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Net Proceeds of the State Lottery

## QUESTIONS

Under Article XI, Section 5 of the Tennessee Constitution as recently amended, the "excess" of net proceeds from a state lottery are to be appropriated to capital outlay projects for K-12 educational facilities and early learning programs and after school programs.

1. What does the term "excess" mean?

2. Are capital outlay projects for K through 12 educational facilities and early learning programs and after school programs equally eligible to benefit from excess net proceeds, or do capital outlay projects take priority over early learning programs and after school programs?

## OPINIONS

1. In the context of Article XI, Section 5, the term "excess" refers to any net proceeds of the state lottery remaining after funding the financial assistance program for Tennessee citizens to attend post-secondary institutions that the General Assembly establishes.

2. In allocating excess lottery funds, capital outlay projects for K through 12 educational facilities do not take priority over early learning programs and after school programs. Excess lottery funds may be allocated for either K through 12 capital projects or early learning programs and after school programs, or for both purposes. Excess lottery funds may be allocated for early learning programs or after school programs, or for both types of programs.

## ANALYSIS

1. Excess Net Proceeds under Article XI, Section 5 of the Tennessee Constitution

This opinion concerns the interpretation of recent amendments to Article XI, Section 5 of the Tennessee Constitution. As amended, that section 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 educational resources for education programs and purposes.

The first question is the meaning of the term "excess" as used in the second sentence of paragraph one. The first rule of interpreting a constitutional provision is to give effect to the intent of the people who adopted it. *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983). This intent is derived from the language of the provision. *Id.* The words are given their ordinary and inherent meaning. *State ex rel. Cohen v. Darnell*, 885 S.W.2d 61 (Tenn. 1994). If the words are unclear, then other sources of interpretation may be utilized. *Shelby County v. Hale*, 200 Tenn. 503, 292 S.W.2d 745 (1956) (proceedings of a constitutional convention); *State v. Cloksey*, 37 Tenn. 482 (1858) (debates and journals of convention); *Gaskin v. Collins*, *supra* (history and circumstances preceding adoption of provision). Furthermore, constitutions must be read as a whole. *Davis v. Williams*, 158 Tenn. 34, 12 S.W.2d 532 (1928).

By specifying that the General Assembly may authorize a state lottery if net proceeds are allocated to provide financial assistance to citizens to attend post-secondary schools, with the "excess after such allocations" to be appropriated for the other purposes listed in the amendment, Article XI, Section 5 creates a clear priority in favor of the financial assistance program for post-secondary education students. The provision does not, however, limit the discretion of the legislature to design the financial assistance program as it sees fit. Thus, matters such as eligibility requirements and the amount and form of assistance to be made available are within the exclusive authority of the legislature to determine. Once the financial assistance program established by the legislature is fully funded, then any remaining net proceeds may be appropriated for the other purposes listed in Article XI, Section 5.

Legislative history supports this interpretation. On May 5, 1999, the House amended House Joint Resolution 2, the first of the two joint resolutions that placed the lottery amendments on the ballot. As amended, the resolution contained the same language that now appears in Article XI, Section 5 regarding the use of net proceeds, except that the language in the May 5, 1999 version referred only to aid to attend universities and colleges, and provided that the excess "shall be" appropriated instead of "would be" appropriated. Representative Newton, who sponsored House

Joint Resolution 2, discussed the use of net proceeds under the resolution as amended. Representative Newton stated:

> Just for clarification, is that the major bulk of the dollars was to be used for those HOPE-like scholarships that you just mentioned — like Georgia has. Anything that is in excess of those after they have been distributed, after the guidelines have been set before this General Assembly — anything left over from that would actually go to — one time, these are non-recurring items, okay? For capital outlay projects for K through 12 and early learning programs and after school programs. So they go to the scholarships first and if there's any money left over, then it can go into those K through 12 and those after school programs.

