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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012-SC-000197-D

LOUISVILLE SOCCER ALLIANCE, INC.;
MICHAEL E. HAYES; LOUISVILLE SOCCER CLUB, INC.;
DOUGLAS LANHAM; KENTUCKY SOCCER ASSOCIATION, INC.;
REBECCA NALLEY; CATHOLIC CONFERENCE OF KENTUCKY;
EDWARD C. MONOHAN; HOLY NAME OF JESUS PARISH;
AND REV. J. EDWARD BRADLEY

APPELLANTS

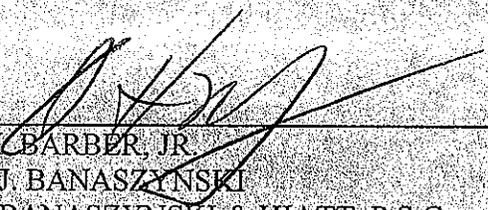
vs. **On Discretionary Review from the Kentucky Court of Appeals**
Case No. 2011-CA-000406

Appeal from the Franklin Circuit Court
Honorable Phillip J. Shepherd, Judge
Case No. 08-CI-1208

STEVEN L. BEHEAR, IN HIS OFFICIAL
CAPACITY AS THE GOVERNOR OF KENTUCKY;
TODD HOLLENBACH, IN HIS OFFICIAL CAPACITY
AS STATE TREASURER; JONATHAN MILLER, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE
AND ADMINISTRATION CABINET; MARY LASSITER,
IN HER OFFICIAL CAPACITY AS STATE BUDGET DIRECTOR;
AND ROBERT VANCE, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF THE PUBLIC PROTECTION CABINET

APPELLEES

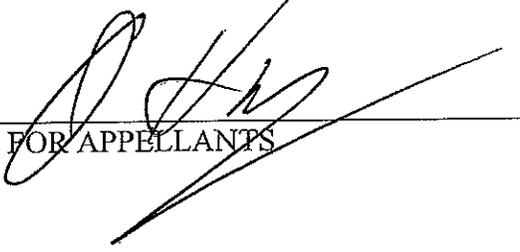
BRIEF ON BEHALF OF APPELLANTS


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CERTIFICATE OF SERVICE

It is hereby certified that the original and nine copies of the foregoing Brief for Appellants have been mailed, postage prepared, to Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capitol Avenue, Room 235, Frankfort, KY 40601-3415; and a copy each to: Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601, Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, 669 Chamberlin Ave., P.O. Box 678, Frankfort, KY 40602; Mr. Stephen Pitt and Christopher W. Brooker, WYATT, TARRANT & COMBS, LLP, 500 West Jefferson St., Suite 2800, Louisville, KY 40202, this 13th day of December, 2012.



COUNSEL FOR APPELLANTS

INTRODUCTION

The Petitioners, not-for-profit organizations, conducting charitable gaming activities, sought declaratory and injunctive relief to prevent the Executive Branch of the Commonwealth from transferring surplus, anti-lapse funds, in the Department of Charitable Gaming Regulatory and Enforcement KRS 238.570 Fund to the general fund; to declare the transfers to the General Fund unconstitutional; to deny an increase in the charitable gaming license fee. The trial court determined that the transfer of \$700,000.00 from the Charitable Gaming Fund to the General Fund was unconstitutional, which was reversed by the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(ii) of the Kentucky Rules of Civil Procedure, Appellants request the opportunity to present oral argument. The issues in this case can be explained, and the error of the Court of Appeals demonstrated, if Appellants are allowed oral argument.

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STATEMENT OF THE CASE

PROCEEDURAL HISTORY AND BACKGROUND

This action was initiated with the filing of a Petition for Declaration of Rights by the Appellants in the Franklin Circuit Court on July 23, 2008 (T.R. 1-42). The Appellant entities are certified licensees or permit holders who have paid, and continue to pay, fees to the Department of Charitable Gaming (“DCG”) (formerly Office of Charitable Gaming (“OCG”)) regarding the regulation and enforcement of the Kentucky Charitable Gaming Act KRS 238.500, et seq.

The Appellant entities are all not-for-profit organizations, authorized to operate in Kentucky, and each of which is involved in charitable gaming activities. These charitable gaming activities, including bingo, are operated pursuant to the provisions of KRS 238.500 et seq., and provide needed funds for the ongoing operations of the Appellant entities.

The Appellant individuals are all responsible for ensuring that the charitable gaming activities of the entities, which they represent, comply with the requirements of the Kentucky Charitable Gaming Act, KRS Chapter 238, as well as the requirements of the Department of Charitable Gaming.

The Appellee state officials have varying degrees of responsibility to implement the budget enacted by the Kentucky Legislature. Appellee Robert Vance is the Secretary of the Public Protection Cabinet, and oversees regulated businesses and entities, including the Department of Charitable Gaming (“DCG”). The Department of Charitable Gaming is a government unit which has as its primary duty to provide a regulatory framework to allow charities to engage in charitable gaming as a viable fund

raising activity. It is to exercise appropriate police powers to regulate charitable gaming, and to protect the public. It is an administrative agency created to perform one specific function.

Appellants brought this action on behalf of themselves, as well as other entities and individuals, which are licensees or permit holders who have paid or will pay fees to DCG (formerly Office of Charitable Gaming (“OCG”)), concerning the regulation and enforcement of the state charitable gaming act.

The underlying action was initiated following the implementation of Executive Order 2008-011 (T.R. 21-25), in conjunction with General Fund Budget Reduction Order 08-01 (T.R. 26-42), which directed the State Budget Director, inter alia, to transfer to the general fund certain monies held in the Department of Charitable Gaming KRS 238.570 restricted account, license fees collected by DCG from entities engaged in charitable gaming in the amount of Seven Hundred Thousand Dollars (\$700,000.00) (T.R. 37).

The Appellants/Petitioners sought a declaration of rights that all payments to DCG for applications, licenses, permits and other related activities, by persons and entities engaged in charitable gaming, or fees, were statutorily dedicated to regulatory and enforcement purposes under the Kentucky Charitable Gaming Act; that none of those payments constitutes a tax which may be transferred to the general fund of the Commonwealth; that the increase in the KRS 238.570 regulatory fee from 0.53% to 0.60% in 2008, an even-numbered year, was statutorily impermissible and *void ab initio*. The petition for declaration of rights further sought an order that the taking or transfer of the payments assessed and collected by DCG to the general fund violated Sections 2, 15, 28, 51, 59, 81, 171 and 180 of the Kentucky Constitution. The Appellants further sought

a temporary injunction to prohibit the transfer, pursuant to Executive Order 2008-011, of the Seven Hundred Thousand Dollars (\$700,000.00) from the DCG account to the general fund.

