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October 21, 2010

Larry Niswender, Interim Director
Oregon State Lottery
500 Airport Road, SE
Salem, OR 97301

Re: Opinion Request OP-2010-6

Dear Mr. Niswender:

Ballot Measure 75 (2010) is a *statutory* initiative (Initiative Petition 77, 2010) that proposes to authorize a privately-owned casino that could operate up to 3,500 electronic gaming devices and Keno, as well as other forms of gambling. The measure appears on the November 2, 2010 general election ballot. A companion *constitutional* initiative (Initiative Petition 76, 2010) that proposed an exception to Article XV, subsection 4(12), the Oregon constitutional provision that provides the legislature may not authorize casinos and directs it to ban them, did not qualify for the ballot. As the exclusive constitutional provider of lotteries in Oregon (other than charitable, fraternal, or religious raffles, bingo, or lotto), the Oregon State Lottery seeks advice as to its potential involvement in the operation of the casino's 3,500 electronic gaming devices and Keno game if the people approve Measure 75.

FIRST QUESTION PRESENTED

If Ballot Measure 75 is approved by the people, would the electronic gaming devices or Keno referred to in the measure have to be operated by the State Lottery in order to comply with Article XV, subsection 4(1), of the Oregon Constitution?

SHORT ANSWER

Yes, to the extent the electronic gaming devices or Keno operate wholly or predominantly upon elements of chance.

SECOND QUESTION PRESENTED

If the answer to the first question is yes or partially yes, would the number of games or devices that the Oregon State Lottery could place at the facility referred to in Measure 75 potentially be restricted by the casino limitations established by Article XV, subsection 4(12), of the Oregon Constitution?

SHORT ANSWER

Yes.

DISCUSSION

1. Constitutional Provisions at Issue and Methods of Interpretation

a. Lottery Prohibition – Dates from Original Oregon Constitution

The original Oregon Constitution prohibited all lotteries.[1/] Or Const, Art XV, § 4 (1859). After several amendments to section 4, subsection 4(1) of Article XV still prohibits lotteries generally, subject only to certain narrow exceptions:

> Except as provided in subsections (2), (3), (4), (10) and (11) of this section, *lotteries* and the sale of lottery tickets, for any purpose whatever, *are prohibited, and the Legislative Assembly shall prevent the same by penal laws.*

Subsection (2) of section 4 permits the "Legislative Assembly [to] provide for the establishment, operation, and regulation of raffles and the lottery commonly known as bingo or lotto by charitable, fraternal, or religious organizations." Subsections (3), (4), (10) and (11) of section 4 concern only the State Lottery. Thus, the net effect of current subsection 4(1) is to prohibit lotteries in Oregon that are neither operated by the State Lottery nor qualify as charitable gaming under subsection 4(2).

In interpreting an original provision of the Oregon Constitution, such as the lottery prohibition in Article XV, section 4, the Oregon Supreme Court considers its "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce*, 314 Or 411, 415-17, 840 P2d 65 (1992). Accordingly, we apply this method below to construe the meaning of the term "lotteries" as used in current subsection 4(1).

b. Limitation on Casinos – Amendment by Initiative

Subsection 4(12) of Article XV is the constitutional provision that limits casinos. It was added to the Oregon Constitution through an initiative petition approved by the people in 1984. When adopted, it was subsection 4(7), but its numbering has changed over the years due to unrelated amendments to Article XV, section 4. For purposes of consistency and clarity, we refer to it as subsection 4(12) throughout this opinion, regardless of its previous numbering.

Subsection 4(12) provides:

> The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.

In interpreting an initiated constitutional provision, the Oregon Supreme Court seeks to determine the intent of the voters in adopting it. *Pendleton School Dist. 16R v. State*, 345 Or 596, 606, 200 P3d 133 (2009); *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994). While the provision's text and context are the best indicators of the voters' intent, if that intent is unclear after an examination of text and context, then the Oregon Supreme Court turns to the provision's history. *Pendleton School Dist. 16R*, 345 Or at 608-609. The court has noted that caution must be used before ending the analysis of a provision without considering the history of the constitutional provision at issue. *Ecumenical Ministries*, 318 Or at 559 n 7. In considering the history of a constitutional provision adopted through the initiative process, the court examines "sources of information that were available to the voters at the time the Measure was adopted and that disclose the public's understanding of the Measure[,]" including "the ballot title and arguments for and against the Measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the Measure." *Ecumenical Ministries*, 318 Or at 559 n 8. We apply this method below to construe the meaning of subsection 4(12)'s limitations on casinos.

