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RECEIVED
STATE OF NEBRASKA
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DATE: November 8, 1995

SUBJECT: Constitutionality of Legislation Authorizing Slot Machines or Other Electronic Gaming Devices as "Lotteries" Whose Proceeds are Used for Community Betterment Purposes

REQUESTED BY: Senator LaVon Crosby
Nebraska State Legislature

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

You have requested our opinion regarding the constitutionality of legislation which would authorize slot machines or other electronic gaming devices. During the last legislative session, you sought our opinion as to the constitutionality of two bills proposing to authorize the use of such devices. LB 765 proposed to permit counties, cities, villages or licensed racetrack organizations to conduct "electronic lotteries" using "electronic gaming devices" if approved by local voters. Revenues generated from such "electronic lotteries" would be required to be used for "community betterment purposes" as defined in the bill. LB 851 proposed to authorize counties, cities, villages or licensed racetrack organizations to conduct "lotteries" through the use of "lottery terminals" which were defined as: (1) For racetracks, "electronic or computerized gaming device[s] by which winners receive cash or credits redeemable for cash and the selection of winners is predicated on the basis of chance"; or (2) For other licensed premises, "electronic or computerized video gaming device[s] which award[ ] tickets or stubs redeemable for something of value and the selection of winners is predicated on the basis of chance". Such lotteries could be conducted only after receiving

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approval from local voters. Also, revenues generated from such "lotteries" would be required to be used for "community betterment purposes" as defined in the bill.

Neither LB 765 nor LB 851 were enacted into law last session. Because of the potential that these bills, or other legislation seeking to authorize expanded gambling of this type, may again be introduced, you have asked us to consider the constitutionality of legislation which proposes to authorize the use of "slot machines" or other forms of "electronic gaming devices" as "lotteries" whose proceeds are used for "community betterment purposes" under Neb. Const. art. III, § 24.[1]

For the reasons outlined below, it is our conclusion that the Legislature may not enact legislation to permit the use of "slot machines" or other forms of "electronic gaming devices" under the constitutional grant permitting the Legislature to authorize "lotteries, raffles, and gift enterprises. . .the proceeds of which are to be used solely for charitable or community betterment purposes. . . ." Under Article III, § 24, the Legislature is precluded from authorizing "any game of chance or any lottery or gift enterprise" except as provided in the Constitution. In our opinion, "slot machines" or other forms of "electronic gaming devices" fall within the category of "games of chance" prohibited by the Constitution, and not "lotteries" which the Legislature may sanction under its authority to permit "lotteries, raffles, and gift enterprises" whose proceeds are used for charitable or community betterment purposes. Accordingly, "slot machines" or other "electronic gaming devices" may not be authorized by the Legislature for these purposes absent an amendment to the Nebraska Constitution.

I. Nebraska Constitutional and Statutory Provisions Relating to Games of Chance and Lotteries.

A. Constitutional Provisions.

The first State Constitution adopted in 1866 provided that "[t]he Legislature shall never authorize any lottery or grant any divorce." Neb. Const. of 1866 art. II, § 22. Subsequently, the Constitution of 1875 was adopted, which included a provision that "[t]he legislature shall not authorize any games of chance,

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[1] For purposes of this opinion, we assume that your reference to "slot machines" or other "video or electronic gaming devices" is intended to encompass gaming devices in the nature of traditional "slot machines", or some video device based on a "slot machine" theme, and video or electronic devices based on games such as poker, blackjack, dice, or other forms of gambling.

lottery, or gift enterprise under any pretense or for any purpose whatever." Neb. Const. of 1875 art. III, § 21. This prohibition remained unchanged until 1934 when an amendment was approved to allow the enactment of laws permitting the licensing and regulation of parimutuel wagering on horse races when conducted within licensed racetrack enclosures. Neb. Const. art. III, § 24 (Comp. Stat. 1934). In 1958, an amendment was approved allowing laws providing for the licensing and regulation of bingo games conducted by non-profit associations in existence for a period of five years. Neb. Const. art. III, § 24 (Cum. Supp. 1959). A 1962 amendment added language providing that no game of chance, lottery, or gift enterprise was authorized "where the consideration for a chance to participate involve[d] the payment of money for the purchase of property, services, chance or admission ticket, or require[d] an expenditure of substantial effort or time." Neb. Const. art. III, § 24 (Cum. Supp. 1963).

In 1968, an amendment to art. III, § 24, was approved to allow the Legislature to enact laws to authorize and regulate "lotteries, raffles, and gift enterprises which are intended solely as business promotions or the proceeds of which are to be used solely for charitable or community betterment purposes without profit to the promoter of such lotteries, raffles, or gift enterprises." Neb. Const. art. III, § 24 (Cum. Supp. 1969). A 1988 amendment authorized parimutuel wagering on the results of horse races "wherever run either within or outside of the state. . . ."

Finally, in 1992, the Constitution was amended to permit the Legislature to authorize a state lottery. Article III, § 24, currently provides, in pertinent part, as follows:

> (1) Except as provided in this section, the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money or the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time.
>
> (2) The Legislature may authorize and regulate a state lottery pursuant to subsection (3) of this section and other lotteries, raffles, and gift enterprises which are intended solely as business promotions or the proceeds of which are to be used solely for charitable or community betterment purposes without profit to the promoter of such lotteries, raffles, or gift enterprises.

B. Statutes.

Consistent with the long-standing constitutional prohibition against gambling, Nebraska's criminal statutes have historically

barred gambling activities. Early in the State's history, statutes were enacted which imposed criminal sanctions for various gaming activities, including: (1) playing games for money or wagering or betting (Gen. Stat. § 214 (1873)); (2) keeping gaming devices or machines (Gen. Stat. § 215 (1873)); (3) permitting gaming on private premises (Gen. Stat. § 216 (1873)); (4) permitting gaming in public places (Gen. Stat. § 217 (1873)); (5) keeping a "gambling room" (Gen. Stat. § 218 (1873)); or (6) being a "common gambler" (Gen. Stat. § 219 (1873)). In addition, statutes imposing criminal penalties for engaging in lottery-related activities were adopted, including: (1) making "any lottery or scheme of chance" (Gen. Stat. § 224 (1873)); (2) selling lottery tickets (Gen. Stat. § 225 (1873)); and (3) advertising any "lottery, or scheme of chance" (Gen. Stat. § 226 (1873)). These statutes, separately recognizing offenses related to "gaming" or "games of chance" and "lotteries", remained relatively unchanged for many years. *See* Comp. Stat. §§ 9799 to 9805 ("gaming") and 9818 to 9820 ("lotteries") (1922); Neb. Rev. Stat. §§ 28-941 to -947 ("gaming" or "games of chance") and 28-961 to -963 ("lotteries") (1943).

