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IN THE SUPREME COURT OF FLORIDA

CASE NO. 15-1929

L.T. NOS. 1D14-3483; 2013050343

GRETNA RACING, LLC,

Petitioner,

vs.

DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

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PETITIONER GRETNA RACING, LLC'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner, Gretna Racing, LLC ("Gretna"), owns a licensed pari-mutuel facility located in Gadsden County, Florida. R: 27; 574. The Respondent, Division of Pari-Mutuel Wagering (the "Division"), is the state agency that supervises gambling operations at pari-mutuel facilities in Florida.

Pursuant to §551.102(4)[1] as amended in 2009 by §19 of Chapter 2009-170, Laws of Florida, Gretna filed an application with the Division seeking the issuance of a license to conduct slot machine gaming at its licensed pari-mutuel facility. R: 25. The application was filed on December 10, 2013. *Id*. On December 23, 2013, the Division denied the application. R: 1. The application was denied despite a binding countywide referendum held in Gadsden County on January 31, 2012 in which 62.95% the people of Gadsden County voted to approve the use of slot machines at Gretna's licensed pari-mutuel facility. R: 30-32; Appendix 1. Through this appeal, Gretna seeks review of the Division's denial of its application.

During the 2009 legislative session, the Legislature amended §551.102(4), Fla. Stat. (2009), for the purpose of "redefining" the parameters under which a licensed pari-mutuel facility may become an "eligible facility" to conduct slot

[1]Unless otherwise indicated, references to the Florida Statutes shall be to the 2010 official version published by the Statutory Revision Commission. References to the Florida Constitution shall be to the 1968 constitution as amended. References to the record on appeal shall be: "R:" followed by the appropriate page number. References to the attached Appendix shall be "Appendix" followed by the appendix tab number.

machine gaming.[2] Effective July 1, 2010, the "redefined" definition of the statutory term "eligible facility" for slot machine gaming became:

> **§551.102(4)**: **"Eligible facility"** means any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility in the respective county; any licensed pari-mutuel facility located within a county as defined in s. 125.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter; or any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter. (emphasis added to identify the statutory text added by Chapter 2009-170).[3]

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[2]The title contained within Chapter 2009-170 corresponding to the amendment to §551.102(4) in §19 states as follows**: "amending s. 551.102, F.S.; redefining the terms 'eligible facility' and 'progressive system' to include licensed facilities in other jurisdictions;"**

[3]Prior to the 2009 amendment, §551.102(4), Fla. Stat. (2009), provided:

> **"Eligible facility"** means any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution ***that has conducted live racing or games during calendar years 2002 and 2003*** and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility in the respective county."

Accordingly, the 2009 amendment added two additional classifications of permitholders eligible to possess and operate slot machines pursuant to §551.102(4). The first new classification added via the new second clause of amended §551.102(4) (the "Second Clause") provides:

> **"Eligible facility"** means … any licensed pari-mutuel facility located within a county as defined in s. 125.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter."

Through this Second Clause, the Legislature expanded the pari-mutuel facilities eligible for slot machine licensure to also include facilities located in any county that meets the definition of "county" found in §125.011. In *Golden Nugget Group v. Metropolitan Dade County,* 464 So. 2d 535 (Fla. 1985), this Court determined that Miami-Dade County met the definition of a county under §125.011.

The other new classification of "eligible facility" created by the Legislature is found in the new third clause (the "Third Clause") which provides:

> **"Eligible facility"** means … any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar

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As is evident, pre-amendment §551.102(4) was carried over in amended §551.102(4) as the "**First Clause**." In *Florida Gaming Centers, Inc. v. DBPR*, 71 So. 3d 226 (Fla. 1st DCA 2011), *rev. denied* 90 So. 3d 271 (Fla. 2012) ("*Florida Gaming Centers"*), the First District noted that the class of pari-mutuel facilities eligible under the First Clause included only the ***seven*** facilities located in Miami-Dade and Broward Counties ***that had conducted live racing during 2002 and 2003***.

> years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter.

Through this Third Clause, the Legislature expanded the pari-mutuel facilities eligible for slot machine licensure to include licensed facilities located in any "other" county (i.e., any county "other" than the counties identified in the First and Second Clauses) provided that the electorate approve the use of slot machines at a pari-mutuel facility in their county in a countywide referendum.

Immediately before Chapter 2009-170 became effective on July 1, 2010, three of the seven "eligible facilities" under the First Clause, i.e., pre-amendment §551.102(4), challenged the constitutionality of §19 of Chapter 2009-170. In affirming summary judgment upholding §551.102(4) as amended, the First District held that the Legislature had plenary authority under the police power to amend the definition of "eligible facility" to include not only the seven facilities included within the scope of the First Clause, but to include other facilities as well. *Florida Gaming Centers*, 71 So. 3d at 228.[4]

After the decision in *Florida Gaming Centers*, the County Commission of Gadsden County, on November 1, 2011, authorized a binding countywide

[4]Shortly after §19 of Chapter 2009-170 became effective on July 1, 2010, South Florida Racing Association, LLC ("SFRA") filed an application for a license to conduct slot machine gaming at its pari-mutuel facility in Miami-Dade County known as **Hialeah Park**. Because **no live racing** occurred at **Hialeah Park** in **either 2002 or 2003**, **Hialeah Park** did not qualify under the First Clause despite its Miami-Dade County location. On or about December 21, 2010, the Division issued a slot machine gaming license to SFRA pursuant to the Second Clause. R: 520.

referendum on this specific question: **Shall slot machine gaming be approved for use at the pari-mutuel horsetrack facility in Gretna, FL?** R: 30-1; Appendix 1 (the "Referendum" or the "Gadsden Referendum"). The Referendum was scheduled for January 31, 2012. *Id.*

After the vote of the Gadsden County Commission but prior to the vote of the electorate, the Secretary of DBPR requested an opinion from the Attorney General (the "AG") questioning whether the referenda scheduled in Gadsden County and elsewhere would satisfy the referendum requirement of the Third Clause of §551.102(4). The AG promptly complied with the Secretary's request by issuing AGO 2012-01 on January 12, 2012, just days before the scheduled Gadsden Referendum, in which the AG advised the Secretary:

> "[DBPR] is not authorized to issue a slot machine license to a pari-mutuel facility in a county which, pursuant to the third clause of section 551.102(4), Florida Statutes, holds a countywide referendum to approve such machines, ***absent a statutory or constitutional provision enacted after July 1, 2010, authorizing such referendum*.**" (R: 17)**.**

A copy of AGO 2012-01 is also included in Appendix 2.

The Referendum in Gadsden County was held on January 31, 2012 as scheduled. The people of Gadsden County approved the Referendum by a margin of 62.95% in favor to 37.05% against. R: 32; Appendix 1. Gadsden County's vote was followed during 2012 by successful slot machine referenda in Palm Beach, Lee, Brevard, Washington and Hamilton Counties.

On December 10, 2013, Gretna filed its application for a slot machine gaming license. R: 25. The application asserts that Gretna is an "eligible facility" for slot machine gaming under the provisions of the Third Clause. R: 26-161. Gretna's application established the following prerequisites for slot machine licensure:

> (a) Gretna is a pari-mutuel permitholder that operates a licensed pari-mutuel facility in Gadsden County, a qualifying county under the Third Clause.
>
> (b) Pursuant to both statutory and constitutional authority,[5] Gadsden County conducted a binding countywide referendum authorizing the use of slot machines at Gretna's licensed pari-mutuel facility by a vote of 6,053 in favor of approval and 3,563 against approval.
>
> (c) The Referendum conducted in Gadsden County was conducted on January 31, 2012; and therefore the Referendum was conducted after July 1, 2010, i.e., the date on which the Third Clause became effective.
>
> (d) Gretna has satisfied all of the other requirements of the Third Clause, including the conduct of a full schedule of live racing for the two (2) consecutive calendar years immediately preceding the filing of Gretna's application and submission of an agreement with Gretna's horsemen and required internal controls documentation.

On December 23, 2013, the Division issued a letter to Gretna denying its application (the "Denial Letter") (R: 1; Appendix 3). As indicated in the Denial Letter, the application was denied ***exclusively*** for the two (2) ***legal*** reasons:

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[5]See *Watt v. Firestone,* 491 So. 2d 592, 593 (Fla. 1st DCA 1986), *rev. denied*, 494 So. 2d 1153 (Fla. 1986) in which the First District held that non-charter counties like Gadsden County have home rule authority to conduct referenda on gambling issues under both "Article VIII, §1(f) of the Florida Constitution and §125.01 of the Florida Statutes."

> 1. That the referendum was not a qualifying referendum under the Third Clause because the referendum was not conducted under a statutory or constitutional provision ***enacted*** after July 1, 2010 specifically authorizing the referendum; and
>
> 2. That irrespective of whether Gretna achieved the status of an "eligible facility" because of the successful referendum, the Division is nonetheless precluded by the provisions of §551.104(2) from issuing a slot machine license to any facility located in any Florida county except for Miami-Dade or Broward Counties, i.e., the only two (2) counties in which slot machine gaming is authorized by Chapter 551.

