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OAG 09-004

June 15, 2009

Subject: Video Lottery Terminals at Kentucky's Horse Race Tracks

Requested by: State Representative Jody Richards, 20th Legislative District

Written by: Jennifer Black Hans
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Syllabus: The General Assembly may authorize the Kentucky Lottery Corporation to establish, license, regulate and tax video lottery terminals at designated horse racing tracks under Ky. Const. § 226(1) without further amendment to the Kentucky Constitution.

Statutes construed: Ky. Const. § 226, KRS § 238.505, KRS § 154A.010, KRS § 154A.060, KRS § 154A.063

OAGs cited: OAG 05-003, OAG 99-008, OAG 93-58, OAG 92.127 and OAG 80-409

Opinion of the Attorney General

INTRODUCTION

By letter dated May 7, 2009, State Representative Jody Richards requests the Attorney General's opinion concerning whether electronic games at Kentucky's race tracks are allowed under Section 226 of the Kentucky Constitution.



A. Factual Context for Opinion

Pursuant to 40 KAR 1:020 Section 3, official opinions of the Attorney General must involve "an actual, current factual situation." After receiving Representative Richards' initial request, the Office of the Attorney General sent two (2) letters seeking additional information, particularly the specific draft legislation upon which his inquiry was based. In response, on June 1, 2009, Representative Richards wrote that the General Assembly was not in session, and, therefore, he could not provide a specific bill draft. In lieu of a specific bill draft, Representative Richards provided the following questions:

- (1) Is a video lottery terminal whereby a patron wins by matching numbers, pictures, or symbols considered to be a slot machine and therefore prohibited under Section 226 of the Kentucky Constitution?
- (2) Is it permissible for the Kentucky Lottery Corporation to allow one or more vendors to have or operate several video lottery terminals at a single location; several dozen terminals at the same location or several hundred terminals at the same location?

While *more* specific, the foregoing questions still did not provide a specific bill draft for legal analysis. Moreover, the additional questions presented are too conclusory to be useful to a legal opinion concerning whether electronic games at Kentucky's race tracks are allowed under Section 226 of the Kentucky Constitution. Therefore, this opinion will squarely address the initial, non-conclusory question presented by Representative Richards on May 7, 2009.

Since the date of Representative Richards' original request, additional facts have been presented on this question. On June 3, 2009, Governor Steve Beshear issued a Proclamation convening the General Assembly into Special Session to begin on June 15, 2009, for the sole purpose of considering the amendment of the Fiscal Year 2009-2010 state budgets and related budget reduction plans. On June 4, 2009, the Governor amended his Proclamation to include consideration of the following subjects:

- (1) Enacting legislation authorizing the Kentucky Lottery Corporation to establish, license, regulate and tax video lottery terminals at authorized licensed racetracks in Kentucky.
- (2) Amending or repealing only those provisions of the Kentucky Revised Statutes specifically necessary to implement the subjects and provisions of this amended Proclamation.
- (3) Declaring an emergency thereby making any legislation enacted pursuant to this amended Proclamation effective upon the signature of the Governor.

On June 9, 2009, the Office of the Governor issued a draft of the legislation for which it seeks the General Assembly's consideration during the Special Session. This opinion will rely on the Governor's draft of the video lottery terminals gaming legislation¹ as the actual and current factual basis upon which its legal analysis will rest.

B. Authority for Opinion

KRS § 15.025 requires the Attorney General to furnish opinions when a public question of law is submitted by any member of the Legislature. The Attorney General possesses the authority to issue an opinion if the question presented in writing "is of such public interest that the Attorney General's opinion on the subject is deemed desirable." The question presented meets both of the foregoing conditions.

This opinion will seek to reconcile five (5) prior opinions of the Attorney General, which interpret Section 226 of the Kentucky Constitution. Specifically, the prior opinions to be analyzed are OAGs 80-409, 92-127, 93-058, 99-008 and 05-003. This will however be a new opinion that will offer a fresh review of the relevant constitutional, statutory and case law addressing the issue.

This opinion is limited in scope to the constitutional question presented and the factual context described above – specifically whether video lottery terminals at Kentucky's race tracks are permitted under Section 226 of the Kentucky Constitution. Policy considerations, such as long-term economic stability

¹ See Draft of gaming bill at web page for Governor Steve Beshear.

and forecasts, the financial health of the horse racing industry, and societal interests regarding gambling do not fall under the opinion authority of the Attorney General and will not be considered. Instead, these policy matters are appropriately left to legislative debate during the Special Session or during future Regular Sessions of the General Assembly.

