
IN THE SUPREME COURT OF FLORIDA

Case No. 83,886

Upon Request From The Attorney General
For An Advisory Opinion As To The
Validity Of An Initiative Petition

IN RE: ADVISORY OPINION
TO THE ATTORNEY GENERAL -

LIMITED CASINOS

INITIAL BRIEF OF
FLORIDA LOCALLY APPROVED GAMING, INC. and
BALLY MANUFACTURING CORPORATION

OPPOSING THE LIMITED CASINOS PETITION

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INTRODUCTION

FLORIDA LOCALLY APPROVED GAMING, INC. ("FLAG") and BALLY MANUFACTURING CORPORATION ("Bally") submit this brief as interested parties in response to this Court's Interlocutory Order of June 27, 1994 [A 1]. FLAG is the proponent of another initiative petition to authorize casino gaming in Florida, which is presently being circulated for signatures. Bally, now known as Bally Entertainment Corporation, is affiliated with FLAG in its petition drive. Bally is a Delaware corporation listed on the New York Stock Exchange (BLY), and in 1994 had revenues of over \$1.2 billion. Through its subsidiaries, Bally operates casinos in Atlantic City, New Jersey (Bally's Park Place and The Grand), Las Vegas, Nevada (Bally's Las Vegas), and Tunica, Mississippi (Bally's Saloon and Gambling Hall). Bally also operates over 330 fitness centers through its Bally's Health and Tennis subsidiary.

FLAG and Bally support authorization of casino gaming in Florida, but only in a manner that is consistent with the requirements of Florida law applicable to initiative petitions. The Limited Casinos petition is misleading and unfair to the voters, because it relies upon ambiguous language indicating that it will "limit" casino gaming, when in fact it will authorize gaming for the first time and has a very real potential to create a larger casino gaming empire than currently exists anywhere else in the United States. In addition, the Limited Casinos petition is misleading because the summary fails to advise the voters that one casino must be placed in the so-called "South Pointe Redevelopment Area," which, according to all public records revealed by a long

and diligent search, does not exist. Even assuming the reference to "South Pointe Redevelopment Area" was simply intended to designate part of south Miami Beach, the requirement that a casino be placed there would, by virtue of undisclosed material facts, virtually guarantee ownership of that casino by a foreign national. Finally, the Limited Casinos petition is misleading because it omits material facts such as the locations of the majority of the casinos it authorizes -- those to be placed at existing pari-mutuel facilities throughout the state.

When the casino gaming industry enters Florida, the entry should be free from false pretenses and incomplete disclosures. The Limited Casinos petition fails to give the voter fair notice of its intended effect and significant ramifications, which violates the requirements of Florida law and is fundamentally unfair to the voting public. For these reasons, FLAG and Bally have a direct and vital interest in the outcome of these proceedings, and urge the Court to strike the Limited Casinos petition from the ballot.

STATEMENT OF THE CASE AND FACTS

In accordance with article IV, section 10, Florida Constitution and section 16.061, Florida Statutes (1993), the Florida Attorney General has petitioned this Court for an advisory opinion on the validity of the "Limited Casinos" initiative petition (the "Limited Casinos petition"). The Limited Casinos petition seeks to amend article X, section 7 of the Florida Constitution by revising the title to read "Lotteries and Limited Casinos," labelling the existing provision for lotteries as paragraph "(a)," and adding a new section labelled "7(b)" as set forth below.

The issues before the Court are whether the Limited Casinos petition complies with the single-subject requirement of article XI, section 3, Florida Constitution,¹ and whether the ballot title and substance comply with section 101.161(1), Florida Statutes.² The Attorney General concluded that the Limited Casinos petition appeared to violate the single-subject and ballot requirements in an unprecedented number of respects [A 1]. The Court issued an Interlocutory Order permitting interested parties to submit briefs on these issues [A 1].

¹ Article XI, section 3 of the Florida Constitution limits a proposed amendment to "but one subject and matter directly connected therewith."

² Section 101.161(1) provides, in pertinent part:

The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

The ballot title and summary of the Limited Casinos petition provide as follows:

Title: Limited Casinos³

Summary:

Authorizing a limited number of gaming casinos in Broward, Dade, Duval, Escambia, Hillsborough, Lee, Orange, Palm Beach and Pinellas Counties, with two in Miami Beach; and limited-size casinos with existing and operating pari-mutuel facilities; and if authorized by the legislature up to five limited-size riverboat casinos in the remaining counties, but only one per county. Mandating implementation by the legislature. Effective upon adoption, but prohibiting casino gaming until July 1, 1995.

