BEFORE THE IOWA RACING & GAMING COMMISSION

PETITION BY RIVERSIDE CASINO AND GOLF RESORT, LLC; and WASHINGTON COUNTY RIVERBOAT FOUNDATION, INC. FOR A DECLARATORY ORDER REGARDING IOWA CODE § 99F.7(11)	)	**REFUSAL TO ISSUE DECLARATORY ORDER**

Under Iowa Code section 17A.9(1)(*b*)(1) and Iowa Administrative Code rule 491—2.28, the Iowa Racing and Gaming Commission (the Commission) declines to issue a declaratory order in response to the Petition for Declaratory Order filed on November 8, 2024 by Riverside Casino and Golf Resort, LLC (Riverside) and Washington County Riverboat Foundation, Inc. (together, Petitioners) regarding Iowa Code § 99F.7(11).

I. STATEMENT OF THE PROCEEDINGS

On November 8, 2024, under Iowa Code section 17A.9 and Iowa Administrative Code rule 491—2.20, Petitioners filed a petition for declaratory order with the Commission. The petition identifies the question to be answered as:

> Does the [Commission] lack authority under Iowa Code § 99F.7(11) to issue a license to conduct gambling games in Linn County?

Petitioners contend the answer to this question is "yes."

As required under Iowa Administrative Code rule 491—2.20(7), Petitioners identified two entities that would be affected by or interested in the questions in the petition: Linn County Gaming Association, Inc. (LCGA) and Cedar Rapids

Development Group, LLC (CRDG). These entities would be affected by or interested in the subject of the petition because, in July 2024, LCGA and CRDG applied to the Commission for licenses to conduct gambling games and operate a gambling structure at a proposed facility in Linn County. That application is still pending.

Petitioners also requested a brief and informal meeting under Iowa Administrative Code rule 491—2.26 to discuss the petition. A brief and informal meeting took place on November 20, 2024 at the Hotel at Kirkwood Center in Cedar Rapids, Iowa. The informal meeting included counsel for Petitioners, counsel for CRDG, Commission staff, and the Commission chair and vice chair.

Petitioners' initial filing asked the Commission to stay consideration of the Linn County license application while the petition was pending. At its public meeting on November 21, 2024, the Commission unanimously voted to deny a stay and directed Commission staff to prepare a written denial order. The Commission also voted unanimously to establish a schedule for further declaratory order proceedings. The Commission issued an order denying the stay and memorializing the decision to establish a schedule on November 26, 2024.

The time for intervention passed on December 9, 2024. *See* Iowa Admin. Code r. 491—2.22(1). CRDG and LCGA filed a timely petition to intervene on December 6, 2024. Commission staff then issued a briefing and submission schedule on December 17, 2024, after consultation with Petitioners and Intervenors. Petitioners and Intervenors each declined an additional informal meeting that would have taken place after briefs were submitted, but before oral argument.

Oral argument occurred at the Commission's public meeting on January 23, 2025, at Wild Rose Casino & Resort in Jefferson, Iowa. Following oral argument, the Commission deliberated in open session and voted 4–1 to decline to answer the petition for declaratory order under Iowa Code section 17A.9(1)(*b*)(1) and Iowa Administrative Code rule 491—2.28. The Commission also directed Commission staff to prepare this corresponding order reflecting the Commission's decision. Commissioner Ostergren dissented.

II. LEGAL ISSUE

Petitions for declaratory order probe "the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency." Iowa Code § 17A.9(1)(*a*). The Commission has adopted agency-specific rules authorizing petitions for declaratory order. Iowa Admin. Code r. 491—2.20. It has issued declaratory orders on several subjects in the past. *See, e.g.*, *Benda v. Prairie Meadows Racetrack & Casino, Inc.*, 989 N.W.2d 184, 189 (Iowa 2023); *Kopecky v. Iowa Racing & Gaming Comm'n*, 891 N.W.2d 439, 441–442 (Iowa 2017); *Nat'l Cattle Congress, Inc. v. Iowa Racing & Gaming Comm'n*, No. 07–0412, 2008 WL 2402653, at *1 (Iowa Ct. App. May 14, 2008).

The statute on which Petitioners seek a declaratory order is Iowa Code section 99F.7(11). Section 99F.7(11) establishes a referendum prerequisite—meaning the voters in a county must approve a gambling games referendum before the Commission may grant a license for a casino in that county. Iowa Code § 99F.7(11)(*a*); *Kopecky*, 891 N.W.2d at 443 ("Prior to the Commission issuing a license for a

gambling structure in a particular county, the electorate must approve a referendum to permit gambling games in the county.").

If a county approves gambling games through a referendum, that county's board of supervisors must submit "a proposition requiring the approval or defeat of gambling games to the county electorate" again in a future election. Iowa Code § 99F.7(11)(*d*). The second referendum cannot take place "until the eighth calendar year" after the first referendum. *Id.* § 99F.7(11)(*e*).

Licenses "shall be issued only if the county electorate approves the conduct of the gambling games as provided in this subsection." *Id.* § 99F.7(11)(*a*). Two phrases in this statute—"only if" and "as provided in this subsection"—are the cornerstones of Petitioners' position.

In setting the schedule for these proceedings, the Commission also encouraged the participants to address three additional legal questions: (1) whether the Commission should decline to issue an order under Iowa Code section 17A.9(1)(*b*)(1) and Iowa Administrative Code rule 491—2.28; (2) whether the Commission is prohibited from issuing an order under Iowa Code section 17A.9(1)(*b*)(2) because neither Linn County nor the Linn County Board of Supervisors intervened in the proceedings; and (3) whether strict compliance or substantial compliance is the appropriate standard under Iowa Code section 99F.7(11).

III. FACTS

Linn County voters approved a gambling games referendum in March 2013. *See Kopecky*, 891 N.W.2d at 441. The ballot proposition stated "Gambling games at

a casino to be developed in Linn County are approved" and asked voters to select "yes" or "no." The proposition passed with 61.23% of the vote.[1]

The approved referendum triggered the statutory obligation for the Linn County Board of Supervisors to "submit a proposition requiring the approval or defeat of gambling games to the county electorate" at a future election. Iowa Code § 99F.7(11)(*d*). But the subsequent referendum could not occur "until the eighth calendar year" after the initial one. *Id.* § 99F.7(11)(*e*).

