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January 22, 2003

Opinion No. 03-007

Charitable Lotteries

QUESTIONS

1. May proceeds from the state lottery be used to fund the regulation of charitable lotteries?

2. What does "located in this state" mean?

3. Does a 501(c)(3) organization, which by federal law is prohibited from attempting to influence legislation, risk its 501(c)(3) status by going to the legislature for authorization of a charitable event?

4. May the State regulate the percentage of receipts that must be used for the organization's charitable purposes?

5. Is it permissible to pay for the regulation of charitable gaming out of application fees from the charities or from general funds appropriated for that purpose?

6. May the legislature establish a maximum number of annual events that may be approved in any given year?

7. May the legislature pass a bill by a two-thirds vote to allow a charitable duck race without establishing any regulatory framework?

8. May the legislature implement this provision by enacting a bill that says all 501(c)(3) organizations may conduct a lottery that is not prohibited by the Constitution?

9. Does the constitutional amendment require the legislature to approve by a two-thirds vote only the types of lotteries that 501(c)(3) organizations may conduct, or is the two-thirds vote required to approve the annual event?

10. May the legislature preapprove particular categories of events (e.g., church cakewalks) by a two-thirds vote?

11. May an organization that fits the 501(c)(3) criteria (e.g., local school), but does not hold a certificate from the IRS, be approved to hold an annual event?

12. How often is legislative approval of the annual event required? Must it be done at least every two years? Must it be done annually?

13. Must each non-profit get a two-thirds vote for its annual event?

OPINIONS

1. The legislature is restricted in its use of the net proceeds from the state lottery to providing financial assistance to citizens of this State to enable such citizens to attend post-secondary educational institutions located within this State, and for capital outlay projects for K-12 educational facilities and early learning and after school programs. While the legislature has some discretion in defining what constitutes an expense of the state lottery (e.g., legal expenses incurred in advising on the implementation and administration of the state lottery), we do not believe that the proceeds from the state lottery may be used to fund the regulation of charitable lotteries, as this would not be an expense incurred in realizing the gross proceeds from the state lottery.

2. At a minimum, "located in this state" requires a physical presence or location within this State. However, the legislature has the discretion to define this term more rigorously.

3. What activities a 501(c)(3) organization may engage in without jeopardizing its status as a 501(c)(3) organization is a question of federal law to be interpreted and administered by the Internal Revenue Service, the federal administrative agency charged with interpreting and administering the provisions of the federal tax code. As such, this Office is not in a position to render an opinion on this issue.

4. It is our opinion that regulation of the percentage of receipts that must be used for an organization's charitable purposes is constitutionally defensible.

5. Yes.

6. Yes.

7. Yes.

8. No, the legislature must approve each annual event by a two-thirds vote of each House.

9. No, the legislature must approve each annual event by a two-thirds vote of each House. But the General Assembly could, by legislation, specify the types of events that will be eligible for approval by the two-thirds vote as a means of screening requests for approval.

10. No, the legislature must approve each annual event by a two-thirds vote of each House. Again, the General Assembly could, by legislation, specify the types of lotteries that will be eligible for approval by a two-thirds vote as a means of screening requests for approval.

11. Only the Internal Revenue Service can authoritatively determine whether an organization meets the criteria to qualify as a 501(c)(3) organization. Unless an organization obtains such certification, therefore, it cannot be verified that the organization meets the constitutional standards to qualify as a 501(c)(3) organization for the benefit of which a lottery may be approved. For this reason, even if an organization such as an educational organization or a church is not required to obtain certification to be treated as a 501(c)(3) organization for federal tax purposes, an organization that wishes to obtain legislative approval for a lottery to be held for its benefit must receive certification as a 501(c)(3) organization from the Internal Revenue Service.

12. The legislature must approve each annual event by a two-thirds vote of each House. A separate approval must be obtained for each annual event. One session of the General Assembly could approve two different annual events for the same organization, each to be held in successive years. But each event would have to be specifically approved. One session of the General Assembly could not approve any annual event to be held after the term of that General Assembly expires.

