



KATE BROWN
Governor

February 16, 2022

Diego Conde, Chair
Steve O'Hagan, Vice Chair
Jan Palmer, Commissioner
Charles Williamson, Commissioner
Oregon Racing Commission
800 NE Oregon Street, Suite 310
Portland, OR 97232

Delivered by electronic mail

Dear Commissioners:

As you know, the Oregon Department of Justice recently issued an opinion on the legality of certain applications pending before the Oregon Racing Commission, which I am attaching to this letter for your convenience. That opinion advises the Commission that the proposed activity would violate the Oregon Constitution.

It is my expectation that the Oregon Racing Commission will heed the advice in this published opinion by our state legal counsel. Where, as here, an application before a state regulatory licensing agency proposes unconstitutional activity, that application should be denied.

As dedicated public servants, I know you all appreciate the significance of following the law. If members of the Commission vote to take any action inconsistent with the law, as interpreted by the Oregon Department of Justice, I would regard such conduct as contrary to my expectations for your appointment. This could provide grounds to initiate removal from the appointment as provided under the cause standard identified in ORS 462.230.

Thank you for your attention to this matter, and for your service to our state.

Sincerely,

Governor Kate Brown



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

February 11, 2022

SENT VIA EMAIL ONLY: jack.mcgrail@orc.oregon.gov

Jack McGrail
Executive Director
Oregon Racing Commission
800 NE Oregon Street, Suite 310
Portland, OR 97232

RE: Opinion Request OP-2022-1

Dear Mr. McGrail:

The Oregon Racing Commission (Commission) is currently considering an application from TMB Racing LLC (TMB Racing), the operator of the Grants Pass Downs horse racing course. The Commission is also considering four applications from vendors affiliated with TMB Racing. The applications relate to TMB Racing's plan to operate 225 historical horse racing machines (HHRs) at a new entertainment facility on the grounds of the race course.

Because of gaming restrictions in our state constitution, you have requested a legal opinion on the authority of the Commission to allow the operation of the proposed HHRs. Whether the state constitution's restrictions on gaming reflect good public policy is not for us to decide. Our role is limited to assessing whether the proposed HHRs are permissible under existing state law.

QUESTION

Does TMB Racing's proposed operation of 225 HHRs comply with the Oregon Constitution's prohibition on casinos and restriction on lotteries?

ANSWER

No. Operating 225 of these HHRs would violate two provisions of the Oregon Constitution: Article XV, section 4(10), which prohibits casinos, and Article XV, section 4(1), which prohibits lotteries, except those operated by the State Lottery.

The planned concentration of 225 electronic gaming machines offering games of chance constitutes a casino. Therefore, TMB Racing's plan violates the constitutional prohibition against casinos.

After reviewing the features and design of the HHRs proposed by TMB Racing, we determine that the machines are games of chance that do not afford players any meaningful opportunity to exercise skill. As a result, we conclude that they are lotteries. Lotteries are constitutionally prohibited in Oregon, unless they are run by the State Lottery. Thus, the HHRs cannot be authorized by the Commission.

BACKGROUND

In 1933, the Oregon Legislative Assembly authorized betting on live horse races. The Commission regulates horse racing in the state, as well as betting on horse races.¹ Traditionally, participants bet on live horse races, either at a race course or at an off-track betting facility. However, since 2013, the Commission may allow race meet operators “to conduct mutuel wagering at the licensee’s race course on horse races previously held.”²

The Commission is currently considering applications related to a plan to operate 225 HHRs at a new entertainment facility located on the grounds of the Grants Pass Downs race course. We have previously opined that 75 electronic terminals offering video lottery machines would constitute a prohibited casino.³

We understand that the proposed HHRs allow players to bet on previously run horse races by using a video machine similar in appearance to a slot machine. Examining similar HHRs, the Nebraska Attorney General noted that the “‘bells and whistles’ associated with slot machines * * * are all present * * *. The machines are the same height and design as a slot machine, and include flashing buttons, blinking lights, [and] video display.”⁴ This similarity in appearance is not coincidental. The Wyoming Supreme Court has cited patent documents that show these machines are a response to the increased competition the racing industry has seen from lotteries and casinos.⁵ Those documents indicate that while “‘a typical racetrack offers one race every half hour[, a] casino having slot machines * * * offers a patron the opportunity to place a wager that can be won or lost every few seconds.’”⁶

