. As you must have seen already, the instant racing slot machines are completely different from wagering on horse races. First, a three-second video shown on a 2" x 2" video screen in the top corner of an instant racing device is not a horse race. It is a video. Second, a single patron betting on a single race is not wagering in pari-mutuel with other patrons on the same race. It is impossible for one patron to constitute a pool of wagers as is required for pari-mutuel wagering. Thus, under no scenario was the Racing Commission ever authorized by the General Assembly via KRS 230.361 to promulgate regulations which permit statutorily prohibited activities on statutorily prohibited gambling devices. In fact, when the Administrative Regulation Review Subcommittee considered the draft regulations concerning instant racing, only one

The Honorable Jack Conway

Page 4

October 14, 2011

legislator voted in favor of them. Recently, columnist Al Cross characterized instant racing as nothing but a result of "legal fiction and compliant courts" in an article which appeared in the *Courier Journal* on September 24, 2011. After reviewing the December 29, 2010, opinion, and given the absence of a single reference to KRS 230.361, we have to agree with Mr. Cross's characterization.

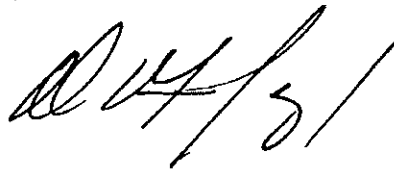
We understand that you may disagree with the General Assembly's expressed opposition to expanded gambling and video slot machines at the racetracks. However, we respectfully submit that the Office of the Attorney General is statutorily obligated to enforce the law as written—not to advance a material change in public policy by inaction.

Your promptest attention and response to our request is respectfully expected and will be very much appreciated. Thank you.

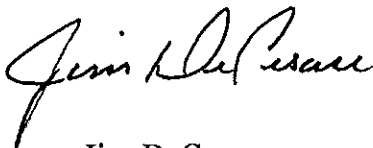
Sincerely,



Tim Moore
State Representative
House District 26



David Floyd
State Representative
House District 50




Jim DeCesare
State Representative
House District 21



Kim King
State Representative
House District 55



Stan Lee
State Representative
House District 45

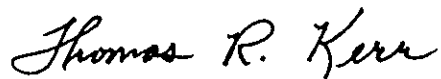


F. L. Waide
State Representative
House District 10


The Honorable Jack Conway

Page 5

October 14, 2011



Thomas Kerr
State Representative
House District 64



Joseph Fischer
State Representative
House District 68



Brent Housman
State Representative
House District 3