13. Yes, each 501(c)(3) organization must get a two-thirds vote for its annual event. A 501(c)(3) organization is a particular type of non-profit organization, and not every nonprofit organization is a 501(c)(3) organization as that term is defined under federal law.

ANALYSIS

1. The first question asks whether any of the proceeds from the state lottery may be used to fund the regulation of charitable lotteries. Article XI, Section 5 of the Tennessee Constitution, as amended by the passage of the November 5, 2002 Referendum, now provides in relevant part:

> The Legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State, except that the legislature may authorize a state lottery if the net proceeds of the lottery's revenues are allocated to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state. The excess after such allocations from such net proceeds from the lottery would be appropriated to:
>
> (1) Capital outlay projects for K-12 educational facilities; and
>
> (2) Early learning programs and after school programs.
>
> Such appropriation of funds to support improvements and enhancements for educational programs and purposes and such net proceeds shall be used to

> supplement, not supplant non-lottery education resources for education programs and purposes.

Pursuant to this constitutional provision, the legislature is restricted in its use of the net proceeds from the state lottery to providing financial assistance to citizens of this State to enable such citizens to attend post-secondary educational institutions located within this State and for capital outlay projects for K-12 educational facilities and early learning and after school programs. This provision does not define what constitutes "net proceeds of the lottery's revenues." However, the words of the Constitution are to be given their natural and inherent meaning. *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983). As commonly used, the term "net proceeds" refers to what remains of the gross proceeds after all expenses and losses incurred in realizing them are deducted.

The statutory schemes implementing state lotteries in other states are consistent with this definition in that net proceeds are generally considered to be the gross revenues less the expenses of administering and operating the lottery and prize money. For example, Georgia requires the payment of the operating expenses of the Georgia Lottery Corporation, the entity charged with administering and operating the Georgia State Lottery, out of lottery proceeds. It further requires that forty-five per cent of the proceeds from the sale of lottery tickets be made available as prize money. Ga. Code § 50-27-13(a)(2). Georgia also requires that, as nearly as practicable, the net proceeds of the state lottery equal at least thirty-five per cent of the lottery proceeds. Ga. Code § 50-27-13(a)(3).

Similarly, Kentucky requires that all lottery proceeds are to be deposited into the operating account of the Kentucky Lottery Corporation, the entity charged with administering and operating the Kentucky State Lottery. All operating costs and prizes are to be paid out of this account. By the last day of each month, the Kentucky Lottery Corporation is required to transfer to the Lottery Trust in the state's general fund the amount of net revenues which the Corporation has determined are surplus to its needs in administering and operating the state lottery. KRS § 154A.130. Kentucky's statutory scheme further provides that after the start-up costs of the lottery are paid, it is the intent of the legislature that it be the goal of the Corporation to transfer each year thirty-five per cent of the gross revenues to the Lottery Trust in the state's general fund. *Id.*

Finally, Virginia requires that all monies received from the sale of lottery tickets be deposited in the State Lottery Fund, less any amount paid as prizes or retained as compensation for the lottery sales agents. Va. Code Ann. § 58.1-4021. It further requires that the total costs for operations and administration of the state lottery be funded from the State Lottery Fund and that at no time shall such costs exceed ten per cent of the total annual estimated gross lottery revenues, exclusive of agent compensation. Va. Code Ann. § 58.1-4022.

Accordingly, it is our opinion that "net proceeds," as used in Article XI, Section 5 of the Tennessee Constitution, are the funds remaining from the gross proceeds from the state lottery after all expenses and losses incurred in realizing them are deducted. While the legislature has some discretion in defining what constitutes an expense of the state lottery (e.g., legal expenses incurred in advising on the implementation and administration of the state lottery), we do not believe that the

proceeds from the state lottery may be used to fund the regulation of charitable lotteries, as this would not be an expense incurred in realizing the gross proceeds from the state lottery.