Based on the information available to us, the proposed HHRs include the following features. Although the user interface (or player “experience”) may vary slightly depending on what vendor supplies the machine, all of the HHRs allow two ways for a player to bet on a fixed

¹ *E.g.*, ORS 462.270(1) (“The Oregon Racing Commission shall license, regulate and supervise all race meets held in this state and cause the various places where race meets are to be held to be visited and inspected at least once each fiscal year.”).

² ORS 462.155(1).

³ 48 Op Atty Gen 15 (1995).

⁴ Neb Atty Gen Op No 10009, at 3 (2010), *available at* <https://ago.nebraska.gov/sites/ago.nebraska.gov/files/docs/opinions/AG%20Opinion%202010-009.pdf>.

⁵ *Wyo. Downs Rodeo Events, LLC v. Wyoming*, 134 P3d 1223, 1229 (Wyo 2006).

⁶ *Id.*

number of randomly chosen, previously run horse races. Under either option, the player does not know which race they are betting on, or the names of the horses, trainers, or jockeys.

Under option 1, or the “auto handicap” function, the player lets the machine make the selections for them, using the odds established on the day the historical races were actually run. We understand this is the more commonly used option. It involves no skill whatsoever—the machine picks for the player. In fact, the player is not even shown the day-of-race odds; rather, the machine has internal access to that data and ranks the horses for the player.

Under option 2, or the “manual handicap” function, a player manually selects finish orders for approximately 10 randomly selected horse races (some machines may offer slightly more or less). A player who chooses option 2 will be presented with randomly selected and limited information from official racing publications available on the date of the race. The machine presents this information in an anonymized way to eliminate the possibility of looking up the outcome of the historical race. What information specific players receive is randomized. As a result, even in the unlikely event that two players sitting at different machines happen to be betting on the same race at the same time, it is highly unlikely they will receive the same pieces of information regarding the race.⁷

A time limit to select picks makes it even more difficult to use information that may not be helpful in the first place. For example, the player may have only 200 seconds to rank finishers in 10 different races. Additionally, if a player who selects option 2 runs out of time (or simply decides they no longer want to continue selecting a finish order), the machine erases any picks already chosen by the player and makes selections for the player *not* using the odds from the day of the race, but completely at random.

Under either option, after the selections are completed, the HHR displays the results of the past race in a video presentation, which includes the last seconds of the race and can include animated features similar to slot machines, such as spinning reels.

⁷ The machines vary in this regard, but all of them display only a very small amount of data—three pieces is typical from a very large dataset. Possibilities include things like how many times each horse had previously started a race, how many times a trainer had a horse finish in third place, and how much total prize money a jockey had previously accumulated. All of this data is rendered into a bar graph so that it can be displayed as purely relative information.

ANALYSIS

1. **An entertainment facility with 225 HHRs would qualify as an unlawful casino under Article XV, section 4(10).**

Under Article XV, section 4(10), of the Oregon Constitution, “[t]he Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.” In *Ecumenical Ministries v. Oregon State Lottery Comm.*, the Oregon Supreme Court interpreted this ban on casinos to apply to “establishments whose dominant use or dominant purpose, or both, is for gambling.”⁸ We subsequently applied that interpretation to mean that the State Lottery’s operation of 75 video lottery terminals at a horse race track would likely qualify as a prohibited casino.⁹ We reasoned that combining a facility whose dominant purpose was already gambling on horse races with these 75 additional gambling devices would likely result in a casino.¹⁰ Yet we also explained that “regardless of whether an establishment is a race track or another type of business, we regard a concentration of 75 video lottery terminals at any single establishment under one ownership or devoted to a single general function” as likely constituting a casino.¹¹

Here, TMB Racing proposes to operate three times as many machines—not 75 HHRs, but 225. The dominant purpose or use of this gaming area is clearly gambling.

