



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 18, 2013

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

Re: Opinion Request OP-2013-2

Dear Mr. Niswender:

You have asked us to answer seven questions about the authority of the Legislative Assembly to require or the Lottery Commission (Commission) to undertake various actions to address responsible gambling and problem gambling. For purposes of this opinion, we use the definitions for those terms provided by the State Lottery. “Problem gambling” means any gambling behavior that has a negative effect on the gambler or the lives of people close to the gambler. For example, if gambling is causing the gambler to miss work, fall behind in school, have arguments with family or friends, or worry about money lost, the gambler may be a “problem gambler.” “Responsible gambling” means behavior whereby the gambler views gambling as entertainment with associated costs; sets a limit for the time and money spent and sticks to it; and recognizes that uncontrolled gambling can create problems for the gambler, for others in the gambler’s social network, and for the community.

FIRST QUESTION PRESENTED

May the State Lottery expend constitutionally appropriated lottery administrative funds to implement and carry out responsible gambling and problem gambling policies, procedures and programs?

ANSWER GIVEN

Yes, if the expenditure is reasonably necessary or required to internally implement and manage the State Lottery and not if the expenditure is for a program or operation that does not contribute to the internal implementation or management of the State Lottery. For example, expenditures for communications that encourage the responsible use of lottery products might be reasonably necessary or required to internally implement the lottery, but expenditures to fund programs to treat “problem gambling” behavior or to fund programs to mitigate harms caused or exacerbated by operation of the lottery would not.

SECOND QUESTION PRESENTED

To what extent may staff and other resources of the State Lottery be used to implement and carry out responsible gambling and problem gambling policies, procedures and programs?

ANSWER GIVEN

Staff and resources funded by gross state lottery proceeds may be used to implement and carry out “responsible gambling” and “problem gambling” policies, procedures and programs to the same extent that gross state lottery proceeds may be used to fund those policies, procedures and programs.

THIRD QUESTION PRESENTED

May the Legislative Assembly require the Director of the State Lottery to employ an individual to advise the Director and the Commission on mental health and addiction issues associated with the State Lottery?

ANSWER GIVEN

Yes, but state lottery administrative funds may be expended to employ such an individual only to work on internal implementation and management activities of the State Lottery, as discussed further in the answers to the first and second questions.

FOURTH QUESTION PRESENTED

May the Legislative Assembly require the Commission to adopt a policy to minimize “problem gambling” risks and mitigate “problem gambling” harms associated with lottery games?

ANSWER GIVEN

Yes, but, as discussed in the answer to the first question, state lottery administrative funds may be used to develop and implement policies only to the extent that those policies implement the State Lottery and may not be expended to mitigate harmful effects that may be caused in part or exacerbated by State Lottery operations.

FIFTH QUESTION PRESENTED

May the Legislative Assembly require the Oregon Health Authority and the Commission to jointly report annually to an appropriate legislative committee specified data regarding “problem gambling,” “problem gambling” awareness campaigns, progress made in reducing “problem gambling,” and similar metrics?

ANSWER GIVEN

Yes, if the Legislative Assembly appropriates sufficient non-lottery funds to the Commission to pay the expenses of preparing the legislatively-required report.

SIXTH QUESTION PRESENTED

May the Legislative Assembly reduce the pressure on the State Lottery to generate additional income by making the goal of lottery operations to generate the amount of revenue currently generated, freezing the amount that may be transferred to the Administrative Services Economic Development Fund if that goal is exceeded, and specifying that any additional revenue generated would go into a rainy day fund to be used for Article XV, section 4, purposes?

ANSWER GIVEN

Yes, if the proportional amounts specified by the constitution to be allocated to particular funds are allocated to those funds, moneys in the rainy day fund are used only for constitutionally specified purposes, and doing so does not conflict with the State Lottery's constitutional duties to operate as a revenue-raising state agency and to spend no more than 16 percent of gross lottery proceeds to operate the lottery.

