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STATE OF NEBRASKA
OFFICIAL
MAR 28 1994
DEPT. OF JUSTICE

DATE: March 24, 1994

SUBJECT: Use of Keno Lottery Proceeds to Provide Funding to Nonprofit Foundation for the Acquisition and Construction of a Community Recreation and Fitness Center.

REQUESTED BY: Senator Jerome Warner
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on several questions pertaining to the propriety of a city providing funding to a nonprofit organization to aid in operating a community recreation and fitness center. A private, not-for-profit corporation located in a city in your district [the "Foundation"] is currently raising funds for the construction of a community recreation and fitness center [the "Center"] to be located in the city.[1] The Foundation is exempt from federal income taxation under I.R.C. § 501(c)(3). The Foundation will own, operate, and maintain the Center. The Center will be acquired, built, equipped, staffed and maintained by utilizing a combination of funding from charitable donations, as well as membership and user fees. The Center will be open to the public, including, but not limited to, citizens of the city. The Center will not discriminate against potential employees or patrons

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[1] Based upon an inquiry directed to your staff, it is our understanding that the city in question is a city of the second class, as defined in Neb. Rev. Stat. § 17-101 (1991).

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on the basis of race, color, national origin or disability, subject to its ability to set reasonable rules and regulations regarding health and safety and subject to the power to set reasonable user fees. There is currently no public recreational center such as the proposed Center located in the city. The city does not have the revenues to construct, equip, operate and maintain such a project.

Your first question is whether the city may lawfully "appropriate a sum of money to the Foundation for the express purpose of contributing to the acquisition, construction and equipping of the proposed Center;. . . ." In this regard, we assume that you are asking if the City may expend public funds generated through taxation for this purpose.

In ***United Community Services v. Omaha Nat'l Bank,*** 162 Neb. 786, 77 N.W.2d 576 (1956), the Nebraska Supreme Court considered, in part, whether a public power district could lawfully make contributions to a "Community Chest" operating within the area served by the district. The Community Chest provided funds to support various agencies engaged in charitable and eleemosynary activities in the district. The Court noted the general rule that "`* * * a municipality cannot give away its property or expend money for purposes other than corporate ones, and it follows that a municipality has no power in any manner to dispose of property of the corporation without consideration, where not for a corporate purpose.'" ***Id.*** at 791, 77 N.W.2d at 582 (***quoting*** 10 McQuillin, Municipal Corporations § 28.43 (3d ed.)). The district, however, contended that it could lawfully make the contributions under its general powers, and that the donations constituted ordinary expenses, and not a gift. 162 Neb. at 791-92, 77 N.W.2d at 583.

In analyzing the district's contention, the Court reiterated the rule that "`* * * a municipal corporation `possesses, and can exercise, the following powers, and no others; First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable.'" ***Id.*** at 793, 77 N.W.2d at 583. The district, a public corporation engaged in a proprietary function, was held to be limited in its powers in the same manner as a municipal corporation. ***Id.*** The Court held that, absent specific statutory authority, the district lacked the power to make the contributions:

> In this jurisdiction, under the general powers granted public corporations, the revenues derived are required to be devoted to the purposes for which the corporation is being operated, that is, the payment of operating expenses, indebtedness, and repairs, extensions, and improvements of the facilities. The diversion of the revenue to purposes other than these cannot be approved as incident thereto. While we are not unmindful of the fact there is some reasonable basis for the argument made, particularly in view of the evidence adduced to the

> effect that these contributions bring some benefits to the district and therefore should be considered as operating expenses, we think the matter of subjecting all such public corporations to solicitations by all classes of nonprofit agencies serving a public purpose is a matter of such grave public concern that it should be left with the Legislature which has plenary power over them. The pros and cons of the matter can be fully presented and that body determine the public policy in regard thereto. We think the purposes served by these agencies are very worthy of everyone's charity but whether or not the revenue of public corporations should be permitted to be contributed for those purposes through these agencies, and to what extent, is, we think, a matter for the Legislature and not the courts. In the absence of express statutory authorization we find the district was without authority to make these contributions.

Id. at 794-95, 77 N.W.2d at 584.

We have reviewed the statutes relating to the powers of cities of the second class. Based upon this review, it appears that the Legislature has not granted cities of the second class authority to expend general public revenues to provide donations or assistance to charitable organizations. The Legislature has established a procedure for cities of the second class to acquire or receive real estate for recreational purposes, to issue bonds following voter approval to raise funds to improve and equip land so acquired, and has granted such cities authority to levy a tax to maintain, improve, and manage recreational facilities. Neb. Rev. Stat. §§ 17-948 to -952 (1991). The Legislature has not, however, specifically authorized the expenditure of general public revenues as a donation to an organization such as the Foundation for the purpose described in your request.

Your second question is whether the city may lawfully expend gross proceeds from its keno lottery for the purpose of supporting the Foundation in acquiring and constructing the Center. The Nebraska Constitution authorizes lotteries "the proceeds of which are to be used solely for charitable or community betterment purposes. . . ." Neb. Const. art. III, § 24. Under the Nebraska County and City Lottery Act, "the gross proceeds of any lottery conducted by a county, city, or village shall be used solely for community betterment purposes, awarding of prizes, taxes, and expenses." Neb. Rev. Stat. § 9-629(1) (Supp. 1993). Specifically, you ask whether the appropriation of lottery proceeds for this purpose falls within the definition of "community betterment purposes" in Neb. Rev. Stat. § 9-604 (1991).