We have taken into account that the new facility will contain other features, in addition to HHRs. For example, the facility will have a restaurant, bar, and office space, which may generate significant revenue. But the common understanding of “casino” refers not just to buildings that are solely dedicated to gambling, but also to Las Vegas–style casinos, which contain restaurants, bars, hotels, and concert venues. When the Oregon Supreme Court defined casinos as establishments whose dominant use or purpose is gambling, it is unlikely the court meant to suggest that a traditional casino could be allowed so long as other operations are present or bring in significant revenue. The court in *Ecumenical Ministries* was considering whether introducing elements of video gambling into traditional retail establishments would transform those establishments into casinos, and its analysis of a casino should be understood in that context. A casino remains a casino even if it is operated as part of a larger enterprise.

As explained below, these machines are electronic games of chance with no meaningful relationship to traditional parimutuel racing wagers. Concentrating 225 of them on a dedicated gaming area would create a space that is predominantly used for gambling and is readily recognizable as a casino.

⁸ 318 Or 551, 562, 871 P2d 106 (1994).

⁹ 48 Op Atty Gen at 17–21.

¹⁰ *Id.* at 17–18.

¹¹ *Id.* at 19.

2. HHRs qualify as a lottery under Article XV, section 4(1).

Article XV, section 4(1), of the Oregon Constitution prohibits lotteries, subject to exceptions that include the State Lottery: “Except as provided in subsections (2), (3), (4), (8) and (9) of this section, lotteries and the sale of lottery tickets, for any purpose whatever, are prohibited, and the Legislative Assembly shall prevent the same by penal laws.” One of these exceptions, subsection (3), allows the State Lottery Commission to establish and operate a State Lottery. In effect, section 4(1) prohibits lotteries in Oregon that are not operated by the State Lottery and do not qualify for an express exception.¹²

a. Proposed HHRs are games of chance.

The Oregon Supreme Court has defined a “lottery” as “any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine.”¹³ The three necessary elements of a lottery are therefore “the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize.”¹⁴

Here, the HHRs clearly offer *a prize*—money—and clearly require *consideration*—money from the player—in exchange for the opportunity to win the prize. The HHRs also involve the awarding of the prize *by chance*, given that chance predominates over skill in awarding the prize.

In determining whether a game involves chance, we have consistently applied the “dominant chance” test: the game qualifies as a lottery if chance is the dominant factor in the outcome.¹⁵ The Oregon Supreme Court has similarly stated that “[w]e certainly are justified in saying that chance, as distinguished from skill, must be the predominant factor in a lottery.”¹⁶

Here, we conclude that chance is the dominant factor in the HHRs proposed at Grants Pass Downs. In traditional betting on live horse races, bettors know which race they are wagering on. They have access to the names of the horses, trainers, and jockeys. They can research each of the horses, trainers, and jockeys to inform their predictions in a whole host of ways, including by consulting official racing publications, having conversations with other bettors, or relying on their own observations from past races. They can also use their past experiences in betting on live horse races to decide whether that research is helpful or not to betting on the current race—and whether the race is a good race to bet on.

¹² Letter of Advice to Larry Niswender, Interim Director, State Lottery, at 2 (OP-2010-6) (Oct 21, 2010), <https://www.doj.state.or.us/wp-content/uploads/2017/06/op2010-6.pdf>.

¹³ *Hendrix v. McKee*, 281 Or 123, 132, 575 P2d 134 (1978) (quoting *State v. Schwemler*, 154 Or 533, 536, 60 P2d 938 (1936)).

¹⁴ *Schwemler*, 154 Or at 537.

¹⁵ *E.g.*, OP-2010-6 at 4.

¹⁶ *Mult. Co. Fair Ass’n v. Langley*, 140 Or 172, 180, 13 P2d 354 (1932).

HHRs do not afford players the same opportunities to inform their selections. As described in the “Background” section, the players using HHRs do not know which race they are betting on. The names of the horses, trainers, and jockeys are hidden to avoid players using, for example, internet searches to discover the outcome of the past race and place a bet guaranteed to win. A player cannot apply any observations of past races or other personal knowledge to the unknown race they are betting on. They may be under significant time pressure to make selections. And, perhaps most importantly, the only information available to them is randomly chosen by the machine.

