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**TESTIMONY OF KEVIN M. FOWLER IN OPPOSITION TO HOUSE BILL NO. 2280
BEFORE THE
HOUSE COMMITTEE ON COMMERCE, LABOR AND ECONOMIC DEVELOPMENT**

February 21, 2019

Dear Chairman Tarwater and Members of the Committee:

My name is Kevin Fowler and I am an attorney with the Topeka law firm of Frieden & Forbes, LLP. I represent and appear on behalf of the managers of the Kansas Star Casino in Mulvane, Sumner County, Kansas (Kansas Star), the Boot Hill Casino & Resort in Dodge City, Ford County, Kansas (Boot Hill), and the Kansas Crossing Casino in Pittsburg, Crawford County, Kansas (Kansas Crossing) in opposition to HB 2280.

HB 2280 amends KELA to encourage The Woodlands to reopen as a full-time casino with a limited live horse racing program. The bill completely eliminates the requirement for live greyhound racing and requires only 60 days of live horse racing per year in order to install and operate up to 1,200 slot machines. HB 2280 changes the distribution of net slot machine income by reducing the State's share from 40% to 22% and increasing the racetrack gaming facility manager's share from 25% to 62.5% in the first two years of operation, 60.5% in the third year of operation and 58.5% thereafter. The bill also significantly reduces the live racing days required for The Woodlands to obtain a simulcast license (*i.e.*, from at least 150 to 60 days of live racing per calendar year) and to conduct pari-mutuel wagering on simulcast races 365 days per year. Fair associations which conduct fewer than 22 live racing days per year would also be permitted to obtain an unlimited simulcast license and to conduct pari-mutuel wagering 365 days per year.

HB 2280 is the latest attempt to persuade the Legislature to renege on binding and enforceable commitments the State of Kansas has made to all four (4) lottery gaming facility managers in long-term, written contracts that were negotiated, approved and entered into pursuant to the Kansas Expanded Lottery Act (enacted as SB 66 in 2007 and codified as K.S.A. 74-8733 to 74-8773) (KELA). Relying in part on statutory and contractual assurances that the State would not authorize any "similar gaming facilities" prior to July 1, 2032, the managers of our state casinos have invested nearly \$1 billion in developing and managing these gaming enterprises on behalf of the State. Since the commencement of casino operations under KELA, nearly \$600 million in

gaming revenues have been distributed to the State and approximately \$81 million in such revenues have been distributed to counties and cities in Kansas gaming zones. The four state casinos generate more than \$33 million in economic activity per month, and approximately \$100 million in gaming revenues per year for the State and gaming zone communities.

This bill dramatically changes the gaming environment under KELA and materially breaches the State's contractual obligations by authorizing the closed Woodlands racetrack in Kansas City, Kansas to reopen and operate as a full-time casino that will emphasize slot machines and simulcast gaming in direct competition with our state-owned and operated lottery gaming facilities. Because HB 2280 violates clearly established commitments to our lottery gaming facility managers and threatens their nearly \$1 billion investment in the Kansas economy to date, this bill promises to expose the State to protracted litigation and hundreds of millions of dollars in potential financial liability.

During the past decade, our lottery gaming facility managers have been induced to invest nearly \$1 billion in developing the Boot Hill, Kansas Star, Hollywood and Kansas Crossing casinos based, in material part, on statutory and contractual assurances that the State would not authorize any "similar gaming facilities" prior to July 1, 2032. *See, e.g.*, K.S.A. 2018 Supp. 74-8734(h)(19)(A). HB 2280 blatantly reneges on these commitments by authorizing at least one similar gaming facility and promoting state-sponsored competition that will jeopardize the financial stability and settled expectations of existing casino managers. At a minimum, we believe that the enactment of HB 2280 will obligate the State to repay each lottery gaming facility manager an amount equal to its privilege fee plus interest on that amount compounded annually at the rate of 10%. *See* K.S.A. 2018 Supp. 74-8734(h)(19)(B), and other consequential damages. Based on the Kansas Budget Director's Fiscal Notes in prior sessions to HB 2545 (Feb. 12, 2018) and HB 2173 (Feb. 8, 2017), we believe that the State's liability to repay privilege fees and accrued interest alone is currently estimated to be approximately \$135,399,000.00 as of February 8, 2019. This amount continues to accrue over the next year at the rate of \$37,095.61 per day. During the course of anticipated litigation over the next five years, this single category of potential liability will increase to more than \$215 million. Because the current bill does not require the racetrack manager to indemnify and hold the State harmless from all of its potential liability to lottery gaming facility managers, the State should expect to bear sole financial responsibility for the repayment of privilege fees, compounded interest which has accrued (currently in excess of \$74 million) and continues to accrue, and all damages in excess of the privilege fees and interest.

Kansas Attorney General Opinion No. 2016-6 (April 22, 2016) examined the potential legal consequences of enacting legislation such as HB 2280 and concluded that such action would expose the State to potential liability for violating state law and its contracts with lottery gaming facility managers, and that such liability would at least require the State to repay privilege fees together with interest at the rate of 10% compounded annually. The Attorney General also recognized that the State is potentially subject to common law damages for breach of contract, including benefit of the bargain damages or lost profits, and that any such attempt to impair the State's existing contractual obligations would violate Article 1, Section 10, Clause 1 of the

United States Constitution (the “Contract Clause”), which provides that “No State shall ... pass any ... Law impairing the Obligation of Contracts.” These legal principles are fully applicable to HB 2280, which cannot lawfully legislate away or impair the State’s existing obligations under valid contracts with all four (4) lottery gaming facility managers.

Any question about how HB 2280 can violate the law when the actions of a previous Legislature are not generally binding on the current Legislature is best answered on page 18 of AG Opinion No. 2016-6, which quotes the Kansas Supreme Court’s explanation as follows: “**Where a valid contract with the state has been entered into in pursuance of a legislative enactment a subsequent legislature cannot enact a law which provides for an abrogation of the contract.**” (Emphasis added).

The history of parimutuel horse racing at The Woodlands in Kansas City, Kansas demonstrates that HB 2280 seeks to establish an additional full-time casino that will directly compete with existing state casinos in violation of KELA and the written contracts of our casino managers. Live horse racing was popular at The Woodlands between 1990 and 1994, when its attendance, number of racing days and live handle began to steadily decline. According to the annual reports of the Kansas Racing & Gaming Commission (KRGK), during its final 13 years of operation (*i.e.*, 1995 through 2007), The Woodlands averaged annual attendance of 30,477, only 27 horse racing days per year, and an annual live racing handle of only \$1.68 million. The last horse race at The Woodlands was run in 2007, a year in which the horse track had total attendance of 25,922, only 25 live racing days and a meager \$1,253,968 in live racing handle. The Woodlands cancelled its entire horse racing program for 2008.

Prior to closing, most economic activity at The Woodlands was generated by parimutuel wagering on its live greyhound races and simulcast racing. From 1995 through 2007, annual attendance at the greyhound track was approximately 275,000 and its live greyhound racing handle averaged approximately \$26 million per year. During this same period, the simulcast racing handle at The Woodlands averaged approximately \$58.6 million per year. By eliminating thousands of live greyhound races, reducing the number of live racing days from 150 to 60 for unlimited simulcast wagering, authorizing up to 1,200 slot machines and substantially changing the distribution of net slot income, HB 2280 seeks to reopen this closed racetrack with a very limited horse racing program and an additional full-time casino in direct competition with existing casinos in violation of established statutory and contractual commitments that will substantially disrupt the settled expectations of our casino managers.

I will be happy to stand for questions.

Respectfully submitted,



Kevin M. Fowler
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