The Appellants asserted that the license fees, collected by the Department of Charitable Gaming, had been converted to a tax by virtue of the General Assembly's unlawful fund transfer of the restricted KRS 238.570 account into the general fund of the Commonwealth, and thereupon used to support the general obligations of all of state government.

To the extent that DCG exercises control over its fees and funds, that authority is delegated by the General Assembly. The budget, "which provides the revenue for the Commonwealth and which determines how that revenue shall be spent, is fundamentally a legislative matter." Legislative Research Commission v. Brown, 664 S.W.2d 907, 925 (Ky. 1984). The legislature's power of the Commonwealth's purse strings is plenary. The Kentucky Constitution empowers the General Assembly to make appropriations (Section 230), to contract debts (Sections 49-50), to provide for annual taxes (Section 171), and to provide for payment of license fees and excise taxes (Section 181). The legislature determines, by statute, which funds are restricted and which funds lapse to the General Fund to the extent that they are in excess of appropriations or expenditures. KRS 238.570 funds are so restricted.

By 2008, the Commonwealth had experienced severe financial problems over the preceding years. The Executive Branch, sometimes in concert with the Legislature, had undertaken various scripts to address the revenue shortfalls which the state has

experienced. In recent years, the 2006 General Assembly, appreciably, first addressed anticipated budget deficits.

The general fund budget reduction plan enacted by the 2006 General Assembly directed that any projected deficit in estimated general fund revenues include “a specific plan to address a proportionate share of the general fund revenue shortfall applicable to the respective branch. No budget revision action shall be taken by a branch head in excess of the actual or projected deficit.” The general fund budget reduction plan also directed the “transfers of excess unappropriated restricted funds other than fiduciary funds.” 2006 Ky. Acts, c. 252, p. 993.

The fund transfers enacted by the 2006 General Assembly directed the transfer of \$1,100,000.00 from the Department of Charitable Gaming (“DCG”) KRS 238.570 Regulatory Account for fiscal year 2005-06. 2006 Ky. Acts, c. 252, p. 991.

Executive Order 2008-011, approved on January 4, 2008 by Gov. Steven L. Beshear, eliminated a projected general fund budget short-fall of \$265 million in fiscal year 2008, and ordered reductions in general fund appropriations totaling \$65,262,416.00 (T.R. 32) from executive branch units of state government. General fund appropriations authorized by the General Assembly for FY 2008 were \$9,361,824,916.00 (Id.). The Executive Order also directed reductions in restricted funds appropriations totaling \$8,873,600.00 (T.R. 33).

The Executive Order, in conjunction with General Fund Budget Reduction Order 08-01, directed that the State Budget Director transfer to the general fund certain monies held in agency accounts totaling \$51,198,200.00 (T.R. 34-38). The transfers to the general fund included agency accounts of KRS 238.570 license fees collected by DCG

from entities engaged in charitable gaming for license fees in the total amount of \$700,000.00 (T.R. 37).

STATUTORY PROVISIONS

The Kentucky Charitable Gaming Act, KRS 238.500, et seq., was enacted by the 1994 Kentucky General Assembly, following ratification on November 3, 1992 of the state lottery and charitable gaming amendment to Kentucky Constitution §226. The statutory enactment provided general police powers to regulate charitable gaming through the Office of Charitable Gaming (now "Department of Charitable Gaming") within the Environmental Public Protection Cabinet (now "Public Protection Cabinet").

Charitable Gaming is defined to include bingo, charity game tickets, raffles, and charity fundraising events conducted for fundraising purposes by charitable organizations licensed and regulated under the provisions of the Charitable Gaming Act. KRS 238.505(2). The charitable gaming activities of the Appellant organizations are regulated pursuant to the provisions of KRS 238.500, et seq., and implementing regulations found at Title 820, Public Protection Cabinet, Department of Charitable Gaming, of the Kentucky Administrative Regulations.

KRS 238.570 creates a charitable gaming regulatory account; imposes certain licensing fees upon charitable gaming organizations for the administration and enforcement of the charitable gaming laws; provides a methodology to adjust the licensing fee rate.

KRS 238.570 provides as follows:

(1) A fee is imposed on charitable gaming in the amount of fifty-three hundredths of one percent (0.53%) of gross receipts derived from all charitable gaming conducted by charitable organizations required to be licensed in the Commonwealth of Kentucky. The amount of the fee shall be adjusted by October 1 of each odd-numbered year in accordance with subsection (3) of this section.

Each licensed charitable organization shall remit to the department all moneys due as set forth in administrative regulations promulgated by the department. Failure by a licensed charitable organization to timely remit the fee required under this subsection upon notice of delinquency shall constitute grounds for disciplinary action in accordance with KRS 238.560.

(2) The charitable gaming regulatory account is hereby created as a revolving account within the agency revenue fund and under the control of the Public Protection Cabinet. All revenues generated from the fee levied in subsection (1) of this section from license fees and from administrative fines imposed by the department shall be deposited in this account. Fund amounts attributable to the fee levied in subsection (1) of this section that are not expended at the close of a fiscal year shall not lapse but shall be carried forward to the next fiscal year.

(3)(a) No later than July 31 of each odd-numbered year, the Public Protection Cabinet shall determine:

1. The amount of gross receipts during the prior biennium against which the fee collected under subsection (1) of this section was assessed; and
2. The final budgeted amount as determined by the enacted budget for the upcoming biennium for the administration and enforcement of the provisions of this chapter. If a budget is not enacted, the amount shall be the corresponding amount in the last enacted budget.

(b) On October 1 of each odd-numbered year, the fee assessed under subsection (1) of this section shall be proportionally adjusted by the Public Protection Cabinet. The new rate shall be calculated by multiplying one hundred ten percent (110%) by the amount determined in paragraph (a)2. of this subsection, and subtracting from that amount one-half (1/2) of any remaining balance in the account. The total shall then be divided by the amount determined in paragraph (a)1. of this subsection. The result shall be expressed as a percentage and shall be rounded to the nearest thousandth of a percent (0.000%).

In the matter of Commonwealth of Kentucky v. Louisville Atlantis

Community/Adapt, Inc., 971 S.W.2d 810 (Ky.App., 1997), the Court of Appeals addressed the constitutionality of KRS 238.570. The Court determined, consistent with the provisions of Section 226(2) of the Kentucky Constitution, that the regulatory fee imposed pursuant to KRS 238.570(1) was constitutional. The Court specifically noted as follows:

“The funds generated from the fee imposed pursuant to KRS 238.570(1) are kept in a separate account and are expended by the Charitable Gaming Division only in the administration and enforcement of the provisions of

the Charitable Gaming Act. The fee is a regulatory fee and not a tax.. ...
The fee imposed by KRS 238.570(1) is constitutional....” Id., at 815.

