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IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC15-1929
(Lower Tribunal Nos. 1D14-3484 and 2013050343)

GRETNA RACING, LLC, Petitioner

vs.

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

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

GADSDEN COUNTY'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER GRETNA RACING, LLC

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STATEMENT OF IDENTITY AND INTEREST

Gadsden County is a political subdivision of the State of Florida that conducts its county business under a non-charter form of county government pursuant to Article VIII, § 1(f) of the Florida Constitution and section 125.01, Florida Statutes.[1]

On November 1, 2011, Gadsden County, acting by and through its duly authorized Board of County Commissioners (the "Commission"), adopted a resolution that authorized the conduct of a binding countywide referendum on the question: Shall slot machines be approved for use at the pari-mutuel horse track in Gretna? (the "Referendum"). (R. 30). On January 31, 2012, the electorate of Gadsden County approved the Referendum by a vote of 6,053 to 3,563. (R. 31-32).

The majority opinion on rehearing in the First District Court of Appeal (the "Majority Opinion") adopted the argument asserted by the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division") in its answer brief for the first time on appeal, and found that the Referendum was ineffectual to approve slot machines in Gadsden County because Gadsden County

[1] Unless otherwise indicated, reference to the Florida Constitution shall be to the constitution adopted in 1968, as amended, and reference to the Florida Statutes shall be to the 2010 official version published by the Statutory Revision Commission. Reference to the record on appeal shall be: "(R. [page number])."

was without constitutional or statutory authority to conduct a binding gambling referendum and because the Referendum was a non-binding straw vote or expression of voter sentiment.

The Majority Opinion on these points is contrary to established Florida law. *Watt v. Firestone,* 491 So. 2d 592, 593 (Fla. 1st DCA 1986) (finding that non-charter counties have the power to authorize the conduct of gambling referenda under Article VIII, section 1(f) of the Florida Constitution and § 125.01, Florida Statutes); *See also Speer v. Olson*, 367 So. 2d 207, 211 (Fla. 1979). The abrogation of Gadsden County's right to authorize the conduct of a binding gambling referendum substantially restricts its historically expansive home rule authority under Article VIII, § 1(f), § 125.01, *Speer*, and *Watt*; and effectively vacates the Commission's action in authorizing the Referendum and renders the vote of the electorate meaningless without due process of law.

Gadsden County has a substantial interest in participating in this action to preserve its home rule authority to call and conduct a binding gambling referendum and to defend the validity and binding nature of the Referendum against the Division's collateral attack asserted for the first time on appeal in an action in which the County is not a party.

SUMMARY OF ARGUMENT

On November 1, 2011, the Commission adopted a resolution that authorized the conduct of the Referendum (R. 30); and on January 31, 2012, the electorate approved the Referendum. (R. 31-32). The Referendum was authorized and approved pursuant to Gadsden County's constitutional and statutory home rule authority. No statutory or constitutional enactment subsequent to the amendment to § 551.102(4) was necessary to authorize Gadsden County to conduct and approve the Referendum in order to qualify as an eligible facility under § 551.102(4). An interpretation of § 551.102(4) which requires enactment of statutory or constitutional authorization after the effective date of the statute is contrary to Gadsden County's broad home rule authority.

The Referendum was a valid and binding referendum conducted and approved under Gadsden County's broad home rule authority and was not a straw poll or expression of voter sentiment. Furthermore, because no action was initiated challenging any aspect of the Referendum before the vote occurred, as a matter of law, the Referendum's validity is not subject to a collateral attack asserted for the first time on appeal.

ARGUMENT

Effective July 1, 2010, the legislature amended § 551.102(4); and through that amendment, the legislature expanded the pari-mutuel facilities eligible for slot machines to include facilities in addition to the seven (7) eligible facilities

designated in the 2004 constitutional amendment that authorized slot machines in Miami-Dade and Broward Counties, Article X, § 23. *Fla. Gaming Ctrs., Inc. v. Fla. Dep't of Bus. & Prof'l Regulation*, 71 So. 3d 226 (Fla. 1st DCA 2011). After the decision in *Fla. Gaming*, the Commission, at its regular November 1, 2011 meeting, considered whether to schedule a countywide slot machine referendum under the Third Clause of amended § 551.102(4) (the "Third Clause").

