IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GRETNA RACING, LLC,

Appellant,

v.

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

Appellee.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D14-3484

Opinion filed May 29, 2015.

An appeal from a Final Order of the Department of Business and Professional Regulation.

Marc W. Dunbar, Tallahassee and David S. Romanik of David S. Romanik, P.A., Oxford, for Appellant.

David J. Weiss of Ausley & McMullen, P.A., Tallahassee, for Amicus Curiae Gadsden County, Florida in support of Appellant.

Pamela Jo Bondi, Attorney General, Allen Winsor, Solicitor General, Adam S. Tanenbaum, Chief Deputy Solicitor General, and Jonathan A. Glogau, Chief, Complex Litigation, Tallahassee, for Appellee.

BENTON, J.

Gretna Racing, LLC (Gretna Racing) appeals the Final Order of the Department of Business and Professional Regulation, Division of Pari-Mutuel

Wagering (Department) denying Gretna Racing's application for a license to conduct slot machine gaming at its horsetrack facility in Gadsden County. Because the Department's denial rests on grounds that cannot be reconciled with the controlling statute, we reverse.

On November 1, 2011, Gadsden County Commissioners voted to put a referendum regarding slot machine gaming on a January 31, 2012 ballot. At the January 31, 2012 election, a majority of those voting in the countywide referendum voted "yes" on the question, "Shall slot machines be approved for use at the pari-mutuel horsetrack facility in Gretna, FL?" Nearly two years later, on December 11, 2013, Gretna Racing made application to the Department for a license to conduct slot machine gaming at its horsetrack facility in Gretna.

The Department notified Gretna Racing on December 23, 2013, that it had denied the application. The Department did not base denial of the license on any error, omission, or deficiency in Gretna Racing's application or on any defect in submissions accompanying the application. One stated basis for denial invoked an opinion of the Attorney General,[1] and the only other stated ground for denial was

[1] After Gretna Racing filed its application, the Department posed the following question to the Attorney General: "Does the third clause of section 551.102(4), Florida Statutes, . . . permit the Department to grant a slot machine license to a pari-mutuel facility in a county which holds a countywide referendum to approve such machines, absent a statutory or constitutional provision enacted after July 1, 2010, authorizing such referendum?" Op. Att'y Gen. Fla. 2012-01 (2012). On January 12, 2012, the Attorney General opined the Department was

that, in article X, section 23 of the Florida Constitution, "only two counties are listed, 'Miami-Dade and Broward,' see Art. X, § 23(a)." As Gretna Racing's "pari-mutuel facility is located in Gadsden County," the Department's letter continued, "which is not a 'county as specified in s. 23, Art. X of the State Constitution,' see § 551.104(2), Fla. Stat., [Gretna Racing's] application to conduct slot machine gaming in Gadsden County must, as a matter of law, be denied for this reason as well." Likewise relying on Florida Attorney General Opinion 2012-01, the Final Order states "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 551.102(4) of the Florida Statutes became effective on July 1, 2010." Gretna Racing now appeals the Final Order.

In deciding whether denial for these reasons was lawful, historical context is important. On November 2, 2004, Florida voters approved a ballot initiative, adding article X, section 23 to the Florida Constitution, which provides, in part:

> (a) After voter approval of this constitutional amendment, the governing bodies of Miami-Dade and Broward Counties each may hold a county-wide referendum in their respective counties on whether to

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not authorized to issue a slot machine license pursuant to the third clause of section 551.102(4) "absent a statutory or constitutional provision enacted after July 1, 2010" because the governing clause "contemplates the necessity of additional statutory or constitutional authorization before such a referendum may be held." Id.

> authorize slot machines within existing, licensed parimutuel facilities (thoroughbred and harness racing, greyhound racing, and jai-alai) that have conducted live racing or games in that county during each of the last two calendar years before the effective date of this amendment. If the voters of such county approve the referendum question by majority vote, slot machines shall be authorized in such parimutuel facilities. . . .
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> (b) In the next regular Legislative session occurring after voter approval of this constitutional amendment, the Legislature shall adopt legislation implementing this section and having an effective date no later than July 1 of the year following voter approval of this amendment. Such legislation shall authorize agency rules for implementation, and may include provisions for the licensure and regulation of slot machines. The Legislature may tax slot machine revenues, and any such taxes must supplement public education funding statewide.

(Emphasis supplied.) In 2005, the Legislature enacted Chapter 551, Florida Statutes. See Ch. 2005-362, § 1, at 66-86, Laws of Fla. Section 551.102(4), Florida Statutes (2006), defined an "[e]ligible facility" as

> 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.

(Emphasis supplied.) While the sequence of events and its legislative history make clear that section 551.102 was enacted to implement article X, section 23, the

Legislature's constitutional prerogative to authorize slot machines (as opposed to lotteries) is broader than article X, section 23.

Indeed, the Legislature has plenary authority over slot machines, authority the parties do not question here.[2] "The Constitution of Florida is a limitation of power, and, while the Legislature cannot legalize any gambling device that would in effect amount to a lottery [other than state operated lotteries authorized by article X, section 15 of the Florida Constitution], it has inherent power to regulate [or not] or to prohibit [or not] any and all other forms of gambling." Lee v. City of Miami, 163 So. 486, 490 (Fla. 1935) (alterations in original). Accord, Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, 37 So. 2d 692, 694 (Fla. 1948) ("Authorized gambling is a matter over which the state may . . . exercise its police

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[2] In contrast with the parties, the dissenting opinion goes on at some length about our supreme court's jurisprudence in this area, making much of dicta in Greater Loretta Improvement Association v. State ex rel. Boone, 234 So. 2d 665, 671-72 (Fla. 1970), but acknowledging that the last word from the Florida Supreme Court came in Advisory Opinion to the Attorney General Re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 880 So. 2d 522, 525 (Fla. 2004), where the court actually held:

> We have long since settled the question of whether slot machines constitute lotteries. In Lee v. City of Miami, 121 Fla. 93, 163 So. 486, 490 (1935), we addressed the question of whether certain legislatively described gambling machines, such as slot machines, constituted lotteries prohibited by the state constitution. We concluded they did not.

At oral argument, the assistant attorney general representing appellee conceded that the Florida Constitution does not restrict the Legislature's authority to allow slot machines in any way pertinent to the present case.

power . . . ."); Pasternack v. Bennett, 190 So. 56, 57 (Fla. 1939) ("[I]t is . . . settled in this jurisdiction that those devices commonly known as slot machines are gambling devices . . . subject to the police power of the State to regulate, control, prohibit or destroy them."); Eccles v. Stone, 183 So. 628, 631-32 (Fla. 1938) (recounting that the Legislature legalized the operation of slot machines in 1935, then prohibited the operation of coin-operated gambling devices in 1937, and that the "state policy has for many years been against all forms of gambling, with the exception of the legislative enactment legalizing parimutuel wagers on horse racing and the 1935 Act legalizing the operation of slot machines"); Fla. Gaming Ctrs., Inc. v. Fla. Dep't of Bus. & Prof'l Regulation, 71 So. 3d 226, 229 (Fla. 1st DCA 2011) ("The Legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling . . . .").

The broad reach of legislative authority over slot machines and pari-mutuel wagering notwithstanding, the Legislature is subject, in this area, too, to constitutional restrictions on special laws and general laws of local application. Compare, e.g., Dep't of Bus. Regulation v. Classic Mile, Inc., 541 So. 2d 1155, 1158-59 (Fla. 1989) (holding statute regarding thoroughbred horse racing was unconstitutional as a special law in the guise of a general law because Marion County was the sole county that would ever fall within the statutorily designated class of counties eligible for licensure; rejecting argument that "the regulatory

responsibilities given to the state under the statute [were] part of the overall statewide regulatory scheme for the parimutuel industry, thereby rendering the statute a general law"; and rejecting argument that the statewide impact of revenue that might be generated as a result of the statute rendered the statute a general law),[3] with, e.g., License Acquisitions, LLC v. Debary Real Estate Holdings, LLC, 155 So. 3d 1137, 1142, 1147 (Fla. 2014) (holding a statute that authorized a jai alai facility to convert to a dog track under certain circumstances was a valid general law "because there is a reasonable possibility that it could apply to ten of the eleven jai alai permits in the state" and rejecting an interpretation of the statute that would render it an unconstitutional special law).[4] Constitutional restrictions on

[3] See also Fla. Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n, 967 So. 2d 802, 809 (Fla. 2007) (holding a statute regulating live broadcasts of horse races was unconstitutional as a special law, albeit enacted in the guise of a general law, without compliance with the requirements for the enactment of special laws because the conditions making the provision applicable "existed only in the area where Gulfstream was located, and there was no reasonable possibility that they would ever exist in another part of the state"); Ocala Breeders' Sales Co. v. Fla. Gaming Ctrs., Inc., 731 So. 2d 21, 24-25 (Fla. 1st DCA 1999) (holding statute that enabled one thoroughbred horse breeder operating within the state to obtain an exclusive license to conduct pari-mutuel wagering at its sales facility was an unconstitutional special law enacted in the guise of a general law (affirmed, 793 So. 2d 899 (Fla. 2001))).