Soon after the 2013 referendum, and well before the statutory eight years between referenda elapsed, the Commission received an application for a casino license in Linn County. *See Kopecky*, 891 N.W.2d at 441. After consideration, "the Commission denied [that] application in April 2014," *id.*, and thus declined to issue any license in Linn County at that time. As the Iowa Supreme Court later described it, "the Commission has the power to issue a license following an affirmative gambling games referendum, but is not required to do so." *Id.* at 444.

The Commission received several applications for a casino license in Linn County a few years later in 2017, again before the statutory eight years between county referenda elapsed. After consideration, the Commission denied each application and again declined to issue any license in Linn County.

---

[1] Petitioners submitted an appendix containing copies of sample ballots from the Linn County elections in 2013 and 2021. In addition, the historical election results maintained on the Linn County Auditor's website are appropriate for official notice. *Cf. League of United Latin Am. Citizens v. Pate*, 950 N.W.2d 204, 212–13 (Iowa 2020) (taking judicial notice of election-related data from the Iowa Secretary of State's website).

In November 2021, Linn County submitted Public Measure G to its voters. Like the 2013 referendum, Public Measure G asked voters to select "yes" or "no." Its exact wording consisted of both a bolded summary and a longer explanatory paragraph:

> **Summary: Gambling games on an excursion gambling boat or at a gambling structure in Linn County are approved.**
>
> Gambling games with no wager or loss limits, on an excursion gambling boat or at a gambling structure in Linn County are approved. If approved by a majority of the voters, operation of gambling games with no wager or loss limits may continue. If disapproved by a majority of the voters, the operation of gambling games on an excursion gambling boat or at a gambling structure will end within 60 days of this election.

This proposition also passed, with 54.69% of the vote.

IV. SUMMARY OF ARGUMENTS

The petition identifies the question to be answered as:

> Does the [Commission] lack authority under Iowa Code § 99F.7(11) to issue a license to conduct gambling games in Linn County?

Petitioners contend the answer to this question is "yes." Intervenors contend the answer is "no." The specifics of the dispute boil down to (1) whether Linn County worded its 2021 referendum correctly; (2) whether the wording means Linn County did not submit a second referendum to the voters that complies with Iowa Code chapter 99F; and (3) whether the second referendum necessarily affects the Commission's authority to issue a license for a casino in Linn County.

The participants also dispute whether the Commission should issue any substantive order at all, under Iowa Administrative Code rule 491—2.28. Petitioners contend the Commission should answer the question because it is important and the

answer will guide all future casino license applicants, whereas Intervenors assert seven of the reasons for declining in rule 491—2.28 are satisfied here.

A. *Petitioners.* Petitioners contend two phrases in section 99F.7(11)(*a*)—"only if" and "as provided in this subsection"—are dispositive. Petitioners' position proceeds in a series of steps. First, they contend the phrase "only if" establishes that strict compliance with chapter 99F is required, and if a county does not achieve strict compliance, the Commission cannot grant a license. Second, Petitioners contend the phrase "as provided in this subsection" incorporates the second referendum under section 99F.7(11)(*d*) and (*e*) as an additional prerequisite for Linn County.

Third, Petitioners contend the 2021 Linn County referendum was worded incorrectly—because it used the verb "continue" despite no casino operating in Linn County at the time, and because it referred to an anachronistic subset of gambling games "with no wager or loss limits." Accordingly, Petitioners argue, the 2021 Linn County referendum was legally ineffectual because it asked voters the wrong question. Because it asked the wrong question, the voters did not properly approve gambling games under Iowa Code section 99F.7(11)(*d*). The consequence for that failure was, in Petitioners' view, to deprive the Commission of authority to issue a license for any proposed casino in Linn County after 2021.

B. *Intervenors.* Intervenors contest the petition on several fronts. First, Intervenors contend the Commission should dismiss the petition because Petitioners lack a "real and direct interest in a specific fact situation that may affect their legal rights, duties, or responsibilities" under Iowa Administrative Code rule 491—2.19.

Second, Intervenors urge the Commission to decline to issue an order under Iowa Code section 17A.9(1)(*b*)(1) and seven of the discretionary grounds in Iowa Administrative Code rule 491—2.28. Third, Intervenors contend the Commission *cannot* issue a declaratory order under Iowa Code section 17A.9(1)(*b*)(2), because the Linn County Board of Supervisors—which selected the disputed ballot language—did not intervene. Finally, Intervenors assert Petitioners are attempting to use the declaratory order process as an improper collateral attack on a county ballot measure. Intervenors assert a ballot measure challenge must occur instead (1) under Iowa Code chapters 57 and 62 rather than through the Commission, and (2) nearer in time to the election than the three years that have elapsed here.

On the merits, Intervenors contend chapter 99F requires only substantial compliance before the Commission may issue a license to conduct gambling games or operate a gambling structure. Intervenors then contend the 2021 Linn County referendum substantially complied with chapter 99F because it was "a proposition requiring the approval or defeat of gambling games" under section 99F.7(11)(*d*). Intervenors also contend that even if strict compliance is the appropriate standard under section 99F.7(11), the 2021 Linn County referendum strictly complied.

C. *Public comments.* The Commission invited public comment on the subject of the petition and received one joint comment from Linn County and the Linn County Board of Supervisors (the Board). The comment stated the Board decided on ballot language in both 2013 and 2021 by consulting templates contained in rules promulgated by the Iowa Secretary of State. *See* Iowa Admin. Code r. 721—

21.820(2)–(3). The comment asserted the purpose of the Secretary of State's templates is to assist local governments in drafting ballot questions that comply with applicable law, and so it was reasonable for the Board to rely on these templates. *See* Iowa Code § 47.1(1) (directing the secretary of state to "prescribe the necessary forms required for the conduct of elections").

In 2013, the Board used the template in rule 721—21.820(2), which provides a form of ballot for an election to approve or disapprove the conduct of gambling games. In 2021, the Board instead used the template in rule 721—21.820(3), which provides a form of ballot "for elections to continue gambling games." The comment asserted this choice was appropriate because in 2021, no casino had yet been approved, so the ballot measure needed to ensure the voters continued to approve of a possible casino.

The comment further asserted the 2021 ballot contained a bolded summary of the ballot measure that was unmistakable, did not use the verb "continue," and thus could not have caused any voter confusion. Finally, the comment questioned whether Petitioners may challenge a Linn County ballot measure now (instead of in 2021); and whether these Petitioners have standing to challenge a Linn County ballot measure (because Petitioners are not Linn County residents who voted on, or were eligible to vote on, the 2021 measure).