House Session, May 5, 1999, Tape No. H-40 (remarks of Representative Newton). In the context of Article XI, Section 5, therefore, the term "excess" refers to any net proceeds of the state lottery remaining after funding the financial assistance program that the General Assembly establishes.

2. Priority of Purposes for Which Excess Lottery Proceeds May be Allocated

The second question is whether capital outlay projects for K-12 educational facilities and early learning programs and after school programs are equally eligible to benefit from excess net proceeds, or whether capital outlay projects take priority over early learning programs and after school programs. We do not think the order in which the two purposes are listed creates any priority, nor does the legislative history of the two joint resolutions that placed the lottery amendments on the 2002 ballot clearly reflect such intent. For example, Representative Newton on May 5, 1999, stated: "So they go to the scholarships first and if there's any money left over, then it can go into those K through 12 and those after school programs." Earlier in that same session, when he explained House Joint Resolution 2 as it was to be amended, Representative Newton stated:

> With this amendment, basically the legislature may authorize a state lottery, if the net proceeds of the lottery's revenues are allocated to tuition grants, scholarships or loans to citizens of this State to enable such citizens to attend public and private colleges and universities located within this State.[1] The excess after those allocations from the net proceeds from the lottery would be appropriated to capital outlay projects for K through 12 educational facilities and early learning programs and after school programs. Basically what this would end up doing would be to supplement, not to supplant, any non-lottery

[1] The resolution was later amended to provide for financial assistance to attend "post secondary educational institutions located in this state."

> educational resources for educational programs and those kinds of things.

House Session, May 5, 1999, Tape No. H-40 (remarks of Representative Newton).

On May 27, 1999, the Senate amended House Joint Resolution 2 and approved it on first reading. The language regarding allocation of the excess in the amended resolution was the same language that now appears in Article XI, Section 5, as amended. During discussions of the resolution, Senator Cohen, one of its sponsors, stated:

> The excess of the proceeds . . . would go to K through 12 educational capital outlays, which in essence means it would help your city and county governments to build schools for lowering pupil-teacher ratios, and to early learning programs and after school programs, which are not things the State spends money on now. And so they'd be new programs and not problems with putting money into the education budget and supplanting it as has happened in other states, which is not a fair thing to do.

Senate Session, May 27, 1999, Tape. No. S-82 (remarks of Senator Cohen). Later in the same session, Senator Cohen made the following comment:

> But if you will notice the resolution, it addresses only programs that Tennessee does not offer now. College scholarships, capital funding for K through 12 which right now, your taxpayers are paying out of property taxes and new early school and after school programs. If we can have the money to provide these in any amount, it is better than we have today because we don't have them today. If the revenues are high and they come down some, it is still more than we have today because these are programs that we don't have today. It doesn't affect any of the revenue programs that we have today, it is new programs.

Senate Session, May 27, 1999, Tape No. S-82-83 (remarks of Senator Cohen). The next year, the Senate amended House Joint Resolution 2 again and approved it on three readings. On March 30, 2000, when the Senate approved the resolution on the third and final reading, Senator Cohen explained the use of net proceeds from the lottery as follows:

> Money goes to the citizens not to the colleges. It's a public or private school option. It's post-secondary schools. Remainder of the money would go to K through 12 capital construction which will help all of our cities and counties with their property taxes and to early and after school programs which are the most important new programs to help see that we get an educated workforce. Keep the best and brightest

> in Tennessee and learn from Georgia and do what we need to do to make this State prosper. And I'd ask for your vote.

Senate Session, March 30, 2000, Tape No. 33 (remarks of Senator Cohen).

On April 12, 2000, the House concurred in the amendments to House Joint Resolution 2. Representative Kernell, one of the sponsors of the resolution, made the following statement:

> Mister Speaker, members of the House, when we voted for the lottery resolution once before it did contain only scholarships. This resolution has evolved with the shepherding of Representative Kernell to include K through 12 and early learning. That means that that money will go to both programs as designed and designated by law. And I think we just wanted to clear that up.