2. Your next question inquires as to what is meant by the language "located in this state" with respect to an annual event operated for the benefit of a 501(c)(3) organization. Again, this term is not defined within the amendment to Article XI, Section 5. However, this phrase is commonly used throughout Tennessee statutes. For example, Tenn. Code Ann. § 9-4-107 defines a "State depository" as:

> (A) Any savings bank (savings institution), or any bank chartered by the State of Tennessee;
> (B) Any national bank, or federal savings institution that has its main office ***located in this state***; or
> (C) Any national or state bank, or any federal or state savings institution that has its main office ***located outside this state*** and that maintains one (1) or more branches in this state which are authorized to accept federally insured deposits . . ..

(Emphasis added).

Similarly, Tenn. Code Ann. § 12-3-812 provides that "all state agencies, departments, boards, commissions, institutions, institutions of higher education, schools and all other state entities shall purchase natural gas produced from wells ***located in the state*** of Tennessee if such gas is available at a price which is equal to or less than natural gas produced from wells ***located outside the state*** of Tennessee, transportation costs taken into account." (Emphasis added). Tenn. Code Ann. § 31-6-102 provides that "[r]eal property ***located in this state*** escheats to this state . . ." and Tenn. Code Ann. § 41-6-103 authorizes the Commissioner of Correction to permit certain inmates to engage in approved employment "provided, that such places of employment are ***located in the state*** . . .." Finally, Tenn. Code Ann. § 45-2-1902 requires that a credit card state bank, unless the subsidiary of a domestic lender or domestic holding company, either "[h]ave, within one (1) year of the date it commences operation, fifty (50) employees ***located in this state*** devoted to the credit card activities . . .." (Emphasis added).

There are numerous other statutory provisions containing this language. In each instance, including those cited above, the clear intent is that the language "located in this state" means a physical presence or location in this State. Thus, it is our opinion that the language "located in this state," as used in Article XI, Section 5 of the Tennessee Constitution, requires at a minimum a physical presence or location in this State. Furthermore, the legislature has the discretion to define "located in this state" more rigorously. For example, the legislature could require with respect to corporations that they be chartered in this State or have their main headquarters located within this State.

3. Does a 501(c)(3) organization, which by federal law is prohibited from attempting to influence legislation, risk its 501(c)(3) status by going to the legislature for authorization of a charitable event? The United States Tax Code currently defines a 501(c)(3) organization as:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . ., or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . ., and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. § 501(c)(3). This provision sets forth the requirements an entity seeking tax-exempt status must meet. It is interpreted and administered by the Internal Revenue Service. Thus, whether or not a particular entity has met or continues to meet these requirements is a question of federal law, and our Office is not in a position to opine on the interpretation and application of this federal provision. We would note, however, pursuant to the plain language, an organization only violates 26 U.S.C. § 501(c)(3) when its attempts to influence legislation comprise a "substantial part" of the organization's activities. Furthermore, 26 U.S.C. § 501(h) specifically authorizes 501(c)(3) organizations to spend a set percentage of their exempt-purposes expenditures in a given year on lobbying activities without losing their tax-exempt status.[1]

4. Your next question asks whether the State may regulate the percentage of receipts that must be used for the organization's charitable purposes. The United States Supreme Court has held that solicitation of money by charities is protected speech for purposes of the First Amendment to the United States Constitution. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); and *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). As the Court stated in *Schaumburg*:

> Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information would likely

[1] *See* I.R.C. § 501(h)(2). The permissible lobbying expenditure amount is calculated according to a sliding scale, however, no organization may exceed $1,000,000 in lobbying expenditures.

> cease. Canvassers in such context are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.

Id. at 632, 100 S.Ct. at 832-33, 63 L.Ed.2d at 84-85.