V. THE COMMISSION DECLINES TO ISSUE AN ORDER

The Commission has considered all filings and comments, and the participants' oral presentations. Both sides to this dispute presented arguments in support of their respective readings of chapter 99F. However, there is no need to decide which

competing argument is correct or even which is more plausible, because issuing any substantive order under the circumstances "would be contrary to a rule" the Commission has adopted. Iowa Code § 17A.9(1)(*b*)(1).

Iowa Administrative Code rule 491—2.28 lists reasons why the Commission may decline "to issue a declaratory order on some or all questions raised." Iowa Admin. Code r. 491—2.28(1); *see also Iowa Ins. Inst. v. Core Grp.*, 867 N.W.2d 58, 67 (Iowa 2015) (acknowledging a similar rule another agency adopted). Three of the criteria in rule 491—2.28 are most pertinent here.

A. *Petitioners won't be aggrieved or adversely affected without an order*. First, Petitioners do not demonstrate they "will be aggrieved or adversely affected by the failure of the commission to issue an order." Iowa Admin. Code r. 491—2.28(1)(2). Petitioners assert if the Commission grants a license in Linn County, that facility would operate to Riverside's detriment and cannibalize its gaming revenue, establishing adverse effect in the form of lost profits. But this will not occur merely by the Commission declining *to issue an order*. Declining to issue an order is not the same as granting a license for a Linn County casino. Petitioners' argument assumes the two decisions are coextensive. They are not.

The Commission is scheduled to vote on the pending application separately. It may grant that application—but if it does, any harm Petitioners expect Riverside to experience would be from the new facility itself, not from the Commission declining to issue a declaratory order. Or, the Commission may deny the application—in which case the financial effect Petitioners fear would be averted entirely.

In either event, Petitioners have not demonstrated that *not issuing an order* would alone make them aggrieved or adversely affected. The Commission therefore declines to issue an order on this basis.

B. *The question also inheres in the pending license application process.* Second, "[t]he questions presented by the petition are also presented in a current rulemaking, contested case, or other commission or judicial proceeding, that may definitively resolve them." Iowa Admin. Code r. 491—2.28(1)(4). The license application process is an "other commission . . . proceeding" under this rule. The question presented by this petition—whether the Commission has authority to grant a Linn County license application—inheres in the application process itself.

If the Commission denies the Linn County license application, then Petitioners' question is moot. Petitioners assert only that the Commission lacks authority to *grant* a license, not that it lacks authority even to deny the application. Indeed, Petitioners contend the Commission can do nothing *but* deny the application.

Conversely, if the Commission grants a license to the Linn County applicants, then it has necessarily rejected Petitioners' contention that the Commission lacks authority. Even still, a hypothetical decision granting a license might be subject to judicial review under Iowa Code chapter 17A by a person who can demonstrate the requisite injury. *See Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573, 575 (Iowa 1990) ("A party may have standing [to seek judicial review] without being the primary object of the agency action."); *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444 (Iowa 1983) ("Agency action may have impact on persons other

than those who are the immediate object of the act. We believe the legislature intended to make a judicial remedy available to any person or party who can demonstrate the requisite injury."). Presumably, these declaratory order Petitioners would argue on judicial review of a hypothetical granted license (*if* they are proper *judicial review* petitioners) that granting a license to LCGA and CRDG was "in violation of any provision of law," Iowa Code § 17A.19(10)(*b*)—or any other grounds appropriate under section 17A.19(10). But this illustrates the point—the licensing process and possible judicial review of it will resolve the question, rather than needing a standalone declaratory order.

Petitioners' question is also presented in the licensing process itself, and can be definitively resolved there (including through judicial review of whatever decision the Commission makes there). Petitioners acknowledged as much by asking to stay the application process as part of their petition. This request was a firm indication that the question will be resolved in another agency proceeding and therefore demonstrates the petition fits rule 491—2.28(1)(4). The Commission also declines to issue any declaratory order on this basis.

C. *The petition seeks only to establish the effect of past conduct.* Third, "[t]he petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct." Iowa Admin. Code r. 491—2.28(1)(8). This petition is based solely on the 2021 Linn County referendum, and seeks to establish the legal effect of that referendum on the Commission's authority.

The petition does not seek to aid in planning future conduct, but is squarely an effort to establish the effect of an event that has already occurred. Even though Petitioners do not seek to "invalidate" the 2021 Linn County referendum, seeking a declaration about past events' *current* effect on the Commission's authority is still "an effort to establish the effect" of the past events within the meaning of rule 491—2.28(1)(8). Accordingly, the Commission also declines to issue an order on this basis.

D. *There's no need to address other matters.* Intervenors assert seven of the reasons in rule 491—2.28 justify the Commission declining to issue a substantive order. Because the Commission declines to issue a substantive order on three of those grounds, it is not necessary to decide the other grounds Intervenors asserted. Likewise, there's no need to decide other assorted issues—such as (1) whether the Commission is *prohibited* from issuing an order under Iowa Code section 17A.9(1)(*b*)(2); (2) whether any form of "estoppel" applies based on similar ballot language used for past referenda in other counties; (3) whether some other method is the exclusive way to determine a county ballot measure's legal effect; or (4) what the Commission's answer would be *if* the Commission reached the merits.[2] The Commission expresses no opinion or position on these other questions.

E. *This petition and its resolution are distinct from the pending application.* The discussion among Commissioners at the January 23 meeting carefully

[2] Commissioner Ostergren's dissent opines significantly about his proposed answer to the substantive question. It bears repeating one more time: the Commission declines to reach that issue. The dissent from Commissioner Ostergren is beyond the scope of the Commission's decision on the issues related to the merits.

distinguished between the Commission's decision *on the petition* and its separate, upcoming decision on the *pending application*. That distinction is important and deserves emphasis. This decision to decline to issue a declaratory order does not, and should not be interpreted to, signal anything about how the Commission may ultimately vote on the pending license application.

In deciding whether to grant that application, the Commission will consider all the factors it normally does—including but not limited to community support, financing, gaming integrity, and possible detriment to other facilities. *See* Iowa Admin. Code r. 491—1.7; *Kopecky*, 891 N.W.2d at 445–46. This decision to decline to issue a declaratory order merely means the Commission will fully and fairly consider the license application pending before it.

VI. CONCLUSION

Under Iowa Code section 17A.9(1) and Iowa Administrative Code rule 491—2.28, the Commission declines to issue a declaratory order. Commissioner Ostergren's dissent is appended below.

The Commission's decision constitutes final action on the petition under Iowa Administrative Code rule 491—2.28(2). *See also Women Aware v. Reagen*, 331 N.W.2d 88, 90 (Iowa 1983).