As noted previously, the Nebraska Supreme Court, in the ***United Community Services*** case, held that, absent legislative authorization, the power district, as a public corporation, could not donate funds to charitable concerns. The Court, in addition to

addressing this question, also considered the constitutionality of legislation specifically authorizing the district to "use its funds for charitable or eleemosynary purposes" and to "contribute from its funds. . .for charitable or eleemosynary purposes for the welfare of the public;. . . ." 162 Neb. at 795-96, 77 N.W.2d at 585. The Court stated that,

> [w]hile the revenues received by the district in the operations of its business are not public funds in the same sense as those derived from taxation, however, they are public funds collected by the district for certain purposes and the Legislature may, under its control of the district, authorize their expenditure for a public purpose beneficial to such district and those immediately interested therein but under the restrictions and limitations imposed on the Legislature by the Constitution.

Id. at 797, 77 N.W.2d at 585.

The Court in ***United Community Services*** found that the Legislature's authorization for the district to contribute funds for charitable purposes for the public welfare did not violate the prohibition against giving the credit of the state "in aid of any individual, association, or corporation" (Neb. Const. art. III, § 18), and did not constitute an impermissible authorization of the expenditure of public funds for a private purpose. 162 Neb. at 799-801, 77 N.W.2d at 586-87. In this regard, the Court stated:

> `It is the province of the legislature to determine matters of policy. In appropriating the public funds, if there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the legislature; * * *.' (citations omitted). . . . The nature of appellee and the purposes it serves has already been set forth herein. That these are for the welfare of the public and that they serve a public purpose there can be no doubt. (citations omitted). . . . `the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.' (citations omitted).

Id. at 800-801, 77 N.W.2d at 587.[2]

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[2] While the Court found the legislation did not authorize an unlawful giving of credit or impermissible expenditure of public funds for a private purpose, it declared the act invalid as creating an unreasonable classification in violation of Neb. Const.

Lottery gross proceeds, while not generated by taxation, nevertheless constitute public funds which must be expended for a public purpose. ***United Community Services*** establishes that the Legislature may authorize the expenditure of public funds to aid agencies devoted to activities serving a public purpose. The question which remains is whether the Legislature has authorized the expenditure of such funds for the purpose described in your request by its definition of the term "community betterment purposes".

Section 9-604 provides, in part:

> (1) Community betterment purposes shall mean (a) benefiting persons by enhancing their opportunity for educational advancement, by relieving or protecting them from disease, suffering, or distress, by contributing to their physical well-being, by assisting them in establishing themselves as worthy and useful citizens, by providing them with opportunities to contribute to the betterment of the community, or by increasing their comprehension of and devotion to the principles upon which this nation was founded, (b) initiating, performing, or fostering worthy public works or enabling or furthering the erection or maintenance of public structures, (c) lessening the burdens borne by government or voluntarily supporting, augmenting, or supplementing services which government would normally render to the people, or (d) providing tax relief to the community.

In our opinion, use of lottery proceeds for the purpose of supporting the acquisition and construction of a community recreation center by a nonprofit corporation, under the circumstances described in your request, is consistent with the definition of "community betterment purposes" in § 9-604. The statute defines "community betterment purposes" to include activities "benefiting persons. . .by contributing to their physical well-being", as well as the "fostering of worthy public works or enabling or furthering the erection or maintenance of public structures. . . ." The building and maintenance of a community recreation and fitness center open to the public and available for use by the citizens of the community would be consistent with the furtherance of these purposes. Moreover, the definition of "community betterment purposes" includes "lessening the burdens borne by government or voluntarily supporting, augmenting, or supplementing services which government would normally render to the people,. . . ." As noted, cities of the second class are authorized to acquire and maintain a recreation center. Thus, as operation of a public recreational facility is the type of activity which the city may normally provide for its citizens, aiding and supporting operation of a recreational center

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art. III, § 18. 162 Neb. at 801-805, 77 N.W.2d at 587-89.

operated by a nonprofit corporation for public use appears consistent with this purpose.

Finally, you ask whether, if the city were precluded from using lottery proceeds for the purpose of providing financial support to the Foundation for the acquisition and construction of a recreational facility, § 9-604 could be amended to permit use of lottery proceeds for this purpose. We have, of course, concluded that such a use of lottery proceeds falls within the current definition of "community betterment purposes" under § 9-604. To the extent a question is raised as to whether the present language is broad enough to permit such a use, we see no impediment to amending § 9-604 to include language specifically authorizing the use of lottery proceeds for this particular purpose. As we have determined that such a use is permissible under § 9-604, we obviously do not believe that such an amendment would be inconsistent with the constitutional requirement that lottery proceeds "be used solely for charitable or community betterment purposes. . . ."

Very truly yours,

DON STENBERG
Attorney General

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cc: Patrick O'Donnell
Clerk of the Legislature

7-835-7.27

APPROVED BY:

Don Stenberg

DON STENBERG, Attorney General