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Legislative Intent and the NYRA Racing Properties

By Bennett Liebman and Abigail Nitka



Bennett Liebman

Introduction

In August 2003, Barry K. Schwartz, the chairman of the New York Racing Association (“NYRA”)¹ definitively stated that his non-profit organization owned the Belmont, Saratoga and Aqueduct thoroughbred racetracks.² “No one is using this land besides NYRA,” Schwartz said during an interview with CNBC.³ “They’d have to

build their own racetracks to hold races here.”⁴

Schwartz’s statements were simply the most recent in a series of public stands on the issue of thoroughbred racetrack ownership in New York. It is an issue that has been repeatedly raised by both state officials and the NYRA, but one which has never actually been resolved.

In fact, Schwartz’s words were an echo of statements from 22 years earlier made by former NYRA President James P. Heffernan.⁵ “[NYRA] as a private corporation, owns its land and buildings, and there is no legal or practical way the state can acquire them without proper compensation,” Heffernan said at a press conference from the Aqueduct racetrack in 1981.⁶

Former New York State Assembly Speaker Stanley Fink would have likely disagreed vehemently. In 1981, Assembly Speaker Fink asserted that the people of New York were the actual owners of the tracks, not NYRA.⁷ The “tracks were bought and maintained solely with public monies. . . . Thus, basic equity requires that title to the properties be held by the people of New York.”⁸

In 2003, Governor George Pataki and Attorney General Eliot Spitzer reiterated much of the Fink belief.⁹ Pataki has said that the ownership issue is “a very complicated legal question.”¹⁰ He was supported by Spitzer’s office, which has maintained that NYRA will lose its right to the racetracks if it ever loses its franchise to conduct thoroughbred horse racing.¹¹

The purpose of this article is to explore the legislative history of the NYRA franchise revisions that were made to the Racing, Pari-Mutuel Wagering and Breeding Law in 1983 to determine what the intent of the legislature was on the ownership of the racetracks operated by NYRA.

Speaker Fink and the NYRA

It was Speaker Fink’s position “that NYRA is an instrumentality of the State of New York, and if it ever gets to that point, and the Attorney General would permit me to argue that case before the Court of Appeals, I would be delighted to do it. And once you are an instrumentality of the State of New York, there are a host of decisions indicating that the State of New York can do with its instrumentalities that which it wishes. . . . I believe that there are other reasons why we think that NYRA has no vested properties right [sic] in the race tracks which would require compensation.”¹²

Fink further stated, “NYRA was an instrumentality of the State which we created by statute which we gave power to do certain things. We diverted and had a stream of revenue coming in that we created to them. We created that stream of revenue for them. . . . We believe that title to Belmont Park, Aqueduct and Saratoga Racetracks ought to be vested and our bill vests title in that new public benefit corporation.”¹³

Speaker Fink’s contentions on the ownership of the NYRA racetracks were rejected by NYRA President James Heffernan. Heffernan took the position that NYRA “had the right to sell our properties just as any profit corporation does encumbered only by the mortgage commitments and the loans we had made.”¹⁴

As to the contention that the state would take over NYRA in the event that NYRA lost its franchise to conduct racing, Heffernan replied that the law “only outlines the disposition of our properties on dissolution of the corporation. The dissolution of the corporation and the end of the franchise are not coextensive.”¹⁵

Speaker Fink, to emphasize his point, even asked the Attorney General’s office for an opinion on the constitutionality of his views on NYRA. Attorney General Robert Abrams responded with a curious, three-page, unpublished opinion to the legislative chairs of the Joint Legislative Task Force to Study and Evaluate the Pari-Mutuel Racing and Breeding Industry. While not indicating that the state owned the racetracks, the Attorney



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General gave a *carte blanche* to the legislature to amend the law to force NYRA to change the class of beneficiaries who would assume the property if NYRA were to be dissolved.¹⁶

The Attorney General found that the “Legislature has the constitutional power to amend a statute governing the formation of corporations. It is equally clear that the Legislature has reserved the power to amend the certificate of incorporation of any domestic corporation.”¹⁷

Therefore, “under its reserved power to amend the certificate of incorporation of any domestic corporation, the Legislature may direct NYRA to divest the class of exempt organizations of rights, if any, they may now enjoy upon dissolution, under the corporate charter.”¹⁸

Speaker Fink took the position that the Attorney General confirmed “the legality of a key element in my proposal that the state acquire the property of the New York Racing Association.”¹⁹