As the Constitution was amended to create exceptions to the ban on all "games of chance, lotteries, or gift enterprises", Nebraska's statutory provisions relating to gambling were modified. In addition to earlier legislation authorizing parimutuel wagering on horse races when conducted within racetrack enclosures, and the conduct of bingo by certain non-profit corporations, the Legislature, in 1969, enacted statutes to implement the constitutional amendment permitting "lotteries, raffles, and gift enterprises" whose proceeds were used solely for charitable or community betterment purposes. 1969 Neb. Laws, LB 691 (***codified at*** Neb. Rev. Stat. §§ 28-964.01 to -964.05 (Cum. Supp. 1969)). Counties, cities, and villages were authorized to establish and conduct lotteries when the proceeds were used solely for community betterment purposes, after approval by a majority of voters. Neb. Rev. Stat. § 28-964.04 (Cum. Supp. 1969).

In 1977, Nebraska's criminal statutes were substantially revised and replaced with the enactment of the Nebraska Criminal Code. 1977 Neb. Laws, LB 38. Various criminal offenses relating to gambling activity were defined, including promoting gambling, possession of gambling records, and possession of gambling devices. 1977 Neb. Laws, LB 38, §§ 218 to 221, 223 (***codified at*** Neb. Rev. Stat. §§ 28-1102 to -1105, 1107 (Supp. 1977)). "Gambling device" was defined as "any device, machine, paraphernalia, writing, paper, instrument, article, or equipment. . .used or usable for engaging in gambling,. . . ." "Lottery tickets and other items" used in the playing of legal gaming activities (parimutuel wagering, bingo, or lotteries, raffles, or gift enterprises conducted for charitable or community betterment purposes) were excluded from the definition of

"gambling device". LB 38, § 217. "Lottery" was defined to "mean a gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, once or more of which chances are to be designated the winning ones, (b) the winning chances are to be determined by a drawing or by some other method based on an element of chance, and (c) the holders of the winning chances are to receive something of value." *Id.*

The definition of "gambling device" remained relatively unaltered until 1984, when it was amended to provide that "[g]ambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding monetary prizes, free games redeemable for monetary prizes, or tickets or stubs redeemable for monetary prizes, except as authorized in the furtherance of parimutuel wagering." 1984 Neb. Laws, LB 744, § 1 (***codified at*** Neb. Rev. Stat. § 28-1101(5) (Cum. Supp. 1984)). The definition of "lottery" in § 28-1101(6) was also amended to provide that it did "not include any gambling scheme which uses any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding monetary prizes, free games redeemable for monetary prizes, or tickets or stubs redeemable for monetary prizes." Neb. Rev. Stat. § 28-1101(6) (Cum. Supp. 1984). Counties, cities, or villages conducting lotteries using mechanical, computer, electronic, or video gaming devices on the effective date of LB 744 were permitted to continue doing so until January 1, 1985. LB 744, § 2. In 1986, with the adoption of the Nebraska City and County Lottery Act, the definition of "lottery" in § 28-1101 was eliminated, and a definition of "lottery" was included as part of the City and County Lottery Act. 1986 Neb. Laws, LB 1027, §§ 178 and 192. The definition of "lottery" under the County and City Lottery Act was amended in 1989 to include keno as a permissible lottery. 1989 Neb. Laws, LB 767, § 53.[2]

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[2] The game of "keno" is defined as a game "in which a player selects up to twenty numbers from a total of eighty numbers on a paper ticket and a computer, other electronic 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 correct matching of the numbers on the paper ticket selected by the players with the numbers 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

Presently, "gambling device" is defined to "mean any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling,. . . ." Neb. Rev. Stat. § 28-1101(5) (Supp. 1995). "Gambling device" specifically includes "any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value,. . . ." *Id.* The definition of "gambling device" excludes "[s]upplies, equipment, cards, tickets, stubs, and other items used in any bingo, lottery by the sale of pickle cards, or other lottery, raffle, or gift enterprise conducted" under statutes authorizing lawful gaming activities. *Id.*

The term "lottery" is defined under various statutes pertaining to permissible forms of lotteries, including the Nebraska Lottery and Raffle Act, Neb. Rev. Stat. §§ 9-401 to -437 (1991, Cum. Supp. 1994 and Supp. 1995), the Nebraska Small Lottery and Raffle Act, Neb. Rev. Stat. §§ 9-501 to -513 (1991, Cum. Supp. 1994 and Supp. 1995), the Nebraska County and City Lottery Act, Neb. Rev. Stat. §§ 9-601 to -653 (1991, Cum. Supp. 1994 and Supp. 1995), and the State Lottery Act, Neb. Rev. Stat. §§ 9-801 to -841 (Cum. Supp. 1994 and Supp. 1995).[3] Under the Nebraska Lottery and Raffle Act, "lottery" is defined to "mean a gambling scheme in which (a) participants pay or agree to pay something of value for an opportunity to win, (b) winning opportunities are represented by tickets differentiated by sequential enumeration, and (c) winners are determined by a random drawing of the tickets." Neb. Rev. Stat. § 9-411(1) (Cum. Supp. 1994). "Lottery" under the Nebraska Small Lottery and Raffle Act is defined to "mean a gambling scheme in which (a) participants agree to pay something of value for an opportunity to win, (b) winning opportunities are represented by tickets differentiated by sequential enumeration, (c) the winners are to be determined by a random drawing of the tickets, and (d) the holders of the winning tickets are to receive something of value." Neb. Rev. Stat. § 9-507 (Cum. Supp. 1994). The term "lottery" under the Nebraska County and City Lottery Act means "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;. . .", and winners are determined either "[b]y a random drawing of tickets differentiated by sequential enumeration from a receptacle by hand whereby each ticket has an equal chance of being chosen", or "[b]y use of a game

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completion of the previous selection of random numbers. . . ." Neb. Rev. Stat. § 9-607(1)(c)(ii) (Cum. Supp. 1994).