SEVENTH QUESTION PRESENTED

May the Legislative Assembly define "commensurate with the public good" for purposes of ORS 461.200?

ANSWER GIVEN

Yes, as long as it does so in a way that does not inherently conflict with the State Lottery's constitutional duties to operate as a revenue-raising agency and to spend no more than 16 percent of gross lottery proceeds to operate the lottery and does not unduly burden the Commission's duty to operate the State Lottery.

DISCUSSION

We divide our discussion into five parts. Parts I through IV set out the analytical framework that we apply to answer your questions and discuss pertinent constitutional language, Oregon Supreme Court and Attorney General opinions construing that language and relevant statutory context. In section V, we apply that analytical framework to address your specific questions.

I. Pertinent text of Article XV, section 4

In 1984, Oregon voters, acting through the initiative process, approved Ballot Measure 4, which amended Article XV, section 4, of the Oregon Constitution to provide for the establishment and operation of a state-run lottery. *See Ecumenical Ministries v. Oregon State*

Lottery Comm., 318 Or 551, 554, 871 P2d 106 (1994) (describing origins of the State Lottery).
As pertinent, Article XV, section 4, now provides:

(3) There is hereby created a State Lottery Commission which shall establish and operate a State Lottery. All proceeds from the State Lottery, including interest, but excluding costs of administration and payment of prizes, shall be used for any of the following purposes: creating jobs, furthering economic development, financing public education in Oregon or restoring and protecting Oregon's parks, beaches, watersheds and critical fish and wildlife habitats.

(4)(a) * * * The Commission is empowered to promulgate rules related to the procedures of the Commission and the operation of the State Lottery. Such rules and any statutes enacted to further implement this article shall insure the integrity, security, honesty, and fairness of the Lottery. The Commission shall have such additional powers and duties as may be provided by law.

(b) The Governor shall appoint a Director subject to confirmation by the Senate who shall serve at the pleasure of the Governor. * * * The Director may appoint and prescribe the duties of not more than four Assistant Directors as the Director deems necessary. One of the Assistant Directors shall be responsible for a security division to assure security, integrity, honesty, and fairness in the operations and administration of the State Lottery. To fulfill these responsibilities, the Assistant Director for security shall be qualified by training and experience, including at least five years of law enforcement experience, and knowledge and experience in computer security.

* * * * *

(d) There is hereby created within the General Fund the Oregon State Lottery Fund which is continuously appropriated for the purpose of administering and operating the Commission and the State Lottery. The State Lottery shall operate as a self-supporting revenue-raising agency of state government * * *. The State Lottery shall pay all prizes and all of its expenses out of the revenues it receives from the sale of tickets or shares to the public and turnover the net proceeds therefrom to a fund to be established by the Legislative Assembly from which the Legislative Assembly shall make appropriations for the benefit of any of the following public purposes: creating jobs, furthering economic development, financing public education in Oregon or restoring and protecting Oregon's parks, beaches, watersheds and native fish and wildlife. * * * At least 84% of the total annual revenues from the sale of all lottery tickets or shares shall be returned to the public in the form of prizes and net revenues benefiting the public purpose.

II. Ecumenical Ministries

A. Methodology for interpreting voter initiated constitutional amendments

In *Ecumenical Ministries*, the Oregon Supreme Court articulated its current method for interpreting constitutional amendments adopted by initiative. The interpretive task is to discern the intent of the voters, with the best evidence of that intent being the text of the provision itself. We interpret the text, in context, and that context includes related ballot measures submitted to the voters at the same election. If the intent of the voters is not clear from the text and context, we may consider the history of the provision. 318 Or at 559.

B. Meaning of “costs of administration”

The court in *Ecumenical Ministries* applied that methodology to determine the meaning of “costs of administration” as used in Article XV, section 4(3), and the costs of “administering and operating the Commission and State Lottery” as used in Article XV, section 4(4)(d), which makes those costs payable with constitutionally appropriated funds. The court concluded that the voters intended “costs of administration” and the costs of “administering and operating” the Commission and State Lottery to mean “the ‘expenses’ or ‘costs’ of the internal implementation and management of the lottery.” 318 Or at 567.