ANALYSIS

A. Legal Issues Presented

The Governor's amended Proclamation convening a Special Session of the General Assembly includes as one of its sole purposes amending the Kentucky Revised Statutes to authorize the Kentucky State Lottery Corporation to establish, license, regulate and tax video lottery games and video lottery terminals (hereinafter "VLT") at licensed horse racing tracks in the Commonwealth of Kentucky. As discussed in the introduction to this opinion, the questions presented by Representative Richards on June 1, 2009, are not sufficiently detailed in their legal presumptions and are ultimately too conclusory to be a useful starting point for a legal analysis of the question regarding the constitutionality of VLTs at race tracks. It is also necessary for this opinion to step back and reassess the prior opinions issued on this subject, in order to more fully answer the current question before the General Assembly – may Kentucky's legislators consider the Governor's proposal concerning VLTs at Kentucky's race tracks without a constitutional amendment.

Using the context of the Governor's draft legislation concerning VLTs, this opinion will seek to answer the following two (2) legal questions:

- (1) Is VLT gaming a "lottery" as provided under Section 226(3) of the Kentucky Constitution prohibiting "lotteries ... [and] schemes for similar purposes" unless otherwise exempted under Sections 226(1)?
- (2) If VLT gaming is a lottery under Section 226(3), which would otherwise be constitutionally prohibited, does VLT gaming as proposed by the Governor's draft gaming bill fall within the "state lottery" exception contained in Section 226(1)?

B. History of Kentucky's Constitutional Prohibition on Lotteries & Its Exceptions

The history of Section 226 of Kentucky's Constitution of 1891 is significant to this legal inquiry, and therefore, is provided in summary below. As adopted by the 1891 Constitutional Convention, Section 226 of the Kentucky Constitution included explicit language forbidding "lotteries and gift enterprises ... [and] schemes for similar purposes."² This language, currently codified as §226(3), remained unchanged for nearly 100 years.

In 1988, Kentucky voters adopted a constitutional amendment, codified at §226(1), permitting the General Assembly to establish a Kentucky state lottery and a state lottery to be conducted in cooperation with other states. Soon thereafter, former Governor Wallace Wilkinson convened the General Assembly in Special Session. The 1988 Special Session of the Kentucky General Assembly passed and Governor Wilkinson signed into law enabling legislation adopting the Kentucky state lottery and creating the Kentucky Lottery Corporation, an independent, de jure municipal corporation and political subdivision of the Commonwealth of Kentucky. KRS 154A.020. The Kentucky Lottery Corporation was empowered to conduct and administer lottery games, which would result in "the maximization of revenues" to the state. KRS 154A.060. House Bill 1 as enacted (1988 Ex. Sess.) provided that "'Lottery' mean[t] *any* game of chance approved by the corporation and operated pursuant to this chapter." KRS § 154A.010(3) (1988 Ex. Sess.) (Emphasis supplied). Further, the HB 1 permitted the Kentucky Lottery Corporation to specify "the types of games to be conducted, including but not limited to, instant lotteries, on-line games *and other games traditional to the lottery...*" *Id.* (Emphasis supplied).

This authority was revised in 1990, when the General Assembly amended KRS Chapter 154A to prohibit the Kentucky Lottery Corporation from (1) approving or operating a lottery based on amateur athletics; (2) approving or operating any casino or similar gambling establishment; or (3) approving or

² This language, including the phrase "schemes for similar purposes," was original to the 1891 Constitution. But cf. Jeffrey R. Soukup, *Rolling The Dice On Precedent And Wagering On Legislation: The Law Of Gambling Debt Enforceability In Kentucky After Kentucky Off-Track Betting, Inc. v. Mcburney and KRS § 372.005*, 95 Ky. L.J. 529, 534 (2006-2007) (stating that the 1992 amendment added the language "schemes for similar purposes," thereby expanding the prohibition).

operating any game played with cards, dice, dominos, slot machines, roulette wheels, or where winners are determined by the outcome of a sports contest. KRS § 154A.063, 1990 Ky. Acts ch. 470 § 77 (eff. 1990). Since 1990, Kentucky's statutory law has banned casino and casino-style gaming, including slot machines.