[3] Lotteries by the sale of pickle cards are governed by the provisions of the Nebraska Pickle Card Lottery Act, Neb. Rev. Stat. §§ 9-301 to -356 (1991, Cum. Supp. 1994 and Supp. 1995).

known as keno. . . ." Neb. Rev. Stat. § 9-607(1) (Cum. Supp. 1994). "Lottery", for purposes of the State Lottery Act, is defined as a variation of either an "instant-win game" or an "on-line lottery game". Neb. Rev. Stat. § 9-803(4) (Supp. 1995). The definitions of "lottery" under the Nebraska Lottery and Raffle Act, the Nebraska Small Lottery and Raffle Act, and the Nebraska County and City Lottery Act, specifically provide that "lottery" shall not include any mechanical, computer, electronic, or video gaming devices "which ha[ve] the capability of awarding something of value, free games redeemable for something of value, or tickets or stubs redeemable for something of value." Neb. Rev. Stat. §§ 9-411(2), 9-507(2), and 9-607(2)(a) (Cum. Supp. 1994). The State Lottery Act provides that "[l]ottery game shall not be construed to mean video lottery game." Neb. Rev. Stat. § 9-803(4)(b) (Supp. 1995).[4]

II. Nebraska Case Law Addressing "Lotteries" and "Games of Chance".

"Article III, § 24, prohibits all games of chance and lotteries except as otherwise provided by law." ***City of Ralston v. Balka,*** 247 Neb. 773, 777, 530 N.W.2d 594, 598 (1995). On various occasions, the Nebraska Supreme Court has addressed whether certain activities constitute "lotteries" or "games of chance".

A. Lotteries - Schemes Involving Prize, Chance and Consideration.

In ***State ex rel. Prout v. Nebraska Home Co.,*** 66 Neb. 349, 92 N.W. 763 (1902), the Court considered whether a scheme whereby the company entered into contracts to assist persons in the purchase

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[4] In addition, the Legislature has acted to permit "raffles" by non-profit organizations for charitable purposes and "gift enterprises" used solely for business promotions under the authority provided under art. III, § 24, and has adopted definitions for these terms. Neb. Rev. Stat. § 9-415(1) (Cum. Supp. 1994) ("Raffle" under the Nebraska Lottery and Raffle Act); Neb. Rev. Stat. § 9-509(1) (Cum. Supp. 1994) ("Raffle" under the Nebraska Small Lottery and Raffle Act); and Neb. Rev. Stat. § 9-701(1)(a) (Cum. Supp. 1994) ("Gift enterprises"). The definitions of "raffle" exclude any gambling scheme using a "mechanical, computer, electronic, or video gaming device. . . ." Neb. Rev. Stat. §§ 9-415(2) and 9-509(2) (Cum. Supp. 1994). The definition of "gift enterprise" excludes "any scheme using the game of bingo or keno; any non-telecommunication-related, player-activated electronic or electromechanical facsimile of any game of chance; or any slot machine of any kind." Neb. Rev. Stat. § 9-701(1)(a) (Cum. Supp. 1994).

and payment of a home, who agreed to make certain payments to the company to be placed in a home fund, constituted an impermissible "lottery". Preference in the distribution of the fund was given to those holding contracts with the lowest serial numbers. The Court stated that, "[t]o constitute a lottery, there must be a prize offered, and the payment of something for a chance to obtain it." *Id.* at 372, 92 N.W. at 764. The Court held that the scheme was an illegal "lottery", as the preference provided to holders of the lower numbers in the distribution of the fund was a "prize", which constituted "something of value", and the element of chance was involved in the numbering of the contracts. *Id.* at 372-74, 92 N.W. at 764-65. The Court, in the syllabus accompanying its opinion, stated:

> A scheme whereby a common fund is to be produced by the contributions of various parties, and afterwards distributed among the parties contributing thereto, and a valuable preference or privilege in the distribution thereof is made to depend upon chance, is a lottery, within the meaning of out statute prohibiting lotteries.

Id. at 349, 92 N.W. at 763.

In *State ex rel. Sorenson v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851, 226 N.W. 705 (1929), the issue was whether legislation authorizing the distribution of prizes or stakes resulting from horse races permitted parimutuel wagering on horse race contests. The Court held that "the funds to be raised and distributed for prizes or stakes are intended as rewards for the owners of horses that win and not for the winners of bets on the races." *Id.* at 857, 226 N.W. at 707. To interpret the statute otherwise, the Court reasoned, would render it unconstitutional, as parimutuel wagering contained "every element of a criminal lottery--consideration, chance, price, [and] means of disbursement." *Id.* at 860, 226 N.W. at 709. The Court further stated:

> When betting and gambling are conducted in the form, substance and livery of a criminal lottery they are unlawful and those who conduct them are amenable to the statute forbidding and penalizing lotteries. Neither the Legislature not the state racing commission had power to authorize defendant to operate a lottery in the guise of betting and gambling, or in any other form.

Id. at 861, 226 N.W. at 709.[5]

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[5] The ban against the Legislature's authorization of parimutuel wagering on the results of horse races was, of course, removed by adoption of the 1934 amendment to art. III, § 24.

On several occasions, the Court has addressed whether certain business promotional schemes were prohibited lotteries. ***State ex rel. Hunter v. Fox Beatrice Theatre Corp.,*** 133 Neb. 392, 275 N.W. 605 (1937) ("Bank Night" involving drawing for prize operated by movie theaters); ***State ex rel. Hunter v. Omaha Motion Picture Exhibitors Ass'n,*** 139 Neb. 312, 297 N.W. 547 (1941) ("Prosperity Club" involving prize drawing conducted by movie theaters); ***State ex rel. Line v. Grant,*** 162 Neb. 210, 75 N.W.2d 611 (1956) (Chance prize drawing conducted by car dealer).[6] In each case, the Court noted that, in order for a scheme to constitute a lottery, it must contain three elements: (1) prize; (2) chance; and (3) consideration. ***State ex rel. Hunter v. Fox Beatrice Theatre Corp.,*** 133 Neb. at 395, 275 N.W. at 606; ***State ex rel. Hunter v. Omaha Motion Picture Exhibitors Ass'n,*** 139 Neb. at 314, 297 N.W. at 548; ***State ex rel. Line v. Grant,*** 162 Neb. at 211, 75 N.W.2d at 612.

More recently, the Court has, on two occasions, addressed the validity of certain gaming activities as "lotteries" under statutory definitions adopted by the Legislature. The first of these cases, ***CONtact, Inc. v. State,*** 212 Neb. 584, 324 N.W.2d 804 (1982), was a declaratory judgment action seeking a determination that the sale of "pickle cards" for fundraising by a nonprofit corporation was a permissible form of "lottery" under Neb. Rev. Stat. §§ 28-1101(6) and 28-1115 (1979). "Lottery" was defined as "a gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones, (b) the winning chances are to be determined by a drawing or by some other method based on an element of chance, and (c) the holders of the winning chances are to receive something of value." *Id.* at 585-86, 324 N.W.2d at 805. The State contended that the sale of pickle cards by nonprofit organizations did not fall within this definition of "lottery" because, as the number of winners was predetermined, the potential for fraudulent manipulation was great, and the game therefore did not possess the requisite element of chance. The State also argued that the statutes permitted only lotteries having a drawing after all tickets had been sold, in which the winner was determined by the drawing itself. *Id.* at 587, 324 N.W.2d at 805-06.