Because the constitution does not define “costs of administration” or “administering and operating” the lottery, the court relied on three indicators of voter intent. The first indicator was language in section 4(4)(e) (now in section 4(4)(d)) that requires the State Lottery “to operate as a self-supporting and revenue-raising agency, which must pay ‘all of *its* expenses’ out of the revenues that it receives.” 318 Or at 565-566 (emphasis in original). The second indicator was the plain meaning of “administration,” which is an act of managing the affairs of or directing or superintending, suggesting “that the costs of administration are costs related to the management or implementation of the State Lottery.” *Id.* at 566. The third was the context provided by section 7 of 1984 Ballot Measure 5. Ballot Measure 5 was a companion measure to Ballot Measure 4. It was comprised of statutes to implement and regulate the newly-established lottery. Section 7 of Ballot Measure 5, now codified at ORS 461.510(4) (set forth in full below), described “[e]xpenses” of the State Lottery.” From that context, the court determined that:

[A]lthough a broad range of goods and services apparently is permitted to be leased or purchased under [ORS 461.510(4)], those goods and services must be “required by the commission” and must be “necessary for effectuating the purposes of th[e] Act.”

318 Or at 567.

C. Costs to treat gambling addiction – not “costs of administration”

As pertinent to our present analysis, the issue before the court in *Ecumenical Ministries* was the constitutionality of a statute enacted by the legislature after 1984 that required lottery

administrative funds to be spent on community mental health treatment programs for gambling addiction. While the court acknowledged “that the need for [such programs] may result in part from the operation of the lottery,” expenditures for such programs “are not expenses or costs of the internal implementation or management of the lottery.” *Id.* at 568-569. Therefore, the court held that the statute that authorized those expenditures violated Article XV, sections 4(3) and 4(4)(e), of the Oregon Constitution. *Id.* at 569.

III. Context provided by pertinent provisions of Ballot Measure 5

Three statutes contained in 1984 Ballot Measure 5 provide context pertinent to the constitutional issues your questions raise:

(1) Section 1(2) (now codified with minor amendments as ORS 461.020) provided:

Purpose and Intent. The people of the State of Oregon declare that the purpose and intent of this Act is to provide additional moneys for the public purpose described in Section 4, Article XV of the Constitution of the State of Oregon through the operation of a state lottery without the imposition of additional or increased taxes.

(Bold emphasis in original).

(2) Section 7(2) (codified as ORS 461.510(2) and (4)) describes permissible disbursements from the State Lottery Fund, including certain operation and administration expenses, in pertinent part as follows:

(2) *Disbursements shall be made from the State Lottery Fund* for any of the following purposes:

* * * * *

(b) *Expenses of the commission and the state lottery;*

* * * * *

(4) *Expenses of the state lottery shall include all costs incurred in the operation and administration of the state lottery and all costs resulting from any contracts entered into for the purchase or lease of goods or services required by the commission including, but not limited to, the costs of supplies, materials, tickets, independent audit services, independent studies, data transmission, advertising, promotion, incentives, public relations, communications, compensation paid to lottery game retailers, bonding for lottery game retailers, printing, distribution of tickets and shares, reimbursing other governmental entities for services provided*

to the state lottery, transfers to a contingency reserve, and for any other goods and services necessary for effectuating the purposes of this chapter. * * *.

(Emphasis added).

(3) Section 4(1) (codified as ORS 461.200) directed the State Lottery to maximize net revenues to benefit its public purposes, “commensurate with the public good”:

The Oregon State Lottery shall be initiated and shall continue to be operated so as to produce the maximum amount of net revenues to benefit the public purpose described in section 4, Article XV of the Constitution of the State of Oregon, commensurate with the public good.