The General Assembly delegated to DCG the responsibility to impose and collect fees and, as appropriate, fines, to carry out the duties and responsibilities of DCG. Only the General Assembly may enact taxes, and such authority may not be delegated to an agency of state government. The fees assessed and collected by DCG are non-tax payments, prohibited from transfer to the State general fund. The fees assessed and collected by the DCG are to be used exclusively to enforce the provisions of the Charitable Gaming Act. The transfer of non-tax payments, assessed and collected by DCG, violates the constitutional and statutory scheme enacted and implemented to license and regulate the conduct of charitable gaming.

CHARITABLE GAMING FUND

In 2007, the General Assembly enacted House Bill (HB) 156 (Appendix, Exhibit 6) amending certain sections of the Charitable Gaming Act, including the following:

KRS 238.570(1) imposes upon charitable gaming organizations a fee in the amount of 53/100 of 1% (0.53%) of gross receipts derived from charitable gaming activities.¹ The law requires a biennial recalculation of the charitable gaming fee to collect only what is needed to operate the DCG. Currently, under KRS 238.570, a fee is imposed on charitable gaming in the amount of 0.53% of gross receipts derived from all charitable gaming conducted by charitable organizations required to be licensed in the Commonwealth. It is required to be adjusted every odd numbered year. “The amount of

¹ Originally, the Charitable Gaming Act set a fee of 0.50% of gross receipts derived from charitable gaming activities conducted by charitable organizations, licensed pursuant to the Charitable Gaming Act.

the fee shall be adjusted by October 1 of each odd numbered year in accordance with subsection (3) of this section.” HB 156, Section 3.

KRS 238.570(2) provides for the creation of a charitable gaming regulatory account into which the collected fees are placed. “Fund amounts attributable to the fee levied in subsection (1) of this section that are not expended at the close of a fiscal year shall not lapse but shall be carried forward to the next fiscal year.” Id.

Effective July 1, 2008, the Department of Charitable Gaming raised the fee from 0.53% of gross receipts to 0.60% of gross receipts.²

Funds attributable to the above-referenced fees and fines which are not expended at the end of the fiscal year, **shall not lapse, but shall be carried forward to the next fiscal year.** KRS 238.570(2) (emphasis added).

The Appellants prepared a table for the trial court, based upon information received from the Department of Charitable Gaming, noting the charitable gaming fees generated pursuant to KRS 238.570 since 1998. The table includes transfers from the Charitable Gaming, KRS 238.570 Fund, to the General Fund at various points in time, up through the transfer of the disputed \$700,000.00. For reference purposes, that table is reproduced herein, as follows:

² The Franklin Circuit Court did not directly rule on this fee claim in its March 1, 2011 Opinion and Order. T.R. 201-210. However, the Court acknowledged that the parties had entered into an Agreed Order regarding this issue. T.R. 61-63. This issue was otherwise preserved for appeal by the Petitioners’/ Appellants’ Motion for Summary Judgment and Declaration of Rights, T.R. 67-99, esp. 70-72, as well as the Appellees’ Response, T.R. 104-130. See also video of hearing.

**Table 1:³ Office of Charitable Gaming Revenue Transfer Summary, FY 1998-
FY2010 (est.)**

Fiscal Year	Gross Receipts	Fee Imposed	Current Receipts	Balance Forward	Total Expenditures	Transfers to General Fund
FY 2010 (est.)	470,000,000	0.530%	2,811,800	451,180	3,092,900	-
FY 2009 (est.)	470,000,000	0.530%	2,825,800	682,980	3,057,600	-
FY 2008 (est.)	470,000,000	0.530%	2,995,900	2,031,180	3,343,200	700,000
FY 2007	481,818,300	0.530%	3,210,260	1,993,637	2,898,567	-
FY 2006	528,900,000	0.530%	3,439,248	2,767,445	2,919,156	1,100,000
FY 2005	545,700,000	0.530%	3,475,072	2,279,451	2,678,878	191,200
FY 2004	570,100,000	0.530%	3,584,672	1,486,724	2,791,945	-
FY 2003	588,400,000	0.530%	2,839,244	1,326,411	2,678,930	-
FY 2002	608,000,000	0.400%	2,923,739	2,077,483	3,009,811	-
FY 2001	607,000,000	0.400%	2,832,258	2,874,399	2,929,174	-
FY 2000	584,600,000	0.400%	2,819,121	5,143,200	3,089,260	2,000,000
FY 1999	564,400,000	0.500%	2,720,129	6,674,806	2,251,736	2,000,000
FY 1998	540,300,000	0.500%	3,228,304	4,903,821	1,455,788	-

The Franklin Circuit Court issued its Opinion and Order on February 1, 2011.

The trial court determined that the General Assembly's use of its power to suspend statutes, pursuant to a budget bill, and to effect fund transfers from restricted funds to the general fund, "has become a virtual necessity to balance the state budget. Accordingly, any 'restricted' fund under state control has become, for all practice

³ Prepared by representatives of the Catholic Conference from information received from the Office of Charitable Gaming. Petitioners' Motion, p. 5; T.R. 71.

purposes, a tax which is deposited into the state's general fund at the sole and unlimited discretion of the General Assembly, notwithstanding the constitutional restrictions of Section 180 of the Kentucky Constitution which provide (sic) that 'no tax levied and collected for one purpose shall ever be devoted to another purpose.'" (Opinion and Order, p. 6; T.R. 206).

The court went on to determine that "the challenged portion of the 2008 budget bill violates Sections 51 and 180 of the Kentucky Constitution, which provides that 'no tax levied and collected for one purpose shall ever be devoted to another purpose.'" (Id., p. 9; T.R. 209).

Finally, the trial court found "that KRS 48.315 provides no independent basis for the fund transfers in this case, and the failure of the legislature to list KRS 238.570 among the statutes for which fund transfers are authorized under KRS 48.315 means that the legislature excluded the charitable gaming fee account from the fund transfer statute." (Id.).

The trial court did not directly rule on the increase in the license fee authorized pursuant to KRS 238.570 from 0.53% of gross receipts to 0.60% of gross receipts, effective July 1, 2008. The court did note that "[T]he parties further agreed that payment of the increased fee will not operate as a waiver of the Plaintiffs' claims, that the Defendants will refund the increased fees if the increase is held to be illegal, 'after the exhaustion of all appeals.'...Finally the legislation provided that the fee can be adjusted 'no later than July 31 of each odd-numbered year.'" (Id., pp. 2-3; T.R. 202-203).

