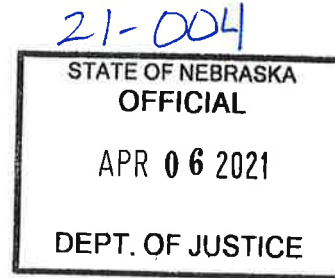




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SUBJECT: Constitutionality of Authorizing Electronic Keno Tickets – LB 561 (AM639).

REQUESTED BY: Senator John Lowe
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

A pending amendment to LB 561 (AM639) would allow keno to be played using an electronic ticket in addition to play on a paper ticket. AM639, § 28. Purchase of a ticket, whether paper or electronic, could only be made by a person present at the location of the lottery operator or a licensed sales location. AM639, § 31. Reasonable safeguards must be approved by the Department of Revenue to ensure that electronic tickets are only accessible to individuals nineteen years of age or older, and only within the confines of the location detection procedures which establish permitted boundaries for play. AM639, § 31. Payment for ticket purchases would be expanded from cash only to allow the use of debit cards or a direct link to an account with a financial institution in the name of the player. AM639, § 29. Credit card payments are prohibited. *Id.*

Noting a prior opinion from this office addressing proposed legislation to authorize “electronic keno” (Op. Att’y Gen. No. 97013 (Feb. 13, 1997)), you ask if allowing electronic keno tickets and expanding the methods to pay for tickets converts keno from a permissible “lottery” to a “game of chance” under Neb. Const. art. III, § 24. You also ask whether, if these changes make keno a “game of chance,” it would be allowed only within a licensed casino, and, if so, how this would affect the age requirement to play keno,

which is currently nineteen years of age. Finally, you ask if a licensed casino operator could conduct keno within a casino and, if so, whether the current statutory requirement that keno games be conducted five minutes apart would apply to the play of keno at a licensed casino.

For the reasons explained below, we conclude that allowing use of an electronic ticket in the play of keno would not change the game's status as a permissible form of lottery for community betterment purposes. Our prior opinion addressing a proposal to permit "electronic keno" involved authorization of player-activated games which utilized stand-alone mechanical, computer, electronic, or video gaming devices. We have not addressed the mere authorization of an electronic ticket as an alternative to use of a paper ticket to play the game of keno currently described in Neb. Rev. Stat. § 9-607(2)(c)(ii) (2012). Unlike the previous proposal which we determined would allow the use of gambling devices constituting "games of chance," authorizing electronic tickets would merely permit players present at a keno location an alternative means to purchase a ticket utilizing new technology. This would not fundamentally alter the nature of the game of keno currently permitted in statute as a ticket is still required which satisfies the requirement for a permissible lottery. As to expanding the method of payment for keno tickets, this has no bearing on the determination of the game's status as a lottery. Finally, conduct of keno by authorized gaming operators at licensed racetracks would not involve a lottery conducted by a county, city, or village for community betterment purposes under the Nebraska County and City Lottery Act. Thus, the five-minute time limit between keno games required by Neb. Rev. Stat. § 9-607(2)(c)(ii) would not apply to keno conducted by authorized gaming operators at licensed racetracks.

ANALYSIS

In November, Nebraska voters approved three initiative measures related to expanded gambling. Initiative Measure 429 amended Neb. Const. art. III, § 24, by adding a new subsection (5) permitting legislative authorization "of all forms of games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure." Initiative Measure 430 enacted a statute (known as the "Nebraska Racetrack Gaming Act" or "NRGA") permitting the operation of games of chance by authorized gaming operators within licensed racetrack enclosures. Initiative Measure 431 enacted a statute providing for the taxation of revenue generated by authorized gaming operators conducting games of chance at licensed racetrack locations, and the distribution of those tax revenues.

LB 561, as amended by AM641, proposes changes to the NRGA, including combining the Nebraska Gaming Commission created by the NRGA with the State Racing Commission to establish a State Racing and Gaming Commission to regulate both horseracing and the new gaming authorized by the NRGA. AM641, §§ 1, 2, 4, 33, 34. AM641 also adds "sports wagering" to the definition of "game of chance" in the NRGA. AM641, § 33. AM640 to LB 561 provides requirements for the conduct of sports wagering. AM639 would allow keno players to purchase electronic tickets in addition to paper

tickets. Your initial question is whether allowing electronic keno tickets would convert keno from a permissible "lottery" to a "game of chance" under Neb. Const. art. III, § 24.