[4] See also Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882-83 (Fla. 1983) (concluding that legislation that, once passed, benefited only a track in Seminole County, was a valid general law because the statute could be applied to tracks that might be built in the future); Biscayne Kennel Club, Inc. v. Fla. State Racing Comm'n, 165 So. 2d 762, 763-64 (Fla. 1964) (holding statute regulating privilege of conducting harness racing was valid general act of uniform operation because "all of the classifications effected by th[e]

special laws and general laws of local application may help explain resort to the ballot initiative that resulted in article X, section 23.

In 2009, the Legislature amended section 551.102(4), originally enacted to implement article X, section 23, in order to authorize slot machines in pari-mutuel facilities not covered by article X, section 23. The amendment expanded the definition of "eligible facility" in two steps, first with this language:

> 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.

Ch. 2009-170, § 19, at 1792, Laws of Fla. (emphasis supplied). As our supreme court explained in Golden Nugget Group v. Metropolitan Dade County, 464 So. 2d 535, 536 (Fla. 1985), county, as defined in s. 125.011(1) refers to Miami-Dade County and to no other county.[5] But the 2009 statutory amendment further expanded the definition of "eligible facilities" with this additional language:

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act are made on the basis of factors which are potentially applicable to others" because "a number of Florida counties may by future referendum acquire racing establishments . . . within the class covered").

[5] The supreme court conceded that "county" as defined in section 125.011 potentially refers to Dade, Hillsborough, and Monroe Counties, but held that only Dade County had adopted a home-rule charter "'pursuant to ss. 10, 11 and 24 of Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968.' See § 125.011(1), Fla. Stat. (1983)." Golden Nugget Grp. v. Metro. Dade Cnty., 464 So. 2d 535, 536 (Fla. 1985). Broward County is not a "county as defined in s. 125.011."

> 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.

Ch. 2009-170, § 19, at 1792, Laws of Fla. (emphasis supplied). By making the amendment to section 551.102(4) applicable statewide, the drafters minimized the possibility that the amendment would be deemed a general law of local application (or a special law for the benefit of the Hialeah Race Track).

In response to this statutory amendment, perhaps (in whole or in part) to prevent competition from the Hialeah Race Track,[6] holders of pari-mutuel wagering permits in Miami-Dade County who were already licensed to install slot machines sought a declaratory judgment that the 2009 amendment to section 551.102(4) was unconstitutional. See Fla. Gaming Ctrs., 71 So. 3d at 228. They

[6] Subsequent to the decision in Florida Gaming Centers, Inc. v. Florida Department of Business & Professional Regulation, 71 So. 3d 226 (Fla. 1st DCA 2011), South Florida Racing Association, LLC, owner of Hialeah Race Track, filed an application for a license to conduct slot machine gaming at the Hialeah Race Track in Miami-Dade County. Before the 2009 amendment to section 551.102(4), Hialeah Race Track was ineligible for such a license. It was not among the seven facilities authorized by the 2004 constitutional amendment to be licensed to conduct slot machine gaming because "live racing or games" did not take place at Hialeah Race Track "during each of the last two calendar years before the effective date of t[he] amendment." Art. X, § 23, Fla. Const.

argued that article X, section 23 of the Florida Constitution limited legislative power to authorize slot machine gaming, by implication, to licensed pari-mutuel facilities in Miami-Dade and Broward Counties that had conducted live racing or games during calendar years 2002 and 2003. Id. The Hialeah Race Track conducted racing during the two years before it applied for a slot machine license, but not in 2002 and 2003, i.e., not "during each of the last two calendar years before the effective date of" article X, section 23.

The incumbent licensees' argument was rejected by each court that considered it. We affirmed summary judgment upholding the constitutionality of section 19 of chapter 2009-170, Laws of Florida, the 2009 amendment to section 551.102, and said: "[T]he only thing that Article X, section 23 limited was the Legislature's authority to prohibit slot machine gaming in certain facilities in the two counties. Contrary to Appellants' position, Article X, section 23 provides no indication that Florida voters intended to forever prohibit the Legislature from exercising its authority to expand slot machine gaming beyond those facilities in Miami-Dade and Broward Counties meeting the specified criteria. Nor is there any indication that Florida voters intended to grant the seven entities who met the criteria a constitutionally-protected monopoly over slot machine gaming in the state." Id. at 229 (citation omitted). The Supreme Court of Florida denied review. Fla. Gaming Ctrs., Inc. v. Fla. Dep't of Bus. & Prof'l Regulation, 90 So. 3d 271

(Fla. 2012).

We now turn directly to the question of statutory interpretation before us. The language in contention does not invoke any "special agency expertise," and the Department does not maintain that any special agency expertise it may have in the area of pari-mutuel wagering or gaming supports its construction. See State, Dep't of Ins. v. Ins. Servs. Office, 434 So. 2d 908, 912 n.6 (Fla. 1st DCA 1983) ("[B]y urging a construction of these terms based upon their common, ordinary meanings, the Department disavows the utilization of any special 'agency expertise' in its interpretation of the statute. This mitigates, if it does not entirely eliminate, the rule calling upon the court to accord 'great deference' to the agency's interpretation of the statute."). See also Schoettle v. State, Dep't of Admin., Div. of Ret., 513 So. 2d 1299, 1301 (Fla. 1st DCA 1987) (same). The Department explicitly relies, not on any purported agency expertise, but on an Attorney General's Opinion.[7]

[7] "Attorney General opinions do not, of course, have binding effect in court. See Abreau v. Cobb, 670 So. 2d 1010, 1012 (Fla. 3d DCA 1996); Johnson v. Lincoln Square Props., Inc., 571 So. 2d 541, 543 (Fla. 2d DCA 1990); Causeway Lumber Co. v. Lewis, 410 So. 2d 511, 515 (Fla. 4th DCA 1981)." Edney v. State, 3 So. 3d 1281, 1284 (Fla. 1st DCA 2009). See also Bunkley v. State, 882 So. 2d 890, 897 (Fla. 2004) (recognizing that "opinions of the Attorney General are not statements of law"); State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993) ("The official opinions of the Attorney General, the chief law officer of the state, are guides for state executive and administrative officers in performing their official duties until superseded by judicial decision."); Comm'n on Ethics v. Sullivan, 489 So. 2d 10, 13 (Fla. 1986) (noting that although the attorney general

Our review of the Department's construction of the statute is de novo. See Fla. Dep't of Children & Family Servs. v. P.E., 14 So. 3d 228, 234 (Fla. 2009). "Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning." Id. The "'statute's text is the most reliable and authoritative expression of the Legislature's intent.' Courts are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.'" Hooks v. Quaintance, 71 So. 3d 908, 910-11 (Fla. 1st DCA 2011) (citations omitted).