2. Meaning of "Lotteries"

a. Text and Context: Subsection 4(1)

To determine the whether the term "lotteries" as used in subsection 4(1) includes electronic gaming devices or Keno, we first examine the text of Article XV, section 4 of the original Oregon Constitution. In 1857[2/], Webster's dictionary defined "lottery" as a "scheme for the distribution of prizes by chance." N. Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). Both the 1839 and 1840 editions of a leading law dictionary include the same definition as Webster's for "lottery": "a scheme for the distribution of prizes by chance." J. Bouvier, A LAW DICTIONARY (1839 and 1860 editions).

But subsection 4(1) forbids not only lotteries, it also prohibits the "sale of lottery tickets for any purpose whatever." A question thus arises as to whether, in order to be prohibited under subsection 4(1), the "lottery" scheme must involve the sale of tickets. We can quickly dispense with this issue. If the drafters of the original constitution were concerned only with lotteries that involved lottery tickets, they could have just banned the sale of lottery tickets. Instead, they banned the operation of lotteries generally – not just those utilizing tickets. As Attorney General I. H. Van Winkle observed in 1935:

> * * * it is immaterial what plan is used or what form the device may take, if it depends upon chance as to its result it is a lottery. It follows, therefore, under the decisions and the quotation above cited, that slot machines being devices depending on chance as to their results, either whole or in part, are lotteries, and under the provision of the constitution above quoted are forbidden in the state of Oregon and their operation can not be authorized by the legislature.

> * * * *the constitutional provision not only forbids the sale of lottery tickets but also forbids lotteries, which includes lotteries of any and all kinds, whether operated through the sale of tickets or otherwise*.

17 Op Atty Gen 250, 252 (1935) (2005 WL 3024509) (emphasis added).

b. Case Law

The case law interpreting Article XV, section 4 (1859), clearly supports the conclusion that subsection 4(1) does not apply only to lotteries involving the sale of tickets. A mere fourteen years after the people's adoption of the original Oregon Constitution in 1857, the Multnomah County Circuit Court upheld a police court decision that a dice and box game (not involving tickets)[37] was a lottery. *Fleming v. Bills*, 3 Or 286 (Cir Ct 1871). In reaching its decision, the court reviewed the Webster's and Bouvier's definitions of lottery discussed above. *Id.* at 290. The court said:

> "A scheme for the distribution of prizes by chance" may provide for distributing them all at one time or at several times, absolutely to one set of persons or conditionally to that set or class. It may allow one person to exhaust all his chances, before other persons accept a chance, and still the scheme is within that definition.

Id. at 291.

Subsequently, the Oregon Supreme Court defined the term "lottery" for purposes of section 4, Article XV, as:

> * * * any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine * * *.

Hendrix v. McKee, 281 Or 123, 131-132, 575 P2d 134 (1977), *quoting State v. Schwemler*, 154 Or 533, 536, 60 P2d 938 (1936).

In *Hendrix*, the court held that a "pull tab" machine was a device that fell within the constitutional definition of a lottery and that "its use violates the public policy of the state of Oregon." *Hendrix*, 281 Or at 132. The court noted that the "pull tab" device "also should be subclassified as a 'slot machine.'" *Id*. at 131. Thus, devices popularly known as "slot machines" generally are lotteries for purposes of current subsection 4(1) of Article XV.

There also is the question whether, for purposes of Article XV, section 4, a "lottery" must be based upon "pure chance" or "dominant chance." We have long concluded that "dominant chance" likely is the standard in Oregon. For example, in the course of concluding that a proposed sports-pool lottery would constitute a "lottery" under Article XV, section 4, we said:

> There are two different rules for deciding whether a game is based on chance. Under the English or "pure chance" rule, no element of skill may be involved. In contrast, under the American or "dominant chance" rule, a game satisfies the chance element if chance is the dominant factor in the outcome.
>
> It is unclear which rule applies in Oregon, because the Oregon Supreme Court has applied both rules. In *State v. Schwemler*, supra, and *Quatsoe v. Eggleston*, 42 Or 315, 71 P 66 (1903), the court used the "pure chance" rule. In other cases, however, the court adopted the "dominant chance" rule. For instance, in *Mult. Co. Fair Ass'n v. Langley*, 140 Or 172, 13 P2d 354 (1932), decided before *Schwemler*, the court stated that "chance, as distinguished from skill, must be the predominant factor in a lottery." 140 Or at 180 (emphasis added).
>
> If, as we believe likely, the Oregon Supreme Court were to adopt the "dominant chance" test for determining the "chance" element of a lottery, we conclude that the proposed sports pool lottery would constitute a "lottery" under Article XV, section 4.

