



Jonathan M. Anderson
 Phone (303) 295-8566
 Fax (303) 672-6508
 jmanderson@hollandhart.com

MEMORANDUM

FROM: Jon Anderson, Esq.
 Jason Crow, Esq.

DATE: February 16, 2012

RE: House Bill 1280- Legal Summary

Bill Summary

Colorado House Bill 12-1280 authorizes the Colorado Lottery Commission to introduce video-lottery terminals (VLTs) at up to three Colorado locations. Under established principles of Colorado law, “games of chance” are a lottery while “games of skill” are gambling, regardless of the type of game. The Colorado Attorney General’s Office has considered this specific issue and determined that VLTs are a form of lottery and not limited gaming.

Colorado Attorney General Opinions

- 1) **Colorado Attorney General Formal Opinion 93-5 provides that “games of chance” are not restricted by the Colorado Limited Gaming Act.** Attorney General Gale Norton concluded that games of chance, such as slots, are lottery games while games of skill, such as poker, are controlled by the Colorado Limited Gaming Act.
- 2) **1994 Informal Attorney General Opinion confirmed that Video Lottery Terminals are a lottery that can be authorized by the Colorado Lottery Commission** (attached as Exhibit A). The Opinion’s legal conclusion is unambiguous:
 - a) Question: “Whether the Colorado Lottery Commission may establish video lottery terminals under its authority to create new lottery games?”
 - b) Conclusion: “Yes. The Colorado Lottery Commission may establish new games such as video lottery terminals... .” (*emphasis added*).
- 3) **1999 Attorney General Interoffice Memorandum to Attorney General Ken Salazar again confirmed the office’s prior determinations** (attached as Exhibit B). As with the previous opinions, the legal conclusion is clear: “I conclude that the finding that the General Assembly may direct the State Lottery Division to use video lottery terminals for lottery games is correct.” (*emphasis added*).

Holland & Hart LLP

Phone [303] 295-8000 Fax [303] 295-8261 www.hollandhart.com

555 17th Street Suite 3200 Denver, CO 80202 Mailing Address P.O. Box 8749 Denver, CO 80201-8749

Aspen Boulder Carson City Colorado Springs Denver Denver Tech Center Billings Boise Cheyenne Jackson Hole Las Vegas Reno Salt Lake City Santa Fe Washington, D.C. ☐

Supreme Court and Constitutional Guidance

- 1) **The Colorado Supreme Court has concluded that games of chance are a lottery.** The Colorado Supreme Court has consistently held that an activity is a “lottery” whenever three essential elements are present: consideration, prize, and chance. The type of activity is immaterial. (*In re Interrogatories of the Governor Regarding the Sweepstakes Races Act*, 196 Colo. 353 (1978)). Thus, VLTs qualify as a type of lottery game under established Colorado Supreme Court precedent.

- 2) **The General Assembly has exclusive authority to expand “lottery” games under the Colorado Constitution; the Colorado Limited Gaming Act did not restrict or preempt that Authority.**
 - a) **The General Assembly has exclusive authority to expand Lottery.** The Colorado Constitution grants exclusive authority to the General Assembly to expand and regulate state lotteries. (Colorado Constitution, Art. XVIII, Section 2(1)).

 - b) **The General Assembly has delegated this authority to the Lottery Division/Commission.** The General Assembly has delegated the authority to expand and regulate state-supervised lotteries to the state Lottery Division and the Colorado Lottery Commission. (C.R.S. 24-35-201, et. seq.).

 - c) **The Limited Gaming Act does not restrict, preempt (or even mention) Lottery.** The Colorado Limited Gaming Act restricts “limited gaming” activities but does not preempt or restrict the general assembly’s authority to expand state-supervised lottery games. (Const. Art. XVIII, Section 9(3)). The Limited Gaming Act does not even cite or reference the constitutional provisions authorizing Lottery. As the Attorney General’s office determined, if the Limited Gaming Act was intended to limit Lottery, it could have amended the Lottery provisions.