The Department argues it properly denied Gretna Racing a license because it "is not authorized to issue a slot machine license to a pari-mutuel facility in a county which . . . holds a countywide referendum to approve such machines, absent a statutory or constitutional provision enacted after July 1, 2010, authorizing such referendum." (emphasis added). But section 551.102(4) does not contain the word "enacted." "'Usually, the courts in construing a statute may not insert words

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has the ability pursuant to section 16.01(3), Florida Statutes, to issue advisory opinions, "such power alone, and without any other constitutional demand, would not make the attorney general a part of the judicial branch"); Browning v. Fla. Prosecuting Attorneys Ass'n., 56 So. 3d 873, 876 n.2 (Fla. 1st DCA 2011) ("Attorney General opinions are not binding on Florida courts and can be rejected."); Ocala Breeder Sales Co. v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 464 So. 2d 1272, 1274 (Fla. 1st DCA 1985) ("Our holding is contrary to the cited opinion of the attorney general, but that opinion is not binding upon the court.").

or phrases in that statute or supply an omission that to all appearances was not in the minds of the legislators when the law was enacted. When there is doubt as to the legislative intent, the doubt should be resolved against the power of the court to supply missing words.'" Special Disability Trust Fund, Dep't of Labor & Emp't Sec. v. Motor & Compressor Co., 446 So. 2d 224, 226 (Fla. 1st DCA 1984) (quoting Rebich v. Burdine's, 417 So. 2d 284 (Fla. 1st DCA 1982) (internal citation omitted)).

Attorney General Opinion 2012-01, on which the Department relied, given in response to a letter in which Department Secretary Lawson requested the Attorney General's views, states in part:

> Section 551.104(1), Florida Statutes, provides in pertinent part that the Division "may issue a license to conduct slot machine gaming in the designated slot machine gaming area of the eligible facility." (e.s.) The term "eligible facility" is defined for purposes of your inquiry to mean:
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> > "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."
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> . . . .

> In light of the amendment to section 551.102(4), Florida Statutes, a question has arisen as to whether the statute's third clause contemplates that a county may now hold a referendum to authorize slot machines, or, alternatively, whether the statute contemplates the necessity of additional statutory or constitutional authorization before such a referendum may be held. Based on my review of the statute, I conclude that additional statutory or constitutional authorization is required to bring a referendum within the framework set out in the third clause of section 551.102(4).
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> . . . I am of the opinion that the Department of Business and Professional Regulation is not authorized to issue a slot machine license to a pari-mutuel facility in a county which, pursuant to the third clause in section 551.102(4), Florida Statutes, holds a countywide referendum to approve such machines, absent a statute or constitutional provision enacted after July 1, 2010, authorizing such referendum.

(Footnote omitted.) Attorney General Opinion 2012-01 relied heavily on the location of the phrase "after the effective date of this section" within what the Opinion called "the third clause of section 551.102(4)."[8]

But the Department's construction would render superfluous the entire third clause, the clause that begins "any licensed pari-mutuel facility in any other

[8] In addition, Attorney General Opinion 2012-01 relies on a mistaken reading of the second clause, and, under the heading of legislative intent, the remarks of a single legislator made during the session in the year following the session in which Chapter 2009-170, section 19, Laws of Florida, was enacted.

county." On one point, we are in full agreement[9] with Attorney General Opinion 2012-01, viz.:

> It is a maxim of statutory construction that a statute is to be construed to give meaning to all words and phrases contained within the statute and that statutory language is not to be assumed to be mere surplusage.[11]
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> [11] See, e.g., Terrinoni v. Westward Ho!, 418 So. 2d 1143 (Fla. 1st DCA 1982); Unruh v. State, 669 So. 2d 242 (Fla. 1996) (as a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless); Op. Att'y Gen. Fla. 91-16 (1991) (operative language in a statute may not be regarded as surplusage).

"'When the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear.'" Altman Contractors v. Gibson, 63 So.

[9] We do not agree, however, with Attorney General Opinion 2012-01's claim that "there were no pre-effective date referenda to be excluded from the ambit of" the third clause. The first clause covers pari-mutuel licensees in Miami-Dade and Broward Counties that had conducted live racing or games in 2002 and 2003. The second clause covers pari-mutuel licensees in Miami-Dade County that had conducted live racing for two consecutive calendar years immediately preceding applying for a slot machine license. The third clause applies to pari-mutuel licensees that conduct live racing for two consecutive calendar years immediately preceding applying for a slot machine license in any other county in which a referendum succeeds after July 1, 2010, including any such Broward County facilities that do not already have slot machine licenses. This is so even though Broward County did conduct a "pre-effective date referend[um]." In any event, since the effective date was contingent and uncertain, see infra n.7, "pre-effective date referenda" were entirely possible and were appropriately addressed with the language "after the effective date of this section."

3d 802, 803 (Fla. 1st DCA 2011) (quoting Mangold v. Rainforest Golf Sports Ctr., 675 So. 2d 639, 642 (Fla. 1st DCA 1996)).[10]

Under the Department's construction of the third clause of section 551.102(4), a referendum could only occur if another statute (or a constitutional amendment) was enacted (or adopted) authorizing a referendum. But that was the status quo before section 551.102(4) was amended (or, indeed, enacted). It goes without saying that the Legislature could enact or amend a statute, or that the people could adopt a constitutional amendment, authorizing a referendum. That was true before chapter 2009-170, section 19, was enacted, and remains true after the enactment. There was no need or purpose in enacting a statutory provision to state the obvious. "We have recognized that 'the Legislature does not intend to

[10] Contrary to the Department's assertion, our interpretation does not render superfluous the language "after the effective date of this section." See Ch. 2009-170, § 26, at 1803, Laws of Fla. (providing in part that "[s]ections 4 through 25 [of this act] shall take effect only if the Governor and an authorized representative of the Seminole Tribe of Florida execute an Indian Gaming Compact . . ., only if the compact is ratified by the Legislature, and only if the compact is approved or deemed approved, and not voided pursuant to the terms of this act, by the Department of the Interior, and such sections take effect on the date that the approved compact is published in the Federal Register"); see also Ch. 2010-29, §§ 4-5, at 295, Laws of Fla. (amending ch. 2009-170, § 26, Laws of Fla. and providing that "[s]ections 4 through 25 of chapter 2009-170, Laws of Florida, shall take effect July 1, 2010"). The effective date of the statute was uncertain at the time of its enactment. Nor does our interpretation render superfluous the phrase "pursuant to a statutory or constitutional authorization." Section 125.01(1)(y), Florida Statutes (2012) requires "a majority vote of the total membership of the legislative and governing body," here the Gadsden County Commission, to place a question or proposition on the ballot.

enact useless provisions, and courts should avoid readings that would render [any] part of a statute meaningless.' State v. Goode, 830 So. 2d 817, 824 (Fla. 2002); see also Martinez v. State, 981 So. 2d 449, 452 (Fla. 2008) (repeating this quote). '[W]ords in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words.' State v. Bodden, 877 So. 2d 680, 686 (Fla. 2004)." Metro. Cas. Ins. Co. v. Tepper, 2 So. 3d 209, 215 (Fla. 2009).[11] We decline the invitation to interpret the third clause in a way that would render the clause perfectly meaningless, nugatory and without any legal effect.

Nor is the Department's reliance on sections 551.101 and 551.104(2)[12] persuasive. "When reconciling statutes that may appear to conflict, the rules of

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[11] See also Butler v. State, 838 So. 2d 554, 555-56 (Fla. 2003) ("Because the Legislature does not intend to enact purposeless or useless laws, the primary rule of statutory interpretation is to harmonize related statutes so that each is given effect." (citation omitted)); Sharer v. Hotel Corp. of America, 144 So. 2d 813, 817 (Fla. 1962) ("It should never be presumed that the legislature intended to enact 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 heighth [sic] of absurdity to assume that the legislature intentionally prescribed a formula which creates the need for a Special Disability Fund, and in the next breath deviously destroyed its own handiwork – thus making a mockery of the intended beneficent purpose of the Special Disability Fund itself. . . . We cannot be persuaded that a majority of the legislators designedly used an indirect, unusual and abnormal procedure. It suggests either inadvertence or cabal." (footnote omitted)).

[12] Enacted after article X, section 23 of the Florida Constitution was adopted, but before section 551.102 was amended, section 551.101 provides:

> 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

statutory construction provide that a . . . more recently enacted statute will control over older statutes. See Palm Bch. Cnty. Canvassing Bd. v. Harris, 772 So.2d 1273, 1287 (Fla. 2000); see also ConArt, Inc. v. Hellmuth, Obata + Kassabaum, Inc., 504 F.3d 1208, 1210 (11th Cir. 2007). With regard to th[is] . . . rule, th[e Florida Supreme] Court has explained '[t]he more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.' Harris, 772 So.2d at 1287." Fla. Virtual Sch. v. K12, Inc., 148 So. 3d 97, 102 (Fla. 2014). The Department's reliance on this provision (together with it the maxim inclusio

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> 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. Notwithstanding any other provision of law, it is not a crime for a person to participate in slot machine gaming at a pari-mutuel facility licensed to possess slot machines and conduct slot machine gaming or to participate in slot machine gaming described in this chapter.