The full text of the Limited Casinos petition is set forth below:

Section 1. Section 7 of Article X is amended to revise its title to read "Lotteries and Limited Casinos," and to designate the existing text as subsection "(a)".

Section 2. Subsection 7(b) of Article X is created to read:

The operation of a limited number of state regulated, privately owned gaming casinos is authorized, but only:

(1) at one facility each to be established within the present boundary of Duval, Escambia, Hillsborough, Lee, Orange, Palm Beach and Pinellas Counties; and

(2) at two facilities to be established within the present boundary of Broward County; and

³ The largest print on the petition form, above the line labelled "Title," says "PROPOSITION FOR LIMITED CASINOS." This gives the impression that the proposal uses two titles. Both "titles" suffer from the same flaws, and the inclusion of two titles is in itself confusing.

(3) at three facilities to be established within the present boundary of Dade County, two of which shall be within the present boundary of the city of Miami Beach--with one of those two being in the South Pointe Redevelopment Area--and the third facility shall be outside the present boundary of the City of Miami Beach; and

(4) with each pari-mutuel facility which has been authorized by law as of the effective date of this amendment and which has conducted a pari-mutuel meet in each of the two immediately preceding twelve month periods; provided that no casino located with a pari-mutuel facility shall have a gaming area in excess of 75,000 square feet; and

(5) at not more than five riverboat casino facilities having a gaming area not in excess of 40,000 square feet, as the legislature may approve within the present boundaries of counties not identified in paragraph (1), (2) and (3); provided that the legislature shall not approve more than one riverboat casino in any one county.

Section 3. By general law, the legislature shall implement this section, including legislation to regulate casinos, to tax casinos, and to license casinos to pari-mutuel permit holders and at the other authorized facilities.

Section 4. This amendment shall take effect on the date approved by the electorate; provided however, that no casino gaming shall be authorized to operate in the state until July 1, 1995.

SUMMARY OF THE ARGUMENT

The Limited Casinos petition cannot appear on the ballot for the November general election because the ballot title and substance of the proposed amendment are misleading and omit material facts, thereby violating the requirements of section 101.161(1), Florida Statutes (1993). The defects are clear and conclusive.

The ballot title and summary mislead the voter by promising "limited" casinos when in fact the proposal would authorize many more casinos, and over four times more square footage devoted to casino gaming, than currently exist in Atlantic City; and as many square feet of gaming area as operate in all of Las Vegas. The summary is misleading and defective for neglecting to advise the voters how many gaming casinos would result from placement of one at each active pari-mutuel facility in Florida, and failing to advise the voters where those facilities are located. The summary is also defective for omitting the material fact that one casino must be placed in the so-called "South Pointe Redevelopment Area," a term that apparently has no definite legal meaning and is not defined in either the summary or text, and substantially all of which is owned by a foreign national who has announced plans to own that casino.

Any of these substantial defects in the Limited Casinos petition is sufficient to prevent the proposed amendment from appearing on the ballot. Cumulatively, they leave no doubt that the proposal is clearly and conclusively defective and must be stricken.

ARGUMENT

A ballot title and summary must use "clear and unambiguous language." Askew v. Firestone, 421 So. 2d 151, 154-55 (Fla. 1982). A summary cannot omit material facts. Id. at 154-56. A misleading title and summary make the Limited Casinos petition "clearly and conclusively defective" when measured against the requirements of Florida law. Therefore, the Court must not permit the petition to be placed on the ballot.

THE LIMITED CASINOS PETITION VIOLATES THE REQUIREMENTS OF SECTION 101.161(1).

Although it need not explain every potential ramification, Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986), a ballot summary is fatally defective if it omits material facts that are essential to understanding the changes to be effected by the proposed amendment. Florida League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992); Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991); Wadhams v. Board of County Comm'rs, 567 So. 2d 414, 416-17 (Fla. 1990); Askew, 421 So. 2d at 155-56. As this Court recently stated in In Re: Advisory Opinion to the Attorney General -- Save Our Everglades Trust Fund, 19 Fla. L. Weekly S276 (Fla. May 26, 1994), the requirements for ballot titles and summaries are intended "so that the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." Everglades, 19 Fla. L. Weekly at S278 (citing Askew, 421 So. 2d at 155)). Impermissible defects exist within the Limited

Casinos petition ballot summary, because it misleads the voter with the terms "limit" and "limited" when the proposal actually authorizes a very large number and size of gaming casinos and offers no comparative basis for the voter to understand the magnitude of the proposal; and it omits material information about the locations of casinos, by completely failing to mention that one casino must be placed in the undefined and apparently nonexistent "South Pointe Redevelopment Area" for significant but unexplained reasons; and by failing to inform the voters where the vast majority of the authorized casinos -- those affiliated with existing pari-mutuel facilities -- would be located.