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[6] These decision pre-date the adoption of the 1968 amendment to art. III, § 24, authorizing the Legislature to permit "lotteries, raffles, and gift enterprises which are intended solely as business promotions. . . ." Pursuant to that amendment, the Legislature has authorized the conduct of "gift enterprises" conducted solely as "business promotions". Neb. Rev. Stat. § 9-701 (Cum. Supp. 1994).

The Court in ***CONtact, Inc.*** noted that the statute defining "lottery" was "a codification of earlier case law", and contained the "basic elements" of "(1) consideration, (2) prize, and (3) chance." ***Id.*** at 587, 324 N.W.2d at 806. It saw the issue as "simply one of statutory construction." ***Id.*** Finding that the statutory language was "unambiguous", the Court rejected the contention that only lotteries consisting of drawings after the sale of all tickets were permissible, stating:

> Section 28-1101(6) requires one or more chances to be designated the winning ones. The statute make no time reference as to when the designation is to take place, but merely states that "the winning chances are to be determined by a drawing or by some other method based on an element of chance." The statute requires designation of the winner only by "chance" or by a drawing.

Id. at 587-88, 324 N.W.2d at 806.

The Court further found that the pickle card scheme satisfied the "chance" requirement, stating: "The drawing of the cards from a tub provides the element of `chance' required by statute. The fact that the winning numbers are predetermined does not eliminate `chance.'" ***Id.*** at 592, 324 N.W.2d at 808. It therefore held "that the sale of pickle cards is a lottery and thus permitted by §§ 28-1101(6) and 28-1115." ***Id.***

The second case, ***Video Consultants of Nebraska, Inc. v. Douglas,*** 219 Neb. 868, 367 N.W.2d 697 (1985), involved the "question whether an electronic gaming machine, such as a video computer, is a form of lottery permitted under statutes enacted by the Nebraska Legislature in 1983 relative to gambling." ***Id.*** at 868-69, 367 N.W.2d at 698.[7] Video Consultants, and IGT Nebraska, Inc., each provided video lottery equipment to the City of Bellevue. The video lottery equipment was stipulated to consist of

> computer-based video machines which [were] activated by a participant inserting one or more coins. The machine

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[7] The Court noted that, in 1984, the Legislature amended the statute defining "lottery" and specified that it did not include any gambling scheme involving mechanical, computer, electronic, or video gaming devices. 219 Neb. at 869, 367 N.W.2d at 698; 1984 Neb. Laws, LB 744, § 1 (***codified at*** Neb. Rev. Stat. § 28-1101(6) (Cum. Supp. 1984)). Because the legality of activities conducted under the earlier statutes continued to raise questions of potential civil or criminal liability, the Court proceeded to address the issue of the legality of the use of the electronic gaming machines under the prior statutes.

> [was] equipped with an eighty-number pad from which the participant [could] select from one to ten numbers. Upon selection of his numbers, the participant activate[d] the machine which select[ed], purely at random, twenty (20) numbers from the total base of eighty (80) numbers. The participant's winnings, if any, [were] determined by matching the numbers selected by the participant with the random numbers selected by the machine.

Id. at 870, 367 N.W.2d at 699.

At issue in ***Video Consultants*** was whether the "video lottery" fell within the definition of "lottery" in Neb. Rev. Stat. § 28-1101(6) (Supp. 1983), and whether the "video lottery equipment" was a "gambling device" prohibited under Neb. Rev. Stat. § 28-1101(5) (Supp. 1983). The State "conced[ed] that the activity produced by the video gaming device [was] a lottery,. . . ." 219 Neb. at 873, 367 N.W.2d at 700. It argued that the video lottery was an illegal gambling device under the statute, however, because the machines did not fall within the statutory exemption for nongambling devices The State also asserted that the sale of a ticket was a necessary part of the "playing phase" of a lottery under the statute, and that the ticket given by the machines was actually a receipt or evidence of winning, and not a ticket. ***Id.***

As to the contention that the machines were illegal "gambling devices" because they did not fall within the statutory exemption for nongambling devices, the Court stated:

> Obviously, video and electronic machines are being used in production of a lottery. In its regulation of gambling, had the Legislature intended to exclude a machine, especially an electronic or video gaming device, as an object proscribed in a permissible lottery, such exclusion was not an impossible statutory feat. Yet, the Legislature employed unrestrictive, generic terms in describing the means to conduct a permissible lottery so that any article or any method was available in the `playing phase' of a legal lottery. This court cannot now insert into the statute an exclusion or restriction which the Legislature might have included when enacting § 28-1101(5) and (6) in 1983. We cannot assume that the Legislature intended to exclude electronic gaming devices from "other items used in the playing phases" of a lottery authorized by statute. . . .
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> * * *

> We conclude that the electronic gaming devices involved in this case are not "gambling devices" as such phrase and description are used in § 28-1101(5).

Id. at 873-74, 367 N.W.2d at 701.

As to the State's contention that a ticket was an essential part of a lottery as defined in § 28-1101(6), the Court determined that it could not "rewrite" the statutes to require that purchase of a ticket be the only method of satisfying the chance element, finding that "[p]urchase of a ticket is not the only means of participating in a lottery otherwise permissible under Nebraska's gambling statutes." *Id.* at 874, 367 N.W.2d at 701.

B. Games of Chance - Games Whose Outcome Depends Predominantly on Luck or Chance, Rather than the Skill of the Player.

In ***Baedaro v. Caldwell,*** 156 Neb. 489, 56 N.W.2d 706 (1953), the Court considered whether a five-ball pinball machine capable of awarding free replays constituted a "game of chance" barred under art. III, § 24, as well as an illegal "gambling device" prohibited by Neb. Rev. Stat. § 28-945. Discussing the test for determining whether a game constituted a "game of chance", the Court stated:

> The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game. . . .
>
> A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.

Id. at 493-94, 56 N.W.2d at 709.

While noting that some element of skill may be involved in the playing of a pinball machine, the Court found that the element of chance was the dominant factor in determining the result of the game. Stating that "Article III, section 24, of the Constitution is clear, explicit, and unambiguous that the Legislature shall not authorize any game of chance", and that § 28-945 "conforms to the constitutional provision in banning any game of chance in this state", the Court concluded the pinball machine was a prohibited "game of chance", as well as an illegal "gambling device". *Id.* at 494, 497, 56 N.W.2d at 710-11.