Section 551.104(2) provides:

> An application may be approved by the division only after the voters of the county where the applicant's facility is located have authorized by referendum slot machines within pari-mutuel facilities in that county as specified in s. 23, Art. X of the State Constitution.

unius est exclusio alterius) is, moreover, at odds with its issuance of a license for slot machines at Hialeah Race Track.

The Department argues it is precluded from issuing a slot machine license to Gretna Racing because section 551.104(2) "currently allows the Division to approve applications for slot machine permits only from pari-mutuel facilities in [Miami-Dade and Broward C]ounties as specified by article X, section 23, of the Florida Constitution." The actual text of section 551.104(2) provides, however, that an "application may be approved by the division only after the voters of the county where the applicant's facility is located have authorized by referendum slot machines within pari-mutuel facilities in that county as specified in s. 23, Art. X of the State Constitution." (Emphasis supplied.) Article X, section 23 authorized Miami-Dade and Broward Counties to hold county-wide referenda "on whether to authorize slot machines within existing, licensed parimutuel facilities . . . that have conducted live racing or games . . . during each of the last two calendar years before the effective date of this amendment." (Emphasis supplied.)

Hialeah Race Track does not and cannot qualify for licensure pursuant to section 551.104(2) (or the first clause of section 551.102(4)) because live racing or games did not occur there in "each of the last two calendar years before" article X, section 23 was adopted. The parties stipulated in the proceedings below that "Hialeah's application was submitted under the second (2nd) clause of §

551.102(4), F.S., enacted effective 7/1/10," not under section 551.104(2). The second clause, like the third clause, expands the universe of eligible facilities[13] beyond the initial seven addressed in article X, section 23 and section 551.104(2). Hialeah Race Track, like Gretna Racing's horsetrack facility, was not among the initial seven facilities.

Gadsden County complied with all requirements for placing the question on the ballot, and a majority of Gadsden County voters approved slot machines at Gretna Racing's pari-mutuel horsetrack facility. Gadsden County held its referendum after July 1, 2010, the date the legislation amending section 551.102(4) took effect. The Gadsden County Commission had clear, statutory authority to place the question on the ballot. See § 125.01(1)(y), Fla. Stat. (2012). See also Watt v. Firestone, 491 So. 2d 592, 593 (Fla. 1st DCA 1986) (stating non-charter counties have authority to conduct referenda[14] on casino gambling under article

[13] Summarizing the 2009 amendment to section 551.102(4), the title to Chapter 2009-170 described its effect as: "amending s. 551.102, F.S.; redefining the terms 'eligible facility' and 'progressive system' to include licensed facilities in other jurisdictions," not just in Miami-Dade or Broward. Ch. 2009-170, at 1749, Laws of Fla. This description of the amendment makes clear its purpose to redefine eligible facilities, not merely to lay the (wholly unnecessary) groundwork for a subsequent statute or constitutional amendment to redefine terms.

[14] "[T]he referendum power 'can be exercised whenever the people through their legislative bodies decide that it should be used.' Florida Land Co. v. City of Winter Springs, 427 So. 2d 170, 173 (Fla. 1983)." Holzendorf v. Bell, 606 So. 2d 645, 648 (Fla. 1st DCA 1992). Black's Law Dictionary 1285 (7th ed. 1999) defines "referendum" as: "1. The process of referring . . . an important public issue to the people for final approval by popular vote. 2. A vote taken by this

VIII, section 1(f) of the Florida Constitution and section 125.01, Florida Statutes); Crescent Miami Ctr., LLC v. Fla. Dep't of Revenue, 903 So. 2d 913, 918 (Fla. 2005) ("Florida's well-settled rule of statutory construction [is] that the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute." (internal quotation marks and citations omitted)). Because the countywide referendum was held "after the effective date of" the amendment to section

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method." Unlike a referendum required for approval of a special law (see article III, section 10, Florida Constitution, which provides: "No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. Such notice shall not be necessary when the law, except the provision for referendum, is conditioned to become effective only upon approval by vote of the electors of the area affected."), voter approval of slot machines does not automatically result in issuance of a license. Private parties, situated as described in Chapter 551, must then take the initiative and make application for a license. Since issues may arise regarding whether an applicant satisfies other statutory requirements for licensure, the grant of a license is not automatic.

The Department asserts, for the first time on appeal, that the favorable response of Gadsden County voters to a "sentiment" question about slot machines was not the specifically authorized referendum required by section 551.102(4). See generally D.R. Horton, Inc.- Jacksonville v. Peyton, 959 So. 2d 390, 397 (Fla. 1st DCA 2007) ("When the trial court reaches the right result, but for the wrong reasons, that decision will be upheld on appeal if there is any basis which would support the judgment in the record." (citing Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644-45 (Fla. 1999))). The Department's argument that section 125.01(1)(y), Florida Statutes, does not authorize Gadsden County to hold a legally binding referendum regarding slot machines and that obtaining "an expression of voter sentiment" is "notably different from referring a legislative act to the people for 'final approval by popular vote'" cannot be reconciled with Watt v. Firestone, 491 So. 2d 592, 593 (Fla. 1st DCA 1986).

551.102(4), Gretna Racing is an "eligible facility," as defined in section 551.102(4).

We certify the following as a question of great public importance:

> 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?

Reversed and remanded with directions to grant Gretna Racing's application for licensure.

CLARK, J., CONCURS; MAKAR, J. DISSENTS WITH OPINION.

MAKAR, J., dissenting.

Gadsden County, where the pari-mutuel facilities of Gretna Racing, Inc., are located, held a countywide non-binding vote in January 2012, the result of which showed that the sentiments of a majority of its electorate favor slot machines at those facilities. Based upon that vote, Gretna Racing now seeks a license for slot machines. Via local referenda authorized by a 2004 state constitutional amendment, however, slot machines were approved and are currently permitted in only two Florida counties: Miami-Dade and Broward. Art. X, § 23, Fla. Const. The question in this statutory interpretation case is whether the Legislature intended to allow expansion of slot machines via local referendum into all other Florida counties in like manner through a 2009 enactment. Ch. 2009-170, Laws of Florida, § 19 (amending section 551.102(4), Fla. Stat.). Because the Gadsden County vote was not an authorized "referendum," amounting to only a non-binding vote of the electorate, it has no binding legal effect. Moreover, nothing in the language, structure, or history of slot machine legislation, including section 551.102(4), Florida Statutes, provides authorization for the holding of slot machine referenda in counties other than Miami-Dade and Broward counties. The administrative order denying issuance of a slot machine license to Gretna Racing should be upheld.

I.

A. The 1885 Constitution

Florida has no history or tradition of allowing slot machines within its borders. To the contrary, other than a very brief period in the State's history—a depression era lacuna from about 1935 to 1937 when the state legislature and the state supreme court were briefly in synch over their legality in highly limited circumstances—slot machines have been prohibited as unlawful lotteries from statehood until the recent passage of a constitutional amendment in 2004 authorizing referenda in Miami-Dade and Broward Counties to permit their usage (more on that later).

The 1885 Constitution prohibited lotteries. Art. III, § 23 (1885) ("Lotteries are hereby prohibited in this State.") As mechanical slot machines developed shortly before the turn of the century, they were generally considered within this prohibition. Because the 1885 Constitution did not define the scope of what constituted a lottery, the Legislature had a degree of flexibility in determining its definitional parameters, which it exercised by enacting the State's first slot machine statute in 1935, allowing for their use. By doing so, the Florida Supreme Court was put in the position of deciding whether slot machines were impermissible under the state constitution's anti-lottery provision, resulting in a judicial decision that altered the three-part lottery test that had prevailed since

shortly after the 1885 Constitution was enacted (a lottery = prize + chance + consideration). In an adroit ruling, the supreme court added a fourth part to the test—widespread operation—which allowed the use of slot machines unless they became too prevalent. That decision, Lee v. City of Miami, 163 So. 486 (Fla. 1935), upheld the facial validity of a statute allowing the use of specified slot machine-like devices, but held that their widespread use might amount to an impermissible lottery under the constitutional prohibition. Id. at 490 ("It may be that some of [the coin-operating vending machines], or possibly all of them in their operation, will become [illegal lotteries]; but we leave that question to be determined when a specific case arises."); see also Hardison v. Coleman, 164 So. 520, 524 (Fla. 1935) (lotteries include "such gambling devices or methods which because of their wide or extensive operation a whole community or country comes within its contaminating influence"). Thus, as of 1935, a limited class of slot machines were deemed permissible, and were authorized by legislative act, so long as their use was not widespread or extensive across a community.