The Court of Appeals reversed the trial court in its Opinion rendered on March 2, 2012. The Court of Appeals held that the fund transfers, such as the one at issue, did not

violate Section 51 of the Kentucky Constitution. The court discussed at length this court's decision in Commonwealth ex rel. Armstrong vs. Collins, 709 S.W.2d 437 (Ky. 1986), and could "find no meaningful distinction between the legislative actions authorized in Armstrong and the facts herein." The court went on to find that the "legislation in question comports with the constitutional requirements of Section 51." (Court of Appeals Opinion, p. 11). The court held that the suspension of KRS 238.570(2), and the transfer of excess funds, did not violate Section 180 of the Kentucky Constitution, relying on that court's decision in Commonwealth v. Louisville Atlantis Community/Adapt, Inc., 971 S.W.2d 810 (Ky.App. 1997).

The Court of Appeals further went on to note that the inclusion of "etc." at the end of Subsection 1 of KRS 48.315 was meant to include other statutes within its purview. (Opinion, pp. 15-16).

Issues preserved for review by the Court:

- (1) Whether restricted fund transfers from KRS 238.570 to the General Fund were authorized by statute or the budget;
- (2) Whether KRS 48.315 provides a basis for transferring charitable gaming funds;
- (3) Whether excess funds in the restricted charitable gaming accounts are prohibited from transfer to the general fund;
- (4) Whether the transfer of charitable gaming license fees to the general fund in a budget bill violates the provisions of Kentucky Constitution Sections 51, 180, 181.⁴

An issue deemed by the Court of Appeals to not have been preserved for review (Opinion p. 17), but which will be presented to the court, is whether the increase in the KRS 238.570 license fee in 2008 is patently contrary to law and void ab initio.

⁴ There is presently pending before this court another matter which presents issues similar to that as herein. Discretionary review was granted by this court in the matter Klein v. Miller on October 17, 2012.

I.

**CHARITABLE GAMING RESTRICTED FUNDS ARE NOT
AVAILABLE FOR TRANSFER TO THE GENERAL FUND
TO OPERATE STATE GOVERNMENT BY SUSPENDING
THE STATUTORY RESTRICTONS IN A BUDGET BILL**

KRS 238.570, generally, creates a charitable gaming regulatory account, and imposes certain licensing fees upon charitable gaming organizations for the administration and enforcement of the charitable gaming laws.

In the matter of Commonwealth of Kentucky v. Louisville Atlantis Community/Adapt, Inc., 971 S.W.2d 810 (Ky.App., 1997), the Court of Appeals addressed the constitutionality of KRS 238.570. The Court determined, consistent with the provisions of Section 226(2) of the Kentucky Constitution, that the regulatory fee imposed pursuant to KRS 238.570(1) was constitutional.

The court went on to discuss the use of the regulatory fee funds. “The funds generated from the fee imposed pursuant to KRS 238.570(1) are kept in a separate account and are expended by the Charitable Gaming Division only in the administration and enforcement of the provisions of the Charitable Gaming Act. The fee is a regulatory fee and not a tax.” Id., at 815. There is a single use for the regulatory fee funds—administration and enforcement.

The trial court herein determined that the General Assembly’s suspension of the statutory restriction of the charitable gaming license fees “resulted in a tax on non-profit entities, licensed by the State to conduct charitable gaming under KRS Chapter 238, although the statute limiting the fee to the amount necessary to regulate charitable gaming license fees has never been repealed; ...that the fee required by the 2008 budget exceeded the actual cost of state regulation; ...that the legislature, through its suspension

of the statute in the budget bill, converted the fee to a tax.” The trial court determined “[t]o that extent, the challenged portion of the 2008 budget bill violates Sections 51 and 180 of the Kentucky Constitution, which provides that ‘no tax levied and collected for one purpose shall ever be devoted to another purpose.’” (Opinion and Order, pp. 8-9; T.R. 208-209).

The Court of Appeals found to the contrary.

The Court of Appeals reversed the trial court’s ruling that Commonwealth, ex rel Armstrong v. Collins, 709 S.W.2d 437 (Ky. 1986) did not provide authority for the General Assembly to extend its authority beyond any meaningful limits and ignore the constitutional restrictions of Section 51 of the Kentucky Constitution. To the contrary, the Court of Appeals could find no meaningful distinction between the legislative actions authorized in Armstrong and the facts in the present dispute. (Court of Appeals Opinion, p. 10). The Court of Appeals erroneously applied Armstrong, and its progeny, to the facts of this case, along with the statutory and constitutional constrictions limiting the use of the police powers of the General Assembly.

The Court of Appeals properly found that the charitable gaming fee charged to not-for-profit organizations pursuant to KRS 238.570 was related to the cost of administering and enforcing the charitable gaming statutes and regulations. (Opinion, p. 12). The fees imposed pursuant to KRS 238.570 are for the specific purpose of fulfilling the statutory mandates regulating charitable gaming. Funds generated from those fees are to be used for the specific purpose of administering and enforcing the charitable gaming statutes and regulations. Kentucky River Authority v. City of Danville, 932 S.W.2d 374, 376 (Ky.App. 1996) (“fees imposed by the authority for the purpose of fulfilling the

statutory mandates cannot be equated with taxes. The funds generated from the fees that are used for the specific purpose of conserving and controlling the waters in the Kentucky River basin and are incidental to the statutes.” *Id.*, at 376). See also Beshear v. Haydon Bridge Company, Inc., 304 S.W.3d 682, 698 (Ky. 2010), which defines and compares taxes to assessments.⁵

The Court of Appeals cited with approval the holding of the Louisville Atlantis Community/Adapt court that the required fee of KRS 238.570 did not constitute a tax, but was rather a regulatory fee.⁶ (Opinion, p. 13). In Gray v. Methodist Episcopal Church, 114 S.W.2d 1141 (Ky. 1938), the court held that an auto registration fee is not a tax and therefore must be paid by a charitable organization, “even if it produces revenue for the public.” (*Id.* at 1144) The Gray court noted that, while the amount of a registration fee may be more than necessary for strictly “police” purposes, using the fee “to repair damage to the highways, occasioned by the use of this new vehicle, constituted a valid exercise of the police power.” (*Id.* at 1144) Gray cannot be construed as condoning, or even remotely dealing with, taking police power fees from a regulatory agency and using them for General Fund taxes.