Effectively, players are making guesses about where the gate numbers assigned to unknown horses on an unknown day will appear in a list that the HHR randomly pulls from a library of thousands of past horse races. These guesses bear little relationship to wagers made on live races.¹⁷

In short: the game mode in which the HHR makes selections for players—option 1 described above—does not pretend to entail any player skill. By offering option 1, TMB Racing is proposing to offer HHRs to the public as a game of chance. But even if players forego option 1 and choose option 2 (allowing the player to manually pick the results), they are still ultimately playing a game of chance.

To reiterate: option 2 only presents a small amount of randomly chosen information about randomly selected races. Because the races have already been completed, the information now has a fixed relationship to the outcome of the race. But that information may or may not be helpful in guessing the outcome. In other words, a player choosing option 2 might be given information that gives an accurate picture of the actual historical results, and thus is relevant to the guesses that the player is asked to make. Or the player might be given information that suggests outcomes very different from the actual result, and thus be led astray. Or the player might be given information that gives no clear suggestion how the races turned out. In short, whether the information is helpful or misleading is entirely a matter of chance and entirely unknown to the bettor.

In addition, the randomized information provided is typically offered in a manner that is not precise, such as depictions of bar charts where different bars may be practically indistinguishable, particularly when viewed under time pressure. Moreover, a player who starts down this path only to realize that the information provided at random is not helpful for selecting the actual results of a significant group of horse races—or even just that the time allotted is too short to complete the task—is actually worse off than a player who chose option 1 to begin with. That is because abandoning manual selections (or failing to complete them on time) results in the machine generating entirely random selections for the player, whereas the machines’ selections

¹⁷ We acknowledge that bettors wagering on live horses can eschew all of the information available to them and choose instead to guess on the outcomes of races. But we do not think that a player’s choice to do so changes the fact that the wagers are offered as games of skill. For example, a person in a free throw shooting competition might choose to wear a blindfold and spin herself around between each shot. But that choice on one contestant’s part does not mean that the contest itself is not a contest of skill.

under option 1 reflect the odds established by those who bet on the races when the races were actually run. We do not see how a player has any realistic opportunity to apply skill in such games. It is evident from their features that the games are designed to encourage players to insert payment, push a button, and watch what happens.

We are not the first to conclude that HHRs are impermissible games of chance. The Nebraska Attorney General reached the same conclusion with respect to other HHRs.¹⁸ That opinion explained that such machines “are player-activated instant gaming machines which more closely resemble slot machines than horse races.”¹⁹ The opinion emphasized that bettors do not know the identity of the horse, jockey, or race track, which is “far removed from conventional wagering on horse races.”²⁰ The games proposed by TMB Racing share these features.

Because the proposed HHRs are games of chance, they qualify as a lottery but would not be operated through the State Lottery. Therefore, operation by TMB Racing would violate the constitutional restrictions on lotteries.²¹

b. No exception allows the proposed HHRs.

We have considered the argument that Article XV, section 4(4)(c), which prohibits the State Lottery from operating “parimutuel racing,” means that the Commission can license the proposed HHRs. However, after reviewing the history and context of that language, it appears that voters in 1984 simply wanted to allow the Commission to continue its practice of licensing traditional, skill-based “parimutuel racing” wagers. We do not believe that voters intended to allow the Commission to offer games of chance, even if nominally related to past horse race outcomes.

For context, “parimutuel” refers to a type of gambling where a player’s odds change based on the wagers placed by other players and the amount those other players bet. The race course operator pools those wagers together, takes a fixed cut of the total amount wagered, and pays out the rest to the winning players, based on the amounts they staked. In other words, the players are playing against each other, not against the operator. The parimutuel system ensures that players’ winnings are not determined through a formula established by a self-interested operator.

Our conclusion that any constitutional authorization for “parimutuel racing” is limited to games of skill is rooted in two observations.

¹⁸ Neb Atty Gen Op No 10009 at 7–8.

