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March 10, 1986

ATTORNEY GENERAL OPINION NO. 86- 35

The Honorable Betty Jo Charlton
State Representative; Forty-Sixth District
State Capitol, Room 272-W
Topeka, Kansas 66612

Re: Taxation -- State Gaming Revenues Fund -- Creation;
Effective Date

Constitution of the State of Kansas --
Miscellaneous -- Lotteries

Synopsis: The provisions of 1986 House Bill No. 2789 create a state gaming revenues fund. Depending upon the passage of other legislation, all or part of the fund may be derived from the operation of a state lottery. While such a lottery is currently prohibited by Article 15, Section 3 of the Kansas Constitution, approval of a proposed constitutional amendment in November, 1986 would permit such activity. Under both Kansas case law and decisions in other states, the legislature may enact bills which are effective only upon the occurrence of some future event, which in this case would be approval of the lottery amendment. Accordingly, 1986 House Bill No. 2789 would be constitutional if enacted. Cited herein: K.S.A. 8-1336; 8-1340; L. 1974, ch. 360; L. 1985, ch. 314; ch. 364; 1985 Senate Concurrent Res. No. 1603; 1986 House Bill No. 2789; Kan. Const., Art. 15, §§ 3, 4.

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Dear Representative Charlton:

You have requested our opinion regarding 1986 House Bill No. 2789, which is an act establishing the state gaming revenues fund and providing for the use and expenditure of moneys credited to the fund. Specifically, you inquire whether it would be legal for the legislature to enact this bill in light of the Kansas constitutional prohibition of lotteries and sale on lottery tickets.

It should be noted at the outset that the bill on its face is not an enabling statute for the proposed constitutional amendment creating a state lottery, 1985 Senate Concurrent Resolution No. 1603. It merely creates a gaming revenue fund, expenditures from which shall be made in accordance with the terms of the bill. The bill refers to but does not define the "state gaming revenue fund" nor does it specify the source of revenue for the fund. Essentially, the bill allocates money derived from the fund into three parts, which represent the initial fifty million dollars produced annually by state gaming activities. The bill divides this amount as follows: county reappraisal costs (30%); correctional institutions building fund (10%); and state economic development initiatives (60%). Any sums in excess of fifty million are placed in the general fund of the state.

At present, the Kansas Constitution makes it "forever prohibited" to conduct lotteries and sell lottery tickets in this state. Article 15, Section 3. 1985 Senate Concurrent Resolution No. 1603 would submit a constitutional amendment to the voters that would allow a lottery conducted by the state, but would otherwise continue the prohibition in effect. If approved by the legislature for submission to the voters, the question will be on the general election ballot in November of this year. In the absence of any language in the concurrent resolution establishing an effective date for the amendment, it would go into effect upon passage. However, unless enabling legislation is in place, the actual operation of a state lottery would await action by the 1987 legislature. 1986 House Bill No. 2789, as noted above, does not contain such enabling legislation, but instead establishes a fund to handle the distribution of state gaming revenues.

It is well-settled in Kansas case law that the legislature may make a law become operative upon the happening of a certain contingency or a future event. In State v. Dumler, 221 Kan. 386 (1977), the court upheld Kansas

statutes which made suspension of certain state speed limits contingent upon action by the United States Congress in removing the federal 55 mile per hour speed limit. Should Congress so act, but impose another, higher limit, then the state highway commission (now replaced in the statute by the secretary of transportation) could enact such higher limit in Kansas. K.S.A. 8-1336. The removal of all limits by Congress would automatically reimpose the suspended state limits in K.S.A. 8-1340. In approving such laws, the court found that tying the effective date of the speed limits to action by Congress at some future, as yet unknown, date was permissible, even though the provisions of the law which depended on such event might never go into effect. See also City of Pittsburg v. Robb, 143 Kan. 1 (1933).

It would appear that in the past the legislature has made use of the same type of delayed effectiveness which is present by implication in 1986 House Bill No. 2789. In 1974, the legislature passed House Bill No. 2035 (L. 1974, ch. 360), which abolished the elective office of state printer on June 30, 1977, and established the appointive office of director of printing, effective July 1, 1977. Section 2 of the act stated:

"The provisions of this act shall be operative only if the proposition to amend the Kansas constitution by repealing section 4 of article 15 is approved by the electors as provided in 1974 senate concurrent resolution no. 91. The provisions of this act shall not be operative but shall be void if said proposition is not approved by the electors of this state."