The record confirms that the Division reviewed the application and compared it to the Division's internal checklist of requirements for slot machine licensure. R: 173; 713-4. At R: 714, the Division's licensing administrator further confirmed that after the review and comparison had occurred, the Division did ***not*** issue a §120.60(1) "deficiency letter" indicating the existence of any error, omission or other deficiency in Gretna's application.[6] Consistent with the decision not to issue a deficiency letter, the Denial Letter is silent with regard to any reason for denial except for the two very specific ***legal*** reasons stated therein.[7] R: 1; Appendix 3.

Because its application was denied as a matter of law, Gretna filed its petition requesting an informal hearing. R: 4. By definition, an informal administrative

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[6]Section 120.60(1) provides that "an agency may not deny a license for failure to correct and error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period."

[7]See *McCarthy v. Department of Insurance and Treasurer*, 479 So. 2d 135, 137 (Fla. 2d DCA 1985) (license denial shall not be affirmed for a reason that was not specified as a reason for denial in the denial letter).

hearing is a hearing in which there are no disputed issues of fact. §120.569(1). The Division accepted the petition on that basis without objection. The informal hearing was held on April 8, 2014. The Division designated Paul R. Waters, a lawyer employed by DBPR, to serve as the Hearing Officer. A transcript of the informal hearing is included in the record at R: 654. Counsel for Gretna and the Division filed a pre-hearing stipulation (R: 648; Appendix 4). In the stipulation, Gretna and the Division summarized their legal positions with regard to Gretna's entitlement to licensure and provided a list of pre-approved exhibits and because no facts were in dispute, a statement of agreed facts.

During the hearing, the Hearing Officer granted the Division's motion to strike the affidavit of Cynthia Massie, Gretna's expert witness on grammar and sentence structure. R: 633 (affidavit); R: 643 (motion to strike); R: 646 (response to motion to strike); and R: 692-700 (relevant part of the transcript). The affidavit of Gretna's grammar and sentence structure expert witness is included in Appendix 5.

Consistent with its decision not to issue a deficiency letter and the terms of the pre-hearing stipulation, the Division never claimed during the informal hearing process that the Gadsden Referendum was a **not** a binding countywide referendum and it offered no evidence to support a claim that the Referendum was intended by the Gadsden County Commission to be a straw ballot. Similarly, the Recommended Order (R: 751) and the Division's Final Order (R: 782) are silent as to that issue.

On May 23, 2014, the Hearing Officer issued a Recommended Order affirming the denial of the application for the reasons stated in the Denial Letter. R: 751. On June 3, 2014, Gretna filed all required exceptions. R: 764.

On July 7, 2014, the Division issued a Final Order that adopted the Recommended Order except with regard to Gretna's Exception #2. (R: 782). In its ruling on that exception, the Division, consistent with the construction given §551.102(4) by the AG and the Hearing Officer, stated that ***the dispositive fact with regard to Gretna's application is not in dispute***, that fact being "that the January 31, 2012 referendum in Gadsden County was not held pursuant to a statute or constitutional provision: (1) specifically authorizing a referendum to approve slot machines; and (2) ***enacted*** after section 551.102(4) of the Florida Statutes became effective on July 1, 2010." R: 784.

On August 1, 2014, Gretna appealed the Division's Final Order to the First District. In its answer brief, the Division, now being represented by the AG's office, raised ***for the first time on appeal*** two new deficiencies in Gretna's application, the first related to allegations that Gretna conducted non-qualifying racing activities and the second that the Referendum was a non-binding straw vote. Gretna moved to strike the foregoing arguments from the Division's brief because, through its answer brief, the Division/AG was inappropriately attempting to interject new facts into the appeal that were not included within the parties' stipulation and new legal issues that were not otherwise raised during the informal hearing or mentioned in the Final

Order as the legal basis for the denial of the application. The First District granted the motion with regard to the racing activities, but allowed the Division/AG to present legal arguments under the "tipsy coachman" doctrine regarding the non-binding nature of the Gadsden Referendum. After the new issue regarding the binding nature of the Referendum was raised, Gadsden County immediately sought and was granted leave to file a brief, as *amicus curiae*, to address the AG's challenge to Gadsden County's home rule powers and to the *bona fides* of the Referendum.

The First District's initial opinion was issued on May 29, 2015. Judge Benton wrote the majority opinion in which now retired Judge Clark joined (the "Initial Opinion"). The Initial Opinion reversed the denial of the license, agreeing with Gretna that its licensure application had been erroneously denied because:

> (a) It is unnecessary to look beyond the plain meaning of the text of the Third Clause to determine that Gretna has satisfied all of the statutory requirements for slot machine licensure.
>
> (b) Gadsden County possessed both statutory and constitutional home rule authorization to conduct the Referendum under the authority of *Watt v. Firestone*, the holding of which case the legislature is presumed to have been aware when it enacted the Third Clause.
>
> (c) The Division's/AG's construction of amended §551.102(4) is clearly erroneous because:
>
> (i) it requires the court to construe the Third Clause as if the legislature had included in the statute's text the word "**enacted**" despite the legislature's decision not to do so.

(ii) it requires the court to construe the Third Clause as if §551.102(4) had not been amended by §19 of Chapter 2009-170 contrary to the presumption that when the legislature makes a material change in the language of a statute, a specific objective or alteration of prior law was intended.

(iii) it renders the entire Third Clause meaningless contrary to the rule of interpretation that it should never be presumed that the legislature intended to enact purposeless or useless legislation.

(iv) it relies upon an *extra-record* statement made by a legislator a year after the enactment of Chapter 2009-170 to establish legislative intent which is contrary to an unbroken line of Florida precedent rejecting statements of legislators as admissible evidence to establish legislative intent.

(d) The Division's denial of Gretna's application under §551.104(2) is inconsistent with the Division's prior approval of SFRA's application for slot machine license for the Hialeah Park facility under the same statute, §551.104(2).

In addition, the Initial Opinion certified the following question to this Court:

Whether the third clause of section 551.102(4), Florida Statutes (2010) authorizes the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, to license slot machines at qualifying licensed pari-mutuel facilities in any county, other than Miami-Dade County, in which voters approve such licensure by a countywide referendum, in the absence of additional statutory or constitutional authorization enacted or adopted after July 1, 2010?

On June 11, 2015, the Division moved for rehearing and rehearing *en banc*. Because of the retirement of Judge Clark, Judge Bilbrey was substituted in her place. For no apparent reason other than a change in personnel, the substitute panel granted rehearing on October 2, 2015 and issued a new majority opinion (the "New Majority Opinion") authored by Judge Makar (who dissented to the Initial Opinion)

and joined in part by Judge Bilbrey (the "New Concurring Opinion"), with Judge Benton dissenting. In reversing course, the New Majority Opinion affirmed the denial of Gretna's application because:

> (a) The Division's/AGO 2012-01's construction of the Third Clause is supported by the rules of statutory construction and the rules of grammar.
>
> (b) The Division's/AGO 2012-01's construction of the Third Clause is supported by the legislative history of the 2009 amendment to §551.102(4), including the statement of a legislator regarding legislative intent made one year after the enactment of Chapter 2009-170 and potential impact on the compact with the Seminole Tribe.
>
> (c) The Division's/AGO 2012-01's construction of the Third Clause does not render the Third Clause meaningless.
>
> (d) The Division's/AGO 2012-01's construction of the Third Clause is supported by a "strict construction" of the 2009 amendment to §551.102(4) and that it must be accorded deference.
>
> (f) The Gadsden Referendum was not a qualifying referendum but instead was a non-binding straw vote.

The New Majority Opinion also certified to this Court a modified version of the question certified in the Initial Opinion:

> **Whether the Legislature intended that the third clause of section 551.102(4), Florida Statutes, enacted in 2009, authorize expansion of slot machines beyond Miami-Dade and Broward Counties via local referendum in all other eligible Florida counties without additional statutory or constitutional authorization after the effective date of the act?**

On October 20, 2015, Gretna filed its notice to invoke this Court's discretionary jurisdiction. On December 1, 2015, jurisdiction was accepted.

STANDARD OF REVIEW

Once this Court accepts jurisdiction on any ground, the entire case is before this Court for review. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

Issues of statutory interpretation and construction involve purely questions of law that are reviewed *de novo*. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

Although this case involves gambling, the wisdom and good policy of a legislative act—irrespective of the subject matter—is for the Legislature and not for the courts to determine. *Rodriquez v. Jones*, 64 So. 2d 278 (Fla. 1953).

The admissibility of expert testimony is reviewed under the abuse of discretion standard. *Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879 (Fla. 1984).

