State of West Virginia
Office of the Attorney General
State Capitol
Building 1, Room 26-E
Charleston, WV 25305-0220

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

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The Honorable Daniel M. James
Morgan County Prosecuting Attorney
77 Fairfax Street, Suite 301
Berkeley Springs, WV 25411

Dear Prosecutor James:

You have asked for an Opinion of the Attorney General addressing several questions that arose in the wake of a racing event that took place last year at a privately owned airport in Morgan County—and that may be held again in future years. This Opinion is being issued pursuant to W. Va. Code § 5-3-2, which provides that the Attorney General may "consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of the Attorney General and publicly available sources.

Last year, large crowds gathered at the airport to watch and participate in a drag racing—short distance automobile racing—event, which was filmed by the Discovery Channel for the "Street Outlaws" TV program. The organizers of the event, who do not own the airport, charged admission and parking fees, as well as a participation fee for the racers. The organizers also sold merchandise on site, such as branded T-shirts, and numerous vendors sold food and other items to the spectators. You also explained in your letter that many of the spectators wagered on the outcome of the races. You have concerns about whether wagering on races at events like this are lawful, and whether the organizers and vendors would be required to obtain a West Virginia business license or other licenses or permits before any future events.

Your letter raises the following legal questions:

1) *Is it necessary for the organizers of a temporary gathering or event, where admission is charged and other commercial transactions occur, to obtain a business license?*

2) *What licenses or permits are required for food or merchandise vendors operating at such an event?*

3) *Can the spectators of, or participants in, a drag race legally place a wager on the outcome of that race?*

The answers to the first two questions are straightforward: West Virginia law requires persons or entities engaged in the sale of goods or services for profit to obtain a West Virginia business license and further requires a business that sells food for public consumption to have (and display upon request) the appropriate permit concerning food safety. The answer to the third question is context-dependent. Generally speaking, wagering on automobile racing is regulated under recently enacted sports wagering legislation. Under this statutory scheme, it would be unlawful for the organizers of an event like the one you describe to facilitate wagering or accept bets without a license from the State Lottery Commission. Nevertheless, spontaneous, spectator-driven wagering likely falls outside the scope of the sports wagering statute.

Discussion

Question 1: Licensing For Event Organizers

With limited exception, any person or entity who wishes to lawfully conduct business in West Virginia must obtain a license—a "business registration certificate"—from the State Tax Commissioner. The statutory scheme that imposes this licensure requirement reads, in pertinent part, as follows: "*Registration required*. -- No person shall, without a business registration certificate, engage in or prosecute, in the State of West Virginia, any business activity without first obtaining a business registration certificate from the Tax Commissioner of the State of West Virginia." W. Va. Code § 11-12-3(a); *see also id.* § 11-12-4(a) ("Except as otherwise provided in this article, a person shall register with the tax commissioner prior to engaging in or prosecuting any business activity in this state."); W. Va. State Tax Dep't, *Business Registration*, https://tax.wv.gov/Business/BusinessRegistration/Pages/BusinessRegistration.aspx ("Before engaging in business activity in West Virginia, every individual or business entity must obtain a West Virginia business registration certificate from the State Tax Department.").

"Person" is broadly defined for purposes of this statute to include both natural persons and legal associations: The term refers to "any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, club, society, or other group or combination acting as a unit, or body politic or political subdivision (whether public or private, or quasi-public), and in the plural as well as the singular." W. Va. Code § 11-12-2(5). Because the organizers of last year's drag racing event plainly fall within one or more of these categories, they are "persons" under the statute, and thus required to obtain a business registration certificate before engaging in "any business activity."

"Business activity" is also defined expansively. It encompasses:

> all purposeful revenue-generating activity engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect, and all activities of this

> state and its political subdivisions which involve the sale of tangible personal property or the rendering of service when such service activities compete with or may compete with the activities of another person.

W. Va. Code § 11-12-2(b)(2). The Supreme Court of Appeals has not had occasion to interpret this statutory language, but by its plain terms the statute almost certainly includes an event like the one you described. There is no indication that the organizers are part of a non-profit organization or that the event was a charity fundraiser. Indeed, because the organizers charged spectators for both admission and parking, collected a participation fee from drivers, and sold T-shirts and other memorabilia, the event appears to have been a "purposeful revenue-generating activity" whose "object" was "gain or economic benefit."

Neither do any exceptions apply to the general requirement to obtain a business registration certificate. First, the Legislature expressly excluded some types of racing events from the "business activity" definition, but not automobile races. Specifically, the term does not include "[t]he conduct of a horse or dog race meeting by any [licensed] racing association" or "[t]he sale of any commodity during the conduct of a licensed horse or dog race meeting." W. Va. Code § 11-12-2(b)(2)(E), (G). The fact that the Legislature exempted some racing events strongly indicates that it understood the definition would apply to *other* racing events it did not name.