However, those courts that have considered the question of whether charitable gaming is similarly protected under the First Amendment have held otherwise. *See There to Care, Inc. v. Commissioner of Indiana Department of Revenue*, 19 F.3d 1165 (7th Cir. 1994); *Allendale Leasing, Inc. v. Stone*, 614 F.Supp. 1440 (D.R.I. 1985); *Pigeon's Roost, Inc. v. Commonwealth of Kentucky*, 10 S.W.3d 133 (1999), *discretionary review denied* (2000); *Commonwealth v. Louisville Atlantis Community/Adapt, Inc.*, 971 S.W.2d 810 (1997), *discretionary review denied* (1998).

In both the *Louisville Atlantis* and *Pigeon's Roost* cases, the plaintiffs challenged a provision of Kentucky's Charitable Gaming Act that required the charity to retain 40% of its gross receipts from its charitable gaming. The Kentucky Court of Appeals upheld this provision in both cases, finding that charitable gaming enterprises do not constitute conduct protected by the First Amendment. Their reasoning was based in part upon the fact that charitable gaming was an exception to the constitutional prohibition against lotteries and that the State could prohibit gambling entirely.

> Charitable gaming is an exception to the constitutional prohibition against lotteries and gift enterprises. Since the state may prohibit gambling entirely, it may clearly put limits on charitable gaming which may not be put on other legitimate enterprises. Keeping charitable gaming from becoming commercial, preventing participation by criminals, and preventing the diversion of funds from legitimate charitable purposes are all legitimate state objectives.

Pigeon's Roost, Inc., 10 S.W.3d at 135, *quoting Louisville Atlantis*, 917 S.W.2d at 816.

In light of these authorities, it is our opinion that regulation of the percentage of receipts that must be used for an organization's charitable purposes is constitutionally defensible.

5. Is it permissible to pay for the regulation of charitable gaming out of application fees from the charities or from general funds appropriated for that purpose? The amendment to Article XI, Section 5 of the Tennessee Constitution contains no prohibition on the authority of the legislature to regulate the charitable gaming authorized or to pay for such regulation out of application fees, licensing fees and other regulatory fees, or from general funds appropriated for that purpose. Accordingly, it is our opinion that the legislature has the authority to fund the regulation of charitable gaming through regulatory fees and/or through the appropriation of general funds.

6. May the legislature establish a maximum number of annual events that may be approved in any given year? The language of the amendment to Article XI, Section 5 creates two exceptions to the general prohibition against lotteries. First, it authorizes the creation of a state lottery. Second, it authorizes "an annual event operated for the benefit of a 501(c)(3) organization located in this state, as defined by the 2000 United States Tax Code or as may be amended from time to time" if approved by a two-thirds vote of all members elected to each house of the General Assembly. This language is quite broad and leaves much to the discretion of the legislature. There is nothing in this language, however, that requires the legislature to approve all annual events proposed for the benefit of a 501(c)(3) organization, or even to approve any such annual event. Accordingly, it is our opinion that it is within the legislature's discretion to establish a maximum number of annual events that may be approved in any given year.

7. Your next question asks whether the legislature may pass a bill by a two-thirds vote to allow a charitable duck race or some other charitable gaming event without establishing any regulatory framework. The amendment to Article XI, Section 5 provides with respect to an annual event operated for the benefit of a 501(c)(3) organization only that it is "expressly prohibited unless authorized by a two-thirds vote of all members elected to each house of the General Assembly." Thus, the amendment does not require the legislature to establish any sort of regulatory scheme before authorizing any annual charitable event. However, the amendment also does not prohibit the legislature from enacting legislation regulating these annual charitable events. If the legislature determines that a regulatory framework should be established, it should do so in a manner that meets any equal protection concerns.

8. Question number eight is whether the legislature may implement this provision by enacting a bill that says all 501(c)(3) organizations may conduct a lottery that is not prohibited by the Constitution. This Office has concluded that, under this provision, the legislature cannot delegate the authority to authorize events to a regulatory commission. Instead, two-thirds of the members of each House of the General Assembly must vote to allow annual events. Op. Tenn. Atty. Gen. 02-019 (February 13, 2002). Similarly, the legislature cannot implement this provision by enacting a bill that says all 501(c)(3) organizations may conduct a lottery that is not prohibited by the Constitution. Instead, this provision requires the General Assembly to approve each annual event involving a lottery to be held for the benefit of a 501(c)(3) organization by a two-thirds vote of each House.