House Session, April 12, 2000, Tape No. H-45 (remarks of Representative Kernell).

2001 House Joint Resolution 21 contains the same language as 2001 Senate Joint Resolution 1, which was finally enacted in 2001 by both Houses of the General Assembly. The House State and Local Government Committee discussed House Joint Resolution 21 at a meeting on February 6, 2001. Different members of the committee asked Representative Newton, the sponsor, how lottery funds would be applied under the proposed amendment. The following exchange took place between Representative Kisber and Representative Newton:

> Representative Kisber: Representative Newton, the way I read the resolution is you talk about the uses of the proceeds, is that the State would be required under a constitutional provision to use whatever proceeds it receives for one of three purposes or any or all of the three purposes: higher education scholarships, capital outlay for K-12 education programs, and early learning programs and after school programs for children. How that would be determined would be left to the discretion of the General Assembly so that in the year in which, whether that's 2003 or some other year, enabling legislation were created, the legislature would then determine whether you expand the TSAC [Tennessee Student Assistance Corporation] grant program, you expand some existing program with whatever criteria and then the appropriate funding after that; the second item, how much you'd want to put into K-12, school construction; after that, early childhood, after school programs. *But it would be left to the sole discretion of the General Assembly to statutorily create the requirement that would then determine how the proceeds would be allocated and appropriated. Is that correct?*

Representative Newton: *That is correct.*

House State and Local Government Committee, February 6, 2001, Tape No. 1 (remarks of Representatives Kisber and Newton) (emphasis added). To the extent that this exchange suggests that no net proceeds at all need be allocated to financial assistance for Tennessee citizens to attend post-secondary institutions, it is not supported by the text of the amendment, as discussed in Question 1 above. But this exchange also reflects the legislators' understanding that the amendment set no priority between the purposes for which excess net proceeds could be used after funding the financial assistance program.

Question 2 raises two other other issues: first, whether excess net proceeds may be allocated to either the first purpose — capital projects for K though 12 facilities — or the second purpose — early learning programs and after school programs — or whether the excess net proceeds must be used for both of the two purposes listed. As quoted above, most of the legislators who discussed allocation of net proceeds indicated it would be used for capital projects "*and"* for early learning and after school projects. In the context of the discussions, however, we do not think the legislators intended these statements to mean that excess proceeds would have to be used for *both* purposes, instead of one or both. Constitutional provisions should be given broad and flexible interpretation where ambiguities exist. *Southern Railway Company v. Fowler*, 497 S.W.2d 891, 895 (Tenn. 1973). In addition, under rules of statutory construction, the words "and" and "or" may be used interchangeably when necessary to carry out the legislative intent. *City of Knoxville v. Gervin*, 169 Tenn. 532, 89 S.W.2d 348 (1936), cited in *Stewart v. State*, 33 S.W.3d 785, 792 (Tenn. 2000). Courts in other states have used rules of statutory construction when construing a state constitution. *See, e.g., Kottel v. State*, 312 Mont. 387, 60 P.3d 403, 407 (2002); *Matter of Retirement Benefits of Yetka*, 554 N.W.2d 85, 91 (Minn. Ct. App. 1996). For these reasons, excess lottery funds may be allocated for either K through 12 capital projects or early learning programs and after school programs, or for both purposes.

The next issue is whether excess net proceeds may be allocated to fund either early learning programs or after school programs, or whether proceeds allocated to the second purpose must fund both early learning programs *and* after school programs. Again, although the legislators who discussed allocation of excess net proceeds indicate they will be used for capital projects "and" early learning "*and"* after school programs, we do not think they intended that the General Assembly be required to fund both early learning and after school programs, but could fund either or both. Excess lottery funds, therefore, may be allocated for early learning programs or after school programs, or for both types of programs.

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