The significance of the 1990 amendment to the state lottery is highlighted here for legal as well as factual reasons. As is discussed below in section F of this opinion, if casino-style games and slot machines were unconstitutional, why then was there a need to *ban* these games by statute? Under a constitutional interpretation contrary to this opinion, such a legislative action would have therefore been superfluous. A universal tenant of statutory construction is that the General Assembly is presumed to have intended to do what it attempts to do by statutory enactment. See *Reyes v. Hardin County, Ky.*, 55 S.W.3d 337 (2001), *quoted in Liquor Outlet, LLC v. Alcoholic Beverage Control Bd., Ky.App.*, 141 S.W.3d 378, 386 (2004).

Finally, in 1992, Kentucky's voters adopted a second constitutional amendment permitting the General Assembly to authorize charitable lotteries and charitable gift enterprises. Ky. Const. §226(2). In the next Regular Session in 1994, the General Assembly enacted legislation codified at KRS Chapter 238 permitting charitable gaming. Included within the definition of "charitable gaming" and "special limited charitable games" under this chapter were a broad category of games, including bingos, raffles, roulette, blackjack, poker, and keno. See KRS § 238.505(2), (17). Just as it did in the 1990 amendment to the state lottery, the General Assembly in its 1994 charitable gaming legislation prohibited slot machines and electronic gaming by statute. KRS § 238.505(2).

C. Constitutional Principles

An analysis of the foregoing sections of the Kentucky Constitution must rely on certain basic principles of constitutional law and construction. It is well established that state government possesses all powers not otherwise denied to it by the 1891 Constitution of Kentucky. *Rouse v. Johnson, Ky.* 28 S.W.2d 745 (1930). Specifically, the lawmaking power for the Commonwealth is vested to the General Assembly, which exists to exert the sovereign authority of state government. The Kentucky Supreme Court has specifically held that the General Assembly may enact legislation on any subject unless otherwise prohibited by the Constitu-

tion of Kentucky. *Legislative Research Commission v. Brown*, Ky., 664 S.W.2d 907, 913 (1984); *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982).

Legislative enactments carry a strong presumption of constitutionality. *Kentucky Sheriffs Assn Inc. v. Fischer*, Ky., 986 S.W.2d 444, 447 (1999); *Rose v. Council for Better Education, Inc.*, Ky., 790 S.W.2d 186, 209 (1989). Doubts regarding the constitutionality of a legislative enactment must be resolved in favor of the sovereign authority of the Commonwealth of Kentucky, which is retained by its citizenry and vested in the lawmaking authority of Kentucky's legislators, who are as representatives of its citizenry. See, e.g., *Kentucky Harlan Coal Company v. Holmes*, Ky., 872 S.W.2d 446 (1994); *Walters v. Bindner*, Ky., 435 S.W.2d 464, 467 (1968). In *Kentucky Sheriffs*, a state representative filed suit in Campbell County challenging the constitutionality of legislation increasing the allowable compensation for public officials. The Kentucky Supreme Court upheld the legislation and the law making power of the General Assembly, stating:

Courts are obligated to "draw all reasonable inferences and implications" from a legislative enactment as a whole in order to sustain its validity, if possible. *Graham v. Mills*, Ky., 694 S.W.2d 698, 701 (1985). We will not disturb a legislative enactment based upon a finding of the General Assembly that is neither arbitrary nor capricious. See *Kentucky Harlan Coal Co. v. Holmes*, Ky., 872 S.W.2d 446, 455 (1994).

Kentucky Sheriffs Ass'n Inc. v. Fischer, *supra* at 447. Finally, the Kentucky Supreme Court has recognized that governmental officers who rely upon an Attorney General's opinion would be acting in good faith. *Babb v. Moore*, Ky., 374 S.W.2d 516 (1964).

D. The Meaning of "Lottery": *Commonwealth v. Kentucky Jockey Club*

In light of these constitutional principles, the decision of Kentucky's highest court in *Commonwealth v. Kentucky Jockey Club*, Ky., 38 S.W.2d 987 (1931) offers a sound constitutional framework upon which to base our current analysis. In *Jockey Club*, the Kentucky Court of Appeals upheld legislation authorizing pari-mutuel wagering on horse races, holding that such wagering is not a prohibited lottery. Representing the weight of authority among the states at the time, the