SUMMARY OF THE ARGUMENT

The New Majority Opinion is hopelessly in error, grounded on anti-gambling policy rhetoric rather than on the impartial application of controlling precedent. The construction given §551.102(4) in the New Majority Opinion, although consistent with the flawed AGO 2012-01, is not consistent with the clear and unambiguous meaning of the text of the statute as it impermissibly requires the grafting of the additional word "***enacted***" into the statute to achieve the desired construction. The ruling also violates several basic rules of grammar, renders completely meaningless the 2009 amendment enacted for the stated purpose of redefining the term "eligible facility" to include licensed facilities in other county jurisdictions (i.e., in addition to

Miami-Dade and Broward Counties) and inappropriately relies upon statement of an individual legislator to establish legislative intent. In addition, the New Majority Opinion applies §551.104(2) in a manner irreconcilable with the record evidence of the Division's prior interpretation that resulted in the issuance of a slot machine license for the Hialeah Park facility (R: 520.) Finally, the New Majority Opinion erroneously applied the "tipsy coachman" doctrine. The record is devoid of any facts suggesting that the Gadsden Referendum was non-binding. It is also clear that neither the record nor the Recommended Order nor the Final Order contain any evidentiary basis to support this argument. Accordingly, it was improper to apply the "tipsy coachman" doctrine to affirm the denial of Gretna's application.

For these reasons, the New Majority Opinion must be reversed.

ARGUMENT

The ultimate issue presented by this appeal is whether, as a consequence of the successful Gadsden Referendum, Gretna is an "eligible facility" for slot machine gaming licensure under §551.102(4) as amended by §19 of Chapter 2009-170. This issue dovetails with the narrower question certified to this Court because if the certified question is answered in the affirmative (i.e., the Third Clause authorizes slot machine gaming referenda ***without additional*** statutory or constitutional referenda authorization after July 1, 2010), then Gretna's otherwise fully compliant

application entitles Gretna to the slot machine gaming license for which it applied.[8]

I. FUNDAMENTAL RULES OF STATUTORY INTERPRETATION AND ENGLISH GRAMMAR CONTROL THE INTERPRETATION OF THE THIRD CLAUSE OF §551.102(4).

In matters of statutory interpretation, the function of a court is to interpret statutes as they are written by the Legislature. *Florida Department of Revenue v. Florida Municipal Power Agency,* 789 So. 2d 320, 324 (Fla. 2001). Because the Legislature is presumed to have expressed its intent through the words found in the statute, the statute's text is the most reliable and authoritative expression of the Legislature's intent. *Zuckerman v. Alter*, 615 So. 2d 661, 663 (Fla. 1993).

In circumstances in which the language of the statute is clear and unambiguous, the statute must be given its plain and obvious meaning, derived from the words used, without involving incidental rules of construction or engaging in speculation as to what the court thinks that Legislature intended or should have intended. *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779 (Fla. 1960). Accordingly, even in those unusual circumstances in which a court is convinced that the Legislature really meant and intended something not expressed in the statute, a

[8] See this Court's decisions in *State rel. Kinsella v. Florida State Racing Commission,* 20 So. 2d 258 (Fla. 1945) (holding that the Division's predecessor agency was under a mandatory duty to issue the permit where the application was in substantial compliance with the requirements of the permitting statute) and *State ex rel. Palm Beach Jockey Club v. Florida State Racing Commission,* 28 So. 2d 330 (Fla. 1946) (holding that in matters of pari-mutuel permitting, each detail is clearly defined by statute and leave but little discretion to the agency).

court is not authorized to depart from the plain meaning of the language; and instead the appropriate remedy in such circumstances is for the Legislature to amend the statute. *Van Pelt v. Hilliard*, 78 So. 693 (1918); *Overstreet v. State*, 629 So. 2d 125 (Fla. 1993); and *Florida Municipal Power Agency,* 789 So. 2d at 324.

This Court's prior decisions make clear that matters *extrinsic* to the text of the statute, i.e., the title, staff reports and other forms of legislative history, are ***not*** appropriate for consideration when the language of the statute is "clear and unambiguous" or is "plain and obvious enough to be conclusive." *See Knowles v. Beverly-Enterprises-Fla., Inc.*, 898 So. 2d 1, 10 (Fla. 2004). This Court has repeatedly relied upon *intrinsic* considerations to aid in statutory interpretation that are generally in the form of presumptions regarding the process that resulted in a statute's enactment. The *intrinsic* aids relevant to the interpretation of §551.102(4) include:

> (a) The presumption that the legislature has knowledge of the meaning of the words in the statute and has expressed its intent by the use of those words. *Overstreet, supra*.
>
> (b) The presumption that the legislature knows the rules of grammar and has applied those rules when writing legislation. *Fla. State Racing C'mission v. Bourquardez*, 42 So. 2d 87 (Fla. 1949); *State v. Bodden*, 877 So. 2d 680 (Fla. 2004).
>
> (c) The presumption that the legislature, when materially amending a statute, intended to effectuate a specific change from the prior statute. *Van Pelt v. Hilliard, supra.*
>
> (d) The presumption that the legislature has knowledge of existing law and the judicial decisions on the subject matter of the enactment;

and when re-enacting a statute, with knowledge of the interpretation previously placed upon it by the courts. *Dickinson v. Davis*, 224 So. 2d 262 (Fla. 1969); *Crescent Miami Center, LLC v. Florida Department of Revenue*, 903 So. 2d 913 (Fla. 2005).

(e) The presumption that the legislature enacted the statute with the intention that every word, phrase and clause of the statute be given meaning. *State v. Bodden, supra*; *Kasischke v. State*, 991 So. 2d 803, 808 (Fla. 2008).

(f) The presumption that the legislature ***never*** intends to enact meaningless legislation. *Sharer v. Hotel Corp. of America,* 144 So. 2d 813 (Fla. 1962).

(g) The judicial canon that if the statutes cannot be harmonized, the latest expression of the legislature prevails. *State Racing Commission v. McLaughlin,* 102 So. 2d 574, 575-76 (Fla. 1958); *Sharer v. Hotel Corp. of America*, *supra*; *State v. Parsons*, 569 So. 2d 437, 438 (Fla. 1990).

(h) The judicial canon that courts may not abrogate legislative power by adding a word to a statute that that was not placed there by the legislature. *Florida Municipal Power Agency*, *supra*.

Because of these presumptions and judicial canons, the appropriate starting point is an analysis of the text of the statute. *State v, Bodden, supra*. In *Bourquardez,* 42 So. 2d at 88, this Court discussed the important role that the presumption regarding the Legislature's knowledge of the rules of grammar plays in statutory interpretation, stating that reliance on this presumption is the "*only way the court is advised of what the legislature intends is by giving [the statute] the generally accepted construction*." Consistent adherence to this presumption provides stability, certainty and predictability in the interpretation of statutes.

Standard English follows a comprehensive system of grammatical rules. These rules establish "a terminology and a system of classification" which facilitate any discussion of the English language. John E. Warriner, *English Composition and Grammar* (Harcourt Brace Jovanovich Inc., 1988) at p. 441. The statutory provision under discussion here, the Third Clause, provides in relevant part:

> **"Eligible facility"** means . . . any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county."

In the independent clause, "eligible facility means any licensed pari-mutuel facility," "eligible facility" is the subject and "any licensed pari-mutuel facility" is its subject complement that helps identify the subject of the independent clause, "eligible facility." The independent clause is modified by a prepositional phrase, an adjective clause and a participial phrase that follow it in the sentence, with all three grammatical parts serving to clarify the meaning of the subject of the independent clause, "eligible facility."

Immediately following the independent clause is the prepositional phrase "in any other county," which phrase begins to identify which "facility" is "eligible." Gadsden County meets this requirement because it is a county "other" than Miami-Dade or Broward Counties.

The adjective clause "in which a majority of voters have approved slot machines at such facilities in a countywide referendum" immediately follows and

modifies the noun "county," restricting the location of an "eligible facility" to such a county. Gadsden County again meets this requirement because the majority of voters in a countywide referendum approved slot machines at Gretna's facility.

"Referendum," the final word in the adjective clause, is a noun and is modified by the participial phrase "held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county." According to *Warriner*, a "participle is a verb form that can be used as an adjective" (*Id.* at 449); an adjective is "used to modify a noun or a pronoun" (*Id.* at 416); and "to modify means 'to limit' or 'to make the meaning of a word more definite'" (*Id.* at 416). Here, the participle "held" functions as an adjective to modify the noun "referendum." *Id.* at 449.

The participle "held" introduces the participial phrase, which includes the participle "held" and a series of three prepositional phrases following "held." A participial phrase contains the "participle and any complements or modifiers it may have." (*Id.* at 450). An adverb is "used to modify a verb, an adjective or another adverb" and may answer any of the following questions: how, when, where, to what extent or how often? *Id.* at 423.