¹⁹ *Id.* at 8.

²⁰ *Id.*

²¹ We recognize that the now-closed Portland Meadows race course operated HHRs similar to those proposed by TMB Racing. However, whether the constitution permitted those machines to be authorized was never formally resolved.

First, the Oregon Supreme Court indicated in 1932 that traditional parimutuel horse race wagering did not violate the constitution's then-absolute ban on lotteries precisely because it is not a game of chance. Specifically, the court noted that "the predominant feature * * * should not be chance but skill, judgment, and horsemanship."²² In the year following this observation, the legislature created the Commission to regulate parimutuel racing wagers. So, when voters in 1984 included a reference to "parimutuel racing," they likely understood that phrase to encompass traditional wagers of skill.

Second, the way in which the phrase "parimutuel racing" is actually used in the constitution is consistent with what we believe voters understood. The constitution *does not say* that "parimutuel racing" is an exception to its prohibition on lotteries. It says that "lotteries and the sale of lottery tickets, for any purpose whatever, are prohibited" except as the constitution specifically provides otherwise.²³ And the only reference to "parimutuel racing" is a provision that *prohibits* the State Lottery from offering parimutuel racing games:

The State Lottery may operate any game procedure authorized by the commission, *except parimutuel racing*, social games, and the games commonly known in Oregon as bingo or lotto, whereby prizes are distributed using any existing or future methods among adult persons who have paid for tickets or shares in that game * * *.²⁴

This structure strongly supports our view that the intent was to prevent the State Lottery from intruding on the Commission's authority to license traditional, skill-based horse racing wagers—even though such wagers distribute prizes among those who have paid for tickets. It *does not* suggest that voters intended to allow any lotteries (games of chance) to be regulated by entities other than the State Lottery.

As a result, our determination that HHRs are fundamentally games of chance—that is, lotteries—is conclusive. We discern no authorization for any type of lottery in the state constitution's use of the phrase "parimutuel racing."

Other authorities have determined that HHRs are generally not "parimutuel" in the traditional sense that voters in 1984 would have understood the term.²⁵ For example, the Kentucky Supreme Court recently concluded that HHRs like the ones TMB Racing proposes to operate are not parimutuel because they do not permit "simultaneous access to one historical horse race to the same group of patrons."²⁶ The court explained that parimutuel wagering "requires that patrons generate the pools based on wagering on the same discrete, finite

²² *Langley*, 140 Or at 185.

²³ Or Const, Art XV, § 4(1).

²⁴ Or Const, Art XV, § 4(4)(c) (emphasis added).

²⁵ We are aware that HHRs have evolved in function over time. However, the authorities we cite describe games materially similar to the proposed HHRs at issue here.

²⁶ *Family Trust Found. of Ky., Inc. v. Ky. Horse Racing Comm'n*, 620 SW 3d 595, 601 (Ky 2020).


events.”²⁷ The Maryland Attorney General likewise concluded that a wager on similar HHRs “is not pari-mutuel betting.”²⁸ These criticisms are well reasoned. Perhaps most strikingly, it appears almost impossible that two HHR players who submit perfect selections would actually split a wagering pool, unless they happened to submit their selections within a couple of seconds of one another. This makes it difficult to see how the players are actually wagering in a common pool, as the traditional understanding of parimutuel requires.

Ultimately, we need not resolve that issue here. As we explained above, the constitution’s reference to “parimutuel racing” was not intended to legalize games of chance just because they are linked to past race results.

CONCLUSION

Based on our analysis of the state constitutional prohibitions and the information available to us about the nature of the proposed HHRs, we conclude that: (1) operating the proposed 225 HHRs at Grants Pass Downs would constitute a prohibited casino; and (2) the HHRs are prohibited lotteries if operated by an entity other than the State Lottery.

Sincerely,



Renee Stineman
Chief Counsel
General Counsel Division

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²⁷ *Id.*

²⁸ 94 Md Op Atty Gen 32, 39 (2009), available at <https://www.marylandattorneygeneral.gov/Opinions%20Documents/2009/94OAG32.pdf>.