This conclusion is based on the language of the provision and by the legislative history of 2000 House Joint Resolution 2, 2001 Senate Joint Resolution 1, and companion lottery resolutions. These resolutions authorized the language now contained in the amendment to Article XI, Section 5 to be placed on the ballot in the November, 2002 election. At a Senate Judiciary Committee meeting on May 25, 1999, the Committee discussed Senate Joint Resolution 346 and House Joint Resolution 2. Senate Joint Resolution 346, sponsored by Senator Cohen, was discussed first. With regard to charitable lotteries, that resolution had the following language to be included in the proposed amendment to Article XI, Section 5 of the Tennessee Constitution:

> All other forms of lottery not authorized herein are expressly prohibited *unless authorized by a two-thirds vote of all members elected to each house of the general assembly for an annual event operated for the benefit of a 501(c)(3) organization located in this state,* as defined by the 1999 United States Tax Code or as may be amended from time to time:

(Emphasis added). Senator Fowler proposed that the resolution be amended to provide that the General Assembly could authorize "an annual event *operated by* a 501(c)(3) organization located in this state *for the benefit of* that organization . . .." Senator Cohen did not oppose the amendment, which eventually failed, and stated:

> That's basically my intent, was just to take care of duck races and St. Peter's and clinic bowls. I don't mind operated by and for the benefit; it doesn't bother me at all. I mean I'm not, it's got to be a two-thirds vote of the General Assembly, *it's going to give us quite a few bills I guess to deal with,* but I thought it's the only way we could do the lottery resolution — eliminate the casinos that so many people seem to be concerned about but, nevertheless, not cripple the 501(c)(3)s, at least for one event a year, and I don't think anybody wants to do that, so I don't have a problem with by and for and if you want to add that as an amendment that would be accepted.

Senate Judiciary Committee, May 25, 1999, Tape No. 1 (remarks of Senator Cohen) (emphasis added). Senator Kyle opposed the amendment, and after some discussion Senator Cohen stated:

> My purpose in drawing that section was to see that there was a way to address what were legitimate charitable organizations which we have for an annual event. I'd really like to make it more than annual, I think I limited it plenty, and a two-thirds vote's the same two-thirds vote it's going to take to put this on the ballot, in the next General Assembly. *And if you can get two-thirds of all the members of each house, two-thirds of the House two-thirds of the Senate to vote for it, you're going to have Betty Crocker running it, so I don't think you have to worry too much . . ..*

Senate Judiciary Committee, May 25, 1999, Tape No. 1-2 (remarks of Senator Cohen) (emphasis added).

On May 27, 1999, the Senate amended House Joint Resolution 2. As amended, the portion of the constitutional amendment regarding charitable lotteries was identical to the same provision in Senate Joint Resolution 346 quoted above. Senator Cohen explained the resolution as amended, stating in part:

> . . . It further allows, with the idea of the duck race, the civic bowl, Clinic Bowl, and certain charities that we tried to help and we couldn't help last time, but not to get into the bingo problem. It allows one charity event for a 501(c)(3) charity a year. One lottery-type game for 501(c)(3)s in our State if it is approved by a two-thirds

> vote of the General Assembly. *A super-high majority, two-thirds of the House and two-thirds of the Senate, would have to approve the duck race, the Clinic Bowl, the St. Peter's Orphanage or whatever,* and we could do that and provide this way a way to have games for 501(c)(3)s, accommodate those beneficial charities, and yet not open up anything for bingo that we had a problem with in the past . . ..

Senate Session, May 27, 1999, Tape No. S-82 (remarks of Senator Cohen) (emphasis added).

