
TO: Derek Brindisi, Town Manager (*By Electronic Mail Only*)

FROM: Mark R. Reich

RE: Wood Lot Racetrack Use Proposal

DATE: September 8, 2022

Question

The Town has presented a number of questions relative to the use of property owned by Plymouth County and generally referred to as the “Wood Lot”. We have presented each question below as well as a response thereto. The use of the Wood Lot is, as we understand the circumstances, of great concern based upon a proposal from a private developer to locate a horse racetrack on that property. This proposal has generated controversy in the Town as well as concerns about the impacts of such a development upon the Town itself. We have reached out to the Commonwealth’s gaming Commission to obtain additional information, have included information as available, and are awaiting further follow-up.

Detailed Analysis

1. Can the County lease or operate a racetrack on County owned land? Or is this a violation of MGL c. 128A, s. 3(I)?

The process for obtaining a horse racing license is governed by a number of statutes that involve approvals at both the county and town levels. At the county level, G.L. c. 128A, §14 requires that a majority of voters in a county approve licensed horse racing using a statutorily prescribed ballot question prior to and as a pre-requisite for the issuance of a horse racing license. At the town level, G.L. c. 128A, §13A requires that the selectmen in a town approve the location of the racetrack before a license to conduct horse racing may be issued. Further, the provisions of G.L. c. 271, §33 allow the selectmen to “regulate and alter the terms and conditions under which the [racetrack] shall be laid out, used or continued in use,”

Applying these statutes to the instant case, in our opinion the County is required to first obtain the approval of voters in the County as a prerequisite to the issuance of a horse racing license. Further, the Select Board must then approve the location of the racetrack prior to the issuance of a license. If the Board approves the location of the racetrack, twelve percent of the voters may file a petition with the Town Clerk pursuant to G.L. c. 128A, §13A protesting the approval of the site. The filing of this petition will require the Select Board to reconsider the matter. If the Select Board does not rescind its approval of the site, the issue would be placed before the voters pursuant to a ballot question. If the location is finally approved, the Select

Board may enter into an agreement with the licensee with respect to the operation of the racetrack at that site for the benefit of the Town, in our opinion.

Given these requirements as laid out above, it is our opinion that the Town should first confirm whether the County did comply with the ballot question process. In our opinion, such confirmation is necessary before the Select Board undertakes its own consideration of the site for a racetrack.

The provisions of G.L. c. 128A, §3(1), as amended, appear to expressly bar horse racing on land owned by a political subdivision of the Commonwealth, which would include County-owned land. It would be necessary, in our opinion, for the County to have considered the application of this statutory provision to the Wood Lot racetrack proposal. This application of the statute may therefore be the basis for discussion with the County and the Gaming Commission as to how this process has proceeded, given the specific language of the statute. In our opinion, this statute likely applies to the Wood Lot property, absent relief having been granted to the County through special legislation or some other method. If not, the County may be acting at its peril.

2. Do the Town of Plymouth Zoning by-laws apply to County owned land? Including Town Meeting approval of any zoning changes.

As a general rule, Plymouth County is exempt from municipal zoning regulations provided the County is performing an “essential governmental function” or an action reasonably related to that function. This so-called “sovereign immunity” extends to activities conducted by a private entity contracted by the County to act on its behalf. Sovereign immunity is limited by caselaw to apply to the essential governmental functions of the sovereign, which would include actions undertaken by the County or its contractors in furtherance of the County’s powers and duties, as defined in G.L. c. 34A, §16. However, in our opinion, the use or lease of County-owned land for a horse racetrack would not be the performance of an essential governmental function within the powers and duties of the County. Therefore, in our opinion, such use of the Wood Lot would not likely be entitled to the immunity referenced above and so would be subject to the restrictions and requirements of the Town’s zoning bylaws.

With regard to the process for amendments of the Town’s zoning bylaws, all amendments to zoning bylaws must be approved by Town Meeting pursuant to the provisions of G.L. c. 40A, §5.

3. Beyond Zoning by-laws, can the Town of Plymouth impose other restrictions on the development of the Wood Lot for example utilities, public safety and traffic.

Towns possesses considerable regulatory authority. Such authority is granted by state statutes and regulations and the Town’s general and zoning bylaws. To the extent that the County is not exempt from aspects of this regulatory authority, as discussed above, in our opinion the County would be subject to such regulatory authority.