Here, the prepositional phrases—"pursuant to a statutory or constitutional authorization," "after the effective date," and "in the respective county"—complete the participial phrase and all modify the participle "held," functioning as adverbs to describe how, when or where, respectively, a referendum may be "held," i.e., held

how—"held pursuant to a statutory or constitutional authorization"; held ***when***—"held after the effective date of this section"; and held ***where***—"held in the respective county." Accordingly, the entire participial phrase—"held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county"—functions as an adjective to modify the noun "referendum."

Under the foregoing grammatical analysis, there are no dangling modifiers to confuse the main idea; and, instead, the close proximity of the modifiers to the modified words results in an obvious meaning of "eligible facility" under the Third Clause, consistent with the meaning continually advocated by Gretna and approved in the Initial Opinion. Furthermore, this analysis respects all of the identified *intrinsic* aids and presumptions, particularly the principle that statutes must be read as a whole with meaning ascribed to every word, phrase and clause—with due regard given to the semantic and contextual interrelationship between the parts. *Kasischke,* 991 So. 2d at 808*; Fleischman v. DPR,* 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983).[9]

[9]The preceding analysis is a verbal explanation of the sentence diagram that was attached to the affidavit of Gretna's expert witness on grammar and sentence structure, Cynthia Massie (Appendix 5). Proper application of the rules of grammar can only result in one correct interpretation of a sentence's grammatical structure (R: 634). As mentioned, the Hearing Officer granted the Division's motion to strike the affidavit of Gretna's expert to which Gretna took exception. Gretna addresses this erroneous evidentiary ruling in Article VIII *infra*.

Application of the rules of grammar to the text of the Third Clause clearly identifies the four (4) parameters for the qualification of a countywide referendum to approve slot machines:

> 1. The referendum was held pursuant to a statutory or constitutional authorization.
>
> 2. The referendum was held after the effective date of this section (viz., after July 1, 2010 which was the effective date of §19 of Chapter 2009-170).
>
> 3. The referendum was held in the respective county.
>
> 4. A majority of the voters approved the referendum.

Gretna asserts that because the Gadsden Referendum satisfies the four (4) statutory conditions, Gretna is an "eligible facility" under the Third Clause.

II. GADSDEN COUNTY WAS AUTHORIZED BY THE FLORIDA CONSTITUTION AND THE FLORIDA STATUTES TO CONDUCT THE GADSDEN REFERENDUM.

The Division has not disputed that Gretna has satisfied conditions 2, 3 and 4 above. Nonetheless, the Division—under the auspices of AGO 2012-01—has determined, and the New Majority Opinion agrees, that the Referendum was not "held pursuant to a statutory or constitutional authorization." Distilling the certified question to its essence, the dispositive question in this case is whether on July 1, 2010 the counties to which the Third Clause applies had home rule authority to conduct a gambling referendum. Because the answer is unquestionably **YES**, Gretna is entitled to the license for which it applied.

Under Article VIII, §§1(f) and (g) of the 1968 Constitution, all Florida counties, both chartered and non-chartered, possess *constitutionally* granted home rule powers. The Legislature implemented the constitutional grant of authority to non-chartered counties under Article VIII, §1(f) through the enactment of Chapter 71-14, Laws of Florida. Chapter 71-14 substantively and substantially amended then existing §125.01 regarding the powers of non-chartered counties.[10] The expansive scope of a non-chartered county's constitutional and statutory home rule powers was first addressed by this Court in *Speer v. Olsen*, 367 So. 2d 207 (Fla. 1979), the foundational case in Florida's home rule jurisprudence, in which it was recognized that Article VIII, §§1(f) and the first sentence of §125.01 had the effect of granting to counties the same plenary legislative authority within their jurisdiction that the Florida Legislature possesses—except when such authority is preempted to the Legislature.[11]

Shortly after the decision in *Speer*, the First District was called upon to determine whether a county's home rule powers included the authority to conduct

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[10]The first sentence of §125.01 was amended by Chapter 71-14 to provide that the legislative and governing body of a non-chartered county has "the power to carry on county government" … [T]o the extent not inconsistent with general or special law." The first sentence of §125.01 appears **not** to have been altered since 1971.

[11]Preemption is not an issue here, as the Third Clause, in requiring a favorable countywide referendum as a condition of slot machine licensure, has *affirmatively informed local government to act in this area*. *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1019 (Fla. 2d DCA 2005).

referenda on gambling. In *Watt v. Firestone*, a most esteemed panel of the First District summarily confirmed the authority of Florida counties to conduct referenda on gambling necessary to implement the local option set forth in a proposed constitutional amendment, stating at 491 So. 2d at 593 that:

> **We find this argument to be without merit. Charter counties have the authority to conduct such referenda under Article VIII, section 1(g) of the Florida Constitution and *non-charter counties have similar power under Article VIII, section 1(f) of the state constitution and section 125.01 of the Florida Statutes*.**

As stated above, the Legislature enacts laws with knowledge of existing law and ***the judicial decisions on the subject matter of the statute***. *Crescent Miami Center, LLC v. Florida Department of Revenue*, *supra*. Because the Third Clause directly implicates a county's authority to conduct a gambling referendum, it must be presumed that the Third Clause was enacted with the knowledge of the pre-existing statutory and constitutional authorization of non-chartered counties to conduct gambling referenda under Article VIII, §1(f) and §125.01 per *Watt v. Firestone*.

Indeed, it is apparent from the issuance of AGO 2012-01 that the Division and the AG were well aware of this authority. This knowledge is evidenced by AGO 2012-01 tacitly acknowledging (R: 20) that Florida counties have "existing statutory or constitutional authority" to conduct gambling referenda and the pre-referendum conduct of the Division seeking an opinion from the AG as to whether amended §551.102(4) requires new and/or additional referendum authority ***enacted***

after July 1, 2010.

The impact of *Watt v. Firestone* on this case cannot be overstated, particularly in light of the failure by the AG, the Division and either the New Majority or Concurring Opinions to address its precedential effect.[12] Indeed, the actions of the Division and the AG appear to be part of an orchestrated effort to avoid the precedential effect of *Watt v. Firestone* relative to the authority of a county to conduct a binding referendum by focusing upon the purported requirement for the enactment of some future and wholly redundant referenda authority.

This logic must ultimately fail, as it is wholly inconsistent with the aforementioned presumptions and canons that serve as *intrinsic* aids to statutory interpretation. Instead, adherence to the doctrine of *stare decisis* requires that the language enacted by the Legislature be interpreted to mean what it plainly says, be interpreted to achieve the specific purpose for which the 2009 amendment was enacted, i.e., expanding the definition of eligible facilities to include new facilities outside of Miami-Dade and Broward Counties per *Florida Gaming Centers* and be interpreted consistently with the holding in *Watt v. Firestone* and the home rule authority of counties to conduct binding referenda. Consequently, based upon the

[12] Curiously, there was no mention whatsoever of *Watt v. Firestone* in any of identified opinions, pleadings or orders. The omission of any argument contesting the precedential effect of *Watt v. Firestone* would generally entitle a court to assume that such argument has been "waived, abandoned, or deemed by appellate counsel to be unworthy." *Polyglycoat Corp. v. Hirsch Distributors, Inc.,* 442 So. 2d 958 (Fla. 4th DCA 1983).

plain meaning of the language of the Third Clause and the recognized home rule powers of counties, the certified question must be answered in the affirmative without the need to delve into matters *extrinsic* to the statute's text.

III. THE DIVISION'S INTERPRETATION REQUIRES AN IMPERMISSIBLE REDRAFTING OF THE THIRD CLAUSE RENDERING IT MEANINGLESS.

Inasmuch as ultimate issue here is whether the Gadsden Referendum was a qualifying referendum under the Third Clause, attention has been focused on the following statutory words:

> "referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county."

Contrary to grammatical construction advanced by Gretna above and adopted by in the Initial Opinion, the Division adopted the flawed construction contained within AGO 2012-01 that claims that the words "pursuant to a statutory or constitutional authorization after the effective date of this section" require that the "statutory or constitutional authorization" for any referendum under the Third Clause must be **enacted** "after the effective date of this section." Based on this construction, the Division claims the right to simply ignore the provisions of the Third Clause until the county receives a new/additional grant of authority—**enacted** after July 1, 2010—to conduct a qualifying referendum. The Division's position, therefore, requires that the Third Clause be read ***as if*** it had been written as follows:

> "referendum held pursuant to a statutory or constitutional authorization **enacted** after the effective date of this section in the respective county."

