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STATE OF NEBRASKA
OFFICIAL
MAR 27 1992
DEPT. OF JUSTICE

DATE: March 24, 1992

SUBJECT: Use of Initiative Petition Process to Provide for the Submission to the Voters of the Question of Whether a County, City, or Village Should Establish and Conduct a Local Option Lottery.

REQUESTED BY: M. Berri Balka, State Tax Commissioner

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

You have requested our opinion regarding a recurring situation under the Nebraska County and City Lottery Act [the "Act"]. The Act provides that a county, city, or village may establish and conduct a lottery. The term "lottery" is defined to include the conduct of lottery activities consisting of ticket drawings and keno. See Neb.Rev.Stat. § 9-607 (Cum. Supp. 1990).

Neb.Rev.Stat. § 9-625 (Cum. Supp. 1990), provides the following with regard to the procedure for the establishment and conduct of a lottery by a county, city, or village:

> Any county, city, or village may establish and conduct a lottery if an election is first held pursuant to this section. . . .No county, city, or village shall establish and conduct a lottery until such course of action has been approved by a majority of the registered voters of such county, city, or village casting ballots on the issue at a regular election or a special election called

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by the governing board of the county, city or village for such purpose.

The question you raise is whether an initiative petition process is a permissible means of providing for the submission to the voters of the question of whether a county, city, or village should establish and conduct a local option lottery under the Act. For the reasons outlined below, we believe that, under certain circumstances, a proper initiative petition may be used as a means to place this issue before the qualified electors of certain municipal subdivisions in the state.

At the outset, we note that no general law has been enacted by the Legislature reserving the powers of initiative and referendum to electors on a county-wide basis. In the absence of any such authorization, we do not believe that an initiative process can properly be used to place before the voters of a county the issue of whether a lottery should be established and conducted by a county under § 9-625.

The Legislature has, however, expressly reserved the powers of initiative and referendum "to the qualified electors of each municipal subdivision in the state." Neb.Rev.Stat. § 18-2501(1) (Reissue 1987). Neb.Rev.Stat. §§ 18-2501 to 18-2537 (Reissue 1987) "govern the use of the initiative to enact. . .measures affecting the governance of all municipal subdivisions in the state, except those operating under home rule charters and as specified in section 18-2537." Neb.Rev.Stat. § 18-2501(1). "Municipal subdivision" is defined to mean "all cities, not operating under home rule charters, of metropolitan, primary, first, and second classes,. . .and villages." Neb.Rev.Stat. § 18-2507 (Reissue 1987). "Measure" is defined, in part, as "an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to pass,. . . ." Neb.Rev.Stat. § 18-2506 (Reissue 1987). Cities operating under home rule charters are required to provide, by charter provision or ordinance, for the exercise of the powers of initiative and referendum within such cities. Neb.Rev.Stat. § 18-2501(2) (Reissue 1987).

Initially, you ask whether, "if the initiative process is generally allowed pursuant to Chapter 18, Article 25, of the Nebraska statutes or by charter or ordinance for cities operating under a home rule charter, does section 9-625 restrict that power?"

In addressing a similar issue regarding the propriety of the use of the initiative power to repeal an ordinance passed by a city council imposing a city sales tax under the Local Option Revenue Act, the Nebraska Supreme Court concluded that the provisions of the Local Option Revenue Act did not limit the power to propose or

reject an ordinance concerning the enactment of a municipal sales tax to the legislative body of the municipality, and did not except the sales tax ordinance from the usual powers of initiative and referendum. State ex rel. Boyer v. Grady, 201 Neb. 360, 269 N.W.2d 73 (1978). The respondent asserted that only the city council and mayor possessed the power to impose, or to determine not to impose, a municipal sale tax under § 77-27,142 of the Local Option Revenue Act, which provided that any "incorporated municipality by ordinance of its governing body" was authorized to impose a sales and use tax. Id. at 368, 269 N.W.2d at 77. The respondent contended the term "governing body" referred only to the legislative body of the municipality, thus evincing an intent to remove the sales tax ordinance at issue from the initiative and referendum processes. Id. The court rejected this contention, stating:

