
IN THE SUPREME COURT OF FLORIDA

Case No. SC04-1290

Review After Remand Of
Revised Financial Impact Statement

**ADVISORY OPINION
TO THE ATTORNEY GENERAL**

**RE: FINANCIAL IMPACT STATEMENT FOR
“AUTHORIZES MIAMI-DADE AND BROWARD COUNTY
VOTERS TO APPROVE SLOT MACHINES
IN PARIMUTUEL FACILITIES”**

**BRIEF AND APPENDIX
OF THE SPONSOR,
FLORIDIANS FOR A LEVEL PLAYING FIELD,
OPPOSING THE REVISED FINANCIAL IMPACT STATEMENT**

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STATEMENT OF THE CASE AND FACTS

The Court has for review a *revised* financial impact statement that the Financial Impact Estimating Conference (the “Conference”) has proposed for the constitutional amendment entitled “Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities.” [A 1.]¹ Floridians for a Level Playing Field (“Floridians”), the sponsor of the initiative, opposes the revised statement, and asks the Court either to approve only the first and third sentences of the revised statement for placement on the ballot,² or to reject the revised statement in its entirety, because the second sentence is fatally flawed.

¹ *Advisory Op. to Att’y Gen. re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, 2004 WL 1064930 (Fla. May 13, 2004) (Case No. SC03-857). Its ballot summary provides as follows:

Authorizes Miami-Dade and Broward Counties to hold referenda on whether to authorize slot machines in existing, licensed parimutuel facilities (thoroughbred and harness racing, greyhound racing, and jai alai) that have conducted live racing or games in that county during each of the last two calendar years before effective date of this amendment. The Legislature may tax slot machine revenues, and any such taxes must supplement public education funding statewide.
Requires implementing legislation.

Id. at *1. The proposed amendment has received the requisite number and distribution of voter signatures to qualify for a ballot position, and has been assigned ballot number 4. *See* <http://election.dos.state.fl.us/initiatives>.

² The Conference made minor changes in wording of the first and third sentences, which Floridians does not challenge here, although Floridians vehemently disagrees with the estimate of state tax revenues to be generated, on the grounds that it is vastly understated. Floridians will address this issue in its informational campaign for the benefit of the voters.

A side-by-side comparison of the initial and revised financial impact statements follows (emphasis added):

Initial Financial Impact Statement	Revised Financial Impact Statement
<p>This amendment alone has no fiscal impact on the state or local governments. <i>However, if the voters in Miami-Dade County, Broward County, or both counties authorize slot machines at pari-mutuel facilities, expenditures by the state and local governments related to problem gambling may increase by an unknown amount.</i> If the Legislature also chooses to tax slot machine revenues, the estimated state tax revenues from both counties would range from \$200 million to \$500 million annually.</p>	<p>This amendment alone has no fiscal impact on government. <i>If slot machines are authorized in Miami-Dade or Broward counties, governmental costs associated with additional gambling will increase by an unknown amount and local sales tax-related revenues will be reduced by \$5 million to \$8 million annually.</i> If the Legislature also chooses to tax slot machine revenues, state tax revenues from Miami-Dade and Broward counties combined would range from \$200 million to \$500 million annually.</p>

The Court rejected the second sentence in the *initial* statement, holding that the statement must be limited to the “probable financial impact” of the proposed amendment,³ and remanded to the Conference for redrafting. [A 2 at 2.] The Conference issued a revised statement, but the second sentence retains the substance of the previously rejected second sentence, and injects an independent new assertion

³ See Art. XI, § 5(b), Fla. Const. (“The legislature shall provide by general law, prior to the holding of an election pursuant to this section, for the provision of a statement to the public regarding the *probable financial impact* of any amendment proposed by initiative pursuant to section 3.”) (Emphasis added.)

that did not appear in the initial statement. [A 1 at 6.]

SUMMARY OF THE ARGUMENT

This Court expressly rejected the initial financial impact statement for the proposed Slot Machine amendment, because its second sentence failed to quantify financial impact and used the subjective phrase "problem gambling." On remand, despite the express terms and limited scope of this Court's ruling, the Conference again included a statement of unquantified impact very similar to the rejected second sentence and thus flawed in the same way. This renders the second sentence ambiguous and misleading to the voters, and reflects what appears to be the Conference's attempt to affect the proposal adversely, rather than simply to inform the public about its economic impact. Further, the Conference injected entirely new, unrelated language about supposed impact on local sales tax revenue, which is misleading, belated, and improper as exceeding the scope of the remand.

Because of these flaws, the second sentence of the revised financial impact statement continues to be improper. Under the doctrine of severability, the Court has the authority to strike only the second sentence and allow the first and third sentences to go on the ballot, because they remain informative and can stand alone without the second sentence. If the Court nevertheless determines that it cannot approve only part of the revised statement, then it should reject the revised statement entirely so that the flawed second sentence does not appear on the ballot.