The concurrent resolution referred to in Section 2 was approved by the voters at the 1974 general election, and thereby amended Article 15, Section 4 of the state constitution. Thereupon, pursuant to the above act, the position of state printer continued until July 30, 1977, when it was abolished.

A more recent example is found at L. 1985, ch. 314, §1, in which property valuations based on use value do not become effective until the later of January 1, 1989, or January 1 of the year following the year in which an amendment is approved by Kansas voters to Article 11, Section 1 (dealing with classification of property for taxation purposes). If 1985 House Concurrent Resolution No. 5018 (L. 1985, ch. 364) is

approved by the voters in November, then the January 1, 1989 date will apply. If not, then the effective date of section 1 of L. 1985, ch. 314 will not occur until some time in the future.

We have not been able to locate any Kansas decisions which specifically speak to the question you present, i.e. may the legislature enact a bill the effect of which is dependent upon a future amendment to the state constitution, when such a bill authorizes or regulates an activity prohibited by the state constitution before amendment? A general rule of law on this question is stated at 171 A.L.R. 1070 (1947) as follows:

"A legislature has power to enact a statute not authorized by the present constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such a constitutional amendment." Id. at 1075.

This is clearly the majority rule, and has been followed by a number of cases. Druggan v. Anderson, 269 U.S. 36, 46 S.Ct. 14, 70 L.Ed. 151 (1925); State v. Hecker, 109 Or 520, 221 Pac. 808 (1923); In re Income Tax Enabling Act, 227 Ala. 291, 149 So. 776 (1933); Busch v. Turner, 26 Cal.2d 817, 161 P.2d 456 (1945). In each case, the law under attack contained provisions that it would not be operative until and unless a proposed constitutional amendment was passed. Each was upheld as within the power of the legislature.

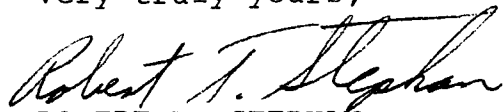
While we have found one case which differs from the above line of decisions, it can be easily distinguished from the situation here. In re Opinions of the Justices, 132 Me. 519, 184 A. 845 (1933) dealt with enabling legislation which the Maine Legislature enacted in anticipation of voter approval of an amendment to the state constitution authorizing an income tax. The court rejected the action of the legislature, and found that where a constitutional prohibition existed, the legislature could not act, even conditionally. However, that case dealt with actual enabling legislation, as distinguished from 1986 House Bill No. 2789 which does not authorize the holding of a lottery or the sale of lottery tickets in any way, as previously noted. As such, even the minority line of cases would appear to authorize the bill, which is only indirectly tied to the lottery. This

conclusion, however, depends upon what the legislature defines as state gaming revenue; it is now impossible to determine what moneys will go into the fund.

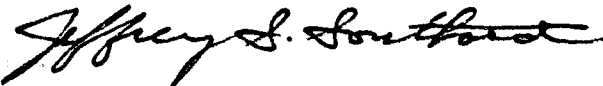
Accordingly, under either established general Kansas case law or the decisions of other states which have considered the specific question, it is our opinion that 1986 House Bill No. 2789 may properly be enacted into law. However, in order to remove any question that it is intended to take effect only upon approval of the proposed constitutional amendment contained in 1985 Senate Concurrent Resolution No. 1603, the legislature may wish to add conditional language similar to that contained in L. 1974, ch. 360, §2 (cited above) prior to final passage.

In conclusion, the provisions of 1986 House Bill No. 2789 create a state gaming revenues fund. Depending upon the passage of other legislation, all or part of the fund may be derived from the operation of a state lottery. While such a lottery is currently prohibited by Article 15, Section 3 of the Kansas Constitution, approval of a proposed constitutional amendment in November, 1986 would permit such activity. Under both Kansas case law and decisions in other states, the legislature may enact bills which are effective only upon the occurrence of some future event, which in this case would be approval of the lottery amendment. Accordingly, 1986 House Bill No. 2789 would be constitutional if enacted.

Very truly yours,



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