(Emphasis added).

IV. Prior Attorney General Opinions

This office has issued four previous opinions addressing questions about the proper use of State Lottery administrative funds and the extent of the legislature’s authority over the State Lottery.

A. 1985 Opinion

In 1985, one year after the voters approved 1984 Ballot Measures 4 and 5, we addressed several fundamental questions about the powers and duties of the then-new Lottery Commission and its relationship to the Legislative Assembly. 44 Op Atty Gen 431 (1985).

The pertinent conclusions of the 1985 opinion are:

(1) The mere fact that the Lottery Commission enjoys constitutional status does not insulate the commission or its area of responsibility from all legislative control. As with the judiciary, however, legislation may not hinder the Lottery Commission’s ability to “establish and operate a State Lottery.” Therefore, as a general principle to apply against possible conflicts between legislative enactments and commission powers and duties as conferred by the constitution, legislative action may not unduly burden or interfere with the duty and power of the Lottery Commission to establish and operate a lottery. *Id.* at 439.

(2) We have in both Ballot Measures 4 and 5 an indication of areas within which the legislature may act. Again, given the fact that the chief petitioners of both ballot measures were the same, and that Ballot Measure 5 initiated statutory provisions, we believe, as a general rule, that areas specifically considered in Ballot Measure 5 were intended to be within the legislature’s prerogatives. In other words, the legislature may safely legislate in the areas addressed in Ballot Measure 5 as they concern the operation of the lottery, without concern that such

legislation would impinge on any area of exclusive authority given to the commission by the constitution. *Id.*

(3) Of course, even when legislating as to matters covered in Ballot Measure 5, the Legislative Assembly may not enact laws that run counter to specific provisions in the constitution. *Id.*

B. 1988 Opinion

In 1988, we considered the constitutionality of ORS 461.510(4). 46 Op Atty Gen 61 (1988). That statute specifies the items that the Commission must treat as “expenses” and provides that “compensation paid to lottery game retailers” is such an expense. We concluded that ORS 461.510(4) neither violates Article XV, section 4, nor unduly burdens the Commission’s ability to operate within the constitutional 16 percent expense limitation. *Id.* at 68.

C. 1996 Opinion

In 1996, we considered the constitutionality of *former* ORS 461.055(2) (1995), which directed the Commission to locate a lottery database backup center in Burns, Oregon, and which would have required the expenditure of a large additional sum of lottery administrative funds. March 26, 1996, Letter of Advice to Chris Lyons, Director of Oregon State Lottery (OP-1996-5). The State Lottery’s consultants had determined that locating the center in Burns, which was not then served by fiber optic lines and which would require the lottery to build those lines, would increase project costs by approximately nine million dollars. They also estimated that the State Lottery would never use more than one-sixth of the capacity of those lines. We opined that, although costs for a backup center were permissible costs of administration, costs to locate it in Burns were not. We reasoned that expenditures to administer the lottery are restricted to “purposes that are reasonably necessary or required” to internally implement and manage the lottery and “must not [be used to] pay for government programs or operations that do not directly contribute to the internal implementation or management of the Lottery.” *Id.* at 5.

D. 2007 Opinion

Most recently, in 2007, we advised that Article XV, section 4, of the Oregon Constitution does not permit the expenditure of state lottery administrative funds to provide debt collection services to other state agencies (by intercepting lottery prizes won by persons who owed money to state agencies). In reaching that conclusion, we observed that state lottery proceeds may be used for only three purposes:

(1) the costs of administering and operating the Commission and [the State Lottery]; (2) the payment of prizes; and (3) economic development, public education and the restoration and protection of specified outdoor resources.

50 Op Atty Gen ____ (2007), slip opinion at 2. We then concluded:

As to the first, *Ecumenical Ministries* holds that the phrase “administering and operating” concerns “the ‘expense’ or ‘costs’ of the internal implementation and management of the lottery.” *Ecumenical Ministries*, 318 Or at 567. That almost certainly does not include collecting debts owed to other state agencies.

