

INTERIM JOINT COMMITTEE ON LICENSING, OCCUPATIONS, AND ADMINISTRATIVE REGULATIONS

Minutes of the 6th Meeting of the 2020 Interim

December 14, 2020

Call to Order and Roll Call

The 6th meeting of the Interim Joint Committee on Licensing, Occupations, and Administrative Regulations was held on Monday, December 14, 2020, at 10:30 AM, in Room 149 of the Capitol Annex. Representative Adam Koenig, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator John Schickel, Co-Chair; Representative Adam Koenig, Co-Chair; Senators Julie Raque Adams, Tom Buford, Julian M. Carroll, Denise Harper Angel, Jimmy Higdon, Christian McDaniel, Michael J. Nemes, Damon Thayer, and Reginald Thomas; Representatives Kim Banta, Tom Burch, Al Gentry, Matthew Koch, Nima Kulkarni, C. Ed Massey, Chad McCoy, Michael Meredith, Jerry T. Miller, Kimberly Poore Moser, Ruth Ann Palumbo, Phillip Pratt, Rachel Roberts, Sal Santoro, John Sims Jr, Susan Westrom, and Buddy Wheatley.

LRC Staff: Tom Hewlett, Jasmine Williams, Melissa McQueen, and Lisa W. Moore

Guests: Joe Heil and Fernando Martinez Amar; Larry Brown, Member, Kentucky Board of Licensed Diabetes Educators; Chris Nolan and Brandy Cantor, MML&K Government Solutions; Allyson Taylor, Commissioner, and Joshua Newton, General Counsel, Alcoholic Beverage Control; Ashli Watts, President and CEO, Kentucky Chamber of Commerce; Braxton Lynch, Kentucky Thoroughbred Association; Doug Cauthen, Kentucky Equine Education Project; Mike Ziegler, Executive Director of Racing, Churchill Downs, Incorporated; Bill Lear, Trustee, Keeneland Association; Kent Ostrander, Executive Director, Kentucky Family Foundation, and Stan Cave, Attorney, Kentucky Family Foundation.

Approval of Minutes from the November 20, 2020, meeting

Representative Koch motioned to approve the minutes from the November 20, 2020, meeting, and Representative Gentry seconded the motion. The minutes were adopted by voice vote.

Chairman Koenig read a resolution honoring retiring member Representative John Sims, Jr. Upon a motion by Representative Pratt, seconded by Representative Miller, the resolution was adopted by voice vote.

Chairman Schickel read a resolution honoring retiring member Senator Julian Carroll. Upon a motion by Senator Schickel, seconded by Senator Thayer, the resolution was adopted by voice vote.

Restaurant Owners Impacted by COVID-19 Restrictions

Mr. Joe Heil, Northern Kentucky restaurant owner, said he feels the restaurant industry has been unfairly targeted during the COVID-19 pandemic. He feels restaurants have been discriminated against in comparison to retail stores, and other licensed businesses. Restaurants have taken unprecedented measures to ensure customer health and safety. This includes taking employees' temperatures, sanitizing tables in between customers, and requiring patrons to wear masks and social distance within the restaurant.

Mr. Heil feels restaurants have gone above and beyond what other businesses have implemented in order to keep customers safe. The food waste caused by these shutdowns could have fed many people in the state. There has been no communication with the restaurant industry other than what is reported in the daily news, with no advance warnings about impending shutdowns. He said a task force should have been formed to allow the restaurant association a seat at the table to provide input to avoid the massive loss of business. A curfew could have been established that would have prevented Kentucky's restaurants patrons from crossing the border and eating out in other surrounding states. Ohio and Indiana have benefited from receiving Kentuckians' tax dollars during these shutdowns in Kentucky.

Mr. Heil said the restaurant industry is the second largest industry in Kentucky. It is losing many quality employees that will be irreplaceable. The employees are not just college students, but come from single income families, and are often the sole bread winner for the household. He did not appreciate the Governor inviting these employees to leave the restaurant industry and apply for jobs at large distribution centers, as owners and managers work hard to train these employees. It costs \$4,300 to hire and train a new employee for the team. He said let the market dictate the business, and people who do not feel comfortable dining out are not forced to do so.