Dated: **January 27, 2025**

Daryl Olsen, Chair
Iowa Racing & Gaming Commission

IOWA RACING AND GAMING COMMISSION
6200 Park Avenue
Des Moines, Iowa

PETITION BY RIVERSIDE CASINO AND GOLF RESORT, LLC AND WASHINGTON COUNTY RIVERBOAT FOUNDATION, INC.

FOR A DECLARATORY ORDER THAT THE IOWA RACING AND GAMING COMMISSION LACKS AUTHORITY TO ISSUE A GAMBLING GAMES LICENSE IN LINN COUNTY UNDER IOWA CODE § 99F.7(11)

DISSENT FROM ORDER DENYING PETITION FOR DECLARATORY ORDER

CEDAR RAPIDS DEVELOPMENT GROUP, LLC AND LINN COUNTY GAMING ASSOCIATION, INC.,

INTERVENORS.

On November 8, 2024, the Iowa Racing and Gaming Commission was presented with a petition for declaratory order as provided by Iowa Code § 17A.9. Petitioners are Riverside Casino and Golf Resort, LLC, and Washington County Riverboat Foundation, Inc. Petitioners are the operator and qualified service organization of the IRGC licensed gaming facility located near Riverside, Iowa. Petitioners challenge the license application before the IRGC by the Linn County Gaming Association, Inc. and the Cedar Rapids Development Group, LLC. This license application seeks authorization to construct and operate a gaming facility in Cedar Rapids, Linn County, Iowa.

Petitioners seek a declaratory order that the IRGC lacks authority to issue a gambling games license in Linn County under Iowa Code § 99F.7(11).

Petitioners also requested a stay of the IRGC's consideration of the Linn County license application. Petitioners contend that Linn County voters have not approved a referendum in the proper form to authorize gambling games in Linn County. Because of this, petitioners argue that the IRGC lacks the statutory authority to grant the license application for the proposed Linn County facility.

Upon receipt of the petition for declaratory order, the commission gave notice of the petition as required by Iowa Code § 17A.9(3). An informal meeting was held as provided by IAC 491—2.26. The informal meeting was conducted with the petitioners and the Cedar Rapids Development Group, LLC and the Linn County Gaming Association, Inc. The latter two parties indicated they would intervene in this proceeding as the petition challenged the legal authority for the commission to grant the license application they have brought before the commission and is currently under consideration. A petition for intervention was later received by the commission and granted. The commission denied petitioners' request for a stay on November 21, 2024.

The commission heard oral argument on the petition on January 23, 2025. At the conclusion of the hearing the commission voted 4-1 to deny the petition.

Procedure for declaratory order.

Iowa Code § 17A.9(1)(a) authorizes "[a]ny person" to "petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency." For purposes of Chapter 17A, a "person" is "any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency." Iowa Code § 17A.2(9). Petitioners meet this definition. The petition asks the IRGC to determine whether the necessary conditions are present for the IRGC to issue a gaming license. Issuance of gaming licenses is within the primary jurisdiction of the IRGC. Iowa Code § 99F.4.

An agency shall issue a declaratory order unless "the agency determines that issuance of the order would be contrary to" a rule adopted by the agency. Iowa Code § 17A.9(b)(2). The IRGC has adopted a rule identifying grounds for refusal to issue a declaratory order. IAC 491—2.28(1).

An agency cannot issue a declaratory order "that would substantially prejudice the rights of a person who would be a necessary party" without that party consenting in writing to participate in the matter. Iowa Code § 17A.9(1)(b)(2). As explained above, the IRGC received a petition to intervene from Cedar Rapids Development Group, LLC and Linn County Gaming Association, Inc. This petition constitutes written consent to participate in the petition for declaratory order. Intervenors make an argument, discussed below, that two additional necessary parties have not consented to join the petition.

Requirements for voter approval of gaming.

Approval of casino gaming in a community is a multi-step process. The Iowa legislature has provided for casino gaming through the adoption of statutes for the licensing of facilities, operators, and the conduct of gaming. Iowa Code § 99D, et seq. and Iowa Code § 99F, et seq. The IRGC is given full jurisdiction to supervise parimutual racing and casino gaming and to issue licenses to gaming facilities. Iowa Code § 99D.5, 99F.7. But the IRGC cannot issue a gaming license without approval from the local community where a proposed gaming facility would be located. Casino gaming is authorized on a county-by-county basis. The voters of a county must first pass a public measure as provided in Iowa Code § 99F.7(11).

To obtain voter approval, the first step is for a petition to be presented to the board of supervisors seeking a public referendum on the adoption of a measure to authorize gaming. Iowa Code § 99F.7(11)(a). This petition requires a significant initial showing of public support because it must be supported by signatures equal to ten percent of the votes cast for either President or Governor, as the case may be, in the preceding general

election. If a proper petition is presented to the board, the board will direct the county commissioner of elections to submit the measure at the next available date for a special election on a public measure. Iowa Code § 39.2(4)(a). The public measure must then receive a simple majority of votes to pass. Iowa Code § 99F.7(11)(a). The measure must "approve or disapprove the conduct of gambling games in the county."

After the approval of the public measure, the authorization must be resubmitted to the electorate a second time. Iowa Code § 99F.7(11)(d). The second vote does not require a petition of voters. The second vote cannot be held until "the eighth calendar year" following the first vote. Iowa Code § 99F.7(11)(e). If approved in two successive elections, the approval of gaming does not need to be resubmitted to the voters.

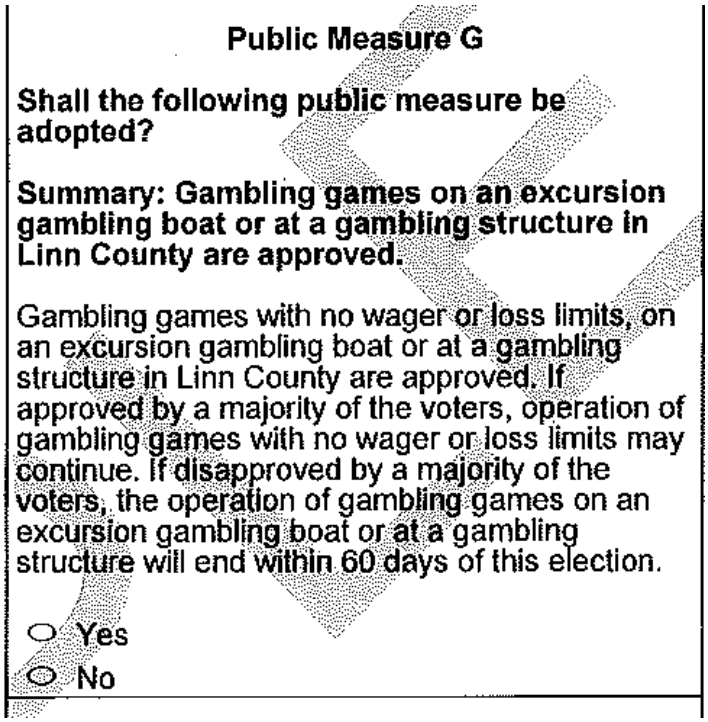
Factual background.

