

TEXAS RACING COMMISSION

P. O. Box 12080 ★ Austin, TX 78711-2080
8505 Cross Park ★ Austin, TX 78754-4552
(512) 833-6699 ★ Fax (512) 833-6907



AD-HOC COMMITTEE ON FINANCE

Monday, July 31, 2017

10:30 a.m.

Texas Animal Health Commission
2105 Kramer Lane
Austin, Texas 78758

Agenda

The Committee will discuss methods of addressing agency funding for the remainder of Fiscal Year 2017 and all of Fiscal Years 2018 and 2019. The discussion will include staff's evaluation of various proposals to reduce costs. The discussion will also include, but is not limited to, proposals to amend Rule 309.8, Racetrack License Fees, and Rule 311.5, License Fees.

The Committee will discuss a Motion for Rehearing/Motion to Overturn/Motion for Reconsideration of the Supplemental Fee approved by the Commission at its meeting on June 13, 2017. This Motion has been submitted by representatives of Laredo Downs, Valle de los Tesoros, Gulf Coast Racing and Gulf Greyhound Park.

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

DIVISION 1. GENERAL PROVISIONS

1 309.13. Annual Racetrack License Fee Supplement

2 (a) Purpose. Upon determination by the Commission that the
3 annual fees provided under §309.8 (relating to Racetrack License
4 Fees) are insufficient to pay the costs of administering and
5 enforcing the Act, the Commission may increase the annual fee to
6 be paid by each racetrack by assessing a one-time annual license
7 fee supplement.

8 (b) Fee Supplement for State Fiscal Year Ending August 31, 2018.

9 A licensed racing association shall pay a one-time annual
10 license fee supplement. The supplement is due to the Commission
11 on November 1, 2017. The license fee supplement for each
12 license type is as follows:

- 13 (1) for a Class 1 racetrack, \$18,713;
14 (2) for a Class 2 racetrack, \$8,608;
15 (3) for a Class 3 or 4 racetrack, \$2,620; and
16 (4) for a Greyhound racetrack, \$13,473.

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

DIVISION 1. GENERAL PROVISIONS

1 309.8. Racetrack License Fees

2 (a) (No change.)

3 (b) Annual License Fee.

4 (1) License Fee for State Fiscal Year Ending August 31,
5 2018. A licensed racing association shall pay an annual license
6 fee. The annual license fee for each license type is as follows:

7 (A) for a Class 1 racetrack, \$562,500 [~~\$500,000~~];

8 (B) for a Class 2 racetrack, \$258,750 [~~\$230,000~~];

9 (C) for a Class 3 or 4 racetrack, \$78,750 [~~\$70,000~~];

10 and

11 (D) for a Greyhound racetrack, \$405,000 [~~\$360,000~~].

12 (2) License Fee for State Fiscal Year Beginning September
13 1, 2018, and thereafter. A licensed racing association shall
14 pay an annual license fee. The annual license fee for each
15 license type is as follows:

16 (A) for a Class 1 racetrack, \$559,880;

17 (B) for a Class 2 racetrack, \$257,545;

18 (C) for a Class 3 or 4 racetrack, \$78,383; and

19 (D) for a Greyhound racetrack, \$403,114.

20 (c) Fee Payments for State Fiscal Year Ending August 31, 2018.

21 (1) Beginning on November 1, 2017, an association that is
22 conducting live racing or simulcasting shall pay its annual
23 license fee by remitting to the Commission 1/10th of the fee
24 remaining as of November 1, 2017, on the first business day of
25 each month.

26 (2) Beginning on November 1, 2017, each association that is
27 not conducting live racing or simulcasting shall pay its annual
28 license fee by remitting to the Commission 1/3rd of the fee
29 remaining as of November 1, 2017, in three equal installments on
30 December 1, March 1, and June 1.

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

DIVISION 1. GENERAL PROVISIONS

1 (d) Fee Payments for State Fiscal Year Beginning September 1,
2 2018, and thereafter.

