



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

November 6, 2019

Representative Paul Evans
900 Court Street NE H276
Salem OR 97301

Re: Use of mobile platforms by Oregon State Lottery

Dear Representative Evans:

You asked several questions about the Oregon State Lottery Commission and its introduction of sports betting games on mobile platforms. Your questions, and our answers, follow.

1. Legislative authority over the Oregon State Lottery Commission's activities

You asked whether the Legislative Assembly may place limits on the operations of the Oregon State Lottery Commission and the Oregon State Lottery, particularly with respect to the introduction of betting via mobile platforms. We think a court would likely uphold legislative restrictions on the use of mobile platforms for lottery gaming. We caution, however, that no court has considered the scope of the commission's authority relative to legislative authority. Without case law in this area, our conclusions are necessarily speculative.

Interpretive Method

The commission is established, and its powers defined, by the Oregon Constitution. To determine the scope of legislative authority to regulate the lottery, a court will examine the text and context of the ballot measures through which the lottery was established. *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or. 551, 559 (1994).

Two ballot measures related to the Oregon State Lottery were submitted to voters in the 1984 general election. Ballot Measure 4 amended Article XV of the Oregon Constitution to establish the lottery and the commission. Ballot Measure 5 established statutory provisions relating to the lottery and the commission. The measures should be read together to determine the intent of the voters in enacting the provisions. *Id.* at 566 (Measure 5 is "context" that must be examined when interpreting the constitutional provisions established by Measure 4).

Text and Context

The relevant provisions of the Oregon Constitution appear to grant broad authority to the commission. Article XV, section 4 (3), Oregon Constitution, mandates the commission to "establish and operate a State Lottery" and empowers it to adopt rules related to the lottery's operation. Section 4 (4)(d) provides that the lottery is to be "a self-supporting revenue-raising agency." Section 4 (4)(c) provides that the lottery "may operate any game procedure authorized

by the commission” (except for “parimutuel racing,”¹ social games, bingo and lotto²), using “any existing or future methods” to distribute prizes.

However, there is textual evidence that the voters intended to retain some legislative control over the lottery. Article XV, section 4 (4)(a), contemplates the enactment of statutes “to further implement” the lottery and to “insure the integrity, security, honesty, and fairness of the Lottery.” The section further provides that the commission “shall have such additional powers and duties as may be provided by law.” These provisions demonstrate that voters anticipated legislation related to the lottery—in other words, the voters intended that the commission and lottery be subject to at least some degree of legislative control.

An indication as to the types of legislative control that voters intended can be found in the statutes originally enacted by Measure 5. As noted above, Measure 5 established statutes governing certain aspects of the lottery. The fact that those aspects were included in Measure 5 is evidence of voter intent that those aspects should be subject to legislative control, because voters knew that statutes enacted by Measure 5 could be legislatively amended or repealed. As described below, Measure 5 suggests that the legislature may exercise some control over the lottery’s operational goals and the types of games offered by the lottery.

One statute enacted by Measure 5 required the commission to operate the lottery “so as to produce the maximum amount of net revenues . . . *commensurate with the public good.*” Measure 5, section 4 (1) (emphasis added). It is notable that these operational goals of the lottery were initially established by statute—Measure 4 (the constitutional amendment) was silent on that aspect of the lottery. In particular, the requirement that the lottery be operated “commensurate with the public good” appears only in the statutory ballot measure, and not in the constitutional ballot measure. In other words, at the inception of the lottery, voters both defined the lottery’s goals and placed a significant limitation on its operations by statute, knowing the statute could be legislatively amended or repealed in the future. We can conclude that the voters who approved the lottery intended that the legislature have control over the lottery’s goals, including the authority to define what is, and what is not, commensurate with the public good.

Another statute enacted by Measure 5 limited the types of games the lottery could offer. See Measure 5, section 4 (2). One of these statutory limitations, prohibiting games that dispense coins or currency directly to players, simply echoed a prohibition established in the constitutional amendment. Another limitation, however, went further: the lottery was prohibited from offering games using “the *theme* of bingo, dog racing, or horse racing” (emphasis added). This limitation was not required by the constitution, and indeed is not part of current law.³ Although the lottery was and is constitutionally prohibited from offering bingo or parimutuel wagering, the statutory limitation was distinct in that it prohibited, for example, a common slot machine with racing-themed artwork (which obviously does not constitute parimutuel wagering). Again, voters’ adoption of these statutory limitations is evidence that voters intended the legislature to have authority to limit the types of games offered by the lottery.

Conclusions and Caveat

To summarize the above discussion: an examination of the statutes originally enacted when the lottery was approved suggests that voters intended the legislature to have continued control over certain aspects of the lottery, including its operational goals and certain limitations

¹ Parimutuel wagering is the traditional form of wagering on horse or dog races.

² “Lotto” appears to be a simpler form of the game bingo. See 44 Op. Att’y Gen. Ore. 431, 443-44 (1985).

³ The limitation was eliminated by section 1, chapter 613, Oregon Laws 1991.

on types of games offered. A legislative limitation on the use of mobile platforms for lottery gaming would constitute both a limitation on the types of games offered and a determination that such gaming is not consistent with the lottery's goal to maximize revenue "commensurate with the public good." Thus, we think that a court would probably find that such limitations are within the scope of the legislature's authority.

However, we note an important caveat: the legislature may not act as to unduly burden the commission's constitutional mandate to operate a "self-supporting" and "revenue-raising" lottery. We agree with the Attorney General's 1985 opinion on this subject, which explained that the legislature may regulate the conduct of the lottery, just as it may regulate the conduct of the judiciary, provided that the regulation does not "unduly burden or interfere with" a constitutionally mandated task. 44 Op. Att'y Gen. 431, 438-39 (1985). Given that the lottery has, to date, operated successfully without offering games on mobile platforms, we think a court would be unlikely to find that limitations on mobile platforms constitute an undue burden on the operations of the lottery.

Finally, we reiterate that there is no case law on this subject. While we think that the most likely outcome is that a court would uphold limitations on the lottery's use of mobile platforms, we have very little judicial guidance on the issue and our conclusions are not certain.

2. Participation in legislative procedures by the Oregon State Lottery

You asked why the Oregon State Lottery participates in committee hearings and other legislative procedures if the lottery is not subject to legislative control. As set forth above, while the lottery is not subject to plenary legislative control (e.g., the legislature could not statutorily discontinue the lottery), it is certainly subject to some degree of legislative control. As explained above, voters always contemplated some amount of legislation related to the lottery.

3. Applicability of amusement device excise tax

You asked whether, if lottery games are available on mobile platforms, individual mobile devices would be subject to the excise tax imposed on the operation of "amusement devices" under ORS 320.011. The answer is probably no.

Under state law, excise taxes are imposed "for the privilege of operating an amusement device within this state." ORS 320.011, 320.013. The term "operate" means "to make an amusement device available for use by the public for gain, benefit or advantage." ORS 320.005. Individual mobile devices are not generally made available for public use by their owners, so owners will not "operate" the devices within the meaning of the statute.

Nor, we think, would the Oregon State Lottery operate any "amusement device" merely by offering gaming on a mobile platform. "Amusement device" is defined as "a video lottery game terminal," including "any electronic, mechanical-electronic or nonmechanical device" that enables video gambling. ORS 320.005. The lottery would not make any physical device available for use by the public. Instead, it would make available a software application to be installed on individually owned devices. We do not think a court would consider a nonphysical software application to be a "terminal" or "device" within the meaning of ORS 320.005.

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Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to read "Paul Evans", with a long horizontal flourish extending to the right.

By
David Fang-Yen
Deputy Legislative Counsel