In the instant case, where the Wood Lot is proposed to be used for a horse racing track and not for an essential governmental function of the County, the Town may exercise its authority in a manner similar to that exercised with respect to other developments, provided that it does not interfere with the licensing process governed by the Gaming Commission. Consideration may be given to the process for issuing building and other necessary permits, and zoning and other applicable land use approvals when reviewing the proposed use of the Wood Lot.

The extent of application of Town regulatory authority with respect to the Wood Lot depends upon what is proposed for use of that property. Currently, that use remains speculative. As such, a complete answer will depend upon the final proposed use for the property.

4. What are the possible ramifications to our residents’ and Select Board opposition to a racetrack, positive and negative, to this being a lease rather than a sale.

A lease is an enforceable interest in real property limited to a period of time and for a specified purpose. It is not clear that a lease of the Wood Lot would differ in impact from a sale, other than with respect to the duration of the use allowed by the lease. If the property is sold, in our opinion, certain statutory requirements with respect to use of property by the County would no longer apply.

The sale or lease of county-owned property must comply with the requirements of the provisions of G.L. c. 34, §14, which states in pertinent part that “any real estate offered for sale or lease, by a county shall first be offered for sale or lease to the commonwealth and upon the non-acceptance by the commonwealth of any such offer, shall then be offered for sale or lease to the city or town where such land is located.” The “notification shall include information as to the real estate's present use; the reason for its sale or lease; the new activity or purpose for which it will be used; and a copy of an independent appraisal done within the past fiscal year.” Pursuant to the statute, that notification is to be provided least ninety days prior to contracting for the sale or lease of the property. Further, a public hearing is to be held by the county at least forty-five days but not more than sixty days prior to contracting for the sale or lease of the property in the town or city in which the property is located.

It is my understanding that on April 6, 2022, Plymouth County notified the Town that the County had accepted a bid for leasing of the Wood Lot, and that notice had also been provided to the Commonwealth of such acceptance. A similar letter was sent to the Commonwealth. The letter indicated that a public hearing would be held on May 9, 2022 regarding this lease, and asked for a response from the Town by that date. It does not appear that the appraisal was included with the notice. It is my understanding that the lease was executed on or about July 22, 2022. The public hearing was noticed for May 9, 2022.

It is not clear whether a lease of the Wood Lot pursuant to the process referenced in the notice from the County has been executed. Please note that G.L. c. 34, §14 states, “Any contract

for the sale or lease of real estate executed in violation of this section shall be voidable; provided, however, that no action for violation of this section may be commenced subsequent to the date of the delivery of the deed conveying such real estate.” The delivery to and execution of the lease by a third party may provide defenses to a challenge to that lease.

5. According to County Commissioners “Plymouth County will receive 12% of gross profit generated at that property... of which 9% will be retained by Plymouth County...3% will be distributed to all member communities...” Is there any set mechanism (laws or precedent rather than negotiation) in place for the host community (Plymouth) to receive a greater share of the profits?

The percentages outlined in the question were likely included in an agreement between the County and the third party with respect to the use of the Wood Lot. Please note that the provisions of G.L. c. 128A, §4 bar to a town from collecting a licensing fee from any racetrack licensee for the operation of the racetrack. However, the application process encourages consideration of local benefits. Further, the provisions of G.L. c.271, §33 state as follows:

No land within a town shall be laid out or used as a race ground or trotting park without the previous consent of and location by the mayor and city council, the town council in a town having a town council or the selectmen in any other town, who may regulate and alter the terms and conditions under which the same shall be laid out, used or continued in use and may discontinue the same when in their judgment the public good so requires; and no land shall be used for any of the purposes declared unlawful in section thirty-one.

Thus, in our opinion, the Select Board may negotiate conditions, including an impact fee, with a racetrack licensee with respect to this use of the property in the best interest of the Town, provided all other statutory and regulatory provisions are addressed by the licensee and the property owner.

6. Can the County lease the land to a private sector entity without giving the Town of Plymouth first refusal? Does that include extension(s) of the current 3-year lease and any new lease after the 3 years?