Slot machines, like the proverbial camel's nose under the tent, rapidly proliferated but soon fell in disfavor due to their widespread use and deleterious effects.[15] As one commentator has noted:

[15] See generally Stephen C. Bousquet, The Gangster in Our Midst: Al Capone in South Florida 1930-1947, 76 Fla. Hist. Q. 297, 307 (1998) (history of gangster Al Capone in Miami, noting that "wide-open gambling rackets in South Florida

> When the Florida Supreme Court decided *Lee* and *Hardison* in 1935, it must have viewed slot machines as novelties and standalone devices, like Mr. Hardison's slot machine, as opposed to paper lottery tickets, which could be sold and distributed all over a community. Things did not unfold in the next two years in the way the Florida Supreme Court apparently expected in 1935. In 1937, the Florida comptroller, the same J.M. Lee who had prevailed in *Lee*, prepared a document for Florida Governor Fred Cone estimating there to be 10,000 slot machines with total yearly play of $52 million in Florida. Even children were allowed to gamble on these machines. Slot machines in their actual operation had collectively turned out to be widespread and lotteries under *Lee*'s criteria, but the Florida Supreme Court did not have a case to revisit the issue directly. Instead, the legislature and Governor Cone took matters into their own hands by repealing the 1935 slot machine statute in 1937. The vote for repeal in the legislature was overwhelming. This repeal statute, which also banned slot machines, was authored and vigorously championed by a young representative and future Florida governor named LeRoy Collins, who called the two-year experience with slot machines "a dose of moral poison."

David G. Shields, Slot Machines in Florida? Wait A Minute, Fla. B.J., Sept./Oct. 2013, at 12 (footnotes omitted). In two years, a complete turn of the wheel had occurred; slot machines were prohibited once again. By 1939, the three-part test was back in force; the "widespread operation" part that the court temporarily relied upon to legitimize slot machines was now absent. See Little River Theatre Corp. v. State ex rel. Hodge, 185 So. 855, 861 (Fla. 1939) ("The authorities are in accord that a lottery has three elements; first, a prize; second, an award by chance; and, third, a consideration."). And slot machines were again relegated to nothing more

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stretched from Coral Gables north to Fort Lauderdale" and that the "legalization of racetrack betting in 1931, and of slot machines four years later, made South Florida a mecca for gamblers.").

than a societal menace. Pasternack v. Bennett, 190 So. 56, 57 (Fla. 1939) ("[I]t is definitely settled in this jurisdiction that those devices commonly known as slot machines are gambling devices; that the use and operation of them has a baneful influence on the persons who indulge in playing them and that they constitute such a menace to public welfare and public morals as to be subject to the police power of the State to regulate, control, prohibit or destroy them.").

B. The 1968 Constitution

Over three decades passed before the issue of lotteries arose again. In adopting a new state constitution, the people of the State of Florida included an anti-lottery provision that drew upon the 1885 constitution's ban of all lotteries with the limitation that certain existing types of pari-mutuel pools would be allowed to continue. The new anti-lottery provision stated: "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state." Art. X, § 7, Fla. Const. (1968). In essence, the 1968 constitutional revision cemented in place the statewide ban on all types of lotteries (which would include slot machines used on a widespread basis), allowing only the limited types of gaming that then existed by law.

This point was made in a case out of Jacksonville, Florida, in which the legality of bingo was questioned under the new constitution. By close vote, the Florida Supreme Court held that because bingo was legislatively authorized at the

time of article X, section 7's enactment, it was grandfathered in as a permissible lottery.

> Obviously, the makers of our 1968 Constitution recognized horse racing as a type of lottery and a 'pari-mutuel pool' but also intended to include in its sanction those other lotteries then legally functioning; namely, dog racing, jai alai and bingo. *All other lotteries including bolito, cuba, slot machines, etc., were prohibited.*

Greater Loretta Imp. Ass'n v. State ex rel. Boone, 234 So. 2d 665, 671-72 (Fla. 1970) (emphasis added). As the highlighted language makes evident, the supreme court—consistent with article X, section 7's clear language—drew a bright line: existing "lotteries" such as pari-mutuel pools for dog racing, jai alai and bingo survived; all other "lotteries" including "slot machines" were impermissible. Whatever authority the Legislature may have previously had to allow these types of gaming was gone. A broad definition of lottery now prevailed, one that included slot machines, but which excluded gaming then-sanctioned by legislation. A new era was ushered in, one in which a constitutional amendment was necessary to allow any type of activity broadly understood as a lottery under article X, section 7 other than those grandfathered in. This understanding of the constitutional language, as interpreted in Greater Loretta was put into doubt in 2004, as the next section explains.

C. The 2004 Slots Amendment and Chapter 551

After the decision in Greater Loretta, interest in expanding gaming in

Florida via constitutional amendment increased. Various failed proposals were attempted.[16] In the 1986 general election, however, the state constitution was amended to authorize a state-run lottery whose net proceeds would be put in a state education trust fund. Art. X, § 15(a), Fla. Const. ("Lotteries may be operated by the state.").

Starting in 2002, an effort was made to amend the constitution to allow slot machines in all counties by local referenda. Proposed section 19(a) of the amendment stated:

> (a) Slot machines are hereby permitted in those counties where the electorate has authorized slot machines pursuant to referendum, and then only within licensed pari-mutuel facilities (*i.e.*, thoroughbred horse racing tracks, harness racing tracks, jai-alai frontons, and greyhound dog racing tracks) authorized by law as of the effective date of this section, which facilities have conducted live pari-mutuel wagering events in each of the two immediately preceding twelve month periods.

Advisory Op. to the Att'y. Gen. re Authorization for Cnty. Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities, 813 So. 2d 98, 99 (Fla. 2002). The proposal was held to violate the single subject requirement and was thereby removed from the ballot.

In 2004, a more limited constitutional amendment was proposed "that would

[16] See, e.g., Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978) (proposed amendment to authorize state-regulated, privately operated casino gambling in Dade and Broward Counties with tax revenues to be used for education and local law enforcement purposes) (allowed on ballot, but failed).

permit two Florida counties to hold referenda on whether to permit slot machines in certain parimutuel facilities." Advisory Op. to the Att'y. Gen. re Authorizes Miami-Dade & Broward Cnty. Voters To Approve Slot Machines In Parimutuel Facilities, 880 So. 2d 522 (Fla. 2004) ("Advisory Op. re: Slot Machines").[17] Those

[17] The proposal was as follows:

> Article X, Florida Constitution, is hereby amended to add the following as section 19:
> SECTION 19. **SLOT MACHINES**-
> (a) After voter approval of this constitutional amendment, the governing bodies of Miami-Dade and Broward Counties each may hold a county-wide referendum in their respective counties on whether to authorize slot machines within existing, licensed parimutuel facilities (thoroughbred and harness racing, greyhound racing, and jai-alai) that have conducted live racing or games in that county during each of the last two calendar years before the effective date of this amendment. If the voters of such county approve the referendum question by majority vote, slot machines shall be authorized in such parimutuel facilities. If the voters of such county by majority vote disapprove the referendum question, slot machines shall not be so authorized, and the question shall not be presented in another referendum in that county for at least two years.
> (b) In the next regular Legislative session occurring after voter approval of this constitutional amendment, the Legislature shall adopt legislation implementing this section and having an effective date no later than July 1 of the year following voter approval of this amendment. Such legislation shall authorize agency rules for implementation, and may include provisions for the licensure and regulation of slot machines. The Legislature may tax slot machine revenues, and any such taxes must supplement public education funding statewide.
> (c) If any part of this section is held invalid for any reason, the remaining portion or portions shall be severed from the invalid portion and given the fullest possible force and effect.
> (d) This amendment shall become effective when approved by vote

opposing the so-called Slots Amendment argued in their briefs that the amendment, if passed, would allow a form of lottery and thereby amend the anti-lottery provision of the constitution without saying so in the ballot summary. No party cited Greater Loretta, nor did the Florida Supreme Court in its advisory opinion, which said—contrary to both Greater Loretta's statement that slot machines are an impermissible type of lottery under the 1968 constitution, and the holdings in Lee and Hardison that slot machines would be impermissible lotteries if in widespread use—that slot machines are *not* a form of lottery. Id. at 525. In doing so, the supreme court relied only on its 1930s decisions in Lee and Hardison, citing them for the proposition that the court had "long since settled the question of whether slot machines constitute lotteries." Id. at 525. On its face, the supreme court's advisory opinion overlooked its precedent in Greater Loretta and misapprehended the limited scope of Lee and Hardison, which during their fleeting shelf lives in the 1930s never authorized slot machines on a widespread basis.