On April 12, 2000, the House concurred in Senate amendments to House Joint Resolution 2. As amended at the time, the provision on charitable lotteries contained the language approved by the voters at the 2002 election. Representative Dunn discussed the provision on charitable lotteries with Representative Newton, who sponsored the resolution. The following exchange took place:

> Representative Dunn: . . . It also, if I read this correctly, it takes two-thirds votes of all members in order for a group to come down here. And that's a nice protection but I guess I would ask the sponsor, how many 501(c)(3)s are there in the State of Tennessee?
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> Rep. Newton: I have no idea. And I dare to say that you don't, either.
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> Rep. Dunn: There are 6,828.
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> Rep. Newton: Okay, I stand corrected then.
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> Rep. Dunn: I checked on that. There are almost 7,000 501(c)(3)s. Now if only one-seventh of those decided to use a lottery, a drawing to get rid of a shotgun, to have a rubber duck race, we'll increase the amount of legislation down here up to maybe a thousand bills. And we thought that the license plate bills were bad when every group wanted one, wait 'til every 501(c)(3) wants to come down here and clog up the system with thousands of bills, and then we're back to deciding what's a good 501(c)(3) or what's a bad one there. So there are problems with this. And I think we need to be more specific so we don't clog up the system and we don't do things that none of us intend to do. And for that reason, I would agree with the previous two speakers who say we need to nonconcur today so we can go back and take care of this paragraph. Thank you.

House Session, April 12, 2000, Tape H-45 (remarks of Representatives Newton and Dunn). Representative Newton did not respond to this comment.

On February 5, 2001, Senate Joint Resolution 1, which was identical to House Joint Resolution 2 approved during the previous session of the General Assembly, was read to the Senate for the second time. Senator Herron, who opposed the resolution, made the following comment on the two-thirds vote requirement for a charitable lottery.

> Sen. Herron: . . .Senator Henry referred to a paragraph, really just one sentence, in this resolution. And I apologize to you for not having focused on this sooner and studied it harder. Because it appears to me to be a sentence that is fraught with peril. It is one that appears, quite frankly, to allow, what we've referred to as rubber duck races and that sort of thing. I would suggest to you it reminds some of another animal, indeed of a Trojan horse. If you'll look at the sentence, and I would urge you to do so and to study the language carefully, ladies and gentlemen, it begins: "All other forms of lottery not authorized herein are expressly prohibited unless authorized . . .." Now that's maybe a lawyer's way or a drafter's way of saying, all forms of lottery besides the state lottery can be authorized. Can be authorized. It goes on to say "by a two-thirds vote of all members elected to each house of the general assembly," and that seems like a high threshold, but then think again, ladies and gentlemen, how easy it is, on issues that we really don't much like to vote for, *such as local tax increases, or private acts*, how easy it is to get two-thirds of a vote, and I'll speak to that a bit more in a moment . . ..
>
> Let me give you a scenario, and perhaps some will be critical of this, and I respect that and perhaps it if doesn't sound plausible to you, you use your own judgment. Suppose somebody calls up the Gleason Rotary Club in Weakley County, Tennessee, and says you know we'd like to help your club, we'd like to give you all a thousand dollars a year from here on out. And they say, great, that's wonderful, please send the check. And they say, there's just one thing we want you to do, would you just get Senator Herron to sponsor a little thing so we could do a gambling event. Doesn't have to be in Weakley County. Could do it in Shelby County. Maybe you could do it all up in Ron Ramsey's district, as far away from me as you can get. Do it somewhere else, and we'll send you the thousand dollars maybe from here on out, all you have to do is just take the check at the Gleason Rotary Club, if you're a 501(c)(3), we want you to have the money. Well, what if Senator Herron doesn't want to sponsor it? Well, you know, all he really has to do is not object to it. If you'll just get him not to be against it. We'll get it done, as a matter of fact, the Senator from Shelby or the Senator from whatever other county will handle it. And then we get up here and then, you know, you've got a civic club, they want you to do it, and so you have to do it, and if I've got one that wants me to do it, then I've got to vote for your bill and you have to vote for mine, and that's the way it happens, and we do that on local taxes all the time. And on other legislation we might, I really want personally, I don't think it's hard to imagine as some might indicate, it's not as I first thought it might be, quite frankly, let me urge you ladies and gentlemen, I know tonight's vote in one sense does not count, but Wednesday's vote will mean a whole lot. Let me urge you to look at that language. Read that one sentence and understand that when you vote on this you're not just voting for a lottery . . ..