Indoor Recreation Enterprises, Inc. v. Douglas, 194 Neb. 715, 235 N.W.2d 398 (1975), was an action seeking a judgment declaring that poker, bridge, chess and checkers were games of skill, and that the playing of such games or operation of a place where such games were played did not violate the State's gambling laws. In deciding the issue, the Court relied on the "dominant factor" test for distinguishing between games of skill and games of chance employed in ***Baedaro v. Caldwell,*** which requires that "[t]he test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game." 194 Neb. at 716-17, 235 N.W.2d at 400 (***quoting Baedaro v. Caldwell,*** 156 Neb. 489, 56 N.W.2d 705 (1953). The Supreme Court affirmed the lower court's determination that the games at issue were prohibited games of chance, noting that "the predominant purpose of the games in issue was chance." 194 Neb. at 719, 235 N.W.2d at 401.

Finally, in ***State ex rel. Spire v. Strawberries, Inc.,*** 239 Neb. 1, 473 N.W.2d 428 (1991), the Court considered whether certain video gambling devices, authorized by a 1987 statute excluding mechanical, computer, electronic, or video gaming devices capable of awarding free games from the definition of "gambling device" under § 28-1107(2) (1989), were legal. The devices in question allowed the play of various games, including video poker, blackjack, and dice. ***Id.*** at 4, 473 N.W.2d at 432. The Attorney General argued that the statute purporting to authorize such devices violated the prohibition in art. III, § 24, against the Legislature's authorization of "games of chance."

In addressing the constitutionality of the statute, the Court stated that the "constitutional provision (art. III, § 24) has remained relatively unchanged since 1875", and, "[c]orrespondingly, the statute relating to the `possession of gambling devices' enacted pursuant to [the] constitutional provision [had] also remained relatively unchanged for 100 years." ***Id.*** at 6, 473 N.W.2d at 433. Discussing the scope of the prohibition against "games of chance" in the Constitution, the Court stated:

> Neb. Const. art. III, § 24, is in clear and unambiguous language and can be divided into three elements: (1) chance: "[t]he Legislature shall not authorize any game of chance"; (2) consideration: "when the consideration for a chance to participate involves the payment of money"; and (3) prize: "for the purchase of property [or] services."
>
> In defining these elements, this court has held that a game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental

> circumstances incidental to the game or the manner of playing it or on the device or apparatus with which it is played. ***Indoor Recreation Enterprises, Inc. v. Douglas,*** 194 Neb. 715, 235 N.W.2d 398 (1975). See, also, ***CONtact, Inc. v. State,*** 212 Neb. 584, 324 N.W.2d 804 (1982) (a game of chance is one in which the winner is determined by mere luck and not by skill; the predominant nature of the game, i.e., skill or chance, determines its classification). Free replays are things of value and when obtained on a gambling device constitute property within the meaning of Neb. Const. art. III, § 24. ***Baedaro v. Caldwell,*** 156 Neb. 489, 56 N.W.2d 706 (1953).

239 Neb. at 7, 473 N.W.2d at 434.

Applying the test for determining if a game constitutes a prohibited "game of chance", the Court determined the statute purporting to authorize the video gaming devices was unconstitutional, stating:

> Section 28-1107(2) attempts to exempt devices which would normally fall under the "games of chance" prohibition by redefining them. Subsection (2) provides that subsection (1) shall not apply to games used for amusement only and also attempts to exclude free replays from being considered as property under the "prize" element. Neb. Const. art. III, § 24, is clear. The court has already ruled that free replays on a device otherwise considered a gambling device constitute property within the meaning of the prohibition.
>
> The Legislature cannot avoid constitutional provisions by statutorily redefining constitutionally unacceptable activity. The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution. ***MAPCO Ammonia Pipeline v. State Bd. of Equal.,*** 238 Neb. 565, 471 N.W.2d 734 (1991). To redefine the activity that the Legislature seeks to permit would require an amendment to this state's Constitution. Absent such an amendment, § 28-1107(2) is unconstitutional for being in contravention of the express provision of Neb. Const. art. III, § 24.

239 Neb. at 8, 473 N.W.2d at 434.

III. "Slot Machines" and Electronic Gaming Devices - Permissible "Lotteries" or Prohibited "Games of Chance"?

Article III, § 24, provides, in part:

> (1) Except as provided in this section, the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money or the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time. (emphasis added).

Under subsection (2) of art. III, § 24, "[t]he Legislature may authorize and regulate a state lottery. . .and other lotteries, raffles, and gift enterprises. . .the proceeds of which are to be used solely for charitable or community betterment purposes. . . ." (emphasis added).

The issue raised by your request is whether slot machines or other electronic gaming devices may be authorized by the Legislature as "lotteries" whose proceeds are used for community betterment purposes.

Initially, resolution of this issue would seem to be a simple matter. As noted previously, the Nebraska Supreme Court has held on several occasions that, in order for a scheme to constitute a "lottery", it must contain three elements: (1) prize; (2) chance; and (3) consideration. ***CONtact, Inc. v. State,*** 212 Neb. 584, 324 N.W.2d 804 (1982); ***State ex rel. Line v. Grant,*** 162 Neb. 210, 75 N.W.2d 611 (1956). In ***Video Consultants of Nebraska, Inc. v. Douglas,*** 219 Neb. 868, 367 N.W.2d 697 (1985), the Court held that a "video lottery" constituted a permissible "lottery" as that term was defined by statute, and that the video and electronic machines used to conduct the lottery did not fall within the statutory definition of unlawful "gambling devices". Under this broad definition of "lottery", "slot machines" have been found to be "lotteries". ***E.g., State v. Village of Garden City,*** 74 Idaho 513, 265 P.2d 328 (1953); ***State v. Marck,*** 124 Mont. 178, 220 P.2d 1017 (1950); ***see*** Annot., 101 A.L.R. 1126 (1936); 38 Am.Jur.2d Gambling § 71 (1969).

We do not, however, believe that application of this broad definition of lottery results in a proper construction of that term as it is used in that portion art. III, § 24, permitting the Legislature to authorize "lotteries, raffles, and gift enterprises" whose proceeds are used for community betterment purposes. We reach this conclusion for two reasons.

