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April 20, 1993

The Honorable Keith Burdette  
President, West Virginia Senate  
Building 1, Room M-211  
Capitol Complex  
Charleston, West Virginia 25305

Re: Ownership of Lottery

Dear President Burdette:

I am writing in response to the April 8, 1993 request from you for a formal Attorney General's Opinion regarding expansion of the lottery system.

Specifically, you asked whether the State Lottery Commission's proposals as to video lotteries are constitutionally permissible when the equipment will be owned by private enterprises rather than the State of West Virginia.

Article VI, section 36 of the Constitution of West Virginia provides in pertinent part:

The legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State; except that the legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law, either separately by this State or jointly or in cooperation with one or more other states. . . . (emphasis added).

Pursuant to the Constitutional provision, the Legislature established and implemented a state-operated lottery in 1985. W. Va. Code §§ 29-22-1 through 28 (1992 Repl. Vol.). Through the State Lottery Act the Legislature created a seven member state lottery commission. The commission members are appointed by the Governor together with the advice and consent of the State. W. Va. Code § 29-22-4 (1992 Repl. Vol.).

Further, the Legislature created the position of the lottery director whose duties include the management and administration of the state lottery office. The lottery director is appointed by the Governor. W. Va. Code § 29-22-6 (1992 Repl. Vol.).

The Legislature also provided for the internal structural organization of the State lottery office and established various divisions. The divisions established were security and licensing, personnel, data processing, accounting and administration, and a marketing, education and information division. Each division was statutorily placed under the supervision of a deputy director. W. Va. Code § 29-22-7 (1992 Repl. Vol.).

The statutory provisions specifically state that the legislative intent is for the state lottery commission and the lottery director to "hold broad authority to administer the system in a manner which will provide the State with a highly efficient operation." W. Va. Code § 29-22-2 (1992 Repl. Vol.). Through the statutory framework, the Legislature granted broad powers and duties to the state lottery commission. These powers, without limitation, included:

- establishing rules for conducting lottery games;
- selecting the type and number of public gaming systems;
- entering into interstate lottery agreements with other states;
- prescribing fees and charges;
- the ability to lease, rent, acquire, purchase, own, hold, construct, equip, maintain, operate, sell, encumber, and assign right of real or personal property; and
- the ability to make and enter into all agreements and do all acts necessary or incidental to the performance of its duties or the exercise of its powers under the Act.

W. Va. Code § 29-22-5 (1992 Repl. Vol.).

The lottery commission was charged with the duty of initiating operation of a continuous state lottery as early as practicably feasible. The first operation was legislatively directed to be of the preprinted instant winner type lottery. W. Va. Code § 29-22-9 (1992 Repl. Vol.).

The Legislature directed that the lottery commission promulgate rules and regulations for the types of lottery games to be conducted. There were some limitations. For instance, it was specifically directed that "electronic video lottery systems must include a central site system of monitoring the lottery terminals utilizing an on-line or dial-up inquiry." W. Va. Code § 29-22-9(2) (1992 Repl. Vol.).

The Legislature also recognized future technological advances and specifically noted that the lottery commission "shall proceed with operation of such additional games, including the implementation of games utilizing a variety of existing or future technological advances at the earliest feasible date. The commission may operate lottery games utilizing electronic computers and electronic computer terminal devices and systems, which systems must include a central site system of monitoring the lottery terminals utilizing direct communication systems, or other technological advances and procedures, ensuring honesty and integrity in the operation of the lottery." W. Va. Code § 29-22-9(c) (1992 Repl. Vol.).

Additionally, the Legislature incorporated the language of the constitutional provision in the Act. West Virginia Code section 29-22-25 provides that "[n]othing in this article shall be deemed to permit the operation of any lottery otherwise prohibited by the laws of this state, not owned and operated by this state and permitted by this article." (emphasis added).

Thus, both the language of the Constitution and the Act rely upon the mandate that authorized lotteries must be owned and operated by the State of West Virginia. Pursuant to the basic principles of construction the plain meaning of those words control.

A review of the meaning of the term own must guide our analysis. The American Heritage Dictionary defines the word own very simply. It is defined as "of or belonging to oneself or itself," "that which belongs to one," and "to have or possess."

The Oxford English Dictionary offers useful definitions:

Own: to make (a thing) one's own, appropriate, take possession of, to seize, win, gain (2) to have or hold as one's own, have belonging to one, be the proprietor of, possess.

Owner: one who owns or holds something as his own; a proprietor; one who has the rightful claim or title to a thing (though he may not be in possession).

Ownership: the fact or state of being an owner; legal right of possession, property, proprietorship, dominion.

The Random House Dictionary of the English Language provides the following:

Own: Of pertaining to, or belonging to oneself or itself (usually used after a possessive to emphasize the idea of ownership, interest or relation conveyed by the possessive)

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Ownership: the state or fact of being an owner. Legal right of possession; proprietorship.

Gilmer's Law Dictionary (6th ed.) does not define the term own but provides that the word owner is a flexible term for a person who has the right of dominion or title concerning something that is subject to ownership. An owner is a person who has control over a thing with the right to use it or dispose of it as he sees fit. The term is properly applied only to one who has absolute ownership, as distinguished from special ownership, or the right to possess and enjoy, which a bailee may have.

The Guide to American Law does not define the word own but defines owner as "the person recognized by the law as having the ultimate control over, and right to use, property as long as the law permits and no agreement or covenant limits his or her rights."