A. The Limited Casinos Petition Is Ambiguous And Misleading As To Its Chief Purpose and Effects.

The Limited Casinos petition uses the words "limit" or "limited" eight times.⁴ "Limit" is ambiguous because it is readily susceptible to more than one meaning, especially when used without any basis for comparison. To limit is to restrict, and "limit" is commonly understood to be restrictive, but its meaning in any given context can vary significantly. Voters who mistakenly think that casino gaming is already authorized in Florida would think a proposal to "limit" casinos is intended to restrict their growth. Voters who know that casino gaming is not currently authorized may think that a "limited casinos" proposal would offer a safeguard to keep casino gaming a small industry. Most people who think of casinos think of Las Vegas and Atlantic City, and with that in mind would probably assume that a proposal to "limit" Florida's casinos would keep them smaller in number and size than those that exist in Las Vegas and Atlantic City. All of these voters would be wrong.

The Limited Casinos petition authorizes 51 casinos: 34 at pari-mutuel sites [A 2], 12 among named Florida counties, and 5 on riverboats.⁵ The pari-mutuel sites are limited to 75,000

⁴ One of the uses of the word "limited" appears in the prominent "title," "Proposition For Limited Casinos," which is not identified as the title but which appears at the top of the petition form in the largest and boldest print on the form.

⁵ The Attorney General's request for an advisory opinion stated that there were 35 active pari-mutuel permitholders [A 1, AG letter p.4 n.1]. However, the list of permitholders for 1993-94 and 1994-95 only includes 34 [A 2]. Also, as noted by the Attorney General, it is not clear whether some facilities with more than one

square feet of gaming area, for an authorized total of 2,550,000 square feet. The county-based casinos are not limited as to size, but it is a fair assumption that they would be at least as big as the pari-mutuel sites, for an authorized total of 900,000 square feet of gaming area. Finally, the five riverboats at 40,000 square feet each would total 200,000. The grand total of casino gaming area authorized by the Limited Casinos petition would be 3,650,000 square feet.

According to a March, 1994 report of the Atlantic City Casino Association, released by the New Jersey Casino Control Commission, Atlantic City has twelve casinos and 855,768 square feet of gaming space (which includes 57,149 square feet of simulcasting space). The Las Vegas Convention and Visitors' Bureau reported in January of this year that 3,210,183 square feet of gaming area were in operation; that number has since increased with the openings of the Luxor and MGM casinos. These figures show that Florida's casino industry would be more than four times larger in terms of gaming area than Atlantic City's, and approximately as big as all of Las Vegas's.

Any voter who thinks that the Limited Casinos petition actually "limits" casino gaming is mistaken as to the true purpose of the petition. "A proposed amendment cannot fly under false colors; this one does." Askew, 421 So. 2d at 156 (quoted in Everglades, 19 Fla. L. Weekly at S278).

permitholder would be entitled to more than one casino. To err on the conservative side, figures here rely on 34 rather than 35 eligible pari-mutuel permitholders.

The Limited Casinos petition suggests that it will restrict gaming, but in fact it authorizes casino gaming for the first time. It promises a limited number of casinos among designated counties, but fails to limit their size. It promises a limited size for the gaming areas at casinos to be located at currently authorized pari-mutuel facilities that have conducted a pari-mutuel meet in each of the two preceding twelve-month periods, but fails to tell the voter how many such facilities exist and how many would be eligible to operate a casino, thus omitting the number of casinos that would result from this provision as well as their locations. The summary promises a limited overall number of gaming casinos, but fails to reveal that number. The summary also promises limited sizes for the gaming areas at riverboat and pari-mutuel casinos, but fails to reveal the size.

The net result of these omissions is that the Limited Casinos petition neglects to inform the voter that the proposition would authorize a total of over fifty casinos, making Florida the biggest casino gaming center in the country with the possible exception of Las Vegas. The petition fails to inform the voter that the total square footage devoted to casino gaming at the authorized Florida gaming casinos, well over 3 and a half million square feet of gaming area, would approximately equal that currently located in all of Las Vegas, and would total more than four times that in Atlantic City. This is the kind of information voters need in order to place in context the Limited Casinos petition's promises of "limits."