Letter of Advice dated June 23, 1989, to James J. Davey, State Lottery Director (OP-6328, 1989 WL 439834).

c. History

We also have consulted the history of Article XV, section 4 (1859). That history is helpful only insofar as it confirms that the drafters of the original Oregon Constitution did not intend to prohibit all forms of gambling but instead intended to prohibit only those types of gambling that qualified as lotteries. Professor Claudia Burton describes the discussion of Article XV, section 4, at the 1857 constitutional convention as follows:

> The committee of the whole took up the article on miscellaneous at the September 16, 1857 (aft.) session. Matthew Deady moved to strike the entire section: "He said he had no objection to prohibiting lotteries and punishing the establishment of them, but he would leave it to be regulated by law, like other crimes." Boise commented that several other state constitutions contained such prohibitions. Deady's motion was not adopted. Thomas Dryer and a few others saw no reason why only lotteries – and not other forms of gambling – should be prohibited in the constitution. Dryer moved to amend to prohibit "all species of gambling." William Farrar moved to amend Dryer's motion by adding "and all games at billiards, ten pins, and cards," and La Fayette Grover added "[a]nd football," which drew laughter from the delegates. Farrar's and Grover's motions to amend Dryer's motion were lost. George Williams moved to amend Dryer's motion to state it more generally to add the words "and other gambling" to the section, as originally reported. The committee agreed to Williams' amendment, but then defeated Dryer's motion as amended, with the amended motion drawing

> only three aye votes. The Oregon Statesman concluded: "The section was adopted as reported."

Burton, "*A Legislative History of The Oregon Constitution of 1857 – Part III (Mostly Miscellaneous: Articles VIII-XVIII),*" 40 Willamette L Rev 225, 376-377 (2004) (footnotes and accompanying citations omitted).

3. Measure 75 – Electronic Gaming Devices and Keno

a. Electronic Gaming Devices

Measure 75 authorizes the gaming operator to operate "[u]p to 3,500 electronic gaming devices[.]" Measure 75, § 7(1)(a). The measure defines "electronic gaming device" as:

> a device that, *upon payment of consideration*, whether *by reason of skill or the element of chance or both*, may deliver to or entitle the person playing or operating the device to receive:
>
> (A) Cash;
> (B) Bills, tickets, tokens or electronic credits to be exchanged for cash;
> (C) Merchandise; or
> (D) Any other thing of value.

Measure 75, § 7(3)(c) (emphasis added). Such a device "may use spinning reels, video displays, or both." Measure 75, § 7(4). The device must "[t]heoretically pay out a mathematically demonstrable percentage of all amounts wagered that is not less than 80 percent for each wager available for play on the device." Measure 75, § 7(5)(a).

A comparison of the characteristics of Measure 75's electronic gaming devices and the Oregon Supreme Court's construction of the term "lottery" for purposes of Article XV, section 4(1) makes clear that those devices are lotteries insofar as they rely wholly or predominantly upon chance:

Electronic gaming device (Measure 75)	**Lottery (Article XV, section 4)**
upon payment of consideration	on paying money or other valuable thing to another
theoretically pay out a mathematically demonstrable percentage	scheme whereby one * * * upon formula
by reason of the element of chance (or combination of chance and skill)	of chance

b. Keno

Measure 75 authorizes the gaming operator to operate "Keno." Measure 75, § 7(1)(c). The measure does not define "Keno."

In a 1981 opinion, Attorney General Dave Frohnmayer described the game of "Keno" as follows:

> The player buys a card on which numbers are printed. Numbers are then drawn by chance, and if enough of those numbers match numbers on the player's card, a prize is won. The prize increases substantially with each additional number drawn which matches a number on the player's card.

42 Op Atty Gen 184, 184-185 (1981) (1981 WL 152292).

The dictionary defines "Keno" as:

> *a game resembling lotto* in which numbers printed on pellets taken from a keno goose are announced to the players who cover the same numbers on cards and in which five numbers covered in the same horizontal row win for the player – *see* BINGO.

WEBSTER'S THIRD INTERNATIONAL DICTIONARY (unabridged 2002) at 1237 (emphasis added).