According to Speaker Fink, “[t]his opinion of the attorney general dispels any notion that the state would have to spend hundreds of millions of dollars to acquire these properties. I now see no legal or financial roadblocks to the state’s acquiring the tracks on behalf of the people and for the betterment of the thoroughbred racing industry.”²⁰

The 1983 Legislation

Despite the opinion of the Attorney General, legislation to renew the NYRA franchise and to make the state the ultimate owner of the racetracks did not progress in either 1981 or 1982. In fact, no legislation on this subject was even formally introduced in the legislature in either 1981 or 1982. Nor was any legislation on this subject introduced until the last days of the regular legislative session in 1983. Shortly before the legislative session was to conclude in 1983, the Assembly, the Senate, and the Executive Chamber reached agreement on the NYRA legislation.²¹ The legislation extended NYRA’s franchise for fifteen years until 2000. It provided for a capital investment fund to lend money to NYRA to help fund NYRA’s capital needs. The revenue from expanded simulcasting of NYRA races would provide the initial revenue which the capital investment fund would use to provide loan funds to NYRA.²² On the issue of who owned the racetracks, the legislature agreed not to make a decision on who owned the tracks as of 1983. Instead, they established a system for future bidding of the tracks after NYRA’s franchise expired in 2000.²³ Should NYRA lose its franchise, “the existence of such association shall terminate at any time that such franchise expires.”²⁴ Once NYRA was dissolved, the assets “after payment of or provision for its liabilities

will be assigned, transferred and conveyed and distributed by the governor then in office in accordance with applicable provisions of law.”²⁵

The legislation, S.6969, sailed through the legislature. It passed the Senate on June 26, the same day that it was introduced.²⁶ Explaining the bill, Senator John Dunne stated that it was the “product of literally years of discussion.”²⁷ “It seems to be finally the piece of legislation that everyone is in agreement on.”²⁸ The few objections to the bill were that it had been passed in haste, gave excessive power to the capital investment fund and whether NYRA should be reauthorized to run the tracks.²⁹

The bill similarly had no trouble moving through the Assembly the next day. In that house, Assemblyman Arthur Kremer, the chairman of the Ways and Means Committee, explained and argued for the bill. Assemblyman Kremer stated:

[a]bout two years ago, Speaker Stanley Fink made it clear that he had no intent of being part of any type of extension of NYRA as a franchise unless and until there was an agreement that eventually the tracks would belong to the people of the State of New York and that NYRA would give them up. . . . In the year 2000, when the charter of the Racing Association and the franchise expires, all of the tracks presently used by NYRA and covered by their franchise will be turned over to the people of the State of New York for the people of the State of New York to own as their property.³⁰

The legislation accomplished this by making “NYRA’s franchise and their charter both terminate in the year 2000.”³¹ Kremer added, “[t]he Speaker of this House is to be congratulated for putting together a package which takes away ownership and control of these tracks and puts it in the hands of the people of the State of New York.”³²

The basic argument over the bill in the Assembly was the question of whether local governments could exercise zoning powers over NYRA. Assemblyman Madison, representing the Belmont Park area, and Assemblyman Seminerio, representing the Aqueduct area, complained that NYRA had not been a good neighbor. Their effort to amend the bill to apply local zoning laws to NYRA was voted down,³³ and the bill passed by a vote of 141 to 2.

Because the main bill had been passed in such extreme haste, there was a need for an additional bill to make technical corrections in S.6969.³⁴ The Assembly,

also on June 27th, passed A.8212, which was designed to be a chapter amendment to S.6969 and which made technical and conforming changes in S.6969. Since the Senate had adjourned, the technical amendments bill did not pass the Senate until July 12, 1983, when the Senate returned to Albany.

The passage of these bills placed the management of NYRA in somewhat of a bind. The legislature had aided NYRA by providing for a lengthy franchise extension and by providing funding for needed capital improvements, but it had also significantly limited NYRA's ownership rights over racetrack properties. The NYRA trustees met on July 13, 1983 to discuss their position on the legislation. After the meeting, NYRA officers announced that they would make a formal statement of their position on July 14.³⁵ On July 14, however, NYRA took no position on the legislation.³⁶ "The New York Racing Association which operates Aqueduct, Belmont Park, and Saratoga finally may have conceded that these three tracks belong to the state of New York and its people, not to the N.Y.R.A."³⁷