It also does not matter to this analysis that the event was confined to a single weekend. Although the Legislature crafted an exception for "[o]ccasional or causal sales of property or services," W. Va. Code § 11-12-2(b)(2)(I), the statute expressly limits its application to sales of "tangible personal property not held or used by a seller in the course of an activity for which a business registration certificate is required," and emphasizes that it does not apply to "a series of sales or exchanges sufficient in number, scope and character to constitute a business activity requiring the holding of a business registration certificate," *id.* § 11-12-2(b)(4). Selling tickets and parking passes is much different from, say, a one-off sale of a household item to a friend, particularly where event organizers engage in a "series of sales" to hundreds or thousands of spectators.

Finally, it is irrelevant that the organizers do not appear to have a continuous or permanent presence in West Virginia. Section 11-12-3 expressly contemplates application of the licensure requirement to "transient vendors." The statute defines a "transient vendor" as "any person" who "brings into this state . . . or purchases in this state, tangible personal property the sale or use of which is subject to one or more taxes administered by the tax commissioner" and who does "not maintain an established office, distribution house, sales house, warehouse, service enterprise, residence from which business is conducted, or other place of business with this state." W. Va. Code § 11-12-20(e)(1). There are separate requirements that apply to transient vendors, but significantly, they apply in "[a]ddition[]" to the general requirement to obtain a business registration certificate. *Id.* § 11-12-3(a)(1) ("Additionally, before beginning business in this state, . . . a transient vendor, shall comply with the provision of sections twenty through twenty-five of this article."). The additional requirements include bond and notification provisions, and also reemphasize the need to "obtain a business registration certificate from the tax commissions," *id.* § 11-12-20(a), and to "publicly display the certificate whenever conducting business in this

state" and "exhibit the certificate upon the request of an authorized employee of the tax commissioner or any law-enforcement officer," *id.* § 11-12-20(c).

Organizers of events like the one you described are thus required to obtain a business registration certificate before operating in the State.

Question 2: Licensing/Permitting For Vendors

Your second question asks about the licensing requirements for food and merchandise vendors who operate independent of event organizers. As an initial matter, a similarly straightforward analysis controls with respect to business registration certificates: There is no indication that any of these vendors operated not-for-profit, and selling food or other tangible items to spectators is quite plainly "purposeful revenue-generating activity" undertaken for "the object of gain or economic benefit." W. Va. Code § 11-12-1(b)(2). Accordingly, these vendors are also subject to the business registration certificate requirement.

Food vendors must also comply with regulations promulgated by the West Virginia Department of Health and Human Resources ("DHHR"), along with its constituent departments and agencies. The Legislature delegated to DHHR and these related agencies regulatory authority over restaurants and other entities that serve food to members of the public. *See* W. Va. Code §§ 16-1-4, 16-6-2. As most relevant here, one of DHHR's subordinate entities, the West Virginia Bureau for Public Health, has adopted (with limited modifications) the "Federal Food Code"—a comprehensive model regulatory scheme of "enforceable provisions" designed to "mitigat[e] risk factors known to cause foodborne illness." U.S. Food & Drug Admin., Food Code 2005 ("Food Code"), *available at* https://www.fda.gov/food/guidanceregulation/retailfoodprotection/foodcode/ucm2016793.htm; *see also* W. Va. Code St. R. § 64-17-3.1 (incorporating the Food Code by reference, with minor alterations).

Under West Virginia's version of the Food Code,[1] "[a] person may not operate a food establishment without a valid permit to operate issued by the [designated] regulatory authority." Food Code § 8-301.11. West Virginia defines the term "food establishment" as "[a]n operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption." W. Va. Code St. R. §§ 64-17-4.1. Restaurants are the most common examples, but the definition also includes "satellite" or "vending location[s]" that are "conducted in a mobile, stationary, temporary, or permanent facility." *Id.* §§ 64-17-4.1.a, 64-17-4.2.b. Temporary food vendors at events like last year's drag racing event are therefore "food establishments" subject to the permit requirement.

Local boards of health are the regulatory bodies charged with issuing permits to food establishments and overseeing compliance with the Food Code. *See* W. Va. Code § 16-2-11(a)

[1] During the 2019 Regular Legislative Session, the Bureau for Public Health promulgated and the Legislature approved an updated version of W. Va. Code St. R. § 64-17-3.1. *See* 2019 WV REG TEXT 495875. This updated regulation incorporates by reference the 2013 version of the Food Code, and will go into effect on July 1, 2019. There are only minor changes between the 2005 and 2013 versions of the Food Code, none of which will affect the substance of this Opinion after the new regulation goes into effect.