3 (1) [(+2)] An association that is conducting live racing or
4 simulcasting shall pay its annual license fee by remitting to
5 the Commission 1/12th of the fee on the first business day of
6 each month.

7 (2) [(+3)] An association that is not conducting live racing
8 or simulcasting shall pay its annual license fee in four equal
9 installments on September 1, December 1, March 1, and June 1 of
10 each fiscal year.

11 (e) [(+e)] Adjustment of Fees.

12 (1) Annual fees are calculated using a projected base of
13 143 days of live horse racing and 36 [270] performances of live
14 greyhound racing per calendar year. To cover the additional
15 regulatory cost in the event additional days or performances are
16 requested by the associations the executive secretary may:

17 (A) recalculate a horse racetrack's annual fee by
18 adding \$3,750 for each live day added beyond the base;

19 (B) recalculate a greyhound racetrack's annual fee by
20 adding \$750 for each live performance added beyond the
21 base; and

22 (C) review the original or amended race date request
23 submitted by each association to establish race date
24 baselines for specific associations if needed.

25 ~~(2) If at any point the executive secretary determines the~~
26 ~~total revenue from the annual fees is insufficient to pay the~~
27 ~~Commission's costs during a fiscal year, the executive secretary~~
28 ~~shall recommend to the Commission a supplemental fee, in~~
29 ~~addition to the license fee, that each association would be~~
30 ~~required to pay to generate the necessary revenue to pay the~~
31 ~~Commission's costs.~~

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

DIVISION 1. GENERAL PROVISIONS

1 (2) [~~(3)~~] If the executive secretary determines that the
2 total revenue from the annual fees exceeds the amount needed to
3 pay those costs, the executive secretary may order a moratorium
4 on all or part of the annual license fees remitted [~~monthly~~] by
5 any or all of the associations. Before entering a moratorium
6 order, the executive secretary shall develop a formula for
7 providing the moratorium in an equitable manner among the
8 associations. In developing the formula, the executive secretary
9 shall consider the amount of excess revenue received by the
10 Commission, the source of the revenue, the Commission's costs
11 associated with regulating each association, the Commission's
12 projected receipts for the next fiscal year, and the
13 Commission's projected expenses during the next fiscal year.

14 (3) The annual fees that become due on September 1, 2017,
15 and October 1, 2017, shall be counted towards and be included
16 within the total annual license fee for State Fiscal Year Ending
17 August 31, 2018, that is due under paragraph (b)(1) of this
18 section.

CHAPTER 311. OTHER LICENSES
SUBCHAPTER A. LICENSING PROVISIONS
DIVISION 1. OCCUPATIONAL LICENSES

1 **Sec 311.5 License Fees**

2 (a)-(c) (No change.)

3 (d) The fee for an occupational license is as follows:

4 Type of License	1 Year Fee	2 Year Fee	3 Year Fee
5 Adoption Program Personnel	<u>\$28.25</u> [\$25]		
6 Announcer	<u>\$39.50</u> [\$35]		
7 Apprentice Jockey	<u>\$84.50</u> [\$75]		
8 Assistant Farrier/Plater/Blacksmith	<u>\$28.25</u> [\$25]		
9 Assistant Starter	<u>\$28.25</u> [\$25]		
10 Assistant Trainer	<u>\$112.50</u> [\$100]		
11 Assistant Trainer/Owner	<u>\$112.50</u> [\$100]		
12 Association Assistant Management	<u>\$56.25</u> [\$50]		
13 Association Management Personnel	<u>\$84.50</u> [\$75]		
14 Association Officer/Director	<u>\$112.50</u> [\$100]		
15 Association Other	<u>\$84.50</u> [\$75]		
16 Association Staff	<u>\$39.50</u> [\$35]		
17 Association Veterinarian	<u>\$84.50</u> [\$75]		
18 Authorized Agent	<u>\$17.00</u> [\$15]		
19 Chaplain	<u>\$28.25</u> [\$25]		
20 Chaplain Assistant	<u>\$28.25</u> [\$25]		
21 Equine Dental Provider	<u>\$112.50</u> [\$100]		
22 Exercise Rider	<u>\$28.25</u> [\$25]		
23 Farrier/Plater/Blacksmith	<u>\$84.50</u> [\$75]		
24 Groom/Exercise Rider	<u>\$28.25</u> [\$25]		
25 Groom/Hot Walker	<u>\$28.25</u> [\$25]		
26 Groom/Pony Person	<u>\$28.25</u> [\$25]		
27 Jockey	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
28 Jockey Agent	<u>\$112.50</u> [\$100]		
29 Kennel	<u>\$84.50</u> [\$75]		
30 Kennel Helper	<u>\$28.25</u> [\$25]		
31 Kennel Owner	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]