Senate Session, February 5, 2002, Tape No. 7 (remarks of Senator Herron) (emphasis added). Senator Cohen responded to this comment in part:

> Senator Cohen: . . .To the gentleman my friend from Dresden, I've offered him last week on three different occasions to sit down with me and talk about this proposition, my door has been open, he's yet to come by and talk to me about it. My door will remain open. But I can assure you that all this does, and the intent and I believe not only the intent but the draftsmanship of it, would allow the Clinic Bowl in Nashville, St. Peter's Orphanage in Memphis, and the Duck Race in Knoxville, people, like that to have the opportunity to have an annual event. That is indeed the intent and I believe it's the language . . ..

Senate Session, February 5, 2002, Tape No. 7 (remarks of Senator Cohen). Senator Cohen, therefore, did not attempt to correct Senator Herron's assumption that each House would have to approve each event held for the benefit of a 501(c)(3) organization.

Before the Senate passed the resolution by a two-thirds vote on February 7, 2001, there was an attempt to amend the resolution. Senator Cohen, who sponsored the resolution, opposed the amendment and stated, in part:

> . . . and I would submit that the better course is not to amend, to leave the proposition as it is as it was passed by the previous General Assembly, not to risk this and put this into the courts but to let the people vote on it*, and to preserve the opportunity for 501(c)(3)s such as the Clinic Bowl, the Rubber Ducks in Knoxville, St. Peter's Orphanage and other educational charitable institutions to have by a two-thirds vote if the wisdom of the General Assembly*, if it should so deem it, the opportunity to help those folks on a one-time event. One time is what I intend, one time is what the sponsor will say here, is what annual means, one time, once a year, for legislative intent. I yield to the Speaker.

Senate Session, February 7, 2001, Tape No. 8 (remarks of Senator Cohen) (emphasis added). Members of the General Assembly, therefore, interpreted the language on charitable events to require the General Assembly to approve each annual event held for the benefit of a 501(c)(3) organization by a two-thirds vote of each House.

9. The next question is whether the legislature may implement this provision by enacting, by a two-thirds vote, legislation preapproving particular categories of events, for example, church cakewalks, by a two-thirds vote. Such a measure is not sufficient to implement this provision. Instead, the General Assembly must approve each annual event involving a lottery to be held for the benefit of a 501(c)(3) organization by a two-thirds vote of each House. The General Assembly could enact legislation specifying particular categories of events that would be eligible for legislative approval as a means of screening requests for approval.

10. Question number ten is whether this provision requires the legislature to approve by a two-thirds vote only the types of lotteries 501(c)(3) organizations may conduct or whether the two-thirds vote must be as to approval of the annual event. As discussed above, under this provision, the

General Assembly must approve each annual event involving a lottery to be held for the benefit of a 501(c)(3) organization by a two-thirds vote of each House. Legislation regarding the types of lotteries a 501(c)(3) organization may conduct would not be sufficient to authorize an annual event operated for the benefit of a 501(c)(3) organization. The General Assembly could enact legislation specifying types of lotteries eligible for legislative approval as a means of screening requests for approval.

11. The next question is whether each "nonprofit" must get a two-thirds vote for an annual event involving a lottery held for its benefit. As discussed above, the General Assembly must approve each annual event held for the benefit of a 501(c)(3) organization by a two-thirds vote of each House. It should also be noted that the annual event must be held for the benefit of a 501(c)(3) organization. While such an organization is a nonprofit organization, there are other types of nonprofit organizations that are not 501(c)(3) organizations.