On this point, the AG, the Hearing Officer and the Division all found it necessary to insert the word **"enacted"** into their respective analysis of the Third Clause in order to support their desired construction.[13] The obvious rub with this construction is that the word **"enacted"** cannot be found anywhere within the Third Clause. Accordingly, in order for the Division's construction of the Third Clause to be upheld, this Court would be required to do what no court is authorized to do—to add to the Third Clause an additional word—**"enacted"**—notwithstanding that the Legislature's decision not to include it. As this Court stated in *Florida Municipal Power Agency*, 789 So. 2d at 324:

> Under the fundamental principles of separation of powers, courts cannot judicially ***alter*** the wording of a statute where the Legislature

[13]For example see: **(a)** the AG's summary of AGO 2012-01 provides that DBPR is not authorized to issue a slot machine license under the Third Clause "absent a statutory or constitutional provision **enacted** after July 1, 2010, authorizing such referendum." R: 17; **(b)** the Hearing Officer in Footnote 1 of the Recommended Order noted that "[t]here is no dispute that the January 31, 2012 referendum in Gadsden County was not held pursuant to a statute or constitutional provision **enacted** after §551.102(4) of the Florida Statutes became effective on July 31, 2010." R: 754; **(c)** the Denial Letter parrots the statement from AGO 2012-01 that the Referendum was ineffectual "absent a statutory or constitutional provision **enacted** after July 1, 2010, authorizing such referendum." R: 1; and **(d)** the Division, when clarifying of the Hearing Officer's statement found in Footnote 1, stated on page 3 of the Final Order that there is no dispute that the Referendum "was not held pursuant to a statute or constitutional provision … **enacted** after section 551.102(4) of the Florida Statutes became effective on July 1, 2010." R: 784.

> clearly has not done so. A court's function is ***to interpret statutes as they are written*** and to give effect to each word in the statute.[14]

Although AGO 2012-01, the Recommended Order and the Final Order all attempt to employ both *intrinsic* aids and *extrinsic* considerations to justify the Division's desired construction of the Third Clause, the conclusion is inescapable that the Division's construction makes no sense grammatically[15] without the of the word **"enacted"** between the words "authorization" and the "after." The grafting of the word **"enacted"** into the Third Clause obviously violates several of the *intrinsic* aids mentioned above. Further to that point, the grafting of the word **"enacted"** makes the Third Clause a legal nullity, merely words on a page waiting for a subsequent act of the Legislature to take effect. As stated, it is presumed that the Legislature, when materially amending a statute, intended some specific objective or alteration of the prior statute and further intended that the amendment achieve the purpose for which it was enacted; and it is ***never*** presumed that the Legislature intended the amendment to be a purposeless or useless enactment. *Mangold v. Rainforest Golf Sports Center*, 675 So. 2d 639, 642 (Fla. 1st DCA 1996); *supra; Van Pelt v. Hilliard, supra; Sharer, supra.*

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[14]Lest there be any doubt, the grafting of the word "**enacted**" into the Third Clause works a complete 180º reversal of the meaning of the Third Clause.

[15]An obvious grammatical problem with the Division's construction of the phrase "***pursuant to a statutory or constitutional authorization after the effective date of this section***" is that the phrase does not express a complete thought because it lacks a **verb**.

The First District determined in *Florida Gaming Centers* that the purpose behind the enactment of §19 of Chapter 2009-170 was to amend the definition of "eligible facility" to now include licensed pari-mutuel permitholders that were previously disqualified under pre-amendment §551.102(4). 71 So. 3d at 228. The Division's construction, however, completely negates any useful purpose of the Third Clause added via the 2009 amendment because all facilities that were disqualified from licensure under pre-amendment §551.102(4) remain disqualified under amended §551.102(4)—just ***as if*** the 2009 amendment to §551.102(4) was never enacted. The Division's construction practically results in an unnecessary precatory legislative preauthorization to itself to enact future legislation. As insightfully noted in the Initial Opinion at p. 16: "[t]here is no need or purpose in enacting a statutory provision to state the obvious."

On this point, this Court in *Sharer v. Hotel Corporation of America, supra,* stated at 144 So. 2d at 817:

> "It should never be presumed that the legislature intended to enact a purposeless and therefore useless legislation. Legislators are not children who build block playhouses for the purpose, and with the gleeful anticipation, of knocking them down. It would be the height of absurdity to assume that the legislature intentionally prescribed a formula which creates the need for the Special Disability Fund, and in the next breath deviously destroy its own handiwork—this making a mockery of the intended beneficent purpose of the Special Disability Fund."

The Division's construction of the Third Clause—which simply maintains the *status quo*—totally frustrates the purpose for which the First District in *Florida*

Gaming Centers found that §551.102(4) was amended—which is to allow additional facilities a pathway to slot machine eligibility. 71 So. 3d at 228. As in *Sharer,* the construction approved in the New Majority Opinion causes the 2009 amendment to mean absolutely nothing, to nullify it and to render it meaningless; and therefore this construction runs afoul of the *intrinsic* aid that provides that the Legislature is **never** presumed to have enacted purposeless, useless or meaningless legislation.[16]

Both the New Majority Opinion and the New Concurring Opinion attempts to defend the Division's engraftment of the word "***enacted***" into the Third Clause. Both of the new opinions point also to these words as determinative: "pursuant to a statutory or constitutional authorization after the effective date of this section." At pp. 35-36, the New Concurring Opinion provides this grammatical analysis:

> "Plainly, the "after the effective date of this section" language in section 551.102(4) modifies the immediately preceding "a statutory or constitutional" phrase, and not the more remote "referendum held" phrase."

The foregoing analysis violates one of grammar's most basic rules: ***an adverb cannot modify a noun***. *Warriner* at p. 423. The word "authorization," the last word in the prepositional phrase "pursuant to a statutory or constitutional authorization," is a noun. The word "after" is an adverb and the entire prepositional phrase "after the effective date of this section" functions as an adverb.

[16]See *Kasischke*, 991 So. 2d at 808, noting that the "subject" statutory phrase must modify "something." To paraphrase *Kasischke*, the Third Clause must mean **something**. However, under the Division's construction, it means **nothing**.

Consequently, the adverb, "after the effective date of this section," cannot modify the noun, "authorization." See *Wausau Insurance Co. v. Haynes*, 683 So. 2d 1123 fn. 2 (Fla. 4th DCA 1996) (an adverb, an adverbial phrase, or an adverbial clause may qualify several parts of speech, but a noun is not one of them). The majority's argument made at p. 22 violates the same rule based on a similarly flawed grammatical analysis.

At p. 20, the majority condemns Gretna's reading of the Third Clause because it allows the three key prepositional phrases, "pursuant to a statutory or constitutional authorization," "after the effective date of this section" and "in the respective county" to be separated and moved like "refrigerator magnets." The majority's first grammatical error is not recognizing that the three prepositional phrases are each separate grammatical elements, each separately functioning as an adverb by providing answers to typical adverbial questions: how, when and where. If the order of the three phrases is rearranged so instead of the phrases answering the questions how, when and where in that order, those questions are answered in any different order: when, where and how or where, how and when or where, when and how, the meaning of the entire participial phrase beginning with "held" remains exactly the same.

Additionally, at p. 26, the majority asserts that simply because no new gaming rights are created under the Division's construction of the 2009 amendment to §551.102(4) does not render the Third Clause meaningless. The New Majority

Opinion, however, is devoid of even one example in which the Legislature conditioned the effectiveness of any statute, much less a licensing statute, upon its own future action on the same subject. Lacking any support in the case law, the majority's "not all statutes are blossoms" analogy rings hollow absent the majority's ability to identify any licensing statute that supports the metaphor. Quite simply, the logic to support this construction is merely an effort to justify a policy objective of restricting gambling as opposed to giving effect to the words enacted by the Legislature—which, of course, is the executive branch's constitutional duty to do. *See* Article IV, §1(a): "The governor shall take care that the laws be faithfully executed."; and *Kirk v. Baker*, 224 So. 2d 311 (Fla., 1969) (noting that the Governor's performance of this constitutional duty is clearly essential to the orderly conduct of government and the execution of the laws of this State).

Because the construction set forth by AGO 2012-01, the Division, the Final Order and the New Majority Opinion renders the Third Clause a meaningless, dormant "seed," this Court must reject that construction as contrary to Florida law.

IV. THE MAJORITY'S CONSIDERATION OF THE LEGISLATIVE HISTORY OF THE THIRD CLAUSE WAS IMPROPER BUT NONETHELESS SUPPORTS GRETNA'S INTERPRETATION.

This Court has made it clear that when the text of the statute is clear and unambiguous, it is unnecessary and improper to consider a statute's legislative history. See *Knowles,* in which this Court stated at 898 So. 2d at 10 that because

"the language used by the legislature is unambiguous, it is not necessary to examine the legislative history." Similarly, in *Florida Municipal Power*, this Court held at 789 So. 2d at 324 that "legislative history cannot be used to change the plain and clear language of a statute."

Here, none of the words contained in the Third Clause are of doubtful meaning; neither of the parties nor the AG have asserted that the meaning of the Third Clause is anything but clear and unambiguous; and the neither the Recommended Order nor the Final Order nor the New Majority Opinion identify any specific ambiguity. Furthermore, Gretna's grammatical analysis set forth above demonstrates the Third Clause, exactly as written, is in complete accord with the rules of grammar, resulting in a clear and unambiguous meaning for the statutory term "eligible facility." Accordingly, consideration of and reliance upon the legislative history of Chapter 2009-170 is clearly improper.