> This argument is not persuasive. There is no indication that the Legislature intended to grant powers concerning sale tax ordinances solely to city councils and to exclude municipal voters from proposing or rejecting such ordinances through the initiative and referendum processes. Although it is true that during the legislative debate on section 77-27,142, R. R. S. 1943, certain senators referred to city councils enacting a municipal sales tax, these references were not addressed to the issue of whether the initiative or referendum processes could be utilized with respect to sales tax ordinances. We do not read the legislative history of the act as indicating an intention on the part of the Legislature to except sales tax ordinances from the usual powers of initiative and referendum, and it would have been an easy matter to expressly make such an exception if the Legislature had so intended. Since the powers of the initiative and referendum are to be liberally construed, we do not believe that their use should be limited in the manner suggested by respondent. Under our statutory scheme, there is little doubt that city councils and the electorate are coordinate legislative bodies, and there is no superiority of power between the two. (Citation omitted).

Id. at 368-69, 269 N.W.2d at 78.

Based on the decision in State ex rel. Boyer v. Grady, we do not believe that the language of § 9-625 establishes a legislative intent to restrict the use of the initiative power provided under §§ 18-2501 to 18-2538 (in municipal subdivisions to which such provisions are applicable) as a means of placing the question before the electorate of whether a city or village should establish and conduct a lottery under the Act. While the election referred

to in § 9-625 is to be "called by the governing board," the plain language of the statute does not indicate that the Legislature intended to except the enactment of a resolution submitting such a question to the voters of a municipal subdivision from the initiative power for submission of measures provided under §§ 18-2501 to 18-2538.

As you note in your request, the Legislature, in 1989, specifically provided that the question of whether an existing lottery should be continued could be placed on the ballot by an initiative petition process. 1989 Neb. Laws, LB 767, § 67 (codified at Neb.Rev.Stat. § 9-627 (Cum. Supp. 1990)). We have reviewed the legislative history behind the enactment of this statute, and note that the brief explanation by its sponsor of the reason for the amendment adopting this provision reveals nothing to indicate that the initial submission to the electorate of the issue of whether or not a lottery should be established and conducted could not properly be the subject of the general initiative powers applicable to measures falling within §§ 18-2501 to 18-2538. In the absence of a clear indication of legislative intent compelling a contrary conclusion, we will not adopt a construction which would have the effect of limiting the right of the people to act under the initiative power granted pursuant to §§ 18-2501 to 18-2538.

As a final matter, we point out that, with respect to the initiative powers reserved to electors of municipal subdivisions under §§ 18-2501 to 18-2538, cities operating under home rule charters are required to provide, "by charter provision or ordinance, for the exercise of the powers of initiative and referendum within the cities." Neb.Rev.Stat. § 18-2501(2) (Reissue 1987). It may well be that the availability of the initiative petition process in home rule charter cities will depend upon the particular language of the charter provision or ordinance adopted by the city pursuant to § 18-2501(2). For example, if the initiative process is limited to "ordinances," and does not encompass "resolutions," such may preclude submission by initiative petition of the issue of establishing and conducting a city lottery under § 9-625 of the Act. See 62 C.J.S. Municipal Corporations § 454a. (1949). Application of this distinction would, of course, depend upon the factual circumstances attendant in a particular situation.

In conclusion, it is our opinion that, subject to the exceptions stated above, the initiative petition process authorized pursuant to Neb.Rev.Stat. §§ 18-2501 to 18-2538 (Reissue 1987) may, in appropriate circumstances, be utilized to place the issue of the establishment and conduct of a lottery under the Act before the electorate of a city or village. As no statutory provision exists for the submission of such a question to the voters on a county-wide basis, it is our opinion that the question of the

establishment and conduct of a lottery by a county under § 9-625 may not be presented by initiative petition process.

Very truly yours,

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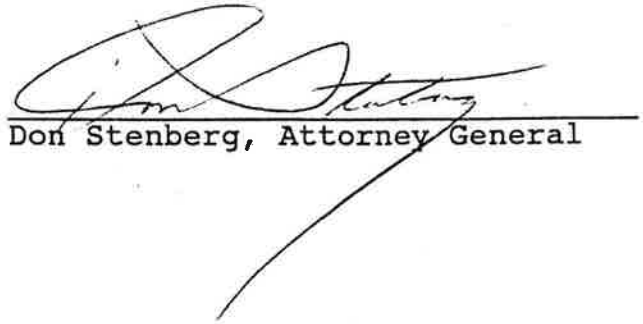
APPROVED BY:



Don Stenberg, Attorney General