As noted in the response to question 4 above, the provisions of G.L. c. 34, §14 require the County to first offer the property to the Commonwealth and then to the Town. It is my understanding that the County provided notice to the Town of its intent to lease the property and cited the provisions of G.L. c. 34, §14 within that notice. The lease may be subject to challenge if statutory requirements have not been met. However, if the execution and delivery of lease may insulate it from challenge based upon the statute and if relied upon by a third party.

7. Has Plymouth County ever conducted a public vote to permit horse racing? Per MGL c. 128A, s. 14.

As stated above, G.L. c. 128A, §14 requires that the voters of a county approve horse racing in that county prior to the issuance of a license. This is a pre-requisite to the issuance of a horse racing license. We have been unable to find any information indicating whether a public hearing has been conducted. The question of whether the County held such a vote requires further investigation. If the County did not comply with statutory requirements, in our opinion, it may be proceeding at its peril.

8. We currently have written notice of Select Board opposition on file with the State Gaming Commission. Under previous application protocol this written notice was to be submitted in response to an application. They are currently reviewing possible changes to the license application process to go into effect in October. Since Boston South has not yet submitted an application:

-What are the possible ramifications if the Commission eliminates the requirement for this letter of opposition or support from the APPLICATION process?

Please be aware that neither the statute nor the Gaming Commission application reference a letter of support by the municipality in which the racetrack is to be located. The application does require that the applicant provide a copy of the local approval of the applicant’s premises in accordance with G.L. c. 128A §13A, demonstrating the vote approving the specific location after a noticed public hearing. The applicant is required to submit a statement indicating why the applicant believes the operation of the racetrack will be beneficial to the public.

In our opinion, however, the Town would not be precluded from issuing a letter on its own initiative indicating its support for or opposition to the proposed project during the application process. Whether to issue any such a letter would be a policy decision to be made by the Select Board, in my opinion, but would not substitute for the statutorily required location approval.

-The fact that we sent our letter prior to Boston South’s application; if the new application process (as to be put in play in October), still includes the need for this letter, will we need to submit a new letter?

Since the Select Board sent a letter prior to the initiation of the application process, in our opinion, that letter is arguably not part of the application package for a racetrack license. In our opinion the Board would not be precluded from rescinding the prior letter and can abstain from issuing any subsequent letter of support or opposition for inclusion in the application process whether or not such a letter is required by the Gaming Commission.

-Can comments still be submitted to this Gaming Commission regarding possible application changes given their statement “Written public comments are REQUESTED by Monday July 18, 2022 at 5:00 PM.”

According to the Massachusetts Gaming Commission, the date and time by which comments on its regulations are requested are usually tied to when the Commission will review the matter in public. In such cases, the Commission prefers to have all comments submitted in a timely manner so those comments can be considered as part of the public review process. It is our understanding that the Commission will accept comments after the requested date and time. However, comments received after the requested time and date may not be considered as part of the review process, and the submitter runs the risk that comments not submitted in a timely manner may receive less, if any, consideration by the Commission.

Please note with respect to the timeline for licenses, the provisions of G.L. c. 128A, sec. 2 state in pertinent part, “Such application shall be filed with the commission on or before the first day of October of the calendar year preceding the calendar year for which application requests a license to be issued under this chapter; and the commission shall grant or dismiss such application not later than the fifteenth day of November next following...” Therefore, pursuant to the statute, a license application for a race meet must be filed with the Gaming Commission by October 1, 2022 for a license to be issued for 2023, with the Commission required to issue its decision on the application by November 15, 2022. Please note further that the provisions of G.L. c. 128A, sec. 3 specifies that “the commission, after reasonable notice and a public hearing in the city or town wherein the license is to be exercised, may issue a license to the applicant to conduct a racing meeting, in accordance with the provisions of this chapter, at the race track specified in such application.” Thus, the Gaming Commission is required to undertake a public hearing prior to the issuance of a license.

Conclusion

As noted above, the licensing of racetracks in Massachusetts is subject to a variety of statutory and regulatory requirements. In particular, the locating of such a facility on property owned by a political subdivision of the Commonwealth requires additional procedures to ensure approval by voters. Since the Wood Lot is owned by Plymouth County, a political subdivision of the Commonwealth, those additional procedures must be undertaken. Any such license will be subject to a public hearing process before issuance by the Gaming Commission. Thus, the Town should have several opportunities to express its position with respect to the location of a racetrack facility and the issuance of any such license.

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