12. The next question is how often legislative approval of an annual event for the benefit of a 501(c)(3) organization is required. As discussed above, the General Assembly must approve each annual event held for the benefit of a 501(c)(3) organization by a two-thirds vote of each House. Each annual event, therefore, requires a specific approval. By its terms, Article XI, Section 5 provides that an annual lottery event must be "authorized by a two-thirds vote of all members elected to each house of the general assembly . . .." This language focuses on the vote of the members of a specific session of the General Assembly. As a general proposition, one legislature cannot restrict the power of its successor, at least on general questions of policy. *Mayhew v. Wilder*, 46 S.W.3d 760, 770 (Tenn.Ct.App. 2001), *p.t.a. denied* (2001) (citing 72 Am.Jur.2d *States, Territories and Dependencies* §40 (1974). One session of the General Assembly could approve two different annual events by the same organization to be held in successive years, but each event would have to be specifically approved. One session of the General Assembly could not approve an annual event to take place after the term of that General Assembly had expired.

13. The last question is whether an organization that fits the 501(c)(3) criteria, for example, a local school, but that does not hold a certificate from the Internal Revenue Service, may be approved to hold an annual event. In order to qualify for approval by the General Assembly under Article XI, Section 5 of the Tennessee Constitution as amended, a lottery must be held "for the benefit of a 501(c)(3) organization located in this state, as defined by the 2000 United States Tax Code or as may be amended from time to time." The provision, therefore, expressly refers to an organization that satisfies the requirements of federal law. 26 U.S.C. § 501(c)(3) provides tax exempt status for organizations that meet the following requirements:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no

> substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

This is an elaborate definition. The Internal Revenue Service is charged with administering and interpreting the federal tax laws. There is a large body of regulations, letter rulings, and case law interpreting 501(c)(3) requirements. Under 26 U.S.C. § 508, with some exceptions, an organization will not be treated as a 501(c)(3) organization unless it notifies the Secretary of the Treasury that it is applying for recognition of 501(c)(3) status. This statute does not apply to churches, their integrated auxiliaries, and conventions or associations of churches, or any organization which is not a private foundation and whose gross annual receipts are no more than $5,000. 26 U.S.C. § 508(c)(1). The Secretary of the Treasury may also exempt educational organizations and other classes of organization from this requirement by regulation. 26 U.S.C § 508(c)(2). Review of Internal Revenue Service forms and publications indicates that any organization besides a church or church auxiliary, convention, or association, or a non-private foundation that has annual gross receipts not more than $5,000 must apply for 501(c)(3) recognition in order to be treated as a 501(c)(3) organization. Even exempt organizations like churches, however, may apply for 501(c)(3) recognition. Instructions to Form 1023 note that:

> Section 501(c)(3) status provides certain incidental benefits such as:
> Public Recognition of tax-exempt status.
> Advance assurance to donors of deductibility of contributions.
> Exemption from certain state taxes.
> Exemption from certain Federal excise taxes.
> Nonprofit mailing privileges, etc.

Instructions for Form 1023, Department of the Treasury, Internal Revenue Service, p. 1.

A church applying for 501(c)(3) status must fill out Schedule A to Form 1023. Instructions to the schedule state in part:

> In determining whether an admittedly religious organization is also a church, the IRS does not accept any and every assertion that such an organization is a church. Because beliefs and practices vary so widely, there is no single definition of the word "church" for tax purposes. The IRS considers the facts and circumstances of each organization applying for church status.

Schedule A, Form 1023, p. 13.

As a practical matter, there is no authoritative way to verify that an organization actually has 501(c)(3) status unless it obtains recognition from the Internal Revenue Service. Determining

whether an organization meets the statutory definition of a 501(c)(3) organization requires applying legal concepts that only the Internal Revenue Service can definitively interpret. With regard to churches, the Internal Revenue Service itself states that it must examine the facts and circumstances pertaining to each organization to determine whether it qualifies as a "church." Because 501(c)(3) status is a threshold constitutional requirement, any organization that wishes to gain approval for an annual event to be held for its benefit under Article XI, Section 5 of the Tennessee Constitution must obtain recognition of its 501(c)(3) status from the Internal Revenue Service.

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