First, while the Nebraska Supreme Court has employed the broad definition of lottery as any scheme involving the three elements of prize, chance, and consideration in a number of cases, it has done so in the context of applying statutory definitions of "lottery" to particular activities. Most significantly, ***Video Consultants of Nebraska, Inc. v. State*** involved only issues of whether the video

gaming activities at issue constituted a "lottery" or involved use of unlawful "gaming devices" as those terms were defined by the Legislature; no issue was raised as to whether the video gaming activity was a permissible form of "lottery" under the Constitution.[8]

Second, application of the broad definition of lottery fails to give proper consideration to the constitutional prohibition against the Legislature's authorization of "any game of chance". The Nebraska Supreme Court has, of course, held that various forms of gambling constitute "games of chance" prohibited under art. III, § 24. ***State ex rel. Spire v. Strawberries, Inc.,*** 239 Neb. 1, 473 N.W.2d 428 (1991) (video poker, blackjack, and dice devices); ***Indoor Recreation Enterprises, Inv. v. Douglas,*** 194 Neb. 715, 235 N.W.2d 398 (1975) (card games, including poker); and ***Baedaro v. Caldwell,*** 156 Neb. 489, 56 N.W.2d 706 (1953) (pinball machine). "Slot machines" have often been held to constitute "games of chance". ***E.g., State v. Busch,*** 59 R.I. 382, 195 A. 487 (1937); ***Territory v. Jones,*** 14 N.M. 579, 99 P. 338 (1908); ***see*** Annot., 135 A.L.R. 104, 138-41 (1941); 38 Am.Jur.2d Gambling § 88 (1969).

Thus, as we see it, the crucial issue is whether "slot machines" or other electronic gaming devices are forms of "lotteries" which the Legislature may authorize for community betterment purposes under art. III, § 24, or whether "slot machines" or other electronic gaming devices are "games of chance" which the Legislature is prohibited from authorizing under art.

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[8] The decision in ***CONtact, Inc. v. State*** also involved consideration only of whether the sale of "pickle cards" constituted a permissible "lottery" under a legislative definition of the term. Also, while the Court in ***CONtact, Inc.*** noted that the statute defining "lottery" in relation to the three elements of prize, chance, and consideration was "a codification of earlier case law" (212 Neb. at 587, 324 N.W.2d at 806), it must be remembered that such case law predated the 1968 constitutional amendment to art. III, § 24, allowing the Legislature to authorize "lotteries, raffles, and gift enterprises" for charitable or community betterment purposes. These decisions occurred when Nebraska's Constitution and statutes generally prohibited any "games of chance, lottery, or gift enterprise", thus obviating the need to make any distinction between "games of chance" and "lotteries".

III, § 24.[9] The Nebraska Supreme Court has not been required to address this issue.

While our Supreme Court has not been called upon to address an issue of this nature, the Supreme Court of South Dakota, in ***Poppen v. Walker,*** 520 N.W.2d 238 (1994) recently addressed a similar question. At issue in ***Poppen*** was whether "video lottery" was a permissible form of "lottery" under an amendment to the South Dakota Constitution authorizing a "state lottery", or whether it was a "game of chance" prohibited under the Constitution. ***Id.*** at 240-41.

Article III, § 25, of the South Dakota Constitution, adopted in 1889, provided: "The legislature shall not authorize any game of chance, lottery, or gift enterprise, under any pretense, or for any purpose whatever." In 1970, an amendment to this provision was approved authorizing the legislature to allow veterans, charitable, educational, religious, fraternal, other specified organizations to conduct games of chance for public purposes. In 1982, a proposed amendment to this constitutional provision which would have allowed the legislature to authorize games of chance "or coin operated gaming machines, bingo, lotteries, and card games", was rejected by South Dakota voters. Later, in 1986, the electorate approved an amendment to art. III, § 25, permitting the legislature to authorize a "state lottery". 520 N.W.2d at 240. After adoption of the 1986 amendment, the South Dakota Legislature, in 1987, enacted statutes creating an instant "scratch and match" lottery game. In 1989, legislation authorizing "video lottery" was enacted in South Dakota. The "video lottery" consisted of electronic devices which permitted the play of varieties of the games of poker, blackjack, bingo, and keno. ***Id.*** at 240-41.

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[9] This office has rendered a number of opinions on questions relating to gambling issues. ***See*** Op. Att'y. Gen. No. 284 (Nov. 12, 1982) (classic "slot machines" were prohibited "gambling devices" under statute); Op. Att'y Gen. No. 133 (Aug. 9, 1983) (use of video machines in conduct of lottery likely prohibited by statute defining "gambling device", but use of video machines not necessarily barred by Constitution); Op. Att'y Gen. No. 59 (April 10, 1985) (games such as roulette, blackjack, craps, or other casino games permissible under statute defining "lottery"); Op. Att'y Gen. No. 25 (Feb. 26, 1985) and Op. Att'y Gen. No. 87062 (April 24, 1987) (legislation authorizing wagering on sporting events unconstitutional as authorizing prohibited "game of chance"); Op. Att'y Gen. No. 87084 (May 29, 1987) (legislation authorizing unlimited free games for playing coin-operated video gaming device authorizes impermissible "game of chance" contrary to art. III, § 24). None of these opinions, however, address the issue presented.

Initially, the Court in *Poppen* noted that the term "lottery", which was not defined in the Constitution, was ambiguous, and susceptible of two meanings. Analyzing various dictionary definitions of the term, the Court noted that, "in its usual sense the dictionary definition of the term `lottery' appears to contemplate the sale of tokens or tickets and a drawing for prize,. . . ." *Id.* at 242. It further noted, however, that "some subsensal definitions [of lottery] appear to be broader in scope to include any event whose outcome is dependent on chance." *Id.* (footnote omitted). In this context, it recognized the broad definition of "lottery" which had evolved in the organic law as "any plan or scheme which has three essential elements: 1) a prize, 2) the element of chance, and 3) consideration paid for the opportunity of winning the prize." *Id.* at 243. Because the term "lottery" has more than one meaning, the South Dakota Court found it was necessary to construe its meaning in the context of the 1986 amendment. *Id.*

The Court proceeded to analyze the nature of South Dakota's original constitutional provision, which, like Nebraska's, contained a prohibition against any "game of chance, lottery, or gift enterprise." In this regard, the Court stated:

> Original state constitutional provisions prohibiting lotteries varied in language. Most either prohibited lotteries outright or prohibited the legislature from authorizing them. Others prohibited "gift enterprises" as well as lotteries. A few, including South Dakota, prohibited any "game of chance, lottery, or gift enterprise." None of the constitutional provisions cited define the term "lottery."
>
> Most states have enacted statutes prohibiting lotteries and other forms of gambling, either pursuant to self-executing constitutional mandates or under the general police power, or both. 28 Am.Jur.2d ***Gambling***, § 57 (1968). Under the constitutional mandates and statutes prohibiting lotteries as a matter of public policy, the courts developed a broad definition of the term "lottery" in order to dissuade all sorts of ingenious attempts to circumvent the prohibition. Absent any statutory definition, courts generally hold that any enterprise, whether it be a plan, scheme, or other artifice, is a "lottery" if the three elements of chance, prize and consideration are present. This broad definition is used especially when the issue is whether a scheme, plan or device falls under a constitutional provision in which the only prohibition is against a lottery.
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> * * *

> As opposed to those constitutional provisions which prohibit only lotteries, our constitution prohibits the legislature from authorizing three items: games of chance, lotteries, and gift enterprises.
>
> * * *
>
> When a constitution prohibits both games of chance and lotteries, the question arises as to the distinction between the two terms. When both terms are used, the term "lottery" has a narrower meaning in that it is a special form of game of chance. ***Contact, Inc. v. State,*** 212 Neb. 584, 324 N.W.2d 804 (1982). It is the term "game of chance" which has a broad generic meaning.