On March 5, 2013, Linn County voters approved a public measure to authorize gaming. The specific ballot language stated, "Shall the following Public Measure be adopted? Gambling games at a casino to be developed in Linn County are approved." Following this language, voting targets corresponding to a "Yes" and "No" vote were printed. Petition Exhibit A. The measure received the necessary simple majority approval of the voters.

The Linn County Board of Supervisors submitted the question to voters again by a resolution adopted July 14, 2021. The resolution directed the commissioner of elections to place the following ballot language on the November, 2021 general election ballot: "Shall the following public measure be adopted?" Following this language, voting targets corresponding to a "Yes" and "No" vote were printed. After the voting targets, the ballot read, "Summary: Gambling games on an excursion gambling boat or at a gambling structure in Linn County are approved." After this summary language, the ballot contained a bold horizontal line. Under the line the ballot read, "Gambling games with no wager or loss limits, on an excursion gambling boat or at a gambling structure in Linn County are approved. If

approved by a majority of the voters, operation of gambling games with no wager or loss limits may continue. If disapproved by a majority of the voters, the operation of gambling games on an excursion gambling boat or at a gambling structure will end within 60 days of this election." Petition Exhibit B.

The actual ballot language submitted to voters differed in format from the board's resolution. The ballot format moved the voting targets to the end and omitted the bold line:



Public Measure G

Shall the following public measure be adopted?

Summary: Gambling games on an excursion gambling boat or at a gambling structure in Linn County are approved.

Gambling games with no wager or loss limits, on an excursion gambling boat or at a gambling structure in Linn County are approved. If approved by a majority of the voters, operation of gambling games with no wager or loss limits may continue. If disapproved by a majority of the voters, the operation of gambling games on an excursion gambling boat or at a gambling structure will end within 60 days of this election.

○ Yes
○ No

Petition Exhibit C. Linn County voters approved this public measure at the November 2, 2021, election.

Petitioners challenge the validity of Public Measure G and ask the commission for a declaratory order that states there is no valid referendum in Linn County that would permit the issuance of a gaming license. Before answering this question, the commission must consider several arguments raised by the intervenors in response.

Do any of the grounds for refusing to issue a declaratory order listed in IAC 491—2.28 apply and therefore give a basis for the commission to refuse to issue a declaratory order?

The commission has adopted rules for handling petitions for declaratory orders that list grounds for refusing to issue a declaratory order. IAC 491—2.28(1). Intervenors argue that seven of these grounds apply to the present dispute. Importantly, it is within the commission's discretion whether to apply any of these factors. *Id.* (commission "*may* refuse to issue a declaratory order on some or all questions raised for the following reasons.") (emphasis added).

The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order. IAC 491—2.28(1)(2)

Intervenors claim that the petitioners lack standing to bring this challenge. IAC 491—2.19 requires that a petitioner for declaratory order "must have a real and direct interest in a specific fact situation that may affect their legal rights, duties or responsibilities under statutes or regulations administered by the commission." Standing for purposes of pursuing agency action is different from standing to obtain judicial relief. *Dickey* v. *Iowa Ethics and Campaign Disclosure Bd.*, 943 N.W.2d 34, 38 (Iowa 2020). In the Iowa APA context, a petitioner need not demonstrate that he will be injuriously affected by the outcome of the agency action. *Id.* at 39-40.

Petitioners are the QSO and licensed operator of a facility within the commission's jurisdiction that will suffer economic harm if a gaming license is issued for a Linn County facility. Intervenors have presented documents to the commission in support of their license application which show that petitioners will suffer an economic injury from the granting of a Linn County license. While intervenors argue that the injury is modest and should not cause the commission to refuse them a license, they can hardly deny that the petitioners here have an economic stake in the outcome of this petition. "A direct economic injury through constriction of the market…is a sufficient

injury to satisfy standing." *Ames Rental Prop. Ass'n* v. *City of Ames*, 736 N.W.2d 255, 259 n. 3 (Iowa 2007) (citing *Craig* v. *Boren,* 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397, 405 (1976)). I find the petitioners have standing.

The commission does not have jurisdiction over the questions presented in the petition. IAC 491—2.28(1)(3).

The commission has "full jurisdiction" over Iowa's gaming industry. Iowa Code § 99F.4. The commission's powers include the authority to "investigate applicants and determine the eligibility of applicants for a license…" Iowa Code § 99F.4(1). The commission is specifically directed to only issue a license if a county's electorate has approved a referendum in the matter provided by section 99F.7(11)(a). This authority includes the power to determine if the electorate do not favor the conduct of gambling games. *Id.* The examination of a public measure by a county's electorate to determine if it is sufficient to give the commission the authority to issue a license is a core function of this commission. Administrative agencies routinely determine whether a particular circumstance brought before the commission complies with the requirements of law. Intervenors' jurisdiction argument is meritless.

The questions presented by the petition are also presented in a current rulemaking, contested case, or other commission or judicial proceeding, that may definitively resolve them. IAC 491—2.28(1)(4).

Intervenors argue that the commission's review of their license application means the validity of Public Measure G cannot be determined by a petition for declaratory order. However, the application review process does not require that the validity of the public measure be "definitively resolved." It is possible that, by implication, the grant of a license to the intervenors would mean the commission had determined the public measure was valid. But a denial of the application could be for any number of reasons. The commission has numerous factors to consider in weighing the Linn County

application. The failure of a motion to grant the application will not *definitively* resolve the validity of Public Measure G.

Also, the commission's resolution of a petition for declaratory order will bind the petitioners, intervenors, and the commission. Iowa Code § 17A.9(7). This is a definitive resolution of the question. The commission's vote on a license application (in a process referred to as "other agency action") is not binding on anyone other than the applicant. I find that subsection (4) does not apply.

The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter. IAC 491—2.28(1)(5).

I have already explained that the commission has jurisdiction and there is no other proceeding more suitable for resolution of the question presented by the petition.

The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order. IAC 491—2.28(1)(6).