CHAPTER 311. OTHER LICENSES

SUBCHAPTER A. LICENSING PROVISIONS

DIVISION 1. OCCUPATIONAL LICENSES

1	Kennel Owner/Owner	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
2	Kennel Owner/Owner-Trainer	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
3	Kennel Owner/Trainer	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
4	Lead-Out	<u>\$28.25</u> [\$25]		
5	Maintenance	<u>\$39.50</u> [\$35]		
6	Medical Staff	<u>\$39.50</u> [\$35]		
7	Miscellaneous	<u>\$28.25</u> [\$25]		
8	Multiple Owner	<u>\$39.50</u> [\$35]	<u>\$80.50</u> [\$70]	<u>\$120.75</u> [\$105]
9	Mutuel Clerk	<u>\$39.50</u> [\$35]		
10	Mutuel Other	<u>\$39.50</u> [\$35]		
11	Owner	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
12	Owner-Trainer	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
13	Pony Person	<u>\$28.25</u> [\$25]		
14	Racing Industry Representative	<u>\$112.50</u> [\$100]		
15	Racing Industry Staff	<u>\$33.75</u> [\$30]		
16	Racing Official	<u>\$56.25</u> [\$50]		
17	Security Officer	<u>\$33.75</u> [\$30]		
18	Stable Foreman	<u>\$56.25</u> [\$50]		
19	Tattooer	<u>\$112.50</u> [\$100]		
20	Test Technician	<u>\$28.25</u> [\$25]		
21	Trainer	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
22	Training Facility Employee	<u>\$33.75</u> [\$30]		
23	Training Facility General Manager	<u>\$56.25</u> [\$50]		
24	Valet	<u>\$28.25</u> [\$25]		
25	Vendor Concessionaire	<u>\$112.50</u> [\$100]		
26	Vendor/Concessionaire Employee	<u>\$33.75</u> [\$30]		
27	Vendor/Totalisator	<u>\$550/\$600</u> [\$500]		
28	Vendor/Totalisator Employee	<u>\$56.25</u> [\$50]		
29	Veterinarian	<u>\$112.50</u> [\$100]	<u>\$225.00</u> [\$200]	<u>\$337.50</u> [\$300]
30	Veterinarian Assistant	<u>\$33.75</u> [\$30]		

IN THE MATTER OF THE
THE ADOPTION OF A
SUPPLEMENTAL FEE

2017 JUL -6 PM 3: 41

TEXAS RACING
COMMISSION

BEFORE THE
TEXAS RACING COMMISSION

**MOTION FOR REHEARING/MOTION TO OVERTURN/
REQUEST FOR RECONSIDERATION**

NOW COMES LRP Group, Ltd.; Valle de los Tesoros, Ltd.; Gulf Coast Racing, LLC; and Gulf Greyhound Partners, Ltd. (collectively, "Movants")¹, and submits Motion for Rehearing/Motion to Overturn/Request for Reconsideration in the above-referenced matter (the "Motion"). In support of this timely-filed Motion, Movants respectfully submit the following:

I.