After hearing public comments regarding the pros and cons of slot machine gaming in Gadsden County, the Commission made the legislative policy decision to allow the electorate to decide the question under the local option provision of the Third Clause. Included in the Record (R. 30) is a certificate of the Gadsden County Clerk, certifying the Commission's unanimous approval on November 1, 2011 of the placement of the Referendum on the January 31, 2012 ballot. The ballot title (in 15 words or less per §101.161(1)) was: **"Countywide Referendum for Approval of Slot Machines at the Gretna Horsetrack Facility"** (R. 31). The Referendum summary (in 75 words or less per §101.161(1)) as stated in the ballot was: **"Shall slot machines be approved for use at the pari-mutuel horsetrack facility in Gretna, FL?"** *Id.* Below the ballot summary is a box for a yes vote signifying approval and a box for a no vote signifying rejection. *Id.* While the ballot makes repeated use of the words "approved" and "approval," the ballot

contains no words remotely similar to the words: “straw vote,” straw poll,” “non-binding election,” or “expression of voter sentiment.” *Id.*

Neither the Division nor the Attorney General nor anyone else initiated a circuit court action seeking to enjoin the Referendum or otherwise asserting any procedural or substantive irregularity with the Referendum before the vote occurred. The Gadsden County electorate approved the Referendum. (R. 32).

In the letter denying the Petitioner’s application (R. 1) (the “Denial Letter”), the Division ruled that the Referendum was not a qualifying referendum under amended § 551.102(4) because the Referendum was not held pursuant to a constitutional or statutory authorization ***enacted*** *after July 1, 2010.*[2] Gadsden County’s review of the record (including the informal hearing transcript at R. 654)

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[2] Also see the Pre-Hearing Stipulation of the parties at R. 648 when the Division, consistent with the Denial Letter, stated its legal position with regard to the efficacy of the Referendum as follows:

> On July 1, 2010, the Legislature expanded § 551.102(4)’s definition of a slot machine “Eligible facility.” However that expanded definition, at least without any subsequent post-July 2010 “statutory or constitutional authorization” authorizing local county referenda for slot machine gaming outside Miami-Dade or Broward Counties, only qualified Miami-Dade and Broward County non-slot machine eligible facilities that were previously ineligible for licensure to obtain slot machine gaming licenses. In light of the fact that there has been no post-July 2010 “statutory or constitutional authorization” authorizing local slot machine gaming referenda outside Miami-Dade and Broward Counties, Gretna which is located in Gadsden County, Florida, is ineligible to obtain a slot machine gaming license ***despite Gadsden County’s post-July 2010 passage of a referend[um] authorizing slot machine gaming at the Gretna facility.”***

indicates that the Division did not present any evidence or make any argument during the informal hearing that Gadsden County lacked home rule authority to call and conduct a binding gambling referendum or that the Referendum was intended by the Commission to be a non-binding straw poll or expression of voter sentiment. Instead, consistent with the Pre-hearing Stipulation (R. 648), the focus of the Division's legal argument about the Referendum was that it was not a qualifying referendum under the Third Clause because it was not held pursuant to statutory or constitutional authorization ***enacted*** *after July 1, 2010.*

The Division did not assert that Gadsden County lacks the authority to conduct a gambling referendum and that the Referendum was intended to be a non-binding straw poll or expression of sentiment until it filed its answer brief in the First District Court of Appeal. Gadsden County is filing this brief in support of the Petitioner in order to: (a) vindicate Gadsden County's constitutional and statutory home rule authority to conduct a binding gambling referendum; and (b) defend the validity and binding nature of the Referendum against the Division's untimely and impermissible collateral attack.