Subsection 4(2) of Article XV identifies "lotto" and "bingo" as a lottery, i.e., "the lottery commonly known as bingo or lotto * * *." Thus, assuming the players pay consideration, there is no doubt that Keno is a lottery for purposes of subsection 4(1) of Article XV: it involves the payment of money in a scheme that awards prizes based upon chance.

4. Necessary Involvement of State Lottery in Operation of Measure 75's Electronic Gaming Devices and Keno

Measure 75 provides that the State Lottery Commission shall issue "a 15-year license to the gaming operator to operate the games authorized under section 7 of this Act" if the commission determines that the operator meets certain criteria. Measure 75, § 6(1). But the State Lottery cannot comply with this direction if it would violate the Oregon Constitution.

As noted above, subsection 4(1) of Article XV prohibits lotteries outright unless they are operated by a charitable, fraternal, or religious organization (as permitted by subsection 4(2)) or the State Lottery (as permitted by subsections 4(3),4(4), 4(10), and 4(11)). Keno clearly is a lottery and Measure 75's electronic gaming devices are lotteries to the extent they operate purely or predominantly on chance.[4/] We understand that the gaming operator contemplated by Measure 75 will not be a charitable, fraternal, or religious organization. Accordingly, subsection 4(1) of Article XV prohibits the operation of such lotteries outright unless the State Lottery operates the game or the devices. Under that provision, the State Lottery cannot license the gaming operator to operate lottery games or devices as stated in Measure 75, but must operate the games or devices itself. The gaming operator could apply to be a State Lottery game retailer, but would be subject to all constitutional, statutory and administrative limitations and benefits applicable to State Lottery game retailers.

Moreover, subsections 4(4), 4(5), and 4(10) of Article XV describe the distribution of the net proceeds from operation of the State Lottery. While Measure 75 sets forth a different distribution scheme for "25 percent of the adjusted gross revenues" to be paid by the gaming operator to the State Lottery (Measure 75, §§ 3 and 4), the constitutional distribution formula applies to the net proceeds of any games or devices that the State Lottery operates, including those at the Measure 75 casino, under section 4 of Article XV.

Finally, Measure 75 potentially permits the casino's "electronic gaming devices" to deliver cash to a player of the machine. Measure 75, § 7(3)(c)(A). But the Oregon Constitution provides that "in lottery games utilizing computer terminal or other devices, no coins or currency shall ever be dispensed directly to players from such computer terminals or devices." Or Const, Art XV, § 4(4)(c). Therefore, any State Lottery computer terminal or other device placed at the casino must not deliver coins or currency to a player.

5. Limits on Number of State Lottery Terminals That Can Be Placed at Measure 75 Casino

a. Prior Attorney General's Opinion

In 1995, we considered whether the State Lottery's operation of 75 video lottery terminals in combination with pari-mutuel racing activities at New Portland Meadows or Multnomah Greyhound Park as authorized by Enrolled House Bill 3411 (1995) would constitute a casino prohibited by the Oregon Constitution. Attorney General Theodore Kulongoski concluded:

> There is a high probability that a court, if presented with the question, would hold that HB 3411 violates Article XV, section 4[12], of the Oregon Constitution due to the concentration and operation of 75 video lottery terminals that would be permitted at a single racing facility.

48 Op Atty Gen 15 (1995) (1995 WL 751217).

In reaching this conclusion, Attorney General Kulongoski relied in large part on the Oregon Supreme Court's decision in *Ecumenical Ministries*. He noted that the Oregon Supreme Court had concluded in that decision that, in adopting subsection 4(12),

> the voters intended to prohibit the operation of establishments whose dominant use or dominant purpose, or both, is for gambling.

48 Op Atty Gen at 17 (quoting *Ecumenical Ministries*, 318 Or at 562). Attorney General Kulongoski further observed that "[t]he court's definition of a casino embraces traditional, Las Vegas-type casinos." *Id.*

It appears that Measure 75 contemplates a traditional casino, at least if all the games authorized by the measure are deployed in the facility. The measure refers to a "destination

resort casino" with an "investment of at least two hundred fifty million dollars." Measure 75, § 6(1)(f). Accordingly, the placement of any video lottery terminals, let alone 3,500, at a facility that also could offer, for example, up to 150 table games very well could result in the State Lottery's participation in the operation of a casino. If the legislature were to adopt a statute authorizing the State Lottery's participation in a casino, we would conclude it is unconstitutional, as did Attorney General Kulongoski in 1995.