BACKGROUND

Movants are all entities that hold either a horse or a greyhound racetrack license issued by the Texas Racing Commission ("TRC" or "Commission") pursuant to its authority under the Texas Racing Act, Article 179e, Vernon's Texas Civil Statutes § 3.021. They are regulated by the TRC pursuant to the Texas Racing Act and the Rules adopted by the TRC thereunder.

On our about June 13, 2017, during a public meeting, the Executive Secretary of the TRC recommended that the Commissioners adopt a Supplemental Fee for the year 2017 pursuant to Rule 309.8(c)(2). The Commissioners voted during that meeting to impose such a Supplemental Fee for 2017. It is Movant's understanding that such fees are due by August 1, 2017.

¹ Movants are filing this Motion collectively in the interest of administrative efficiency, rather than filing four individual, identical Motions. By doing so, Movants do not take the position that the Texas Racing Commissions' actions challenged in this Motion constitute one comprehensive "contested case" adjudicating the rights of all licensed Texas racetracks collectively. Please see discussion in the Background section of this Motion for further explanation.

The TRC has admitted during work sessions with certain of the regulated entities and during the June 13, 2017 public meeting that the Supplemental Fee is necessary because the agency would be insolvent without it (i.e., the agency's operational budget otherwise would leave the agency's expenditures exceeding its revenue).

The amount of the Supplemental Fee to be paid by each of the Movants is not reflective of an analysis of agency oversight costs that can be directly attributable to a particular Movant. Rather, the TRC determined how much it needs to cover its seemingly always expanding costs, and simply divided that amount among the racetracks by category.

Procedurally, because the Supplemental Fee was not imposed as the result of a contested case or other evidentiary hearing, it is the Movants' position that it need not file this Motion in order to exhaust its administrative remedies. It is Movants' position is that they may file a direct appeal of the Supplemental Fee in Travis County District Court pursuant to the Texas Administrative Procedure Act § 2001.035, .038, and .171; the Texas Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Chap. 37; Article 179c, Vernon's Texas Civil Statutes § 5.02; and pursuant to the Court's inherent authority to consider whether the individual Defendants' actions were *ultra vires* and/or unconstitutional. Movants file this Motion in an abundance of caution to the extent the TRC takes the position that the June 13, 2017 public meeting constituted a series of separate "contested cases" (as defined in the Administrative Procedure Act) against each individual licensed racetrack (including a separate contested case against each of the four Movants). While the four Movants are filing this as one Motion for purposes of administrative efficiency, each Movant is responding to any alleged individual decision made against them in a "contested case" (if any.)

II.
GROUND FOR REHEARING/RECONSIDERATION²

A. *The Supplemental Fee is Invalid on its Face and/or As Applied*

The Commission should rehear, reconsider and overturn the Commissioners' prior decision to adopt the Supplemental Fee.

Rule 309.8(c)(2) of the TRC's Rules allows the Executive Secretary to recommend that the Commissioners adopt a Supplemental Fee should the Executive Secretary determine the total revenue from annual fees is insufficient to pay the Commission's costs during a fiscal year. During a public meeting held June 13, 2017, the Executive Secretary recommended that the Commissioners adopt a Supplemental Fee for the year 2017 pursuant to Rule 309.8(c)(2), and the Commissioners voted during that meeting to do so. This action was improper.

Rule 309.8(c)(2) does not and cannot circumvent or supersede the rulemaking requirements found in the Administrative Procedures Act of the Texas Government Code. The adoption of the Supplemental Fee is clearly a "rule" as that term is defined by the Administrative Procedures Act:

"Rule":

(A) means a state agency statement of general applicability that:

(i) implements, interprets, or prescribes law or policy; or

(ii) describes the procedure or practice requirements of a state agency;

(B) includes the amendment or repeal of a prior rule; and

(C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

² Movants contend that it may also assert all of the points of error contained in this Motion in a suit for judicial review.