“It is a well-known rule of law that a license fee imposed under the police power must not be so large as to create the imputation of a revenue measure. The fee

⁵ “Taxes, as the term is generally used, are public burdens imposed generally upon the inhabitants of the whole state, or upon some civil division thereof, for governmental purposes, without reference to peculiar benefits to particular individuals or property. ‘Assessments,’ have reference to impositions for improvements and which are specially beneficial to particular individuals or property, and which are imposed in proportion to the particular benefits supposed to be conferred. They are justified only because the improvements conferred special benefits and are just only when they are divided and proportioned to such benefits. Black’s Law Dictionary 1629 (rev’d 4th ed. 1968).” *Id.*, at 697-698.

⁶ “[S]ince a tax is a charge imposed for the purpose of raising revenue, a charge primarily imposed for the purpose of regulation is not a tax, and is not subject to the constitutional limitations upon the power of taxation. . . . If the primary purpose of the legislature in imposing such a charge is to regulate the occupation or the act, the charge is not a tax *even if it produces revenue for the public.* *Id.* at 815. (Emphasis added). (Quoting Gray v. Methodist Episcopal Church, 272 Ky. 646, 652, 114 S.W.2d 1141, 1144 (1938)).”

must be sufficient only to meet the expense of issuing the license and supervising any necessary regulatory measures. In *City v. Henderson v. Lockett*, 157 Ky. 366, 163 S.W. 199 (1914), we said:

‘* * * But, where a license fee is imposed under the police power, the fee exacted must not be so large as to charge the ordinance with the imputation of a revenue-producing purpose. The fee that may be imposed under the police power is one that is sufficient only to compensate the municipality for issuing the license and for exercising a supervision regulation over the subjects thereof. Anything in addition to this amounts to a tax for revenue, and cannot be upheld as a valid exercise of the police power. What is a reasonable fee is a question of fact, depending upon the particular circumstances * * *.’

See also *Reeves v. Adam Hat Stores*, 303 Ky. 633, 198 S.W.2d 789 (1946); *Martin v. City of Greenville*, 312 Ky. 292, 227 S.W.2d 435 (1950).” Roe v. Commonwealth, 405 S.W.2d 25, 28 (Ky. 1966).

In Beshear v. Haydon Bridge Company, Inc., 304 S.W.3d 682 (Ky. 2010), this court was presented, inter alia, with the issue of whether the General Assembly could suspend the effect of KRS 342.122 as part of the 2002-2004 biennial budget bill. In its analysis, Haydon Bridge posited that “[i]n *Armstrong*, we noted the General Assembly had ‘not repealed or amended the... statutes, it [had] simply temporarily suspended them, as it clearly [had] the power to do.’ *Id.* at 445-46.” *Id.* at 700. Haydon Bridge went on to discuss the applicability of KRS 48.310 and 48.315. The Court noted that KRS 342.122 was one of the statutes specifically named in KRS 48.315. As an enumerated statute in KRS 48.315(1), the General Assembly had reserved to itself the right to suspend the applicability of KRS 342.122.

“Through KRS 48.315, the General Assembly *clearly* intended to provide for the modification or suspension during the budgetary period of the funds enumerated in KRS 342.122 as was done here.” *Id.*, at 702...KRS 48.315 appears to have been set out separately from KRS 48.316 in recognition that the funds affected were ‘agency funds,

special funds, or other funds established under the [noted] provisions.’ Cf., KRS 48.315(1).” *Id.*, at 703. KRS 238.570 was not and is not so enumerated.

II.

KRS 48.315 DOES NOT PROVIDE A BASIS FOR TRANSFERRING CHARITABLE GAMING FUNDS

KRS 48.315 authorizes the transfer of enumerated agency, special or other delineated funds to the general fund. A budget bill does not entitle the Governor nor the General Assembly to transfer funds from the charitable gaming special account. The delineation of the various statutes in KRS 48.315(1) is conspicuous in the absence of any reference to the agency fund created pursuant to KRS 238.570.

KRS § 48.315 provides as follows:

(1) The General Assembly may provide in a budget bill for the transfer to the general fund for the purpose of the general fund all or part of the agency funds, special funds, or other funds established under the provisions of KRS 15.430; 21.347; 21.540; 21.560; 42.500; 47.010; 48.010(15)(g); 56.100; 61.470; 64.345; 64.350; 64.355; 95A.220; 136.392; 138.510; 161.420; 161.430; 164A.020; 164A.110; 164A.800; 164A.810; 216A.110; 230.218; 230.400; 230.770; 248.540; 248.550; 278.130; 278.150; 286.1-485; 304.35-030; 311.450; 311.610; 312.019; 313.022; 314.161; 315.195; 316.210; 317.530; 317A.080; 319.131; 320.360; 321.320; 322.290; 322.330; 322.420; 323.080; 323.190; 323.210; 323A.060; 323A.190; 323A.210; 324.286; 324.410; 325.250; 326.120; 327.080; 330.050; 334.160; 334A.120; 335.140; 342.122; 342.480, etc..

(2) The transfer of moneys from the agency funds, special funds, or other funds to the general fund provided for in subsection (1) of this section shall be for the period of time specified in the budget bill.

(3) Any provisions of any statute in conflict with the provisions of subsections (1) and (2) of this section are hereby suspended or modified. Any suspension or modification shall not extend beyond the duration of the budget bill.

The trial court correctly found “that KRS 48.315 provides no independent basis for the fund transfers in this case. The failure of the legislature to list KRS 238.570 among the statutes for which fund transfers are authorized under KRS 48.315 means that

the legislature excluded the charitable gaming fee account from the fund transfer statute. 'A general rule of statutory construction is that the enumeration of particular things excludes other items which are not specifically mentioned.' Louisville Water Company v. Wells, 664 S.W.2d 525, 527 (Ky.App. 1984)." (Opinion and Order, pp. 9-10; T.R. 209-210).

The Court of Appeals came to a contrary conclusion opining that where the General Assembly had added "etc." at the end of Subsection (1), it intended to include other statutes within its purview. (Court of Appeals Opinion, p. 15). As far as it goes, that statement is accurate. The court goes on to explain that the statutes must be interpreted according to their plain meaning and in accordance with the intent of the legislature, citing Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921, 927 (Ky. 1997). Id., p. 16. The court cites to McDowell v. Jackson Energy RECC, 84 S.W.3d 71, 77 (Ky. 2002) Id. as authority for determining legislative intent:

"To determine legislative intent, a court must refer to 'the words used in enacting the statute rather than surmising what may have been intended but was not expressed.' ...Similarly, a court 'may not interpret a statute at variance with its stated language.'" Id., citing Hale v. Combs, 30 S.W.3d 146, 151 (Ky. 2000) (quoting Commonwealth v. Allen, 980 S.W.2d 278, 280 (Ky. 1998). Id., at 16. See also Travelers Indem. Co. v. Reker, 100 S.W.3d 756, 763 (Ky. 2003) ("The cardinal rule of statutory construction is to ascertain and give effect to the intent to the legislature.")