According to the *New York Times*, the NYRA "had been expected to take a public stand against the bill if only to make its familiar argument that it, rather than the state, actually owns the tracks . . . [s]itting still for the bill does mean acknowledging that the state owns the tracks, but many trustees have believed this was an inevitable conclusion anyway."³⁸

Passage of the legislation was termed "an unprecedented victory for Assemblyman Fink."³⁹ The editor of the racing trade publication, the *Blood-Horse*, on the other hand, complained, "[n]ow we have the Fink Legislation so named not because it is so preposterous but after House Speaker Stanley Fink who somehow thinks that New York has always owned the NYRA properties."⁴⁰

The NYRA's so-called surrender, however, did not end the battling over the legislation. The Racing and Wagering Board raised a host of technical questions,⁴¹ and NYRA raised questions about some issues involving the capital investment fund. Based on these questions, Governor Cuomo had the bills recalled by the legislature.⁴²

Nonetheless, in August of 1983, all parties agreed on necessary amendments to the law.⁴³ NYRA Chairman Thomas Bancroft endorsed the bill "finding that the legislative package when enacted into law will form the foundation for the physical revitalization of our three racetracks."⁴⁴

The legislature returned in September of 1983 and quickly passed the chapter amendment that had been agreed to in August.⁴⁵ There was no debate in either house of the legislature. A.8224 /S.6987 passed the

Assembly by a unanimous vote of 144-0 and by a 56-2 vote in the Senate. In urging approval of the chapter amendment, Senator Dunne, who was one of the sponsors of the chapter amendment, noted, "NYRA's franchise and charter are made coterminous. The assets of the corporation upon dissolution will be distributed by the Governor in accordance with applicable provisions of law rather than being distributed to charities."⁴⁶ After passage, the original bill (S.6969) and the September chapter amendment (A.8224/S.6987) were both sent to the Governor for signature. The initial chapter amendment (A.8212), which had been recalled by the legislature was abandoned.⁴⁷ Governor Cuomo signed both bills on September 27. In approving the bills, he wrote, "[b]ecause NYRA has successfully operated the tracks and no other group has shown a willingness or capability to operate the tracks, NYRA's franchises are extended to the year 2000. Thereafter, the bills establish a competitive bidding process for the franchises to insure the selection of the most qualified future operator of the thoroughbred tracks."⁴⁸ At a public bill signing ceremony the next week, NYRA Chairman Bancroft said, "It is an excellent bill, . . . and we are delighted with it. We accept the challenge of the next 17 years and want you to know that the NYRA will be competitive after the year 2000 in seeking to continue our operation of the New York tracks."⁴⁹

So the clear implication of the 1983 NYRA franchise extension legislation was to grant NYRA a life estate in the racetrack properties. Once NYRA lost its franchise and/or was dissolved, the remainder interest of the properties would fall to the State of New York.

The Constitutional Issues

So was Barry Schwartz out of line when he argued that the racetrack properties belonged to NYRA? Maybe, under section 202.2 of the Racing Law, he was. Yet, he and NYRA could certainly present a series of colorable claims that the 1983 legislation was unconstitutional as applied to NYRA's racing properties.

First of all, it should be noted that the 1983 legislation is not a model of consistency. While it is reasonably clear what will happen if NYRA loses the franchise, there are a host of other provisions adding ambiguities to the issue of how the property will be disposed of if NYRA does not own the property. There are, in fact, five sections of the law that deal specifically with the disposition of the racetracks, each mandating a different protocol. In addition to section 202.2, there are sections 202-b(3), 208(8)(i), 208-a, and 209-a of the Racing Law, all of which provide variations on how the NYRA racetrack properties are to be distributed. These provisions were not all written in synchronization with each other and provide the opportunity for considerable ambiguity.

But apart from these obscurities, the major question is whether the legislature was empowered to do what it did in 1983. A full analysis of the legal arguments for and against the state's takeover of the NYRA properties is beyond the scope of this article. Did the legislature—as suggested by Attorney General Abrams—have the authority to revise NYRA's corporate charter and force NYRA to divest itself of the racetracks when it lost its franchise?⁵⁰ Was the forced divestiture of the racetrack properties a regulatory taking which would require the state to pay compensation to NYRA under the Just Compensation Clause of the Fifth Amendment?⁵¹ Even if this was a regulatory taking, would NYRA, which could itself suffer no pecuniary loss, be entitled to compensation?⁵² Finally is NYRA, as claimed by Speaker Fink, an "instrumentality of the State?"⁵³ If NYRA is an instrumentality of the state, could it have any claim to compensation? Could the state impose a claim of laches against any NYRA assertion that the 1983 laws were unconstitutional?⁵⁴

"[T]he legislature clearly intended in 1983 that if NYRA were to lose its franchise to conduct racing, its racetrack properties would become the property of the state."

