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95074
NO.
STATE OF NEBRASKA
OFFICIAL
SEP 19 1995
DEPT. OF JUSTICE

DATE: September 18, 1995

SUBJECT: Operation of "Keno Enhanced Display Devices" As a Form of Keno Lottery Under the Nebraska County and City Lottery Act, Neb. Rev. Stat. §§ 9-601 to -653 (1991 and Cum. Supp. 1994).

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 as to whether the proposed operation of a form of video keno device is authorized under the current provisions of the Nebraska County and City Lottery Act, Neb. Rev. Stat. §§ 9-601 to -653 (1991 and Cum. Supp. 1994) [the "Act"]. You indicate that representatives of the keno industry and local governments have approached the Charitable Gaming Division of the Department of Revenue regarding a proposal to operate a form of video keno by use of a "Keno Enhanced Display Device" ["KEDD"]. Based on the Department's concerns that operation of the proposed video keno device may not be permitted under current legislation authorizing the conduct of keno lotteries, you have asked us to address whether the use of such devices to conduct keno would be consistent with the Act.

## I. Proposed Operation of the "Keno Enhanced Display Devices" ["KEDD"].

While still conceptual in nature, the KEDD would operate by means of a player identification card (constructed of some type of

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rigid paper), which would contain information identifying the player's account, and would track his or her game participation and access the account balance when the player checks out. It would also contain the player's number selections, regardless of whether he or she chose the numbers directly or opted to use quick pick numbers. The player's number selection would be limited to a special ticket with a large number of "ways".[1] The player would place his or her identification card in a KEDD and signal the keno writer that he or she is ready to play the game by inserting a wager into the bill acceptor.[2]

At this point, the keno writer would activate the random number generator feature on a remote central computer using standard licensed keno software and the player's "game" would be drawn and the results sent to the KEDD for viewing by the player. In order for the player to view the results, the player would press a play button on the KEDD the number of times that he or she had bet "ways". Each "way" would be displayed individually on the screen with symbols that would line up in slot machine fashion. For example, if a three out of six "way" was being displayed, it might show one cherry or other such winning symbol and the screen would indicate that the player had won and the amount of his or her winnings. If four out of six, five out of six, or six out of six "ways" hit, then the other symbols would align that corresponded to that win. The video screen would show rolling cylinders with each push of the play button. When all of the "ways" had been displayed, the total winnings would be displayed on the screen and the player could either cash in that ticket, or if five minutes had elapsed from the beginning of his or her game, the player could replay the winnings by signaling the writer that he or she wished to play again by pushing a replay button. If so, the keno writer would cause the winning numbers to be selected and the player would again begin displaying the results of his or her original "way" ticket against a new number draw, one "way" at a time as before. When a player wishes to cash out, he or she would take the identification card back to the keno writer, the account activity would be accessed and a paper ticket of account activity would be

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[1] Under current regulations, a "way" ticket is "a single ticket which allows a player to wager on the combination of groups of numbers in various ways designated by the player." 316 NAC 35.600.02X. ***See also*** Neb. Rev. Stat. § 9-607(3) (Cum. Supp. 1994).

[2] You indicate that the use of a bill acceptor in the device is "negotiable", if such an element is deemed to violate the player access restriction in § 9-607 of the Act. By this, we assume that the proponents of the device have proffered an alternative means for players to furnish the consideration for their wagers.

printed. Payment would be based on the recorded transaction log, but the player would also have had the benefit of a continuously updated statement of his or her account on the video screen during play.

The number selection, odds, record keeping and payout would remain as in the present game; however, unlike current games, the player would sit at a video screen, electronically signal to the writer concerning his or her wagers and observe the results of the keno draw by a video display of symbols, not numbers. The player could, if he or she chose to do so, also view the game results in the traditional manner by viewing the winning numbers on a display board. It is also anticipated that a number of "different" games would be in play at any one time allowing numerous players the opportunity for concurrent play without having to wait for the results of a single game every five minutes. Because of the ability to track each individual player's activity via the identification card issued to that particular player, however, no player would be allowed to access any of the "different" games in play until at least five minutes had elapsed since that player's previous game results were issued.