Thereafter, the court references Black's Law Dictionary (7th Edition 1999) for a definition of etc. or et cetera has "[a]nd other things. The term [usually] indicates additional, unspecified items **in a series.**" Id. (Emphasis added).

Inexplicably the Court of Appeals ignores the plain language of KRS 48.315; ignores the fact that KRS 238.570 is not in the enumerated series of KRS 48.315(1); ignores the plain language of its cited authority. Etc. can only have one meaning in the

context of the statute. It refers to agency funds, special funds or other funds in statutes subsequent to KRS 342.480. Any other construction is contrary to the plain language of KRS 48.315(1).

KRS 48.315 was originally enacted in 1984. It has since been amended in 1992, 2003, 2006, 2009 and 2010. The Charitable Gaming Act came into being in 1994. It must be assumed that the legislature would have been aware of the existence of the agency account authorized and established pursuant to KRS 238.570 at the time of the statutory amendments in 2003, 2006, 2009 and 2010. There is no mention of KRS 238.570 in the sequential listing of statutes in KRS 48.315.

Consider that in 2003, KRS 48.315 was amended to specifically remove reference to KRS 61.565, 61.580 and 78.650, matters relating to retirement funds. Likewise, in 2006, two (2) other statutory references were deleted or eliminated, namely KRS 150.150 and 235.330, related to fish and wildlife. In 2009, clarifying language was added regarding 48.010(15). The 2010 amendment added further clarifying language. The legislature knew to delete certain references. It could just as well have inserted KRS 238.570 in the sequential listing. *Inclusio e exclusio*.

The legislature is thus deemed to have intended to exclude the restricted funds not listed. Smith v. Wedding, 303 S.W.2d 322, 323 (Ky. 1957) (“it is a primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned.”)⁷ Since DCG statutes are **not** listed, there is no unambiguous authority for transferring DCG funds.

⁷ See also Kearney v. City of Simpsonville, 209 S.W.3d 483 (Ky.App. 2006) (“It is a fundamental, ‘primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned.’” Id., at 485, citing Smith v. Wedding, 303 S.W.2d 322 (Ky. 1957)).

In Beshear v. Haydon Bridge Co., 304 S.W.3d 682 (Ky. 2010), this court discussed the interplay of KRS 48.310(2)⁸, 48.315 and 48.316. The later enactment of KRS 48.310(2) was determined to have “trumped” the limiting language in the earlier enacted KRS 48.315 and 48.316.⁹

Scarcely months before the transfer to the general fund of the charitable gaming restricted fund fees, the legislature enacted HB 156. The legislation reiterated the restriction on the transfer of funds from the charitable gaming license fee restricted fund. “Fund amounts attributable to the fee levied in subsection (1) of this section that are not expended at the close of a fiscal year shall not lapse but shall be carried forward to the next fiscal year.” (Appendix, Exhibit 6, Section 3, amending KRS 238.570).

III.

CHARITABLE GAMING REGULATORY FEES ARE PRIVATE FUNDS

In discussing the biennial adjustment of the regulatory fee, provided for in KRS 238.570(3), the Court of Appeals determined that the formula was designed to match revenues from fees as closely as possible with the cost of regulating charitable gaming in Kentucky. The Court then went on to find that “here, there can be no contention the gaming fees constitute private funds. Therefore, pursuant to *Armstrong*, the Circuit Court’s conclusion that transfer of these public funds prohibited is contrary to existing

⁸ (2) A budget bill may contain language which exempts the budget bill or any appropriation or the use thereof from the operation of a statute for the effective period of the budget bill.

⁹ “Looking at the contrasting statutes and considering that KRS 48.315 and 48.316 were enacted together in 1984, and that KRS 48.310(2) was added in 1990, it seems clear that the Legislature intended to retain the statutory authority ‘to suspend’ provisions of KRS 342.122. KRS 48.315 appears to have been set out separately from KRS 48.316 in recognition that the funds affected were ‘agency funds, special funds, or other funds established under the [noted] provisions.’ Cf., KRS 48.315(1). Thus, although KRS 48.310(2) and 48.315 were both confined by *Armstrong*, they do overcome any perceived limitation of KRS 48.316 when dealing with ‘public’ funds, even if commingled – but only so long as such ‘public’ funds can be *differentiated* from any ‘private’ funds.” Haydon Bridge, at 703.

law.” (Opinion, p. 14). The Court of Appeals makes no attempt to explain how it reaches this conclusion pursuant to Armstrong. The Opinion ignores the source of the charitable gaming regulatory fees. In Thompson v. Kentucky Reinsurance Assoc., 710 S.W.2d 854 (Ky. 1986), this court held that the General Assembly could not transfer assessments collected by the Kentucky Reinsurance Association (“KRA”).

The funds paid to KRA are private funds. “[T]he premiums assessed by the KRA against its subscribers are clearly *private* funds, as opposed to public, and are therefore not subject to control by the General Assembly. To arrive at this conclusion, it is only necessary to identify the nature and purpose of the KRA and to identify its *sole* source of funds.” (*Id.*, at 857.) See also Haydon Bridge, *supra*, at 698. Charitable gaming regulatory fees come solely from private not-for-profit licensees and permittees. Pursuant to Thompson, these regulatory fees are private funds, and may not be transferred to the general fund.

IV.

THE INCREASE IN THE KRS 238.570 REGULATORY FEE IS REVIEWABLE, AND IS VOID *AB INITIO*

KRS 238.570 specifically provides that the regulatory fee rate is to be reassessed and readjusted in odd numbered years. The statute does not say annually. If the legislature wanted to allow a reassessment by the Cabinet or Department of Charitable Gaming, it could well have included language that a reassessment could be done more often than in odd-numbered years, if necessary. The legislature had a specific reason, whatever reason that may be, for specifically setting forth the odd-numbered year language.

An increase in the fee in an even numbered year, 2008, is patently contrary to the provisions of KRS 238.570 and is void *ab initio*.