I find the facts presented in the petition are clear and straightforward. Indeed, the parties do not dispute anything factually, they argue instead about the legal implications of the same facts. The question presented is similarly straightforward: whether the public measure was valid. This ground permits the commission to avoid answering unduly abstract questions where it will later be difficult to determine whether the declaratory order is binding on the commission. This concern is not presented by the petition.

The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a commission decision already made. IAC 491—2.28(1)(8).

Intervenors claim the petition is based solely on prior conduct and therefore this ground applies. But they misunderstand the temporal concern that drives this provision. An agency may properly refuse a declaratory order when the purpose of the order would be to determine the legal status of facts in the past that are staying in the past. This is the very point made in the case quote in their brief. Intervenors' Brief 9 (citing *Int'l Union, United Auto, Aerospace, Agriculture and Implement Workers of America* v. *Iowa Dep't of Workforce Development*, 2002 WL 1285965, at * 3 (Iowa App. 6/12/2002)). As explained in *In'tl Union*, a declaratory order was inappropriate when the petitioner sought only "an opinion regarding agency duties, based on prior conduct…" *Id.* The court affirmed the agency's decision to decline to opine about how it had previously handled workers' compensation claims. "Because the purpose of a declaratory order is to set forth a legal opinion based on hypothetical or future circumstances, the [union's] petition does not serve to end the controversy." *Id.*

In contrast, the petition here seeks an answer to what can happen in the future: the issuance of a license to a Linn County casino. The petitioner is not asking to litigate solely about conduct in the past. This ground does not apply to the petition.

<u>The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner. IAC 491—2.28(1)(9).</u>

Intervenors claim the commission cannot proceed with issuing a declaratory order because the Linn County Board of Supervisors and Linn County have not consented to participate and they would be substantially prejudiced by the requested declaratory order. Intervenors do not explain how those entities would be prejudiced. The commission is presented with only conclusory statements asserting prejudice exists.

This argument fails. First, there is potentially only one party that has not intervened here. The board of supervisors for a county is not a distinct legal entity. The county is a legal entity, the board of supervisors are the officers of that entity. *See* Iowa Code § 331.301(2) (vesting power of county in the board of supervisors, unless an alternative form of county government has been established). Second, the only interest of the county identified in the intervenors' brief is the ministerial duty to direct the county auditor to place a public measure on the ballot when presented with a valid petition. Iowa Code § 99F.7(11)(a). The county is not the applicant for the license. There is little basis to conclude Linn County will be harmed by the commission considering the petition. *See Iowa Ins. Inst.* v. *Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58, 69 (Iowa 2015).

Third, the commission received a letter dated December 5, 2024, from an Assistant Linn County Attorney on behalf of the board of supervisors and the county. The letter explains the board and the county are aware of the petition for declaratory order and have chosen not to intervene. The letter identifies no substantial prejudice to the county from the declaratory order and does not object to the proceeding moving forward. True, the county sent a subsequent letter recommending the commission reject the petition. But the county's communications with the commission appear, individually and jointly, to indicate its consent to this process.

I find that Linn County is not a necessary party under section 17A.9(1)(b)(2). I also find that Linn County has consented to the declaratory order proceeding under that code section.

Are petitioners estopped from bringing this challenge?

Intervenors claim the petitioners are estopped from bringing this challenge because Riverside Casino and Golf Resort, LLC is a related corporate entity to the operator of a licensed facility in Lyon County. Intervenors argue the ballot measure in Lyon County contains materially the same language as Public Measure G. Therefore, they say it is inconsistent for the Washington County operator to raise a challenge that, intervenors say,

could be brought against the Lyon County facility. Intervenors state that the doctrines of judicial estoppel and estoppel by acquiescence apply.

The intervenors do not describe, and the commission is unaware of, any prior litigation about the validity of the Lyon County public measure. Judicial estoppel cannot come from a potential argument in a hypothetical case, it requires actual litigation about the topic to have taken place. *Winnebago Indust.* v. *Haverly*, 727 N.W.2d 567, 573-75 (Iowa 2006). Nor does estoppel by acquiescence have any applicability to the Lyon County gaming license. The doctrine is a defense "where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right." *Humboldt Livestock Auction, Inc.* v. *B&H Cattle Co.*, 155 N.W.2d 478, 487 (Iowa 1967). This doctrine would require a long ongoing dispute between the parties where the Lyon County operator could have, but did not, assert the invalidity of Public Measure G. This is simply inapplicable to the issues raised in the petition.

And intervenors' estoppel argument has a more fundamental problem. The qualified service organization in Lyon County is not the Washington County Riverboat Foundation, Inc. Whatever estoppel argument that could be raised against Riverside Casino and Golf Resort, LLC cannot be raised against its partner QSO. The intervenors' estoppel argument needs no further discussion.

Was the only method for challenging the legal effect of the 2021 public measure an election contest?

Intervenors argue that the sole method to challenge the legal effect of the 2021 public measure was an election contest under Chapter 57. And because such a challenge was not raised within 20 days of the election canvass, challengers say it is too late now. *See* Iowa Code § 62.5(1) (setting deadline for contest).

Intervenors are correct that Iowa law provides a method to contest the outcome of a public measure vote. None of the grounds for contesting the outcome of a public measure election suggest that the contest court is empowered to adjudicate the legal effect of what the voters have approved. Nothing in Chapter 57 requires the members of a contest court to be lawyers. While a contest court can gather facts about potential errors in the conduct of an election, the court is ill suited to perform legal analysis to determine the effect of a public measure.

Intervenors do not develop this argument by explaining which statutory ground for an election contest would apply to this scenario. Although Iowa Code § 57.1(2)(g) allows a contestant to claim "[t]hat the public measure or office was not authorized or required by state law to appear on the ballot at the election being contested," this ground does not apply to this question. There is no question that, in general, the voters can be presented with a referendum to approve gambling games. The other grounds for an election contest plainly do not apply to these circumstances. No one claims that there was an error in the tabulation of votes, that election officials committed misconduct, or ineligible voters participated in the election. If these were the grounds raised to contest the validity of the public measure's approval, the commission would be compelled to reject the attempt. The certification of the election's outcome is conclusive as to what was approved. But this is not what intervenors argue.

Intervenors cite no authority that a contest court has the power to adjudicate the meaning and legal effect of a public measure. Iowa's appellate courts have decided many cases involving such a question; indeed many are cited in the briefs of the petitioners and intervenors. My legal research does not reveal a single case about the meaning and legal effect of a public measure that has reached an Iowa court from a decision of a contest court.