The proposal's failure to give the voter a basis for comparison to other gaming centers and facilities, or even to some other widely recognized building or complex of comparable size, is misleading. In order to evaluate whether the promised "limits" are acceptable, a voter must be informed as to the context in which "limit" is used. Most voters think of the square footage of buildings in terms of three or four digits indicating the size of apartments or houses, and have no concept of how big a 40,000 square foot gaming area on a riverboat casino or a 75,000 square foot gaming area at a pari-mutuel facility will be.

If voters are to make an "intelligent and informed" choice about the Limited Casinos petition, they must be given more information. Everglades, 19 Fla. L. Weekly at S278. The Limited Casinos petition omits material information and relies upon language that is commonly understood to indicate restrictions, not authorizations and expansiveness. The petition gives the voter no basis for understanding the magnitude of the proposal. It is, therefore, ambiguous and misleading.

The same failure to disclose the real nature of a proposed constitutional amendment was fatal in In Re: Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994). In Discrimination, the Court soundly rejected a proposal containing an ambiguity that "will in all probability confuse the voters" by failing to include details necessary to make the proposed amendment "accurate and informative." 632 So. 2d at 1021 (quoting the latter phrase from Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992)).

More recently, the proposal at issue in Everglades was found guilty of using misleading language by proclaiming its goal to "save" the Everglades and to make the sugar industry "help pay," when in fact the proposal intended to "restore" the Everglades and was completely silent on who would "help pay" in addition to the sugar industry. This Court ruled that the Everglades proposal was misleading and must be stricken from the ballot.

Like the Discrimination and Everglades proposals, the Limited Casinos petition relies upon ambiguities and omits material facts necessary to inform and to avoid confusion, and for those reasons should be stricken from the ballot. Askew, 421 So. 2d at 154-55.

B. The Limited Casinos Petition Is Inaccurate And Omits Material Facts About A Mandatory Location For A Gaming Casino.

A ballot summary must advise voters of "the meaning and ramifications of the proposed amendment." Wadhams, 567 So. 2d at 418. It must "give the voter fair notice of the decision he must make." Askew, 421 So. 2d at 155. It must "fairly reflect the chief purpose of the proposed amendment," In re Advisory Opinion to the Attorney General, English -- The Official Language of Florida, 520 So. 2d 11, 13 (Fla. 1988), or "accurately track[] and describe[] the proposed amendment." In re Advisory Opinion to the Attorney General, Limitation of Non-Economic Damages in Civil Actions, 520 So. 2d 284, 287 (Fla. 1988). The ballot summary must give the voter clear and accurate notice of the issue and purpose of the proposed amendment, and be sufficient to enable the voter to "cast an intelligent and informed ballot." Everglades, 19 Fla. L.

Weekly at S278 (citing Askew, 421 So. 2d at 155). The Limited Casinos petition fails these tests.

The most glaring defect in the Limited Casinos petition is the failure of its summary to even mention that one casino must be located in the so-called "South Pointe Redevelopment Area."⁶ Even worse, but less obvious, is the fact that there appears to be no such thing as the "South Pointe Redevelopment Area." There is a South Beach Redevelopment Project [A 5],⁷ there is a South Shore Revitalization Strategy [A 5], but there is no "South Pointe Redevelopment Area." How can a voter possibly make an informed and intelligent decision about the Limited Casinos petition when it mandates placement of a casino in a purportedly defined area that does not exist as such?

Even assuming for the sake of argument that by "South Pointe Development Area" the sponsor means part of the area generally known as "South Pointe," and overlooking for the moment the failure of the summary to even mention the requirement that a casino be placed there, the proposal still fails to inform the voter of the material facts. Neither the summary nor the text of the petition explains what or where that area is, nor why it is singled out for special treatment. Most voters do not know what or where South Pointe is, or what or where a redevelopment area is

⁶ The summary already contains 72 words, just short of the 75-word limit prescribed by section 101.161(1); addition of the phrase "South Pointe Redevelopment Area" itself would cause the summary to exceed the limit without other substantial rewriting.

⁷ See also State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980) (validating bonds and holding community redevelopment statutes constitutional).

within South Pointe, nor are the voters aware of the ramifications of placing a casino there. Virtually no voters will have, or expend, the time and money to find out about South Pointe and why it is being proposed as a constitutionally-selected site for a gaming casino. They certainly will not be able to obtain this information from the summary or even the full text of the Limited Casinos petition, and the unavailability of that material information renders the ballot summary of the Limited Casinos petition fatally misleading.