Conclusion

VLTs are a lottery based on the fact that they are a game of chance. Lottery commissions in states such as Delaware, West Virginia, Rhode Island, South Dakota and Maryland operate VLTs. In Colorado, the law is clear that such games of chance qualify as a lottery and the Attorney General’s Office has held that VLTs are a lottery not subject to the Colorado Limited Gaming Act. Any reading of the Limited Gaming Act to the contrary simply does not comport with Attorney General Opinions on the matter or established Colorado Supreme Court precedent.

April 19, 1999

INTRA OFFICE MEMORANDUM

TO: Ken Salazar
Attorney General

FROM: Mauricio Knaizer *MK*
Deputy Attorney General

RE: Video Lottery Terminals

I have reviewed the informal opinion regarding video lottery terminals which was issued on December 4, 1994. I conclude that the finding that the General Assembly may direct the State Lottery Division to use video lottery terminals for lottery games is correct. Colo. Const. art. XVIII, § 2(7) authorized the General Assembly to establish a state-supervised lottery, "any provision of this constitution to the contrary notwithstanding." (emphasis added). Nothing in the State Constitution, including the Limited Gaming Amendment, Colo. Const. art. XVIII, § 9, restricts this power. If the proponents of the Limited Gaming Amendment had intended to limit this power, they could have amended § 2(7) or added specific language to § 9.

In addition, § 2(7) and § (9) address different types of gambling conducted by different types of entities. Section 2(7) gives the General Assembly broad authority to define state-sponsored lottery games, including the types of games and the places where the games may be conducted by the State. Section 9, the Limited Gaming Amendment, addresses gambling conducted by private interests. Private owners of gambling casinos may conduct only certain types of games, which are limited in wager amounts, in three jurisdictions within Colorado.

Finally, I have reviewed the Legislative Council's analysis of the Limited Gaming Amendment. Nothing in the analysis indicates that the proponents intended to limit the types of games conducted by the State Lottery Division or the means by which the games are conducted.

AG FILE: DOCUMENT2



GALE A. NORTON
Attorney General

STEPHEN K. ELKEMBRACK
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL


STATE SERVICES BUILDING
1525 Sherman Street - 5th Floor
Denver, Colorado 80203
Phone (303) 826-4500
FAX (303) 826-3891

December 7, 1994

MEMORANDUM

TO: The Honorable Tom Norton
President of the Senate

THUR: Maurica Knaizer
Deputy Attorney General

FROM: Clifton D. Hypshar
Assistant Attorney General 

RE: Video Lottery Terminals

This informal opinion is provided in response to your request of November 7, 1994, concerning the authority of the Colorado Lottery Commission to establish video lottery terminals. This opinion reflects the legal opinion of the author and is not to be construed as an official opinion of the Attorney General.

QUESTION

Whether the Colorado Lottery Commission may establish video lottery terminals under its authority to create new lottery games?

CONCLUSION

Yes. The Colorado Lottery Commission may establish new games, such as video lottery terminals, which satisfy the requirements of § 24-35-208(2)(a), C.R.S.

DISCUSSION

The Colorado Constitution, article XVIII, section 2, makes certain lotteries legal in Colorado. These legal "games of

chance' include a state-supervised lottery. Article XVIII, section 2, of the Colorado Constitution states:

(1) The general assembly shall have no power to authorize lotteries for any purpose, except that the conducting of such games of chance as provided in subsections (2) and (4) of this section shall be lawful on and after January 1, 1959, and the conducting of state-supervised lotteries pursuant to subsection (7) of this section shall be lawful on and after January 1, 1981.