One would think that if the intervenors were correct about the necessity of bringing an election contest to challenge a public measure's meaning, this argument would have been made in the literally hundreds of reported

decisions about the creation, merger, or dissolution of school districts or the issuance of bonds for public improvements such as roads, waterworks, and electric lighting plants. Yet, the commission is not presented with a single such case. This, in combination with the lack of statutory authority suggesting a contest court is granted adjudicatory power, is strong evidence that intervenors' argument lacks any merit.

Did the November 2, 2021, approval of the public measure comply with the requirements of Iowa Code § 99F.7(11)?

Petitioners argue that the November 2, 2021, public measure was not sufficient. They focus their argument on the explanation provided to voters following the bold-text summary. That explanation included a statement that if approved by the voters, "gambling games with no wager or loss limits may continue," and if disapproved the games "will end within 60 days of this election." This was misleading because there was no operating gaming facility in Linn County at the time.

Intervenors' brief includes a string cite of cases purporting to adopt a substantial compliance standard. Intervenors' Brief 14-15. The brief states, "[m]oreover, the Iowa Supreme Court has held that the substantial compliance doctrine applies to the ballot measures like Public Measure G." *Id.* at 15. The citation for this sentence is *Lahn* v. *Primghar*, 281 N.W. 214, 220 (Iowa 1938).

The pin cite to *Lahn* does not support the intervenors' argument. *Lahn* was one of many Iowa Supreme Court cases rejecting challenges to the form of the ballot in public measures seeking approval of municipal power utilities. Those challenges centered around the claim that certain statutes required the full details of the plant to be constructed to be printed on the ballot. The Iowa Supreme Court rejected those claims, finding that more specific statutes dealing with municipal utilities only required the maximum amount to be expended to be listed on the ballot. *See Greaves* v. *City of Villisca, Iowa*, 251 N.W. 766, 767 (Iowa 1933). As *Lahn* explains, "[t]he ballot is substantially in the form required by law and we find no ambiguity therein."

Lahn, 281 N.W. at 220. *Lahn* and the other cases cited by intervenors are not on point.

Intervenors argue that Public Measure G followed the format of rules of the Iowa Secretary of State for gambling elections. *See* IAC 721—21.820. The Secretary of State has promulgated forms for ballot measures covering several potential scenarios under Iowa's gaming laws. The first form, IAC 721—21.820(2), was the format for Linn County's 2013 approval of gambling games. But when the time came to approve gambling games again eight years later, intervenors say that the form found in IAC 721—21.820(7), a "[b]allot form for general election for continuing gambling games on an excursion gambling boat or at a gambling structure" was the appropriate model to use. Intervenors point out that the explanatory language in 21.820(2) says it is for an "election called by petition" and the explanatory language in 21.820(7) says it is for "elections to continue gambling games…at a gambling structure."

This is a thin argument. The explanatory language is just that, explanatory. It does not, and can not, modify the requirements of statutes enacted by the Iowa legislature. A person tasked with drafting what eventually became Public Measure G should have recognized that neither section 21.820(2) nor 21.820(7) exactly covered the situation. But the drafter should have perceived that section 21.820(2) was the closest to being correct. The question to be put to the Linn County voters in 2021 was accurately described: should gambling games be authorized? It was the explanatory language that was not correct: the measure was not placed on the ballot by petition, it was placed there by the Linn County board of supervisors following the direction of Iowa Code § 99F.7(11)(d). But this was a minor difference to the voters. The voters would never have seen the explanatory language, they would have seen an accurate description of the choice they had to make.

Not so for section 21.820(7). The drafter should have realized immediately that there was no casino operating in Linn County. The language about gambling games continuing at a gambling structure made no sense.

Choosing 21.820(7) over 21.820(2) because the latter was preceded by an explanation about petitions makes little sense. A petition is simply the way a public measure to authorize gambling games must first get on the ballot in a county. It has nothing to do with the substance of what the voters are asked to approve. The Secretary of State's ballot forms do not show that Public Measure G complied with Iowa Code § 99F.7(11).

Intervenors point to the commission's grant of a license to the casino in Lyon County as proof that Public Measure G was valid. I have already explained why judicial estoppel does not prevent the commission from considering this petition, but we must separately address whether the grant of the license to the Lyon County casino has any bearing on its disposition of the petition.

I find that the issues raised by this petition are separate from any potential attack on the validity of the Lyon County public measure that authorizes gambling games. The votes in Lyon County occurred under a different statutory scheme than exists today. *See* 2011 Iowa Acts, Ch. 111, § 11. The Iowa legislature made significant changes to the process for conducting a referendum to authorize gambling games. Relevant here, the legislature changed the eight-year interval for a second authorization referendum. *Id.* (changing "shall not be held for at least eight years" to "shall not be held until the eighth calendar year thereafter.")

Importantly, the 2011 amendments were made retroactive "to elections occurring on or after January 1, 1994." *Id.* at § 14. Legislation normally is given a prospective effect unless the legislature expressly states otherwise. Iowa Code § 4.5. Retroactive legislation is unusual and presents complicated questions about how an agency or court would interpret a 2011 statute purporting to alter the timing of requirements of elections going back to 1994. The statute could be interpreted to mean that elections that were appropriately spaced apart under existing law were retroactively deemed to have occurred with the wrong interval. This would have the effect of wiping out the authorizations provided by various county electorates and making their licenses invalid. It is hard to believe that the legislature intended this

result. Surely a legislature intending to blot existing casinos out of existence would have said so clearly and not left it to the happenstance of someone challenging a license application years later. *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 468 (2001) ("Congress, have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.")

The more logical interpretation of the 2011 legislation is that it was similar to a curative or legalizing act. The legislature approved of the referenda in effect at enactment but created a new rule going forward. This new rule established the requirement of two referenda approving gaming that were spaced eight calendar years apart. Once passed twice, there was no need to go back to the voters. This legislation shared the purpose of curative statutes, "to fulfill and secure expectations rather than to frustrate and defeat them." *Zaber* v. *City of Duquque*, 789 N.W.2d 634, 647 (Iowa 2010).

A challenge to the Lyon County license is not before the commission. It would be inappropriate to speculate on who might have standing to bring such a challenge, the procedural vehicle for the challenge, and what arguments could be made by the challenger. The commission does not know what arguments would be made in response. But it is sufficient to say that the existence of a Lyon County casino does not dictate how the commission must consider the validity of Public Measure G.