**II. Issues Presented.**

Neb. Rev. Stat. § 9-607 (Cum. Supp. 1994), which defines the term "lottery" for purposes of the Act, provides, in pertinent part, as follows:

> (1) Lottery shall mean a gambling scheme in which:
>
> (a) The players pay or agree to pay something of value for an opportunity to win;
>
> (b) Winning opportunities are represented by tickets;
>
> (c) Winners are solely determined by one of the following two methods:
>
> (i) By a random drawing of tickets differentiated by sequential enumeration from a receptacle by hand whereby each ticket has an equal chance of being chosen in the drawing; or
>
> (ii) <u>By use of a game known as keno in which a player selects up to twenty numbers from a total of eighty numbers on a paper ticket and a computer, other electronic selection device, or electrically operated blower machine which is not player activated randomly selects up to twenty numbers from the same pool of eighty numbers and the winning players are determined by the</u>

> correct matching of the numbers on the paper ticket selected by the players with the numbers randomly selected by the computer, other electronic selection device, or electrically operated blower machine, except that no keno game shall permit or require player access or activation of lottery equipment and the random selection of numbers by the computer, other electronic device, or electrically operated blower machine shall not occur within five minutes of the completion of the previous selection of random numbers; and
>
> (d) The holders of the winning paper tickets are to receive cash or prizes redeemable for cash Selection of a winner or winners shall be predicated solely on chance (emphasis added).

As you note in your request, in light of the provisions governing the manner in which keno lotteries are to be conducted under § 9-607(1)(ii), the following three issues must be considered in addressing whether operation of the proposed video keno devices would be consistent with the Act:

> (1) Does the manner in which the KEDD's are to operate satisfy the statutory requirement that numbers must be selected by players "on a paper ticket";
>
> (2) Will the KEDD's operate in compliance with the statutory restriction that the selection of winning numbers "shall not occur within five minutes of the completion of the previous selection of random numbers"; and
>
> (3) Does the KEDD's proposed operation violate the statutory prohibition against player access or activation of lottery equipment.

**III. Discussion.**

The issues presented require us to attempt to interpret the intent of the Legislature in enacting the provisions outlining the manner of play of keno lotteries. In doing so, certain rules of statutory construction should be considered.

A fundamental principle of statutory construction is to attempt to ascertain legislative intent and to give effect to that intent. ***County of Lancaster v. Maser,*** 224 Neb. 566, 400 N.W.2d 238 (1987). The reasons for the enactment of a statute, and the purposes and objects of the act, may be guides in attempting to give effect to the intent of lawmakers. ***State v. Jennings,*** 195 Neb. 434, 238 N.W.2d 477 (1976). A statute should be interpreted

in such a manner as to give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute in its plain and ordinary sense. ***NC+ Hybrids v. Growers Seed Ass'n,*** 219 Neb. 296, 363 N.W.2d 362 (1985). A statute should be construed in the context of the mischief sought to be remedied and the purpose to be served. ***In re Boundaries of McCook Public Power Dist,*** 217 Neb. 11, 347 N.W.2d 554 (1984). In construing a legislative act, resort may be had to the history of its passage for the purpose of determining legislative intent. ***Georgetown Ltd. Partnership v. Geotechnical Services, Inc.,*** 230 Neb. 22, 430 N.W.2d 34 (1988).

It is generally recognized that statutes which allow gambling activity are subject to strict construction. ***Aicardi v. Alabama,*** 86 U.S. (19 Wall.) 635 (1873); ***see West Indies, Inc. v. First Nat'l Bank of Nevada,*** 67 Nev. 13, 214 P.2d 144 (1950). (gambling statute, granting special privileges, must be strictly construed). The Nebraska Supreme Court, construing the constitutional provision authorizing the Legislature to permit lotteries for charitable or community betterment purposes, has stated:

> Traditionally in Nebraska lotteries have been forbidden. The Constitution of Nebraska still forbids any lottery except a lottery specifically authorized by the Legislature within the limitations of Article III, section 24. Under the 1968 amendment, the Legislature cannot authorize any lottery beyond the specific scope of the constitutional permission. <u>The Legislature may refuse to authorize any lottery, or it may impose limits or restrictions, or qualifications upon the operation of a lottery it authorizes</u>. . . .<u>In Nebraska,. . ., unless a lottery is conducted and operated within the specific limits and terms of a statutory authorization, it is illegal</u>.

***State v. City Betterment Corp.,*** 197 Neb. 575, 580-81, 250 N.W.2d 601, 604 (1977) (emphasis added).

With these principles in mind, we will endeavor to address the issues presented.