Article XVIII, section 2, clause 7, of the Colorado Constitution delegates to the General Assembly express authority to "establish" the state-supervised lottery mentioned in clause 1. Article XVIII, section 2, clause 7, provides in relevant part:

(7) Any provision of this constitution to the contrary notwithstanding, the general assembly may establish a state-supervised lottery. * * *

The General Assembly in § 24-35-201 C.R.S., et. seq., establishes a state-supervised lottery for Colorado. As part of the lottery system, § 24-35-208 C.R.S., authorizes the Colorado Lottery Commission (the Commission) to:

(1) (a) Promulgate rules and regulations governing the establishment and operation of a state lottery,...

(2) (a) [Determine] the types of lotteries to be conducted, but no lottery conducted under this part 2 shall be based upon the game of chance commonly known as bingo, nor shall any lottery be conducted which depends upon the outcome of any athletic contest except races, races at state licensed dog or horse tracks if approved by the Colorado racing commission.

Section 24-35-208 imposes only two specific exceptions to the Commission's authority to establish new lotteries. These exceptions, that the game may not be based upon bingo nor be dependent upon the outcome of athletic events, are the only limitations on the Commission's authority to choose how lotteries are to be conducted. Accordingly, the Commission is free to utilize modern technology, such as video terminals, as a mechanism for bringing the state lottery before the public. See Truck Insurance Exchange v. Home Insurance Company, 841 P.2d 354

(Colo. Ct. App. 1992), (express limitations contained in a statute are construed to be exclusive.)¹

Thus, § 24-35-208(2)(a), authorizes the Commission, at its discretion, to establish state lottery games which pass a three factor test. These three factors may be restated as follows:

- 1) The game must constitute a lottery.
- 2) The game must not be based on the game commonly known as bingo.
- 3) The game may not be dependent on the outcome of an athletic competition with two enumerated exceptions, state licensed dog or horse races upon approval of the Racing Commission.

Of the three factors which must be satisfied in determining whether a game may be established in the state lottery, we will assume for purposes of this opinion that only the determination of what constitutes a lottery is problematic.

In analyzing whether a game is a lottery for purposes of Colorado law, the Colorado Supreme Court stated:

Our cases have established that a lottery is present when consideration is paid for the opportunity to win a prize awarded by chance. (Citation omitted)

In re Interrogatories of Governor Regarding Sweepstakes Races
App, 585 P.2d 598, 598 (1978).

¹ An important duty of the Commission is to insure the integrity of the state-supervised lottery. Section 24-35-208(1)(c) states that one of the duties of the Commission shall be:

To carry on continuous study and investigation of the lottery throughout the state for the purpose of ascertaining any defects in this part 2 or in the rules and regulations issued under part 2 whereby abuses in the administration and operation of the lottery or any evasion of this part 2 or the rules and regulations may arise or be practiced...

This section evidences the intent of the legislature that any programs implemented by the Commission be secure from "abuses in the administration and operation of the lottery." Thus, the Commission must insure that any lottery instituted by it must be secure from fraud and tampering. See, Evnum v. Kautsky, 784 P.2d 715 (Colo. 1989), (statutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme.)

Thus, in order for a game to constitute a lottery it must exhibit the elements of consideration, chance, and prize. See, Federal Communications Commission v. American Broadcasting Co., Inc., 347 U.S. 284, 28 LEd. 699, 706, 74 S.Ct. 593 (1953) (there are three essential elements of a lottery... (1) the distribution of prizes; (2) according to chance; (3) for a consideration.)

Consideration is defined as "something given as recompense, as payment or reward" Webster's Third New International Dictionary, p.484 (1971). A prize is "something offered or striven for in competition or in contests of chance; something that may be won by chance (as in a lottery)." Id. at p.1806.

The element of chance is less easily defined. In general, chance will be present where randomness and unpredictability dominate the game. See Id. at p.373. Some level of skill may be present in a lottery; in a lottery chance is the controlling factor in the award. In re Interrogatories of Governor, at p.598.

The Commission may establish any video lottery terminal as part of the state-supervised lottery which fits within the parameters enunciated above.