Nevertheless, legislative history also favors Gretna's interpretation. Indeed, because no staff reports exist, the only indicia of legislative history appropriate for this Court's consideration is that section of the title to Chapter 2009-170 that corresponds to §19. This Court has previously stated that an enactment's title, having been placed at the beginning of the legislation by "the legislature itself," is "a direct statement by the legislature of its intent." *State v. Webb*, 398 So. 2d 820 (Fla. 1981). That part of the title that corresponds to §19 provides:

"amending s. 551.102, F.S.; redefining the terms 'eligible facility' and 'progressive system' to include licensed facilities in other jurisdictions;"

Webster's defines "redefine" to mean "to reformulate; to reexamine or reevaluate ***with a view to change***." The statutory term "include" is defined by Webster's to mean: "to contain between or within." Grammatically speaking, the words in the title, "*eligible facility and progressive system,*" form a restrictive appositive phrase that explains the plural noun *"terms."*[17] The infinitive phrase "*to include licensed facilities in other jurisdictions*" is used as an adjective to clarify *"terms"* further—leading to the conclusion that the Legislature intended to "*change*" the definition of *"eligible facility"* to thereafter include facilities located in county jurisdictions ***other than*** the two county jurisdictions mentioned in the pre-2009 amendment version of §551.102(4), Miami-Dade and Broward Counties. Hence, the title evidences a legislative intent to expand the facilities and communities eligible for slot machine gaming, consistent with the First District's determination on this point in *Florida Gaming Centers*, 71 So. 3d at 228.

Instead of addressing the title, the New Majority Opinion committed reversible error by relying on the *extra-record* statement of a legislator as evidence

[17]The statute analyzed in *Kasischke, supra*, also contained a restrictive appositive phrase that received a grammatical analysis at 991 So. 2d at 812 consistent with the analysis herein set forth.

of legislative intent.[18] In doing so, the New Majority Opinion ignored an unbroken line of Florida case law rejecting such statements as evidence of legislative intent. *Security Feed and Seed Co. v. Lee*, 138 Fla. 592, 189 So. 869 (1939); *McClelland v. State Farm Mutual Automobile Insurance Co.*, 366 So. 2d 811, 813 (Fla. 4th DCA 1979); and *State v. Patterson,* 694 So. 2d 55 fn. 3 (Fla. 5th DCA 1997).

The fact that the referenced statement was made at least one year after the Third Clause was enacted further compounds the majority's error—because, as noted by the DC Circuit in *Walsh v. Brady*, 927 F. 2d 1229 n. 2 (D.C. Cir. 1991), views of a legislator expressed *after* the legislation was enacted amount to "oxymoronic 'subsequent legislative history'" than can "add nothing" to an analysis of the legislation. Also see *American Constitutional Party v. Munro*, 650 F. 2d 184, 188 (9th Cir. 1981) (holding that statement of committee member made one year after the legislation's enactment "is entitled to no weight and cannot be relied on as indicative of legislative motivation or intent"); *Rogers v. Frito-Lay, Inc.*, 611 F. 2d 1074, 1080 (5th Cir. 1980) (stating that "the retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history); and *U.S. v. City of Miami, Fla*., 664 F. 2d 435, 437 n. 1 (5th Cir. 1981) (rejecting use of statements by

[18]Identical to the manner in which the New Majority Opinions refused to address the applicability of the decision in *Watt v. Firestone*, that opinion likewise refused to address the applicability of the title; and instead relies upon the inadmissible statement of a legislator ***that directly contradicts the title***.

member of Congress made retrospectively with regard to a statute enacted by an earlier Congress).

The New Majority Opinion also concludes that the tribal compact between the State of Florida and the Seminole Tribe provides some relevance in construing the Third Clause and justifying the denial of Gretna's license. Curiously, however, the Seminole Compact was never included in the record of the informal hearing. It goes without saying that if the Legislature had intended to condition "eligible facility" status upon a potential impact on tribal gaming, then the Legislature easily could have included that factor in the Third Clause as a condition of licensure as it has done in several other pari-mutuel statutes.[19] However, because it did not, the Division is not authorized to deny Gretna's application for that reason or any other reason not included within the text of the licensing statute as a reason for license denial. See *Gulfstream Park Racing Association, Inc. v. Division of Pari-Mutuel Wagering,* 407 So. 2d 263 (Fla. 3d DCA 1981) (holding that it is improper to deny a pari-mutuel permit application for a reason not apparent from the face of the permitting statute, citing as authority this Court's decisions in *Kinsella, supra*, and

[19] The Legislature has provided such conditions in connection with other authorizations under Chapter 550. See §550.01215(3) conditioning operating license amendments on the impact on operating permitholders located within 50 miles of the facility requesting the change in dates; and §550.0555 conditioning facility relocation on whether the relocation would cause a deterioration of the revenue-producing capability of any facility within 50 miles of the proposed new location.

Palm Beach Jockey Club, supra). Furthermore, a reviewing court is not authorized to look outside the record to justify its affirmance of a lower tribunal's order. *Atlas Land Corp. v. Norman*, 156 So. 885 (Fla. 1934).

The Seminole Compact and the various circumstances surrounding its negotiation and ratification are not relevant to an interpretation of the Third Clause, but nonetheless support Gretna's interpretation of the Third Clause. This is so because both the compact implementing legislation enacted in June, 2009 and the Compact itself, negotiated, signed by the Governor and ratified by the Legislature many months later, specifically provides for the anticipated contingency of slot machine expansion beyond Miami-Dade and Broward Counties.[20]

V. THE DIVISION'S CONSTRUCTION OF §551.102(4) IS NOT ENTITLED TO DEFERENCE.

The New Majority Opinion held that deference must be accorded the Division's construction of the Third Clause. Gretna is cognizant that courts accord deference to an agency's interpretation of a statute when the interpretation relies upon "special agency expertise." *State, Dep't of Ins. v. Ins. Servs. Office,* 434 So. 2d 908 n. 6 (Fla. 1st DCA 1983). Here, the Division explicitly relies, not on any asserted agency expertise, but on AGO 2012-01. Neither the Division nor the New Majority Opinion cite to any decision requiring the courts to give deference to an

[20]See Part XII of §2 of Chapter 2009-170 which provides in paragraph H: "Nothing in this Compact is intended to affect the ability of the State Legislature to enact laws either further restricting or expanding gambling on non-tribal lands."

opinion of the AG. Furthermore, the case law identifies many circumstances relevant to this appeal in which deference is not accorded:

> 1. No deference is accorded when an agency's interpretation conflicts with the plain and ordinary meaning of the statute, conflicts with the legislative intent of the statute or is otherwise unauthorized or clearly erroneous. *Summer Jai Alai Partners v. DBPR*, 125 So. 3d 304, 307 (Fla. 3d DCA 2013).
>
> 2. No deference is accorded to an agency's construction of a statute based upon traditional methods of statutory analysis inasmuch as statutory construction is not a function within an agency's demonstrated area of expertise. *Schoettle v. State, Department of Administration*, 513 So. 2d 1299 (Fla. 1st DCA 1987).
>
> 3. No deference is accorded to an agency's interpretation unrelated to the functions of the agency as the agency is in no better position than the court to interpret such a statute. *Chiles v. Department of State,* 711 So. 2d 151 (Fla. 1st DCA 1998).
>
> 4. No deference is accorded when the agency has suddenly changed its interpretation of a statute with little or no explanation. *Communication Workers of Am., AFL-CIO v. City of Gainesville,* 65 So. 3d 1070, 1076 (Fla. 1st DCA 2011).

The presence of any one of the foregoing circumstances precludes according deference to an agency's construction. The Division's demonstrated area of expertise is in the field of gambling regulation, not in the fields of statutory construction or grammatical analysis. Furthermore, as the decision in *PPI, Inc. v. DBPR,* 698 So. 2d 306 (Fla. 3d DCA 1997), makes clear, the Division has no function or authority whatsoever over how a county government conducts its business.

At best, the construction based upon AGO 2012-01 may be deemed persuasive under the case law, but certainly not deferential. *State v. Family Bank of Hallandale,* 623 So. 2d 474 (Fla. 1993). However, in instances like here in which the Attorney General has ignored the plain language of the statute, even the "persuasiveness" given the opinion is removed. *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005).