To effectuate the Slots Amendment, the Legislature in 2005 enacted Chapter 551, Florida Statutes, entitled "Slot Machines", which laid out the authority for slot machines in Miami-Dade and Broward Counties and the manner in which they would be regulated. As to authority, the statute in section 551.101, entitled "**Slot**

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of the electors of the state.

Advisory Op. re: Slot Machines, 880 So. 2d at 522-23. After passage, it was placed in section 23 of article X rather than section 19.

machine gaming authorized," stated—and still states today—as follows:

> 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. Notwithstanding any other provision of law, it is not a crime for a person to participate in slot machine gaming at a pari-mutuel facility licensed to possess [slot machines] and conduct slot machine gaming or to participate in slot machine gaming described in this chapter.

§ 551.101, Fla. Stat.; Ch. 2005-362, § 1, Laws of Fla. The bracketed phrase was added in 2007. Ch. 2007-5, § 129, Laws of Fla. No other change has been made to this section, which specifies the breadth of the counties for whom authorization is explicitly authorized: Miami-Dade and Broward only.

This point was emphasized in an inter-branch dispute over the State's gaming compact with the Seminole Tribe. See Fla. House of Reps. v. Crist, 999 So. 2d 601, 614 (Fla. 2008) ("The state's constitution authorizes the state lottery, which offers various Class III games, *and now permits slot machines in Miami–Dade and Broward Counties*.") (emphasis added). Indeed, in holding that Governor Crist exceeded his authority in signing a compact with the Seminole Tribe that allowed for gaming that was illegal under Florida law, the Florida Supreme Court said "[i]t is . . . undisputed . . . that the State prohibits all other

types of Class III gaming, including lotteries not sponsored by the State *and slot machines outside Miami–Dade and Broward Counties*." Id. (emphasis added). In other words, as of 2008, the supreme court recognized that slot machines continued to be illegal other than in Miami-Dade and Broward Counties, seemingly in conflict with the supreme court's 2004 statement in Advisory Opinion re: Slot Machines.

D. The 2009 Amendments to Chapter 551

Because the gaming compact with the Seminole Tribe had just been deemed illegal, during its next general session in 2009 the Florida Legislature was consumed with enacting legislation to ensure a legal compact was achieved, which resulted in last minute legislative ping-pong between the Senate and House to finalize what ultimately was chapter 2009-170, Laws of Florida. What began and progressed through the session as a bill devoted entirely to the Seminole Tribe gaming compact issue, Senate Bill 788 ultimately morphed into a final bill that also included the amendment to section 551.102(4) at issue here.

During the conference committee process, the following amendment to section 551.102 was added and approved:

> 551.102. Definitions.
> As used in this chapter, the term:
>
> (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.

Ch. 2009-170, § 19, Laws of Fla. Sections 4 through 25 of the act would not take effect by their enactment; instead, they would only take effect if specified events in the process of establishing the Seminole Gaming Compact were achieved.[18] These conditions precedent were removed during the next legislative session. Ch. 2010-29, § 4, Laws of Fla.

The 2009 amendment to "eligible facilities" has two clauses, referred to as the "second clause" and "third clause." The former, which was designed to expand

[18] The contingencies were met "if the Governor and an authorized representative of the Seminole Tribe of Florida execute an Indian Gaming Compact pursuant to the Indian Gaming Regulatory Act of 1988 and requirements of this act, only if the compact is ratified by the Legislature, and only if the compact is approved or deemed approved, and not voided pursuant to the terms of this act, by the Department of the Interior, and such sections take effect on the date that the approved compact is published in the Federal Register." Ch. 2009-170, § 26, Laws of Fla.

the number of facilities in Miami-Dade County beyond those existing at the time, was upheld in Florida Gaming Centers, Inc. v. Florida Department. of Business & Professional Regulation, 71 So. 3d 226 (Fla. 1st DCA 2011) (statute allowing holders of pari-mutuel wagering permits in Miami-Dade County to obtain approval for slot machines in that county did not violate constitutional provision authorizing slot machine gaming in Miami–Dade County; legislature may expand slot machine gaming beyond the existing facilities provided they meet the specified criteria). The third clause, the one at issue in this litigation, is claimed by Gretna Racing to be the Legislature's expression of authority to allow slot machine referenda in any of the other sixty-five counties; the Department reads its differently, siding with the hearing officer and the Attorney General, who read it to say that the authorization for slot machine referenda does not exist other than in Miami-Dade and Broward Counties.

II.

A.

This case has been presented as a statutory interpretation case, but, as an initial matter, it is not at all clear that the Legislature has the constitutional authority to expand the use of slot machines outside of the geographic areas of Broward and Miami-Dade Counties as permitted by article X, section 23. The Florida Supreme Court's decision in Greater Loretta, which has not been

overturned, explicitly held that article X, section 7, of the 1968 Constitution, prohibited—as a form of lottery—the use of slot machines anywhere in the State. It is worth repeating: "All other lotteries including bolito, cuba, *slot machines*, etc., were *prohibited*." 234 So. 2d at 672 (emphasis added). Yet the supreme court in Advisory Opinion re: Slot Machines in 2004 stated its belief that its 1930s decisions involving slot machines had settled the question of whether slot machines are lotteries, but it did so without so much as mentioning its directly contrary decision in Greater Loretta; the supreme court is not in the habit of silently overruling its precedents. Puryear v. State, 810 So. 2d 901, 905-06 (Fla. 2002) ("We take this opportunity to expressly state that this Court does not intentionally overrule itself sub silentio."). So which is it? Are slot machines a form of lottery that only the people may approve via constitutional amendment? Or are slot machines not prohibited as lotteries under article X, section 7, which may be legislatively authorized statewide without constitutional authority?

Despite the uncertainty that exists, counsel for Gretna Racing and the Department at oral argument disagreed with the notion that any constitutional limitation exists on the Legislature's authority to expand slot machines statewide; they disagreed only on whether the statute at issue was intended to do so without additional statutory or constitutional authority. Similarly, some argue that this Court has already implicitly held in Florida Gaming Centers that the Legislature is

not limited by the anti-lottery provision in article X, section 7, and may expand slot machines statewide if it chose to do so. That case, of course, did not make such a holding, didn't even mention Greater Loretta, and was limited to only whether a facility *in Miami-Dade County* could be legislatively included as an eligible facility for slot machines in that already-approved jurisdiction. 71 So. 3d at 227-29. That the Legislature allowed additional facilities in a county already authorized by article X, section 23, to have slot machines is a far different question than whether the Legislature may allow expansion into the other sixty-five counties that have not been given constitutional authority to hold slot machine referenda. As such, it appears that a serious unresolved question exists, one upon which this Court need not pass to resolve the specific dispute this case, but one for which a clear resolution is needed. See generally Shields, supra (discussing the need to address the conflict between Greater Loretta and Advisory Opinion re: Slot Machines).

B.