Mr. Fernando Martinez Amar, Owner of Havana Rumba in Louisville, Kentucky, told his story about fleeing from Cuba under government control in search of a better life in the United States of America. He was picked up on his raft by the United States Coast Guard and placed in a refugee camp for a year in Guantanamo Bay where he completed an immigration process where he was accepted legally into the United States.

Mr. Amar humbly worked his way up and now owns four successful restaurants in the Louisville area. He feels the restrictions on the restaurant industry are unfair and compared it to the government controlled environment under Fidel Castro in Cuba. He said the United States is the land of the free and difficult solutions must be sought to get through the COVID-19 pandemic. He said there is no data supporting the shutdown of restaurants slowing the spread of the virus.

Mr. Amar said he has restaurant employees that have been waiting on unemployment checks since March of 2020. These people have mortgages and children to feed. Kentucky restaurant shutdowns are only causing hardship to Kentucky restaurant owners and employees. Customers are still enjoying dining out in surrounding states, and this is hurting the Kentucky economy. Some restaurants will never recover and will close their doors forever.

Chairman Schickel said the General Assembly is very angry at the situation and hopes to bring relief to the restaurant industry the very first week of January during the 2021 Session. He said many smaller restaurants will not survive this, and the Governor should not have been granted the authority in 1991 to make emergency executive actions unilaterally.

Senator McDaniel thanked the restaurant owners for their hard work and resilience. He said it is the job of the General Assembly to honor what restaurants mean to the economy and to specific regions of the Commonwealth.

Representative Pratt congratulated Mr. Amar on his success in the restaurant business in Louisville. It is not unreasonable for the restaurant owners to be included in the decision-making process that is so pertinent to the industry.

Representative Moser said the testimony was compelling, heart breaking, and maddening. She reiterated the General Assembly will be handling the clean-up of this business in January 2021. In the meantime, she has communicated the restaurants' voices to the Department of Public Health Commissioner, Dr. Steven Stack. He is very aware of the restaurant situation and subsequent lack of communication. She also noted the lack of data from the contact tracing that has cost \$80 million is severely lacking. Restaurants have gone far and beyond to follow CDC guidelines and ensure customer and public safety.

Representative Massey said the restaurants owners are not alone, and said the Governor has not communicated with members of the General Assembly either. He will continue to fight for restaurants and their rights, and reported Representative Nemes asked to convey that Mr. Amar as his constituent has his full support as well.

Senator Thayer said the Governor is completely out of touch with Kentucky's economy and he has no clue the cascading effects of his unilateral decisions made without

the input of the people's branch of government. He said it is pathetic to be left out of the decision-making process and for Mr. Amar to have to fight Governor Beshear in the same manner as he fought Fidel Castro. He assured the business owners that help was on the way.

Senator Thomas said restaurants reopened as of this day to 50 percent capacity. No one asked for the pandemic and Governor Beshear has dealt with it the best way he knows how. The Governor should be commended for his leadership with COVID-19 and keeping Kentucky's numbers down as compared with surrounding states. He said the health of Kentuckians comes first to the needs of business owners. He also said more information is coming to light every day about the virus and how to treat and deal with it. It is unfair, but he feels the Governor has listened to the restaurant owners.

Representative Miller said the Cuban community has been more vocal in the last ten months than in the previous five years. He commended Mr. Amar on his success and his testimony defending freedom.

Licensed Diabetes Educators

Larry Brown, Member, Kentucky Board of Licensed Diabetes Educators, said the national board of the Association of Diabetes Educators was changed to the Association of Diabetes Care and Education Specialists. He is requesting that the Kentucky statute is amended to conform to the national change when referencing the organization so the name can be officially changed in the administrative regulations. The biggest concern is that within the next year to three years private insurers, Medicare, and Medicaid, will change their payment portals to reflect this newer credential name leaving Kentucky licensees on the outside when trying to get reimbursed. Kentucky is a leader in the number of citizens diagnosed with diabetes. The board does not see any issue with the request of the name change and its impact on any other health care practitioners. It also does not have any financial impact on the state board's operating budget. There were no questions from members.