Recently, in Op. Att'y Gen. No. 21001 (February 5, 2021), we addressed whether Initiative Measure 430, which permits the operation of "games of chance" only by authorized gaming operators within licensed racetrack enclosures "[n]otwithstanding any other provision of law," removed the authorization to conduct other forms of gaming which had been previously permitted. We noted that the Constitution distinguishes "games of chance" from other forms of gaming, including "lotteries":

Subsection (1) of art. III, § 24, prohibits "any game of chance or any lottery or gift enterprise" unless an exception is allowed in that section of the Constitution. As noted, exceptions have been carved out for parimutuel wagering on horse races, bingo conducted by qualified nonprofit associations, the state lottery, and lotteries, raffles and gift enterprises conducted for specified purposes. Initiative 429 added a new exception allowing games of chance when conducted by authorized gaming operators at licensed racetracks.

In Op. Att'y Gen. No. 95085 (Nov. 17, 1995), this office considered whether slot machines or other electronic gaming devices could be authorized as "lotteries" if operated for community betterment purposes. Recognizing that "games of chance" and "lotteries" both share the common elements of prize, chance, and consideration, we concluded that, if the term "lottery" in the Constitution was "construed to authorize any scheme involving the elements of prize, chance, and consideration, the prohibition against 'games of chance' would be rendered meaningless." *Id.* at 22. Thus, we concluded that, "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." *Id.* at 23.

Op. Att'y Gen. No. 21001 at 4-5.

We concluded that the forms of gaming previously authorized under the specific exceptions in art. III, § 24, including the State Lottery 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," were distinct from the broad "games of chance" permitted by Initiative Measure 429, and were thus still authorized gaming activities:

[T]he forms of gaming the Legislature has authorized under exceptions in art. III, § 24, include parimutuel wagering on horse races, bingo, lotteries (including a state lottery), raffles, and gift enterprises. There was no exception permitting

legislative authorization of any “game of chance” prior to adoption of Initiative Measure 429.

The statutes authorizing these forms of gaming reflect their distinction from the broad term “games of chance.” In particular, the various statutes pertaining to permissible “lotteries” are limited to schemes involving some form of tickets where winners are either predetermined or selected by random drawing. See, e.g., Neb. Rev. Stat. §§ 9-312 and 315 (2012); Neb. Rev. Stat. § 9-411(1) (2012); Neb. Rev. Stat. § 9-507(1) (2012); Neb. Rev. Stat. § 9-607(1)(c)(i) (2012); Neb. Rev. Stat. § 9-803(4) (2012).

* * *

The Nebraska Supreme Court has recognized the distinction drawn by the Constitution between keno, a form of lottery authorized under the Nebraska County and City Lottery Act, and “games of chance.” In *Stewart v. Advanced Gaming Technologies, Inc.*, 272 Neb. 471, 723 N.W.2d 65 (2006), the Court held a video keno initiative did not violate the resubmission clause in Neb. Const. art. III, § 2, because it proposed to amend statutes authorizing a lottery and was thus different from a prior measure proposing to allow games of chance at casinos.

* * *

The initiative did not alter or amend any of the language in art. III, § 24, permitting the Legislature to allow gaming in the form of parimutuel wagering on horse races, bingo, lotteries, raffles, and gift enterprises. As these are distinct forms of gaming for purposes of art. III, § 24, the authorization of “games of chance” at licensed racetracks under Initiative Measure 429 did not affect the constitutional authorization for these other forms of gaming or limit their conduct to racetracks.

Op. Att’y Gen. No. 21001 at 5-6 (footnote omitted).

The Nebraska County and City Lottery Act, in addition to permitting lotteries involving random ticket drawings, also permits a keno lottery “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 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.” Neb. Rev. Stat. § 9-607(1)(c)(ii) (2012) (emphasis added). AM639 would add the option for players to participate in a keno game via an “electronic” ticket. “Any electronic ticket shall be clearly associated with the county, city, or village conducting the lottery during the purchase of the ticket, or if an electronic ticket is represented by a printable image,

the name of the county, city, or village conducting the lottery shall be clearly visible on the printable image.” AM639, § 30.

Your request mentions a previous opinion from this office addressing the constitutionality of legislation to authorize “electronic” keno. Op. Att’y Gen. No. 97013 (Feb. 13, 1997). The bill (LB 522) proposed to “amend the provisions of the Nebraska County and City Lottery Act to eliminate the ‘paper ticket’ requirement currently contained in the act, as well as the prohibitions against ‘player activation’ and the use of ‘mechanical’, ‘computer’, ‘electronic’, or ‘video’ gaming devices, to permit ‘electronic keno.’” *Id.* at 1. Discussing this issue, we referenced an earlier opinion concluding that the term “lottery” in the constitutional provision authorizing lotteries for community betterment purposes should be interpreted to mean “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.” *Id.* at 12 (*quoting* Op. Att’y Gen. No. 95085 at 23). Applying this definition, we concluded “that the ‘electronic’ keno proposed . . . [did] not constitute a form of ‘lottery’ which the Legislature may authorize under art. III, § 24.” *Id.* at 12. In reaching this conclusion we noted the bill would “eliminate the current ‘paper ticket’ requirement” which was “one part of the definition” of lottery noted in our previous opinion. We went on to state:

Of greater significance, however, is the elimination of the “player-activation” restriction. You state that these “provisions are not intended to change the essential nature” of the authorized lottery. . . . We cannot accept the premise that elimination of the “player-activation” prohibition does not “change the essential nature” of the activity. While it is true that a computer or electronic device may be used to select winning numbers under current law, we believe it is significant that these devices are not activated by the players, but, rather, are used by the keno operator. The concept of individual players activating gambling devices utilizing random-generation of numbers to determine winners at each device is, in our view, inconsistent with what we believe is the narrow manner in which the people, through their Constitution, intended to grant the Legislature power to permit “lotteries” for community betterment purposes. *Id.* at 12-13.

While our 1997 opinion does identify a “paper ticket” as “one part of the definition” of lottery, the actual definition from our 1995 opinion referred only to “tickets” or “tokens.” In the twenty-four years that have passed since issuance of our 1997 opinion, technology has advanced to the point where it is now possible for players to purchase a ticket in an electronic format in addition to the traditional paper ticket. The Supreme Court has recognized that the terms and provisions of the Constitution must be read in a manner which reflects changed circumstances:

A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their

nature applicable. *State ex rel. State Railway Comm'n v. Ramsey*, 151 Neb. 333, 338, 37 N.W.2d 502, 506 (1949).

Unlike our earlier opinion, which addressed the authorization of a totally new form of keno using stand-alone machines activated by players in which no ticket was involved, AM639 would only permit an additional means to play a traditional keno game by purchasing an electronic ticket rather than a paper one. Providing an additional means to purchase a ticket in this manner does not fundamentally alter the nature of the game. Accordingly, we conclude that the addition of an option to play keno using an electronic ticket does not place the game outside a permissible lottery under art. III, § 24.¹

Your second question is premised on finding that use of an electronic ticket makes keno a game of chance and not a lottery. As we have concluded it does not, there is no need to address this question.

Finally, you ask whether a licensed casino operator could conduct keno within a casino and, if so, whether the current statutory requirement that keno games be conducted five minutes apart would apply to the play of keno at a licensed casino.

Initiative Measure 429 amended Neb. Const. art. III, § 24, by adding a new subsection (5) permitting legislative authorization “of all forms of games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure.” AM641 would define “[g]ame of chance” as “any game which has the elements of chance, prize, and consideration,” including specified games. AM641, § 33. As noted above, we have distinguished “games of chance” from “lotteries” in art. III, § 24, by interpreting “game of chance” as a broad term referencing “all gambling activities” and “lottery” in a narrower sense where tickets are sold and prize winners are either secretly predetermined or selected by some form of random drawing. Op. Att’y Gen. No. 95085 at 23. The new constitutional amendment permits “all forms of games of chance” when conducted by authorized gaming operators at licensed racetracks, and the implementing statute would define “game of chance” to broadly include “any game which has the elements of prize, chance, and consideration.”

While keno conducted pursuant to the County and City Lottery Act is a “lottery” permitted by separate constitutional exception, the broad authorization of “all games of chance” in new subsection (5) of art. III, § 24, and the broad definition of “game of chance” as “any” game with the elements of prize, chance, and consideration, should allow authorized gaming operators to conduct keno within licensed racetrack enclosures. If allowed, we presume this would be subject to regulation by the proposed State Racing

¹ In connection with the allowance of electronic keno tickets, you also ask whether allowing payment for keno ticket purchases to be expanded from cash only to authorize the use of debit cards or a direct link to an account with a financial institution in the name of the player violates art. III, § 24. The means used to purchase tickets does not impact the nature of the game and has no constitutional significance.

and Gaming Commission as it would not be a lottery conducted by a county, city, or village for community betterment purposes under the Nebraska County and City Lottery Act. Thus, the five-minute time limit between keno games required by Neb. Rev. Stat. § 9-607(2)(c)(ii) would not apply to keno conducted by authorized gaming operators at licensed racetracks.

CONCLUSION

We conclude that allowing use of an electronic ticket in the play of keno would not change the game's status as a permissible form of lottery for community betterment purposes. Allowing this option in lieu of purchasing a paper ticket would not fundamentally alter the nature of the game of keno currently permitted in statute as a ticket is still required which satisfies the requirement for a permissible lottery. As to expanding the method of payment for keno tickets, this has no bearing on the determination of the game's status as a lottery. Finally, the five minute time limit between keno games required by Neb. Rev. Stat. § 9-607(2)(c)(ii) would not apply to keno conducted by an authorized gaming operator at a licensed racetrack because it would not involve a lottery conducted by a county, city, or village for community betterment purposes under the Nebraska County and City Lottery Act.

Very truly yours,

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Approved by:



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