I. Home Rule Authority

Under Article VIII, § 1(f) of the Florida Constitution and § 125.01, Florida Statutes, Gadsden County possesses fundamental constitutional and statutory home rule authority. The expansive scope of this home rule authority was first

recognized by this Court in the seminal case of *Speer v. Olson*, 367 So. 2d 207 (Fla. 1979), wherein this Court found that counties have the same plenary authority within their jurisdictions as the Florida Legislature possesses, except when that authority has been preempted.[3] The First DCA has recognized this broad authority in finding that the county commission in a non-charter county has "full legislative autonomy" within its area of legislative competence. *Jones v. Chiles,* 654 So. 2d 1281, 1283 (Fla. 1st DCA 1995). Furthermore, this Court has recently found that when deciding if the legislature intended to preclude a local elected governing body from exercising its home rule power, "it generally serves no useful public policy to prohibit local government from deciding local issues." *Sarasota Alliance for Fair Elections, Inc. v. Browning,* 28 So. 3d 880, 887 (Fla. 2010).

Here, there is no question that the Commission, as the governing body of Gadsden County, possesses the home rule authority to call and to conduct a binding gambling referendum. This conclusion is evident from *Speer* and numerous decisions considering the authority of non-charter counties to carry on county government generally (*see, e.g., Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96 (Fla. 1st DCA 1994) and *Jones v. Chiles, supra*) and also specifically

[3] Preemption is not an issue here because the Third Clause *affirmatively informs local government to act in this area. Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1019 (Fla. 2d DCA 2005).

with regard to the authority to conduct a gambling referendum (*Watt*, 491 So. 2d 592).

In *Santa Rosa County*, the First DCA, quoting from this Court's decision in *Speer*, said:

> The first sentence of Section 125.01(1), Florida Statutes, (1975), ***grants to the governing body of a county the full power to carry on county government.*** Unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, ***has full authority to act through the exercise of home rule power***.

The Court in *Santa Rosa County* went on to state:

> Thus, the specific powers enumerated under section 125.01 are not all-inclusive, and a non-charter county's authority comprises that which is reasonably implied or incidental to carrying out its enumerated powers. The only limitation on a county's implied power to act occurs if there is a general or special law clearly inconsistent with the powers delegated.[4]

Santa Rosa County, 635 So. 2d at 99.

In *Watt,* the First DCA answered the specific question of whether non-charter counties like Gadsden County have home rule authority to conduct a gambling referendum when it ruled that non-charter counties have two independent sources for such authority:

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[4] As previously stated, preemption is not an issue here. *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019.

> **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*.**

Watt, 491 So. 2d at 593.

Hence, under *Watt*, there is no question that the Commission possesses constitutional and statutory authority to authorize the conduct of a binding gambling referendum. The lack of any attempt by the Division or the Majority Opinion to distinguish this case from *Watt* can only lead to the conclusion that *Watt* is controlling precedent.

Furthermore, the procedure established by the legislature in the Third Clause of amended § 551.102(4) is consistent with the purpose of the constitutional grant of home rule powers to local government: to allow local issues to be decided locally. Under the Third Clause, two levels of local approval are required—one from the county commission when exercising its legislative discretion to call and conduct a slot machine referendum and one from the electorate at the polls. The Commission followed the local option procedure the legislature set forth in the Third Clause, and the Gadsden County electorate decided by a significant majority to allow slot machine gaming to occur at a designated pari-mutuel facility in Gadsden County. Neither the Division nor the Majority Opinion have established a legitimate public purpose served by denying to both the elected governing body

and the electorate of Gadsden County the right to decide this local issue locally. *See Sarasota Alliance for Fair Elections, Inc.,* 28 So. 3d at 887.

II. Binding Nature of the Referendum

The Majority Opinion also concludes that because § 125.01(1)(y) does not authorize the conduct of binding referenda, the Referendum merely amounted to a straw poll or expression of voter sentiment. The Majority Opinion on this point is fundamentally flawed for multiple reasons.