Reorganization of the Kentucky Radon Program Advisory Committee

Chris Nolan, Consultant, The Kentucky Association of Radon Professionals, said radon is naturally occurring gas that is the second leading cause of lung cancer in Kentucky. It is very prevalent in Kentucky, and accumulates in houses, schools, daycares, and other buildings. Radon is easily mitigated with a system that vents the deadly gas outside of the building. Kentucky's radon program is located within the Department of Health, which has become overwhelmed since the fight of the COVID-19 pandemic.

Mr. Nolan said it is being proposed to move the oversight and regulation of Kentucky's radon program from the Department of Public Health to the Public Protection Cabinet's Department of Professional Licensing. The Public Protection Cabinet oversees the licensing and regulation of dozens of occupations and professions. The state's radon

certification and education program would be well suited to operate in the Public Protection Cabinet with an independent board. There were no questions from members.

Direct Shipping Administrative Regulation

Allyson Taylor, Commissioner, and Joshua Newton, General Counsel, Alcoholic Beverage Control (ABC), explained the staff suggested amendment to 804 KAR 4:415. A copy of the amendment was in each member's folder. Chairman Koenig said while he does not agree with all the changes made by the ABC Department, he does appreciate their hard work and willingness to compromise.

Responding to a question from Chairman Schickel, Chairman Koenig said the amendment only deals with the application to obtain the license and should be incorporated by reference. A staff member noticed the error and this amendment corrects it.

Responding to a question from Senator Thayer regarding the timeline of the implementation of 804 KAR 4:415, Chairman Koenig said he is mostly pleased with the ABC's implementation of the administrative regulation. Senator Thayer said if the regulation had been in place earlier, it could have helped businesses to have this additional revenue stream during the pandemic. Chairman Koenig said he does not agree with all the language in the administrative regulation, but ABC had made some accommodations. He said the legislature has the final say.

A motion was made by Chairman Schickel to approve the staff amendment to 804 KAR 4:415, and Representative Wheatley seconded the motion. The amendment was adopted by voice vote.

Senator Thomas asked Chairman Koenig to clarify what language he specifically did not agree with in the administrative regulation. Chairman Schickel said he repeatedly hears from his constituents who want the direct shipment of wine sales. He thought this regulation would provide parity and allow direct shipment of wine, but he has since learned that this is not the case. This is the epitome of government bureaucracy and special interest groups not listening to its citizens. He will find out who is responsible for removing the shipment of wine from the regulation, and was pleased that Chairman Koenig assured it would be fixed in the next session.

Chairman Koenig said the original bill allowed producers, wholesalers, and retailers to ship, but in order to get the bill passed, he had to limit it to producers. He said the regulation specified that a fulfillment house cannot be used to direct ship, and products much be direct shipped from a premises. There are many wineries, especially in California, that use fulfillment houses on a regular basis as part of their business model. Thus, they would be excluded from shipping under this bill.

Ms. Taylor said there is a statute that states alcohol can only be direct shipped from a licensed premises, and fulfillment centers are not licensed premises. The ABC supports doing this, but the statute will have to be changed to allow it. Mr. Newton said they have to operate with the statutes that have been established. They would like to get fulfillment centers approved when the statute is amended during session, but it is acceptable to ship wine from a licensed premises.

Responding to a question from Senator Higdon regarding what the staff amendment does, Chairman Koenig said it was a technical, clean-up language amendment.

Defining Pari-mutuel Wagering

Chairman Koenig provided some background information on pari-mutuel wagering to the members. Recently the Kentucky Supreme court made a decision which threatens the future of historical horse racing, which has been legally operating in the Commonwealth for nearly a decade.