VI. THE MAJORITY'S STRICT CONSTRUCTION ANALYSIS IS CLEARLY ERRONEOUS.

The New Majority Opinion also held that the construction placed on the Third Clause by the Division and AGO 2012-01 is supported by the notion that all statutes involving gambling licensure must be "strictly construed." Strict construction is certainly different than restrictive construction. The following excerpt from 82 C.J.S. Statutes §311 (without citations) explains the difference:

> "*Strict or liberal construction.* A 'strict construction' of a statute is a close adherence to the literal or textual interpretation thereof, and requires that a case be excluded from the operation unless its language includes it. ***A strict construction does not require that the words of a statute be so restricted as not to have their full meaning; and does not require that a statute should be stintingly or even narrowly construed***.
>
> * * *
>
> A statute will not be strictly construed where to do so will result in emasculation or deletion of a provision which a less literal reading would preserve."

Furthermore, the cases regarding the ***strict regulation*** of pari-mutuel wagering all hold that it is the ***Legislature***—and not the Division or the courts—that has been granted broad discretion to regulate and control pari-mutuel wagering. See *Schultz v. State*, 361 So. 2d 416, 418 (Fla. 1978) (within police power of State ***to enact legislation*** to supress gambling) and *Division of Pari-Mutuel Wagering, Dep't of Bus. Regulation v. Florida Horse Council, Inc.*, 464 So. 2d 128 (Fla. 1985) (***Legislature*** has broad discretion in regulating pari-mutuel industry). The New Majority Opinion fails to cite to any case that holds that pari-mutuel permitting or licensing statutes are to be strictly construed. Conversely, this Court in *Kinsella* held that the agency was under a mandatory duty to issue a permit when the application is in "substantial" compliance with the permitting statute. 20 So. 2d at 260.

Further, the New Majority Opinion's reliance on slot machines being an exception to the general prohibition against gambling does not support strict construction. The Third Clause serves to identify the parameters that must be satisfied for a licensed pari-mutuel facility like Gretna to become an "eligible facility" for slot machine licensure. In this way, the Third Clause is no different than the pari-mutuel permitting statutes at issue in *Palm Beach Jockey Club*, *Kinsella* and *Gulfstream* inasmuch as pari-mutuel wagering, like slot machines, is also an exception to the same general prohibition. Yet, the cited decisions all indicate that upon substantial compliance with the statutory requirements for licensure, the agency's duty to issue the requested license becomes mandatory.

More fundamentally, even if the Third Clause is strictly construed, the plain meaning of the Third Clause does not change. Reading the Third Clause as narrowly as reasonably practicable is different than: (a) adding a word to the text of the Third Clause to change its meaning; (b) denying a license for a reason not apparent from the text of the Third Clause (i.e., because of a possible impact on tribal gaming); or (c) arbitrarily applying the 2009 amendment to §551.102(4) differently to similarly situated applicants (i.e., SFRA/Hialeah Park and Gretna). The Third Clause can only mean what it clearly and plainly says. Strict construction is not a substitute for legislative reform. *Holly v. Auld,* 450 So. 2d 217 (Fla. 1984).

VII. THE DIVISION'S INCONSISTENT AGENCY ACTION WARRANTS REVERSAL.

The Division's alternative reason for application denial—that the Division may not issue slot machine gaming licenses to facilities located outside of Miami-Dade and Broward Counties (hereinafter the "Alternate Reason")—is both clearly erroneous and irreconcilable with the Division's prior agency action in granting the same type of license to SFRA for Hialeah Park.[21]

The record establishes that on December 21, 2010, the Division issued a slot machine license for Hialeah Park under the Second Clause of amended §551.102(4). R: 520. The parties stipulated that Hialeah Park, despite its location in Miami-Dade

[21]The New Majority Opinion does not address this Alternative Reason for denial. However, inasmuch as this entire case is now before this Court, Gretna will briefly address why the Division committed reversible error when denying Gretna's application on account of the Alternative Reason.

County, was not among the seven facilities that qualified for slot machine licensure under pre-amendment §551.102(4). (R: 686-691). Despite this agreement, the Division contends that SFRA qualified for licensure because its facility is located in Miami-Dade County while Gretna did not qualify because its facility is not located in either Miami-Dade or Broward Counties. R: 762.

When amending §551.102(4) in 2009, the Legislature left in place several pro- visions of the pre-existing Chapter 551 that are unquestionably inconsistent with the 2009 amendments to §551.102(4), including:

> 1. **Section 551.101 Slot machine gaming authorized.**—***Any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 may possess slot machines*** and conduct slot machine gaming at the location where the pari-mutuel permitholder is authorized to conduct pari-mutuel wagering activities pursuant to such permitholder's valid pari-mutuel permit provided that a majority of voters in a countywide referendum have approved slot machines at such facility in the respective county.
>
> 2. Section 551.102(10*): "Slot machine license" means a license issued by the division authorizing a pari-mutuel permitholder to place and operate slot machines* ***as provided by s. 23, Art. X of the State Constitution****, the provisions of this chapter, and division rules.*
>
> 3. Section 551.102(11*): "Slot machine licensee" means a pari-mutuel permitholder who holds a license issued by the division pursuant to this chapter that authorizes such person* ***to possess a slot machine within facilities specified in s. 23, Art. X of the State Constitution*** *and allows slot machine gaming.*

Hialeah Park did not qualify as an "eligible facility" for slot machine licensure ***until after*** the 2009 amendment to §551.102(4) ***because no live racing***

occurred at Hialeah Park during 2002 and 2003, a requirement under Article X, §23 and pre-amendment §551.102(4). R: 689. Because the Legislature failed to conform existing §§551.101 and 551.102(10) and (11) to the "redefined" term "eligible facility" contained in amended §551.102(4), Hialeah Park was faced with the same "ineligibility" as Gretna irrespective of the county in which Hialeah Park is located. Indeed, in order for the Division to have licensed Hialeah Park, the Division had to do with respect to that application precisely that which it refused to do with respect to Gretna's—which is to recognize that the 2009 amendment to §551.102(4), as the latest expression of the legislature, prevails over all of the inconsistent pre-existing provisions of Chapter 551. *Sharer v. Hotel Corp. of America*, *supra*; *State v. Parsons*, *supra*; and *Miami Beach Jockey Club, Inc. v. State ex rel. Wells*, 227 So. 2d 96 (Fla. 1st DCA 1969) (identical fact pattern to case at bar). Issuing inconsistent agency orders based upon similar facts violates §120.68(7)(e)3 as well as the equal protection clauses of the Federal and Florida constitutions. *Amos v. HRS,* 444 So. 2d 43, 47 (Fla. 1st DCA 1983). Also see *Gessler v. DBPR*, 627 So. 2d 501, 504 (Fla. 4th DCA 1993) (requiring application of the doctrine of administrative *stare decisis*).

Furthermore, the Division's interpretation again renders the 2009 amendment a complete nullity. *Sharer*, *supra; Miami Beach Jockey Club, supra*. As such, this Court must reject such an interpretation and reverse the flawed Final Order.[22]

VIII. THE MAJORITY COMMITTED REVERSIBLE ERROR WHEN IT CONSIDERED AN ISSUE RAISED FOR THE FIRST TIME ON APPEAL.

The New Majority Opinion also committed reversible error when, under the guise of the "tipsy coachman" doctrine, it considered and adopted the argument, ***raised for the first time on appeal***, that the Gadsden Referendum was a non-binding straw poll. Gretna contests the Division's authority to raise this issue for the first time on appeal for several reasons.

First, as a matter of law, the Division may not collaterally attack the validity or the accuracy of the ballot after the vote has occurred. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000). The content of AGO 2012-01 and the timing of its issuance immediately before the scheduled Gadsden County referendum make it apparent

[22]The Division's Alternative Reason also violates several other canons of statutory interpretation. First, the related sections, §551.101, amended §551.102(4), §§551.102(10) and (11) and §§551.104(2) and (3), must all be read *in pari materia* so that their provisions may be harmonized. *State Racing Commission v. McLaughlin*, *supra.* Reading the statutes together makes it clear that slot gaming is authorized at any "eligible facility." However, if the foregoing sections of Chapter 551 cannot be harmonized, then the provision of amended §551.102(4) must control over any contrary provisions of §551.104(2) because amended §551.102(4) is the Legislature's most recent expression on the topic of which pari-mutuel facilities are "eligible facilities" for the conduct of slot machine gaming. *Sharer, supra; State v. Parsons, supra.*

that both the Division and the Attorney General (the "AG") had knowledge that the Gadsden Commission had scheduled a §551.102(4) referendum for January 31, 2012. Yet, neither the Division nor the AG filed suit to challenge Gadsden County's authority to conduct a gambling referendum or to otherwise challenge the form, accuracy or clarity of the title or ballot summary or the binding nature of the vote. The general rule discussed in *Armstrong* indicates that the type of objection first raised in the Division's answer brief must be challenged before the vote occurs or else is cleansed by the vote.

Additionally, the "tipsy coachman" doctrine has no applicability here. As acknowledged by this Court in *Robertson v. State,* 829 So. 2d 901 (Fla. 2002), the "**foundation** principle of appellate review" is that if a claim, issue or argument is not raised in the trial court, it will not be considered on appeal. And while Gretna's acknowledges that this doctrine is one of the extremely limited exceptions to this "foundation principle," its applicability nonetheless ***mandates*** that the proponent show an "***evidentiary basis***" for the alternative theory or principle of law ***in the record*** before the trial court. *Id.* at 906-7.