Bouvier's Law Dictionary (3d rev.) defines ownership as "the right by which a thing belongs to some one in particular, to the exclusion of all others. . . The entirety of the powers of use and disposal allowed by law. It implies that there is some power of disposal . . . ."

Barron's Law Dictionary (2d ed.) defines owner as "the person who has legal title to property, . . . the person in whom ownership, dominion, or title of property is vested." Further, ownership is "one's exclusive right of possessing, enjoying, and disposing of a thing. . . . The term has been given a wide range of meanings, but is often said to comprehend both the concept of possession and, further, that of title and thus to be broader than either" (citation omitted).

Finally, Black's Law Dictionary (6th ed.) defines own as "to have a good legal title; to hold as property; to have a legal or rightful title to; to have; to possess."

It is observed that the intent of the people in voting for the provision could only have been with the contemplation and understanding of the plain meaning of the word own.

Thus, it seems clear that the lottery system operated in the State of West Virginia must be owned by the State. Any plans to set up a lottery system with ownership in the hands of private enterprise runs afoul of the strict construction of the plain meaning of the constitutional provision. This is the case despite the fact that the system is regulated, controlled and operated by the State.<sup>1</sup> It is important to note that in reaching this conclusion this Office has not undertaken to survey the universe of financing schemes and their relationship to the concept of ownership.

A recent decision of the West Virginia Supreme Court is instructive. In Contractors Association v. Department of Public Safety, Slip Op. No. 21519 (W. Va. Sup. Ct. March 25, 1993), the Court noted that "questions of constitutional construction are in the main governed by the same general rules as those applied in statutory construction. . . . Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Therefore, if the language in a constitutional provision is clear, and without ambiguity, the plain meaning is to be accepted." Contractors Association,

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<sup>1</sup>A close reading of the February 14, 1991 Opinion of the Attorney General written in response to questions about the lottery raised by the Prosecuting Attorney of Ohio County reveals that the opinion does not answer the precise question asked here as to whether the Constitution mandates that the lottery system be owned by the State. The analysis was based on a reading of the statutes.

Slip Op. No. 21519 at 10 (citations omitted). Further, the use of dictionary definitions was endorsed. The Court commented that "there are four traditional methods of judicial definitions of words used in statutes and constitutions and not specifically defined in them: dictionary definitions current at the time, and those now extant; pronouncements by courts; reliable extrajudicial commentary; and definitions set or inferable from debates and proceedings of the bodies that drew the documents." Contractors Association, Slip Op. No. 21519 at 13 (citations omitted).

The constitutional provision also plainly states that the Legislature may define by general law the system of authorized lotteries. The Legislature must, of course, do so within the mandate of the Constitution. However, in reviewing statutes "every reasonable construction must be resorted to by a court in order to sustain constitutionality and any doubt must be resolved in favor of the constitutionality of the legislative enactment in question." Contractors Association, Slip Op. No. 21519 at 6 (citations omitted).

As has been discussed above, the Legislature provided a statutory mechanism that vests tremendous and broad authority in the lottery commission and the lottery. Indeed, confusion may exist because the commission was granted the statutory power to lease, rent and hold real or personal property in order to operate the lottery system. W. Va. Code § 29-22-5 (1992 Repl. Vol.).

It is cautioned that while this Office concludes that the plain language of the Constitution requires that the lottery systems not only be operated by the State but be owned by the State, the language of the provision is subject to interpretation and is not clearly defined until such time as a court has determined what it means. Only the courts can ultimately determine the meaning of words in the Constitution and the general laws. Through the presentation of contested cases the courts can and often do make accommodations to validate reality and the existing facts. It is often recognized that constitutional case law is a very intricate blend of politics, economics, public policy, history and the social sciences.

A court may very well recognize that the Legislature delegated broad responsibility, powers and duties to the lottery commission. It may acknowledge that in the statutory framework the Legislature recognized and authorized development and expansion of the lottery system. A court may cite the entire infrastructure that has been built up around the lottery system including the important public policy considerations made as to the use of lottery funds and proceeds to advance important public interests. A court may also rely upon developed practices in terms of leasing or renting equipment. A court may note that the Legislature has acquiesced to the operations and conduct of the lottery commission. By engaging in such a judicial process, a court may well conclude that the constitutional provision was meant simply to vest functional operational control with the State and that this purpose is in no way frustrated when actual pieces of equipment are owned by a private enterprise, given the regulatory control of the lottery commission.



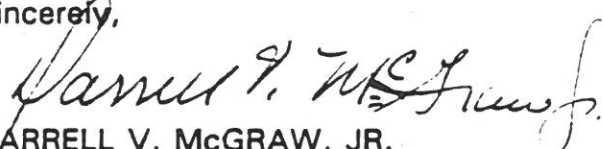
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Such an exercise, properly engaged in by courts in the context of contested cases, is not one in which the Office of Attorney General may engage. Rather, the Attorney General has issues of law presented to him or her in a sterile and abstract setting without the opportunity of considering formally presented competing points of view, legal interpretations, and unknown factual aspects.

When presented with a question of constitutional interpretation from the President of the Senate, the Attorney General must look first to the plain meaning of the words if that can be determined. The approach of the Attorney General must be conservative. Here, it can only be concluded that the Constitution dictates that the State must own the devices of the lottery system.

Thank you for the opportunity to consider this matter.

Sincerely,

  
DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

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