Ashli Watts, President and CEO, Kentucky Chamber of Commerce, Braxton Lynch, President, Kentucky Thoroughbred Association (KTA), and Doug Cauthen, Kentucky Equine Education Project (KEEP), provided testimony in support of historical horse racing and the horse racing industry. Mr. Cauthen said horse racing in Kentucky needs to be supported in order to keep Kentucky the horse capital of the world. This can be accomplished by enhancing visibility and the viability of KEEP through education based initiatives, and educating Kentuckians and elected officials on the importance of the Kentucky horse industry.

Mr. Cauthen said Kentucky legislators should take action to protect Kentucky's signature horse industry in response to a recent Supreme Court ruling by defining pari-mutuel wagering, consistent with how the Kentucky Horse Racing Commission has regulated live racing for decades and historical horse racing for the past ten years. Reinforcing, through the definition of pari-mutuel wagering, that the Kentucky Horse Racing Commission is only authorized to regulate pari-mutuel wagering on horse racing and not on any other form of wagering. Finally, maintaining the status quo for historical horse racing facilities, and codifying existing regulatory limitations that restrict historical horse racing to the licensed premises of a racing association and its single corresponding extension facility.

Mr. Cauthen said historical horse racing directly employs over 1,400 Kentuckians in seven cities across the Commonwealth. He said more than \$52 million has been contributed to the general fund with an additional \$45 million paid annually through direct and payroll benefits. Historical horse racing contributes to higher purses, creating a more competitive racing circuit that attracts more horses, owners and trainers to Kentucky. It helped Kentucky stay competitive when neighboring states started casino gaming, and it

helps to keep Kentucky dollars in Kentucky. He believes a threat to historical horse racing is a threat to Kentucky's signature industry, as well as agriculture and tourism.

Ms. Lynch said historical horse racing contributed \$36 million to purses in 2019 and helps Kentucky remain competitive with attractive purse sizes. It helps to recruit and retain more horsemen resulting in larger and stronger field sizes, and greater track attendance. It also makes a difference to small breeders who bring 80 percent of the yearlings to market. Without it, Kentucky will soon experience empty fields and barns, which also impacts farming.

Ms. Watts said the horse industry has a \$5.2 billion economic impact statewide and employs 60,000 Kentuckians directly and indirectly. She said racetracks pay over \$100 million in state and local taxes that benefit Kentucky communities. Racetracks have invested nearly \$1 billion in capital projects over the last decade, with another \$600 million planned. All of this is made possible by the industry's growth from historical horse racing. She said the Kentucky Supreme Court ruling has put this revenue and success at risk. Businesses planning to invest millions of dollars in Kentucky communities and create even more jobs, are operating in uncertainty, which can be a deterrent from locating in the Commonwealth. She asked the General Assembly for assistance to keep the businesses in Kentucky to assist with economic growth and development.

Mike Ziegler, Executive Director of Racing, Churchill Downs, Incorporated, testified in support of historical horse racing and supporting the horse industry. He asked for action from the General Assembly in the 2021 Legislative Session to create a more certain environment for investment, employment, and growth.

Mr. Bill Lear, Trustee, Keeneland Association, gave some background on the Kentucky Horse Racing Commission and the timeline for the regulations to allow historical horse racing. In 2010, the racing commission adopted a set of regulations allowing pari-mutuel wagering on historical races. The regulations went up to the Kentucky Supreme Court and they were deemed valid. He would like the legislature to uphold that and allow historical horse racing to continue, but not expand in Kentucky.

Representative Koch said the end of historical horse racing would close Turfway Park, and end year round racing in Kentucky. He said this would be a huge blow to Kentucky families and their livelihoods. This would also open up the door for trainers to quit bringing their horses to Kentucky and move on to other tracks that are open year round. This affects jobs of over 60,000 Kentuckians. Historical horse racing has been allowed in Kentucky for over 10 years.

Responding to a question from Representative Wheatley regarding redefining pari-mutuel wagering, Mr. Lear said it is possible to do it without a constitutional amendment. The constitution only prohibits lotteries, except for the state lottery. It does not prohibit

other types of gaming and gambling. The irony concerning pari-mutuel wagering is that the statute that allows it has never defined pari-mutuel wagering.