**A. Paper Ticket Requirement.**

Section 9-607(1)(ii) provides that an authorized keno lottery game requires that a player select his or her numbers "on a paper ticket. . . ." Subsection (1)(b) requires that "[w]inning opportunities" of permitted lotteries be "represented by tickets. . . ." Subsection (1)(d) further provides, in pertinent part, that "holders of the winning paper tickets are to receive cash or prizes redeemable for cash".

You indicate that proponents of the KEDD assert that the magnetically encoded player identification card issued to each individual player (constructed of "rigid paper"), which will contain information unique to that particular player's wager and number selection, will satisfy the "paper ticket requirement".

Generally, a "ticket" is defined as "a printed card or piece of paper that gives a person a specified right, as to attend a theater, ride on a train, claim a purchase, etc. . . ." Webster's New Universal Unabridged Dict. 1907 (2d ed. 1983). "In contracts, [a ticket is] a slip of paper containing a certificate that the person to whom it is issued, or the holder, is entitled to some right or privilege therein mentioned or described; such, for example, are railroad tickets, theater tickets, pawn tickets, lottery tickets, etc." Black's Law Dict. 1328 (5th ed. 1979).

In our view, the requirement in § 9-607(1)(ii) that a keno player select numbers "on a paper ticket", is not satisfied by the proposed issuance of a "player identification card" to be used as part of the KEDD wagering system. This "card", while it is to be constructed of some form of "rigid paper", and is to contain information regarding the player and his or her wagers and number selections, does not appear to fall within the general understanding of the term "paper ticket" as used by the Legislature in § 9-607. The statute seems to contemplate the actual issuance of a piece of paper constituting a ticket to a keno player; the "card" to be used with the KEDD is not consistent with the apparent intent of the Legislature in adopting this requirement.

This interpretation is further supported by the legislative history of the bill adding the "paper ticket" requirement. The "paper ticket" provision was added to § 9-607(1)(ii) in 1991. 1991 Neb. Laws, LB 795, § 7. The language mandating selection of keno numbers on a "paper ticket" was part of an amendment offered by Senator Hall (AM1650). 1991 Legislative Journal, 92nd Leg, 1st Sess. 2208-2209. This amendment also added the language banning player activation or access of lottery equipment and mandated that no random selection of numbers by a computer or other authorized device could occur within five minutes of completion of the previous selection of random numbers. *Id.* The floor debate on the amnendment reveals that the intent of these changes was to clarify that certain "video keno machines", which the Department had apparently authorized for use on an experimental basis, would not be allowed. Floor Debate on LB 795, 92nd Leg., 1st Sess. 5419 (May 16, 1991) (Statement of Sen. Hall).[3] With respect to the "paper

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[3] This intent was also stated in floor debate on a prior amendment to LB 795 (AM1468), which was later withdrawn and replaced by AM1650. Floor Debate on LB 795, 92nd Leg., 1st Sess.

ticket" requirement in particular, Senator Hall, the author of the amendment, stated:

> "[I] felt that that [the paper ticket provision] was another restriction. . .in terms of the ban on the machines. In other words, if I have to use a paper ticket, I'm clearly not going to be using a machine. And I added that language because that means that I have to use a little crayola or the pencil or however they operate right now, do it on the ticket, hand that ticket to someone and then they enter it on the keno equipment as what is considered a traditional keno game. So I put on the paper ticket because I felt that that meant that was an additional ban and, in other words, I couldn't enter my numbers on a machine and it's just really nothing more than that. . . .[I]t was an additional safeguard to prevent those numbers from being entered on a machine.

Floor Debate on LB 795, *supra*, at 5425 (Statement of Sen. Hall).

This history reveals that the Legislature understood the "paper ticket" requirement as a means to prevent the use of what it referred to as "video" or "instant" keno machines. These video keno devices, which had apparently been given conditional approval by the Department, subject to some modifications, were described as video gaming devices which allowed players to "tap into" keno games conducted at intervals of approximately twenty seconds. Floor Debate on LB 795, *supra*, 5426-29 (Statement of Sen. Smith). The "paper ticket" requirement was part of the overall scheme of changes to existing legislative authorization for the conduct of keno lotteries which were intended to prevent the use of such video keno gaming devices by limiting the conduct of keno lotteries to the "traditional" form of keno lottery in effect at that time.