South Pointe is the southern-most tip of the City of Miami Beach, south of Fifth Street to Government Cut (which separates Miami Beach from Fisher Island) and from Biscayne Bay to the Atlantic Ocean [see maps at A 4]. Significant portions of South Pointe's real estate, particularly its vacant oceanfront parcels, are under the ownership or control of one Thomas B. Kramer, a German citizen, either individually or through the more than two dozen corporations and partnerships with which he is affiliated [A 8].⁸

As of October 1993, Kramer held 62 properties in the area [A 6], including a twelve-acre oceanfront parcel of vacant land purchased for \$13,300,000, and was negotiating the purchase of

⁸ These include 2 Star Island Inc.; 35 Star Island Inc.; 36 Star Island Inc.; 404 Investcorp, Inc.; 5 Star Island Inc.; 7th & 5th Deco Corp.; Azure Coast, Inc.; Il Paradiso Beach Club, Inc.; Joya International, Inc.; Marquesa, Inc.; Marquesa Development; MB Acquisition Corp.; New Fiesta, Inc.; Olympus Holdings, Inc.; PDS Overseas, Inc.; Portofino Group, Inc.; Raincloud, Inc.; Santorini Isle, Inc.; SBE, Inc.; Seagull Development Corporation; South Beach Creative Group, Inc.; St. Tropez Living, Inc.; Sun & Fun Inc.; The Thomas and Cathrine Kramer Foundation Inc.; and West Side Partners, Inc. [A 8].

other parcels that "would result in the Portofino Group [one of Kramer's corporations] controlling nearly all of the available waterfront properties in the entire South Beach area" [A 6 at 4 (emphasis added).] Kramer's financial advisors have identified this large oceanfront parcel as a "large enough" and "premier development piece" for a "destination resort hotel." [A 6 at 9, 10.]

Earlier this year, the media reported Kramer's announcement that he had entered an agreement with Steve Wynn of Mirage Hotels, a Las Vegas casino chain, for the operation of a casino to be owned by Kramer in South Pointe [A 7]. At almost precisely that same time, the Limited Casinos group filed with the Secretary of State an amended petition form, the text of which among other substantial revisions included the requirement that a gaming casino be placed in the so-called "South Pointe Redevelopment Area" [A 3].

Any voter who has all of this information understands that a vote for the Limited Casinos petition is a vote for the constitutionalization of the site and the owner and the operator of a specific gaming casino. However, the petition fails to reveal any of this information, and the summary fails to even mention that one casino must be located in South Pointe. At a minimum, the voter is entitled to know from the summary that a specific location is being selected for a casino. The failure to include this information in the summary -- as to the pari-mutuel locations as well as to Kramer's South Pointe casino -- renders the Limited Casinos petition fatally defective.

The lack of information about the pari-mutuel locations, ownership, and management also has the potential to seriously mislead the voters about the ramifications of the Limited Casinos petition. This petition automatically elevates existing pari-mutuel owners to constitutional status as the authorized owners of the majority of Florida's casinos, simultaneously elevating to constitutional status any existing problems with pari-mutuel ownership and control. The proposal in effect forecloses all fair competition for ownership and control of the majority of the state's casinos, shutting out opportunities for minority participation that would otherwise exist if the selection process were initiated anew by a regulatory body with authority over casinos.

The potential for uninformed or inaccurate decisions is one of the reasons why constitutional initiatives are subject to greater judicial scrutiny than are legislative enactments and constitutional revisions by commission.⁹ The lack of popular, legislative, or judicial input at the drafting stage must be countered by careful scrutiny before a proposed amendment reaches the ballot:

It is apparent that the authors of article XI realized that the initiative method did not provide a filtering legislative process for the drafting of any specific proposed constitutional amendment or revision. The legislative, revision commission, and constitutional convention processes of sections 1, 2 and 4 all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal. That opportunity for input in

⁹ Constitutional revision is governed by article XI, sections 2, 4, and 5.


the drafting of a proposal is not present under the initiative process and this is one of the reasons the initiative process is restricted to single-subject changes in the state constitution.


Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984). The same reasoning justifies careful judicial screening of initiative petitions, to prevent concealed effects from going before the unwary voters, and to protect the voters from otherwise misleading ballot summaries. These dangers and fatal flaws exist in the Limited Casinos petition, justifying its removal from the ballot.

CONCLUSION

Because the Limited Casinos petition relies upon ambiguous and misleading language, and because its ballot summary omits material facts and is misleading, the proposal violates Florida's title and ballot substance requirements. Accordingly, the Court should render its opinion invalidating the Limited Casinos petition and prohibiting its submission to the voters.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished to the following by hand delivery this 6th day of July, 1994.

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