

# memorandum

**to:** Rick Michaud  
**from:** Tim Murphy  
**subject:** Limitations on Racinos  
**date:** 12/18/03

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Rick, you have asked me to review whether the City can limit the ability of Scarborough Downs/Penn National, or a successor entity, to expand the manner, type and amount of gambling at a proposed Saco "racino" facility. Put another way, you want to know if the City can bar Scarborough Downs from expanding beyond the proposed 1500 slots machines; bar an increase in machines; bar other types of gambling such as poker, craps, roulette, etc.

The short answer is yes, the type, nature and amount of gambling at a proposed Saco facility can be strictly limited and controlled by a number of means.

## SUMMARY OF CONCLUSIONS

1. Casino style gambling (roulette, craps, poker, etc) is not presently permitted under state law, and given the tenor of the times it appears highly unlikely it will be authorized in the near future. State law is the first limitation.
2. Slot machine gambling is currently allowed under state law, but is strictly limited to two locations. Any such gaming facility may only be situated at an existing harness racing track that held a minimum number of races last year: in short, only two possible locations Scarborough and Bangor.
3. The Attorney General has issued an opinion that suggests localities such as Saco are not barred from by the so-called pre-emption doctrine from regulating the operations of slot machines. Saco may therefore set reasonable time, place and manner restrictions, including restrictions on the number of machines at a facility, limitations on the hours of operation, etc. Authority is derived from Saco's Home Rule rights under 30-A MRSA Section 3001 and Maine case law interpreting that provision and the Maine Constitutional provision on Home Rule.
4. The proposed location for a Saco horse racing facility, more appropriately the proposed use, is not a permitted or conditional use in the "BP" zone. As a result, Scarborough Downs will need to seek a so-called "contract zone" approval from the City. No party has a right (vested, statutory, constitutional or otherwise) to claim an entitlement to a contract zone change. Therefore the City, as part of the contract zone application process, may create and establish a range of reasonable time, place and manner restrictions upon Scarborough Downs including a limitation on the number of machines. As a result, Saco may limit Scarborough Downs to 1 machine, 100 machines or

1,000 machines; whatever numbers the Council can accept. It may also force other restrictive conditions upon the applicant.

5. Contract zoning limitations may seem surplusage in light of the fact that Saco may set time, place and manner restrictions via local ordinances as discussed in number 3 above. However, contract zoning restrictions provide additional coverage in case local officials attempt later to alter and amend local laws, and more importantly in case the State should someday decide to pre-empt and regulate the field. Were the latter to happen, the State rules would wipe out local ordinances, but they likely could not wipe the slate created by contract zoning.
6. The last and best time, place and manner restriction would be in the form of covenants that run with the land. As the purchaser of certain land Scarborough Downs is free to encumber that land with development restrictions including those that bar the use of the land for anything other than harness racing and slots. Many people are familiar with Conservation Easements that limit development and subdivision rights. This would be in the same vein. In short, a covenant can be added which would affirmatively bar Scarborough Downs and any successor from ever setting up a casino.

### ANALYSIS

First, let me note that State law regulates this issue in part. Gambling, as a general proposal, would not be allowed in Saco. It took a statewide referendum to create even the possibility of slot machines in Saco. Prior to the November election, slots were not allowed in this City or any other.

Thus, the enacting law provides the initial control. That law allows slots. It does not, however, permit nor allow for craps, poker, roulette, or any other form of wagering (save for pari-mutual horse race wagering which pre-dates the November election). In short, the current state law does not permit or allow for the proposed racino to morph into a casino as was proposed for Sanford.

Let me note that again because the public seems to drive right by this point: the current law does not permit or allow for a racino to morph or grow into a casino.

Now, as one can readily imagine, a law enacting some form of gambling might be re-visited by either the voters or the Legislature at some future date. In short, while a casino is not a distinct possibility today, we should not be lulled into a false sense of security. It is possible the Legislature or the Voters via statewide referendum might decide on some future date to expand the type, manner, nature and amount of gambling permitted under state law.

Bear in mind, a local City Council or Mayor, even the citizens of Saco by referendum, would not have that same option to expand gambling as the State holds. By this I mean even if Saco wished desperately to expand a racino into a casino, for whatever reason or purpose, it could not currently do so because the State controls the field by law, and the current law does not permit or authorize such expansion even if the local community desired it.