In view of the language employed by the Legislature in adopting the "paper ticket" requirement in 1991, and the history underlying enactment of this requirement, we do not believe that the "player identification card" proposed for use as part of the KEDD system is consistent with the "paper ticket" requirement currently imposed under § 9-607(1)(i).[4]

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3883-3895 (Statements of Sen. Hall and Sen. Will).

[4] We are aware that the Department has, by regulation, approved oral and "quick pick" wagers. 316 NAC 35.613.03. We believe the authorization of such wagers is consistent with § 9-607(1)(ii), as, in each case, the wagers are represented by an actual "paper ticket" issued to the player.

**B. Five Minute Restriction.**

Section 9-607(1)(ii) also provides that "the random selection of numbers" for a keno lottery "shall not occur within five minutes of the completion of the previous selection of random numbers;. . . ." You state that the proponents of the KEDD assert that this restriction can be satisfied in one of two ways: (1) several games can be run in staggered fashion at a single location so long as there is a five minute delay between games on any particular KEDD; or (2) with respect to any given player, there is not a number draw with any greater frequency than once every five minutes.

On its face, the statute simply states that the random selection of numbers for a keno game cannot occur within five minutes of the completion of the previous selection of random numbers. It seems to contemplate the conduct of only a single game at a time. You state, however, that the Department "has made some accommodations to this five-minute restriction." Several years ago, the Department authorized the concurrent operation of both a main game and a satellite game at a single location. Although that accommodation was not actually put into place at that location, it is currently operational in the game being conducted by the City of Bellevue. As you note, "[t]his effectively results in the running of more than one keno game with a frequency greater than once every five minutes." Unlike the proposed operation of the KEDD, however, this limited exception results in the same games being run for all players.

The history of the 1991 amendment adding the five minute restriction contains no extensive discussion of the purpose of this portion of the amendment. It appears the five-minute provision was intended to address the concerns implicated by the use of video keno devices which allowed players to play games conducted as little as twenty seconds apart. Floor Debate on LB 795, *supra*, at 5422 (Statement of Sen. Will) and at 5428 (Statement of Sen. Smith). The rapid pace of games under these "instant" keno machines was noted as constituting the type of "addictive" video lottery gambling which is not sanctioned under Nebraska law. *Id.* at 5422 (Statement of Sen. Will).

Our concern with the proponents position that operation of the KEDD's can satisfy the five minute restriction lies primarily in the fact that the overall purpose behind the Legislature's enactment of all of the restrictions in § 9-607(1)(ii) was, as noted above, to preclude the use of "video keno machines" by players. While the "instant" keno machines which the Legislature sought to bar by adoption of the 1991 amendment conducted games in a very short period of time (every twenty seconds), and the proposed operation of the KEDDs would involve a five minute delay

between games, we still have concerns that the overall intent and purpose of the Legislature's adoption of the limits on the conduct of keno games in § 9-607(1)(ii) would be frustrated by the use of these video keno devices, even if the five minute delay is incorporated. Construing the statute as a whole, including the five minute requirement, it seems the Legislature intended that keno games continue to be played in the manner in which they traditionally had been conducted, and to prevent the conduct of single or multiple games within a short time frame. While the proposed operation of the KEDD does not clearly contravene this restriction, we believe that use of these devices in this manner would likely be viewed as contrary to the Legislature's overall intent in enacting the restrictions in § 9-607(1)(ii).

**C. Player Access or Activation Prohibition.**

Finally, § 9-607(1)(ii) provides that the computer, other electronic device, or electrically operated blower machine used to randomly select numbers for keno games cannot be "player activated", and "that no keno game shall permit or require player access or activation of lottery equipment. . . ." Proponents of the KEDD contend that the player access or activation prohibition is satisfied because: (1) the player cannot cause a ticket to be issued, voided, or paid without the intervention of licensed keno personnel; (2) the player cannot cause a number draw to occur without the intervention of licensed keno personnel; and (3) the player has no physical access to the hardware which actually runs the keno game or the control input device by which licensed personnel trigger games and write, void, and pay tickets.

In our view, the proponents of the KEDD assert a much narrower interpretation of the "player access or activation" restriction than is warranted by the language of the statute. The prohibition extends to player access or activation of "lottery equipment". This is broad enough, we believe, to include equipment in the nature of a video device for playing keno such as the proposed KEDD.