But unlike the situation with HB 3411 (1995), the voters – not the legislature – will have adopted Measure 75 if it passes. That raises the question whether subsection 4(12) of Article XV only limits the ability of the Legislative Assembly to approve a casino and does not preclude the voters from doing so by statute rather than through a constitutional amendment.

b. Text and Context: Subsection 4(12)

Following the method for interpreting initiated constitutional amendments described above, our goal is to discern the intent of the voters in adopting subsection 4(12). We begin by considering the text of the provision in context.

Again, subsection 4(12), provides:

> The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.

Subsection 4(12) contains two parts. The first part clearly precludes the legislature from authorizing a casino. But it does not state directly that the people cannot authorize a casino. The second part of subsection 4(12) directs the legislature to prohibit casinos. It does not state that this requirement is inapplicable if the people approve a casino. In other words, assuming for sake of argument that subsection 4(12) does not prevent the people from approving a casino, it appears that the legislature still would be required to subsequently prohibit any casino approved by the people.[5/]

Indeed, there is no doubt that the Legislative Assembly has the power to repeal a law enacted by the people:

> By this reservation of the legislative power in the people themselves by means of the initiative, the people may propose and enact any law, and by means of the referendum may repeal any law passed by the Legislative Assembly, and at the same time *the Legislative Assembly*, when convened, *may amend or repeal a law passed by the people*. Under this dual system of legislation, we have now two law-making bodies, the Legislative Assembly, on the one hand, and the people, on the other, which in the exercise of the legislative powers are coequal and co-ordinate.

State ex rel. Carson v. Kozer, 126 Or 641, 644, 270 P 513 (1928) (emphasis added).

There has been little appellate court discussion of the effect of such a constitutional mandate upon the legislature. In a ballot title case involving a sales tax referral, the Oregon Supreme Court said that "there is no reason to doubt" that the legislature would enact a limit required by a proposed constitutional amendment if the amendment was approved by the voters. *Oregon State Homeowner's Ass'n v. Roberts*, 299 Or 460, 468, 703 P2d 954 (1985).[6/]

We also must consider the two parts of subsection 4(12) in its context. Part of its context is subsection 4(1). Unlike the direct prohibition of lotteries in subsection 4(1), subsection 4(12) mandates the legislature to prohibit casinos. This suggests that, if an outright prohibition was in fact intended, the drafters of subsection 4(12) could have stated more directly, for example, that "casinos are prohibited and the Legislative Assembly shall prevent the same by penal laws."

But subsection 4(12) was adopted through an initiative process. Unlike legislative enactments, there are no drafting controls in the initiative process to ensure that similar intents are expressed consistently. This fact lessens considerably the weight we can accord to any inference as to voters' intent that is derived from the differing wording of the two subsections.

Another aspect of subsection 4(12)'s context is Article II, subsection 18(8), which provides:

> Such additional legislation as may aid the operation of this section shall be provided by the legislative assembly, including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer. *But the words, "the legislative assembly shall provide," or any similar or equivalent words in this constitution or any amendment thereto, shall not be construed to grant to the legislative assembly any exclusive power of lawmaking nor in any way to limit the initiative and referendum powers reserved by the people*.

(Emphasis added.)

At the outset, we note that "shall provide" is not necessarily equivalent to "shall prohibit." Rather, "shall provide" merely is a direction to the legislature to enact legislation in an area. By contrast, "shall prohibit" tells the legislature exactly what the legislation must say. In any event, subsection 18(8) arguably reinforces the interpretation that subsection 4(12)'s direction to the legislature to prohibit casinos does not preclude the people from approving a casino.

But we must be cautious not to place too much weight upon such an interpretation. To the extent the first part of subsection 4(12) and subsection 18(8) permit the people to approve a casino, the legislature still would be under the mandate in the second part of subsection 4(12) to prohibit that casino. The possibility of such a peculiar back and forth, enactment and repeal/prohibition, by the voters and the Legislative Assembly prompts the question whether the people instead intended subsection 4(12) to be an outright prohibition of casinos.

Indeed, in addressing the question whether the voters intended subsection 4(12) to prohibit the State Lottery's use of video lottery games, the Oregon Supreme Court first concluded that voters intended subsection 4(12) to prohibit certain establishments whose dominant use or purpose, or both, is gambling:

> Considering all of the foregoing text and context, *we conclude that, in adopting Article XV, section 4[12], prohibiting the operation of "casinos," the voters intended to prohibit the operation of establishments whose dominant use or dominant purpose, or both, is for gambling*.