So, in any case, while it is not a perfect defense because state law can be altered, state law is currently the first line of defense in limiting a racinos growth. Bottom line, until state law is re-written, no party can create a casino. Moreover, any slots, to the extent they are to exist and operate, cannot be standalone entities or properties. They can only exist within the setting of a horseracing track. It is easy to forget that this is also a significant limitation on the manner and scope of slot wagering within the State of Maine. Such requirement automatically limits the State to having only two such facilities, and per force limits the number and amount of slots available to the public.

There are additional means in which Saco can limit Scarborough Downs ability to expand. They fall into three categories: local legislation, contract zone limitations and covenants running with the land. I am of the opinion that collectively these three devices can forever bar, limit and control the manner, amount, nature and type of wagering at a proposed racino facility. I particularly commend to your attention covenants that run with the land as perhaps the most effective means of accomplishing a limitation upon gambling. Let me, however, address them in the order set forth.

#### LOCAL LEGISLATION

According to the Opinion of the Attorney General Steve Rowe, a town or City like Saco is not preempted or barred from regulating gambling, including slot machines. See Tab 1. He states:

The initiated legislation does not contain any provision that expressly limits the authority of a municipality, nor does it use language that might be read as intending to limit the applicability of existing state or local laws....

[adding later]...these references do not, in our view,...preempt a municipality from exercising its police powers. Nor would the exercise by a municipality of its police powers over slot machines to the extent a municipality might regulate slot machine activities within its border more stringently than the State, appear to frustrate the purposes of the initiated legislation. Indeed, the provision [requiring a local approval vote]...is consistent with our conclusion that the initiated legislation leaves room for some municipal regulation.

The Attorney General's opinion rests upon his conclusion that the State has not "pre-empted" the field of gambling. Preemption would bar a local entity such as Saco from regulating certain conduct or actions via the passage of laws. However, the Attorney General has not found that the Legislature intended to bar towns from regulating gambling, i.e. intended to pre-empt the field of gambling regulation.

Let me state simply what this means and does not mean as far as gambling and racinos go. It means that Saco could not by legislation permit casino style gambling because that remains barred by the current state law. However, Saco could pass its own local ordinances barring casino style gambling such as poker, craps, roulette, etc. It could also pass regulations on slot gambling such as hours of operation, number of machines allowed in town or on a certain property, zones where slots are allowed and zones where they are not allowed, inspection of premises, etc.

In other words, even though the State bars casino style gambling, Saco could and should also create local limitation legislation. I say this for three reasons.

First, as noted above, local legislation can set up time, place and manner limitations such as hours of operation as well as location or zone limitations. These can prove helpful because existing State law does not discuss or address many issues that would be of particular concern to Saco such as number of machines, hours of operation, etc. In short, a local act can bar one form of gambling, and beef up the regulation of slots.

Second, should the State someday decide (as noted above) to enact racino regulations/laws, Saco will in all likelihood still be permitted to enact and enforce local laws that are "stricter than" any rules/regulations passed by the State. So, if for example, the State passed a law which said any race track in Maine can have up to 5,000 slot machines, but Saco had a local law limiting the number to 1500, local law would control and limit development even though State law authorized a larger number.

In short, local legislation can militate against some of the weaknesses describe above regarding statewide regulations particularly as the State moves to amend its laws in the future.

Third, local legislation barring casino style gambling would entirely trump any subsequently enacted State law permitting casino style gambling provided the Attorney General is correct in his opinion regarding preemption, and our Courts agree if challenged. In other words, if the Attorney General is correct that a city can pass regulations “stricter than” State law, then a City regulation barring casino style gambling, being stricter than a State law permitting such gambling, could survive Court challenge and would add an extra level of defense to later changes in law by Augusta. Thus, it is worth considering it as an option. This is not without legal precedent.

The case which comes to mind is International Paper Company v. Town of Jay. There, the Maine Supreme Court reviewed certain restrictive environmental air quality regulations enacted by the Town of Jay. International Paper argued that the State of Maine already regulated and enforced its own air quality rules, and therefore, it preempted the field, and the Town was barred from enacting (as it had done) and enforcing ordinances stricter than State law.

The Law Court denied International Paper’s appeal finding specifically that the State had not preempted the field of air quality regulation and control; and, that as a result the Town of Jay was free to enact and enforce rules stricter than that set by the State. In other words, the Court authorized dual and overlapping regulation as it upheld the local town’s acts.

Now, I should note here that local law is certainly subject to the same pressures for change as State law. A strict local law enacted today, might be reviewed and reversed tomorrow by a new Council. So, like State statutes, these rules are not bulletproof. They are a layer of defense, but not infallible.