(providing, *inter alia*, that "each local board of health . . . shall . . . promot[e] and maintain[] . . . clean and safe. . . food [by] the administering of public health laws . . . as to . . . the sanitation of . . . food"). The Morgan County Health Department oversees food-safety regulation and compliance related to the Food Code more generally in Morgan County, and makes clear that it is responsible for "Temporary Food Establishments located at fairs, festivals, roadside stands, etc." no less than permanent establishments. *See* Morgan County Health Dep't, *Environmental Services*, "Food Safety Program," http://www.morgancountyhealthdept.com/food-safety.html. The Morgan County Health Department is also authorized under the Food Code to "summarily suspend" a food establishment's permit upon determination that an "imminent health hazard exists," Food Code § 8-804.10, and "all food operations shall immediately cease" after a suspension, *id.* § 8-804.3(A). Failure to maintain a permit or comply with its terms exposes the vendor to potential "administrative" remedies, *see id.* § 8-801.10; "reasonable civil penalt[ies]," such as the "closure of [the] food establishment," *id.* §§ 8-806.40, 8-813.10(B); and even "criminal proceedings," *id.* § 8-811.10.

In addition to a general business registration certificate, then, any vendor that "provides food for human consumption," W. Va. Code St. R. § 64-17-4.1, at a future racing event must obtain a permit from the Morgan County Health Department.

Question 3: Wagering On Automotive Racing

Your final question concerns the legality of gambling at events like the one that took place last year. Determining the legal status of a specific form of gambling is a context-dependent inquiry. As an initial matter, there is no general prohibition against wagering in West Virginia.[2] Prior to 1984, Article VI, Section 36 of the West Virginia Constitution contained an "absolute prohibition against lotteries." *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 281, 438 S.E.2d 308, 313 (1993). Yet even before the amendment removing that ban on lotteries was enacted, the Supreme Court of Appeals recognized the rule that, unless specifically prohibited by statute, individuals could "indulge in certain games of amusement, *or even bet on them*, to a limited extent." *State v. Gaughan*, 55 W. Va. 692, 48 S.E. 210, 212 (1904) (emphasis added). Indeed, if all gambling or wagering were unlawful, West Virginia Code § 61-10-9—which makes it a misdemeanor for "any person playing at any game, or making a wager" to "cheat, or by fraudulent means win or acquire . . . money or [an]other valuable thing"—would be superfluous.

[2] Once, in dicta, the Supreme Court of Appeals described "common gambling" as "an offense at common law." *State v. Chesapeake & Potomac Tel. Co. of W.Va.*, 121 W. Va. 420, 4 S.E.2d 257, 259 (1939). This brief reference was unnecessary to the disposition of the case, has never been repeated or otherwise affirmed by our supreme court, and is contradicted by multiple other courts, including the supreme court of Virginia, the State from which West Virginia's common law descended. *See Parr v. Com.*, 198 Va. 721, 725, 96 S.E.2d 160, 163 (1957) ("It is well settled that gambling and keeping a gambling house are distinct offenses, and that while gambling is not an offense at common law, keeping a common gaming house is."); *see also, e.g.*, *State v. Felton*, 239 N.C. 575, 581, 80 S.E.2d 625, 629-30 (1954) ("[G]ambling *per se* is not a crime at common law . . . ."); *Hurvich v. City of Birmingham*, 46 So.2d 577, 580 (Ala. Ct. App. 1950) ("[A]t common law gambling, or the keeping of a gambling device, was not an offense."). In light of these authorities and the complex statutory scheme that now governs gambling and lotteries in this State, the concept of gambling as a common-law offense almost certainly has no continued vitality.

The closest our courts have come to a categorical bar is on one-sided games, or those that are so skewed in favor of one participant that "the chances for winning are all on his side," and "[t]he skill of the player, or his luck, cannot affect the general result of the game." *Gaughan*, 55 W. Va. 692, 48 S.E. at 213; *see also* W. Va. Op. Att'y Gen., 2016 WL 3857081 (July 7, 2016) (explaining that West Virginia's various criminal statutes concerning gambling "are best interpreted to refer only to games decided wholly or predominantly by chance"); 64 W. Va. Op. Att'y Gen. 8, 1991 WL 628003 (Jan. 8, 1991) (explaining that a person wagering on the outcome of a sporting contest "is utilizing his knowledge about the sporting activity in order to enhance his chances of winning," which requires "the employment of skill"). Because the results of drag races turn on some combination of skill and luck, this exception would not apply here (absent, of course, evidence that races are rigged). *See* 64 W. Va. Op. Att'y Gen. 8, 1991 WL 628003 ("[T]he process by which the result is determined in a lottery is purely random. The result of a sporting event, however, is in part determined by the skill of the participants and a variety of other factors that are controlled to some degree by the players.").