Of the decisions addressing the tipsy coachman doctrine, the most *factually* similar is the First District's decision in *Powell v. State*, 120 So. 3d 577 (Fla. 1st DCA 2013), ironically authored by Judge Makar. In *Powell*, the state attorney asserted in a motion for rehearing that the First District was ***required*** under the tipsy coachman doctrine to consider an issue raised for the first time at oral argument.

Citing to this Court's decision in *Robertson* and to the "**bedrock** principle" that a claim not raised in the trial court will not be considered on appeal, the First District rejected the state attorneys' argument, stating at 120 So. 3d at 591:

> Here, **not only was the [new] argument not made or developed below, nothing in the record supports it**: ***no testimony*** **on the topic was offered**, no photos … were entered in evidence, ***no documents*** **were presented that addressed the matter, and** ***the trial court made no factual findings on the issue***. Indeed, the State points us to no case that has ever addressed such an issue. As such, this case is a poor vehicle for the State's argument that the tipsy coachman doctrine should apply to the new issue it raised at oral argument.
>
> * * *
>
> The tipsy coachman doctrine allows appellate courts to consider grounds for affirmance ***if the record supports doing so***; it does not compel them ***to overlook deficient records and blaze new trails*** that even the tipsiest of coachmen could not have traversed.

Although Gretna and the *amicus* both cited to *Powell* in opposition to the Division's tipsy coachman argument, the decision in *Powell* was dealt with in the New Majority Opinion just like the decision in *Watt v. Firestone* and the provisions of the title were—it was ignored as if it had never been decided. Nonetheless, a far more disturbing aspect of the majority's treatment of the Division's non-binding referendum argument is that there is no mention anywhere, except in Judge Benton's dissent, that this argument was raised by the Division ***for the first time on appeal***—a fact that was rather obvious to all considering the partially granted motion to strike the Division's answer brief, the appearance of Gadsden County as an *amicus* for the sole purpose of challenging the Division's untimely and

unwarranted collateral attack on its binding referendum and the citations in both the reply brief and the amicus brief to the decisions in *Robertson* and ***Powell***.

Indeed, even a cursory review of the record reveals that **not** only did the Division **not** raise the non-binding referendum issue at the informal hearing, but instead, until the time that the AG filed the Division's answer brief, the Division was in complete agreement with Gretna that Gadsden Referendum was indeed a binding referendum. The Division's agreement with Gretna is evidenced by the following actions irreconcilable with the AG's **new** theory of the case:

> (a) the Division's failure to issue to Gretna a §120.60(1) deficiency letter identifying any error in Gretna's application that, if not corrected, would result in the denial of the application;[23]
>
> (b) the Division's failure to identify in its Denial Letter (R: 1) that the application was denied because the Referendum was a non-binding straw poll ;[24]
>
> (c) the Division's failure to identify in the pre-hearing stipulation (R: 648) the issue of the non-binding nature of the Referendum as an issue for consideration by the Hearing Officer and its failure to present evidence on that issue at the hearing;

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[23] See the testimony of the Division's licensing coordinator at R: 714-715. Also, §120.60(1) provides that "an agency may not deny a license for failure to correct an error or omission … unless the agency timely notified the applicant within this 30-day period." See *Doheny v. Grove Isle, Ltd.*, 442 So. 2d 966 (Fla. 1st DCA 1983).

[24] See *McCarthy v. Department of Insurance and Treasurer*, 479 So. 2d 135 (Fla. 2d DCA 1985) (error to affirm the denial of a license application for a reason not identified in the denial letter).

(d) the Hearing Officer's failure to make any findings regarding the non-binding nature of the Referendum or to otherwise mention this issue in the Recommended Final Order (R: 751);[25] and

(e) the Division's continual reference to the vote of the electorate of Gadsden County as "a referendum" or as "its referendum," including the reference in the Stipulation at R: 648 and Appendix 4 that the Division denied the application "*despite Gadsden County's post-July 2010 passage of* ***a referendum*** *authorizing slot machine gaming at the Gretna facility*."[26]

Decisions in appeals following administrative hearings provide further support for Gretna's argument that the Division's failure to raise the issue of the non-binding nature of the Gadsden Referendum during the informal hearing precludes consideration of that issue on appeal. See *DBPR v. Harden*, 10 So. 3d 647, 649 (Fla. 1st DCA 2009) (holding that it is well-established that for an issue to be preserved for appeal it must be raised during the administrative hearing) and *Palm Construction Co. of West Florida v. Department of Financial Services*, 153

[25]The ***failure*** of lower tribunal to make findings of fact on the issue raised for the first time on appeal has been uniformly held to ***preclude*** consideration of the new issue under the "tipsy coachman" doctrine. See *Robertson*; *Powell*; *State, Department of Revenue v. Morris*, 736 So. 2d 41 (Fla. 1st DCA 1999); *Bryant v. Florida Parole Commission*, 965 So. 2d 825 (Fla. 1st DCA 2007); and *Bueno v. Workman*, 20 So. 3d 993 (Fla. 4th DCA 2009).

[26]In Webster's online dictionary, "referendum" is defined as "a general vote by the electorate on a single political question that has been referred to them for a direct decision." In Black's Law Dictionary, online edition, "referendum" is defined as "a method of submitting an important legislative measure to a direct vote of the people." If the Division actually considered the vote to be something other than a "referendum," then certainly it would not have continually referred to the vote as "a referendum" or as "its referendum" as "referendum" has a definite meaning that does not include any notion of the vote of the electorate being "non-binding."

So. 3d 948 (Fla. 1st DCA 2014) (holding that issues raised for the first time on appeal are not properly preserved for appellate review).

Based upon the record, it is uncontroverted that on January 31, 2012, Gadsden County possessed home rule authority to call and to conduct a binding gambling referendum under Article VIII, §1(f), §125.01, *Speer* and *Watt v. Firestone*. The majority of the electorate voted YES. The vote of the people must be recognized. The Division is wholly without authority to control the manner in which Gadsden County conducts its county business. See *PPI, Inc. v. DBPR,* 698 So. 2d at 308. Arguments to the contrary under the tipsy coachman doctrine are not appropriate and must be rejected.

IX. THE EXCLUSION OF GRETNA'S EXPERT TESTIMONY WAS AN ABUSE OF DISCRETION.

Sentence diagramming has long been used to allow the grammatical function of the words and word groups in a sentence to be more easily seen. *Warriner* at page 436. Gretna offered into evidence a sentence diagram prepared by Cynthia Massie, an expert with over 30 years' experience teaching grammar and advanced sentence structure,[27] which diagram was verified by the sentence diagramming software made available by the University of Central Florida. R: 633-642; Appendix 5. The diagram was submitted to the Division a week prior to the informal hearing

[27]Ms. Massie's biography clearly indicates that she possesses the knowledge, skill, experience, training and education to qualify as an expert in the disciplines of grammatical analysis and sentence structure under the standards set out in §90.702.

for review and verification. R: 699. Inasmuch as proper application of the rules of grammar can only result in one correct interpretation of a sentence's grammatical structure (R: 634), the Division was unable to submit a "counter-diagram."

Contrary to the arguments asserted in the Division's motion to strike (R: 643) and to the Hearing Officer's conclusion that led to the erroneous decision to grant the motion (R: 700), the expert's affidavit does not opine on the ultimate issue in the case and does not instruct the Hearing Officer how to decide the case. Instead, the affidavit testimony was limited to an analysis, under the rules of grammar, as to which word in the Third Clause the statutory phrase "after the effective date of this section" modifies.

Here, because of the limited nature of Ms. Massie's expert testimony, her testimony was certainly admissible under the rationale set forth in the decision in *City of Jacksonville v. Cook*, 765 So. 2d 289 (Fla. 1st DCA 2000), *quashed on other grounds*, 823 So. 2d 86 (Fla. 2002) (expert testimony is permissible if it does not outright instruct the trier of fact how to decide the case). Accordingly, the Hearing Officer's refusal to admit the affidavit was an abuse of discretion.

CONCLUSION

Because all Florida counties possess home rule authority to conduct gambling referenda, which authority is not in any way limited or restricted by the provisions of the Third Clause, the certified question must be answered in the affirmative.

It is without question, contrary evidence or adverse legal precedent that the Gadsden Referendum:

(a) was held pursuant to both a constitutional authorization (Article VIII, §1(f)) and a statutory authorization (§125.01);

(b) was held after July 1, 2010;

(c) was held in Gadsden County; and

(d) was passed overwhelmingly.

As such, the Gadsden Referendum was a qualifying referendum, thereby requiring that the Division issue to Gretna a license to conduct slot machine gaming.

Respectfully submitted this 21st day of December, 2015.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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