The Iowa Supreme Court has not considered a challenge to the validity of a public measure to authorize gambling games. The Court has, however, previously considered a challenge to the misleading language in a public measure to authorize the construction of a public utility. In *Muscatine Lighting Co.* v. *City of Muscatine*, 217 N.W. 468, 469 (Iowa 1928), a city placed a public measure before voters to authorize "the issuance of bonds in the sum of $350,000 for establishing and erecting a municipal electric light and power plant." The measure passed and the city constructed the plant. *Id.*

Almost immediately after the plant was completed, it became clear there was more demand for power than the plant could supply. *Id.* The city submitted a second public measure asking for authority to bond for $100,000 "for the purpose of paying the cost of erecting an electric light plant." *Id.* This measure also passed. A competitor private electric company sued to enjoin the issuance of the second bonds, claiming that the purpose of the bonds was to increase the capacity of the first plant, not to build a second power plant. *Id.*

The Court agreed. Because bonding to construct a power plant created the risk of taxpayers subsidizing private industry if the plant operated at a loss, the requirements for bonding to pay for public utilities must be strictly observed. *Id.* at 471 ("It is the settled law of this jurisdiction that authority for the issuance of negotiable bonds by a municipality must be found in express language of statute. Such power cannot be implied.") Because the second bond measure was for expanding the first plant, not building a second one as claimed in the public measure, the Court found the bonds could not be lawfully issued. *Id.*

Muscatine Lighting Co. teaches that a public measure is subject to strict compliance when there is a timely challenge to the extent of authority granted by the voters. As in other election contexts, "[t]he general rule is that election laws…require strict compliance." *Gluba* v. *State Objection Panel*, 11 N.W.3d 459, 466 (Iowa 2024) (discussing candidate qualification for ballot). "The settled rule is that election laws are mandatory and require strict compliance, and that substantial compliance is acceptable only when an election statute expressly permits it." *Id.* at 466-67. Intervenors cite no statute expressly permitting substantial compliance. I conclude a strict compliance standard is required by Iowa Supreme Court precedent.

But even a substantial compliance standard imposes a burden. In *Honohan* v. *United Comm. Sch. Dist. of the Counties of Boone and Story*, 137 N.W.2d 601 (Iowa 1965), the court considered a challenge to a public measure because of a discrepancy in the wording of the measure from what had been proposed by the school board. The school board gave

public notice of a proposal to issue bonds for a school building. “At all times prior to the election, discussions centered on the proposed construction of a new school building to house grades 5 through 12, and possibly kindergarten through the 12th grade.” *Id.* at 602. Yet the ballot read differently, asking voters to approve bonds for “building and furnishing a new senior high school building…” *Id.*

After reciting the various statutes that control the bonding approval process by public measure, the court summarized the requirements as not requiring the public measure to be “set forth [word for word], there must still be substantial compliance with the relevant statutes.” *Id.* at 604. “[T]he terms ‘schoolhouse’ and ‘senior high school’ are not synonymous…[i]t is therefore self-evident the people were compelled to vote on the senior high school proposal which had not been presented to the school board by any petition, had not been set forth in any notice of election, and as far as the record discloses had never been heard of, known to or considered by the people of the [school district] prior to the challenged election.” *Id.*

The public measure did not meet a substantial compliance standard. “This is a far cry from minor, technical or insignificant errors. We are not here dealing with color, texture, or initialling of ballots, voting places, number of judges or clerks, irrelevant errors in description of property, imperfectly marked ballots and similar minor defects as to form or procedure.” *Id.* The error in the description of the public measure’s purpose “goes to the very heart and soul of the election.” *Id.* This discrepancy required the court to find the bonds could not be issued by the school district.

Honohan gives guidance for how a different hypothetical challenge to Public Measure G would be resolved. As described above, there were minor discrepancies between the resolution adopted by the Linn County Board of Supervisors and the appearance of Public Measure G on the ballot. The resolution and ballot differ in the location of the voting targets and the omission of the bold line. If these discrepancies were the basis for a challenge to the validity of Public Measure G, *Honohan* would compel the commission to reject it. Any difference between the resolution and the ballot

was insubstantial, a “minor defect[] as to form or procedure” that cannot undo what the voters have approved.

But *Muscatine Lighting Co.* and *Honohan* teach that regardless of whether the adjectives “strict” or “substantial” are used, the law requires *compliance* as to the essence of the statutory obligations behind the public measure. The commission must look, as *Honohan* put it, at the “heart and soul” of what the election decided. Public Measure G did not comply with the direction in section 99F.7(11) for the public measure to “approve or disapprove the conduct of gambling games in the county.” The language in the public measure includes misleading surplusage. Voters were told, incorrectly, that gambling games could continue if the measure passed. They were also incorrectly told they were approving games without limits. Just as *Honohan* found a fatal difference between “schoolhouse” and “senior high school,” I am compelled to find the same result from discrepancies in Public Measure G from what section 99F.7(11) commands. The statute directs a simple question to the voters. The public measure was not that.

Because the 2021 public measure vote did not comply with the requirements of section 99F.7(11), I must consider whether the 2013 public measure can continue to authorize the issuance of a gaming license in Linn County. I determine that it cannot. Because section 99F.7(11) calls for resubmission of the authorization of gambling games to the voters after eight years, and Public Measure G did not so authorize in the manner required by law, the commission must determine that the 2013 authorization lapsed.

Admittedly, section 99F.7(11) does not expressly provide a remedy for a situation where an incorrectly phrased public measure is submitted to the voters. The code presumes that the question placed before the electorate will be done in the manner specified. But that did not occur. I must therefore interpret the remaining provisions of section 99F.7(11) to decide whether the lack of reapproval is the same as a disapproval by the voters in 2021. I conclude that it is. The legislature has specified a path to authorize

gambling games in a county that calls for two affirmative votes spaced eight years apart. That path was not followed. Because of this, there is no currently effective authorization from the Linn County electorate to conduct gambling games.

Conclusion

My colleagues' refusal to answer the question presented by the petition is deeply unfortunate. This commission must from time to time make hard decisions. It is not easy to tell intervenors that their project cannot move forward because of a terrible oversight in how the 2021 referendum was drafted. I imagine it is not easy for other agencies to revoke the license of a physician who struggles with depression, impose a heavy environmental fine on a family business, or decertify a peace officer over a serious, yet momentary, lapse of judgment. But the answer for an agency presented with these hard questions is to apply reasoned judgment, explain its rationale for acting, and enforce the rules within its jurisdiction without hesitation. The commission's vote today did not meet this standard.

I respectfully dissent.

January 23, 2025

Alan R. Ostergren
Commissioner
Iowa Racing and Gaming Commission