520 N.W.2d at 243-44 (footnotes omitted) (emphasis added).

The Court continued by defining "game of chance" as follows:

> A game of chance is one which the result as to success or failure depends less on the skill and experience of the player than on a purely fortuitous circumstance incidental to the game, or the manner of playing it, or the device or apparatus with which it is played. ***Baedaro v. Caldwell,*** 156 Neb. 489, 56 N.W.2d 706, 709 (1953). It is a contest wherein chance predominates over skill. ***Bayer v. Johnson,*** 349 N.W.2d 447, 449 (S.D. 1984). The test is whether chance is the determining element in the outcome of the game. ***Stubbs v. Dick,*** 89 N.E.2d 480, 482 (Ohio, 1949). The three elements of prize, chance, and consideration are present in a game of chance. ***Automatic Music and Vending v. Liquor,*** 426 Mich. 452, 396 N.W.2d 204 (1986). It is an encompassing definition which includes most forms of gaming. . . .

520 N.W.2d at 244-45 (emphasis added).

Based on this analysis, the South Dakota Court

> conclude[d] that by separately stating the terms "game of chance" and "lottery," the framers of the original provision intended the term "game of chance" to be broad in scope, including most forms of gaming, and the term "lottery" in the narrower sense contemplating the sale of tokens or tickets to large numbers of people for the chance to share in the distribution of prizes for the purpose of raising public revenue.

Id. at 245.

The ***Poppen*** Court then undertook an analysis of the circumstances surrounding the 1986 amendment to South Dakota's Constitution authorizing a "state lottery". It began by noting that the Legislature, after the 1970 amendment permitting the authorization of "games of chance" conducted by veterans, charitable, and other organizations, allowed only bingo and lotteries consisting of the sale of tickets and a drawing for prizes. ***Id.*** at 245. The Court stated that, "[b]y restricting the forms of `games of chance' authorized,. . ., it [was] clear that the legislature did not intend to authorize `games of chance' which might take the form of slot machines, card games, roulette, craps, and other games which would fall within the broad definition of `games of chance' or `lottery.'" ***Id.*** at 245-56.

The Court also noted the defeat in 1982 of the proposed amendment to allow "wagering on coin-operated gaming machines", as well as "bingo, lotteries, and card games", and the rejection of specific language authorizing "video poker" in the 1986 proposal submitted to the voters, as evidence of a distinction between gaming activities involving such devices and "lotteries". ***Id.*** at 246. It also emphasized that, after adoption of the 1986 amendment approving a state lottery, only a "scratch and match" ticket lottery was adopted by the Legislature, and that this form of lottery, along with so-called "on-line lotteries", were the predominant forms of state-sanctioned lotteries in operation at that time. ***Id.*** at 246-47.[10] Stating that "if possible, we must endeavor to construe the term `lottery' in the amendment in the same sense as in the original provision", the Court

> conclude[d] from the applicable rules of construction, the modern dictionary definitions of the term "lottery," and the history of and circumstances surrounding the 1986 amendment, that the people adopting it had in mind the

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[10] It is worth pointing out that the Court specifically noted that, prior to South Dakota's authorization of "video lottery", a legislative committee concluded a "video lottery" could be implemented under the constitutional grant to create a "state lottery", relying on ***Video Consultants of Nebraska, Inc. v. Douglas,*** 219 Neb. 868, 367 N.W.2d 697 (1985). The South Dakota Supreme Court recognized that "[t]he court in ***Video Consultants*** was not construing the Nebraska constitutional provision, but was determining the applicability of a series of statutes enacted under the general police power, one of which broadly defined the term "lottery", and "[t]hat the state on appeal conceded that the video device was a lottery. . . ." 520 N.W.2d at 246. The Court properly concluded that ***Video Consultants*** "does not in any way stand for the proposition that video lottery is permissible under the Nebraska Constitution." ***Id.***

> same concept of lottery as did our forefathers: a plan or scheme involving the sale of tokens or tickets to a large number of participants for the chance to share in the distribution of prizes by drawing or lot for the purpose of raising public revenue.

Id. at 247.

Finally, the Court in ***Poppen*** analyzed whether "video lottery" constituted a "game of chance" prohibited by the State Constitution. In this respect, the Court stated:

> One element which distinguishes a game of chance from a lottery as we have defined it, is that a "game of chance" encompasses less pervasive games which involve one or several players as opposed to a large number. Another distinction is that in a lottery, skill, choice or control of the player has no place. A token or ticket is purchased by the participant with no idea of the potential result. The participant buys a ticket and takes a chance; whether the participant is a winner or a loser is completely a matter of fate. In games of chance other than lotteries, the player has some conscious control over his input.
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> * * *
>
> These distinctions place video lottery in the category of a "game of chance" as contemplated in our constitution. In video lottery, there is only one participant playing the machine; there is no ticket or token sold or drawing held in its usual sense, and there are choices available to the participant in playing the game, which choices affect the outcome.

Id. at 247,

The South Dakota Court concluded by stating as follows:

> We are firmly convinced beyond any reasonable doubt that video lottery is not a "lottery" as contemplated under our constitution but is a "game of chance" which is prohibited by Article III, § 25. Were we to adopt the State's definition of lottery (any plan, scheme, game, or enterprise which contains the elements of prize, chance, and consideration), the legislature would be empowered to sanction just about any form of gambling heretofore so vigorously suppressed by constitutional provisions, statutes, and the courts. The State's argument turns the public policy against gambling inside out by contending

> that the people have empowered the legislature to sanction any form of gaming which contains the "three elements." Theoretically, slot machines would be constitutionally authorized, as would all other forms of gaming heretofore prohibited as lotteries by the organic law.
>
> The 1986 amendment was an exception to the general prohibition against gambling. The intent of the people in adopting that amendment was not to give the legislature carte blanche power to authorize any form of gaming which contains the elements of prize, chance, and consideration. The sole power granted was to authorize "a state lottery", not state "games of chance."

Id. at 248 (emphasis added).