The Court of Appeals determined that the issue of the increase in the charitable gaming license fee from 0.53% to 0.60% of gross receipts, effective July 1, 2008, was precluded from appellate review in that court because the trial court had not ruled on that issue in its Opinion and Order granting summary judgment. (Court of Appeals Opinion, p. 17). However, the Court of Appeals did acknowledge and state that the Charitable Gaming Act provides an objective statutory formula for computing the biennial adjustment of the KRS 238.570 regulatory fee. (Id., p. 13).

The Appellants take the position that this increase in the charitable gaming license fee in an even numbered year is a matter which is properly reviewable by this Court.

The parties below agreed to certain stipulations, contained in an Agreed Order, entered into on September 9, 2008, related to the fees collected pursuant to KRS 238.570, as follows:

“The Kentucky Department of Charitable Gaming, effective July 1, 2008, has increased the fee authorized pursuant to KRS 238.570 from 0.53% of gross receipts to 0.60% of gross receipts, which Plaintiffs allege violates certain Kentucky constitutional and statutory provisions. It is agreed that the Commonwealth of Kentucky...shall, during the pendency of this action, continue to collect fees derived from charitable gaming activities, pursuant to KRS 238.570, in the amount of 0.60% of gross receipts, or such other amount as may be established by the Public Protection Cabinet pursuant to KRS 238.570(3)(a), but, subject to the terms of paragraph 3¹⁰ hereof, and without being considered a waiver by Petitioners of their position that the increase from 0.53% to 0.60%, or such other increase as

¹⁰ “In the event a final judgment is entered in favor of Petitioners on the merits of this action, which is affirmed by the appellate courts of Kentucky after the exhaustion of all appeals, the Commonwealth agrees to return to Petitioner licensees the amount of any increased fees, or offset future fees, in a sufficient amount to fully restore all revenues transferred before or after June 30, 2008, pursuant to Executive Order 2008-011, general fund reduction Order 08-01, or the 2008-2010 “Biennial Budget, or as a result of the increase in the subject fee from 0.53% to 0.60% or to such other level as may be set during the course of this Action.”

may be made pursuant to said statute during the pendency of this Action, was and/or would be contrary to law.” (T.R. 61-63).

A reviewable matter upon which the trial court did not specifically rule is an exception to the tenet that “no claim will be heard on appeal unless the trial court has made or been requested to make unambiguous findings on all essential issues.” Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997).

As noted above, the matter was clearly presented to the trial court, although there was no specific ruling made on the issue. Such a scenario readily falls within the exception discussed in Fischer v. Fischer, 197 S.W.3d 98 (Ky. 2006), wherein this court observed as follows:

“A review of the record does disclose that this issue was brought to the attention of the trial court, and argued in Appellee’s response to Appellant’s summary judgment motion. An appellate court ‘is without authority to review issues not raised in or decided by the trial court.’ However, this issue was raised by Appellee in the trial court, and that court ultimately adjudicated the summary judgment with full knowledge of the argument.” Id., at 102-103 (citations omitted).

Clearly, the issue of the increase in the regulatory license fee is one which was addressed by counsel below, and may be addressed by this Court. “We take the view that counsel and the courts below have sufficiently identified the issues; that we need not redefine the question in the last stage of the litigation.” Mitchell v. Hadl, 816 S.W.2d 183, 185 (Ky. 1991). The requirement that a trial court should first make findings is one which this Court may waive. Clark Mechanical Contractors, Inc. v. KST Equipment Company, 514 S.W.2d 680 (Ky. 1974).¹¹

¹¹ “The duty of the trial court to make findings of fact should be strictly followed. But such findings are not a jurisdictional requirement of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular

The interpretation of the statute is a matter of law. This Court is not constrained by the decision of the trial court or Court of Appeals as to a matter of law. The statute should be interpreted according to its plain language, and in accordance with the legislative intent. Floyd County Board of Education v. Ratliff, 955 S.W.2d 921, 925 (Ky. 1997). See also Hardin County Schools v. Foster, 40 S.W.3d 865 (Ky. 2001).¹²

The increase in the regulatory license fee from 0.53% to 0.60% in 2008, an even numbered year, is patently contrary to law and void *ab initio*.

V.

THE TRANSFER OF CHARITABLE GAMING LICENSE FEES TO THE GENERAL FUND VIOLATES PROVISIONS OF THE KENTUCKY CONSTITUTION SECTIONS 2, 51, 180 AND 181

All license fees, permit fees, and other monies paid by persons or entities engaged in charitable gaming for the regulation and enforcement of the Charitable Gaming Act by DCG constitute non-tax payments to be held and used separate and apart from the state general fund. The transfer of these funds by Executive Order of the Governor and by the 2008 biennial budget bill is arbitrary and void under Ky. Const. § 2.

As a matter of law, based upon the public record, all license fees, permits, fees and other monies paid to DCG by persons and entities engaged in charitable gaming are

case. This is the situation here. *Hurwitz v. Hurwitz*, 78 U.S.App.D.C. 66, 136 F.2d 796, 799, 148 A.L.R. 226, 229 (1943).⁷ *Perry v. McLemore*, Ky., 414 S.W.2d 141.

The above-quoted rule was applied in *Jenkins v. Jenkins*, Ky., 450 S.W.2d 816 (1970). Here, as there, this court finds no great necessity for findings of fact since, ... 'there is not presented such a difficulty or inconvenience as would prevent the court from waiving the requirement.'" *Id.*, at 682.

¹² "The proper standard of review of a question of law does not require the adoption of the decision of the trial court as to the matter of law, but does involve the interpretation of a statute according to its plain meaning and its legislative intent. See *Floyd County Bd. of Ed. v. Ratliff*, Ky., 955 S.W.2d 921 (1997), as well as *Reis v. Campbell County Bd. of Ed.*, Ky. 938 S.W.2d 880 (1996)." *Id.*, at 868.

dedicated to enforcing the Charitable Gaming Act in the Commonwealth of Kentucky.

All such payments are non-tax revenues dedicated to a specific purpose.

The license fees assessed and collected by DCG are an integral part of enforcing the Charitable Gaming Act under KRS 238.500, et seq.

Only the General Assembly may levy tax under Section 180.¹³ The enactment must specify the purpose of the levy and no tax collected for one purpose shall ever be devoted to another purpose.

Even if the charitable gaming fees are somehow not regarded as taxes, the purpose for which they are levied and collected is limited to charitable gaming enforcement, and are prohibited from transfer to the general fund under the constraints of Section 180. City of Newport v. Rawlings, 289 Ky. 203, 158 S.W.2d 12 (1941).¹⁴ See also Unemployment Compensation Commission v. Savage, 283 Ky. 301, 140 S.W.2d 1073 (1940).¹⁵ Cited with approval in Kentucky Color & Chemical Co. v. Barnes, 290 Ky. 681, 162 S.W.2d 531 (1942).