We believe this interpretation is consistent with the intent of the Legislature in adopting the "player access or activation" restriction. During debate on the amendment adding this provision, the following exchange occurred:

> SENATOR WILL: [ ] Senator Hall, as I read your amendment, it would say that no keno games shall permit or require player access or activation of lottery equipment. Would that. . .would your interpretation of that mean that by accessing. . .access of lottery equipment that there would be no player contact allowed,

> no physical contact between the player and the lottery equipment?
>
> SENATOR HALL: In my estimation, Senator Will, what that means is that I, as a player, if I walk in, currently what's being done in, say, a Ralston or a LaVista, you know, you use the paper ticket which is not considered equipment and I don't touch anything. I just hand it to somebody behind the counter and. . .after I fill it out, along with whatever wager I may want to make, and I never touch a machine or any of the equipment related to that.
>
> SENATOR WILL: So this would be. . .this would be directed towards a situation where an individual is actually. . .physically comes in contact with the machine and as currently happens with the instant keno games and this would be saying. . .this would be clarifying that that's not legal, that's not a legal way to run a lottery.
>
> SENATOR HALL: That's correct.

Floor Debate on LB 795, *supra*, at 5421-22.

Thus, the Legislature, in adopting the prohibition against player access or activation of "lottery equipment", contemplated that this would include equipment in the nature of video keno devices or machines used in the conduct of keno games. The KEDD, we believe, would thus constitute "lottery equipment" of the type the Legislature sought to include in the prohibition against player access or activation in § 9-607(1)(ii).[5]

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[5] The proponents of the KEDD, as noted, argue the "player access or activation" prohibition is not violated because players cannot cause tickets to be issued or cause a number draw without action also being taken by keno personnel, and have no physical access to the hardware used to run games. They apparently believe these factors are sufficient to distinguish the proposed operation of the KEDD from the manner in which the "instant" keno machines which the Legislature sought to ban under the 1991 amendment to § 9-607(1)(ii) operated. Senator Smith, referring to a description provided by the Department of the operation of the instant keno games, noted that "instant keno utilizes keno player stations which permit player access to the keno game. The player stations, themselves, have no internal game function other than to provide the player access to the keno game that's running through the computer. So they just tap into the game." Floor Debate on LB 795, *supra*, at 5426. She further stated that "the player does not activate the keno game by pressing play. That function is

We recognize that the Department has approved the use of a video screen device known as a Selective Lottery Output Terminal System (SLOTS) which permits players to view game results. This device allows players to view game results by pressing one or more buttons on a video display terminal. The game results are displayed in slot-machine like fashion with the use of symbols (cherries, bars, etc.) rather than the typical number display. In approving use of the system, the Department, in correspondence issued in 1991, concluded that "the device merely displays the results of the game in a novel way and does not directly affect the outcome of the game." The Department concluded the system operated as a "keno display board", and, therefore, was excluded from the definition of "lottery equipment" under 316 NAC 35.617.01A.

We do not view the Department's approval of this video display device as being inconsistent with the "player access or activation" restriction. This particular device is used only for viewing game results and allows no other communication or interaction between the player and the licensed keno personnel operating the game. Unlike the KEDD, it plays no role in the actual conduct of the keno game itself. While this video display device is not the type of "lottery equipment" which the player access or activation prohibition is intended to include, we conclude that the KEDD is a form of "lottery equipment" which players may not access or activate in the conduct of keno lotteries without violating § 9-607(1)(ii).

**IV. Conclusion.**

For the reasons stated above, it is our opinion that the proposed manner in which the KEDD system would operate is not consistent with current legislative authorization for the conduct of keno lotteries under the Nebraska County and City Lottery Act. We are aware of the many "community betterment purposes" served by the revenues generated by keno lottery funds, and the desire of communities to enhance those revenues through the adoption of new and innovative ways to conduct keno lotteries. We believe, however, that the KEDD system cannot be operated in a manner consistent with the limitations presently established by the Legislature for the conduct of keno lotteries. In view of the

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programmed into the control computer and it begins the play when that next game comes on line." *Id.* at 5428. Even under the "instant keno" game, the player did not "activate" the keno game; rather, the player merely "tapped into" a game. The Legislature clearly intended to bar the use of such devices to play keno. In our view, this demonstrates a legislative intent to bar any form of player access or activation by use of video keno machines, including a device such as the KEDD.

strict construction to be applied to statutes authorizing gambling activity, we conclude that it is necessary for the Legislature to act before video gaming devices such as proposed under the KEDD system may legally be used in the conduct of keno lotteries under the Act.

Very truly yours,

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7-2061-7.35

APPROVED BY:

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