Texas Government Code § 2001.003(6). Thus, the TRC was required to adopt the Supplemental Fee by following the rulemaking requirements of the Administrative Procedures Act. If Rule 309.8(c)(2) allows the TRC to ignore those applicable statutory requirements, it is invalid on its face. Alternatively, the TRC has improperly interpreted Rule 309.8(c)(2) to give its Commissioners authority to ignore statutory rulemaking requirements, and thus Rule 309.8(c)(2) is invalid as applied to Movants.

B. *The Adoption of the Supplemental Fee Was and Ultra Vires Act*

As noted above, while Rule 309.8(c)(2) of the TRC's Rules allows the Executive Secretary to recommend that the Commission adopt a Supplemental Fee should the Executive Secretary determine the total revenue from annual fees is insufficient to pay the Commission's costs during a fiscal year, it does not and cannot circumvent the rulemaking requirements found in the Administrative Procedures Act of the Texas Government Code.

Nevertheless, the Commissioners apparently interpret Rule 309.8(c)(2) to provide them unilateral authority to impose a new fee on the regulated industry simply upon recommendation by the Executive Secretary, without engaging in any of the public input and other procedural and analytical requirements of formal rulemaking. The Commissioners are interpreting Rule 309.8(c)(2) as giving them authority to impose fees at their leisure without following statutory rulemaking requirements for those fees, which is an *ultra vires* act. No agency may pass a rule giving itself authority to ignore the rulemaking procedures and requirements established by the Texas Legislature. The Supplemental Fee is therefore both an *ultra vires* act and an invalidly promulgated rule under the Administrative Procedures Act

Under Rule 309.8(c)(2), the Executive Secretary may recommend that the Commissioners follow the statutory rulemaking process to assess a Supplemental Fee when warranted. But the Commissioners' unilateral adoption of a Supplemental Fee without the

necessary rulemaking process is beyond the scope of the Texas Racing Commission's statutory authority, and is therefore an *ultra vires* action by the Commissioners and Executive Secretary.

Furthermore, the adoption of the Supplemental Fee is not justified under Rule 307.4. That Rule addresses decision-making proceedings by the Commissioners during an open meeting, such as the approval of live race dates. Rule 307.4 does not give the Texas Racing Commission the authority to circumvent the rulemaking requirements found in the Administrative Procedures Act of the Texas Government Code.

Even if the TRC is somehow entitled to adopt an entirely new fee through an informal decision-making proceeding, it defied the requirements of Rule 307.4 itself. Subsection (a)(2) requires a "reasonable opportunity for each affected licensee and industry organization to review relevant information presented to the Commission on the matter." The TRC provided no information in support of the Supplemental Fee, other than the Executive Secretary's recommendation at the open meeting where the Supplemental Fee was adopted. The only written information provided by the TRC was information related to the agency's cash-flow issues. Subsection (a)(1) requires "reasonable notice to each affected licensee and industry organization." Although the TRC included the Supplemental Fee as part of the public meeting agenda notice published seven days before the public meeting, this sort of monumental shift in fees warrants more than seven days notice to be reasonable. Subsection (a)(3) requires "reasonable opportunity for each affected licensee and industry organization to present information to the Commission on the matter." While Movants had nominal opportunity to respond to the Supplemental Fee during the public meeting, this opportunity was effectively meaningless given the complete lack of supporting documentation for this significant action. Essentially, the Executive Secretary said in a public meeting that the agency needs more money and thus the Commissioners should impose a Supplemental Fee. This conclusory statement

provided Movants with no meaningful opportunity for response and, as a practical matter, improperly shifted the burden for justifying the Supplemental Fee off the agency's shoulders.

Section 3.02(g) requires the TRC to consider the effect of a proposed action "on the state's agricultural, horse breeding, horse training, greyhound breeding, and greyhound training industry." Clearly, the TRC failed to do so in imposing the Supplemental Fee. There is nothing in writing indicating any such consideration was made and there was no discussion at the public meeting of the risk that the Supplemental Fee would bankrupt the entire industry, including the Texas breeders and trainers and related segments of the Texas agriculture industry.

The Commission should rehear, reconsider and overturn the Commissioners' decision to adopt the Supplemental Fee.