Responding to a question from Representative Miller about the net handle, or the amount of wagers less how much goes back to the bettors per year generated from historical horse racing, Chairman Koenig said well over \$1 billion is wagered, but he will have to get the exact figures.

Representative Meredith said this issue affects the small farms as well. The loss of historical horse racing will hurt hay suppliers and feed stores. It is a business issue, and not just a gaming issue. There have been millions of dollars invested at Kentucky racetracks over the years based on legal interpretations and signals sent from the interpretations. Kentucky needs to be aware of the message it is sending to the broader business community.

Responding to a question from Senator Higdon regarding the amount of money generated from historical horse racing and reporting, Ms. Watts said she would get the facts and figures. Senator Higdon would like to see a report similar to what the Kentucky Lottery publishes annually. Mr. Lear said the take out money generated from historical horse racing is under 8 percent compared to 20 percent take out from live racing. He said money is given back to the Kentucky Thoroughbred Development Fund (KTDF) which supplements purses, and there is an existing tax rate that is levied. Mr. Ziegler said it is a 1.5 percent gross handle.

Representative Gentry said historical horse racing benefits the entire horse industry. He said that all members need to understand what taxing the gross handle is and how it equates to net revenues other states use when taxing casino gaming. He said it is much more than 1.5 percent in reality. He will help in any way he can to keep historical horse racing.

Senator Thomas said historical horse racing is a job development issue. He said the Red Mile is critical in keeping jobs in Fayette County, and to the success of the thoroughbred industry statewide.

Kent Ostrander, Executive Director and Stan Cave, Attorney, Kentucky Family Foundation, testified in opposition of historical horse racing. They showed the committee a short video of the historical racing machines in action at Kentucky Downs. He noted at the top of the machine there is a small three second cartoon horse race that goes across the screen. The horses running at the top is an option.

Mr. Cave said the Kentucky Supreme Court ruled historical horse racing machines were not pari-mutuel wagering. He said the tax rate on the gross handle is 1.5 percent. By statute, one percent is returned to the racing industry, and one-half of one percent is kept

for the general revenue. It was noted the \$52 million that was contributed to the general fund was over a nine-year period.

Mr. Cave said the Family Foundation entered into the court case as a defendant years ago when the case was before the Franklin County Circuit Court. At the urging of the racetracks and the Kentucky Horse Racing Commission, the court barred all questioning about the gaming. The Family Foundation appealed the decision and lost. It then won its appeal with the Court of Appeals. The Kentucky Supreme Courts said the regulations on their face were valid, but not as applied to the gaming systems at issue. A unanimous Supreme Court reversed the Franklin County Circuit Court in 2018 ruling that the gaming systems needed more discovery and evidence about how they actually operated. The Kentucky Supreme Court eventually went on and determined historical horse racing was not pari-mutuel wagering in 2020.

Mr. Cave urged the committee members not to attempt to change the definition of part-mutual into something that it is not. He said slot machine style gambling will never be pari-mutuel wagering under the law. He said the only way to solve the problem is to amend the Constitution of Kentucky.

Senator Thayer sought an Attorney's General Opinion from General Jack Conway in 2009 regarding this issue and that opinion found it to be permissible. He said historical horse racing provides \$15-18 million of dollars to the general fund in Kentucky's budget. This is one of the few growing areas of Kentucky's economy and provides much needed revenue in the budget as more facilities are added. He is concerned about the how the families are affected by job and revenue loss and asked if the Family Foundation supports families.

Mr. Ostrander said the horse industry asked the Family Foundation to help keep casino gaming out of the state. He helped them only after researching casino gaming and looking at data that it hurts families. He noted slot machines are the mother's milk of gambling. Years later, the horse industry reversed course and wants to own casinos. Senator Thayer told the Family Foundation that if jobs leave Kentucky and hurt working families, the blood is on their hands.

Co-Chair Schickel took over the chair as Chairman Koenig had to be at another event. He noted his support for the Family Foundation and historical horse racing.

Senator Nemes said there must be better answers for supporting the horse industry than breaking the law.

With no further business before the committee, the meeting adjourned at 12:40 p.m.