First and foremost, as a constitutional county government, the efficacy of Gadsden County's legislative acts cannot be determined by the characterization or mischaracterization of such acts by third parties. Whether or not the parties in this action properly or improperly agreed on the specific source of Gadsden County's home rule authority does not change the undisputable legal fact that Gadsden County has home rule authority to call and to conduct a binding gambling referendum under Article VIII, § 1(f), § 125.01, *Speer*, and *Watt*. This undisputable legal fact remains undisputable irrespective of the agreement (or disagreement) of the parties that the authority specifically arises under Article VIII, § 1(f), under the first sentence of § 125.01, under § 125.01(1)(y), or under some other constitutional or statutory provision. Furthermore, the Division does not have the authority to control the manner in which Gadsden County conducts its county business. *PPI, Inc. v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering*, 698 So. 2d 306, 308 (Fla. 3d DCA 1997). Accordingly, there

exists no authority to deny the Petitioner's application because of confusion over the precise source of Gadsden County's otherwise acknowledged home rule authority to call and to conduct a binding gambling referendum.

In addition, the record confirms that the Division and the Petitioner were in complete agreement that Gadsden County possessed pre-existing authority to call and conduct a binding gambling referendum until the Division's answer brief was filed in the First DCA. The Division agreed with the Petitioner that a source of that authority was § 125.01(1)(y). The Division's collateral attack[5] on the validity of the Referendum in this action is both untimely and impermissible. *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 Referendum suggest that both the Division and the Attorney General were aware that the Commission had scheduled a § 551.102(4) referendum for January 31, 2012. Yet, neither the Division nor the Attorney General elected to file a circuit court action to challenge the Commission's authority to call and conduct a gambling referendum or to otherwise challenge the

[5] Black's Law Dictionary defines "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective." *Black's Law Dictionary* 278 (8th ed. 2004). The same definition applies to indirect attacks on the validity of official governmental actions. *See Goldtrap v. Bryan*, 77 So. 2d 446 (Fla. 1954).

form, regularity or accuracy of the title, the ballot summary, the ballot text, or the binding nature of the vote. Instead, the Division launched its attack: (a) well over two years after the Referendum was conducted and approved by the voters; (b) in the First District Court of Appeal and not in circuit court; and (c) in a proceeding in which the constitutional county government that authorized and conducted the Referendum was not a party.

In *Armstrong*, this Court recognized the general rule that a vote of approval by the electorate cures irregularities in the form of the ballot that could have been raised before the election but were not. 773 So. 2d at 18-19. Under the general rule discussed in *Armstrong,* the type of objection raised in the Division's answer brief must be raised in circuit court before the vote occurs or it is deemed cleansed by the vote. The rule is consistent with the straw ballot cases cited in the Majority Opinion, *City of Miami v. Staats*, 919 So. 2d 485 (Fla. 3d DCA 2005) and *City of Hialeah v. Delgado*, 963 So. 2d 754 (Fla. 3d DCA 2007), both of which involved circuit court challenges that were filed before the vote occurred. In order to raise a timely objection to a perceived irregularity in the ballot, the Division and the Attorney General were required to raise the objection before the vote occurred, and neither did. *See Sylvester v. Tindall*, 154 Fla. 663, 18 So. 2d 892 (1944).

Furthermore, it is well established in Florida's jurisprudence that the validity of an action taken by an official public body cannot be collaterally attacked in a

suit between private parties in which the public body is not made a party to the proceeding.[6] *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (Fla. 1933); *Goldtrap*, 77 So. 2d 446;[7] *Conoley v. Naetzker*, 137 So. 2d 6 (Fla. 2d DCA 1962).