Id.

V. Answers to questions

A. Expenditure of lottery administrative funds on “responsible gambling” and “problem gambling” policies, procedures and programs

You first ask whether the State Lottery may expend funds constitutionally appropriated under Article XV, section 4(4)(d), to “operate and administer” the lottery to carry out responsible gambling and problem gambling policies, procedures and programs. As discussed above, the court in *Ecumenical Ministries* held that the constitution permits administrative expenditures only for internal implementation or management of the State Lottery, and therefore that a statute requiring the expenditure of state lottery administrative funds on community mental health treatment programs for gambling addiction violated Article XV, sections 4(3) and 4(4)(e)(now 4(4)(d)), of the Oregon Constitution. 318 Or at 569. Again, the court acknowledged “that the need for [such programs] may result in part from the operation of the lottery,” but concluded that expenditures for such programs “are not expenses or costs of the internal implementation or management of the lottery.” *Id.* at 568-569.

Under that holding, permissible costs of lottery administration do not include expenditures to fund mental health treatment programs for gambling addiction. Problem gambling treatment programs are not distinguishable from gambling addiction treatment programs. While problem gambling is a broad term that likely encompasses gambling addiction, there is no meaningful distinction between the two for purposes of applying the holding in *Ecumenical Ministries*. Accordingly, funds appropriated under Article XV, section 4(4)(d), to pay for administering and operating the lottery cannot be used to implement “problem gambling” treatment programs. Nor are we able to read *Ecumenical Ministries* as permitting expenditures for other types of programs intended to address or provide information about “problem gambling” generally.

The court appears to draw a distinction between *operation* of the lottery and programs that address *harms that might result in part from operation*. Expenditures on the former may be paid for with state lottery administrative funds and expenditures for the latter may not. In other words, the voters intended state lottery administrative funds to be spent solely on running the lottery and not for mitigating social harms, including any that result in part from or are exacerbated by operation of the lottery. But the court did not address whether acting to minimize the potential abuse of lottery products is part of operating the State Lottery. Thus, *Ecumenical Ministries* does not unambiguously foreclose expenditures targeted at promoting the responsible use (or preventing the potential abuse) of lottery products. We turn to that question.

At the outset, we observe that no language in the constitution itself or the context provided by the statutes contained in 1984 Ballot Measure 5 addresses “responsible gambling.” The State Lottery’s fundamental constitutional purpose is to operate a lottery to raise revenue to fund the identified public purposes. *See* Or Const, Art XV, § 4(4)(d) (commanding the State Lottery to operate as a “self-supporting revenue-raising agency of state government[.]” The context provided by Ballot Measure 5 confirms that purpose, as section 1(2) (now codified with minor changes as ORS 461.020) provided that “[t]he people of the State of Oregon declare that the purpose and intent of this chapter is to provide additional moneys for the public purpose described in section 4, Article XV of the Constitution of the State of Oregon through the operation of a state lottery without the imposition of additional or increased taxes.”

Article XV, section 4, also directs that the lottery be implemented in a way that “insure[s] its] * * * integrity, security, honesty, and fairness[.]” Or Const, Art XV, § 4(4)(a). Article XV, section 4(4)(b), puts the functions specified in 4(4)(a), under the supervision of a “security division” to be assigned to an assistant director having law enforcement experience and knowledge and experience in computer security. *See also* ORS 461.110 (providing for furnishing criminal identification information to lottery to ensure security, integrity, honesty and fairness in operation and administration of the lottery); ORS 461.180(6) (requiring independent comprehensive study of lottery security, including security against fraudulent methods of winning).

Read together, those provisions appear to be intended to ensure that lottery products and proceeds are secure and free from fraud, corruption and tampering, rather than to address individual gambling behavior. Requiring that the State Lottery be implemented in a fair and honest manner also could encompass a duty to inform customers about the odds of winning. Fair and honest implementation also arguably could extend to informing consumers that there is a potential for abuse of lottery products, although nothing in the context confirms that this language was so intended.