Procedurally, the Court has three options to keep the flawed second sentence off the ballot: (1) issue another advisory opinion approving only the first and third sentences for placement on the ballot; (2) issue another advisory opinion rejecting the revised statement and remanding it to the Conference again for redrafting with explicit

instructions to delete the second sentence and add nothing new; or (3) reject this revised financial impact statement entirely, simply by taking no action on it before 5:00 p.m. on August 19, 2004. Floridians urges the Court to ensure that the flawed second sentence of the revised statement does not appear on the ballot, even if the Court must reject the entire revised statement.

ARGUMENT

Standard of Review. The issue before the Court is a question of law for which the standard of review is de novo. *E.g., Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998).

I. THE COURT SHOULD REJECT THE SECOND SENTENCE OF THE REVISED FINANCIAL IMPACT STATEMENT.

A. The First Part Of The Second Sentence Is Still Unquantified And Ambiguous. The Court rejected the initial financial impact statement because its second sentence said "expenditures by the state and local governments related to problem gambling may increase by an unknown amount." [A 2.] That statement had two problems. It used the emotionally-loaded and judgmental subjective phrase "problem gambling"; and it failed to quantify the costs of such gambling, thus failing to fulfill the statutory mandate to specify an impact and a price tag.

The Court should reject the first part of the revised second sentence for the same reasons. This part now says "governmental costs associated with additional gambling will increase by an unknown amount." Although the phrase "additional gambling" is a slight semantic improvement over the initial reference to "problem gambling," it still fails to quantify anything. Without the required price tag, the clause is nothing more than an unsubstantiated and indefinite – and therefore ambiguous --

scare tactic.⁴ The Conference was created to provide objective, quantifiable financial information, not to make qualitative value judgments based on political views or otherwise attempt to affect the outcome of the vote. For the same reasons that the Court rejected the second sentence in the initial financial impact statement, the Court should reject this language again.

B. The Second Part Of The Second Sentence Belatedly And Improperly Injects An Entirely New And Misleading Assertion. The second part of the second sentence is entirely new and did not appear in any form in the initial financial impact statement. It now says that "local sales tax-related revenues will be reduced by \$5 million to \$8 million annually." Injection of a new assertion for the first time after remand is unauthorized and improper.

It is important to note at the outset that this second part of the second sentence was *not* proposed as a way to quantify the alleged increase in unspecified social costs associated with gambling that the Conference referenced in the first part of the second sentence. As set forth clearly in the Conference's explanatory statement and working papers, the two halves of the sentence deal with two separate issues. [A 4.]⁵ The first half of the sentence related to increased government costs from compulsive gambling. [A 4 at 3.] The second half of the sentence was a separate point, addressing not increased costs, but decreased local sales tax revenues. [A 4 at 3.] The two halves of the sentence address two separate subjects: allegedly increased costs related to alleged

⁴ Ambiguity is forbidden. § 100.371(6)(b)3, Fla. Stat. (as amended by Ch. 04-33, § 3, at 201, Laws of Fla.).

⁵ The Conference initially included both statements as separate sentences. [A 4, Handouts at 2.] It was not until the final draft that the two sentences were joined as a compound sentence. [A 4, Handouts at 3.]

social problems; and separately, allegedly decreased local sales tax revenues. [See A 6 (transcript).] Thus, the Court should not be confused into thinking that the second half of the second sentence was intended to quantify the first half.

Further, the working papers reveal two misleading inaccuracies in the second half of the second sentence. The alleged decrease in local sales tax revenues was actually statewide, and not local as the sentence incorrectly states; and the alleged decrease in local sales tax had already been taken into account in arriving at the increased revenue figure in sentence three, although it is presented as if it should represent a further reduction in the sentence three figures. [A 4 at 4.]

It was improper to inject an entirely new issue on remand because nothing in the statutory scheme authorizes the Conference to do anything on remand except to redraft where this Court has told it to redraft. The Court rejected only the second sentence of the initial financial impact statement. Thus, the only thing the Conference was authorized to do was to delete the offending sentence (as it did in the *Repeated Medical Malpractice* case, see A 3), or fix the problems with it by eliminating references to non-economic social impacts and providing a specific price tag for purported financial impacts. See A 2 at 2 (statements must relate directly to financial impact). The Conference exceeded the scope of the Court's instructions on remand when it injected an entirely new assertion about the supposed impact of the proposed amendment on local sales tax revenue.⁶

⁶ Where the Court approves part of an order and remands with *specific* instructions, the only proper action on remand is to comply with the specific instructions, and further changes cannot be made to what the Court has already approved. See *Collins v. State*, 680 So. 2d 458, 459 (Fla. 1st DCA 1996) (improper to exceed bounds of a specific remand); *White Sands, Inc. v. Sea Club Condo. Ass'n*, 591 So. 2d 286, 287-88 (Fla. 2d DCA 1992) (improper to include new matter on remand where court

The Court should not permit the Conference to add entirely new assertions on every remand in disregard of the scope of the Court's instructions on remand, and in disregard of ever-decreasing time within which to complete this process. Otherwise, the result would be a never-ending spiral of "new" review in proceedings that ought instead to become increasingly narrow in scope. If the process started many months ahead of the statutory deadline for finality of financial impact statements (75 days before the target election), perhaps that would be less of a problem. But where time is very short, as it is here, the injection of brand-new assertions on remand is prejudicial to the due process rights of the amendment's sponsor and other interested parties -- particularly if, as was the case here, the Conference refuses to accept any public testimony on the newly-raised issue. [See A 6 at 14-15.] Adding new issues on remand also increases the pressures on this Court to start over again analyzing new assertions with each redraft, as the time available to do so becomes shorter. That is not what the statutory scheme contemplates, and it is not a smart or efficient way to conduct judicial review proceedings. The Court should prohibit this improper manipulation of the statutorily-prescribed process from becoming the *modus operandi* in future cases, and also should reject the second half of the second sentence.