Pembroke and *Conoley* both involved attempts to judicially invalidate deeds issued by the Trustees of the Internal Improvement Fund pursuant to a statute that provided for the publication of a notice of the proposed sale, the right to object administratively, and the right to bring a circuit court action to enjoin the sale within 30 days after any objection is administratively overruled. In both cases, the lawsuit was brought several years after the Trustees acted and without the joinder of the Trustees or the State as parties. The courts in both cases, recognizing that the statute authorized a direct action to enjoin the sale if timely asserted, ruled that the validity of the sale could not be collaterally attacked. This Court stated in *Pembroke*:

> The presumption is that the trustees, being public officials of the state, complied with their duty under the

[6] *See Bd. of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.,* 100 So. 2d 67, 69 (Fla. 1st DCA 1958) in which the First DCA stated that "[o]ne of the primary reasons for the rule against collateral attacks is to insure due process of law . . ."

[7] In *Goldtrap*, one of the parties collaterally attacked the validity of a deed from a municipality in an action in which the municipality was not a party. In affirming the dismissal of the action, this Court stated: "That the validity of a deed of a municipality which is voidable only may not be collaterally attacked in a suit like the present one, to which the city is not a part, is apodictic." 77 So. 2d at 447.

> law, and that they correctly ascertained the facts warranting their action. ***This presumption is to all intents and purposes a conclusive one when attempted to be put in issue by a collateral attack in a suit between private parties . . .***

Pembroke, 108 Fla. at 73 – 74, 146 So. at 258.

The court in *Conoley* also addressed the significance of the failure of the party asserting the collateral attack to protest the sale at the time it took place in stating that:

> Neither does the record reflect that defendants in any manner sought to enjoin the sale by appropriate court action. Since defendants have not shown that they were denied any opportunity to make a direct attack on the findings of the Trustees, they are in no way prejudiced by being foreclosed from doing so collaterally.

Conoley, 137 So. 2d at 9.

The same circumstances that existed in *Pembroke* and *Conoley* existed here. On November 1, 2011, the Commission, by official action, authorized the conduct of the Referendum on January 31, 2012. Although the circuit court had jurisdiction over an action to enjoin the Referendum <u>if the action had been filed before the vote occurred</u>, neither the Division nor the Attorney General elected to pursue an injunction prior to the vote. Under *Pembroke*, *Conoley*, and *Goldtrap*, the failure to make a direct attack on the Referendum <u>before the vote occurred</u> precludes the Division from making a collateral attack on the Referendum as a

matter of law, particularly in an appellate proceeding in which the County is not a party.

Finally, it is a foundational rule of appellate review that a claim, issue or argument not raised in the trial court will not be considered on appeal. *Robertson v. State,* 829 So. 2d 901, 906 (Fla. 2002). As a matter of law, this foundational rule precludes consideration of Division's collateral attack on the binding nature of the Referendum raised for the first time on appeal.

CONCLUSION

Under Florida's form of government, legislative policy decisions are made by the legislature and by those other governmental jurisdictions granted home rule authority under the constitution. Here, after observing the results of several years of economically successful and societally uneventful slot machine operations at the pari-mutuel facilities in Miami-Dade and Broward Counties, the legislature properly exercised its authority to allow slot machine gaming to occur in county jurisdictions other than Miami-Dade and Broward. *Fla. Gaming*, 71 So. 3d 226.

Pursuant to and in reliance on the legislature's action, the Commission similarly exercised its legislative authority when allowing the electorate of Gadsden County to decide whether or not to allow slot machine gaming to occur in their community. On November 1, 2011, Gadsden County had the undisputed home rule authority under Article VIII, § 1(f), § 125.01, *Speer*, and *Watt* to call

and conduct a countywide referendum to approve the use of slot machines at the racetrack in Gretna. The County called and conducted the Referendum and the voters approved the Referendum. Consistent with the stated purpose for granting county governments broad home rule powers in the first instance, this is precisely the type of local decision that is and was properly decided locally, and any attempt to abrogate Florida counties' historically expansive home rule authority should be summarily denied.

Dated this 6th day of January, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Email through the Court's E-Filing Portal System, this 6th day of January, 2016, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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