In addition, Article XV, section 4(c), limits the use of lottery products to adults as only “adult persons” may obtain lottery prizes. But no language explicitly or by necessary implication authorizes administrative funds to be spent to ensure that persons with gambling problems do not use lottery products.

Article XV, section 4, however, provides that the “Commission shall have such additional powers and duties as may be provided by law.” Or Const, Art XV, § 4(4)(a). Ballot Measure 5, section 4(1) (codified as ORS 461.200) is such a law. It directs that the State Lottery “shall continue to be operated so as to produce the maximum amount of net revenues to benefit the public purpose described in section 4, Article XV * * *, *commensurate with the public good.*” ORS 461.200 (emphasis added). “Commensurate with the public good” is not defined.^{1/} We give undefined words their “plain, natural, and ordinary meaning[s.]” *Ecumenical Ministries*, 318 Or at 560.

“Commensurate” means “equal in measure or extent: COEXTENSIVE * * * corresponding in size, extent, amount, or degree: PROPORTIONATE.” WEBSTER’S THIRD NEW INT’L DICTIONARY at 456 (2d ed 2002). The pertinent meaning of “public good” is the advancement of the interest of the people. *Id.* at 1836, 978, respectively (defining “public as “of, relating to, or affecting the people as an organized community” and “good” as “advancement of interest or happiness”). Hence, the context provided by section 4(1) of Ballot Measure 5 suggests that the people understood that the Lottery’s constitutional duty to operate as a “revenue-raising agency” did not mean that the Lottery would be required to maximize revenue to the exclusion of any other considerations. Rather, in making an operational decision, the State Lottery’s duty to maximize net revenues would be moderated by a proportionate consideration of the impact of that decision on the welfare of the people of Oregon as a whole. For example, a State Lottery marketing campaign that targets adults with developmental disabilities or early-stage dementia might maximize lottery revenues but would not be commensurate with the public good. On the other hand, when making such operational decisions the Commission’s consideration of the public good also must be coextensive with its statutory duty to maximize net revenues. The Commission can neither let its assessment of the impact of lottery games on the welfare of the community at large outweigh its commitment to maximize net revenues to fund the public purposes explicitly identified by the people, nor let its commitment to maximizing revenue outweigh its commitment to the public good.

In sum, from *Ecumenical Ministries*, our earlier opinions, and the preceding analysis of ORS 461.200, we distill three major principles that bear on your question. First, permissible costs of administration are limited to expenses that are reasonably necessary or required to internally operate or manage the lottery. Second, permissible costs do *not* include expenses to pay for government programs or operations that do not contribute to the internal implementation and management of the lottery, even where those programs or operations might otherwise be related to Lottery operations. Third, in its own operations, the Lottery must comply with the statutory mandate to maximize revenue commensurate with the public good.

Applying these principles, we conclude that permissible administrative costs of the Lottery might include, for example, expenditures reasonably necessary to develop marketing strategies to avoid the exploitation of vulnerable persons, to communicate with the public about and promote the responsible use of lottery products, and to evaluate the potential for abuse in deciding what lottery games to offer or whether to offer a particular product. But, in accordance with *Ecumenical Ministries*, the constitution does not permit “costs of administration” in the form of expenditures to address the mental health needs of problem gamblers – even those caused or exacerbated by operation of the lottery – or to fund programs to otherwise mitigate harms such as “problem gambling” to which operation of the State Lottery might contribute.

B. Use of staff and lottery resources

Your second question is to what extent the staff and other resources of the State Lottery may be used to implement and carry out “responsible gambling” and “problem gambling” policies, procedures and programs.