We believe that the decision in ***Poppen*** is persuasive authority supporting the conclusion that "slot machines" or other electronic gaming devices are properly viewed as "games of chance" prohibited by Neb. Const. art. III, § 24, and not permissible "lotteries" which may be authorized for community betterment purposes. Nebraska's Constitution, like South Dakota's, has long contained a provision barring the Legislature from authorizing any "games of chance, lotteries, or gift enterprises." Also, Nebraska, like South Dakota, has enacted certain amendments to its Constitution allowing exceptions, including the conduct of "lotteries, raffles, and gift enterprises" for charitable or community betterment purposes. We agree with the South Dakota Court's conclusion that, "[w]hen a constitution prohibits both games of chance and lotteries, the question arises as to the distinction between the two terms." 520 N.W.2d at 244. "When both terms are used, the term `lottery' has a narrower meaning in that it is a special form of game of chance. . . .It is the term `game of chance' which has a broad generic meaning." *Id.* (citation omitted).

The term "game of chance" under Nebraska's Constitution refers to any game in which chance is the predominant element, as opposed to skill, "when the consideration for a chance to participate involves the payment of money or the purchase of property [or] services." ***State ex rel. Spire v. Strawberries, Inc.***, 239 Neb. at 7, 473 N.W.2d at 434. The three elements of prize, chance, and consideration are present in a game of chance. ***Poppen v. Walker,*** 520 N.W.2d at 245. If the term "lotteries" under the exception in art. III, § 24, authorizing the Legislature to permit "lotteries, raffles, and gift enterprises" for community betterment purposes, is construed to authorize any scheme involving the elements of prize, chance, and consideration, the prohibition against "games of chance" would be rendered meaningless. "It is a fundamental principle of constitutional interpretation that each and every

clause within a constitution has been inserted for a useful purpose." ***Day v. Nelson,*** 240 Neb. 997, 1000, 485 N.W.2d 583, 585-86 (1992). A constitutional provision "must be construed as a whole, and no part will be rejected as meaningless or surplusage, if such can be avoided." ***State ex rel. State Ry. Comm'n v. Ramsey,*** 151 Neb. 333, 340-41, 37 N.W.2d 502, 507 (1949). In order to give effect to the separate recognition of "games of chance" and "lotteries" under art. III, § 24, the term "games of chance" must be interpreted as a broad prohibition against gambling activities, and the term "lotteries", under the exception allowing such for community betterment purposes, must be interpreted in a narrower sense, as involving schemes in which tickets or tokens are distributed or sold and prize winners are either secretly predetermined or ultimately selected by some form of random drawing. The American Heritage College Dictionary (3d ed. 1993).[11]

In addition, Nebraska, like South Dakota, has historically prohibited gambling and lottery activities. As noted at length in our earlier discussion of the history of Nebraska's constitutional and statutory provisions concerning "games of chance" and "lotteries", such activities have long been barred in Nebraska, and only limited exceptions to the constitutional prohibitions have been approved over the years. We have examined the history behind the amendment submitted to the voters in 1968 to alter art. III, § 24, to permit "lotteries, raffles, and gift enterprises" for charitable or community betterment purposes. Nothing in the history of the amendment reveals any intent to permit the Legislature to authorize gambling in the nature of "slot machines" or other types of "casino gambling" as "lotteries". Clearly, the voters who approved the 1968 amendment did not understand that it would give the Legislature the power to authorize all forms of gambling activity involving prize, chance, and consideration, which, as noted, would include all "games of chance" which have historically been banned under our Constitution and statutes.[12]

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[11] While this definition is somewhat broader than that adopted by the South Dakota Court in ***Poppen,*** we believe it is appropriate, in that it is consistent with the common understanding of the term. Moreover, existing "lotteries" authorized under the Nebraska statutes governing permissible "lotteries" for charitable or community betterment purposes, including the Nebraska Pickle Card Lottery Act, Neb. Rev. Stat. §§ 9-301 to -356 (1991, Cum. Supp. 1994 and Supp. 1995) and the Nebraska County and City Lottery Act, Neb. Rev. Stat. §§ 9-601 to -653 91991, Cum. Supp. 1994 and 1995), would satisfy this definition of "lottery".

[12] We recognize that art. III, § 24, was amended in 1992 to allow the Legislature to authorize a "state lottery". That amendment, however, did not effect any change to the language

Finally, the Court in ***Poppen*** noted that "games of chance" were distinguishable from "lotteries" in that they generally involve only one or a limited number of players; no ticket or token is sold or drawing held; and players exercise some choice affecting the outcome of the game. 520 N.W.2d at 247. While it is true that a traditional "slot machine" does not involve any exercise of choice by the player, as contemplated by the Court in ***Poppen***, this does not mean that "slot machines" should be considered "lotteries" rather than "games of chance." Indeed, it is clear the South Dakota Court considered "slot machines" to be unconstitutional games of chance.[13] More importantly, the Nebraska Supreme Court has held that pinball machines (***Baedaro v. Caldwell***) and video poker, blackjack and dice devices (***State ex rel. Spire v. Strawberries, Inc.***) are "games of chance" prohibited under the Nebraska Constitution. "Slot machines" or other electronic gaming devices thus are properly viewed as "games of chance" prohibited under art. III, § 24, and not forms of "lotteries" which may be authorized by the Legislature for community betterment purposes.

IV. Conclusion.

Based on the foregoing, we conclude that the Legislature may not enact legislation to permit the use of "slot machines" or other "electronic gaming devices" under the constitutional grant permitting the Legislature to authorize "lotteries, raffles, and gift enterprises. . .the proceeds of which are used solely for charitable or community betterment purposes." Under Article III, § 24, the Legislature is precluded from authorizing "any game of chance or any lottery or any gift enterprise" except as provided in the Constitution. In our opinion, "slot machines" or other forms of "electronic gaming devices" fall within the category of "games of chance" prohibited by the Constitution, and not "lotteries" which the Legislature may sanction under its authority to permit "lotteries" for charitable or community betterment purposes. Accordingly, "slot machines" or other "electronic gaming devices"

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relating to the Legislature's power to authorize "lotteries" for charitable or community betterment purposes. For purposes of addressing the issue raised by your request, therefore, it is appropriate to examine the history behind the 1968 amendment creating this exception.

[13] In discussing the State's argument that the broad definition of lottery as any scheme involving prize, chance, and consideration should be adopted, the Court singled out "slot machines" as being among the forms of gambling "[t]heoretically" authorized by such a construction of the Constitution. 520 N.W.2d at 248. The Court, of course, declined to adopt such a construction.

may not be authorized by the Legislature for these purposes absent an amendment to the Nebraska Constitution.

Very truly yours,

DON STENBERG
Attorney General

L. Jay Bartel
Assistant Attorney General

07-03-14.op

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

Approved by:

Attorney General