II. PROCEDURAL OPTIONS.

The financial impact statement is supposed to give the voters information, but that information must be both clear and fair. Floridians urges the Court to approve

affirmed all but one aspect of previous order); *St. Joe Paper Co. v. Adkinson*, 413 So. 2d 107, 108 (Fla. 1st DCA 1982) (improper to take new testimony on issue not within scope of single issue remanded); *see generally Blackhawk Htg. & Plbg. Co. v. Data Lease Financial Corp.*, 328 So. 2d 825, 827 (Fla. 1975) (appellate court's mandate cannot be altered or evaded on remand).

only the first and third sentences of the revised statement for placement on the ballot, while striking the second. The statutory scheme does not forbid the Court to approve part of a financial impact statement for placement on the ballot while disapproving other parts. The Court can do this either by striking the second sentence as severable, while approving the first and third; or by remanding the statement to the Conference for redrafting with more explicit instructions.

The Court already has drawn upon the concept of severability, by singling out the second sentence as being improper. The doctrine of severability encourages courts to uphold valid parts of a whole despite invalidating other parts, if it is possible to do so without negating the intent of the whole or rendering the remaining portions meaningless.⁷ The Court can save the good and sever the bad in this revised financial impact statement, because the first and third sentences can stand alone. The omission of the flawed second sentence does not negate or frustrate the overall message to the voter. Accordingly, the best result is for the Court to approve the first and third sentences, either by issuing an advisory opinion directing that they alone appear on the ballot, or by remanding the statement to the Conference with explicit instructions to retain only those sentences while deleting the second and adding nothing new.

If the Court determines that it cannot approve only part of a financial impact statement, it nevertheless must act to ensure that the flawed second sentence does not

⁷ See *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999) ("Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactment where it is possible to strike only the unconstitutional portions."); see also *Cramp v. Board of Public Instr.*, 137 So. 2d 828, 830 (Fla. 1962) (factors relevant to severability); *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991) ("severability can occur whether or not the enactment contains a severability clause"), *cert. denied*, 503 U.S. 964 (1992).

appear on the ballot. The Court can do this by rejecting the revised statement and remanding it, with the likely result being that no redrafted statement could be prepared and approved before 5:00 p.m. on August 19, 2004, and thus the ballot would contain the default statement, "The financial impact of this measure, if any, cannot be reasonably determined at this time." § 100.371(6)(b)4, Fla. Stat. (as amended by Ch. 04-33, § 3, at 201, Laws of Fla.). The Court also can keep the flawed sentence off the ballot simply by failing to act on the revised statement by 5:00 p.m. on August 19, 2004, in which case the same "cannot be reasonably determined" language will go on the ballot by default. Either way, the bottom line is that the second sentence of this revised statement is so flawed that it cannot be allowed on the ballot, even if that means the Court must reject the entire statement.

CONCLUSION

The Court should reject the revised financial impact statement because it still contains a vague assertion about unspecified and unquantified governmental costs associated with the social impact of gambling, which the Court has rejected already. Further, the revised statement improperly and belatedly injects an entirely new assertion, beyond the scope of the remand, and misleading. The Court either should approve the first and third sentences for placement on the ballot, or reject the revised financial impact statement in its entirety and ensure that the flawed second sentence does not appear on the ballot.

Respectfully submitted this 5th day of August, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing with its appendix has been furnished by United States mail to the following this 5^h day of August, 2004:

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CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

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INDEX TO APPENDIX

- A 1 Court's July 29, 2004 scheduling order and attachments, including revised financial impact statement on the Slot Machine initiative.
- A 2 Court's advisory opinion rejecting the second sentence of the initial financial impact statement on the Slot Machine initiative.
- A 3 Revised financial impact statement on Repeated Medical Malpractice amendment (simply deleting the sentence that this Court rejected as improper).
- A 4 Summary and Complete financial information statements, plus Conference's handouts from its meeting on July 27, 2004, all reflecting two separate points being addressed in second sentence of revised financial impact statement. The Summary and Complete financial information statements are available online at www.state.fl.us/edr/conferences/constitutionalimpact, or on the Secretary of State's website under Elections, Proposed Constitutional Amendments, and Financial Impact Information.
- A 5 Ch. 04-33, Laws of Florida (amending several statutory provisions with respect to the financial impact statement process).
- A 6 Transcript of Financial Impact Estimating Conference proceedings conducted on July 27, 2004, re: Slot Machine financial impact statement