Ecumenical Ministries, 318 Or at 562 (emphasis added). Significantly, the court did not interpret subsection 4(12) to mean that the voters intended the legislature to prohibit casinos.

c. History of Subsection 4(1)

Finally, to the extent that there remains any ambiguity as to the intended meaning of subsection 4(12), we consider the history of the provision. As noted above, the Oregon Supreme Court has said that "caution is required in ending the analysis before considering the history of an initiated constitutional provision." *Id*. at 559 n 7.

In this instance, the history of Ballot Measure 4 (1984) (resulting in the adoption of subsection 4(12)) is quite clear on the question whether the measure was intended to prohibit casinos. The Ballot Title's Explanation for Measure 4 in part states unequivocally that the measure "*Bans casinos*." *Official 1984 General Election Voters' Pamphlet*, November 6, 1984, at 19 (emphasis added). Moreover, in the sole *Voters' Pamphlet* argument in favor of or against Measure 4, State Senator Dell Isham states in part: "The measure will, for the first time, put a prohibition on casino gambling in our state constitution." *Id.* at 20. In other words, the Oregon Supreme Court's conclusion that voters intended to prohibit casinos when they adopted subsection 4(12) is entirely consistent with the history of the measure.

Because the voters intended subsection 4(12) to prohibit casinos, and it is reasonable to interpret the provision as having that effect, we conclude that the voters do not have the power in a statutory initiative to authorize a casino as that term is construed by the Supreme Court in *Ecumenical Ministries*. If the voters approve Measure 75, the State Lottery still must operate in compliance with the Oregon Constitution.

CONCLUSION

Due to the limits on lotteries stated in subsection 4(1) of Article XV, the State Lottery must operate any electronic gaming devices (that operate wholly or predominantly upon chance) or Keno games at the Measure 75 "destination resort casino." The number of such devices or games that the State Lottery may operate at that facility is constrained by Article XV, subsection 4(12)'s prohibition of casinos. The State Lottery may not operate lottery devices or games at the Measure 75 facility if that facility will be an establishment that has a dominant use or dominant

purpose, or both, for gambling, either as a result of the placement of the lottery devices or games or otherwise.

Sincerely,

David E. Leith
Associate Attorney General and
Chief General Counsel
General Counsel Division

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[1/] Article XV, section 4, Oregon Constitution (1859) provided:

> Lotteries, and the sale of lottery tickets for any purpose whatever, are prohibited, and the Legislative Assembly shall prevent the same by penal laws.

[2/] The original Oregon Constitution was drafted at an 1857 convention and approved by a vote of the people of the Oregon Territory that same year. The Constitution went into effect when Oregon was admitted to the Union in 1859. *See* discussion of this history preceding the Constitution in volume 17 of the Oregon Revised Statutes (2009).

[3/] The decision describes the game held to be a lottery as follows:

> The box was divided into compartments; these compartments were numbered from eight to forty-eight inclusive. Some of these compartments contained prizes; others were empty or blank. The game was played by means of eight dice thrown by the person who chose to pay the specified sum for the chance of winning a prize. If such person threw a number corresponding with the number of a compartment containing a prize, he became entitled to a prize contained in that compartment, otherwise he received nothing.

Fleming v. Bills, 3 Or 286, 288-289 (Cir Ct 1871).

[4/] There may be other games or devices offered at a traditional casino that also would constitute a lottery game for purposes of subsection 4 (1) of Article XV. In this opinion, however, we address only those lottery games and devices listed in Measure 75 that are currently operated by the State Lottery.

[5/] 48 Op Atty Gen 15, 21 (1995):

> Article XV, section 4(6), is not phrased as a prohibition on a gambling facility of a certain character, although it has the effect of prohibiting such facilities, but as a direct prohibition on actions taken or not taken by the Legislative Assembly itself: "The Legislative Assembly has no power to authorize, and shall prohibit, casinos ***."

[6/] The court in *Oregon State Homeowner*s went on to observe, however:

> For the effectiveness of placing affirmative lawmaking directives in a constitution, compare Article XI-D, section 3 of the Oregon Constitution, which in 1931 directed the legislature to develop water power in Oregon. Directives that the Legislative Assembly "shall" enact legislation are commonly used in the constitutional articles required to authorize state borrowing, *see* Or. Const., Arts. XI to XI-J.

299 Or at 468 n 3.