The same analysis that applies to the expenditure of administrative funds from gross lottery proceeds applies to the use of lottery staff and resources that are funded by gross lottery proceeds. That is because using staff and resources funded by those proceeds is tantamount to using the proceeds themselves. If State Lottery staff and resources are to be used for purposes other than to implement the State Lottery, there must be statutory authority for that use (as the constitution does not provide it) and the use must be funded by moneys other than state lottery administrative funds.

C. Mental health and addiction adviser

Your third question is whether the Legislative Assembly may require the Director of the State Lottery to employ an individual to advise the Director and the Commission on mental health and addiction issues associated with the state lottery. We conclude that it can. No provisions in Article XV, section 4, either expressly or by inherent conflict with another provision suggest that the Legislative Assembly is prohibited from imposing this requirement. Nor would such a requirement unduly burden the Commission's power to establish and operate a lottery. Of course, to be paid for with state lottery administrative funds, the activities of such an employee must qualify as "costs of administration" as discussed in the answer to question one. Any duties related to such tasks as addressing "problem gambling" generally or mitigating the harms associated with playing lottery games must be funded with proceeds other than lottery administrative funds.

D. Legislative mandate to adopt "problem gambling" policies

Your fourth question is whether the Legislative Assembly may require the Commission to adopt a policy to minimize "problem gambling" risks and to mitigate "problem gambling" harms associated with lottery games. As discussed, state lottery administrative funds may be expended on State Lottery operations, but not to mitigate harms caused by those operations. State Lottery operations may include activities that address and encourage the responsible use of lottery products as discussed above, but do not include the mitigation of harms caused by those operations. If the Legislative Assembly wishes to require the Commission to adopt policies that concern the latter, it must specify a funding source other than lottery administrative funds to pay the costs to develop and implement such policies.

E. Joint report by Oregon Health Authority and Commission

Your fifth question is whether the Legislative Assembly may require the Oregon Health Authority and the Commission to jointly report annually to a legislative committee specified data regarding "problem gambling," "problem gambling" awareness campaigns, progress made in reducing "problem gambling," and similar metrics.

As discussed, the "costs of administration" do not include expenditures to address "problem gambling" generally, therefore, reports concerning "problem gambling" generally may not be paid for with lottery administrative funds. The Legislative Assembly may, however,

require such reports if it appropriates non-lottery funds to the Commission to pay for the costs to prepare such a report.

State lottery administrative funds may be used, however, to study the demographics of players of each lottery game. ORS 461.180(4) (originally enacted as section 3(14) of 1984 Ballot Measure 5) required the State Lottery director, after the first six month of lottery sales, to engage “an independent firm experienced in demographic analysis to conduct” studies to “ascertain the *demographic characteristics of the players of each lottery game*, including, but not limited to, their income, age, sex, education and frequency of participation” and to present the report to the Legislative Assembly, among others. (Emphasis added). ORS 461.180(4) further authorizes the director to conduct “similar studies” from time to time “as determined by the director.” Hence, state lottery administrative funds may be used to pay for such demographic studies.

F. Statutes directing the amount of gross revenue to be raised and directing use of net proceeds

Your sixth question concerns the constitutionality of a statutory proposal under which: (1) the goal of State Lottery operations would be changed from maximizing net proceeds commensurate with the public good to generating the amount of net proceeds that were generated in the 2011-2013 biennium; (2) net proceeds would be transferred to the Education Stability Fund, the School Capital Matching Fund and the Parks and Natural Resources Fund in the percentages required by Article XV, sections 4(4)(d), 4(5), and 4(8); and, (3) the remaining net proceeds would be transferred to the Administrative Services Economic Development Fund, except if, in any biennium, the net proceeds exceeded the amount of net proceeds produced in the 2011-2013 biennium, in which case the amount transferred to the Administrative Services Economic Development Fund would not exceed the amount of net proceeds produced in the 2011-2013 biennium, and the remaining amount would be transferred to an Oregon Rainy Day Fund from which the legislature could appropriate funds for the public purposes specified in Article XV only if certain preconditions were met.