Also, local legislation is subject to the State deciding it wishes to *entirely preempt* a field such as gambling. In other words, while I agree with the AG that current law does not preempt or bar the City from enacting local gambling legislation, the State could not only pass new laws, but could within those laws express the clear intent and purpose of preempting the field. State preemption would limit Saco’s ability to regulate, to be “stricter than” any State rule, and would require the City either not regulate at all or regulate “less strictly” than State law depending upon the wording of the legislation.

However, the mere “possibility” that the State might preempt Saco, should not dissuade Saco from regulating while it can; particularly because it is probably unlikely the State would seek to preempt local law. On balance, having strict local legislation is a significant plus in deterring the facilities expansion. Moreover, with local legislation in place, you can always turn to the Courts and argue that preemption should not apply. If there is no local legislation, you do not have that opportunity. Also, local legislation can set reasonable time place, and manner restrictions that can prove beneficial.

#### CONTRACT ZONING

Likely a more effective tool will be traditional municipal powers afforded under Municipal Home Rule (30-A M.R.S.A. § 3001), including zoning controls and police powers, both of which can be part of the contract zone application process Scarborough Downs must confront.

As you know, the site (Map 63, Lot 6) proposed for the facility is not zoned for the potential use. That parcel is currently zoned BP or “Business Park”. A list of permitted and conditional uses is attached as Tab 2. A harness racing track is not a permitted or a conditional use on that site.

Given a harness racing track is neither a permitted nor conditional use in this zone, Scarborough Downs will need contract zoning approval from the City Council if it hopes to locate on the subject site. As part of that process, the Planning Board must also review the application.

State law does not afford a private party such as Scarborough Downs with vested or some other form of protected rights to contract zoning. In other words, no party can claim or demand a contract zone change; it is purely an option of the Council. The Council enjoys full and total discretion to consider and approve a contract zone change.

As a result, the City has ample latitude to force restrictions and controls upon an applicant. The City has long had a practice of being open to proposals for contract zones when it is believed that such applicants will advance *important municipal interests*. It is for the Council to decide if that baseline is met here. However, assuming the Council believes it can be met, then that same Council will have authority to set and exact conditions upon and from the applicant such as reasonable time, place and manner restrictions.

Such restrictions are very important. As noted above, even though such restrictions might mirror local legislation, contract zoning restrictions offer additional protection from the possibility of changes in State law. In short, I would contend that even if the State were to totally legitimize casino- style gambling, our local contract zone would insulate Saco from that rule change thereby barring Scarborough Downs from doing that which is subsequently permitted under State law.

So, contract zoning is both an additional, and very important, layer of defense.

#### COVENANTS THAT RUN WITH THE LAND

As you know, a party can voluntarily place development restrictions upon their own land. This is often done today with what are popularly called "Conservation Easements". In that case, an owner agrees to prohibit activities that might result in development or subdivision of the subject parcel. These covenants run with the land, a legal phrase meaning they run in perpetuity, and ultimately bind any successor in title to the real estate.

I suggest these as a final layer of defense because many people worry that Scarborough Downs might be sold off to some other entity, an entity unwilling to limit their activities along the lines described by Sharon Terry. With protective covenants in place, Scarborough Downs could forever limit gambling on the site to solely slot machines and pari-mutual horse race gambling. The covenant could affirmatively state that no casino-style gambling will ever be permitted on site. We could even go to the extent of giving enforcement rights to the City or some additional third party. Such covenants could forever restrict the site to harness racing and slot machines. Even the number of machines could be set.

Now, you may well have detected a key word at the introduction: voluntarily. Covenants are created by an owner voluntarily agreeing to establish them. In short, Sharon Terry has to agree to such covenants and to draft and record an appropriate deed establishing them. While normally no party is forced by law to record restrictive covenants (which ultimately impair marketable value) that should not be a problem here.

Because the applicant will require a contract zone, the City will be well placed to force the passage of such covenants. In fact, I would suggest we draft them for Scarborough Downs.

*Use of protective covenants is, in my opinion, critical.* Restrictive covenants will bar any successor entity from expanding. This takes a big concern off the plate. Also, covenants will *immunize* the property from subsequent law changes in Augusta and/or Saco. In other words, regardless of any

changes in law (for example if the State decides to permit full Atlantic City style, no holds barred, sky's the limit gambling) that law change could not undo the voluntary restriction placed by Scarborough Downs on the land. That land will be forever limited as stated in the covenant.

#### CONCLUSION

For all the above reasons, it is my opinion the City can require, create and/or implement – in conjunction with the applicant – those mechanisms that will fully and totally bar the proposed facility from becoming a casino.