Bearing in mind the history of the illegality of slot machines in Florida, and keeping the Florida Supreme Court's uncertain jurisprudence about slot machines as lotteries as a backdrop, we turn to the statutory interpretation question at issue: Did the Legislature intend its 2009 amendment to the definition of "eligible facility" in section 551.102(4) to authorize the sixty-five counties other than Miami-Dade and Broward to hold slot machine referenda in their jurisdictions

without the passage of additional authority for such referenda?

The key portion to be interpreted is whether "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." § 551.102(4), Fla. Stat. (emphasis added). The question is which of two differing interpretations of the italicized phrase should prevail.

Greta Racing operates a pari-mutuel facility in Gadsden County, which held a "voter's sentiments" election on January 31, 2012, on the topic pursuant to section 125.01(1)(y), Florida Statutes. Gretna Racing reads this phrase as two separate and independent provisions: "*held [1] pursuant to a statutory or constitutional authorization [2] after the effective date of this section.*" It reads the latter portion—[2]—to mean that a county is authorized to hold a local vote on slot machine approval "after the effective date" of the statute. Rather than modifying the immediately adjacent word "authorization," it views [2] as modifying the word "held" only, which appears eight words earlier. It reads the former portion—[1]—as meaning that slot machine approval need only be "pursuant to a statutory or constitutional authorization" on the books at the time of the vote. It rejects reading [1] and [2] together as requiring specific or additional statutory or constitutional authorization for county referenda to approve slot machines, such as the

authorization given to Miami-Dade and Broward under article X, section 23; instead, a county may hold a slot machine vote under whatever existing general authority it has to submit a vote to the public.

The Department offers a different view, one that is consistent with a plain reading of the statute, the rules of statutory construction, and the history of slot machine legislation in Florida. The Department views the phrase "pursuant to a statutory or constitutional authorization after the effective date of this section" as one continuous, connected union of words that collectively state the authority to which a slot machine referendum must be held. The phrase, in total, directly follows and modifies the words "referendum held" to explain that the "statutory or constitutional authorization" for a referendum on slot machines must be "after the effective date of this section." In other words, the legal "authorization" for such a vote is not already on the books; the authorization must be "after" the section's effective date.

This reading is superior to that posited by Gretna Racing in many ways. First, under a plain reading approach the language at issue is essentially one long adjective modifying "referendum," explaining what authorization is necessary for future county referenda on slot machines. It does not require that the two components of the phrase, [1] and [2], be separated and moved about like refrigerator magnets to restructure and thereby change the meaning of the statute.

Under Gretna Racing's reading, the statute would read: "referendum held [2] after the effective date of this section and [1] pursuant to an existing general statutory or constitutional authorization of referenda ~~after the effective date of this section~~." Separating and re-positioning the phrase "after the effective date of this section" to an earlier point changes the statute markedly; detaching the two neighboring words "authorization after" from one another removes the direct temporal connection between them. Read as written by the Legislature, the "statutory or constitutional authorization" for the referenda must have arisen "after the effective date of this section." Moreover, the phrase "referendum held pursuant to *a* statutory or constitutional authorization after the effective date of this section" envisions a separate and distinct *new* basis of authority; if existing referenda powers were enough, the statute need only say "held pursuant to ~~a~~ statutory or constitutional authorization," making the "a" redundant. It is plain that this statute alone does not provide the authorization for statewide slot machine referenda.

This perspective is consistent with the Attorney General's view of the third clause, upon which the hearing officer heavily relied:

> Applying standard rules of statutory and grammatical construction, it is clear that the phrase "after the effective date of this section" modifies the words immediately preceding it, *i.e.*, "a statutory or constitutional authorization." Specifically, under the last antecedent doctrine of statutory interpretation, qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to others more remote, unless a contrary intention appears. Here, all pertinent

> considerations confirm that the Legislature intended that any statutory or constitutional authorization for a slots-approving referendum must occur after July 1, 2010, the effective date of the relevant portion of section 551.102(4), Florida Statutes.

Op. Att'y Gen. 12-01 (2012) (internal citations and footnotes omitted); see also State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993) ("Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive."); Beverly v. Div. of Beverage of Dep't. of Bus. Reg., 282 So. 2d 657, 660 (Fla. 1st DCA 1973) (official opinions of the Attorney General, though not binding, are "entitled to great weight in construing the law of this State."). The Attorney General continued, saying:

> Similarly, if a county's existing powers were sufficient to authorize a slots-approving referendum, there would be no need to include the phrase "pursuant to a statutory or constitutional authorization." Had the Legislature simply been referring to a county's existing statutory or constitutional authority, the following stricken language could have been omitted without causing any change in the meaning of the statute:
>
> > "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 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."
>
> Instead, the Legislature chose to mandate that the referendum be held

> "pursuant to a statutory or constitutional authorization"—an explicit qualifier that appears to be unique in the Florida Statutes. Indeed, no other referendum provision in the Florida Statutes employs similar language. Thus, I cannot conclude that the language "statutory or constitutional authorization" merely recognizes a county's authority in existence as of the effective date of the act. Rather, the Legislature's chosen language requires the adoption of a statute or constitutional amendment specifically authorizing a referendum to approve slot machines.

Op. Att'y Gen. Fla. 12-01 (2012) (footnotes omitted). Her opinion, though not binding, and merely persuasive, is spot on.

The statute need not be rewritten to achieve the Department's view by inserting the word "enacted" between "authorization" and "after" (i.e., "pursuant to statutory or constitutional authorization enacted after the effective date of this section."). While insertion of the word "enacted" may provide a degree of clarity, it is unnecessary. And from a grammatical viewpoint, the statute would need to say "pursuant to a statute ~~statutory~~ or constitutional amendment ~~authorization~~ enacted after the effective date of this section" to be intelligible. Statutes and constitutions can be "enacted"; saying an "authorization" was "enacted" is exceptionally awkward.

Second, the Department's reading is more faithful to the statute's structure and answers the question of what legal authorization is necessary for local slot referenda. Keep in mind that no statutes exist, other than those passed to effectuate referenda in Miami-Dade and Broward as constitutionally authorized, see, e.g.,

§§ 551.101 (slot machines in Miami-Dade and Broward authorized "provided that a majority of voters in a countywide referendum have approved slot machines at such facility in the respective county.") and .104(2) ("An application may be approved by the division only after the voters of the county where the applicant's facility is located have authorized by referendum slot machines within pari-mutuel facilities in that county as specified in s. 23, Art. X of the State Constitution."), that provides authorization for slot machine approval via county referenda. Gretna Racing cannot point to any such authorization; all it relies upon is a generalized "voter sentiment" statute (discussed later) that provides no authorization for approval of any substantive matter of county concern. § 125.01(y), Fla. Stat. Gretna Racing's reading of section 551.102(4) would transform an exceedingly limited authority for county straw polls into a broad authority to expand slot machines statewide, which cannot possibly be what the Legislature intended.

Third, if the Legislature truly intended to immediately expand the authority of counties to hold referenda on slot machines, without future "statutory or constitutional authorization" for such referenda, it assuredly would have amended a critical portion of the slot machine statute, which is the authorization section, entitled "Slot machine gaming authorized." § 551.101, Fla. Stat. That statute, which limits authorized slot machine gaming to Miami-Dade and Broward Counties, was not amended to include any other possibilities.

Fourth, it takes little imagination to envision, particularly in the heat of an internal debate over legislation about the Seminole Tribe gaming compact, that the potential proliferation of slot machines statewide in competition with the Tribe's gaming operations would merit some legislative statement about how local expansion beyond Miami-Dade and Broward might occur. On this point, the Attorney General, recognizing the context in which section 551.102(4) was amended, said:

> [T]he conclusion that additional legislative authorization is required for a slots-approving referendum gives due recognition to the context in which the Legislature adopted the relevant portion of section 551.102(4), Florida Statutes. The language in question took effect as part of legislation ratifying a gaming compact between the State and the Seminole Tribe of Florida, which contained provisions mandating a reduction or loss of revenue to the State in response to an expansion of slot machine gambling beyond that which existed at the time of the compact's adoption. To read the pertinent language in section 551.102(4) as allowing counties other than Miami-Dade and Broward by referendum to authorize slot machines, absent specific legislative or constitutional authority, would be at odds with the legislation as a whole. Specifically, that interpretation of the statute would eliminate the State's control over its continued entitlement to a substantial amount of revenue from the Seminole Tribe. In light of the intense consideration and debate that went into the Legislature's approval of the Seminole compact, it is virtually unthinkable that the Legislature would have intended to both undermine and ratify the compact in the same enactment. The basic canons of statutory interpretation require me to reject a reading of section 551.102(4) that would lead to such an absurd result.