¹³ § 180. Act or ordinance levying any tax must specify purpose, for which alone money may be used. Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

¹⁴ "When money, which should have been allocated to various funds for which it was levied and apportioned, was used for other purposes there was a clear violation of Section 180 of the Constitution prohibiting a tax levied and collected for one purpose from being diverted to another purpose." 289 Ky. 208, 158 S.W.2d 15.

¹⁵ "We are unable to escape the conclusion that the Act of the Legislature, with which we are here dealing, which directed a transfer of the railroad workers contributions to the Railroad Unemployment Insurance Account in the Unemployment Trust Fund (that is, to the Federal Government), is plainly an attempt to devote the tax raised under the Act for a specific purpose to another purpose and is therefore in violation of section 180 of the Constitution and void." 283 Ky. 308, 140 S.W.2d 1077.

Section 181¹⁶ limits the power of the General Assembly to impose and collect license fees. That power must be exercised so as to not be unduly oppressive. Great Atlantic & Pacific Tea Co. v. Kentucky Tax Commission, 278 Ky. 367, 379, 128 S.W.2d 581, 587 (1939).

“It is a well-known rule of law that a license fee imposed under the police power must not be so large as to create the imputation of a revenue measure. The fee must be sufficient only to meet the expense of issuing the license and supervising any necessary regulatory measures.” Roe v. Commonwealth, 405 S.W.2d 25, 28 (Ky. 1966), citing City of Henderson v. Lockett, 157 Ky. 366, 163 S.W. 199 (1914).

Section 181 constitutional or statutory license fees administratively collected may not be collected for one purpose, and used for another purpose by the general fund. Balancing the budget does not override the constitutional constraint.

To the extent that DCG exercises control over its fees and funds, that authority is delegated by the General Assembly. The budget, “which provides the revenue for the Commonwealth and which determines how that revenue shall be spent, is fundamentally a legislative matter.” Legislative Research Commission v. Brown, 664 S.W.2d 907, 925 (Ky. 1984). The legislature’s power over the Commonwealth’s purse strings is plenary. The Kentucky Constitution empowers the General Assembly to make appropriations (Section 230), to contract debts (Sections 49-50), to provide for annual taxes (Section 171), and to provide for payment of license fees and excise taxes (Section 181). The legislature determines, by statute, which funds are restricted and which funds will or may

¹⁶ §§ 181 provides in pertinent part: General Assembly may not levy tax for political subdivision, but may confer power—License and excise taxes—City taxes in lieu of ad valorem taxes. The General Assembly may by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax.

lapse to the General Fund to the extent that they are in excess of appropriations or expenditures. Charitable gaming funds are not to lapse.

The General Assembly delegated to DCG the responsibility to impose and collect fees and, as appropriate, fines, to carry out the duties and responsibilities of DCG. Only the General Assembly may enact taxes, and such authority may not be delegated to an agency of state government. The fees assessed and collected by DCG are non-tax payments, prohibited from transfer to the State general fund. The fees assessed and collected by the DCG are to be used exclusively to enforce the provisions of the Charitable Gaming Act. The transfer of non-tax payments, assessed and collected by DCG, violates the constitutional and statutory scheme enacted and implemented to license and regulate the conduct of charitable gaming.

The trial court properly determined that “the General Assembly’s suspension of statutory restriction and charitable gaming license fees,” pursuant to KRS 238.570, “has resulted in a tax on non-profit entities that are licensed by the state to conduct charitable gaming... In these circumstances, legislation, through its suspension of the statute and budget bill has converted the fee to a tax. To that extent, the challenged portion of the 2008 budget bill violates Sections 51 and 180 of the Kentucky Constitution, which provides that ‘no tax levied and collected for one purpose shall ever be devoted to another purpose.’” Opinion and Order at pages 8-9. TR 208-09. The actions of the General Assembly in appropriating the surplus charitable gaming fees collected by the Department of Charitable Gaming are patently contrary to the anti-lapse provisions of KRS 238.570, which has not been repealed. The transfer of those excess funds to the general fund of the Commonwealth is neither authorized pursuant to the Kentucky

Constitution, nor by statute, whether or not those excess funds are characterized as surplus fees or a tax.

The license fees assessed and collected by DCG are an integral part of enforcing the Charitable Gaming Act under KRS 238.500, et seq.

DCG has assessed and collected license fees and other funds authorized by statute to enforce the Charitable Gaming Act. The 2008 transfer of \$700,000.00 from the DCG account was arbitrary and contrary to law. The public interest demands that the entire charitable gaming structure, including all DCG funds paid by applicants and licensees for policing and enforcing the Charitable Gaming Act, be maintained according to law.

The taking of the payments assessed and collected by DCG, by transfer to a special fund, violates Sections 2, 51, 180 and 181 of the Kentucky Constitution.

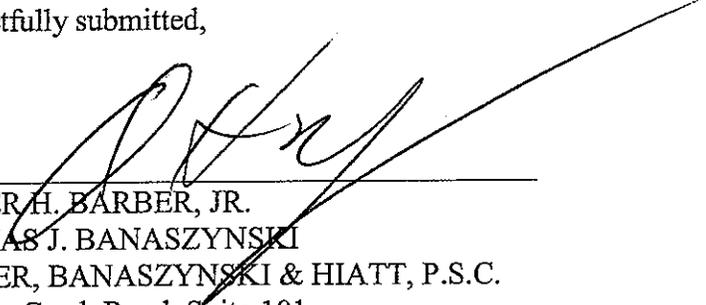
CONCLUSION

This Court should reverse the Court of Appeals and confirm the trial court's Order granting the Appellants a declaratory judgment and injunctive relief to prevent the Executive Branch of the Commonwealth and its budget director from enforcing Executive Order 2008-011 and prevent the transfers contained in the 2008-10 biennial budget with respect to DCG regulatory and enforcement funds. This Court should further void the increase in the licensee fee from 0.53% to 0.60%; order a rescission of the increase imposed since July 1, 2008; order a refund or credit to the licensees of the wrongfully collected fee increase.

The General Assembly should not be permitted to use its power to suspend statutes, pursuant to a budget bill, and to effect the transfer from charitable gaming restricted funds to the general fund. When it is allowed to so act, any restricted fund

under state control becomes, for all practical purposes, a tax which is deposited into the state's general fund at the sole and unlimited discretion of the General Assembly, notwithstanding constitutional and statutory restrictions.

Respectfully submitted,



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