Conclusion

Horse racing in New York has always been highly politicized. For this reason, the constitutionality of chapters 1006 and 1007 of the Laws of 1983 and their effect on the disposition of the racetrack properties may never be litigated. When the next controversy over thoroughbred racetrack ownership arises, it is likely that there will simply be different legislation enacted to deal with the issues at hand at the time. Any new legislation could modify the law already in place, or it may be repealed altogether. Much of that will depend on the goals of NYRA, the interests of the legislature, and the potential interests of individuals or corporations wishing to operate the NYRA tracks.

Within this nebulous framework, there are two certainties. The first is that the legislature clearly intended in 1983 that if NYRA were to lose its franchise to conduct racing, its racetrack properties would become the property of the state. Second, it is certain that this racetrack ownership issue will resurface, although it may never be fully resolved.

Endnotes

1. The New York Racing Association (NYRA) is a private nonprofit racing corporation which was founded in 1955 to run the thoroughbred racetracks in New York. See Chapters 812 and 813, L. 1955. Prior to 1955, the thoroughbred tracks in New York (Saratoga, Jamaica, Aqueduct and Belmont) were all owned by separate, small for-profit corporations. These racetracks were all antiquated, and these small corporations were incapable of making needed capital improvements. The NYRA was formed through an initiative of the Jockey Club to improve the racing facilities in New York while providing maximum revenue to the state. NYRA (which until 1958 was known as the Greater New York Association) was given a 25-year franchise to operate the tracks. It sold Jamaica, rebuilt Aqueduct, and refurbished Belmont and Saratoga. The NYRA franchise was extended to 1985 by ch. 757, L. 1970 and until 2000 by Ch. 1006, L. 1983. It currently is scheduled to expire on December 31, 2007, pursuant to ch. 445, L. 1997.
2. Erin Duggan, *NYRA Warns of Track Seizure*, Albany Times Union, Aug. 23, 2003, at A1.
3. *Id.*
4. *Id.* Schwartz was likely referring to Magna Entertainment Corporation, which had expressed interest in operating the NYRA tracks.
5. Dorothy J. Gaiter, *Assembly Speaker Urges State Takeover of Race Tracks*, Albany Times Union, March 15, 1981, at 40. See also, Lena Williams, *N.Y.R.A. Franchise Renewal Questioned*, N.Y. Times, May 8, 1981, at A22.
6. Gaiter, *supra* note 5.
7. Gaiter, *supra* note 5.
8. *Id.* Somewhat ironically, Speaker Fink, after he left the legislature, served for a period of time as a lobbyist for NYRA. See *1993 Registered Lobbyists, September Update*, New York Temporary State Commission on Lobbying, Clients of Bower & Gardner at 11.
9. Duggan, *supra* note 2.
10. *Id.*
11. *Id.*
12. *In re Public Hearing on Thoroughbred Racing in New York State*, before the Joint Legislative Task Force to Study and Evaluate the Joint Pari-Mutuel Racing and Breeding Industry, May 7, 1981, at 22.
13. *Id.* at 34.
14. *Id.* at 80.
15. *Id.* at 82.
16. June 16, 1981, Opinion of Attorney General Robert Abrams, to Hon. John R. Dunne and Hon. William B. Finneran., N.Y. State Archives, Papers of Stanley Fink.
17. *Id.* at 2.
18. *Id.*
19. Assembly Speaker Stanley Fink, Statement on Attorney General's Finding Regarding Constitutionality of Speaker's Racing Legislation, June 17, 1981, N.Y. State Archives, Papers of Stanley Fink. See also Lena Williams, *State Racing Told: Prove Need for Aid*, N.Y. Times, June 18, 1981 at B17.
20. *Id.*
21. Senate Bill No. 6969 (Rules Committee); Assembly Bill No. 8209 (Rules Committee).

