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DEPARTMENT OF JUSTICE

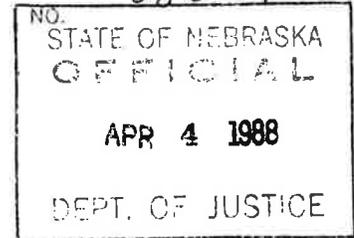
STATE OF NEBRASKA

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April 4, 1988

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Senator Timothy J. Hall
2028 State Capitol
Lincoln, Nebraska 68509

Dear Senator Hall:

This is in reply to your letter requesting an Opinion from this office concerning the constitutionality of the requirement in LB 1232 that charitable organizations be in existence for at least five years before they are eligible for a license to conduct a pickle card lottery.

The starting point of any analysis concerning Legislative authorization or regulation of gambling in Nebraska must begin with §24 Article III of the Nebraska Constitution.

Originally this section of the Nebraska Constitution prohibited the Legislature from authorizing any game of chance or lottery. In 1934 this provision of the constitution was amended to allow horse races by the parimutuel or certificates method within the race track enclosure.

Later amendments to this section of the Constitution permitted the Legislature to license and regulate bingo games conducted by non-profit associations which have been in existence for a period of five years and to authorize and regulate lotteries in which the proceeds are to be used solely for charitable or communities betterment purposes.

In is obvious from reading this section of the constitution and its history that while the Legislature may now authorize wagering on horse races, bingo and charitable lotteries as above described, there is nothing requiring the Legislature to do so.

It is also clear that if the Legislature decides to authorize the limited gambling permitted by the constitution, it may strictly regulate what it authorizes.

In the Supreme Court of Nebraska case of Alcoholic Resocialization Conditioning Help, Inc., et al., v. State of Nebraska, Charles Thone, Governor, et al., appellees, 206 Neb.

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Senator Timothy J. Hall
April 4, 1988
Page -2-

788, the plaintiffs contested the constitutionality of certain bingo statutes enacted by the Legislature which provided that not more than two bingo occasions per week could be held within a single structure or building.

The Supreme Court of Nebraska in upholding this statutory restriction on bingo commenced its analysis as follows:

It is important at the outset to recognize that the activity which the statute regulates is a form of gambling. Gambling is an activity that, for the most part, is prohibited and, where permitted, may be subjected to strict regulation.

The United States Supreme Court in the recent case of Posadas de Puerto Rico Associates etc. v. Tourism Company of Puerto Rico, 478 U.S. _____, 82 L.Ed.2d 266 arrived at a similar conclusion where the plaintiff claimed a legislative ban on casino game advertising was unconstitutional and in conflict with two other U.S. Supreme Court cases, referred to as Carey and Bigelow. In those cases the Supreme Court had struck down legislative bans on advertisements of contraceptives and abortion clinics. In the casino gambling case, the U.S. Supreme Court put it this way:

In Carey and Bigelow, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and Carey and Bigelow are hence inapposite. (Emphasis added.)

In Pegasus of Omaha, Inc., v. State, 203 Neb. 755, the Supreme Court of Nebraska upheld a statute which prohibited a messenger service from carrying bets to the race track. In recognizing that the service rendered was not gambling in itself, the Supreme Court held that "the activity of Pegasus is so intertwined with gambling that, under its constitutional power to regulate, the Legislature may ban messenger services operating

Senator Timothy J. Hall
April 4, 1988
Page -3-

for a fee from accepting bets and conveying the bets to a licensed race track."

The Court later upheld a similar statute which prohibited such messenger services from being operated with or without a fee. Midwest Messenger Services, Inc. v. Spire, 223 Neb. 748.

In upholding the statute, the Nebraska Supreme Court recognized that the Nebraska Legislature had conducted hearings concerning the legislation and had considered a report concerning a number of abuses involving messenger services at race tracks in Illinois. The abuses included the booking of bets without buying the corresponding parimutuel tickets, failure to pay off winners, involvement of organized crime, an increased burden on law enforcement, and a reduction in track attendance and betting with a corresponding loss of local and state revenue.

The court concluded in both cases that the legislative ban had a reasonable relationship to the possible abuses. The requirement, that a licensee to conduct a lottery by the sale of pickle cards, be in existence in this state for five years has, in our view, a reasonable relationship to determining whether the past record of an applicant is such that the licensing authority may make an educated determination whether the applicant is likely to use its proceeds for charitable purposes as required, to pay its gambling taxes and to not disappear with the proceeds of the lottery in the middle of the night.

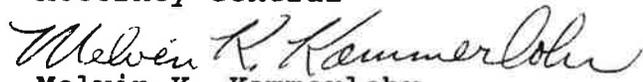
In light of the above discussion that, (1) the constitutional authority to prohibit the activity altogether

Senator Timothy J. Hall
April 4, 1988
Page -4-

includes the lesser authority of the legislature to enforce strict regulation, and (2) that the five year requirement has a reasonable relation to a legitimate State purpose, it is our opinion that the constitutionality of this requirement could be successfully defended.

Respectfully submitted,

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Senior Assistant
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Approved:


Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

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