Op. Att'y Gen. Fla. 12-01 (2012). In this context, the third clause is easily seen as a statement that set the parameters for possible future expansion via county

referendum, which would require "statutory or constitutional authorization after the effective date of this section." This view of the statute does not render it meaningless or inconsequential. It reflects that the authority to expand slot machines beyond Miami-Dade County must be pursuant to a statutory or constitutional authorization that currently does not exist, which makes sense given the first clause's limitation to Miami-Dade County as well as the doubt that surrounds whether the Legislature has authority to expand slot machines into counties other than Miami-Dade and Broward without a constitutional amendment like article X, section 23. Nothing prohibits legislation that has a contingency that makes a statute effective only upon some triggering event (such as possible future authorization of slot machines on a local basis via referendum). And nothing prohibits the Legislature from enacting a statute that operates as a restraint on society with a stated understanding about how that restraint might be eliminated in the future. Not all statutes are blossoms; some are only seeds. One need look no further than our state constitution, which has a provision allowing for the legislature to pass a special law without notice to an affected community that "is *conditioned to become effective only upon approval by vote of the electors of the area affected*." Art. III, § 10, Fla. Const. (emphasis added). By analogy, the enactment of the third clause in 551.102 was the legislature acting in anticipation of a contingency.

Fifth, to the extent one sees an ambiguity in the statute, the legislative history, exceptionally limited as it is (nothing written, only comments by legislators during a floor debate), is helpful. The Attorney General's opinion is again persuasive on this point:

> Legislative intent, the cornerstone of all statutory interpretation, may be illuminated by the comments of the sponsor or proponents of a bill or amendment. The Senate bill sponsor, Senator Dennis Jones, gave the following explanation on second reading of the 2010 legislation in response to a question about the local referendum process for a county that wants to add slot machine gaming and how that process would work:
>
> > "Should we want to expand in the future, a Legislature would come back and . . . let's just say we wanted to go to Class III slots, we could not do that as a local bill but we could come up here and file it as a general bill and should that bill pass to allow [a county] to have a referendum of the people and then the people vote on it, if it was passed, we could get Class III slots but it [would] also break the compact with the Indians."
>
> In further clarification, Senator Jones stated:
>
> > "If they have a referendum in a county outside of Miami-Dade and Broward for the purpose of Class III gaming *and the Legislature passes the legislation to allow that county to have the referendum*, the county has the referendum and that referendum passes, then that would effectively break the payments of the compact." (e.s.)
>
> The above explanation by a sponsor of the legislation clearly indicates that, under the pertinent language in section 551.102(4), Florida Statutes, a county referendum to approve slots must be specifically authorized by a statute or constitutional amendment enacted after July 1, 2010. Such an explanation is contrary to any assertion that the Legislature intended the provisions of section 551.102(4), in

> conjunction with a county's already-existing powers, to constitute authority for a county to hold a referendum on slot machine gaming.

Op. Att'y Gen. Fla. 12-01 (2012) (footnotes omitted). In sum, little commends the reading that Gretna Racing places on section 551.104(2), and essentially every meaningful means of statutory interpretation favor the Department's view, which is itself accorded great weight. Orange Park Kennel Club, Inc. v. State, Dept. of Bus. & Prof'l Reg., 644 So. 2d 574, 576 (Fla. 1st DCA 1994) ("An agency's construction of a statute which it administers is entitled to great weight and will not be overturned unless the agency's interpretation is clearly erroneous; the agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations."). What's more, Gretna Racing seeks an exception to the long-standing prohibition against slot machines, the possession and use of which are criminal acts absent clear authorization, which is why the statute at issue is strictly construed as opposed to expansively interpreted. PPI, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, 698 So. 2d 306, 308 (Fla. 3d DCA 1997) ("The penny-ante statute is an exception to long-standing Florida law that prohibits all such forms of gambling; as such, it is to be strictly construed."); State v. Nourse, 340 So. 2d 966, 969 (Fla. 3d DCA 1976) ("Being an exception to a general prohibition, any such statutory provision is normally construed strictly against the one who attempts to take advantage of the exception.").

C.

Finally, even if the statute could be read as Gretna Racing suggests, the Gadsden County vote was neither a "referendum" nor did it provide voter approval as section 551.104(2) requires, which states that a "majority of voters have *approved* slot machines at such facilities in a countywide *referendum*" to be eligible. (Emphasis added). The state constitution provides that "Special elections and referenda shall be held as provided by law." Art. VI, § 5, Fla. Const. The phrase "as provided by law" means an act passed by the Legislature. Holzendorf v. Bell, 606 So. 2d 645, 648 (Fla. 1st DCA 1992).

The sole statutory authorization the County relied upon for holding a "referenda" on slot machines, section 125.01(1)(y), Florida Statutes, neither provides for a "referendum" nor does it permit voter approval of any substantive matters. It states in relevant part:

> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:
> . . .
>
> (y) *Place questions or propositions on the ballot* at any primary election, general election, or otherwise called special election, when agreed to by a majority vote of the total membership of the legislative and governing body, *so as to obtain an expression of elector sentiment with respect to matters of substantial concern within the county*. No special election may be called for the purpose of conducting a straw ballot.

§ 125.01(1)(y), Fla. Stat. (emphasis added). Rather than allowing for voter *approval* on a substantive matter, which is the essence of a referendum, see 5 McQuillin Mun. Corp. § 16:51 (3d ed.) ("Referendum is the right of people to have an act passed by the legislative body submitted for their approval or rejection.") (footnote omitted), section 125.01(1)(y) merely allows for voters to express their *sentiments* on a matter. Voter sentiment falls short of voter approval; sentiment is mere opinion akin to a straw vote that is non-binding; approval is authorization, which is binding. City of Miami v. Staats, 919 So. 2d 485, 487 (Fla. 3d DCA 2005) (non-binding straw ballot defective because "it fails to adequately inform the voting public that their response has no official effect, i.e., that the ballot question is simply a nonbinding opinion poll."); 5 McQuillin Mun. Corp. § 16:51 (3d ed.) ("Ordinarily, 'referendum' does not include nonbinding public questions.") (footnote omitted). At most, the County could only have put to the voters the non-binding question of whether they are supportive of slot machines in the Gretna Racing facility. City of Hialeah v. Delgado, 963 So. 2d 754, 757 (Fla. 3d DCA 2007). And to the extent the County's vote under section 125.01(1)(y) is portrayed as a binding "referendum," it was not; it could not have been absent statutory or constitutional authorization giving the County referendum powers. As we said in Holzendorf, "Since the constitution expressly provides that the power of referendum can be granted only by the legislature, it is beyond the power of the

electorate to say what shall or shall not be done by referendum." Id. The administrative order, even if incorrect in its construction of section 551.102(4) is nevertheless legally correct. Dade Cnty Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999) (appellate court not limited to "reasons given by the trial court but rather must affirm the judgment if it is legally correct regardless of those reasons").

III.

The Department's interpretation of the third clause in section 551.102(4) is an entirely reasonable one. The alternative view, which would restructure the statute and change its meaning to allow slot machines to be deployed on a statewide basis without any clear authority to do so, is inconsistent with principles of statutory and constitutional construction, legislative intent, and the history of laws prohibiting slot machines in the State of Florida. Because the issue presented is one of great public importance statewide, the following certified question is appropriate:

> 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 Florida counties without additional statutory or constitutional authorization after the effective date of the act?

Should our supreme court choose to review this question, consideration should also be given to resolution of the Legislature's authority under the 1968 Constitution to

authorize slot machines at pari-mutuel facilities in counties other than Miami-Dade or Broward, whose authority arises from article X, section 23. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 912 (Fla. 1995) ("Having accepted jurisdiction, we may review the district court's decision for any error."); Puryear v. State, 810 So. 2d 901, 905-06 (Fla. 2002) ("Where this Court's decisions create this type of disharmony within the case law, the district courts may utilize their authority to certify a question of great public importance to grant this Court jurisdiction to settle the law.").