Your question thus turns on the specific statutes that govern gambling related to drag racing events. The Legislature's recent enactment of the West Virginia Lottery Sports Wagering Act, W. Va. Code § 29-22D-1 *et seq.* ("Sports Wagering Act"), is directly on point. The purpose of this statute is "to protect [the] residents of this state who wager on sports or other events" by "authorizing and establishing a secure, responsible, fair, and legal system of sports wagering." *Id.* § 29-22D-2(b)(5). The Sport Wagering Act applies both to "operating a sports wagering operation" directly, and to "facilitating" such an operation. *Id.* § 29-22D-20(a). It does not, however, bar sports wagering outright; rather, "the operation of sports wagering and ancillary activities are only lawful when conducted in accordance with the provisions of this article and rules of the [State Lottery] [C]omission." *Id.* § 29-22D-2(a). The Act defines "sports wagering" as the "business of accepting wagers on sporting events and other events," *id.* § 29-22D-3(22), and further defines "sporting events" as "any professional sport or athletic event, any collegiate sport or athletic event, *motor race event*, or any other special event authorized by the commission under this article," *id.* § 29-22D-3(15) (emphasis added).

Under the Sports Wagering Act's plain language, there can be no question that it applies to some types of wagering at an event like the one you described. As a "motor race event," drag racing falls squarely within the statute's sweep under the definition of "sporting event." This means that anyone engaged in the "business of accepting wagers on" drag racing is participating in "sports wagering" as defined by the statute, and must therefore comply with all of the statutory limits and licensing requirements. The analysis would also be the same for any third-party individuals or entities who "facilitat[e]" sports wagering at a drag race, W. Va. Code § 29-22D-20(a), such as a "bookie" or bet clearinghouse.

That being said, we do not suggest that all wagers on the outcome of a drag race are necessarily unlawful or otherwise subject to the Sports Wagering Act. The Legislature knows how to categorically criminalize specific forms of gambling: West Virginia Code § 3-9-22, for example, provides that "[i]t shall be unlawful to bet . . . on any election held in this state," and West Virginia Code § 61-10-5 makes it a misdemeanor if "any person" bets money "on any game of chance." The Sports Wagering Act stops short of this absolute language. Instead, it defines "sports

wagering" as the "*business* of accepting wagers on sporting events," W. Va. Code § 29-22D-3(22) (emphasis added), and criminalizes only "accepting, facilitating, or operating a sports wagering *operation*" where done without the requisite license, *id.* § 29-22D-20(a) (emphasis added). This emphasis on betting operations highlights the Legislature's intent in the statute to restrict systematic sports wagering run by unregulated businesses or syndicates. Thus, if the organizers of a drag racing event established odds and accepted wagers for participants, or otherwise actively facilitated gambling at the event without appropriate authorization from the State Lottery Commission, that conduct would be illegal. On the other hand, it is unlikely that wagering by individual spectators that is casual, isolated, or spontaneous would qualify as the "business of accepting wagers" or a "sports wagering operation." The examples above make clear that it would certainly be within the Legislature's power to criminalize this conduct, but the text's focus on the business of wagering militates against an expansive interpretation. Indeed, the Supreme Court of Appeals has repeatedly emphasized that interpretation of criminal statutes should be guided by the rule of lenity, which is intended to "preclude 'expansive . . . interpretations [that] may create penalties for offenses that were not intended by the legislature.'" *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 262, 465 S.E.2d 257, 262 (1995) (citation omitted). Absent clear legislative intent to the contrary, a reviewing court would be unlikely to construe the Sports Wagering Act in a manner that transforms all casual wagering at or on a sporting event into criminal conduct.

* * *

Should an event similar to the one described in your letter take place again, the appropriate authorities would be well within their rights to insist on proof that the organizers and any vendors possess business registration certificates, and that any vendors selling food have a valid permit to operate a food establishment. Additionally, while the Sports Wagering Act does not extend to all wagering on sporting events like drag races, its prohibitions and licensing requirements govern all systematic wagering operations and third-parties who facilitate the business of sports wagering.

Sincerely,

Patrick Morrisey
Attorney General

Lindsay See
Solicitor General

Zachary A. Viglianco
Assistant Attorney General