22. For an explanation of the legislation, see Governor's Approval Memorandum for chs. 1006 and 1007, L. 1983, 1983 N.Y. State Leg. Annual, at 416–17.
23. John Caher & Edward Fitzpatrick, *NYRA Remains Beholden to Politics*, Albany Times Union, August 24, 1997, at A13.
24. Racing, Pari-Mutuel Wagering and Breeding Law § 202.5 ("Racing Law"). See also Governor's Bill Jacket for Ch. 1006, L. 1983, July 26, 1983 Budget Report on Bills. Section 202 would "provide that upon the expiration of the NYRA's franchise its existence also terminates."
25. Racing Law § 202.2. This replaced a provision which had originally been enacted by ch. 1006, L. 1955, § 1 under which NYRA's certificate of incorporation had to contain "the provision that all of its assets . . . will be assigned . . . to or among one or more 'exempt organizations' . . . as may be designated by the governor then in office upon termination of the existence or earlier liquidation of such association."
26. Governor Cuomo submitted a message of necessity to secure its passage. See 1983 Public Papers of Governor Cuomo at 436.
27. Senate Debate on S.6969, June 26, 1983 at 10479.
28. *Id.*
29. *Id.* at 10481–10484. Most of the complaints about the bill were raised by Senators Leichter and Ruiz.
30. Assembly Debate on S.6969, June 27, 1983 at 267–268.
31. *Id.* at 269.
32. *Id.* at 270.
33. *Id.* at 266–67.
34. Assembly Bill No. 8212 (Rules Committee).
35. Steven Crist, *Vasquez Appeal Bid Is Rejected*, N.Y. Times, July 14, 1983 at B11.
36. Steven Crist, *N.Y.R.A. Chooses Silent Surrender*, N.Y. Times, July 15, 1983 at A16.
37. *Id.*
38. *Id.* Also, according to Blood-Horse, NYRA was expected to fight the provisions on ownership of the tracks. "Lengthy legal proceedings are foreseen if the state attempts to change the rules." William H. Rudy, *NYRA Franchise Extended*, Blood-Horse, July 16, 1983 at 4770.
39. *NYRA Franchise Extension Bill Gains Senate Support*, Daily Racing Form, June 29, 1983.
40. *What's Going on Here*, Blood-Horse, August 6, 1983 at 5391.
41. Governor's Bill Jacket for ch. 1006, *supra* note 24. Letter of July 12, 1983 from John Van Lindt to Michael J. Del Giudice.
42. *Extension of NYRA Franchise, Construction Fund 'Dead Issues'*, Daily Racing Form, July 30, 1983. NYRA had suggested limits on the operating expenses of the capital investment fund as well as some authorization to defer payments on its loans to the capital investment fund. These issues were handled through ch. 1007, L. 1983 §§ 12 and 16.
43. Joe Hirsch, *Will Extend NYRA's Operating Franchise Through Year 2000*, Daily Racing Form, August 6, 1983.
44. *Id.*
45. Assembly Bill No. 8224 (Rules Committee at Request of Fink, Kremer, Walsh, Hinchey, Ruggiero, Sears); Senate Bill No. 6987 (Dunne, Fink, Kehoe.)
46. Governor's Bill Jacket for ch. 1007, L. 1983, September 22, 1983 letter of John R. Dunne to Alice Daniel. The language seems in clear contrast to the language of John Heffernan in note 15.
47. This was well prior to *Campaign for Fiscal Equity v. Marino*, 87 N.Y.2d 235 (1995) which found that the practice of the legislature recalling bills that had passed both houses of the legislature was unconstitutional.
48. See Governor's Approval Memorandum, *supra* note 22.
49. Joe Hirsch, *Gov. Cuomo Signs Racing Aid Bill to NYRA Tracks*, Daily Racing Form, October 8, 1983.
50. See N.Y. Const. art. X, § 1. Cf. *In re Mount Sinai Hospital*, 250 N.Y. 103 (1928)
51. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). There would also be a substantial state constitutional law question presented under Article 1, § 7(a) of the New York State Constitution which states that "private property shall not be taken for public use without just compensation."
52. See *Brown & Hayes v. Legal Found. of Washington*, 538 U.S. 216 (2003).
53. There are a series of cases which deal with the complex relationship between the state and the NYRA. Cf. especially *Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164 (E.D.N.Y. 1987) with *Murphy v. New York Racing Ass'n, Inc.*, 76 F. Supp. 2d 498 (1999).
54. For a detailed treatment of the laches issue, see *Saratoga Chamber of Commerce Inc. v. Pataki*, 100 N.Y.2d 801, 816–19 (2003).

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