C. *The Supplemental Fee is Unconstitutional*

In continuing to purport to impose an illegal Supplemental Fee, the TRC is ensuring the economic failure of racetracks. A racetrack license in Texas has economic value. There are only ten Texas racetrack licenses currently in existence. They are obtained at great expense (often through a contested case hearing). For most Movants, a particular piece of property is tied to the license itself. Without that license, the value of the associated land is decreased, and certainly the license owner is deprived of its reasonable use and enjoyment of the property. Forced license relinquishment resulting from inability to pay improper and unreasonable fees constitutes a regulatory taking prohibited by Article I, Section 17 of the Texas Constitution. *See, e.g., Mayhew v. Town of Sunnyvale*, 964 S.W.2d 9222 (Tex. 1998) (takings can include unreasonable interference with use of property through negative economic impact and interference with investment-backed expectations). It is also well-established that a government-set rate or price control can be considered "confiscatory" such that it constitutes a regulatory taking. Here, the TRC has adopted illegal regulatory fees that are confiscatory.

Similarly, constitutional due process requires that government-set rates must allow a business to operate successfully at a profit reasonable to ensure financial integrity. The TRC has imposed unreasonable and illegal fees that have no relationship to the actual oversight needs of the Movants. The Supplemental Fees were adopted without following any of the rulemaking procedures required by the Texas Administrative Procedure Act and will result in the demise of the financial integrity of Movants in violation of their due process rights provided for in the Texas Constitution, Article I, Section 3.

For all or many of the same reasons, the Supplement Fees amount to an unconstitutional tax in violation of the Texas Constitution, Article 8. The Defendants are collecting “fees” that are well beyond the actual or even reasonably anticipated costs of regulation, which amounts to a tax.

The Commission should rehear, reconsider and overturn the Commissioners’ decision to adopt the Supplemental Fee.

D. The Movants Did Not Receive Proper Notice of a Contested Case Hearing

To the extent the TRC believes the June 13, 2017 meeting constituted a separate contested case against each of the Movants, the TRC failed to provide the requisite ten day notice required by the Administrative Procedure Act § 2001.051(1). Rather, only seven days notice of the public meeting was given. Finally, the TRC did not provide Movants with a written order as provided by the Administrative Procedure Act § 2001.141.

The Commission should rehear, reconsider and overturn the Commissioners’ decision to adopt the Supplemental Fee.

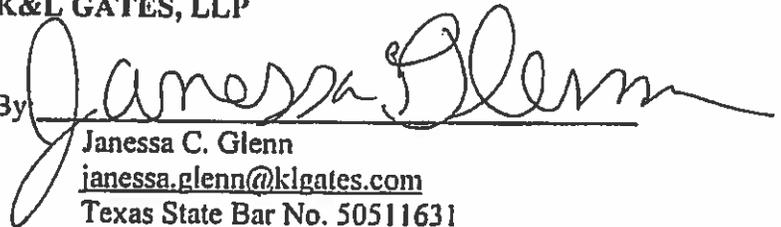
III.
RELIEF REQUESTED

WHEREFORE, Movants LRP Group, Ltd., Valle de los Tesoros, Ltd., Gulf Coast Racing, LLC and Gulf Greyhound Partners, Ltd. ask the TRC to rehear, reconsider and overturn the Commissioners' decision to adopt the Supplemental Fee.

Respectfully submitted,

K&L GATES, LLP

By


Janessa C. Glenn
janessa.glenn@klgates.com
Texas State Bar No. 50511631

William J. Moltz
william.moltz@klgates.com
Texas State Bar No. 14259400

K&L Gates, LLP
2801 Via Fortuna, Suite 350
Austin, TX 78746
Phone: (512) 482-6800
Facsimile: (512) 482-6859

**ATTORNEYS FOR LRP GROUP, LTD.;
VALLE DE LOS TESOROS, LTD.; GULF
COAST RACING, LLC; AND GULF
GREYHOUND PARTNERS, LTD.**