Article XV, section 4(4)(d), requires 18 percent of the net proceeds of the lottery to be deposited in the Educational Stability Fund and section 4(8), requires 15 percent of the net proceeds to be deposited in the Parks and Natural Resources Fund. The proposal complies with those provisions by allocating the requisite percentages to those funds. Moreover, the proposal specifies that the moneys in the Rainy Day Fund may be spent only for purposes specified in the constitution. Hence, we see no constitutional infirmity in those pieces of the proposal.

The remaining question is whether a statutory mandate to operate the State Lottery with the goal of raising net revenues in the amounts raised in the 2011-2013 biennium violates Article XV, section 4. As discussed, the current goal of State Lottery operations as specified in ORS 461.200 is to maximize net proceeds commensurate with the public good. We first observe that no language in the constitution requires the State Lottery to be operated to maximize net revenues commensurate with the public good. Article XV, section 4(3), which establishes the Commission to “operate a State Lottery,” does not contain that language.

Article XV, section 4(4)(d), requires the State Lottery to operate: (1) “as a self-supporting revenue-raising agency of state government” (*i.e.*, to generate a net profit from lottery proceeds); (2) to use lottery proceeds alone to operate the lottery; and, (3) to return “[a]t least 84% of the total annual revenues from the sale of all lottery tickets or shares * * * to the public in the form of prizes and net revenues benefitting the public purposes” (limiting costs of administration to 16 percent). Read together, those provisions require the State Lottery to operate in a way to generate a net profit from lottery proceeds, while expending no more than 16 percent of gross lottery proceeds and receiving no other state funds to operate the State Lottery.

Article XV, section 4(4)(a), provides that “[t]he Commission shall have such additional powers and duties as may be provided by law.” That language authorizes the legislature to specify “additional” powers and duties of the Commission, but does not allow the legislature to abolish any duties that are constitutionally specified. As discussed, in 1984, the people exercised the legislative power by providing in section 4(1) of Ballot Measure 5 that the “lottery shall continue to be operated so as to produce the maximum amount of net revenues * * * commensurate with the public good.”

That initial statutory context for the constitutional text arguably cuts two ways. On the one hand, it may suggest that the goal of lottery operations was authorized to be established via exercise of the legislative power. On the other, it might suggest that the voters intended the Commission to operate the State Lottery to continuously maximize profits commensurate with the public good. We conclude that the first interpretation is the one most likely intended by the voters for the following reasons. First, the constitution does not specify that the Commission must operate the State Lottery to maximize revenues commensurate with the public good. Second, the legislature is authorized to specify additional duties of the Commission. And third, as the people initially established the goal of lottery operations through their exercise of the legislative power contemporaneous with their adoption of the pertinent constitutional provisions, this suggests that the people intended the goal of lottery operations to be established by statute.

But there is a caveat. The legislature may not define the operational goal of the State Lottery in a way that would preclude the lottery from carrying out its constitutional duties to operate as a revenue-raising agency and to limit expenditures to 16 percent of gross lottery proceeds as doing so would conflict with those express constitutional requirements. We do not believe that the proposal to make the goal of lottery operations to generate the same amount of net proceeds generated in the 2011-2013 biennium conflicts with those duties.

G. Defining “commensurate with the public good”

Your final question is whether the Legislative Assembly may define “commensurate with the public good” for purposes of ORS 461.200. We conclude that it may for the same reasons and subject to the same limitations discussed in the answer to question six.

Sincerely,

[Steven A. Wolf]

Steven A. Wolf
Chief Counsel
General Counsel Division

SAW:nog/clr:DM4062258
c: Sarah Castner, DOJ

¹ Oregon is not alone in having this type of language in its lottery laws: “Lottery statutes in 19 states [including Oregon] demand operations with the objective of maximizing net revenue * * *, subject only to vague constraints of consistency with the dignity of the state, the welfare of the public, or the public good.” *The Puzzling Case of the Revenue-Maximizing Lottery*, 79 NC LAW REV 1, 4 (2000).